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TREATISE ON CANADIAN COMPANY LAW.

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A TREATISE

ON

CANADIAN COMPANY LAW

CONTAINING

A COMMENTARY ON THE COMPANIES ACT OF THE DOMINION,
WITH INCIDENTAL REFERENCE TO THE LAW
OF THE VARIOUS PROVINCES

WITH

FULL NOTES OF THE JURISPRUDENCES AND APPENDICES
OF THE STATUTES AND USEFUL FORMS

BY

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PREFACE.

The basis of this book has been the Companies' Act of the Dominion. The arrangement of that Act has been generally followed, and where the Provincial Acts are not in effect the same, these differences have been pointed out. The Winding Up Act is treated in the concluding Chapter. There are so many excellent works upon the subject of Joint Stock Companies, and the principles are of such universal application that the necessity for a Canadian work might be questioned, but unfortunately Parliament has not always followed the improvements that have been made elsewhere, and our system, especially in regard to incorporation, remains somewhat antiquated. One of the main objects of this book has been to collect and refer to all the leading Canadian cases. This jurisprudence is not very extensive, but most of the decisions have dealt with important questions and have been carefully considered. At the same time, the standard text books have been consulted and will be found referred to constantly. The monumental work of Judge Thompson from the United States point of view and the admirable works of Mr. Palmer, Mr. Buckley, Judge Lindley and other English commentators have been compared and where necessary distinguished.

The aim has been to make the book as complete as possible, so that it might be useful, not only to the profession as a digest of the Canadian cases, but that the text might be sufficiently clearly expressed to serve the student and stock-holders in general. On points regarding which there is no Canadian jurisprudence or conflicting decisions, the conclusions stated in the text may not in all cases receive the approval of the Courts, but the greatest possible care has been applied to have the references reliable, so that recourse to them may be facilitated. The cases were at first collected by Mr. F. Longueville Snow, Librarian of the New York Life Building, Montreal, and were laboriously verified and added to as the work advanced by Mr. J. A. Ewing, Advocate, who also rendered valuable assistance in the revision of the text. A few of the most useful forms are added in an appendix, for many of which I am indebted to Mr. W. E. Hodgins, M.A., of the Department of Justice, Ottawa, who, amongst his other duties, is specially charged with matters coming under the provisions of the Companies' Act. An appendix contains the text of the Dominion Acts relating to Joint Stock Companies, and also the Acts of the Provinces of Ontario, Quebec, and British Columbia. Those of the other provinces, it was thought, would not be of such general necessity and will be readily accessible to barristers in the respective provinces, by applying to the Provincial Secretaries.

W. J. WHITE.

MONTREAL, 2nd January, 1901.

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LIST OF ABBREVIATIONS

OF

CANADIAN REPORTS AND REFERENCES.

B. J. P. C	Beauchamp, Jurisprudence Privy Council.
C. L. J	Canada Law Journal.
Can. L. T	Canadian Law Times,
C. C. L. C	Civil Code of Lower Canada.
C. P	Code of Procedure (Quebec).
Ex. R	Exchequer Reports.
Geld & Oxley	Nova Scotia Reports.
Grant's Chy	Upper Canada Chancery Reports.
L. C. J	Lower Canada Jurist.
L. C. L. J	Lower Canada Law Journal.
L. C. R	Lower Canada Reports,
L. N	Legal News (Montreal).
Man. L. R	Manitoba Law Reports.
M. C. R	Montreal Condensed Reports.
M. L. R., Q. B	Montreal Law Reports, Queen's Bench.
M. L. R., S. C	Montreal Law Reports, Superior Court.
N. B. R	New Brunswick Reports.
N. S. R	Nova Scotia Reports.
N. W. T. Rep	North West Territories Reports.
Ont. A. R	Ontario Appeal Reports.
Ont. P. R	Ontario Practice Reports.
O. R	Ontario Reports.
Pugs	New Brunswick Reports.
Pyke's R	Pyke's Reports.
Dorion Q. B. R	Dorion Queen's Bench Reports (Quebec).
Q. L. R	Quebec Law Reports.
Q. R., Q. B	Quebec Official Reports, Queen's Bench.
Q. R., S. C	" " " Superior Court.
Ram. A. C	Ramsay's Appeal Cases.
R. C	Revue Critique.
R. de J	Revue de Jurisprudence.
R. L	Revue Légale.
R. L. N. S	" " Nouvelle Série.
Rev. de Lég	Revue de Législation.
R. J. Q	Rapports Judiciaires de Québec.
Russ & Geld	Nova Scotia Reports.
R. S. C	Revised Statutes of Canada.
R. S. M	" " " Manitoba.
R. S. N. B	" " " New Brunswick.
R. S. N. S	" " " Nova Scotia.
R. S. O	" " " Ontario.
R. S. Q	" " " Quebec.
S. C. R	Supreme Court Reports, Canada.
S. C. R., N. W. T	" " " North West Territories.
U. C. C. P	Upper Canada Common Pleas.
U. C. L. J	" " Law Journal.
U. C. R., O. S	" " Reports Old Series.
U. C. P. R	" " Practice Reports.
U. C. Q. B	" " Queen's Bench Reports.

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ERRATA ET CORRIGENDA.

Page 13, foot note 7, line 7; for "(not yet reported)" read "R. J. Q., 17 S. C., 28."
" 15, do 3; the remainder of this note is found under note 4.
" 26, do 6, last three words; for "(not yet reported)" read "R. J. Q., 17 S. C., 28."
" 34, do 5, ninth line from the bottom; for "$500,00" read "$500,000."
" 37, do 1; for "p. 2" read "pp. 32, 33."
" 37, do 2; the remainder of this note is found on the fifth line of the notes.
" 37, do 3; the remainder of this note is found on the sixth line of the notes.
" 37, do 4; the remainder of this note is found on the seventh line of the notes.
" 42, line 19; for "*supra* p. 8" read "*supra* pp. 39, 40."
" 45, foot note 5; for "Ch. Div." read "17 Ch. Div."
" 52, do 2; for "7 E., 1 App." read "7 E. & I. App."
" 65, do 4; for "p. 4" read pp. 52, 53."
" 72, do 5 and 6; for "sec." read "see."
" 78, do 4, last line; for "20 A post" read "81, *post*."
" 81, do 2; for "p. 74" read "p. 78."
" 95, line 7, seventh word; for "in" read "is."
" 100, line 5; for "depreciating" read "depreciation."
" 102, foot note 2, second line; for "*Esparts*" read "*Ex parte*."
" 134, third line; for "RESTUI" read "CESTUI."
" 135, foot note 2, add "pp. 109, 110."
" 146, sixth line; for "concerning" read "convening."
" 172, foot note 3; for "p. 1 of chap. on Incorp. of Companies" read "see p. 60."
" 184, do 7; for "92 B. Div.," read "9 Q. B. Div.,"
" 215, second line from the bottom of the page; for "mortgages" read "mortgagees."
" 222, foot note 4; add "see pp. 218 et seq."
" 254, do 6; add "p. 102."
" 283, do 4, third line; for "30 C. D." read "40 C. D.
" 253, do 3, for "903" read "603."

A TREATISE

ON

CANADIAN COMPANY LAW.

CHAPTER I.

INTRODUCTION.

1. Creation of companies.
2. Territorial limitations.
3. Jurisdiction.
4. Incorporation—means of.
5. Dominion Acts — general and special.
6. Existing company may obtain a charter under the General Companies' Act.
7. Repeal of certain Acts.
8. Position of companies incorporated under general and special Acts.
9. Winding-up Acts.
10. Provincial Acts.
11. Basis of this work.

1. Creation of Companies.—Canadian Companies are created under the authority of the Dominion Parliament or of a Provincial Legislature.

By the B. N. A. Act, 1867, sec. 92, ss. 11, Provincial Legislatures may incorporate companies with Provincial objects.[1] The authority of the Dominion Parliament to incorporate companies carrying on business in the Dominion does not rest merely on Sec. 91 (2) of the

[1] The term "Provincial objects" refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality. Clarke v. Union Fire Ins. Co., 10 Ont. P. R., 313, confirmed in Appeal, 6 O. R., 223. An Act passed by the Legislature of Nova Scotia, in 1874, intituled : An Act to Incorporate the Halifax Company, Limited, giving rights to cross rixers without reference to the rights of Navigation, was disallowed by the Governor-General as not being for purely local works or undertakings, nor an Act for the incorporation of a Company with Provincial objects merely, or objects of a merely local or private nature in the Province, but for objects beyond the power and control of a Local Legislature. (Dom. Sess. Papers, 1877, No. 89, p. 86, cited by Doutre, Con. of Canada, p. 237.)

above Act, which gives to it exclusive power to regulate trade and commerce, but belongs to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces. The only subject on this head assigned to the Provincial Legislatures being as above stated, it follows that the incorporation of companies for objects not purely provincial falls within the general powers of the Parliament of Canada.[1]

2. Territorial Limitations.—Provided a company obtains from the Dominion Parliament, without fraud, a charter permitting it to carry on its business throughout the Dominion, the mere fact that it confines its operations to one province and to local provincial objects, will not effect its status as a corporation, or operate to render its original incorporation illegal as *ultra vires* of Parliament.[2] Similarly, a company lawfully incorporated by a Provincial Legislature has, for the purposes of its business, the same corporate franchises and powers within the jurisdiction creating it, as a company incorporated by the Dominion or even Imperial Parliament, and may transact its business outside the Province wherever by comity or otherwise its contracts are recognized.[3]

3. Jurisdiction.—But because the Dominion Parliament has alone the right to create a corporation whose object is to carry on business throughout the Dominion, it does not follow that it alone has the right to regulate such company's contracts in each of the Provinces.[4] Dominion Companies must conform to the enactments of Local Legislatures relating to property and civil rights.[5] Thus, if a Provincial enactment prohibits corporations from holding land without the con-

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[1] Citizens Ins. Co. of Canada v. Parsons, P. C. 1881. 7 App. Cas., pp. 116-117.

[2] Colonial Building & Investment Assocn. v. Atty.-Gen., P. C. 1883. 9 App. Cas., 157 ; reversing Q. B. 5 L. N., 116.

The Dominion cannot incorporate a railway company where the road is wholly within a Province, without expressly declaring the work to be for the general advantage of Canada or two or more of the Provinces. *Re* Grand Junction Ry. Co. v. Peterborough, 6 Ont. A. R., 339.

[3] Clarke v. Union Fire Ins. Co., 10 Ont. P. R., 313 ; affirmed on Appeal, 6 O. R. 223.

[4] Citizens Insur. Co. vs. Parsons, P. C. 1881, 7 App. Cas. ,at p. 117, adhered to in Colonial Building & Investment Association and Attorney-General, P. C. 1883, 9 App. Cas., at 164 & 165.

[5] Colonial Building and Invest. Assn. & Atty.-General, *ibid*, at p. 166.

sent of the Crown, Dominion corporations operating in that Province must conform to that enactment,[1] and similarly with other Provincial enactments relating strictly to property and civil rights.[2] But it would appear that the Dominion Parliament might pass an Act providing that a license from the Crown should not be necessary to enable any corporation to hold lands in the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license.

Such an Act would not prevent the Provinces from passing laws preventing altogether or restricting and regulating the holding of lands by corporations in such Provinces. It would be merely an abnegation on the part of the Crown of its prerogative right to require a license.[3]

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[1] *Ibid* and Citizens Insur. Co. v. Parsons, *supra*. [2] *Ibid.*
[3] McDiarmind v. Hughes, 16 O. R., 570.

As to the enlarging by the Dominion Parliament of the powers of a Provincial Company the following are extracts from a discussion in the House of Commons on the 9th April, 1883, on a motion for the third reading of a bill to grant certain powers to the Acadia Powder Company. The Company, which is incorporated under a local Act of Nova Scotia, applied to the Parliament of Canada for extended powers.

"Mr. Ouimet.—From the reading of our Constitutional Act, it is quite clear that corporations created by the Local Legislatures may come here to have their powers extended, that is to say, to have powers granted them which could not be granted by the Local Legislatures. . . . From the reading of this Bill I understand that the corporation does not come here to get a new charter, but only to get extended powers. The first clause provides that a certain business may be carried on throughout Canada. No doubt we have power to create corporations whose operations may be extended to the whole of Canada, or, as the constitutional Act says, whose object is general or Federal. The first clause then might be allowed. But the second clause, giving the company power to increase its capital, is, I think, an infringement of the rights of the Province which created this company. The third clause, relating to the directors being continued in office, is of the same character. This Bill does not make this corporation a Federal corporation. It is only a local corporation which comes here for extended powers. I would say, therefore, that this Legislature ought to grant only those powers which the corporation could not obtain from the Provincial Legislature.

Mr. Blake.—There are two modes in which we can deal with a manufacturing or trading company which wants more than a local legislature can give. We can either extend to the corporate entity which has been created by the Local Legislature certain powers which we alone can give; or we can create a Federal corporation complete and entire, created by ourselves and amenable to ourselves, *totus, teres, atque rotundus*, giving it such

No Legislature can confer upon corporations created by it any rights relating to business to be carried on in a foreign country. The Legislative enactments of a country have no binding force *proprio vigore* in other territorial sovereignties. Where, however, a Legislature assumes to authorize its corporations to carry on business in other countries, which may properly be done, such authority is no more than a legislative sanction to an agreement between the corporators that their busniess may be carried on abroad as well as at home,[1] and, conversely, it would be unconstitutional for the Parliament of Canada to pass an Act rendering Canadian corporations subject to such laws as might be passed by the legislature of a foreign state ; this would be an abdication of sovereignty inconsistent with the relations of Canada to the Empire of which it forms a part.[2]

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powers as we see fit to give. On general principles I strongly prefer the second of these two modes, because the second gives you a multiplicity of conveniences. . . . Upon the whole I think it is too plain to require lengthy argument that a corporate body engaged in trade should owe its birth, origin and powers to one legislative body to which it is responsible, and to which it can apply for further powers. . . . Suppose this company wants something else next Session. Cannot it get it from the Legislature of Nova Scotia ? Are some of the domestic arrangements to be altered by the Nova Scotia Legislature and some to be altered here ? What inextricable confusion would be created if we adopted this principle.

Sir John A. Macdonald.—While we can give extended powers, we cannot alter the constitution of the corporation granted by a Provincial Legislature; nay, I go further and say, that if a corporation chartered under certain conditions and provisions by a Provincial Legislature and ask for increased powers, which the Provincial Legislature says are contrary to their policy, under which, by which and for which they created it a corporation originally, then I think it is quite within the jurisdiction of the Provincial Legislature to destroy that corporation and to take steps to dissolve it. . . . So that I quite agree with the hon. gentleman opposite, in stating that the most convenient way to obviate the inconvenience already pointed out is, that when a corporation wishes to extend its powers, obtained from the Provincial Legislature, which originally created it, the company should come to this Parliament and obtain a new charter giving it a Dominion existence instead of a Provincial existence, which existence can be destroyed or hampered at any time by our dealing with the company contrary to the policy of the Provincial Legislature which created it."

[1] Clarke v. Union Fire Ins. Co., 10 Ont. P. R., 313; confirmed in Appeal, 6 O. R., 223, and see for example sec. 90 (r) Railway Act, 1888, as amended by 53 Vict., ch. 28, sec. 1.

[2] International Bridge Co. v. Canada Southern Railway Co., 28 Grant's Chy., 114.

Just as Dominion companies are subject to the control of Provincial Legislatures in regard to property and civil rights in the respectives provinces, so are Provincial companies subject to control in regard to matters over which the Dominion has exclusive jurisdiction, such as the regulation of trade and commerce, navigation and shipping, etc.[1] Although a Provincial Legislature might incorporate a boom company, it could not give the latter power to obstruct a tidal navigable river,[2] and the charter in so far as it authorised the erection of booms, at a place where they would obstruct navigation, would be *ultra vires*.[3]

The Dominion Parliament having exclusive jurisdiction in certain subjects, has the right to interfere with property, civil rights or procedure within the Provinces, as far as is necessary in a general law enacted on any of these subjects.[4] The subject of banking is within the exclusive jurisdiction of the Dominion Parliament, and the latter can legislate in regard to all matters coming within the legitimate business of bankers, although such legislation would have the effect of modifying the law of a Province in relation thereto.[5] Thus, although chattel mortgages are not recognized in the Province of Quebec, it would appear that under sec. 74 of the Bank Act a person in that Province could, in certain cases, while retaining possession of the goods, pledge them to a bank as security for an advance.[6].

The subjects of bankruptcy and insolvency are within the exclusive jurisdiction of the Dominion Parliament.[7] In its compulsory operation upon incorporated companies the Dominion Winding-Up Act[8] is an insolvency law, and a company incorporated by a Provincial Legislature may be put into compulsory liquidation and wound up under its provisions.[9] But enactments relating purely to the volun-

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[1] Sec. 91 B. N. A. Act.

[2] Queddy River Driving Boom Co. v. Davidson, 10 Can. S. C. R., 222.

[3] *Ibid* ,and see Halifax Co., Limited (Dom. Sess. papers 1877, No. 89, p. 86), and see *re* Lake Winnipeg Transportation L. & T. Co., 7 Manitoba, 255, as to an example of what is within the powers of the Provincial Legislature to incorporate.

[4] Cushing v. Dupuis, 1880, 5 App. Cas., 409.

[5] Tennant v. Union Bank, P. C. 1894, 6 The Reports, 382, and Cushing & Dupuis discussed and approved.

[6] *Ibid.* [7] Sec. 91 (21) B. N. A. Act. [8] R. S. C., ch. 129.

[9] Shoolbred v. Clarke.—In *re* Union Fire Assur. Co., 1890, 17 Can. S. C. R., 265.—*Re* Iron Clay Brick Mfg. Co. (Turner's Case), 19 O. R., 113.

tary liquidation of a company do not infringe on the exclusive legislative power conferred upon the Dominion Parliament,[1] hence a Province may enact legislation for the purely voluntary winding-up of companies incorporated by it.[2] But where a provincial company is in liquidation or in process of being wound up, whether voluntarily or not, it may be brought under the operation of the Dominion Winding-up Act on the petition of shareholders or creditors, as well as assignees or liquidators.[3] A wider power now exists under the Dominion Winding-up Amendment Act.[4] This Act provides only for the voluntary winding-up of the companies falling within its provisions, and not for their compulsory liquidation, which is provided for by the former.[5] The companies falling within the provision of the Amendment Act are those whose incorporation and affairs are subject to the legislative authority of the Parliament of Canada,[6] and those incorporated by a Provincial Legislature, when the latter has enacted that the Amendment Act shall apply to them,[7] as, for example, companies incorporated under the British Columbia Act of 1890.[8]

4. Means of Incorporation.—Companies in Canada are incorporated either by letters patent or registration under a general joint stock companies' Act or by special Act of the Parliament or Legislature.

5. Dominion Acts, General and Special.—Pursuant to the above enumerated powers given by the British North America Act respecting the incorporation of companies, the Dominion Parliament has enacted at different periods statutes for that purpose, culminating in the present Companies' Act, contained in the Revised Statutes, ch. 119, as amended. It has also incorporated by *special* act of Parliament a large number of companies. Soon after Confederation (1869)

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[1] Atty. Genl. of Ontario v. Atty. Genl. for Dominion of Canada, P. C., 1894, 6 The Reports, 409.

[2] See R. S. O., ch. 222.—In *re* Wallace Huestis Grey Stone Co., Russell's Nova Scotia Rep. 1873-82, p. 461.

[3] R. S. C., ch. 129, sec. 3(b); Shoolbred v. Clarke, 17 Can. S. C. R., per Patterson, J., at p. 274.—*Re* Iron Clay Brick Mfg. Co.; and see Atty. Genl. of Ontario v. Atty. Genl. of Canada *supra*.

[4] 52 Vict., ch. 32.

[5] *Re* Ontario Forge & Bolt Co., 25 O. R., 407.

[6] Shoolbred v. Clarke, 17 Can. S. C. R., at p. 275.

[7] In *re* B. C. Iron Works Co., 6 B. C. L. R., 536.

[8] R. S. B. C., ch. 44, sec. 160, as amended by 61 Vict., ch. 13, sec. 14.—In *re* B. C. Iron Works, *supra*.

it was found advisable to render these companies amenable to a general statute, as has been done in other countries, and in that year " The Canada Joint Stock Companies' Clauses Act "[1] was passed and made applicable to every joint stock company to be thereafter incorporated by special act of the Parliament of Canada, excepting railway and insurance companies and banks. This statute, with the exception of one section,[2] has been consolidated in the Revised Statutes of Canada, ch. 118, under the title of " The Companies' Clauses Act," and is declared to apply to every Dominion Joint Stock Company incorporated subsequent to the 22nd of June, 1869, by any special Act of the Parliament of Canada, with the exception of railway, insurance companies and banks, and so far as it is applicable to the undertaking, and is not expressly varied or excepted by the Special Act, is incorporated with it, and forms part thereof, and is to be construed therewith as forming one act.[3] This statute also provides[4] that any of its provisions may be excepted from incorporation with the Special Act, and states the mode in which this may be done.

6. Existing Company may obtain a Charter under the General Companies' Act.—In order to have the advantage of doing business under the present Joint Stock Companies' Act, any company incorporated before the Joint Stock Companies' Act came into force for any purpose or object for which letters paent may be issued under this act, and whether under a *special* or general act, are enabled, under certain restrictions to apply for a charter thereunder and be governed wholly by it excepting as to the liability of the shareholders to existing creditors.[5] Such company may also by the same letters patent have its powers extended to such other objects which the act permits.[6] Such application is subject, so far as applicable, to all the provisions of the act relating to the obtaining of supplementary letters patent.[7] This provision of the Companies' Act is in effect an amendment to the former general acts.

7. Repeal of Certain Acts.—In the Companies' Act of 1877 (D), certain sections[8] made special reference to the repeal of the former act and provided for the status of companies incorporated thereunder,

[1] 32 & 33 Vict., ch. 12. [2] Sec. 43. [3] Sec. 3. [4] Sec. 4.
[5] Sec. 69, R. S. C., ch. 119. [6] Sec. 70 *ibid.*
[7] Sec. 71 *ibid* ; and secs. 13-16. [8] 73, 75 and 105.

but these sections were recommended for repeal by the Commissioners for revision of the Statutes, and they were in effect repealed.[1] As to the former Companies' Act, it is specially repealed by the Revised Statutes Schedule A. General acts are ordinarily held not to repeal the provisions of charters granted to corporations, or other Special Acts passed for their benefit, though conflicting with the general provisions[2] and in the absence of a manifest contrary intention, it is said that no general law subsequent to the enactment of a special provision for a corporation, can be construed to add other conditions to those imposed by the special law, thus modifying the latter by a cumulation of conditions.[3]

8. **Position of Company under General and Special Acts.**—Under our Companies' Act, companies incorporated by letters patent are thereby created bodies corporate and politic.[4] When a company is organized under the general laws, it has been held in England that the memorandum or certificate of incorporation stands in the place of a legislative charter,[5] and this memorandum is the equivalent of letters patent in those part of Canada where the English system has been adopted. As the letters patent recite that the company is a body corporate and politic " with all the rights and powers given by the said Act," it is to be inferred that the Act mentioned bears the same relation to the letters patent as the general law does to a special Act which is declared to be subject to the provisions of the general law. This is frequently done in the case of railway companies, the special Act incorporating either whole or part of the general Act then in force, and it has been admitted by our Courts that, as a general rule, a later general act repealing the former general act would not repeal clauses of such general act which had been incorporated in the special act.[6] Further, the present Companies' Act provides that where existing companies apply for charters under it, this shall not alter the liability of shareholders towards creditors of the company as it existed under

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[1] See R. S. C., vol. 2, p. 2421, last line.

[2] Endlich Statutes, secs. 228, 229. [3] *Ibid*, sec. 229.

[4] And such is the form of the charter granted under the Acts. See Hodgins, p. 35. The Quebec Statute has recently been amended to that effect, 56 Vict., ch. 35.

[5] Per Lord Cairns in Ashbury Ry. Co. v. Riche, 7 H. L. 653, and see Thomas v. Railroad Co., 101 U. S. 71, 80.

[6] Zimmer v. Grand Trunk Ry. Co., 21 O. R., 628, per Robertson, J., at p. 632, and see Lindley Comp., p. 129.

the company's former charter,[1] nor shall the rights of debenture holders be impaired in the case of loan companies availing themselves of its provisions.[2]

In the case of conflict between a special Act and the general Act incorporated into it, the provisions of the former will prevail over any of the latter with which they are inconsistent.[3]

10. Winding-up Acts.—The Dominion Parliament has also enacted Winding-up Acts for the enforced[4] and voluntary[5] liquidation of companies, also an act for the incorporation and government of loan companies.[6]

10. Provincial Acts.—The Provinces have likewise, in pursuance of the powers granted them by the B.N.A. Act, passed statutes, generally on the lines of the Dominion Acts, for the incorporation of joint stock companies, with general clauses' acts regulating companies incorporated by Special Act, and for voluntary winding-up of companies.

In the Provinces also there are a large number of other general acts providing for the incorporation of companies for special purposes, such as timber slide companies,[7] gas and water companies,[8] building societies,[9] cemetery companies,[10] exhibition buildings,[11] insurance companies,[12] loan companies incorporated out of the Province,[13] railway companies,[14] road companies.[15]

11. Basis of this Work.—In the following chapters the Dominion Acts will form the basis of the commentary, the Provincial Acts being incidentally referred to.

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[1] Sec. 69. [2] Sec. 92 (6).

[3] Maxwell Statutes, at p. 221. See Ontario & Sault Ste. Marie Ry. Co., 15 O. R., 432, for a case of conflicting provisions.

[4] R. S. C., ch. 129. [5] 52 Vict., ch. 32. [6] 62-63 Vict., ch. 41.

[7] R. S. O., ch. 194 ; R. S. Q., art. 4921.

[8] R. S. O., ch. 199 ; R. S. Q., art. 4794.

[9] R. S. Q., art. 5401. [10] R. S. O., ch. 213 ; R. S. Q., art. 5253.

[11] R. S. O., ch. 196. [12] R. S. Q., art, 5264 *et seq.* [13] R. S. Q., art. 5470.

[14] R. S. O., ch. 207 ; R. S. Q., art. 5125.

[15] R. S. O., ch. 193 ; R. S. Q., art. 5064.

CHAPTER II.

PROMOTION OF COMPANIES.

1. Prospectus.—The formation of a company is usually preceded by the publication by its projectors of a prospectus, setting forth the nature and objects of the proposed company, the number and value of shares intended to be created, and the amount of capital supposed to be required.

2. Prospectus must disclose Contracts by Directors or Promotors.—Under the Dominion Joint Stock Companies' Act,[1] "every prospectus of the company, and every notice inviting persons to subscribe for shares in the company, must specify the dates and the names of the persons to any contract entered into by the company or the promotors, directors or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors, or the company, or otherwise ; and every prospectus or notice which does not specify the same shall, with respect to any person who takes shares in the company, on the faith of such prospectus or notice, and who has not

[1] R. S. C., ch. 119, sec. 80. A similar provision exists in the New Brunswick Joint Stock Companies' Act, 1893, sec. 39, and in the Nova Scotia Act, R. S. N. S., ch. 79, sec. 83, but not in the Manitoba, Quebec, Ontario or British Columbia Acts.

had notice of such contract, be deemed fraudulent on the part of the promotors, directors and officers of the company who knowingly issue such prospectus or notice."

The fact that a prospectus may be, and very often is, upon the issue of new capital, sent out long after the formation of a company, as well as before, renders this section difficult of application. A clause should be inserted in the prospectus to the effect that applicants for shares waive all claims against directors for infringement of the section, but Lord Justice Lindley considers that the validity of such a clause is doubtful.[1] Mr. Palmer, however, considers such a clause valid and effective, if properly framed and free from fraud.[2] Much difference of judicial opinion has been expressed in England in the attempt to give a satisfactory interpretation to this ill-expressed enactment, the phraseology of the corresponding section of the English Act of 1867 being identical with our own.

3. What Contracts must be disclosed.—It is now pretty well settled, however, that what the section in effect requires is, that the date and parties to every *material* contract made by the company, or by the directors or promotors, shall be stated in the prospectus ; that is, every contract which would be likely to influence the judgment of an intending applicant as to whether he should or should not take up shares.[3]

It is generally concluded that the section is not confined to contracts to be performed by the company, but extends to all contracts, whether in writing or not,[4] entered into by the persons mentioned, and directly or indirectly affecting the formation, management, capital or other property of the company, or the position of the directors or officers of the company with respect to the company, its promotors or vendors, and which might reasonably influence a person in determining whether to apply for shares or not.[5]

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[1] Lindley Comp., p. 92.

[2] Palmer Comp., p. 241, citing Bensusan v. Clarke, W. N. (1897), 175 ; Palmer Company Precedents, Part 1, p. 88. See also Buckley Comp., pp. 574 & 575 ; Greenwood v. Leather, etc., Co. (1899), W. N., 26.

[3] Sullivan v. Metcalfe, 5 C. P. D., 465 ; Gover's Case 1, ch. D. 200 ; Craig v. Phillips, 3 Ch. D., 722 ; Palmer Comp., p. 240.

[4] Arkwright v. Newbold, 17 Ch. L. 301 ; Capel v. Sims Composition Co., 58 L. T., 807 (W. N., 1888, p. 97).

[5] Sullivan v. Metcalfe, 5 C. P. D., 455 ; Twycross v. Grant, 2 C. P. D., 469 ; Jury v. Stoker, 9 L. R. Ir., 385; Cornell v. Hay, L. R., 8 C. P., 328.

4. Effect of omission to disclose contracts.—Where the section is applicable, it gives to shareholders a remedy against the "promoters, directors and officers" personally.[1] It does not entitle a shareholder, on account of the omission in the prospectus, to a rescission of his contract to take shares, nor give him any right of action against the company.[2]

5. Meaning of "knowingly issue."—The words "knowingly issue" mean intentionally issuing a prospectus without inserting the contracts, which are by this section required to be specified, although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them.[3]

6. Statements and Representations in Prospectus.—The object of a prospectus is to incite the public generally to join the proposed undertaking; and in an advertisement of this description allowance must always be made for the sanguine expectations of promotors, and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement. But while some high-coloring and even exaggeration may be expected, yet no mis-statement or concealment of any material facts or circumstances ought to be permitted. The public ought to have the same opportunity of judging of everything which has a material bearing on the true character of the adventure as the promotors themselves possess.[4] A clear distinction must be drawn between mere exaggeration and misrepresentation of any precise or definite facts.[5]

7. Misrepresentations in Prospectus.—Misrepresentation may be by concealment, so that not only must those who issue the prospectus abstain from stating as fact that which is not so, but they must omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take

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[1] Charlton v. Hay, 31 L. T., 437; Twycross v. Grant, 2 C. P. Div., 469.

[2] Gover's Case, 20 Eq., 114; 1 Ch. Div., 182.

[3] Twycross v. Grant, 2 C. P. Div., 469.

[4] Central Ry. of Venezuela v. Kisch, L. R. 2 H. L., 99, per Chelmsford, L. C., at p. 113.

[5] Ross v. Estates Investment Co., 3 Eq. 132, see per Wood, V. C., at p. 136.

shares.[1] The concealment of material facts may give to the truth that is told the character of falsehood.[2]

A mere difference in the language of the prospectus and the act of incorporation will not relieve the shareholder from his liability. The question always is, whether the obligations incurred under the memorandum, charter or act of incorporation do or do not go beyond those which would have been incurred under the prospectus.[3] Where the prospectus stated that the capital was to be $75,000, and the company, as incorporated, had a capital of $150,000, it was held that this was a material change,[4] and where the name of the company was changed from the "Royal Hotel Co.," to the "Windsor Hotel Company," and the capital had been changed from $600,000 to $500,000, and it was not proved that those changes had been made previous to the defendants signing the subscription list, he was relieved from liability for calls.[5]

If a fact stated in the prospectus which was true at the date of the prospectus becomes untrue before allotment, the allottee is entitled to rescind.[6]

8. Remedies of person injured by misstatements in prospectus—Action "ex contractu," action "ex delicto."—Distinction must be made between two remedies open to the party injured in respect of the misrepresentations. He may have relief against the company by way Why not both?
of rescision of contract and indemnity, or by way of damages against the individuals who have misled him.[7] The one is an action arising *ex contractu*, the other *ex delicto*.

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[1] New Brunswick & Canada Ry. Co. v. Muggeridge, 1 Dr. & Sm., 363, sec. per Kindersley, V. C., at p. 381.

[2] Oakes v. Turquand, L. R. 2 H. L., 325, per Chelmsford, L. C., at p. 343.

[3] Downes v. Ship, L. R. 3 H. L., 343, 354.

[4] Delano's case, 15 O. R., 75.

[5] Windsor Hotel Co. v. Laframboise, S. C. 1877, 1 L. N., 63; Ct. of Rev. 1878, 22 L. C. J., 144.

[6] Anderson's Case, 17 Ch. Div., 373; Scottish Petroleum Co., 23 Ch. Div., 413, 438. But see Petre v. Guelph Lumber Co., 11 Can. S. C. R., 452.

[7] Where defendant, with others, published a prospectus containing false statements, on the strength of which plaintiff entered into a contract with certain parties acting as trustees for The Trading & Mining Company for the term of two years, the company never being incorporated, the defendant was condemned to pay plaintiff his salary under the said contract. Bonmomme v. Bickerdike, decided by Court of Queen's Bench, Montreal, April 24th, 1900, affirming the decision of the Court of Review (not yet reported). See also Weatherby v. Whitney, 30 N. S. R., 49.

Where rescision is claimed, it is sufficient that there was misrepresentation of fact which induced the contract ; it is immaterial that the representation was innocent.[1] In an action of deceit it is essential that there shall have been deceit.[2] An action of deceit is a common law action, there is no such thing as an equitable action of deceit.[3]

That which would not sustain an action for deceit may be sufficient to sustain an action for rescision. No mere silence will ground an action of deceit, unless the non-disclosure is such as to make statements in the prospectus false ;[4] but silence as to a material fact which ought to have been disclosed may be a ground for an action for rescision. And an action for rescision may succeed where the misrepresentation was innocent, while in an action for deceit the representation must be either wilfully false or made with reckless disregard as to whether it is true or not.[5]

Where the prospectus represented that certain figure heads had consented to become members of the particular company which the prospectus related to, whereas they had only consented to be upon the board of a company to be thereafter formed *with their approval* ; the company being formed without their approval, this was held to be misrepresentation as to the shareholders.[6]

Where the prospectus stated that a certain proportion of shares had been subscribed for, when as a matter of fact, such subscription was a sham one, this was held to be such a misrepresentation as entitled the applicant to rescision.[7]

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[1] Smith's Case, 2 Ch., 604 ; Reese River, etc., L. R., 4 H. L., 79 ; London & Staffordshire Co., 24 Ch. Div., 149.

[2] Derry v. Peck, 14 App. Cas., 337 ; Arkwright v. Newbold, 17 Ch. Div., 301. And see judgment of Gwynne, J., in Petrie v. Guelph Lumber Co., 11 Can. S. C. R., 450.

[3] *Ibid*, at p. 471, citing opinion of Lord Blackburn in Arkwright v. Newbold., 9 App. Cases, 197.

[4] Peck v. Guerney, L. R., 6 H. L., 403; Aaron's Reefs, &c. (1897), A. C.

[5] Peck v. Derry, 12 App. Cas., 337 ; Arkwright v. Newbold, 17 Ch. Div., 301; Karberg's Case (1892), 3 Ch., 1. See Petrie v. Guelph Lumber Co., 11 Can. S. C. R., 450.

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

[7] Alderson v. Smith, 41 C. D., 348 ; Henderson v. Lacon, 5 Eq., 240 ; Ross v. Estates Investment Co., L. R. 3 Ch., 682 ; Kent v. Freehold Land Co., 3 Ch., 493.

Also where it falsely stated that the surplus assets, as appearing in the last balance sheet, amounted to a certain sum.[1]

So where it stated that a certain mine was in full operation and making handsome returns, when it was quite worthless.[2]

Where the prospectus of a company, which was formed to buy a mine, contained extracts from the report of an expert in such a way as to give a false impression of that report, conveying the idea that the mine was identical with a rich one near by, it was decided that the subscriber was entitled to relief.[3]

So too where the prospectus falsely stated that certain persons were to be the directors.[4]

So also where it is stated that the company has purchased a property, when in fact, it was only negotiating.[5] Again where it contained statements to the effect that persons whose requirements would make them extensive customers had ordered goods for use, so that when the company started, a large business might be expected, whereas many of the orders were mere trial orders, on some of which the purchasers were to pay reduced prices or not at all if the trial proved unsuccessful. The directors in this case did not show that they had reasonable ground to believe these statements to be true, and so were held with the promotor, liable for damages to the subscribers.[6] But it must be borne in mind in reading English decisions as to the liability of directors on an action on deceit that, by the Directors Liability Act of 1890, when once the statement is proved to be untrue, the burden of proof rests upon them to show that they had reasonable grounds to believe the statements to be true and did so believe them. We have no such act.

If the prospectus represents as facts, the matters stated in reports, which it refers to, the subscriber will be relieved should they prove false.[7] But if the prospectus merely refer to the report, giving all

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[1] *Re* London & Staffordshire Bank, 24 C. D., 149.

[2] Reese River & Co. v. Smith, L. R. 4 H. L., 64.

[3] Scottish Petroleum Co., 23 Ch. Div., 413 ; Anderson's Case, 17 Ch. Div.,

[4] *Re* Mount Morgan Co., 56 L. T., 622.

373 ; Smith v. Chadwick, 20 Ch. Div., 50 ; Wainright's Case, 62 L. T., 30.

[5] Ross v. Estates Investment Co., *supra*.

[6] Greenwood v. Leather, etc., Co. [1899], W. N., 26.

[7] In *re* Reese River Mining Co., L. R. 2 Ch., 611 ; Rawlins v. Wickham, 3 de G. & J., 304.

known facts, and suggest that some one be sent out to test it, the company will not be held as guaranteeing its truth.[1]

It has been held that the statement in a prospectus that something will be done, is not a statement of fact to give ground for a rescision.[2] But a representation of opinion, expectation or intention may be sufficient misrepresentation of fact: "for the statement of a man's mind is as much a matter of fact as the state of his digestion." [3]

Ambiguous statements may also furnish ground for rescision, if, according to a reasonable construction, they contain a misrepresentation.[4]

Representations made in a prospectus, which is issued by the promotors, although not rendering the company liable in damages, not having itself made the representation, are as regards a contract induced by such representation, and as regards the question of a rescision of the contract, in the same position as if the company had itself made the representation.[5]

But a person defrauded by directors must, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, seek his remedy against the directors personally.[6] To enable the shareholder to make the directors personally liable to indemnify him in respect of the shares as before stated, it must be established that there was, by the prospectus, a fraudulent misrepresentation made by the person sought to be made censurable, and that such misrepresentation deceived the shareholder,[7] and the main question in such case is, whether the plaintiff acted on the misrepresentation, not whether he acted on the misrepresentation alone.[8]

[1] In *re* British Burmah Lead Co., 56 L. T., 815 ; Palmer Comp., 237.

[2] Beattie v. Elbury, 7 Ch., 804 ; Alderson v. Maddison, 5 Ex. Div., 293 ; 8 App. Cases, 367 ; Billars v. Tucker, 13 Q. B. D., 562 ; Palmer Comp., *supra*.

[3] Edgington v. Fitzmaurice, 29 C. D., 483 ; per Bowen, L. J.

[4] Hallows v. Fernie, 3 Ch., 476 ; Arkwright v. Newbold, 17 Ch. Div., 322; Smith v. Chadwick, 9 App. Cases, 187. See also Palmer Comp., 238.

[5] Karberg's Case, Crt. of Appeal (1892), 3 Ch., 1. In rescinding the contract the parties must be restored, as far as possible, to their original position, and allotment money must be refunded with interest at the legal rate (*ibid*).

[6] Western Bank of Scotland v. Addie, L. R. 1 H. L., Sc. 145; Houldsworth v. Glasgow Bank, 5 App. Cas., 317, 328, 331, 340.

[7] Derry v. Peck, 14 App. Cas., 337.

[8] Edington v. Fitmaurice, 29 Ch. Div., 459 ; London & Leeds Bank, W. N. 1887), 31 ; 56 L. T., 115 ; 56 L. J. Ch., 321 ; Arnison v. Smith, 41 Ch. Div., 348, 359, 369. See Petrie v. Guelph Lumber Co., 11 Can. S. C. R., 450.

Lord Herschell in Peck v. Derry[1] said: "In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made. First, knowingly, or second, without belief in its truth, or third, recklessly or carelessly, whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth, and this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial." But in Angus v. Clifford,[2] Lord Justice Lindley pointed out that Lord Herschell qualified this passage further on[3] by stating: "In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds;" and further[4]: "I think there is much to be said for the view that this moral duty" (that is, to be vigilant in preparing these prospectuses, and stating no more than you believe to be true) "ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the Legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think

[1] 14 App. Cas., at p. 374. Thus where a prospectus stated that the profits previously realized had been 17% upon the capital employed in it, which would be true if the words "capital employed" did not include the business premises, or only included their value less the mortgages thereon, but was grossly untrue if the whole value of the business premises was taken as part of the capital. Held by Court of Appeal that under the decision in Derry v. Peck as there was not any evidence of dishonesty in making the representation, therefore, although it were untrue, the action would not lie. Glasier v. Rolls, 42 Ch. D., 436.

[2] (1891) 2 Ch., at p. 465. [3] 14 App. Cases, at p. 375.

[4] 14 App. Cases, at p. 376.

mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent, whether his acts can or cannot be justly so designated." Lord Lindley's deductions from these observations are, that, if the matter to be enquired into is fraud, it is actionable, if it is not fraud, but merely carlessness, it is not.[1]

A director can be rendered liable only for his own personal fraud or for the fraud of his co-directors or of other agents of the company which he has either expressly authorized or has connived at.[2] A provisional director may have the authority of his co-directors to take the prospectus around, and, upon the strength of its statements, to canvass for subscriptions for stock, but he is not the agent of the other directors to make, and has no implied authority to make, any representations outside of the prospectus by which, if false and fraudulent, they could be made responsible for such false and fraudulent representations.[3]

As already stated, a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted is entitled to rescind such contract, but he must do so within a reasonable time after his discovery of the fraud. In such case the contract is voidable, not void.[4] But the contract must be avoided, or that must be done which is equivalent to avoidance, before the commencement of the winding-up.[5] The fact that the company is going on and trading, and the rights of shareholders and others varying from day to day, is a most material circumstance to be taken into consideration when deciding whether the repudiation has taken place within a reasonable time, for after any considerable length of time the rights of third parties will be injuriously affected by repudiation.[6] In this case a person must repudiate his shares within the shortest limit of time which was fairly possible in such a case.[7] He must also

[1] (1891) 2 Ch., at p. 466.

[2] See Petrie v. Guelph Lumber Co., 11 Can. S. C. R., at p. 455; Weir v. Barnett, 3 Exch. Div., 32; Cargill v. Bower, 10 Ch. Div., 502.

[3] Petrie v. Guelph Lumber Co., 11 Can. S. C. R., at p. 455, 456.

[4] Per Baggallay, J., in In *re* Scottish Petroleum Co., 23 Ch. Div., 413.

[5] *Ibid*; Oakes v. Turquand, L. R. 2 H. L., 235; Reese River Co. v. Smith, L. R. 4 H. L., 64, 77, 78; Whiteley's Case [1899], W. N., 34; [1899], 1 Ch., 770.

[6] In *re* Snyder Dynamite Projectile Co., 3 The Reports, 289, 292, 293, as to recision of contract and laches.

[7] Scholey v. Central Ry. of Venezuela, L. R. 9 Eq., 266 n.

ascertain, at the very latest, when shares are allotted to him, whether there is any discrepancy between the prospectus and the act of incorporation.[1]

The parties to the issue of a fraudulent prospectus are also amenable to the criminal law. The Criminal Code[2] provides that "every one is guilty of an indictable offense 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 intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof."[3]

9. **Promotor.**—The word "promotor" has no technical legal meaning and applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not.[4]

In order to constitute a person a promotor, it must be shewn that he was a promotor in fact, and not merely that he intended or had agreed to promote.[5] But it is submitted as impossible to lay down any general rule to determine who are and who are not pro-

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[1] See the judgments in Peel's Case, Law Rep. 2 Ch., 674; Lawrence's Case and Kinkaid's Case, *ib.* 412; Wilkinson's Case, *ib.* 536; also in Downes v. Ship, L. R. 3 H. L., 343, and Oakes v. Turquand, 2 *ibid*, 325.

[2] Sec. 365.

[3] The expression "property" includes every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise. See 3 (v), Criminal Code.

[4] See an article by Adelbert Hamilton in 16 Am. L. Rev., 671; and see Emma Mining Co. v. Lewis, 48 L. J. (C. P.), 257. See also article in 2 L. N., p. 265, for article from London Law Journal as to what is a promotor.

[5] Ladywell Co. v. Brookes, 34 Ch. Div., 398; 35 Ch. Div., 400, 410; Gover's Case, 1 Ch. Div., 182.

motors.[1] The question in each case must be, what has the co-called promotor done to make himself liable to the demand made against him? What fraud or breach of trust has he committed or been party or privy to?[2] If none, he is under no liability.

A promotor cannot be considered an agent or trustee for the company, which is not in existence, but the principles of the law of agency and trusteeship have been extended to meet his case. He stands in a so-called fiduciary relation to the company which he promotes, and is accountable to it just as if the relationship of principal and agent or of trustee and *cestui que trust* had existed.[3]

10. Contracts of Promotor with and at expense of the Company.—A clear distinction must be made between a trust for a company of property acquired by promotors and afterwards sold to the company and the fiduciary relationship engendered by the promotors, between themselves and the company, which exists as soon as the latter is formed.[4] There is no rule of law which prohibits a person from bringing about the formation of a company, for the purpose of selling property acquired by him to the company, for a profit.[5] The promotor does not necessarily hold such property in trust for the prospective company, but he stands in what, for want of a better term, has been called a fiduciary relation to the latter, and, if he sells to them, must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him, the contract may be rescinded provided the property remains in such a position that the parties may be restored to their original state.[6] The mere

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[1] For particular cases see Great Wheal Polgooth, 53 L. J. (Ch.), 42 (Solicitor); Lydney & Wigpool Co. v. Bird, 31 Ch. Div., 328 (Vendor's Agent); Cornell v. Hay, L. R. 8 C. P., 328.

[2] See Lydney, etc., Co. v. Bird, 33 Ch. Div., p. 93; Whaley Bridge Co. v. Green, 5 Q. B. D., 109.

[3] New Sombrero Co. v. Erlanger, 5 Ch. Div., 73, 112, 118, 123; 3 App. Cas., 1218; Emma Mining Co. v. Grant, 11 Ch. Div., 918, 936; and see In *re* Hess Manufacturing Co., 23 Can. S. C. R., 644.

[4] In *re* Hess Hanufacturing Co., 23 Can. S. C. R., 644; New Sombrero Phosphate Co. v. Erlanger, 3 App. Cas., 1218.

[5] *Ibid* and Gover's Case, L. R. 1 Ch. Div., 182; Albion Steel Co. v. Martin, L. R. 1 Ch. Div., 580.

[6] In *re* Hess Manufacturing Co., *supra*; and see Northrup Mining Co. v. Dimock, 27 Nova Scotia, 112.

Defendants entered into a verbal agreement with D to dispose of a gold mine, of which they were owners, for the sum of $70,000. D thereupon organized a company to purchase the mine. The persons who associated themselves with D for this purpose, with the exception of T and I, were led to believe that the price to be paid for it was $100,000. T was induced to become a member and use his influence to persuade others to do so by the payment of a commission. I. learned of the arrangement after becoming a member and demanded and received a commission, in consideration of which he induced others to take an interest. There was nothing to connect defendants with the dealings between D and his associates down to the date of a meeting held for the purpose of completing the purchase, when defendants transferred the property to a trustee nominated by the purchasers, for the sum of $100,000, one-half to be paid in cash at the time, the balance to be paid in instalments at dates agreed upon. On the same date defendants paid D the sum of $5,000 cash and entered into a private agreement with him in writing, by which they undertook to pay him the further sum of $25,000 when the last instalment of the purchase money was paid. Plaintiffs got possession of the mine on the 30th August, 1889, and worked it profitably until December, 1890, when a fault in the lead was met, and operations were discontinued. In October, 1890, the directors received information of the facts, of which they had previously heard rumours, in connection with the purchase. In January, 1891, the directors negotiated with one of the defendants for a lease of the mine, and, failing to agree on terms, intimated that proceedings would be taken to rescind the sale. The bringing of the suit for this purpose was authorized in October, 1891, but the suit was not actually commenced until January, 1892.

Held (Ritchie, J., dissenting) : that the delay in commencing proceedings was not unreasonable under the circumstances of the case, and did not bar the claim of the plaintiffs (and as to delay in bringing action see Beatty v. Neelon, 13 Can. S. C. R., 1).

Per Townshend, J.—The plaintiffs were not bound to act on mere rumours, or on information received, until they had good grounds for believing it correct.

Partly on account of the delay in commencing proceedings, the abandonment of the mine, the caving in of part of the works, and partly on account of the nature of the title from the Crown, under which the property was held, it was impossible to restore the defendants to their original position.

Held, that rescision should not be decreed, but that plaintiffs should recover the proportionate amounts contributed by them to make up the sum of $30,000, received by D and his associates T and I.

Per Ritchie, J.—Under the circumstances, plaintiffs were not entitled to rescind the sale, but their claim, if any, was for compensation in damages.

Per McDonald, C. J.—It was incumbent on defendants, in view of the facts brought to their knowledge, to have put plaintiffs upon inquiry.

Per Townshend, J.—That D was a partner with his associates in the purchase of the mine, and could not obtain the advantage sought by him without a full disclosure of the facts.

Also, that what D obtained from defendants was not an option, in the usual sense, but an agreement to allow him to retain all that he obtained from the sale over and above the price fixed; that the circumstances rebutted the idea of a sale to D, and that defendants were responsible for his fraudulent act. Northrup Mining Co. v. Dinock, 27 N. S., 112.

fact, however, that the directors who purchase for the company do not constitute an independent board, is not *ipso facto* a sufficient ground for setting aside the contract.[1] He must make a full and fair disclosure of his interest and position with respect to the property which he desires to sell to the company.

If a promotor purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret agreement with the vendor, a part of the price, when the agreement is carried out, comes into the hands of the promotor, that is, a secret profit which he cannot retain,[2] and if any part of such secret profit consists of paid-up shares of the company, issued as part of the purchase price of the property, such shares might, in winding-up proceedings, be treated, if held by the promotor, as unpaid shares upon which he may be made a contributory.[3]

In a recent English case, a syndicate was formed to purchase the property of a company, which was being wound up, and which property was subject to debentures and a mortgage, and to resell it to a company to be formed by them, or some other purchaser. Four members of the syndicate were appointed trustees to purchase and resell the property and promote the company ; they were also empowered to purchase, as an interim investment, any debentures of the old company. The syndicate bought the mortgage and some of the debentures at a figure much below what they realized, and later on purchased the property itself. An agreement was then made between the syndicate trustees and one Close, as trustee for the intended company, by which the vendors agreed to sell the property to the proposed company for £40,000 more than they paid for it. It was also provided in the agreement that its validity should not be impeached on the ground that the vendors as promoters or otherwise stood in a fiduciary relation to the company, nor should the vendors be required to account for any profits made or to be made by them by the purchase of any debentures or other charges on the property. The articles of the company, when formed, ratified this agreement. The four trustees of the syndicate became the first directors of the company. The prospectus made reference to the above agreement

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[1] Per Lindley, M. R., and Collins, J., in Lagunas Nitrate Co. v. Lagunas Syndicate, C. A. [1899] 2 Ch., 392.

[2] Hess Manufacturing Co., *supra*.   [3] *Ibid.*

as to profits by purchase of debentures, etc. The company being in course of winding up, the liquidator took proceedings to recover from the directors their proportion of the secret profit made on purchase of the mortgage and debentures. Held on appeal, reversing Wright, J., that the syndicate trustees, having provided for the formation of the company, owed it to the company not to make a profit out of it without informing it of the fact; that there was no sufficient disclosure of the profit, a reference to documents by the inspection of which it might be ascertained what profit had been made being insufficient; that the agreement with Close was not binding on the company, as the directors who adopted it were not an independent body; and the fact that the company having been kept in the dark could not then rescind, was no bar to relief, and that the four were jointly and severally liable to replace their proportion of the secret profit.[1]

Supposing, however, all the members of the purchasing company to be aware of the real facts of the case, it appears that the want of an independent board will not invalidate the agreement. *Volenti non fit injuria.*[2]

Numerous devices have been resorted to by promotors to secure promotion money at the expense of the company. One of the latest and most ingenious of these was an attempt by a director to get payment for services in promoting.[3] P. was interested in certain property that he wished to hand over to a company; he also had the sole right to call for a lease of the S. property. In order to float the company he employed the services of A and B and caused the lease of the S. property to me made to him and A and B jointly. These three agreed to transfer the S. property to the company on receiving fully-paid-up shares therein. The company was registered with A and B as its first directors. In accordance with a method often now adopted in such cases, the articles provided that the directors should adopt the above agreement, and that its validity should not be impeached on the grounds of the directors being interested as vendors or promotors, that they should not be liable to account for any benefit

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[1] In *re* Olympia, Ltd., C. A. [1898] 2 Ch., 153.

[2] Palmer Comp., at p. 227, citing Salomon v. Salomon (1897), A. C., 22; Brit. Seamless Paper Box Co., 17 Ch. Div., 467; see also Lagunas Nitrate Co. v. Langunas Syndicate, C. A. [1899] 2 Ch., 392.

[3] In *re* Westmoreland Slate Co., Bland's Case, 2 The Reports, 509 (Ch. App., 1893).

received thereunder, and that every member was to be deemed to have had notice of the terms of the agreement ; and A and B were placed on the register as holders of fully paid shares. Upon the winding up of the company, it was held that the insertion of the names of A and B as lessees in the lease of S. quarry was a mere piece of machinery for enabling them to get payment for their services in the promotion of the company ; and that B was liable for misfeasance in accepting, while director of the company, the shares for his services in promoting the company, and for allowing the shares to be issued to A, and that he must pay to the liquidator the nominal amount of the shares allotted to him and to A. In another case,[1] which was an action for damages, a promotor who procured himself to be appointed metal broker to the company on certain terms which were disclosed, also managed to obtain a large sum in addition out of the promotion money, which was added to and hidden in the price paid by the company for the property it bought. He was compelled to refund what he had surreptitiously obtained.

The concealment of the promotor's profits is sometimes sought under the form of exaggerated commission. If the promotor claims that he is entitled to a commission, he may fairly retain a trifling percentage, but where, under that guise, he retains a large part of the purchase money, it would make that an untrue representation which might be substantially true if the amount were trifling.[2]

11. Actions against Promotors by the Company and individual shareholders.—The company, being the body with whom, by its agents, the contracts with promotors are entered into, must usually be the body to set them aside,[3] and although individual shareholders who were parties to the fraud may be benefited, yet, so far as courts of equity are concerned, the mere fact that the punishment cannot be apportioned, will not avoid justice being done.[4]

But the holding in our Supreme Court case of Beatty v. Neelon,[5]

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[1] Emma Silver Mine Co. v. Lewis, 4 C. P. D., 396.

[2] Emma Silver Mining Co. v. Grant, 17 Ch. Div., 122 ; Bagnall v. Carlton, 6 Ch. Div., 371.

[3] Beatty v. Neelon, 13 Can. S. C. R., 1 ; New Sombrero Phosphate Co. v. Erlander, 5 Ch. Div., 73, per Jersel, M.R. Confirmed in H. L. 3 App. Cas., 1218.

[4] See New Sombrero Phosphate Co. v. Erlanger, 5 Ch. Div., 73, per Jersel, M.R., and Northoup Mining Co. v. Dinock, 27 N. Scotia, at p. 158, per Townshend, J. ; Kerr Fraud and Mistake, p. 390.

[5] *Supra.*

to the effect that individual shareholders in a joint stock company cannot bring an action against the promotors for damages caused by misrepresentation by the latter as to the prospects of the company when formed, the injury, if any, being an injury to the company, not to the respective shareholders—cannot be taken as an invariable rule on the subject. It has been held in England that if the directors have connived with or participated in the fraud, and being in control of the machinery of the corporation, refuse to bring the action, a court of equity will open its doors to an action by a defrauded shareholder, on behalf of himself and the other shareholders, except the defendants, upon his showing that the directors have refused to allow the action to be brought in the name of the company.[1] And where, as in the Province of Quebec, the Courts combine the jurisdictions, effect would undoubtedly be given to the remedy. In Nova Scotia a shareholder may also sue as trustee for the other shareholders of the company.[2] But if the action be in reality one on behalf of all the stockholders of the company, it should in the ordinary course be brought in the name of the company; and when brought in the name of a shareholder, to sustain such an action special circumstances must be shown,[3] for which purpose it will not be sufficient to show that the company was under the absolute control of the defendant, who induced the subscription to shares by misrepresentations, unless clearly indicated that such control existed at the time the action commenced.[4] If a plaintiff sues alone when he ought to sue on behalf of himself and others, an amendment will usually be allowed.[5]

It would also seem that any one shareholder can maintain an action against a company to restrain it from doing an act that is illegal or *ultra vires*.[6] Under section 80 of the Dominion Companies' Act, promotors being rendered liable for omission to state contracts in the prospectus, it has been held under the corresponding

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[1] Atwood v. Merryweather, 37 L. J. (Ch.), 35; Knoop v. Boluninck, 23 Atl. Rep., 118; 31 Amer. Law Register, 142.

[2] Hinchens v. Congreve, 4 Russel, 562; approved in Northoup Mining Co. v. Dinock, 27 N. S., at p. 160, 132; Beck v. Kantowing, 3 K. & J., 230.

[3] Weatherbee v. Whitney, 30 N. S. R., 49.

[4] *Ibid.*

[5] *Ibid*, at p. 59. See Lindley Companies, 566; Duckett v. Gover, 6 Ch. Div., 82.

[6] See Hoole v. Gt. West. Ry., 3 Ch. 262; Russell v. Wakefield Waterworks Co., 20 Eq., 481; Simpson v. Westminster Palace Hotel Co., 8 H. L. C., 712.

section of the English Act,[1] that when the section is applicable it gives to shareholders a remedy against the promotors, etc. personally.[2]

12. Liability for contracts made before incorporation.—It is now well established that persons engaged in forming a company are not partners.[3] The object of the promotors being to form a company, which is a sort of partnership with limited liability, it is held that persons who hold themselves out as members of such associations do not thereby hold themselves out as partners, either with each other or with their co-members. And in order that a person engaged with others in forming a company may be liable for their acts, he must have authorized them to do those acts as his agent, or have ratified such acts.[4] It has been recently held in the Province of Quebec that the signing of the petition for incorporation of a company by the provisional directors renders them jointly and severally liable for the fees of an attorney employed by the promotor to incorporate the company and before the company has, in fact, been incorporated.[5]

It has also been held in the same Province by the Court of Queen's Bench, confirming the Court of Review, which reversed the decision of the Court below, that where defendant caused a prospectus to be published of a company to be formed, and on the strength of certain representations therein, which were not correct, the plaintiff entered into a contract for two years for an expedition to the Yukon, at a salary of $60 per month, the defendant was responsible for the consequences of the representations contained in the prospectus, no company having been formed at the time it was issued, as therein alleged, nor subsequently incorporated, and defendant was liable to plaintiff for his salary.[6]

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[1] Sect. 38.

[2] Charlton v. Hay, 31 L. T., 437; 23 W. R., 129; Tycross v. Grant, 2 C. P. Div., 469.

[3] Raynell v. Lewis, 15 M. & W., 517; Wyld v. Hopkins, 15 M. & W., 517; Capper, *Ex parte*, 1 Sim. N. S., 178 ; Hutton v. Thompson, 3 H. L. C., 161 ; Bright v. Hutton, 3 H. L. C., 368; Norris v. Cottle, 2 H. L. C., 647.

[4] See Lindley Comp., 143. In Quebec held: That an agent who makes a contract in behalf of a corporation which has no legal existence, is personally liable to the third party, with whom he contracts. Pearson v. Lighthall, 7 R. J. Que., S. C., 1895, 201. See also Ellis v. Drummond, S. C., 1893, 4 Que., 473.

[5] Auger v. Corneillier, R. J. Q. B., 1892, 293.

[6] Bonhomme v. Bickerdike, Court of Review. Montreal, November 28th, 1899. Confirmed by Court of Queen's Bench, April 18th, 1900 (not yet reported).

13. Preliminary expenses and contracts before formation—Ratification by Company.—It is a rule, both of the Civil and the Common Law, that a person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them.[1] And a person incapable of contracting may, by the quasi-contract which results from the act of another, be obliged toward him.[2] In the Province of Quebec there was some doubt as to whether a corporation was a person in the above sense, and the question was first decided in De Bellefeuille v. Municipality of Mile End[3] to the effect that a corporation after it was formed was liable for the fees of the attorney who secured the charter of incorporation. This case was followed by Atwater v. The Importers and Traders Co.,[4] and the very recent case of Burroughs v. Corporation of Lachute,[5] all in the same sense. The question of ratification, it will be noticed, could not very well enter into these cases, for the very existence of the corporation depended upon the services which had been rendered on its behalf.

In England the Courts have held, even where there has been no ratification by the corporation, that a corporation should not be allowed to use its powers, which it has been enabled to obtain through the engagements of its promotors, in disregard of those engagements and to the prejudice of the persons with whom those engagements were made.[6] Companies frequently embody in their Act of Incorporation, or articles of association, an undertaking to pay for the expenses incurred in their incorporation, and an action will then lie against the company on this express promise.[7] If the attempt to incorporate the company is abortive, those who jointly signed the petition for incorporation will be held jointly and severally liable for

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[1] Pothier Obligations, 113, 114; Art. 1041, Quebec C. Code; 1 Addison on Contracts, 1025.

[2] Pothier Obligations, 115 and 128; Art. 1042, Quebec C. Code; 2 Addison on Contracts, p. 1030.

[3] 25 L. C. J., 18. [4] C. R. 1886, 31 L. C. J., 52.

[5] S. C. 1894, 6 Que. 393.

[6] Edwards v. Grand Junction Ry., 1 M. & Cr., 650. The propriety of this decision has been questioned and denied more than once in the House of Lords, yet as regards contracts of the class above treated, it may still be regarded as unimpeached. See Lindley Comp., 151, and Bedford Rail. Co. v. Stanley, 2 J. & H., 746.

[7] Western Screw Co. v. Cousley, 72 Ill., 531.

the attorney's charges in connection with the drawing up of the charter and promoting the bill through the legislature.[1] But apart from such a case, no member of an unincorporated company is liable to non-members for acts done before he became a member, unless he has rendered himself liable for them by some contract between him and them.[2] And generally speaking, an incorporated company is not liable for the acts and engagements of its promotors, unless it is made so by its charter, Act of Parliament, or deed of settlement, or unless it has become so by what it has done since its formation.[3] Hence a contract, other than the kind above mentioned, entered into by a promotor before the incorporation of the company, will be at the personal risk of such promotor if the company, after incorporation, repudiates it.[4]

Contracts of promotors which would be *ultra vires* if entered into by the company after its formation, cannot, even if attempted to be ratified by the company when formed, bind the latter.[5]

But apart from equitable grounds already stated, a contract entered into or an act done before a company is formed cannot be ratified by it in the proper sense of that expression.[6] Ratification is a technical word and presupposes the existence : 1, of a principal ; 2, of an agent ; and 3, of some act done by the agent for and on behalf of the principal but without his authority.[7]

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[1] Auger v. Corneillier, R. J. Q. B., 1892, Que., 293.

[2] Lindley Partnership, 201, *et seq.*

Where parties signed a declaration under R. S. O. 1887, c. 172, and became incorporated for the purpose of carrying on the business of life insurance, and were prevented from doing so by the refusal of the Inspector of Insurance to issue a license, one of the signers of the declaration, who was compelled to pay the debts incurred by him in promoting the company, cannot hold the others liable to contribution as partners. Ellis v. Drummond, 1893, R. J. Q., 4 S. C., 473.

[3] Lindley Comp., 146; and see National Insur. Co. v. Hatton, Q. B. 1879, 24 L. C. J., 26.

[4] Irwin v. Lessard, Q. B. 1889, 17 R. L., 589. In this case the leasing of premises by a promotor for the purpose of carrying on the business of the Company when incorporated.

Carden v. General Cemetery Co., 5 Bing. N. C., 253. In *re* Brampton v. Longtown Ry. Co., L. R. 10 Ch., 177; Hitchens v. Kilkenny Ry. C., 9 C.B., 536.

[6] See Waddell v. The Dominion City Brick Co., 5 Manitoba, 119.

[7] Wilson v. Tumman, 6 Man. & Gr., 236; Lindley Comp., 176. See Kelner v. Baxter, L. R. 2 C. P., 174; Scott v. Lord Ebury, *ibid*, 255; Melhado v. Porto Alegre Ry. Co., 9 C. P., 503; Spiller v. Paris Skating Rink Co., 7 Ch. Div., 368.

But a company may by a valid contract entered into by itself after its formation become bound to do what others have undertaken it shall do when formed. If the contract, although purporting to be made by the company and showing an intention to ratify an agreement prior to its charter, was nevertheless invalid for informalities the company would not be liable thereunder.[1]

Of course the company may impliedly ratify agreements entered into by its promotors, in cases where it accepts and retains any benefits which accrue to it therefrom as a company, in which case it becomes liable, not on the strict theory of contract, but on a principle analagous to that of *estoppel*.[2]

14. Withdrawal of proposed member before formation.—Where a number of persons meaning to join in a common undertaking, and raise a fund, eventually to be increased, for the purpose of forwarding that common undertaking, but commencing by deposits, put such deposits into the hands of a committee with directions to do certain acts ; it is not afterwards competent for any one of them, or for any number of them, to withdraw, and say to such committee, " I, or we, think you ought not to go any further with the undertaking." In such a case a single dissenter may insist on the committee proceeding, however inexpedient it may appear to do so, and however con-

[1] Waddell v. Dominion City Brick Co., 5 Manitoba, 119 (before the full Court), and see Allen v. Clark, 65 Barb., 563. Articles of association are a contract of the shareholders *inter se*, and therefore an outsider cannot base an action against the company on any of their provisions (Eley v. Positive Assurance Co. (1 Ex. Div., 20 and 88; Howard v. Patent Ivory Co., 38 Ch. Div., 156; Northumberland Hotel Co., 33, Ch. Div., 16). Save, however, in so far as such provisions create a trust for the plaintiff which he can enforce. (See Touche v. Metropolitan Ry. Co., 6 Ch., 671; Terrell v. Hutton, 4 H. L. C., 1091).

[2] *Supra*; and Edwards Grand Junction Ry. Co., 1 Milne & C., 650; Paxton Cattle Co. v. First Nat. Bank, 21 Neb., 621; Low v. Ry. Co., 45 N. H., 370; Rockford, etc., Ry. Co. v. Sage, 65 Ill., 328.

Promissory notes, granted by the members of a company before incorporation, for goods sold and delivered by the plaintiffs, and renewed by notes of the company after the completion of the incorporation (the old notes being surrendered and given up to the company) were, together with the original debt for the goods, novated and paid.

In the absence of fraud, in effecting the exchange of notes as above, the shareholders who paid up their stock in full, and caused the fact to be duly registered were free from all liability to pay said notes, or the original price cf said goods (Brewster v. Chapman, Q. B. 1875, 19 L. C. J., 301).

trary to the opinions and wishes of the rest.[1] The discontinuing power originally vested in the committee can be taken away only by the power that gave it.[2] Hence a subscriber cannot recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company upon the terms assented to by him has been abandoned or has become impracticable.[3] Subscribers to abortive companies are not liable for expenses incurred in attempting to form them.[4] But deposits when paid to cover preliminary expenses are not returnable,[5] barring exceptional circumstances.[6]

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[1] Baird v. Ross, 2 Macqueen, 61 (House of Lords). [2] *Ibid.*

[3] See Johnson v. Goslet, 18 C. B., 728; National Bolivian Navigation Co., 5 App. Cas., 176.

[4] Nockells v. Crosley, 3 B. & C., 814; Walstab v. Spottiswoode, 15 M. & W., 501; Moore v. Garwood, 4 Ex., 681; Mowatt v. Londesborough, 3 E. & B., 307, and 4 *ibid.*

[5] Garwood v. Ede, 1 Ex., 264; Clements v. Todd, 1 Ex., 268; Jones v. Harrison, 2 Ex., 52; Aldham v. Brown. 7 E. & B., 164.

[6] Wontner v. Sharp, 4 C. B., 404; Jarrett v. Kennedy, 6 C. B., 319; Mowatt v. Lord Londesborough, 3 E. & B., 307; and 4 *ibid.*

CHAPTER III.

INCORPORATION OF COMPANIES.

1. Incorporation by Letters Patent.—All the Canadian Joint Stock Companies' Acts[1] except that of the Province of British Columbia,[2] provide for the incorporation by letters patent of companies which may be formed thereunder[3] which has the effect of creating the persons who petition therefor,[4] and such others as thereafter become shareholders in the company, a body corporate and politic. The letters patent, issued under the Dominion Act by the Governor in

[1] R. S. C., ch. 119, sec. 3; R. S. O., ch. 191, sec. 9; Stat. N. B. 1893, ch. 7, sec. 3 ;R. S. Q., 4696; R. S. M., ch. 25, sec. 4; R. S. N. S., ch. 79, sec. 3.

[2] The British Columbia Act, R. S. B. C., ch. 44 as amended by 61 Vict., ch. 13), provides for incorporation by registration of the memorandum of association (secs 9 to 22). This also constitutes the company a body politic and corporate.

[3] That is to say, companies formed for any of the purposes or objects to which the legislative authority of the Parliament of Canada or of the Provincial Legislatures extends, except the construction and working of railways (or the business of Banking, D), and the issue of paper money or the business of insurance, and the New Brunswick Stat. excepts the management of Trades' Unions, friendly societies, building societies or other associations of like character.

[4] The Ontario Act adds the words, "Creating and constituting such persons and any others who may have become subscribers to the memorandum of agreement a body corporate and politic," etc., R. S. O., ch. 191, sec. 9.

Council[1] form the charter of the company, and, as already stated,[2] such letters patent have all the effects in every respect of a legislative charter. The petitioners for letters patent may ask for the embodiment therein of any provision which, under the Act authorizing the incorporation, might be made by by-law of the company; and such provision so embodied cannot, unless provision to the contrary is made in the letters patent, be repealed or altered by by-law.[3] All powers given to the company by the letters patent or supplementary letters patent must be exercised subject to the restrictions and provisions contained in the act.[4] The letters patent also recite such of the facts contained in the notice and petition for application as to the Governor in Council seems expedient.[5] Notice of the granting of the letters patent is forthwith given by the Secretary of State in the Canada *Gazette*, in the form A mentioned in the schedule of the Act ; and thereupon from the date of the letters patent, the persons therein named and their successors, are a body corporate and politic, by the name mentioned therein. The company must then forthwith insert notice of its incorporation on four separate occasions in at least one newspaper in the county, city or place where the head office or chief agency is established.[6]

The letters patent, whether original or supplementary, will not be deemed void or voidable on account of any irregularity in any notice prescribed by the Act, or on account of the insufficiency or

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[1] In the Provinces by the Lieutenant-Governor in Council, except in B.C., the Registrar of Joint Stock Companies (secs. 20 and 22), and in Quebec the Lieutenant-Governor upon favorable report from the Provincial Secretary and sec. 4710 regarding supplementary letters patent has been amended to that effect, 58 Vict., ch. 37.

[2] *Supra*, p. 8.

[3] R. S. C., ch. 119, sec. 5 (6), and Provinces likewise, except B. C., which allows alteration of memorandum if confirmed by Court, R. S. B. C., ch. 44, sec. 21.

[4] Sec. 23, R. S. C., ch. 119.

[5] R. S. C., ch. 119, sec. 7; Provinces likewise, except B. C. and Ontario.

[6] R. S. C., ch. 119, sec. 9; provisions as to notice by the company itself in newspaper not required by corresponding section of provincial statutes, R. S. Q., art. 4704; N. B. 1893, ch. 7, sec. 11; R. S. N. S., ch. 79, sec. 9; R. S. O., ch. 191, sec. 15; R. S. Man., ch. 25, sec. 18; The B. C. Act, R. S. B. C., ch. 44; sec. 20, provides for the publication for four weeks in the British Columbia *Gazette* of the Registrar's Certificate of Incorporation.

absence of any such notice, or on account of any irregularity in respect of any other matter preliminary to the issue thereof.[1]

2. Forfeiture of Charter.—The question may be raised whether a company, once incorporated under the Companies' Acts, can be disincorporated, and on what grounds and by what means? In a case decided by the House of Lords in 1871,[2] the point arose as to the regularity of the constitution of a company. All the subscribers to the memorandum were foreigners, and there was no intention to carry on business in England. Neither of these circumstances affected its validity, but the articles of association contained provisions contrary to the Companies' Act. The Court decided that if the company had been created, there was no power given by which, through any result of a formal application, like an application for *scire facias* to repeal a charter, the company could be got rid of unless by winding up. In the case of Glover v. Giles,[3] Fry, J., said: "The Court has no power to disincorporate a corporate body because the certificate of incorporation has been improperly obtained. In such a case it is for the Crown to recall the certificate of incorporation." But Halsbury, L. C., in the case of Salomon v. Salomon & Co., decided by the House of Lords in 1896, said[4]: "I do not at all mean to suggest that if it could be established that the provision of the statute . . . . had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of a *scire facias*, you could not prove the fact that the company had no real legal existence." This view would seem to harmonize with the enactments of our legislatures. The Dominion Act provides[5] that the letters patent shall be conclusive proof of every matter and thing therein set forth, *except in any proceeding by "scire facias" or otherwise for the purpose of rescinding or annulling the same.* The Quebec Code of Civil Procedure[6] provides that any letters

[1] R. S. C., ch. 119, sec. 78; R. S. Man., ch. 25, sec. 17; N. B. 1893, ch. 7, sec. 26; R. S. N. S., ch. 79, sec. 76; and see R. S.B. C., ch. 44, secs. 20 and 22.

[2] Princess of Reuss v. Bos., L. R. 5 H. L., 176.

[3] (1881) 18 Ch. Div., 180.

[4] (1897) A. C., at p. 30.

[5] R. S. C., ch. 119, sec. 68.

[6] Art. 1007, and see Banque de Hochelaga v. Murray, 15 App. Cas., 414, P. C. 1890.

patent granted by the Crown may be declared null or be repealed by the Superior Court : 1. When obtained by means of some fraudulent suggestion, or when some material fact has been concealed by the patentee, or with his knowledge or consent; 2. When they have been granted by mistake or in ignorance of some material fact; 3. When the patentee, or those claiming under him, have done or omitted to do some act, in violation of the terms and conditions upon which such letters patent were granted, or for any other reason have forfeited their rights and interests in such letters patent. All demands for annulling letters patent must be made by an officer of the Crown ;[1] but a writ of *scire facias* is not necessary to obtain the revocation of letters patent.[2] A Nova Scotia case has held that the Attorney-General may institute proceedings by way of information asking for an injunction to restrain a company from making use of the name or exercising the powers of the company on the ground that the company was never legally organized.[3]

The Dominion Act[4] declares that the charter of the company shall be forfeited by non-user during three consecutive years, or if the company does not go into actual operation within three years after it is granted.

3. Procedure necessary to obtain Letters Patent.—For the issuing of all letters patent certain fees are charged,[5] and these the Governor-

[1] Art. 1008. See remarks of commission to amend Code of Procedure, 4th report. Common v. McArthur, 29 Can. S. C. R.

[2] Principal Officers of Artillery v. Taylor, 1 L. C. R., 481; Q. B. 1851, Que. C. C. P., art. 1009; R. S. C., ch. 119, sec. 83.

[3] Atty.-General v. Bergen, 29 N. S. R., 135.

[4] R. S. C., ch. 119, sec. 83.

[5] R. S. C., ch. 119, sec. 84.

FEES PAYABLE FOR INCORPORATION OF COMPANIES.

ORDER IN COUNCIL, 11TH MAY, 1897.

(See Canada *Gazette*, 22nd May, 1897.)

When the proposed capital stock is $1,000,000 or upwards..	$500
When the proposed capital stock is $500,00 or upwards, and less than $1,000,000	300
When the proposed capital stock is $200,000 or upwaras, and less than $500,000	250
When the proposed capital stock is $100,000 or upwards, and less than $200,000	200
When the proposed capital stock is more than $40,000, and less than $100,000	150
When the proposed capital stock is $40,000, or less than $40,000	100

in-Council may, from time to time, establish, alter and regulate. He may designate the department or departments through which the issue thereof must take place; and may prescribe the forms of proceeding and registration in respect thereof, *and all other matters requisite for carrying out the objects of the Act.* The amount of the fees may be varied according to the nature of the company, the amount of the capital stock and other particulars as the Governor-in-Council thinks fit. And no steps must be taken in any department towards the issue of letters patent, whether original or supplementary, until after all fees are duly paid.

Under Order-in-Council of 23rd April, 1892, it was provided that petition for letters patent should first be sent to the Secretary of State; and they are then, by the officers of his department, forwarded to the Department of Justice, where examination is made as to the observances or formalities required by the Act, such as the proper observances of formalities required by the Act, such as the proper insertion of notice in the Canada *Gazette*, the sufficiency of the affidavits as to the contents of the petition, the fact that fifty *per cent.* of the capital stock has been subscribed, and ten *per cent.* thereon duly paid up. The petition with the report from the Department of Justice is then returned to the Department of the Secretary of State, from which it is then sent to the Department of Finance. An officer of this Department sees that the powers asked by the company are not excessive or objectionable on grounds of public policy under the regulations at present prevailing. The report of this officer is submitted to the Minister in person. Exception may be taken either to the powers which, are sometimes considered excessive ; to the name of the company, which may be objectionable on grounds of public policy ; or to the incorporation of any company whose objects, such as an illegal combination, might be objected to.

This practice was adopted because a company, which had been incorporated with an authorized capital of $100,000, requiring a deposit of $500 and subscriptions to $5,000 of stock, almost immediately afterwards applied for supplementary letters patent, increasing the capital to $5,000,000, which was alleged to have been for the purpose of making a combine in a certain industry. *Vide* discussion in Dominion House of Commons in *re* Dominion Cotton Mills Company, April 4th, 1892. Hansard, 1892, vol. 1, page 920 *et seq.*

4. Who may obtain Letters Patent.—Letters patent will be granted, under certain conditions, to any number of persons not less than five. The question has arisen, who are "persons" within the requirements of the Act? It has sometimes happened that among the applicants for incorporation, where the number was just sufficient to satisfy the requirements of the Act, one of these was an infant or minor. In an Ontario Court of Appeal case[1] decided in 1886, it was held that by reason of the infancy of one of the subscribers, who numbered five, the company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract. But making due allowances for the terms of the statute under which the case was decided, it would seem doubtful if, in the light of a recent English decision involving the same point,[2] the Ontario case could no longer be sustained. It is first to be noticed that in all these cases and the present Companies' Act, the letters patent are granted on the strength of the representations contained in the petition for incorporation, one of the representations being that the petitioners have each subscribed to so much stock,[3] and for this purpose it is to be supposed that the Legislature must be taken to have intended that the subscription should be such as to create a legal obligation to pay the money required. The Ontario Court considered that the five persons must therefore be persons capable of binding themselves by contract. As a contract by a minor is not void, but merely voidable,[4] the English Court held for that reason that while the signature is unavoided, it is a good signature for the purpose of the Act.[5]

It was also held that on the certificate of incorporation (*i.e.*, the

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[1] Hamilton Road Co. v. Townsend, 13 O. A. R., 534. This was a road company formed under the Act R. S. O. 1877, ch. 152.

[2] In *re* Laxon & Co. (1892), 3 Ch., 555, but Mr. Palmer, in his work on Company Law, seems to consider this case somewhat doubtful. See Palmer, p. 18.

[3] R. S. C., ch. 119, sec. 5 (2).

[4] For Quebec see C. Code, Arts 986, 987. And note that by Art. 323 of the Code a minor engaged in trade is reputed of full age for all acts relating to sucn trade. Quære: whether singing a petition for incorporation in a company might be construed into engaging in trade ?

[5] In *re* Nassau Phosphate Co., 2 Ch. Div., 610, followed. In the Ontario case the question as to the signing of a petition of incorporation by a married woman was considered, and it was doubted whether the Married Woman's Property Act, 47 Vict., ch. 19 (0), would permit of her signature being valid for the purpose.

letters patent) being obtained, the company is validly incorporated, and subsequent avoidance of the minor's contract does not invalidate the registration of the company or any intermediate acts affecting the rights of third parties. As already stated,[1] letters patent under our Act are not invalidated on account of any irregularity in respect of any matter preliminary to the issue of the letters patent or supplementary letters patent; and again, under section 68 of the Act it is provided that except in any proceeding by *scire facias* or otherwise for the purpose of annulling or rescinding the letters patent, they shall be conclusive proof of every matter and thing therein set forth. Thus if the company is not properly incorporated, the letters patent could only be set aside by a direct action for that purpose.[2]

Under the English Act,[3] it has been held that the certificate of incorporation is not conclusive to prevent the objection being taken that the company was not duly incorporated, on the ground that, in fact, less than the required number of persons signed the memorandum of association;[4] but Mr. Palmer, at p. 34 of his work on Company Law, says of this decision that it may be disregarded as being opposed to other decisions both before and since, and cites Lord Chelmsford's remarks in Oakes v. Turquand[5]: "I think that the certificate prevents all recurrence to prior matters essential to registration, *amongst which is the subscription of the memorandum of association by seven persons*, and that it is conclusive in this case that all previous requisites had been complied with." Mr. Palmer also cites Peel's case,[6] Princess of Reuss v. Bos,[7] Salomon v. Salomon.[8] The views expressed in these cases, he says, are and must be authoritative.

5. Provisions peculiar to certain Provinces as to notice re incorporation.—In some of the Provinces it is also provided that when a notice has been published according to the rules of the Legislative

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[1] *Supra*, p. 2.

[2] And see per Hagerty, C. J. O., in Hamilton Road Co, v. Townsend, 13

[3] Companies' Act 1862, sec. 18; very similar to the Brit. Columbia Act,

[4] In *re* National Debenture and Assets Corporation (1891), 2 Ch., 505, dis-

Ont. App., at p. 548.

R. S. B. C., ch. 44, sec. 20, and also to the old Brit. Columbia Act, 1890, sec. 7.

tinguished in *re* Laxon & Co. (1892), 3 Ch., 555.

[5] L. R. 2 H. L., at p. 354.

[6] (1867) 2 Ch., 674.

[7] (1871) L. R. 5 H. L., 176.

[8] (1897) A. C., 22.

Assembly for an Act incorporating any company, and a Bill has been introduced into the Assembly in accordance with such notice, and is subsequently thrown out or withdrawn, then in case a petition to the Lieutenant-Governor for the incorporation of the company is filed with the Provincial Secretary within one month from the day of the termination of the Session of the Assembly for which the notice was given, the notice may be accepted in lieu of the notice required as already stated.[1]

And in some Provinces the Lieutenant-Governor may dispense with the publication of the notice in any case in which the capital of the proposed company does not exceed three thousand dollars;[2] in other Provinces power to make general regulations as to notice is vested with Lieutenant-Governor-in-Council.[3]

6. Application for Letters Patent.—Applicants for letters patent under the Dominion Act must give notice of their intention to apply for the same by inserting the notice six times consecutively in the Canada *Gazette*.[4] This notice must contain :

(*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 purpose for which 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—which in the case of a loan company, shall not be less than one hundred thousand dollars;

(*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

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[1] N. B. 1893, ch. 7, sec. 6; R. S. Man., ch. 25, sec. 10.

[2] N. B. 1893, ch. 7, sec. 7, $5,000, and in such case the petition to the Lieutenant-Governor shall state particulars mentioned in sec. 4 in addition to those required by sec. 5.

[3] R. S. O., ch. 191, sec. 11.

[4] Rules of Department of Public Printing and Stationery, Ottawa, 10 July, 1885, R. S.C ., ch. 119, sec. 4.

provisional directors of the company and the majority of whom shall be residents in Canada.[1]

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[1] In New Brunswick two weeks' notice in the Royal *Gazette*, by at least two consecutive insertions. The capital stock may be not less than $2,000, in any case, actually subscribed. No provision as to residence or loan companies, and differing as to number of applicants requiring special mention, etc. Otherwise the same *mutatis mutandis*.

In Ontario the notice required is regulated by the Lieutenant-Governor-in-Council.

In Manitoba same as Dominion *mutatis mutandis*, and excluding provisions as to residence and loan companies.

In Quebec same as Dominion *mutatis mutandis*; excluding provisions for loan companies, and differing as to number of applicants requiring special mention, etc.

In Nova Scotia same as Quebec.

In British Columbia any five or more persons associated for any lawful purpose within the scope of the Local Companies' Act may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the said Act in respect of registration, form an incorporated company, with or without limited liability. (R. S. B. C., ch. 44, sec. 9.) The liability of the members may, according to the memorandum, be limited either to the amount unpaid on their shares or to such amount as they may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up. (Sec. 10.) Where the liability is limited to the amount unpaid on the shares, the memorandum shall contain the following things: (1), The name of the proposed company, with the addition of the word "Limited" as the last word in such name; (2), The part of the Province in which the registered office of the company is proposed to be situate; (3), The objects for which the proposed Company is to be established; (4), The time of existence of the proposed company if it is intended to secure incorporation for a fixed period; (5), A declaration that the liability of the members is limited; (6), The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

No subscriber can take less than one share, and each subscriber to the memorandum must write opposite to his name the number of shares he takes, which he must *bonâ fide* hold in his own right. (Sec. 11.) Where by the memorandum the liability of the members is limited to what they undertake to contribute to the assets of the company if it is wound up, the memorandum shall contain the following things: (1), Same as (1) in sec. 11, with the addition of "by guarantee" after "limited;" (2), Same as (2) in 11; (3), Same as (3) in 11; (4), A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for the payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributaries amongst themselves, such amount as may be required, At any time, not more han one month after the last insertion of the notice in the Canada *Gazette*, the applicants may petition the Governor-in-Council, through the Secretary of State, for the issue of the letters patent.[1]

2. Such petition must state the facts set forth in the notice, the amount of stock taken by each applicant, the amount paid in upon the stock of each applicant, and the manner in which the same has been paid in, and is held for the company.

3. The aggregate of the stock so taken must be at least one-half of the total amount of the proposed capital stock of the company.

4. The aggregate so paid in thereon must, if the company is not a loan company, be at least ten per cent. of the stock so taken; if the company is a loan company the aggregate so paid in of the stock so taken must be at least ten per cent thereof, and shall not be less than one hundred thousand dollars.[2]

5. (*a*) Such aggregate must be paid in to the credit of the Receiver-General of Canada, and shall be standing at such credit in some chartered bank in Canada, and the applicants shall, with their petition, produce the deposit receipt for such amount so deposited.

(*b*) At any time after the signing of letters patent incorporating the applicants as a company, the said aggregate, so paid in to the credit of the Receiver-General may be returned to and for the sole use of the company, or in case of failure to incorporate, to the appli-

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not exceeding a specified amount. (Sec. 12.) Where no limit is placed on the liability of the members, the memorandum must contain the following things : (1), The name of the proposed company; (2), Same as (2) in sec. 11; (3), Same as (3) in sec. 11. (Sec. 13.) Secs. 14 and 18 deal with the signature and effect of the memorandum and articles of association; sec. 16, the regulations to be prescribed by the articles of association; secs. 15 and 21, alteration of memorandum of association; secs. 19, 20 and 22, registration of memorandum. Secs. 56 *et seq.* provide for the formation of mining companies with specially limited liability on shares.

[1] Dom. Act, sec. 5. Que. Act, art. 4698, Lieutenant-Governor through Provincial Secretary; Manitoba Act, sec. 6, same as Quebec; New Brunswick Act, sec. 5, same as Quebec; Nova Scotia Act, sec. 5, same as Quebec; Ontario Act, same as Quebec as to petitioning Lieutenant-Governor, R. S. O., ch. 191, sec. 10, but notice is regulated by the Lieutenant-Governor-in-Council, *ibid*, sec. 11.

[2] R. S. C., ch. 119, is repealed by 62-63 Vict., ch. 41, so far as regards the formation or incorporation thereafter of any Loan Company, save as to those already incorporated under it.

cants who have paid in or contributed to the same, under regulations from time to time made by the Governor-in-Council.

(*c*) In case the object of the company is one requiring that it should own real estate, any portion not exceeding one-half of such aggregate may be taken as paid in, if it is *bonâ fide* invested in real estate suitable to such object, and such real estate is, by a valid and sufficient registered deed, duly held by two or more trustees for the company, and the applicants shall establish the fact, by oath, affirmation or declaration, that such real estate is of the required value over and above all encumbrances thereon.[1]

6. The petition may ask for the embodying in the letters patent of any provisions which, under the Act, might be made by by-law of the company, and such provision so embodied cannot, unless provision to the contrary is made in the letters patent, be subject to repeal or alteration by by-law.[2]

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[1] As amended by 61 Vict., ch. 50, 1898.

[2] R. S. C., ch. 119, sec. 5 (2), (3), (4), (5), (6).

N. B. 1893, ch. 7, sec. 5 (2), must also state the amount, if any, paid in upon the stock of each applicant.

(3) Same as Dominion.

(4) Must state whether amount of stock taken is paid in cash or by transfer of property, or how otherwise, and if by transfer of property, shall state briefly the description of property transferred.

(5) In case petition is not signed by all the shareholders whose names are proposed to be inserted in the letters patent, it shall be accompanied by a memorandum of association, signed by all the persons whose names are to be inserted, or by their attorneys duly authorized in writing, and such memo. shall contain the particulars required by the next preceding section, and shall be in the form A in the schedule to this Act, or as near thereto as circumstances will admit.

(6) Any payments which shall have been made in cash, on account of the stock, must have been paid in to the credit of the company, or of the trustees therefor, and must stand at such credit in some chartered bank in the Province.

R. S. Man., ch. 25, sec. 7 (*a*), same as N.B. (2).

(7) Same as Dominion (6).

7 (*b*) Petition must also state whether the amount is paid in cash or transfer of property or how otherwise.

7 (*c*) Petition may also ask for the embodying in the letters patent of any provision which otherwise under the provisions hereof might be embodied in any by-law of the company when incorporated.

Sec. 8, same as N. B., No. (5).

R. S. Q., art. 4698 (2), same as Dominion (2), except must also state stock taken by all other persons therein named.

(3) Same as Dominion (3).

(4) The aggregate so paid in thereon must be at least ten per cent. thereof, or five per cent. of the total capital; unless such total exceed $500,000, in which case the aggregate paid in upon such excess must be at least two per cent. thereof.

(5) Such aggregate must have been paid in to the credit of the company or of trustees therefor, and must be standing at such credit, in some chartered bank within the Province, unless the object of the company is one requiring that it should own real estate, in which case not more than one-half thereof may be taken as invested in real estate suitable to such object, duly held by trustees therefor, and being fully of the required value over and above all encumbrances thereon.

(6) Same as Manitoba 7 (*c*).

R. S. N. S., ch. 79, sec. 5 (*a*), same as Dominion (2), adding "such list of shareholders must be sent in with the petition in duplicate."

(*b*) Same as Dominion (3).

(*c*) The aggregate so paid in thereon must be at least ten per cent.

(*d*) Same as Quebec (5) *mutatis mutandis.*

Brit. Columbia, see *supra*, p. 8.

The Ontario Act, R. S. O., ch. 191, differs from the other Provinces, and sec. 10 reads as follows:—

(1) The applicants for incorporation, who must be of the full age of twenty-one years, may petition the Lieutenant-Governor, through the Provincial Secretary, for the issue of letters patent. The petition of the applicants shall show:

(*a*) The proposed corporate name of the company with the word "Limited" as the last word thereof; and such name shall not on any public ground be objectionable, and shall not be that of any known company, incorporated or unincorporated, or of any partnership, or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive; provided, however, that a subsisting company, or partnership, or individual, or the person carrying on such business may consent that such name, in whole or in part, be granted to the new company.

(*b*) The objects, simply stated, for which the company is to be incorporated.

(*c*) The place within the Province of Ontario where the head office of the company is to be situated, and where its principal books of account and its corporation records are to be kept, and to which all communications and notices may be addressed.

(*d*) The amount of capital stock of the company.

(*e*) The number of shares and the amount of each share.

(*f*) The name in full, the place of residence and the calling of each of the applicants.

(*g*) The number, and the names of the applicants, not less than three, who are to be the provisional directors of the company. (As amended by 61 Vict., cap. 19, 1898.)

(2) The petition may be similar to, but in its essential features shall comply with, Schedule "B" to this Act, and shall be accompanied by a memorandum of agreement, executed in duplicate, which may be similar to, but which shall in its essential features comply with Schedule "A" to this Act.

Before the letters patent are issued, the applicants must establish, to the satisfaction of the Secretary of State, or of such other officer as is charged by the Governor-in-Council to report thereon, the sufficiency of their notice and petition, and the truth and sufficiency of the facts therein set forth, and that the proposed name is not the name of any other known incorporated or unincorporated company; and for that purpose the Secretary of State, or such other officer shall take and keep of record any requisite evidence in writing, by oath or affirmation, or by solemn declaration.[1]

7. Corporate Name.—Under our Companies' Acts the name of a company proposed to be incorporated, must not be that of any other known company, incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise on public grounds objec-

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(3) In case any amount has been paid in, on shares taken, by transfer of property to a trustee, the Provincial Secretary may require such evidence as shall be satisfactory to him of such transfer and of the kind, nature and value of the property and the manner in which, and the person or persons or corporate body by whom the property transferred or any other payment, is held in trust for the company with a view to its incorporation.

(4) Each petitioner shall be the *boná fide* holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement.

(5) The petition may ask for the embodying in the letters patent of any provision which, otherwise under this act, might be embodied in any by-law of the company when incorporated.

Sections 11 (*a*) and (*d*) gives the Lieutenant-Governor-in-Council the power to make regulations with respect to the cases in which notice of application for letters patent or supplementary letters patent must be given, and the form and manner of giving the same. Such regulations must be published in *The Gazette.*

[1] Dom. Act, sec. 6. Quebec Act, art. 4699, omits provision as to name, but has this addition, "and further that the applicants and more especially the provisional directors named are persons of sufficiently reputed means to warrant the application." For the rest the same as Dominion *mutatis mutandis.*

Man. Act, sec. 9, same as Dominion *mutatis mutandis,* excepting after writing "under oath or otherwise; and he or any justice of the peace or person authorized by the 'Oaths Act' to take affidavits for use in Manitoba may administer every requisite oath.'

R. S. O., ch. 191, secs. 12 and 13 (1), same as Dominion *mutatis mutandis,* except that for "notice and petition" read "memorandum of agreement and petition," the words "or by solemn declaration" do not appear, and 13 (2) provides for the manner in which proof may be made.

N. B. 1893, ch. 7, sec. 9 (1) (2), same as Dominion *mutatis mutandis.*

R. S. N. S., ch. 79, sec. 6, same as Dominion *mutatis mutandis.*

tionable.[1] Before the issue of letters patent the applicants must establish that the proposed name is not the name of any other known company, incorporated or unincorporated.[2]

The Governor-in-Council may give to the company a corporate name, different from that proposed by the applicants in their published notice, if the proposed name is objectionable.[3] If it is made to appear, to the satisfaction of the Governor-in-Council, that the name of any company (whether given by the original or by supplementary letters patent, or on amalgamation) incorporated under the Act, is the same as the name of an existing incorporated or unincorporated company, or so similar thereto as to be liable to be confounded therewith, the Governor-in-Council may direct the issue of supplementary letters patent, reciting the former letters and changing the name of the company to some other name which shall be set forth in the supplementary letters patent.[4]

8. Improper use of name and remedy.—The Courts will restrain any company which improperly assumes the name of another existing company carrying on the same kind of business.[5]

Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with and injure the business of another bearing the same name, provided he does not resort to any artifice or contrivance to produce the impression that the establishments are identical.[6] In the latter case an injunction against the use of the name will be granted.[7]

[1] R. S. C., ch. 119, sec. 4 (*a*); Provinces likewise.

[2] *Ibid*, sec. 6; Provinces likewise, but Quebec Act does not make special mention of this (sec. 4699).

[3] *Ibid*, sec. 8; Provinces likewise. Under the B. C. Act, the Registrar may direct the name to be changed. R. S. B. C., ch. 44, sec. 24, as amended by 61 Vict., ch. 13.

[4] *Ibid*, sec. 10; Provinces likewise. Under the Ontario Act the objectionable name is changed by an Order-in-Council and not by the issue of supplementary letters patent. R. S. O., ch. 191, sec. 24. For Manitoba see also Act to authorize the changing of names of incorporated companies, ch. 23, R. Stat., and sec. 11 of Joint Stock Comp. Act, ch. 25, R. Stat; for B. C., see sec. 24, *supra*.

[5] Henriks v. Montagu, 17 Ch. Div., 638; Madam Tussaud & Sons v. Tussaud, 44 Ch. Div., 678; National Folding Box & Paper Co. v. National Folding Box Co., 13 The Reports, 60.

[6] Street v. Union Bank of Spain, 30 Ch. Div., 156; Day v. Brownrigg, 10 Ch. Div., 294; Meneely v. Meneely, 62 N. Y., 427; Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y., 462.

[7] Singer Mfg. Co. v. Charlebois, R. J. Q. 16 S. C., 167.

But the right of one to use his own name in his own business is quite different and distinct from the lending or giving of his name to a company with a view of making it similar to that employed by other persons in the same kind of business.[1]

If a person assigns to a company an existing business heretofore carried on by him under his name there would appear to be nothing to prevent the company from carrying on business under that name.[2] But a person cannot give to a company the right to use his name which is similar to that of another company, where it does not succeed him in a business identified by that style.[3]

9. Examples of use of name restrained.—Where one John Turton took his two sons into partnership and styled his firm "John Turton & Sons," a company doing business in the same town, whose name was "Thos. Turton & Sons, Limited," failed in securing an injunction, there being no evidence that the first-named company imitated the trademarks or labels of the other one or attempted to deceive the public.[4]

The Universal Life Assurance Society secured an injunction to restrain a proposed company from registering under the name of The Universe Life Assurance Association.[5]

And the National Folding Box & Paper Co. obtained an injunction against the National Folding Box Co.[6] Also the Manchester Brewery Co., Lim., obtained the same relief against the North Cheshire and Manchester Brewery Co., Lim.[7] This latter company started in the same trade and in the same locality as the former and older company, and the Court held that the practical adoption of its name would cause endless confusion.

10. Examples of use of name permitted.—Injunctions to restrain the defendants from using the name they had adopted on account of its similarity to that of the plaintiffs were refused in the following cases: The London Insurance Co. v. The London & Westminster Insurance Corp., Limited;[8] Colonial Life Assurance Co. v. Home & Colonial Insurance Co.;[9] London & County Bank v. Capital and

[1] Frank E. de Long v. The de Long Hook & Eye Co., 10 N. Y. Misc., 577.

[2] See Tarton v. Tarton, 42 Ch. Div., 128, as noticed in Tussaud v. Tussaud, 44 Ch. Div., at pp. 687, 688.

[3] Tussaud v. Tussaud, 44 Ch. Div., 678.

[4] Turton v. Turton, 42 Ch. Div., 128.

[5] Hendricks v. Montagu, Ch. Div., 638.

[6] 13 The Reports, 60.

[7] L. J. R., Ch. Div., vol. 68, p. 74.

[8] 32 L. J. (Ch.), 664.

[9] 33 Beav., 548.

Counties Bank;[1] Merchant Banking Co. of London v. Merchants' Joint Stock Bank;[2] Australian Mortgage Land & Finance Co. v. Australian & New Zealand Mortgage Co.[3]

It has been held by the Privy Council, in the case of a company which had gone into liquidation, and whose assets were subsequently acquired by a new company, not, however, adopting the same name, but purchasing the good-will, that the new company had no right to restrain an individual from doing business in the name of the old company, even though the two businesses were alike and conducted in the same city.[4]

11. **Change or alteration of name.**—No statutory alteration of the name of the company as above provided will affect its rights or obligations;[5] and all proceedings may be continued or commenced by or against the company under its new name that might have been continued or commenced by or against the company under its former name.[6]

12. **Word "Limited" in name.**—The Dominion and Ontario Acts require that the company shall keep painted or affixed, its name, with the word "Limited" after the same, on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name, with the said word after it, engraved in legible characters on its seal, and mentioned in legible characters 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 such company, and in all bills of parcels, invoices and receipts of the company.[7] The Act also provides penalties for non-observance of the foregoing provi-

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[1] Before Jessel, M. R., 1878; see Buckly Comp., 25.

[2] 9 Ch. Div., 560.

[3] W. N. 1880, 6.

[4] Montreal Lithographing Co. v. Sabiston, P. C. [1899] A. C., 610, affirming Que. Q. B., but for different reasons.

[5] R. S. C., ch. 119, sec. 11; for Manitoba see R. S. M., ch. 23, secs. 1, 2. For Ontario see R. S. O. 1897, ch. 215, sec. 1.

[6] R. S. C., ch. 119, sec. 12; Provinces likewise.

[7] R. S. C., ch. 119, sec. 79; R. S. O., ch. 191, sec. 23.

sions.[1] The Ontario Act requires the use of the *unabbreviated* word "Limited;"[2] and directors will be jointly and severally liable on written contracts or undertakings of the company where "Ltd." is used for "Limited."[3]

The word "Limited" is no part of the name of a company incorporated under the Dominion Joint Stock Companies' Act;[4] but in a company incorporated under the British Columbia or Ontario Acts, it forms the last word of the name.[5]

13. Registration to be effected by companies.—All companies formed in Quebec must file a declaration, in which must be stated the name and head office of the company, together with the name of the President, with the Prothonotary of the Superior Court of the district, or with the Registrar of the Registration Division,[6] the object being to enable papers to be served on the company with certainty. In default of this the company will be subject to a fine of $400, to be recovered by a *qui tam* action.[7] This declaration must also be made when the company changes its name or place of business.[8] In British Columbia registration must be effected with the Registrar of Joint Stock Companies,[9] likewise any alteration in the memorandum.[10]

A foreign company having an agency in Quebec must register, but not when it only employs an agent there for advertising and

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[1] Dom. Act, sec. 79 (2), (3), (4). Ont. Act, sec. 23 (2), (3), (4), (5). The secretary of a limited company was held personally liable on a bill which he had accepted on behalf of the company in which the words "Limited" as part of its name was omitted, the same not having been paid by the company. Penrose v. Martyr, E. B. & E., 499; Atkins & Co. v. Wardle, 58 L. J. (Q. B.), 377. Our Act so provides, sec. 79 (4).

[2] R. S. O., ch. 191, sec. 23.

[3] *Ibid*, Howell Lithographing Co. v. Brethour, 30 O. R. 204; 19 Can. L.T., 69.

[4] Waterous Engine Works, Ltd. v. McLean, 2 Man., 279.

[5] R. S. B. C., ch. 44, sec. 11, ss. 1. See also secs. 86 and 87. R. S. O., ch. 191, sec. 23.

[6] R. S. Q., Sec. 4754.

[7] R. S. Q., art. 4754 *et seq.*

[8] *Ibid*, sub-article (4). The production of a power of attorney by the agent of a foreign company filed in the office of the Prothonotary in conformity with the Federal law (R. S. C., ch, 124, sec. 15), is not sufficient for the purpose of the Provincial Acts, 40 Vict., ch. 15, and 45 Vict., ch. 47 (4754 R. S. Q.), which requires a declaration to be filed and registered in the offices of the Prothonotary and Registrar, Brown v. Lord, Q. B. 1889, 18 R. L., 383.

[9] R. S. B. C., ch. 44, secs. 19 and 84.

[10] R. S. B. C., ch. 44, sec. 22.

canvassing and who does not make any contracts for the business of the company.[1]

The company must also register in each district in which it carries on business,[2] but this has been understood as meaning only when it has a branch house or office, or place of business in the district, and not when it sells its goods through local agents selling on commission.[3]

The British Columbia Act also requires all extra provincial companies carrying on business in that province, to register, this applies to such companies doing business there through a broker or other agent.[4]

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[1] Bertin v. North. Pacific Ry., R. J. Q. 4 S. C., 321, 1893.
[2] R. S. Q., sec. 4754.
[3] Armitage v. Massey Manufacturing Co., 14 R. L., 666.
[4] R. S. B. C., ch. 44, sec. 123, as amended by 61 Vict., ch. 13.

CHAPTER IV.

USES AND ABUSES OF THE COMPANIES' ACTS.

1. Qualification of members of a company—"One man" companies.—The Dominion Act requires that there shall be at least five applicants for incorporation to form a company;[1] the question then arises whether the organization of a company consisting of one substantial person and four mere dummies or nominees of that person without any real interest in the company, apart from the ownership of one share each, would be a compliance with this section? It has been contended that the law will not allow an individual to adopt the machinery of the Act as a protection to his liability while carrying on his old business in the same way as when he was a sole trader. This is the opinion held by certain lawyers in the United States.[2] The whole question has recently been discussed in England and pronounced upon by the House of Lords in the cases of Broderip v. Salomon[3] and Salomon v. Salomon & Co.[4] In this case (for they are one and the

[1] R. S. C., ch. 119, sec. 3.

[2] See paper read before the Texas Bar Association by Hon. J. M. Avery, reported in 27 Amer. L. Rev., 361 *et seq.*

[3] (1895) 2 Ch. (C. A.), 323 (reversed on appeal).

[4] (1897) A. C. 22.

same) one Salomon, a sole trader, in order to obtain advantages of limited liability, he being perfectly solvent at the time, determined to convert his business into a stock company. He took 20,000 shares in the capital, and his wife, sons and daughter took each one. No other shares were issued. Vaughan-Williams, J., held that the company Salomon & Co. was a mere alias for Salomon, and, therefore, that Salomon was bound to pay the unsecured creditors of the company out of his own pocket, although his shares were fully paid up. This decision the Court of Appeal affirmed, but on the ground that the whole scheme was a fraud on the Act, and that the legislature never intended to allow a company to consist of one substantial person and the remaining number required by the Act to consist of mere dummies devoid of any real interest. In the opinion of the Court, the Act contemplated the incorporation of independent, *bonâ fide* members, associated for the purposes of trade of the number required by the Act, the remainder of whom must not be mere puppets of the former owner of the business; therefore this Court held a company not so constituted an abuse of the Companies' Act and a mere trustee for its principle shareholder, Salomon, who was on winding-up made liable for the debts of the company. This view of the requirements of the Act was, according to Mr. Palmer, in his work on Company Law,[1] obviously erroneous and unsound; and the decision of the Court of Appeals was unanimously reversed by the House of Lords in 1896,[2] on the ground that the company was regularly and properly constituted, inasmuch as there were seven members (the English Act requires seven members, while the Dominion Act requires but five), each of whom held at least one share, and that this was the condition, and the sole condition, imposed by the statute; and it declared that there was no foundation for the notion that such a company was irregular because some or one of the seven members happened to hold a relatively small, or relatively large, number of shares, or held them in trust for the other member or members.

" The company attains maturity on its birth. There is no period of minority—no interval of incapacity. I cannot understand how a body corporate made capable by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a sub-

[1] At p. 247.

[2] (1897) A. C., 22.

scriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum." [1]

But the law will not permit the conversion of a business into a joint stock company if it be for the purpose of defrauding creditors. A merchant in insolvent circumstances formed a joint stock company, he and his wife subscribing for all the stock, except a few shares, which were allotted to three employees of his, these five forming the directors. They then, as directors and shareholders, appointed him manager for five years at a salary, and all his assets were assigned to the company. It was held that the company was the mere alias and agent of the assignor, and the assignment a fraud on his creditors, and must be set aside, subject, however, to the rights of the creditors of the company.[2]

2. Illegal application of assets by company.—Although the shareholders of a company may all be members of the promotor's family, and the first directors consist of the promotor and such others as will do his bidding under all circumstances, and the articles of association or act of incorporation give to the directors the very widest powers of management, yet, in the face of all these devices for securing unanimous consent, the directors cannot vote to one of themselves, even with the consent of all the other members of the company, presents made from payments out of capital, or out of money borrowed by the company for the purposes of its business for services alleged to have been rendered to the company, and if made can be recovered back. Nor has such promotor power to dispense with the sanction of the company in general meeting to acts which the directors are not authorized to do.[3] "A family company . . . . does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company." [4]

A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated com-

[1] Per Lord McNaughton in Salomon v. Salomon (1897), A. C., at p. 51; and see R. S. C., ch. 119, secs. 3, 68 and 78. Palmer's Company Law, p. 33 *et seq.*, and cases there cited.

[2] Rielle v. Reid, 28 O. R., 497, citing *In re* Carey [1895], 2 Q. B., 624, and distinguishing Salomon v. Salomon, *supra*.

[3] *In re* G. Newman & Co., 1 Ch. [1895], p. 674, 12 The Reports, 228.

[4] Per Lord McNaughton in Trevor v. Whitworth, 12 App. Cas., 409.

pany's assets are its property and not the property of the shareholders for the time being, and if the directors misapply those assets by applying them to purposes for which they cannot lawfully be applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion.[1] The system of limiting liability was inaugurated not merely for the benefit of the shareholders for the time being in the company, but was intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind.[2]

3. Carrying on business in the name of a company after incorporation, but before complete formation.—The Companies' Act of British Columbia[3] does not require that any capital stock should have been subscribed as a preliminary to registration, though it does require that in a company, the liability of whose members is limited to the amount unpaid on their shares, the memorandum of association shall state the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount;[4] but once registration is achieved the persons who sign the memorandum of association become a body politic and corporate in fact and in name.[5] It has been sought, under somewhat similar acts, to evade liability in the carrying on of a business by acquiring the certificate of incorporation in the regular way, but stopping at that point and making no further efforts to proceed to the proper formation of a company, while all the time trading

[1] *Ibid.* Per Lindley, L. J. at p. 234; this view is measurably near to the trust fund doctrine in vogue in the United States. It may be said to be the same thing without the name. If the buyer of goods for his sole benefit makes the purchase in the name of a corporation (not in good faith) organized by him and having no real existence, though believed by him to be a valid corporation, and gives in payment therefor a promissory note in the name of such corporation, the seller may treat the note as void, and recover against the buyer personally on the original contract for goods sold and delivered (Montgomery v. Forbes, 148 Mass. 249.) Under our law while the letters patent would be valid until annulled on *Scire facias*, yet the same result would be arrived at by treating the company as his trustee.

[2] Per Lord Chancellor Cairns in Ashbury Ry. Co. v. Riche, 7 E., 1 App. at p. 667.

[3] R. S. B. C., ch. 44. [4] Sec. 11, s.s. 6. [5] Sec. 20.

as such, and cases have arisen in which persons purporting to act for a company, as for example trustees, were subsequently found to be using the name of a company which, although incorporated by registration, had not been organized by the election of directors, allotment of shares and other formalities required by the Act, and it was held that they were personally liable upon these contracts upon the general principle that an unauthorized agent, purporting to contract for a principal binds himself; not the principal.[1] If the company has not been legally organized, and its stock not subscribed or paid up, the Attorney-General may obtain an injunction restraining those who are using its name or exercising its powers.[2] This might also be a ground of forfeiture of the charter.[3]

4. Transfer of private business to company.—But a case involving the following condition of affairs must be distinguished from the above. A sole trader being indebted to a creditor for money advanced for the purpose of his business, formed a company to purchase (pursuant to an agreement between him and the company) the business as a going concern. The company was to assume his debts and liabilities. He was to be managing director. The memorandum of association stated the objects of the company to be, *inter alia*, " to mortgage and generally otherwise deal with any part of the business, property or undertaking of the company, to any person or persons, for such consideration as the company may think fit." Under the articles the directors had " power to borrow or raise money by the issue of debentures or otherwise, as they may think fit." One director was to be a quorum. Debentures were issued to the creditor of the vendor in satisfaction of his debt.

The Court held that such issue was within the powers of the directors and was not without consideration; that it was not an improper or irregular exercise of their powers in the interests of the vendor individually and not of the company; and that it was not a fraudulent preference under the Companies' Act.[4]

Firms financially embarrassed might derive some benefit from a company formation, while the parties who compose the firm and trans-

[1] See the case of Wechseiberg v. Flour City Nat. Bank, 24 U. S., App. 308.
[2] Atty. Gen. v. Bergen, 29 N. S. R., 135.
[3] Dominion, etc. Co. v. Atty. Gen. of Can., 21 Can. S. C. R., 72.
[4] Seligmas v. Prince, Ch. App., 1895, 12 The Reports, 592.

fer the greater part of the assets thereof to the new company would receive in payment all the stock of the corporation, and become its sole stockholders, trustees and officers. If the company were to run for two years before the members of the firm assigned, it would appear that this period of time would relieve the members of any presumption that they intended to defraud their creditors.[1] Then, in order to secure the property sunk in the company, consisting principally of real estate, it would appear this could be mortgaged even three days, or thereabouts, before the assignment of the members of the firm, without its being considered as an intent upon the part of the assigners to hinder, delay or defraud their firm creditors.[2]

But as already stated, if it can be proved that the members of an insolvent firm have transferred their stock in trade to a company formed by them, for the express purpose of defrauding their creditors, the transaction would be fraudulent as to existing creditors, and the property so transferred could be taken in execution as that of the former firm.[3]

5. Transfer by one company to another.—Also would it be *ultra vires* for one corporation to transfer all its assets to another, whereby, through a mere change of name, an attempt is made to defraud creditors, or which would operate a fraud.[4]

6. Property of company—" Trust Fund " doctrine.—Upon the question as to the illegal dissipation by a company of its assets, much has been written concerning what is known in the United States as the " Trust Fund doctrine." This doctrine has been much misunderstood and misapplied. But when rightly understood it would appear to be such an equitable doctrine as would be applied in England or any country whose system of law is derived from her. Mr. Justice Bradly of the United States Supreme Court, said[5]: " It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that whilst the latter has

[1]First Nat. Bank v. Wood, 86 Hun., 491. [2] *Ibid.*

[3]Reille v. Reid, 28 O. R., 497; Booth v. Bunce, 33 N. Y., 139; San Francisco & North Pac. Ry. Co. v. Bee, 48 Cal., 398. See also Civil Code Que., Arts. 1032 *et seq.*

[4]Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. Rep., 36, 1032, Que. C. Code.

[5]Graham v. R. R. Co., 102 U. S., at p. 160, Thompson Corp., sec. 650.

supreme dominion over its own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understood, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it.

This tallies well with the remarks of Lord Justice Lindley[1] that "an incorporated company's assets are its property, and not the property of the shareholders for the time being."

In a recent case the United States Supreme Court has held[2] that a party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien.

The officers of a corporation act in a fiduciary capacity in respect of its property in their hands, and may be called to account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors, the corporation is simply a debtor and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, would give to the simple contract creditors any lien upon the property of the corporation, nor charge any direct trust thereon.[3]

7. Illegal division of assets among members of company.—Any division of the assets of a company among its members which would

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[1] *Supra.*

[2] Hollins v. Brierfield Coal & Iron Co., 150 U. S., 371 (1893).

[3] *Ibid.* The same law is laid down in Lindley on Companies, at p. 278. "It must be borne in mind that unsecured creditors of companies, whether limited or unlimited, have no lien on their assets and cannot prevent a sale or other disposition thereof." (Citing Mills v. Northern Ry. Co. of Buenos Ayres Co., 5 Ch., 621.

not leave enough to pay the creditors of the company, would *primâ facie* be a fraud upon them, and all who had participated in the sums so divided, will be held liable therefor upon the winding-up by the creditors.[1] Even those shareholders may be liable whose shares appear upon the list as paid up.[2] Were it otherwise, it would be easy for shareholders to escape liability by posing as owners of nominally paid-up shares, but the amount paid on which, by secret agreement among themselves, would be refunded out of the capital in the form of bonuses. But it would almost appear that there was an indirect way of accomplishing the same end without liability. For instance, where company A sold its business to company B, and the shareholders in company A (who were fully paid up) took in payment shares in company B, it was held that this was not a return of capital so as to make the shares no longer fully paid.[3] But the Lord Chancellor remarked in this case, that "if there had been any colorable contrivance for the purpose of withdrawing the property of the company from claims to which it might be rendered available, although the parties themselves might be bound by their acts, yet the transaction might be impeached in favor of creditors."

8. Sale and purchase of property of insolvent company—Lien.—The mere fact of insolvency does not operate to fasten any specific lien upon the property of the company so as to enable general and unsecured creditors to reach corporate assets conveyed to a *bonâ fide* purchaser unaware of the insolvency.[4]

In case of an absolute sale of all the property of an embarrassed company, the purchase price, with respect to creditors, will stand as

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[1] Chattanooga, etc. Ry. Co. v. Evans, 31 U. S. App., 432, 454, 455. See also Angus v. Pope, R. J. Q., 6 Q. B., 45.

[2] Stringer's Case, 4 Ch., 475 ; Murrough and Chamberlain's Cases, 16 Sol. J., 483; Lord Digby's Case, 18 Sol. J., 184; Rance's Case, 6 Ch., 104; Habershon's Case, 5 Eq., 286; Syke's Case, 13 Eq., 255 ; McDougall v. Jersey Imperial Hotel Co., 2 H. & M., 528, and see sec. 59 Comp. Act., sec. 38 Comp. Clauses Act. and Provincial Acts.

[3] Cardiff Coal Co. v. Norton, 2 Eq., 558; affirmed, 2 Ch., 405. But this case is not one which could be generally followed, it is rather applicable to the peculiar circumstances attending it.

[4] Chattanooga R. R. Co. v. Evans, 31 U. S. App., 432; 1032 *et seq.* Que. C. Code.

a substitute for the property conveyed, and the creditors' rights may be enforced against that price.[1]

Where a purchaser of company property has no knowledge of the insolvency of the company, and there is nothing in the transaction calculated to put him on his guard, he will, in most cases, be safe in buying, though it appear that the purchase price or a part thereof is to be distributed among the stockholders; but where such a purchaser has knowledge, not only of the insolvency of the company, but also of the fact that the stockholders thereof are to share in the distribution of the purchase price, he will be put upon enquiry and will be chargeable with knowledge of the existence of unsecured creditors of the company and with participation in the fraudulent application of the company's assets.[2]

9. Purchase by one company of shares in another.—A company cannot, in the absence of express statutory authority become an incorporator either directly or indirectly through persons acting as its agents or trustees. The word " persons " used in our acts must be construed as persons acting individually and not as representing a corporation. It would, under ordinary circumstances, be in violation of the charter of an existing company to subscribe for shares in another company and assume the resulting liabilities.[3] Our Dominion Joint Stock Companies' Act has no express provision to meet the above case, but the Joint Stock Companies' Clauses Act[4] which governs companies incorporated by special Act, provides that " No company shall use any of its funds in the purchase of stock in any other corporation, unless in so far as such purchase is specially authorized by the Special Act, and also by the Act creating such other corporation." The Ontario Act prohibits this unless the directors have passed a by-law authorizing it and which is sanctioned by at least two-thirds of the shareholders.[5]

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[1] *Ibid.*; 2 Morawtz Corp., secs. 784, 789, 791; Bank v. Lumber & Manuf. Co., 7 Pickle, 12.

[2] Chattanooga, etc., R. R. Co. v. Evans, *supra*; 1032 *et seq.*, Que. C. Code.

[3] See Central R. R. Co. v. Pennsylvania R. R. Co., 31 N. J., Eq. 475; Great Western Ry. Co. v. Metrop. Ry. Co., 9 Jur. (N. S.), 562; *Ex parte* Contract Corp., 3 Ch., 105; *Ex parte* British Nation, etc., Association, 8 Ch. Div., 679; Pauly v, Coronado Beach Co., 56 Fed. Rep., 428 ; Thompson Corpor., sec. 1102.

[4] R. S. C., ch. 118, sec. 41.

[5] R. S. O., ch. 191, sec. 82.

10. Members of one company may form a new one—Construction companies.—But if it is beyond the province of one company to form a new company with the same members and using its funds to subscribe for the shares therein, yet there would be nothing to prevent the individual members of a corporation from forming themselves into a new company provided they use their private funds for the purpose. Such a proceeding would merely require that a more careful scrutiny be made of their dealings with each other, where the interests of outside parties are affected.[1]

Advantage is now very frequently taken of these proceedings to form construction companies, which perform for a corporation what the corporation does not wish to do itself. The members of the construction company are generally members of the company for which the construction is required. A high authority has recently held that the fact that the stockholders in two corporations are the same persons does not operate to destroy the legal identity of either corporation.[2] Nor does the fact that one corporation exercises a controlling influence over the other, through the ownership of its stock or through the identity of stockholders, operate to merge the two corporations into one or make either the agent of the other.[3]

11. Directors making contracts with company.—It is a settled principle that contracts will be viewed with suspicion when made by a corporation with the directors themselves, they acting on both sides of the bargain,[4] and the same principle will apply when directors of a company form themselves into another company for the express purpose of making contracts with the former. Contracts by directors with their company are not void, but only voidable, either at the election of the corporation or of third parties who have had their security thereby impaired.[5] Under our Dominion Railway Act,[6] directors are prohibited from entering into contracts

[1] Davidson v. Mexican Nat. Ry. Co., 58 Fed. Rep., 653.

[2] Richmond Construction Co. v. Richmond R. R. Co., 31 U. S. App., 704; Davidson v. Mexican Nat. Ry. Co., *supra*; Central Trust Co. of New York v. Bridges, 16 U. S. App., 115.

[3] *Ibid.*

[4] McGourkey v. Toledo, etc., Ry., 146 U. S., 536.

[5] *Ibid.* Foster v. Oxford, etc. Ry. Co., 13 C. B., 200; Aberdeen Ry. Co. v. Blaikie, 1 Macq., 461 (H. L.); Flanagan v. G. W. Ry., 7 Eq., 116.

[6] Sec. 57, (Act of 1888); Aberdeen Ry. Co. v. Blaikie, *supra*.

other than those specially mentioned, either directly or indirectly, with the company they represent. Most of our Companies' Acts do not contain such a clause,[1] but the English Companies' Clauses Act has a similar provision and its effect upon contracts made in violation thereof is the same as at common law.[2] If the directors of such a company should wish to participate in a contract for the construction of the railway upon terms very advantageous to themselves, they would merely have to form and become the principal shareholders in a joint stock company for the construction of the road. The contract entered into by the promotors of the construction company who would be the appointees of the railway directors would be practically ratified by themselves, and made upon their own terms.

If such a contract is ratified by the company as a whole, who is to complain of it? Companies are often formed in this country for the construction of railroads, not as purely commercial undertakings and not constructed wholly and chiefly with subscribed capital, but chiefly upon the security of government or municipal subsidies or both. The subscribed capital being necessarily small, is all taken up by the incorporators of the company who constitute themselves directors.

Now, if such a company, instead of doing its construction work by forming a separate construction company in which its directors might be the principal shareholders, should give the contract to a railroad contractor upon condition that the contract price should include the price of shares transferred by the contractor to some of the directors, and a bonus or commission amounting to a large sum to one of them, this contract would be *ultra vires*, at least as regards the illegal amount therein included, and could not be ratified by the company either by its then directors or by its then shareholders.[3] To that extent it would be absolutely void.

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[1] Under the British Columbia Act this is a ground of disqualification of a director. R. S. B. C., ch. 44, schedule first, Table A., sec. 57.

[2] Foster v. Oxford etc. Ry. Co.; Aberdeen Ry. Co. v. Blaikie, *supra*. "The rules which govern fiduciary relations are equitable rules, unknown to the English Courts of common law, consequently in a case determinable by those equitable rules, the decision of a Court of Common Law, when opposed to them, must be disregarded." Aberdeen Ry. Co. v. Blaikie, *supra*.

[3] Charlesbois v. Delap, 26 Can. S. C. R., 221; and see Mann v. Edinburgh Northern Tramway Co. (1893), App. Cas., 69.

But in such a case, although the company cannot ratify the contract, yet apart from fraud or collusion, it would appear that it can allow judgment to go against it by consent; such judgment is as binding upon the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company.[1] The judgment forms a new obligation having a character of its own, and the effect must be the same whether the claim sued on is *ultra vires* of not. It is not *ultra vires* for a company to pay the amount of judgment recovered against it.[2]

It would thus appear that while any direct application of moneys of the company for a purpose not authorized by the charter is wholly *ultra vires*, and not subject to ratification by the members of the company,[3] yet an indirect application thereof could be the subject of ratification by the company, provided it were not fraudulent.

12. Powers possessed by companies—Necessary powers—Convenient powers.—As a general rule for determining what acts are within the corporate powers and what are not, it may be stated that a corporation possesses not only powers specifically granted in terms by its charter, but also such powers as shall be necessary to the exercise of the powers so enumerated and given. The unexpressed and incidental powers possessed by a corporation are not limited to such as are absolutely or indispensably necessary to enable it to exercise the powers specifically granted. Whatever incidental powers are reasonably necessary to enable it to perform its corporate functions are implied from the powers affirmatively granted; but powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the corporation.[4]

Questions similar to these have lately occurred with some frequency in the United States and in one recent case the Supreme Court of the United States was much divided as to its solution.[5] It

[1] *Ibid.*

[2] *Ibid*, per King, J., at p. 248, citing Balkis Consol. Co. v. Tomkinson [1893], A. C., 407.

[3] Ashbury Ry. Carriage & Iron Co. v. Riche (H. L. 1875), 7 E. & I., App. 653; Mann v. Edinburgh Northern Tramway Co. (1893), App. Cas., 69; Charlebois v. Delap, Supreme Court, 1895, 26 Can. S. C. R., 221.

[4] People *ex rel.* Tiffany v. Campbell, 144 N. Y., 166; and see Charlebois v. Delap, 26 Can. S. C. R., 221; Ashbury Ry. Co. v. Riche, 7 E. & I. App., 653.

[5] McGourkey v. Toledo & Ohio Ry., 146 U. S., 536.

was agreed by the Court that any arrangement by which directors of a corporation become interested adversely to the corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure themselves a share in the profits of any transactions to which the corporation is a party, are looked upon with suspicion.[1] In applying these principles to the particular case before the Court, the Chief Justices and Mr. Justice Brewer dissented from the opinion of the majority. In its briefest form the case was that directors of a railroad company organized themselves into a kind of "syndicate," for the purpose of purchasing or leasing rolling stock to equip the road, by means of that kind of conditional sale or lease called a "car trust.

To raise money for the construction and equipment of the road, they put a mortgage on the road, covering its after acquired property. Stating the case roughly, the Court held that the mortgagees had the right to impeach the arrangement by which it was sought to give such a lien or title to the holders of the "Car trust certificates" as would prevent the mortgage from attaching to the rolling stock so procured, and that it was fraudulent in law, although possibly not so in fact, as to such mortgagees.

13. Carrying on a business after its sale by means of a company formation—Legal and equitable title to patent right.—If a person, engaged in a special business, sells out that business, and binds himself not to carry on a similar one under such conditions as not to be against public policy, he cannot, as a means of avoiding this undertaking, form a company to carry on such business, when he is the principal stockholder and president and business manager;[2] nor could he assist others to carry on a similar business.[3] Such a company will be enjoined from carrying on the business.[4] In the Province of Quebec an injunction would be granted,[5] and this would appear to be the remedy at common law.[6] The mere fact that a person has contracted

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[1] *Ibid.*

[2] Beal v. Chase, 31 Mich., 490.

[3] *Ibid.* Beal v. Chase, *supra.*

[4] Parnell v. Dean, 20 Can. L. T., 119.

[5] Can. Paint Co. v. Johnson, R. J. Q., 4 S. C., 253; Que. C. C. P., 957 *et seq.*

[6] *Ibid.* Parnell v. Dean, *supra.*

to sell a patent right to one does not affect the title of a corporation to whom he actually transfers such patent; it would only do so where the corporation had had notice of the equities of the other party, and a decree will be granted the corporation to restrain the other from making use of the patent.[1]

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[1] Davis etc. Co. v. Davis etc. Co., 20 Fed. Rep., 699.

CHAPTER V.

CAPITAL STOCK.

1. Requirements of the Companies' Acts as to capital stock.— Under the Companies' Act (D) the notice of application for letters patent must state the proposed amount of its capital stock, which, in the case of a loan company, must not be less than one hundred thousand dollars.[1] This capital stock is the nominal capital of the company and usually represents the amount supposed to be necessary to carry on its business with success.

The notice must also state the number of shares into which the capital is to be divided, and the amount of each share.[2] In the Acts incorporating companies by letters patent the petition must shew the amount paid in upon the stock of each applicant, and the manner in which it has been paid in, and how it is held for the company.[3] It is also, under most of the Statutes, required as a condition precedent to the granting of the letters patent that the aggregate of the stock so taken shall be at least the one-half of the total amount of the proposed capital stock of the company, and that the aggregate paid in thereon must be at least ten per cent.[4] The exceptions are the Provinces of Ontario, Manitoba and British Columbia, but in regard to the Provinces of Ontario and Manitoba at least there is always the safeguard that the petition must be approved by the respective Lieutenant-Governors. The British Columbia Act has no requirements as to the amount of capital to be subscribed or paid in; but the memorandum of association of a company limited by shares must state the amount of capital with which the company proposes to be registered, divided

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[1] R. S. C., ch. 119, sec. 4 (*d*); The Provincial Acts do not contain the provision relating to Loan Companies.

In New Brunswick the capital stock must not be less in any case than $2000, actually subscribed. (56 Vic., c. 7, sec. 4 (*d*). In the other provinces no statutory limitation.

[2] R. S. C., ch. 119, sec. 4 (*e*). Say for instance, capital $100,000, divided into 1000 shares of $100 each.

[3] R. S. C., ch. 199, sec. 5 (2). The New Brunswick Act requires that if the amount is paid in by transfer of property, the petition must contain a brief description of the property so transferred. Sec. 5 (4).

An Act incorporating the N. W. Transit Co., enacted that it should not be lawful for the company to proceed with their operations under the Act until £50,000 of the capital stock should have been subscribed, and ten per cent. paid thereon subsequently, and before such subscription or payment, a proposition was made by one C. to certain stockholders that C. should sell his steam vessel to the company for £5,000, and that the steamer should be taken as payment of ten per cent. on the £50,000. This was acceded to and carried out in compliance with a resolution of the company.

Held, an evasion of the Statute, and the company were restrained from proceeding with their operations until the conditions of the statute had been complied with. (Howland v. McNab, 8 Grant's Ch., 47.)

[4] But the New Brunswick Act has no provision as to the amount paid in on the stock so taken, but it has another provision that the capital shall not be less than $2000, actually subscribed; 56 Vic., ch. 7, s. 4 (*d*).

into shares of a certain fixed amount.[1] When the memorandum of association is delivered to the Registrar of Joint Stock Companies, the latter shall retain and register it,[2] and once registered the incorporation is complete.[3]

2. Amount of capital required to be subscribed, apart from the Acts, to justify a company in starting business.—We have already touched upon a case where it was sought to do business under Acts similar to that of British Columbia without the company having been properly organized by the subscription and allotment of shares, so that the promotors might avoid liability as holders of unpaid shares.[4] Where no provision is made in the statute as to the amount of capital required to be subscribed before commencing operations and none is stated in the charter,—it is competent for a company to commence business before the whole amount of the nominal capital has been subscribed and all the shares allotted.[5] It would appear to be difficult to state just what amount is necessary to justify the company in proceeding to business and to prevent subscribers from having an excuse for not paying calls. The question to be decided is whether the subscription of the shareholder seeking relief has been obtained by fraud and misrepresentation as to the company's capital. Subscribers know, however, that when the "capital" of a company about to be formed or just formed, is spoken of, the nominal capital is meant, and not the amount of cash in the company's treasury. In estimating the resources of the company, however, the basis is the subscribed capital as it is assumed that this will be available as required for the business of the company. It would only be necessary, therefore, that the subscribed capital should be commensurate with the requirements of the business for which the company has been formed.

It has been held that a company is not entitled to commence business with a capital wholly inadequate; and when only 900 out of 25,000 shares had been allotted—the first issue being fixed at 12,500 shares—an allottee of 200 shares was entitled to the return of his deposit, and the removal of his name from the register.[6]

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[1] R. S. B. C., ch. 44, sec. 11 (6).
[2] *Ibid.* Sec. 19.
[3] *Ibid.* Sec. 20.
[4] *Supra*, ch. 4, p. 4.
[5] McDougall v. Jersey Hotel Co., 2 H. & M., 528.
[6] Elder v. New Zealand Land Co., 30 L. T., 285, and see Lyon's case, 35 Beav., 646; Hawkins' case, 2 K. & J., 253.

3. Capital a trust fund for creditors.—But the insufficiency of a subscribed capital is a question in which outsiders are even more interested than the members of a company. The capital becomes a fund to which creditors must look for the satisfaction of debts. It is a substitute for an individual liability, and constitutes a trust fund for the benefit of creditors.[1] In an English case[2] where a company was advertised as having a capital consisting of 30,000 shares of £1 each to be paid up in full, and professing therefore to have a capital of £30,000, the parties connected with it thought fit to proceed as coal-merchants with an actually subscribed capital of £2,238, of which not much more than £2,000 had been really paid up. Vice-Chancellor Malins used the following language: "Now, whether in the process of winding-up I shall be able to find the means of making the four gentlemen whose names appear in this list as directors of this company pay Mr. Webb, their clerk, in full, as well as these coal merchants, the present applicants, to whom the company became indebted under circumstances which, I think, fell little short of fraud, I know not; but this I know, that I will try very hard to do so. I think if a captain, a major and two others will commence business, calling themselves a company with limited liability, clearly with an intention of not paying their debts, it is very much to be regretted if the law does not possess some means of making them pay. Some time since, in a somewhat similar case, a major applied to me personally in Chambers to be allowed his claim for salary due at the rate of £1,000 a year as manager of a company which had been carried on with only one-fifth of its nominal capital, and I then laid down the rule, which I shall always adhere to, not only that I would never allow remuneration to persons in that position, but that I would, if possible, make them pay themselves, and that is my fixed determination."

4. Provision that business shall not be commenced till a certain amount is subscribed—Acquiescence on part of shareholder.—So far as the shareholders are concerned, they can and should protect themselves by a provision in the subscription form, the charter or the articles of association that until a certain amount of capital has been

[1] Wechselberg v. Flour City Nat. Bank, 24 U. S. App., 308; Harris v. The Dry Dock Co., 7 Grant's Ch., 450; and see Phillips v. Royal Niagara Hotel Co., 25 Grant's Ch., 358.

[2] *In re* Imperial Steam & Household Coal Co., 37 Law Journal (Ch), 517.

bonâ fide subscribed for, business shall not be commenced. Such a provision is valid between the shareholders,[1] and it has been held to be good as against third parties.[2] It would be binding on all parties, because it forms one of the conditions of the subscribers' contract with the company.

Anything amounting to acquiescence or laches on the part of the shareholder would prevent him from objecting to the insufficiency of subscribed capital.[3] But if nothing in the contract of subscription nor the general act requires that a certain amount shall be subscribed before commencing business, it would be no defence to an action for a call that a small or even an insignificant amount of the shares have been taken up.[4] If there is no such restriction which prevents the incorporation, the company so soon as duly incorporated has power under the Act to make calls.

5. Conditional or voidable subscriptions not to be counted till paid in.—Conditional subscriptions, the condition to which has not yet been performed by the company, are clearly not to be counted for the purpose of affording protection to shareholders and creditors;[5] nor are those of married women, minors or persons of unsound mind,[6] unless actually paid in; nor those of insolvents, unless at the time of subscribing they were apparently able to pay the subscription,[7] and it has been so held in regard to subscriptions payable by their terms in labor or materials or contract work.[8] The decision in each case would turn upon an interpretation of the terms of the agreement with the shareholders.

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[1] North Stafford Steel Co. v. Ward., L. R. 3, Ex. 172. See also Dominion etc. Co. v. Atty.-Gen. of Can., 21 Can. S. C. R., 72; No. Sydney Mining etc. Co. v. Greener, 31 N. S. R., 41.

[2] Pierce v. Jersey Waterworks Co., L. R. 5, Ex. 209.

[3] Sharpley v. Louth Ry. Co., 2 Ch. Div., 663; Rooper v. East Norfolk Tramway Co., W. N., 1874, 172, 178.

[4] Ornamental Pyrographic Co. v. Brown, 2 H. & C., 63; McDougall v. Jersey Hotel Co., 2 H. & M., 528; Lyon's case, 35 Beav., 646.

[5] Troy & G. R. R. v. Newton, 74 Mass, 596; Oskaloosa Agri. Works v. Parkhurst, 54 Iowa, 357; Cabot & W. S. B. v. Chaplin, 60 Mass., 50.

[6] Phillips v. Covington & Cin. Bridge Co., 2 Metu. (Ky.), 219.

[7] Lewey's Island R. Co. v. Bolton, 48 Maine, 451; Salem M. D. Corporation v. Ropes, 26 Mass., 187.

[8] New York H. & N. R. R. Co. v. Hunt, 39 Conn., 75; Troy G. R. R. Co. v. Newton, 74 Mass., 596; Oldtown Lincoln Ry. Co. v. Veazie, 39 Maine, 571.

6. Meaning of term "capital stock,"—nominal, issued, and paid-up capital—Borrowing on security of capital.—Before entering upon the questions affecting the capital stock of companies it may be well to consider the meaning of the term " capital stock " as used in our Companies' Acts. The word "capital" may have three modifications, viz : 1st, nominal capital; 2nd, issued capital; 3rd, paid-up capital.

The nominal capital is a stated sum which the incorporators agree will be the utmost limit apparently necessary for the proper carrying out of the object of the company. It is the amount authorized to be issued under the terms of the incorporation, and the directors are empowered to receive subscriptions to that amount. For the purpose of obtaining these subscriptions, the nominal capital is divided into shares, but which, strictly speaking, are not shares at all at this stage; they are merely a power to issue shares. But inasmuch as the shares go into effect as such at the moment of issue, they may be dealt with and sold by those having the power to issue them in the same manner as if they were things in existence. It is not an uncommon thing for a company to consider that when it has a power of issuing capital, it has a right to treat it as capital. But a company has no right to treat its uncalled-up capital as part of its funds and property, nor to use the same as security in borrowing money. The expression "capital not called up" has been interpreted to mean not only shares issued on which all the calls had not been made, but also shares which had not been issued. In one case the company was specially authorized by its incorporation to use capital not paid up as security.[1] The company may, however, agree by contract to issue its unissued stock in such a way that the creditor will receive the proceeds, and to this extent it may be considered as a security.

So far as creditors are concerned, their security is in the issued capital stock which has not been paid up, and in the proceeds of the paid-up shares which have produced the cash capital of the company.[2]

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[1] English Channel Steamship Co. v. Rolt, 17 Ch. Div., 715.

[2] Per Lord Halsbury in Ooregum Gold Mining Co. v. Roper, 1892, App. Cas., at p. 133. In the same case His Lordship said "what is the nature of an agreement to take a share in a limited company ?...... It is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that........the company were prohibited ...... from doing that which is compendiously described as issuing shares at a discount."

But in many cases, probably in most, a company does not issue the whole of its authorized capital. In this event it determines upon a certain issue of shares of its capital stock or secures as large a subscription as is sufficient in its estimation for the present needs of the company. This when subscribed and allotted is "issued capital," and the balance "unissued capital." Whatever is paid up on this issued capital from time to time constitutes the "paid-up capital."

7. **Holders of shares constitute company.**—The holders of the issued shares constitute the company, and are the real owners of the whole concern. The company is considered the owner of the unissued shares,[1] although not strictly so, for a whole body cannot be a member of itself.[2]

8. **Issue of shares at a discount, legality and effect of.**—Three of our Companies' Acts, viz.: the Dominion,[3] New Brunswick,[4] and Manitoba[5] Acts, as well as the Railway Act,[6] contain a provision relating to the allotment and sale of the unissued stock of companies, which has given rise to considerable confusion and difficulty. Their provisions are all, in effect, the same as the Dominion Act, which says: "No by-law for the issue, allotment or sale of any portion of the unissued stock at any greater discount or at any less premium than that which has been previously authorized at a general meeting . . . shall be valid or acted upon until the same has been confirmed at a general meeting." The Manitoba Act does not contain the word "unissued" before the word "stock," but it most probably contemplates unissued stock, as it deals with the sale of such by the company.[7]

The question whether a company incorporated under our general acts can issue or sell any part of its unissued stock at a discount gives rise to much difficulty, and has not yet in this country, been squarely pronounced upon by the Courts. To "issue shares at a discount" means to issue shares as fully paid up upon which any less amount than the nominal value thereof has been paid. In England it is pretty well settled that a company cannot issue its shares at a discount under the Acts of 1862 and 1867, and the liability of the member continues

[1] York & Midland Ry. Co. v. Hudson, 16 Beavan, 485; so all unpaid calls, see Webb v. Whiffin, L. R. 5, H. L., 711; Morris' case, 7 Ch., 200; and sec. 35, (2) Dominion Act; R. S. C. ch. 119.

[2] 1 Morawetz, sec. 288.

[3] R. S. C., ch. 119, sec. 35 (2).

[4] N. B., 56 V., ch. 7, sec. 37.

[5] R. S. M., ch. 25, sec. 30 (*b*), (7).

[6] 1888, ch. 29, sec. 83 (*d*).

[7] The Quebec Mining Companies' Act, 63 Vic. (Q.), cap. 33, expressly provides for the issue of shares under par.

as long as anything remains unpaid on his shares.[1] The English Acts, however, are different from ours in this respect. Sec. 7 of the Act of 1862 declares the liability of members to be limited to the amount unpaid on their shares, or to such amount as, by the memorandum of association, they undertake to contribute on a winding up. Our Act contains no such provision respecting the classes of companies to be registered, though it declares their liability to be limited to the amount unpaid on their shares.[2] The English Acts further contain no provision similar to the proviso of sec. 35 of the Dominion Act above cited; so while English decisions under these Acts may be of assistance in interpreting our Companies' Acts, they cannot be taken as definite authorities.[3]

Has a company incorporated by letters patent under the Dominion Companies' Act power to issue any of its shares at a discount, and if so, what would be the position of the holder of such shares? In sanctioning the principle of limited liability, the legislature has been careful to secure that the limited capital should be a reality, not a sham,[4] and there is nothing in our Acts which can be held to authorize the directors of a company to destroy its capital stock, and thereby nullify the checks and guards which the legislature has wisely provided in order to the protection of the public interest.[5] But sometimes it is necessary to obtain fresh capital to save a company from financial embarrassment, and when new stock is put on the market, the public will only purchase at a price below the par value. Would the issue in such a case be valid? There is nothing in the Companies' Act which gives the right, in so many words, to companies to issue their stock for a price below its nominal value. Section 35 states when a by-law by directors to issue stock at a discount will not be legal; the question is, will a by-law to issue stock at a rate of discount previously authorized by the shareholders, or at a rate below that previously authorized if confirmed at a general

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[1] In *re* Railway Time Tables Pub. Co. [1895], 1 ch., 255; Ooregum Gold Mining Co. v. Roper [1892], A. C., 125; Palmer Comp., p. 78; Walsh v. N. W. Electric Co., per Bain, J., 11 Man., L. R., at p. 649.

[2] R. S. C., ch. 119, sec. 54.

[3] Walsh v. N. W. Electric Co. *supra*, per Killam, J., at p. 641 and per Bain, J., at p. 649.

[4] Palmer Comp., p. 78.

[5] Per Sedgewick, J., in Walsh v. N. W. Electric Co., 29 Can. S. C. R., at p. 48; see also Georgian Bay etc. Canal Co., 29, O. R., 358.

meeting, be *ultra vires* of the company? The question has been indirectly touched upon by our Courts recently in the case of Walsh v. The N. W. Electric Co.[1] The directors of a company incorporated by letters patent under the Manitoba Joint Stock Companies' Act[2] passed a resolution that all the unsubscribed capital stock of the company should be handed over to two trustees, who were also directors, as fully paid up and non-assessable, to be disposed of as they might see fit, in order that an agreement with certain persons who were said to have advanced money to the company might be carried out; and accordingly they directed the issue of 900 shares to these two trustees as fully paid up. No such agreement as that set forth in the resolution was ever even contemplated, nor was any money advanced. At a meeting of the shareholders subsequently held, this resolution was confirmed and incorporated in the by-laws of the company. The directors then issued a certificate to the effect that the two trustees were entitled to 900 shares fully paid up and non-assessable and transferable in the books of the company in person or by attorney on surrender of the certificate. Before the issue of this certificate, the company had contracted with the Edison Company for certain patents in consideration of which, besides a certain sum in cash, the company agreed to deliver to the Edison Company 200 fully paid-up shares, agreeing at the same time that the remaining 600 shares should be issued only after full payment in cash. At a meeting of directors a few months later, the board ratified the allotment by the trustees of portions of this stock to various persons at different prices per share, and on different terms of payment, including 160 shares to the wife of one of them at a discount of 80 per cent.; and certificates for fully paid-up shares were duly issued to them. On the shareholders becoming aware of these facts, and the company being financially embarrassed, calls were made on these persons for the difference between what they had paid and the par value of the shares. All complied except Mrs. Walsh, wife of one of the said trustees, and who held 160 shares. Her stock was then declared forfeited. Action was then brought by her to have the company's register amended to show her the holder of the said

[1] 29 Can. S. C. R. 33, reversing Q. B. Man., 11 Man. L. R., 629.

[2] R. S. M., ch. 25.

stock, or to recover from the company the price she had paid for the same. The case was tried before Taylor, C.J., who dismissed plaintiff's claim. On appeal to the Manitoba Queen's Bench, this judgment was unanimously reversed, the Court holding that the company had power to issue shares at a discount; that the directors were given extensive powers in the management and the making of contracts for the company;[1] that directors might allot shares as by by-law or otherwise they might ordain;[2] that they had no power to allot such stock at a greater discount than that which had been previously authorized by the shareholders,[3] but that this restriction only limited the power of directors when the shareholders had actually fixed a price for the shares; that it merely enabled the shareholders to limit the powers of the directors if they saw fit to do so.[4] the Court, therefore, decided that the directors if acting *bonâ fide*, had power to issue the shares at a discount, and that the company could affirm or repudiate the action of the directors as it chose.[5] Further, even the counsel for the company did not contend that the issue at a discount was *ultra vires* of the company, but urged "the statute means that no shares shall be issued at a discount, unless previously authorized or afterwards ratified." [6] In the Supreme Court[7] the decision of the Queen's Bench was reversed by the majority of the Court;[8] but on the ground: 1. That the directors had no power to make such allotment without the sanction of a general meeting of the shareholders; 2. That the by-law and resolutions of the directors, operating unequally towards a certain class of shareholders and being fraudulent with regard to the Edison Company, were *ultra vires* of the company. On the question of the right of such a company to issue stock at a discount, the Court did not pronounce, though Sedgewick, J., in delivering the judgment for the majority, seemed to doubt the power of the company to do this. He said, after quoting

[1] Sec. 30, R. S. M., ch. 25, similar to sec. 35, R. S. C., ch. 119.

[2] Sec. 33, R. S. M., ch. 25, similar to sec. 26, R. S.C., ch. 119.

[3] Sec. 30 (*b*), R. S. M., ch. 25 similar to sec. 35 (2), R. S. C., ch. 119.

[4] At pp. 644 and 645, 11 Man. L. R.

[5] Sec. at pp. 646 and 648 and 649. *Ibid.*

[6] Sec. at p. 637. *Ibid.*

[7] 29 Can. S. C. R., 33.

[8] Taschereau, J., dissenting, considered the reasoning of Killam, J., of the Man. Q. B. unanswerable.

the above cited clause[1] ; "This proviso doubtless gives rise to some difficulty, and at first sight would seem to lead to the conclusion that the legislature did suppose that the company might sell its stock at a discount without special authorization, and enacted this particular clause under the impression that such was the law. There is no other provision in the statute indicating this intention except as may be inferred from the power of allotment. But the word "allotment" has no connection whatever with the amount to be paid for stock, but only with the number of shares which may be issued to this or that individual altogether irrespective of the consideration to be paid for it. So that there being no conveyance of direct power to the directors, the proviso must refer either to cases where possibly the letters patent themselves give authority to issue stock below par (on the legality of which I do not express an opinion), or to cases where the company incorporated under the General Act may have had special power conferred upon it by Special Act, or it may possibly refer to cases where before issue of stock a general meeting had determined upon the amount below par at which the stock should be sold, and the proviso limits the power of the directors to issue below that amount except under the specified conditions. But whatever the draftsman of this clause or the legislature which passed it had in view, I am perfectly satisfied that it cannot be held to authorize the directors of a company to destroy its capital stock, as they have here to some extent attempted to do, and thereby nullify the checks and guards which the legislature has wisely provided in order to the protection of the public interest." [2] Again, the same Judge says :— "Whether this transfer to the directors and their wives at eighty per cent. below par was legal or not, it was especially flagititious because of the existence of the agreement between the appellant company and the Edison Company." [3]

It should be pointed out, however, that too much importance must not be attached to the dicta of the judges of the Manitoba Queen's Bench in regard to the issue of shares at a discount under the Dominion Companies' Act, for the reason that the conclusion of these judges that the decisions under the English Companies' Acts do not apply to cases arising under the Manitoba Act, and that the latter

[1] Similar to sec. 35 (2), R. S. C., ch. 119.

[2] At p. 48.

[3] At p. 44.

Act permitted the issue at a discount, was partly based on the fact that it contains no provision similar to sec. 25 of the English Act of 1867.[1] Whereas sec. 27 of the Dominion Act, to the effect that every share shall be deemed to have been issued and to be held subject to the payment of the *whole amount thereof* in cash, unless otherwise agreed upon by a contract in writing which is to be filed with the Secretary of State at or before the issue of such shares, is virtually the same as sec. 25 of the English Act, substituting "Secretary of State" for "Registrar of Joint Stock Companies." Possibly had a similar clause been in the Manitoba Act, the conclusion of the judges of the Queen's Bench would have been different.

In an Ontario case[2] a company's act of incorporation contained a provision similar to section 35 of the Dominion Companies' Act. The directors passed a resolution that "the holders of the original stock in the company shall be allowed a discount thereon of eighty per cent." The directors' proceedings were subsequently confirmed by the company, and the original stock declared by it to be paid up. McLennan, J.A., said[3] : "The only authority for allowing a discount on the original capital is section 12 (similar to section 35 of the Dominion Act). This section, no doubt, if not expressly, at all events by implication, authorizes the allotment or sale of stock at a discount, but what was done here was neither an allotment nor a sale. The shares referred to had been allotted or sold long before at par, and not at a discount; and the several shareholders were liable to pay the whole of the amount still remaining unpaid whenever called upon so to do; and the by-law in question was in effect an extinguishment without any value or consideration of eighty per cent. of the company's capital." And Osler, J.A., remarked[4] : "It (sec. 12 of this company's charter) seems to me a most unfortunate and ill-advised permission in any case. Whether it is sufficiently wide to authorize the *original* subscription for and issue of shares at a discount need not be considered. That, however, is the very utmost of the authority which it confers." The Acts under which this company was incorporated contained similar provisions to the Manitoba Act, but no provision similar to sec. 27 of the Dominion Act.

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[1] 11 Man. L. R., at p. 642.
[2] In *re* Ontario Express etc. Co., 21 Ont. A. R., 646.
[3] At p. 661. [4] At p. 658.

The above cases would seem to lead to the conclusion that companies incorporated under the Manitoba and similar Acts containing no provision like sec. 27 of the Dominion Act, can dispose of unissued stock at a discount if the by-law is sanctioned or approved of by the company; and the directors and company act *bonâ fide* in the interests of the company and without partiality. Where, however, companies are incorporated under Acts containing a clause similar to sec. 27 of the Dominion Act, such as the New Brunswick,[1] Nova Scotia,[2] and British Columbia[3] Acts, it would seem, in spite of such a proviso as is contained in sec. 35 of the Dominion Act,[4] to be beyond the powers of the company to issue its shares at a discount.

The American view as expressed by Thompson, is that unless the governing statute otherwise provides, the general rule is that shares of corporate stock can only be issued by a corporation in the first instance at their full value; and any scheme by which they are to be issued at a percentage of their par value is *ultra vires*.[5] This author declares that he states with great confidence that the general principle is that the corporation itself has no power to dispose of its unissued shares in the first instance at less than par value, unless empowered to do so by statute either in express terms or by necessary implication.[6]

This view would doubtless have much weight with our Courts; and the positive enactment of sec. 27 of the Dominion Act, that the shares are deemed to be held subject to the payment of the *whole amount* thereof is stronger than the implied permission which sec. 35 at first sight appears to give.

But though it should be held illegal for the company to issue its shares at a discount, and thereby impair its capital, while the company were a going concern ; may it not, if it find itself financially embarrassed, to save itself from impending ruin, issue and sell its stock for the highest price it can obtain, even though that price be below the nominal value ? This question was discussed and decided

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[1] 56 V., ch. 7, sec. 38.

[2] R. S. N. S., ch. 72, sec. 82.

[3] R. S. B. C., ch. 44, sec. 50.

[4] British Columbia Act requires contract to be filed with Registrar *Ibid.* *Ibid.*

[5] Thompson Corp., sec. 1562, and authorities there cited.

Ibid. Sec. 1564.

some years ago by the United States Supreme Court.[1] It is important to note that this case was reasoned out on general principles and was based upon a statute providing in effect all that can be claimed for our statutes as to the protection of the rights of creditors. This statute provided that nothing in the Act conferring corporate franchises, or permitting the organization of corporations, "shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid instalments on stock owned by them." It must be remembered that the Act of incorporation gave no permission to issue shares at a discount. Mr. Justice Brown said[2] *inter alia*: "The case, then resolves itself into the question whether an active corporation, or, as it is called in some cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. The question has never been directly raised before in this Court, and we are not, consequently, embarrassed by any previous decisions on the point . . . To say that a corporation may not, under the circumstances above indicated, put its stock upon the market, and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this Court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation in some form, the amount represented by it, but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and enquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and, so long

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[1] Handley v. Stutz, U. S. Supreme Court, 1891, 139, U. S., 417; see also Clarke v. Beever, 139 U. S., 96; Fogg v. Blair, 139 U. S., 118.

[2] At p. 429 *et seq.*

as the transaction is *bonâ fide*, and not a mere cover for watering the stock, and the consideration obtained represents the actual value of such stock, the Courts have shown no disposition to disturb it. Of course, no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this Court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase." The learned Judge then goes on to cite a number of authorities.

In England the House of Lords in 1892, in the case of Ooregum Gold Mining Co. of India v. Roper,[1] considered this phase of the question. It was not disputed in this case by the Judges that fresh capital was absolutely necessary to save the company from ruin, and that this was obtained on the very best terms possible. The shares were sold at what could be got for them, and the company became ultimately very prosperous. The Court, however, held that in view of the Companies' Acts of 1862 and 1867, the issue was beyond the powers of the company.

This view of the law seems more in accord with the jurisprudence of our own Supreme Courts than that of the United States Supreme Court, and this is exemplified by the case of McCraken v. McIntyre.[2] A company was incorporated by Letters Patent, issued under 27 & 28 Vic., ch. 23. This Act contained no provisions similar to either sec. 27 or 35 (latter part) of the present Dominion Act; but it enacted that " each shareholder, until the *whole amount* of his stock has been paid up, shall be individually liable to the creditors of the company, to an amount equal to that not paid up thereon," etc. In this respect it was nearly identical with sec. 55 of the Dominion Act. About a year after the company went into operation, additional funds were required to carry on the business. The directors decided to allot the unsubscribed portion of the stock to the shareholders at the rate of sixty per cent. of the nominal value of the shares, and this was approved by the shareholders. The shares were not worth any more

[1] (1892) A. C., 125. [2] 1 Can. S. C. R., 479.

than this,[1] the company needed the money to enable it to carry on business, and all the Courts which dealt with the case, found the allotment to have been a measure adopted without any taint of a fraudulent object, but in perfect honesty and in good faith.[2] The Supreme Court expressed the opinion that the allotment was " beyond all question *ultra vires* of the company, illegal and void, as being in effect a reduction of the share capital.[3]

With regard to the position of a holder of shares issued at a discount, many things must be considered.

When the shares have been legally issued, that is, when the company has power to issue them at a discount as fully paid up, and all necessary formalities have been complied with, it is submitted that the holder must be treated as though the nominal amount thereof had actually been paid in, and he will not be liable for the unpaid portion either to creditors of the company or to other shareholders upon a winding-up; to hold otherwise would be to hold that the shares were not issued at a discount at all, but merely with a condition of deferred payment for the balance.

When the issue at a discount as fully paid-up is *ultra vires* of the company.—If at the time of the allotment at a discount, the company possessed considerable assets over and above liabilities, an Ontario case[4] has decided that a holder of such shares is not liable as a contributory, and creditors could not complain. If, however, the company should not be too strong financially the shareholder's position must be considered in relation to (1) the other shareholders, and (2) creditors of the company. As regards the position of the shareholder

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[1] At p. 519, 539. [2] Per Strong, J., at p. 519.

[3] *Ibid*, and see remarks of Richards, C. J. and Ritchie, J.

[4] A joint stock limited liability company, being indebted in a small amount, which was afterwards paid off, and having at the time assets worth more than double the amount of its issued stock and all other liabilities, allotted a number of its shares to its shareholders, at a discount. Subsequently the company was freshly incorporated with the shares so issued treated as fully paid up, and afterwards falling into difficulties, was put into liquidation under R. S. C., ch. 129. The master decided that as the subscribed stock was fully represented by assets with a considerable surplus, creditors could not complain and that these shareholders were not liable as contributories. On appeal, Robertson, J., upheld the master's decision. *Re* Owen Sound Dry Dock Co., 21 Ont. R., 349, distinguishing in *re* Ry. Time Tables Pub. Co., *ex parte* Sandy's, 42, ch. 98; in *re* Almada and Tirito Co., 38, ch. D., 415; and in *re* Addleston Linoleum Co., 37, ch. D., 191; but see remarks *re* this case at p. 20A post.

towards the rest of the company:—If the other shareholders themselves, with full knowledge of all the circumstances authorize the allotment as fully paid-up at a discount, they will be bound by their act, which amounts to a contract between the subscriber and the company, and will be estopped from pleading their own unlawful proceeding ;[1] but if the directors only have issued them, without being authorized by the shareholders, no proper contract has been made, and the holder will be liable towards the company,[2] and especially if undue favoritism has been shown.[3]

As regards the position of the holder of discount shares illegally issued as fully paid-up, towards creditors of the company.—The general rule is declared by sec. 55 of the Dominion Act to be that, until the *whole amount* of his shares has been paid up, he shall be liable to the creditors of the company to an amount equal to that not paid up thereon; but much depends, before this rule can be said to apply, on whether the purchaser for value knew that the shares had not originally been fully paid for.

If the purchaser of such shares obtain them under the representation that they are fully paid-up, such being the purport of the certificate, and has no means of ascertaining the contrary, he will not be liable to the creditors of the company, especially if he has paid the *real* value thereof. This has been decided by the Supreme Court in 1877.[4] In this case the company was incorporated under 27-28 Vic., ch. 23. This Act contained no provisions like either secs. 27 or 35 (latter part) of the Dominion Act; the question arises if a section similar to 27, which declares that every share shall be deemed to have been issued and to be held subject to the payment of the *whole amount* thereof had been in the Act under which this company was incorporated, would this have caused the Court to come to a different conclusion, and hold the owner of such shares liable to creditors in spite of the fact that the holder was acting in good faith and without notice?

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[1] Bloomenthal v. Ford, [1897] A. C., 156; Welton v. Safferey, [1897] A. C., 299; McCracken v. McIntyre, 1 Can. S. C. R., at pp. 520, 521, 531, 508; see also remarks of Sedgewick, J., in Walsh v. N. W. Electric Co., 29 Can. S. C. R., at p. 50, 51; Fraser River Mining Co. v. Gallagher, 5 B. C. L. A., at p. 93, citing Ooregum case (1892), A. C., 125; and In *re* Pioneer etc. Syndicate, 3 Rep., 265. *Re* Owen Sound etc. Co., 21 Ont. Rep., at p. 351.

[2] Walsh v. N. W. Electric Co., *supra*; Welton v. Safferey, *supra*. [3] *Ibid.*

[4] McCracken v. McIntyre, 1 Can. S. C. R., 479.

The section under which the creditor claimed,[1] however, declared that "each shareholder until the *whole amount* of his stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon." [2] so that for the purpose of fixing the holder's liability toward creditors, this section seems just as insistent that the nominal amount shall be paid as does anything in the present Companies' Act. It is probable, therefore, that this case would still be followed by our Courts. This is also the American view.[3]

It may now be taken as well settled law in England that where shares are issued by the company as fully paid up, and this is stated in the certificate, the holder of these shares who acquires them in good faith, and acts upon the representations of the company, cannot subsequently be held liable, even where, as a matter of fact, the shares have not been fully paid up. This doctrine is clearly laid down in Bloomenthal v. Ford,[4] decided in the House of Lords in 1897. In this case Halsbury, L.C., said[5] : "It appears to me that the company who obtained his (the shareholder's) money upon the distinct representation that what they were about to give him were fully paid-up shares, obtained it by a misrepresentation of a fact which he had a right to believe and act upon; and in my view he did believe and did act upon, and parted with his money upon the belief that he had got that security. My Lords, it appears to me that it is hopeless to contend that after a representation made by a company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say, 'you should have enquired.'"

In this case the company had issued to the defendant what purported to be fully paid-up shares as security for a loan of money, and upon the liquidation of the company, it was sought to hold him liable as a contributory. This case was decided on the English doctrine of estoppel, and would, no doubt, be followed by our Courts.

It would seem, therefore, to be a question of fact, in each case, where shares stated to be fully paid-up are not so in reality, whether the holder of these shares can or cannot escape liability.

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[1] 27-28 Vic., ch. 23, sec. 5 (27).
[2] R. S. C., ch. 119, sec. 55.
[3] Thompson Corp., sec. 1680.
[4] (1897) A. C., 156.
[5] At p. 161.

It has been held in an Ontario case[1] before cited[2] that if the company has considerable assets over and above all liabilities at the time of the issue, creditors cannot complain if the shares are issued at a discount, not being misled in any way. This case apparently lays down the doctrine that if the company has a surplus of assets, they may issue shares at a discount to an amount equivalent to the surplus, or in other words, may pay a share dividend. This is directly contrary to the terms of the Quebec Act,[3] and a careful analysis of this case shows that the conclusions arrived at in this particular case might be justified on other grounds than those so broadly stated by the reporter. It is to be noted that while the company was perfectly solvent, it was reincorporated, and all the assets transferred to the new company, in which the shares were issued to the original shareholders as fully paid-up. The point really was as to whether these new shares had been properly paid up, and this could hardly be said to depend upon whether the shares in the original company were issued at a discount or not. It would seem, therefore, that this case must be accepted with great caution as laying down the principle that shares may be issued at a discount.

9. Payment of shares : by cash or otherwise.—Section 27 of the Dominion Companies' Act and the corresponding section of the New Brunswick[4] and the Nova Scotia Acts,[5] provide that "Every share in the company shall, subject to the provisions of sub-section five of section 5 of the Act, be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has otherwise been agreed upon or determined by a contract duly made in writing and filed with the Secretary of State at or before the issue of such shares." The English Act of 1867 and the British Columbia Act[6] contain a section which is identical, substituting the word "Registrar" for "Secretary of State,"[7] and it was laid down by Lord Halsbury in the Ooregum case[8] that this section simply provides that payment otherwise than in cash, under certain prescribed conditions, may be payment. The whole amount, however, is to be paid. "There is nothing in the section which jus-

[1] *Re* Owen Sound Dry Dock Co., 21 O. R., 349.
[2] *Supra*, p. 74.
[3] R. S. Q., sec. 4722.
[4] Sec. 38, 56 Vic., ch. 7.
[5] Sec. 82, R. S. N. S., ch. 79.
[6] R. S. B. C., ch. 44, sec. 50.
[7] Sec. 25.
[8] *Supra*, p. 70.

tifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all." A registered contract under this section does not exempt the shares from being paid in full; the section only regulates the *mode* of payment.[1] And it has been recently held by Mr. Justice Vaughan Williams[2] that if a contract is registered under this section and the consideration stated in such contract is illusory, or if it permits an obvious money measure to be made, showing that discount was allowed, or showing that shares were openly issued at a discount, the allottee will not be relieved from paying up the balance of the cash value of the shares.

When the contract required by the above section to be filed in the office of the Secretary of State has been filed too late or has not been filed at all, the holder of shares issued under this contract would not in all cases be liable. To make him so, it would have to be shewn that he either was aware of this omission or had not acted on the company's representation in such a way as to sustain the plea of estoppel.[3]

It is now well settled that where shares may be paid for in property, in the absence of fraud, the Court will not enquire into the value of that which is taken by the company in payment instead of money.[4] If fraud is alleged by the liquidator it must be proved in a formal action to rescind.[5]

Whatever be the consideration for which the shares are alloted, it must appear on the face of the contract filed;[6] which must purport

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[1] Per Lindley, L. J., In *re* Addleston Linoleum Co. (1887), 37 C. D., 205; Palmer Comp. Law, p. 78.

[2] In *re* The Theatrical Trust (Ltd.), 13, The Reports, 462, (Ch., 1895).

[3] Palmer's Comp. Precedents, 458; Burkinshaw v. Nicholls, 3 A. C., 1016; Barrow's case, 14 C. Div., 445; *re* Vulcan Iron Works, W. N. (1885), 120; Parbury's case, (1896), 1 Ch. 100; Bloomenthal v. Ford, (1897), App. Cas., 156.

[4] Lindley Comp., 5th Edit., p. 785; Burkinshaw v. Nicholls, 3 App. Cas., 1004.

[5] In *re* Hess Manufacturing Co., 23 Can. S. C. R., 644; and see In *re* The Theatrical Trust Co., 13 The Reports, 462.

[6] Crickmer's case, 10 Ch., 614; Kharascoma Syndicate, (1897), 2 Ch. 1, Palmer Comp. Law, 79. This writer considers that a subsidiary contract fairly disclosing the consideration may be filed and will be sufficient. The contrary view was held In *re* Maynard's, Ltd. (1898), 1 Ch., 515; but this case was dissented from and not followed in Frost & Co. (1898), 2 Ch., 556; which latter case was affirmed in appeal, C. A. [1899], W. N., 83; [1899], 2 Ch., 207; also In *re* Jackson & Co. [1899], 1 Ch., 348.

to bind the company and not merely the promotors *inter se*.[1] The articles of association are not a contract in writing to satisfy the section,[2] a contract made before the incorporation of the company with a trustee for it will, if adopted by the company, be valid.[3]

In the year 1897 the Court of Appeals in England decided in *re* Kharaskhoma Exploring Syndicate (2 Ch., 451), that the true interpretation of sec· 25 of the English Act, which corresponds to sec. 27 of our Act, was that the contract, under which shares were issued as fully paid-up otherwise than for cash, must necessarily be registered before the memorandum of association was filed with the Registrar. There was a very general misunderstanding of these sections. In the case of companies incorporated under the Canadian Companies' Act, it was usual after the charter issued to hold a meeting of provisional directors, and at that meeting to allot the stock, treating the applicants for incorporation in the same way as other subscribers for shares. Before the certificates issued, the contract was passed and duly filed in the office of the Secretary of State; and after that the shares were issued and almost invariably accepted as fully paid-up. In the above case, however, the decision implied that the stock was issued to the applicant for incorporation as soon as the letters patent were granted. As a consequence of this no contract registered subsequent to the issue of the letters patent would be a compliance with the requirements of section 27.

In England an Act was at once passed (The Companies' Act of 1898) which provided in effect that when an insufficient contract had been registered or when a contract had been registered too late, but in good faith, and shares which had been treated as fully paid-up were found to be improperly paid up, the holder of the shares or the company might apply to the Court or a Judge in Chambers for relief, and an order might be made directing that a new contract be registered or in certain cases a memorandum of association approved by the Court or Judge; and that such registration would protect the shareholder from any further liability. This was made operative even when the company was being wound up.

The attention of the Dominion Government has been called to

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[1] Hartley's case, 10 Ch., 157; Palmer Comp., 79.

[2] Smith v. Brown, (1896), A. C., 614.

[3] Pritchard's case, (1893), L. R., 8 Ch., 956; Farmstone's case, 20 Eq., 524; Palmer Comp., 79.

this Imperial Act and to the fact that such a remedial Act is necessary for the protection of a number of shareholders in good faith in Canada, and it is hoped that legislation will be introduced similar to the English Companies' Act of 1898.

The Ontario Act and the Manitoba Act have no provision corresponding to sec. 27 of the Dominion Act. Lord Justice Lindley in his book on Company Law[1] has the following passage :—" Previously to the above enactment it had been decided, and where the statute in question (that requiring in England an agreement in writing when payment is otherwise than in cash) does not apply, it may be taken as settled, that shares may be fully paid-up not only in money but in money's worth; and shares which are *bonâ fide* given as paid-up in payment of property transferred to the company or of services rendered to it, or of other claims against it, must, on the winding-up of a company, be treated as paid-up shares." This view has been followed by our Supreme Court in a recent case based upon the Ontario Companies' Act.[2]

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[1] 5th Ed., p. 785.

[2] In *re* Hess Manufacturing Co., *supra*, p. 82.

The filed contract recited that by a prior agreement of a certain date between the vendor and a trustee for the company, the vendor agreed to sell and the company to purchase "certain leasehold messuages, shops, and premises," and "all the good will of the several businesses carried on by the vendor in the same respective premises, together with all the machinery, plant, horses and carts, fixtures and fittings, used in connection with the several businesses." It also recited the incorporation of the company, and that, by an agreement made between the trustee and the company, it was provided that the purchase money should be paid by allotment to the vendor of a specified number of fully paid up shares, and payment of a specified amount in cash. The contract then witnessed that it was agreed that the company should file "this agreement and should allot to the vendor a specified number of fully paid up shares. Neither of the recited agreements was filed. *Held*, that the contract which had been filed determined, within the meaning of sec. 25, of the Imp. Act of 1867,—sec. 27, Dominion Act—that payment for the shares allotted to the vendor was to be otherwise than in cash, and sufficiently stated the nature of the consideration for the issue of the shares. In *re* S. Frost & Co., C. A. (1899), W. N., 83; [1899], 2 Ch., 207, confirming Romer, J. [1898], 2 Ch., 556, and dissenting from In *re* Maynard's [1898], 1 Ch., 575.

On December 12th, a written agreement was made providing that a company should allot to the vendors of a certain property, 22,500 fully paid up shares, and 217,493 shares upon each of which four-fifths of their nominal value should be deemed to have been paid as mentioned in a prior agreement dated December 6th. On December 19th, another agreement was made which

This question presents considerable difficulty in regard to the Quebec Act. This Act is, in fact, quite unique in its strict provisions relating to the watering of stock and other forms of fictitious capitalization of stock. Section 4722 provides that the capital of all joint stock companies shall consist of that portion of the amount authorized by the charter, which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash. The amount of paid-up capital must be published annually in a report to the shareholders of the company. The property accounts must represent only the amount of the actual *bonâ fide* outlay necessary for the undertaking. The balance of the section prohibits the watering of stock and every form of fictitious capitalization of stock.

The shares must be paid in cash, says the statute. It has been held in a Quebec case, by the Privy Council, affirming the decisions of the Courts below,[1] that where there is no fraud or simulation and

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provided that in consideration of the vendors giving the company immediate possession of the property, "more particularly mentioned and referred to in an agreement dated December 6th," the company should allot to them 22,500 fully paid shares in the company. Both the contracts of December 12th and December 19th were filed with the Registrar,—the first on December 12th, and the second on December 28th. *Held*, that the filed contract of December 19th was a sufficient compliance with sec. 25 of the Companies Act, or that at any rate the two contracts of December 12th and 19th were sufficient. The object of the section being to have it shewn what shares are not to be paid for in cash and the nature of the consideration other than cash, which is to be given, but not to compel disclosure of the agreement in all its details. Concessions and Development Co., C. A. [1899], W. N., 119; [1899], 2 Ch., 480, affirming decision of Wright, J.

By written contract the owner of a business agreed to sell it to a company for a specified sum of money to be paid wholly or partly in cash, shares, or debentures as the directors should determine. Subsequently the directors allotted specified shares to the vendor as fully paid up, in respect of a part of the purchase money, but no written contract to that effect was entered into. *Held*, that the contract was not sufficient within the meaning of the Act, inasmuch as the determination by the directors as to the mode in which payment was to be made was supplemental to the original contract, and without this determination there was no complete contract. In *re* Jackson & Co. [1899], 1 Ch., 348.

[1] Larocque v. Beauchemin, Court of Review, 1895, R. J., Que. (9 S. C.), 73. In this case D. and three others sold a paper mill to a joint stock company for $35,000, (the company consisting of themselves and others) but in pursuance of a special agreement between them and the other shareholders, accepted $10,000, the balance of $25,000 being credited to the shareholders as 50 per cent. paid up on the stock subscribed by them. It was held that this

the transaction is in good faith, the consideration being fair, anything which is in law equivalent to a payment or which would be in law sufficient evidence to support a plea of payment, is a payment in cash within the meaning of this section. In this case the Privy Council approved of the decision in Spargo's case,[1] in spite of the fact that Lord Halsbury, L.C., sitting in the Court of Appeal, expressed his strong disapprobation of this interpretation of the Statute, but felt himself bound to follow it until it should be overruled in the House of Lords.[2]

10. Creation and issue of preference stock—Legality and formalities.—Some Statutes provide for the making of a by-law for the creation and issue of any part of the capital stock as preference stock, both as to the amount of the dividend as well as to priority of dividend.[3] Companies incorporated under these Acts can, by the issue of these shares, attain the same end as could be reached by the more doubtful method of issuing shares at a discount. Suppose the case of a company incorporated with a nominal capital of $300,000, and that of this capital $100,000 has been absorbed in the acquisition of

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was a payment "in cash" within the meaning of Art. 4722 R. S. Q., and that the shareholders could not be called upon by the liquidator to pay up the amount so credited to them.

[1] See specially Spargo's case, L. R., 8 Ch., 407; and an Ontario case, Inglis v. Wellington Hotel Co., 29 U. C. C. P., 387.

[2] *Re* Johannesburg Hotel Co. (1891), 1 Ch., 119, 129.

[3] R. S. C., ch. 119, as amended by 62 and 63 Vic., ch. 40, R. S. C., ch. 118, as amended by 62 and 63 Vic., ch. 40; R. S. O., ch. 191, sec. 22; R. S. Q., sec. 4717*a*, as amended by 61 Vic., ch. 36; Under the New Brunswick Act, 56 Vic., ch. 7, sec. 19, authority to issue preference shares may be asked for in the application for letters patent or supplementary letters patent, or may be created by by-law. Under all these statutes, the by-law must have the unanimous sanction of the shareholders present in person or by proxy at a general meeting of the company, or given in writing. The British Columbia Act, (R. S. B. C., ch. 44, sec. 55), authorizes the directors, with the sanction of a special resolution of the company previously given in general meeting, to create and issue any part of the capital as preference shares giving the same such preference and priority, etc., as may be declared by the special resolution; the number of consenting shareholders must be three-fourths, sec. 100. Further, the Dominion Act, the Company Clauses Act, the Ontario and Quebec Acts provide that if the by-law be sanctioned by not less than three-fourths in value of the shareholders, the company may petition the Governor-in-Council or the Lieut.-Governor-in-Council, as the case may be, for an order approving the said by-law.

property and running expenses, and that the discerning public will not take any of the remaining shares at par, but might be tempted by shares at 50 per centum discount and that $50,000 in money is absolutely necessary to the life of the concern. If shares could be issued at a discount, the company would invite subscriptions to $100,000 of stock at 50 per centum discount. If it should be sought to avoid this course as being doubtful, the company may issue $50,000 of the capital stock as preferential stock, giving to the same as compared with the common stock the right to participate in the dividends of the company in the ratio of $2 per share of preferred to $1 per share of common stock. Under this method the subscriber, instead of subscribing to $200 of stock at 50 per centum discount, subscribes for $100 of stock at par. The same money accrues to the company and the subscriber is in the same position as regards dividends. To be on terms of equality in other respects provision should also be made whereby the preferred stockholder has a proportionate voting power on his shares.[1] In reference to a similar proposition Lord Watson in the Ooregum case regarded it as free from objection.[2]

It has been said that all shareholders are entitled to equal rights unless the contrary is declared by statute, charter, or express contract,[3] and it was until recently considered as a consequence that preference shares can only be created when the authority to create them is given by statute or charter, or by agreement between all the parties interested. If authority to issue them is given by a company's charter, memorandum of association, or by its articles of association, as originally framed, preference shares may undoubtedly be issued.[4] Those of our Acts[5] which specially permit the issue of preference shares do so under conditions which are practically identical with the common law on the subject. The by-law providing for the issue of such shares must be unanimously sanctioned by the vote of the shareholders, present in person or in proxy at a general meeting of the company duly called for considering the same, or unanimously sanctioned in writing by the shareholders of the company. The British

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[1] See Article in 14 Can. L. Times, by W. H. Hunter, at p. 38.

[2] (1892), App. Cas., at p. 138.

[3] Lindley Comp., 396.

[4] *Ibid.* Hutton v. Scarborough Hotel Co., 2 Dr. & Sm., 514 and 521; Ashbury v. Watson, 30 Ch. Div., 376; see also Guiness v. Land Corporation of Ireland, 22 Ch. Div., 349.

[5] *Supra*, p. 86.

Columbia Act, however, only requires the sanction of not less than three-fourths of the shareholders.[1] In the case of the Dominion and Quebec Acts, if the by-law is adopted by two-thirds in value of the shareholders, it may be made operative and valid by the approval of the Governor-General or Lieutenant-Governor-in-Council. It is to be noted that preferred shareholders are not creditors of the company; they are members and are entitled to dividends only from profits.[2] Hence the issue of preferred stock is a question relating solely to the shareholders of the company: creditors of the company are not affected by the arrangement. The preferred shareholder pays the par value of his shares, but the ordinary shareholders agree that the preferred holders shall receive a certain portion of the dividend, if any, in priority to themselves.

Any difficulty that may have arisen in reference to the issue of preference shares by companies has been in connection with the question: can a company represented by the majority of its shareholders, issue such shares? It was until recently considered that unless the original constitution of the company allowed the issue of such shares, the company could not issue them,[3] nor by special resolution alter its regulations so as to acquire power to issue them.[4]

But Lord Macnaghten has expressed his entire dissent from the case of Hutton v. Scarborough Cliff Hotel Co., which gave rise to the above view of the law.[5] "In that case the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorizing the directors to issue a certain number as preference shares. The proposed issue was restrained at the suit of an ordinary shareholder on the ground mainly that, although the company had passed a special resolution authoriz-

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[1] R. S. B. C., ch. 44, secs. 55, 100.

[2] Lindley Comp., 396; Cook stockholders, sec. 270.

[3] Hutton v. Scarborough Hotel Co., 2 Dr. & Sm., 514; 4 D. J. & S., 672; Sturge v. Eastern etc. R. R. Co., 7 De G. M. & G., 158; Guiness v. Land Corp. of Ireland, 22 L. R., Ch. D., 349; Moss v. Syers, 11 W. R., 1046, 32 L. J. (Ch.), 711; Melhado v. Hamilton, 28 L. T. (N. S.), 578.

[4] Hutton v. Scarborough Hotel Co., *supra*, at p. 521.

[5] In British & Amer. Trustee & Finance Corp. v. Couper, House of Lords (1894), App. Cas., 399.

ing the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Vice-Chancellor Rindersley on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing as to the receipt of dividends, and that what was proposed to be done was "contrary to the very nature of a joint stock company" and was "an alteration in the constitution of the company."[1]

Lord Macnaghten criticizing these data said: "It is difficult to understand what the learned Vice-Chancellor meant by the expression 'constitution of the company,' and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view that equality among shareholders in respect to dividends was an 'implied stipulation in the memorandum.' There is nothing in the Act of 1862 or in any other Act requiring the memorandum to contain any reference to the rights of shareholders *inter se*. The division of the capital into shares of a certain fixed amount which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares. The practical result of the decision has been that, except in cases coming within the rule laid down in Harrison v. Mexican Ry. Co.[2]—a decision which has not met with universal acceptance—no company limited by shares that has not taken power bv its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders, and its creditors. It seems to me that the decision in Hutton v. Scarborough Cliff Hotel Co.[3] was not founded upon a sound view of the Companies' Act of 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view because I find that Lord Justice Cotton has disapproved of the chief ground upon which the decision was based. 'In reality,' he says in Guiness v. Land Corporation of Ireland,[4] 'it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the

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[1] *Ibid*, per Lord McNaghten.

[2] 6 Ch. Div., 511.

[3] *Supra*, p. 88.

[4] 22 Ch. Div., 377.

implication which the law raises as between partners, unless their contract has provided the contrary." Lord Justice Lindley, in a later case,[1] takes the same view. "I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum, but I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal."

This view has been strengthened by a decision of the English Court of Appeal,[2] which held that a company could issue new shares created upon an increase of capital with preferential or special rights attached, by altering its regulations so as to take the requisite power. Moreover, the grounds of this decision go far to show that a company can issue part of the shares in its original capital with preferential or special rights attached.[3] This case was decided on grounds which are inconsistent with the proposition that silence gives rise to an implied condition of equality in the memorandum.[4]

These dicta and decisions must be regarded as lending much weight in favor of the legality of the issue of preference shares after the formation of the company when the Act under which it is created is silent on the subject.

The New Brunswick Act provides[5] that authority may be obtained in the letters patent incorporating the company, or in the supplementary letters patent, for the power to issue two classes of stock, ordinary and preferred, and this preference may relate to priority of dividends at the rate mentioned or the distribution of assets. There would appear to be no reason why the same may not be done under any other of our Companies' Acts, by by-law to be incorporated in the letters patent.[6] The decision of the Departmental

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[1] In *re* South Durham Brewery Co., 31 Ch. Div., 261.

[2] Andrews Gas Meter Co. (1896), 1 Ch., 361.

[3] Palmer Comp. Law, 54, 55. [4] *Ibid.* [5] Sec. 19, 56 V., ch. 7.

[6] Bridgewater Nav. Co., 39 Ch. Div., 1; South Durham Brewery Co., 31 Ch. Div. 261; Harrison v. Mexican Rail Co., 19 Eq., 358; Eichbaum v. City of Chicago Grain Elevators (1891), 3 Ch., 459.

officers in Ottawa, charged with the examination of petitions for letters patent, has been that the Governor-in-Council has no power to give the company authority to issue preferred stock; and this decides the matter so far as the Dominion Letters Patent are concerned, because under the Act there is discretionary power in the Governor-in-Council. It was said by Folger, J., in Kent v. Quicksilver Mining Co.[1] : "We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract express or implied, would be broken or impaired."

11. **Subdivision of shares.**—Under the Dominion Companies' Act,[2] as well as the acts of New Brunswick,[3] Ontario,[4] Manitoba,[5] and Nova Scotia[6] companies may, by by-law to be approved by the votes of shareholders representing at least two-thirds in value of all the subscribed stock of the company, at a general meeting called for considering the same, subdivide the existing shares into shares of a smaller amount; and the by-law must be further confirmed by supplementary letters patent.[7] The British Columbia Act provides that "a company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed or as altered by special resolution, as by subdivision of its existing shares, or any of them, to divide its capital, or any part thereof into shares of smaller amount than is fixed by its memorandum of association; provided that, in the subdivision of its existing shares, the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was

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[1] 78 N. Y., 178, 179.
[2] Secs. 17 and 20 of R. S. C., ch. 119.
[3] Secs. 41 and 44, 56 Vic., ch. 7.
[4] Secs. 19 and 20, R. S. O., ch. 191.
[5] Secs. 34 and 38, R. S. M., ch. 25.
[6] Secs. 19 and 22, R. S. N. S.
[7] The New Brunswick Act contains a contradiction as to confirmation of by-law. Compare secs. 19 and 22.

in the case of the existing share or shares from which the share of reduced amount is derived.[1] And every copy of the memorandum of association or other official document issued after the passing of such special resolution containing a statement of the number and amount of shares the capital is divided into, shall be in accordance with such resolution.[2] Without these necessary statutory protections a subdivision of shares would not be valid, for if valid at all it must be valid to whatever extent it may be carried, and thus creditors of the company might, upon a winding-up, be left, and left without any previous notice given to them by the Act of Parliament, with the unpaid capital of the company scattered through such a number of hands that the sum recoverable from each would not pay for the trouble and expense of collection.[3]

12. Increase of capital stock.—All our Companies' Acts provide for the increase or reduction of the capital stock.[4] The Dominion Act provides that the capital may be increased to any amount which the directors consider requisite for the due carrying out of the objects of the company, but not before the whole[5] of the capital stock has been taken up and fifty per cent. thereon paid in.[6] For this purpose the directors make a by-law which must declare the number of the shares of the new stock, and the by-law may prescribe the manner in which the same shall be allotted. This latter provision is merely permis-

[1] R. S. B. C., ch. 44, sec. 63. [2] *Ibid.* Sec. 64.

[3] Remarks of Lord Cairns In *re* Financial Corporation, 2 Ch., 714, 733.

[4] R. S. C., ch. 119, sec. 18, *et seq* ; R. S. M., ch. 25, sec. 35, *et seq* ; R. S. O., ch. 191, sec. 17, *et seq*; N. B., 56 Vict., ch. 7, sec. 42, *et seq*; R. S. Q., art. 4706; R. S. N. S., ch. 79, sec. 20, *et seq*; Brit. Columbia, R. S. B. C., ch. 44, secs. 15 and 71, *et seq.*

[5] Where a company had ceased its operations and obtained a new Act of Parliament to revise its powers, which act enabled it to increase its capital when the whole of the authorized stock shall have been paid up ; the intention of the Act cannot be evaded by declaring a discount to the shareholders of the former stock to the amount unpaid by them on their shares. In *re* Ontario Express & Transportation Co., 21 Ont. A. R., 646.

The holders of shares of the new capital were held not liable as contributories in winding-up proceedings as the issue of the new capital under the above circumstances was wholly illegal. (*ib.*) Page v. Austin, 10, S. C. R., 132, followed.

[6] Ontario: nine-tenths taken up and ten per cent. paid thereon; Quebec: whole capital stock allotted and paid in; New Brunswick same as Dominion; Manitoba same as Dominion; Nova Scotia same as Dominion; British Columbia has no such provision.

sible, if it is omitted the control of the allotment will rest absolutely in the directors. As a safeguard this by-law must be approved by the votes of shareholders representing at least two-thirds in value of all 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. The British Columbia Act requires a vote of at least three-fourths of its shareholders entitled to vote, unless power is given in the original regulations to increase or reduce the capital.[1] After reducing its capital, the words "and reduced" must be added to the company's name.[2] The reduction as well as the increase must be confirmed by the Supreme Court of the Province.[3] The creditors have a right to object to the reduction; and the list is then settled by the Court,[4] which may dispense with the consent of creditors on security being given.[5] The order of the Supreme Court confirming the reduction is then duly registered by the Registrar.[6] Then follow directions for the obtaining of supplementary letters patent and the effect thereof when granted. Apart from the statutory permission to do so, a company has no implied authority to alter the amount of its capital stock, where the charter has definitely fixed the capital at a certain sum; not even by the consent of all the members of the company.[7] But if a company, wishing to increase its cash in hand for working capital does not desire or is not in a position to increase its capital stock, it may borrow money on security for that purpose, there being generally no condition precedent to the right to borrow but the sanction by the vote of not less than two-thirds in value of the shareholders present at a general meeting.[8] The capital stock of a company is one thing, and that which is sought to be increased, viz., the cash in hand or working capital, being a different thing.[9]

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[1] R. S. B. C., ch. 44, secs. 15 and 71, 100. [2] *Ibid*, sec. 72.

[3] *Ibid*, secs. 21 and 73. [4] R. S. B. C., ch. 44, sec. 74. [5] *Ibid*, sec. 75.

[6] *Ibid*, sec. 76, see also secs. 21 and 22.

[7] Electric Telegraph Co. of Ireland, 22 Beavan, 471; Jennings v. Baddely, 3 K. & J., 78; Fisher v. Taylor, 2 Hale, 218; Smith v. Goldsworthy, 4 Q. R., 430; Droitwich Salt Co. v. Curzon, L. R., 3 Ex., 42; *Re* Financial Corp., Holmes' case, L. R., 2 Ch., 714; Lindley Comp., 5th Edit., pp. 397, 398.

[8] Dominion Act, sec. 37; Ont., sec. 49; Man., sec. 71; N. B., sec. 91; Nova Scotia, sec. 84; Brit. Columbia, three-fourths of shareholders required to sanction secs. 100, 122.

[9] See Bryon v. Metrop. Saloon Omnibus Co., 3 De Gex & Jones, 123.

Even where the act incorporating a company authorizes an increase of capital to a certain amount, yet the directors could not order such increase where it is proved that there was no possible need and where the increase was really for the purpose of maintaining the directors in power against the wish of the majority, by a judicious allotment of the increased capital stock among themselves and their friends to turn the balance of voting power.[1] This illegal increase, however, can usually be guarded against by the Secretary of State.[2]

The power given by the statutes to increase the capital stock is a general power and not limited to a single occasion.[3]

The Acts usually provide that at any time not more than six months after the sanction of the by-law for increasing the capital, the directors may petition the Governor-in-Council, through the Secretary of State (or Lieutenant-Governor through the Provincial Secretary, as the case may be) for the issue of supplementary letters patent confirming the increase. The by-law must be produced with the petition and the due passage and approval thereof must be established to the satisfaction of the Secretary of State, as must also the expediency and *bonâ fide* character of the increase of capital. As to such matters, the Secretary of State may take and keep evidence thereof. Upon due proof so made the Governor-in-Council may grant the supplementary letters patent, and notice thereof shall forthwith be given by the Secretary of State in the Official Gazette.[4] Thereupon the whole of the stock so increased will become, as far as possible, subject to the provisions of the Act, as if it had formed part of the original stock.

13. Reduction of capital stock.—The above formalities apply to the reduction of the capital stock. Loan companies must not reduce their capital to less than one hundred thousand dollars.[5] And it is provided that the liability of shareholders to persons who were, at the time of the reduction of the capital, creditors of the company, will

[1] Perrault v. Milot, Q. B., 1886, 12 Q. L. R., 248.

[2] See sec. 21 (2), Dom. Act.

[3] In *re* Massey Manuf. Co., 13 Ont. A. R., 446.

[4] As to power of Secretary of State to refuse to publish notice, under a somewhat similar statute, see In *re* Massey Manufacturing Co., 13 Ont. A. R., 446.

[5] Sec. 19; Dom. Act, R. S. C., ch. 119, 62-63 Vic., ch. 41.

remain the same as if the capital had not been reduced.[1] There is no condition precedent to the reduction of the capital stock, but the passage of the by-law subject to the same formalities as in the case of an increase. The by-law must declare the number and value of the shares of the stock so reduced, and the allotment thereof, or the manner in which the same shall be made.[2] Thus the manner in which the reduction is to be made in discretionary with the company subject to the approval of the officer appointed by the Governor-in-Council to report thereon.

Under the English Acts, like under the British Columbia Act, the approval of the Court must be obtained where the rights of creditors are affected.[3] The English Acts, like ours, do not prescribe the manner in which the reduction is to be effected, and it has been recently held by the House of Lords, that the Court has power to sanction any scheme which is a proper one, for the reduction of capital.[4] It may sanction, for instance, a reduction effected by paying off a single shareholder, or a portion of the shareholders, and cancelling the shares held by him or them.[5] There is now no doubt that the purchase by a company of its own shares is equivalent to a reduction of capital,[6] and as the capital can only be reduced subject to the conditions laid down in the Acts, or the charter, the purchase by a company of its own shares would be illegal unless the prescribed conditions were observed.[7] but once the reduction is sanctioned, the fund thereby set free may be employed in the purchase of shares which it is intended to extinguish.[8]

Where an English company, which issued both common and preferred stock, wished to reduce the former only, and provided for such reduction by proper resolution in accordance with the statute, it was

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[1] Sec. 19, (3) Dom. Act; The Brit. Columbia Act provides for the security of creditors before the Court will confirm the reduction. R. S. B. C., secs. 73, 74 and 75.

[2] Sec. 19, (2) Dom. Act.

[3] Palmer Comp. Law, p. 62, see Watson etc. (Ltd.), [1898], W. N. 69.

[4] Brit. & Amer. Trustee & Finance Corp. v. Couper, 6 R., 146; (1894), App. Cas., 399.

[5] *Ibid.*

[6] Trevor v. Whiteworth, 12 App. Cas., 409; Morawetz, sec. 112.

[7] *Ibid* and Ross v. Dusablon, Q. B., 1883, 10 Q. L. R., 74; Ross v. Fiset, 8 Q. L. R., 251; McCord's case, 21 O. R., 264; see also remarks of Sedgwick, J., in Common v. McArthur, 1898, 29 Can. S. C. R., at p. 245.

[8] Per Lord MacNaghten in British & Amer. Trustee & Finance Corp. v. Couper, *supra*.

held that its action would be sanctioned by the Court part from any reduction of its preference capital.[1]

14. Payment of dividends and impairment of capital—Loss on capital account—Fixed capital : floating or circulating capital.—The Dominion Companies' Act contains several provisions designed to protect the capital of a company from illegal impairment. Directors must not declare and pay any dividend the payment of which renders the company insolvent, or impairs its capital stock.[2] And it is expressly provided that no dividend shall be declared by the company which will impair its capital.[3] The equivalent clause in the English Companies' Act of 1862 reads, "No dividend shall be payable except out of the profits arising from the business of the company."[4] In the English clause it is said that "the word 'profits' is by no means free from ambiguity.[5] The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits.[6] The last expression leads to the inference that the capital must always be kept up and be represented by assets, which, if sold, would produce it; and this is more than is required by law."[7]

In England, until the case of Lee v. Neuchatel Asphalte Co.[8] was decided, the question was open whether a company under the Companies' Act, which has lost part of its capital by loss on capital account, can continue to pay dividends until the lost capital has been made good. But that case and the still later ones of Verner v. General & Commercial Investment Trust,[9] Wilmer v. McNamara & Co.,[10] and Bosaquet, etc. v. St. John del Rey,[11] have decided that, in the absence of some special article or contract to the contrary, a limited company which has lost part of its fixed capital by depreciation can lawfully declare or pay a dividend without first making good

[1] *Re* Agricultural Hotel Co. (1891), 1 Ch., 396; (following *re* Barrow Haematite Steel Co., 39 Ch. Div.,582; *Re* Quebrada Ry. L. & C. Co., 40 Ch. Div., 363; *Re* Gatling Gun Co., 43 Ch. Div., 628; and declining to follow *Re* Union Plate Glass Co., 42 Ch. Div., 513.)

[2] Sec. 58, R. S. C., ch. 119.

[3] Sec. 73.

[4] Table A, sec. 73, Imperial Comp. Act, 1862, sch. 1.

[5] Per Lord Justice Lindley in Verner v. General & Commercial Investment Trust, 7 R., 170 (1894), 2 Ch., 239.

[6] *Ibid.*

[7] *Ibid.*

[8] 41 Ch. Div., 1.

[9] *Supra.*

[10] (1895), 2 Ch., 245; 13 R., 513.

[11] (1897), 77 L. T., 207.

the capital which has been lost. It is clear that this holding is applicable to our statutes. Under our statutes each company is left to make its own regulations as to the declaration and payment of dividends[1] under the reservation that it shall not of its own accord impair the capital by returning it to the shareholders either in the shape of dividends or otherwise.[2] The capital of a company is intended for use in in some trade or business, and is necessarily exposed to risk of loss. It is not a debt owing by it to its shareholders, and if it is lost the company is under no legal obligation either to make it good or, on that ground only, to wind up its affairs.[3] Capital account and revenue account are distinct accounts, and for the purpose of determining profits, accretions to or diminution of capital must be disregarded.[4]

The profits of an undertaking are not such sum as may remain after the payment of every debt; [5] but are the excess of revenue receipts over expenses properly chargeable to revenue account for the year. But some distinction must be made in estimating profits by distinguishing between trading companies and those formed for making investments,[6] or any business which is not carried on for the purpose of buying and selling, such as that of carrier.[7] "An ordinary trader takes a yearly account of all the capital employed in his business, allows for any loss or depreciation in value, and carries the balance to the profit and loss account, from which he makes out the profit and loss of the year. In this mode a loss or depreciation of such capital affects directly the profit of the year which is thereby diminished. But if upon the whole capital account there is a gain this goes to swell the year's profits." Kay, L.J., in Verner v. Gen. Com. Investment Trust, stated it as his opinion that joint stock companies should do the same, but distinguish the case of an investment company.[8]

The distinction in the case of trading companies is still further pointed out by Chitty, J., in Lubbock v. British Bank of South America.[9] The following example was put. "A man's business

[1] Sec. 35 (*b*), Dom. Act, R. S. C., ch. 119. [2] Secs. 73, 59. Dom. Act.

[3] See Lee v. Neuchatel Asphalte Co., 41 Ch. Div., 1. [4] *Ibid.*

[5] Mills v. Northern Ry. of Buenos Ayres Co., 5 Ch., 621, 631.

[6] See Verner v. Gen. Com. & Invest. (1894), 2 Ch., 239; per Kay, L. J., at p. 268.

[7] Wilmer v. McNamara & Co. (1895), 2 Ch., 245.

[8] 7 The Reports at p. 177. [9] (1892), 2 Ch., at p. 202.

is to make boots and shoes. He has £10,000 which he takes into that business as his capital. He makes boots and shoes, and spends the whole of his £10,000 in doing it, and he sells and gets back from his customers a certain sum on the sale. He compares then, assuming he has sold all, what he has got back with his expenditure in producing the boots and shoes, and putting them on the market, and if he finds he has his £10,000 (I am treating it apart from any question of debts outstanding, supposing it is a good solid sale), then his capital is intact, and the rest, if there is a rest remaining in his hands, is profit. On the other hand, if he has only £9,000, his capital is not intact, and he has lost. It is exactly the same principle that has to be applied to a trading company under the Companies' Act, and the capital that has to be regarded for the purpose of the Act of Parliament, is the capital according to the Act and not the things, whether houses, goods, boots and shoes, or hats, or whatever it may be for the time being representing the capital, in the sense of being things in which the capital has been laid out. Where the company is formed to work a wasting property, such as a mine or a patent, different considerations may apply, as was decided in Lee v. Neuchatel Asphalte Co.[1] I am not dealing with such special case." The distinction made by Lindley, L.J.,[2] in dealing with one of these special cases is that fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided; but 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 deducting the capital which forms part of it will be contrary to law.

If the constitution of a company provides that its objects shall be to sink its capital in a wasting property, *e.g.*, a mine or a patent, and acquire profit by working that property, then the gradual diminution of the property by consumption is a gradual destruction of the company's capital, which is within its objects legitimate.[3] Nothing in our Acts requires a sinking fund to replace capital lost by degrees. It is for the shareholders to see that the constitution of the company contains such a provision if they desire it. It is conceived that it would be different in the case of a company formed for the purpose of buying and selling commodities; the loss in this case would arise

[1] 41 Ch. Div., 1, 26.

[2] 7 The Reports, at p. 175.

[3] Lee v. Neuchatel Asphalte Co., 41 Ch. Div., 1.

from the company having received a less price than it originally gave for a portion of its assets, and would have to be reckoned as diminution of the profits for the year.[1] As to what is chargeable to fixed capital and what to floating or circulating revenue, it would be impossible to lay down any general rule. In many cases it may be for the shareholders to determine this for themselves.[2] Depreciation of the goodwill of the business of a company is to be treated as a loss of "fixed" capital and not of "floating or circulating capital."[3]

In England the Court of Appeals has again decided that the law does not prohibit a banking company from paying dividends unless its paid-up capital is intact.[4]

A land company which, for the purpose of meeting and equalizing a bad debt, has brought into its profit and loss account of that year the appreciation of its lands at a higher value than cost price, will not be interfered with by the Court so as to prevent the declaration and payment of a dividend from the profit of a subsequent year, for assuming that what was done in the profit and loss account of the year the loss was made was erroneous, and the company's assets the year the dividend was declared were too highly valued, the company were not bound to adopt the course taken the first year and to bring the depreciation of the year the dividend was declared into the profit and loss account of that year.[5]

The gradual modification of the jurisprudence by which the Courts arrived at this view is shewn by the following extracts from Mr. Buckley's Company Law :—" In the common case of lease holds, which are a wasting property, the whole of the rental will not properly be income; in the case of colliery properties, the difference between the price at which the coal is sold and the cost of working and raising it, will not all be income, for there must also be a deduction made in favor of capital representing the diminished value of the mine by reason of its containing so many less tons of coal ;[6] in the

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[1] See remarks of Stirling, J., in Wilmer v. McNamara, 13 The Reports, at p. 522; and Kay, L. J., in Verner v. Gen. & Com. Investment Trust., 7 The Reports, at p. 177.

[2] Lee v. Neuchatel Asphalte Co., 41 Ch. Div., 1, 18, 21, 25.

[3] Wilmer v. McNamara (1895), 2 Ch., 245.

[4] In *re* National Bank of Wales (Ltd.), C. A. [1899], W. N., 131 ; [1899], 2 Ch., 629.

[5] Bolton v. Natal Land, etc. Co. (1892), 2 Ch., 124.

[6] Buckly Comp., p. 514; Knowles v. McAdams, 3 Ex. D., 23; but see Coltness Iron Co. v. Black, 6 App. Cas., 315.

case of a tramway company you will not have arrived at the net profit before you have set apart a sum to make good deterioration.[1] But as regards such wasting property, it has already been stated that where the charter of the company, as a whole, permits of it, it is not necessary that depreciating by waste shall be brought in as a debit to revenue account.[2] It would appear that it is one thing to say that the company must not divide its capital or any part of it amongst its members and another to say that revenue cannot be divided amongst members until revenue has recouped waste of capital." [3]

Although it is said that dividends are not to be paid out of capital, the word capital means what is subscribed pursuant to the charter, or what is represented by that money.[4] Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders.[5]

But it would appear that the mere increased value put upon the line and plant of a street railway company by its directors who employed experts for making the necessary valuation, would not justify them in declaring a dividend out of such increased value determined by the valuation.[6]

They could, however, declare a dividend based on a reconstruction fund appropriated from the annual profits where it appears that the line and plant of the company has been maintained in good order.[7]

15. Shareholders who acquiesced in the payment of dividends out of capital cannot complain.—Although the creditors of an insolvent company may complain of the payment of fictitious dividends by the directors, based on augmentation of the value of the company's real property, shareholders who were present at the annual meetings and authorized such dividends after communication of the statements, are not entitled to complain of being deceived as to the condition of the company, and shareholders who had the opportunity but did not attend cannot complain because of their own negligence.[8]

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[1] Davidson v. Gillies, 16 Ch. Div., 344.
[2] See Buckly Comp., 514, 516, 517, 518, Lindley, 431.
[3] Buckly Comp., 518.
[4] See Palmer Comp, Law, p. 146
[5] Lubbock v. Brit. Bank of South America (1892), 2 Ch., 198.
[6] Banque d'Epargne v. Geddes, M. L. R., 6 S. C., 243.
[7] *Ibid.*
[8] *Ibid.*

16. Payment of interest to shareholders.—The payment of interest to the shareholders, before any profits have been realized would clearly be an impairment of capital within the meaning of our Acts, whether made in pursuance of a resolution at a general meeting[1] or by virtue of the articles of association.[2] Such an improper payment of a dividend will be restrained by injunction on behalf of a stockholder in the company, as being in effect a lessening of the capital to the prejudice of creditors.[3] But an injunction will not lie at the instance of a mere contract creditor on the ground that the fund for the payment of his debt is thereby diminished.[4] A distinction must be made in the case of debenture capital, which is not capital in the proper sense of the word.[5]

It is specially provided in our Acts[6] that the directors may pay interest not exceeding eight per cent. to shareholders who have advanced sums on their shares beyond what has actually been called for. As already stated[7] the company cannot pay guaranteed dividends when no profits have been earned.

17. Forfeiture of shares, when permissible—Liability of holder—Disposal of such shares—Formalities.—Most of our Acts allow the forfeiture of shares by the directors for non-payment of calls,[8] and this has sometimes been taken advantage of to enable shareholders to escape liability where most of the calls remained to be made and the company was about to become insolvent.[9] But the Dominion Act provides that, nothwithstanding such forfeiture, the holder of such shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof.[10] And this would be the result at common law if the company was insolvent at the time of forfeiture.[11] The right only exists when given by statute or by the

[1] MacDougall v. Jersey Imperial Hotel Co., 2 H. & M., 528.

[2] In *re* Sharpe (1892), 1 Ch., 154.

[3] Hoole v. Great Western Ry. Co., 3 Ch., 262; Bloxam v. Metropolitan Ry. (*ib.*), 337.

[4] Mills v. Northern Ry. of Buenos Ayres Co., 5 Ch., 621.

[5] See Bloxam v. Metrop. Ry. Co., 3 Ch., 337, 350.

[6] Sec. 40, Dom. Act.

[7] *Supra*, p. 96.

[8] Sec. 41, Dom. Act.

[9] Brice *ultra vires*, p. 188; Morawetz Corp., sec. 857; Mills v. Stewart, 62 Barb., 444.

[10] Sec. 41.

[11] Morawetz Corp., sec. 857; Mills v. Stewart, 62 Barb., 444.

The forfeiture of a share within a year before the commencement of the winding-up of a company formed and registered under the Eng. Companies' regulations ; such power is not inherent in the company.[1] Forfeitures made for the purpose of enabling a shareholder to retire when he is not entitled so to do are invalid,[2] and if the resolution declaring the forfeiture be a collusive one, passed for the benefit of the shareholder, there is no forfeiture, and the shareholder will be liable as a contributory.[3] The power of forfeiture given by the statute to the directors is given not to be exercised for the benefit of the shareholders, but for the benefit of the company and its creditors; it is only when payment cannot be obtained that the power of forfeiture is to be resorted to.[4] Forfeiture of shares *primâ facie* prevents any action by the company for past calls; to render the holder liable, there must be an enactment.[5]

Our Acts leave it to the directors to determine by by-law the mode of disposal of forfeited shares. The Railway Act[6] provides that they may sell them either at public auction or private sale or may pledge them as security for the company's indebtedness. If these forfeited shares are cancelled or are not reissued, it is clear, that is a reduction of capital stock;[7] but the Companies' Act clearly leaves the disposal of forfeited shares to the directors of the company.[8]

Act, 1862, does not relieve the former holder from his liability to be put on the list of contributories as a past member, (Bridger's case and Neill's case, 4 Ch., 266; Bath's case, 8 Ch. Div., 334); even although he may have transferred them before the forfeiture (Bridger's case and Neill's case, 4 Ch., 266); and even although the company's regulations are to the effect that forfeited shares are to be treated as extinguished. (Creyke's case, 5 Ch., 63.)

[1] Palmer Comp. Law, 103; Clarke v. Hart, 6 H. L. C., 633.

[2] Common v. McArthur, 29 Can. S. C. R., 239; Richmond's case, 4 K. & J., 305; *Esparts* Trading Co., 12 Ch. Div., 191; Hall's case, 5 Ch., 707.

[3] *Ibid*, at p. 245. [4] *Ibid*, per Sedgwick, J., at p. 245, 246.

[5] Stockin's case, 3 Ch., 415; Palmer Comp. Law, 104.

[6] 1888, sec. 83. [7] Morawetz, sec. 111.

A company having the power of forfeiture, declared forfeited a number of its £10 shares on which calls varying from £3 to £7 had been paid. In the course of proceedings for the reduction of the capital of the company, the directors proposed to change the forfeited £10 shares into £5 5s. shares, credited with £2 5s. as paid thereon and to offer these to the holders of ordinary shares at the price of 30s. per each reduced forfeited share.

Held, affirming the decision of Romer, J., that the company were not bound to treat the forfeited shares as if nothing had been paid upon them ; that this was not in effect an issue of shares at a discount, and that the article empowering the company to sell its forfeited shares was valid, and authorized the directors to deal with them in the way they proposed to do. (Morrison v. Trustees, Exer's. & Securities Ins. Corp. (Ltd.), C. A. [1898], W. N., 154. [8] Secs. 35 (*a*), and 41 R. S. C., 119.

The power of forfeiture is to be construed strictly.[1] A very little inaccuracy in complying with the conditions precedent to a forfeiture is as against the company as fatal as the greatest.[2] If the company rely upon the forfeiture as valid, they must show that all conditions precedent have been complied with; although if the shareholder lie by for a period sufficient to prescribe he may be precluded from asserting his claim.[3] But if it is the shareholder who relies upon it as against the company, who seek to say that it is invalid, this would be another matter.[4]

The company cannot make it a part of its constitution that where a shareholder sues the company or its directors, such shareholder shall forfeit his shares.[5] And a forfeiture which is invalid or oppressive may be restrained by injunction.[6]

The power of forfeiture for non-payment of calls is a power intended to be exercised only when the circumstances of the shareholder render its exercise expedient for the interests of the company. It is not a power to be exercised for the benefit of the shareholder. The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call, and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to.[7] If a forfeiture be

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[1] Clarke v. Hart, 6 H. L. C., 633; Palmer Comp. Law, 103.

[2] Buckly Com., 465; Johnson v. Lyttle's Iron Agency, 5 Ch. Div., 687; Garden Gully Co. v. McLister, 1 App. Cas., 39, 55.

[3] Buckly Comp., 465; Rule v. Jewell, 18 Ch. Div., 660.

[4] *Ibid*; a resolution by a new board of directors illegally appointed to forfeit stock for non-payment of calls is invalid; and the forfeiture will be restrained. (Christopher v. Noxon, 4 Ont., 672.

Action to have certain calls declared null and void and certain resolutions by the directors under which the plaintiff's stock was confiscated, declared illegal and to have the defendants ordered to restore the said stock and to register plaintiff as owner of it. The judgment turned on want of notice. The cashier wrote to plaintiff three times : 1st, that the bank will take legal proceedings to recover if he do not pay; 2nd, if you do not pay, the account will be sent to our attorneys for collection; 3rd, if you do not pay, the directors will serve themselves as regards you to the privileges which the law gives them. *Held*, insufficient. (Robertson v. Hochelaga Bank, 4 K. L. N., 314; S. C., 1881.)

[5] Hope v. International Financial Soc., 4 Ch. Div., 327.

[6] Johnson v. Lyttle's Iron Agency, 5 Ch. Div., 687; Goulton v. London Architectural Co., W. N., 1877, 141; Christopher v. Noxon, 4 O. R., 672.

[7] Stanhope's case, 1 Ch., 161, 169; Spackman v. Evans, L. R., 3 H. L., 171, 186, 230; Harris v. N. Devon. Ry., 20 Beav., 384; Esparto Trading Co., 12 Ch. Div., 191; Common v. McArthur, 29 Can. S. C. R., 245.

ultra vires it is not validated by lapse of time[1] unless acquiescence by every shareholder is shown for a number of years or the means of notice to all appear sufficient so as to raise a clear presumption of knowledge and acquiescence.[2]

The power to compromise does not authorize forfeiture[3] except in compromise of a dispute whether the party whose shares are to be forfeited, is a shareholder or not.[4] But it has been held that, independently of authority in the charter of a company, the directors have no power to cancel an allotment of shares[5] except in compromise of disputes relating to the validity of the shares.[6]

The Dominion Act provides[7] that if, after such demand or notice, as is prescribed by the letters patent or by the by-laws of the company, any call made upon any share is not paid within such time as, by such letters patent or by the by-laws, is limited in that behalf, the directors, in their discretion, by vote to that effect duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment is not made; and the same shall thereupon become the property of the company, and may be disposed of as, by the by-law of the company or otherwise, they prescribe.[8]

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[1] Spackman v. Evans, L. R., 3 H. L., 171; Lord Chelmsford, at p. 263.

[2] Brotherhood's case, 31 Beav., 365.

[3] Spackman v. Evans, L. R., 3 H. L., 171.

[4] Lord Belhaven's case, 12 L. T., 324; Dixon v. Evans, L. R., 5 H. L., 606; Bath's case, 8 Ch. Div., 334; Wheeler & Wilson Manuf. Co. v. Wilson, 6 O. R., 421, 426, citing Brice *ultra vires*, 2nd Edit., p. 383.

[5] Fletcher's case, 37 L. J. (ch.), 49; Clarke v. Hart, 6 H. L. C., 633.

[6] Wheeler & Wilson Manuf. Co. v. Wilson, 6 O. R., 421; see Kinney v. Plunkett, 26 Nova Scotia, 158; Livingstone v. Temperance Colonization Co., 17 Ont. A. R., 379.

[7] Sec. 41.

[8] To a declaration for calls under section 10 of Plaintiff's Charter, 12 Vic., ch. 166; defendant pleaded that by non-payment of said calls the shares became forfeited in pursuance of the Statute, and that defendant acquiesced in such forfeiture of which plaintiff had notice. *Held*, bad, for defendant could not thus forfeit his shares. (Ont. Mar. Ins. Co. v. Ireland, 5 U. C. C. P., 135. The shares of certain shareholders being forfeited by default to pay the calls thereon were offered for sale by auction. *Held*, that the omission to state in the notices of sale the amounts which had been paid on the shares in question did not affect the validity of the sale. (Gilman v. The Royal Can. Ins. Co., M. L. R., 1 S. C., 1); and *Held*, (incidentally) that it is not absolutely necessary that forfeited shares should be sold by public auction. A sale made in good faith and for the advantage of the company will not be disturbed, more especially when the person who owned the shares does not complain

Apart from special provisions, a company, having notice of the death of a member, cannot bind his estate by posting to him at his registered address a notice preliminary to forfeiting his shares for non-payment of calls due at his death.[1]

It is not in all cases necessary that the decision of the directors should be declared in a formal way; so where there had been no declaration of forfeiture sent to the shareholder but the directors had, in their balance sheet treated the shares as forfeited, the shareholder could not be held liable as a contributory at least on the application of the company, unless the Act so provides.[2]

If the company act irregularly in respect of formalities which are intended for the protection of the shareholder, and upon proceedings thus irregularly conducted declare a forfeiture of shares, they cannot afterwards turn round and claim to hold the shareholder liable as a contributory.[3] So if the charter or the statute governing the company provide that forfeiture is to be made by resolution of the directors, the Court will assume that such resolution was duly passed if the forfeiture is found properly entered in the books of the company, although there be no entry in the minutes of the resolution.[4]

18. Distinction between cancellation of shares, and cancellation of share certificate.—A distinction must be made between a cancella-

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thereof. (Gilman v. Robertson & The Royal Can. Ins. Co., M. L. R., 1 S. C., 11).

Where a trading company, incorporated by statute, became insolvent. *Held*, that one of the partners, being also a judgment creditor of the company, was entitled to a decree compelling the directors to make calls upon the stock of subscribers, notwithstanding a clause in the statute declaring the shares of defaulters should be forfeited, the forfeiture being cumulative to all other remedies to which a creditor was entitled. (Harris v. The Dry Dock Co., 7 Grant's Ch., 450).

[1] Allen v. Gold Reefs of West Africa [1899], W. U., 75; [1899], 2 Ch., 40.

[2] Webster's case, 32 L. J. (Ch.), 135. The directors passed a resolution, declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution, which had became forfeited by non-payment of a call, should be sold at a certain date, unless previously redeemed; and the resolution for sale of the stock nad not been acted upon by the company; in an action by a creditor against a shareholder on the forfeit list, it was held that the defendant was still liable as a shareholder. Smith v. Lynn, 3 U. C., E. & A., 201; See also Fraser v. Robertson, 13 U. C. C. P., 184; Nelles v. Second Mutual Bldg. Soc., 29 Grant's Ch.,399.

[3] Buckley Comp., 475.

[4] Knight's case, 2 Ch., 321; compare Smith v. Lyman, *supra*.

tion of shares or the release of a shareholder, and the cancellation of a certificate of shares. A certificate of shares is merely evidence that the holder is a shareholder, and to cancel it would not of itself release him from membership in the company.[1] If a certificate of shares should be issued illegally, or to a wrong person, it would not constitute the holder a shareholder, and its cancellation would merely destroy an invalid instrument which had been issued in the name of the corporation.[2]

19. Withdrawal of shareholder—Surrender of shares—Surrender as compromise.—The withdrawal of a shareholder would reduce the amount of the outstanding shares of the company to that extent. Whether it would also reduce the amount of the company's assets or capital would depend upon circumstances. The cancellation of shares that have not been fully paid-up would deprive the corporation of the right to call upon the holder who was discharged to contribute the amount of the shares to the company's capital. This liability of a shareholder to contribute his proportionate part of capital is for the common benefit of all shareholders. It constitutes a portion of the company's capital or assets, and is pledged to creditors as security for their claims. To release a subscriber or holder of shares which have not been fully paid-up would therefore necessarily reduce the assets or capital of the corporation, and would be in violation of the rights both of creditors and of the remaining members.[3] Hence it has been uniformly held that, unless a company has authority to do so by its charter it cannot cancel shares which have been validly issued, and as to which no question of forfeiture arises.[4]

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[1] Morawetz, sec. 111. [2] *Ibid.*

[3] Morawetz, sec. 111; Gill v. Balis, 72 Mo., 424; Bedford R. R. Co. v. Bowser, 48 Pa. St., 29; In *re* Wallace Huestis Grey Stone Co.; Russell's Nova Scotia Equity Decis., 1873-1882, p. 461.

[4] Fletcher's case, 37 L. J. (Ch.), 49; Livingstone v. Temperance Colonization Soc., 17 Ont. A. R., 379; Green's, Brice, *ultra vires*, 2nd Edit., p. 189 *et seq.*; Ross v. Fiset, S. C., 1882, 8 Q. L. R., 251; Ross v. Dusablon, Q. B., 1883, 10 Q. L.R., 74; Common v. McArthur, 29 Can. S. C. R., at p. 245.

Where a company's charter provided that any shareholder might surrender his shares within a time limited, and that the said shares should be forfeited, and his liability in respect thereof should cease, it was held, in winding-up proceedings that those who had thus surrendered their shares were not liable as contributories, even to the extent of the ten per cent., which they ought to have paid at the time of subscription but had not. (In

It is only where there is a *bonâ fide* dispute as to whether a person is a shareholder or not, that directors can, by virtue of their power to compromise disputes, relieve the person of his shares and cancel the subscription.[1] The compromise must be based on grounds which would enable the Courts to decree such relief, such as, for example, fraud or misrepresentation.[2] As the Court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation *pro tanto* of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of and by cancelling such shares of its capital stock held by the claimant;[3] but if the claim is in connection with certain shares, the company would have power to compromise and accept their surrender.[4]

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re Ontario Express & Transportation Co., 24 O. R., 216; reversed in appeal upon other grounds, 21 Ont. A. R., 646).

Power was given to any shareholder of the company to surrender his stock in writing within a certain time. A shareholder desiring to surrender his stock transferred it within the time by an ordinary assignment to the president "in trust," both intending the transfer to operate as a surrender; *Held*, a valid surrender. (Harte v. Ontario Express Co., 24 O. R., 340).

[1] Bath's case, 8 Ch. Div., 334; Dixon v. Evans, L. R. 5 H. L., 606; Wheeler & Wilson Manuf. Co. v. Wilson, 6 O. R., 421; Livingstone v. Temperance Colonization Soc., 17 Ont. A. R., 379; Green's-Brice *ultra vires*, 2nd Edit., p. 189; In *re* Wallace Huestis Grey Stone Co., Russell's Nova Scotia Equity Decis., 1873-1882, p. 461.

[2] Livingstone v. Temperance Colonization Soc., 17 Ont. A. R., 379; Wheeler, etc., Manuf. Co. v. Wilson, 6 O. R., 421.

In *re* Bath's case (8 Ch. Div., 334), the Court of Appeal held that although the shares were really valid, yet a *bona fide* question of their legality having been raised, and an agreement for their cancellation having been made in order to settle the question, the cancellation was good as between the shareholder and the company.

[3] Livingstone v. Temperance Colonization Society, *supra*.

[4] The defendant, an original stockholder in a joint stock company, his stock being fully paid-up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement, defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threatened legal proceedings to compel them to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called and a

But in regard to the surrender of shares, each case as it arises should be decided upon its own merits.[1] For instance, it has been held that where the company's articles of association empowered it to increase its capital by the issue of new shares, which might be issued with such preferential rights as to payment of dividends or repayment of capital, and generally on such terms as the company should by special resolution determine; and the directors of the company were empowered to accept surrenders of shares from any member of the company upon such terms as should be agreed upon; then the issue and allotment of preference shares in consideration of the *bonâ fide* surrender of fully paid-up shares were not *ultra vires* of the company.[2]

20. Director may accept a transfer of shares to himself.—Whilst, in the absence of special authority, it is not competent for directors to accept on behalf of a company the surrender of shares held in the company, it is as competent for the directors of a company, as for anybody else, to accept shares in the company from such shareholders as may be willing to transfer them in the ordinary way. Consequently, an agreement between the directors and some of the shareholders of a company to the effect that the latter shall relinquish their shares and transfer them to the directors, is not *ultra vires*, or in any way illegal, if the agreement is with the directors as individuals, and not with them as representing the company.[3]

21. Reduction of capital by transfer to "dummies"—Liability of directors—English law.—Another method of illegally reducing the available capital of a company as towards its creditors, is the transfer of unpaid shares by their holders, upon the approaching insolvency

by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff after such cancellation, issued a writ and obtained a judgment against the company, and then sued the defendant for the amount of the new stock unpaid by him. Held, that the plaintiff could not recover; that there was power to cancel the stock; that the cancellation was duly made; and that the defendant was not guilty of any laches. (Wheeler & Wilson Manuf. Co. v. Wilson, 6 O. R., 421.)

[1] In *re* Dronfield Silkstone Co., 17 Ch. Div., 76, 85.

[2] Eichbaum v. City of Chicago Grain Elevators (1891), 3 Ch., 459.

[3] Lindley Comp., 521-522; Haddon v. Ayers, 1 E. & E., 118; distinguish *Re* Union Fire Ins. Co., McCord's case, 21 O. R., 264, *infra*, p. 110.

of the company, to parties who are mere dummies so far as the creditors are concerned, owing to their notorious inability to meet the demands made upon them for the amount unpaid on their shares. The Dominion Act, while leaving the transfer of shares almost wholly within the discretion of the directors,[1] places certain restrictions upon the latter, one of them being that no share shall be transferable until all previous calls thereon are fully paid in,[2] and another rendering directors personally liable for allowing the transfer of shares not fully paid to parties who have no apparent means of meeting the calls which may be made of the unpaid portion of the shares held by them.[3] A director may, however, evade all responsibility for such a transfer by resorting to certain formalities provided by the Act[4] whereby he publicly renounces all connection with such transfer. But if shares are transferred to a pauper or man of straw, who is misdescribed, so that the directors are imposed upon and induced to make no enquiries about him, the company can, on ascertaining the facts, repudiate the transfer and place the transferor on the list of contributories.[5] The British Columbia Act declares a transfer to escape liability for a nominal or no consideration or to a servant of the transferor shall be deemed fraudulent and need not be recognized on the winding-up.[6] The English law allows great latitude in respect of the transfer of shares. De Pass's case ruled that when the transfer is an absolute out-and-out disposal of the property even though done for the express purpose of escaping liability,[7] the transferee and not the transferor will be the contributory, but this case is difficult to reconcile with others, and is generally admitted to be unsatisfactory. If the transaction is merely a colourable one, the transferor will be held liable as a contributory.[8]

All transfers of stock by a stockholder to the company, which have the effect of reducing the capital stock of the company, are void[9] and no valid distinction can be drawn between cases where the object of the transfer is to traffic in shares on the part of the company and where the intention is simply to cancel certain shares. In either case

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[1] Secs. 49, 52. [2] Sec. 51. [3] Sec. 49. [4] Sec. 49.

[5] Lindley Comp., 827; Payne's case, 9 Eq., 223; *Ex parte* Kintrae, 5 Ch., 95.

[6] R. S. B. C., ch. 44, sec. 35.

[7] 4 De G. & J., 544; Lindley Comp., 826.

[8] Hyam's case, 1 D. F. & J., 75; Budd's case, 3 D. F. & J., 297; 30 Beav., 143.

[9] Ross v. Worthington, 5 Legal News, 140.

(no special power to do so being given to the company) the transfer is illegal, but whether the liability upon the shares is transferred, or not, depends upon the knowledge or ignorance of the prior holder.[1]

22. Devices to accomplish reduction of capital.—We have already dealt with the question of illegal reduction of capital stock by the issue of shares at a discount,[2] but other expedients have sometimes been adopted to avoid this difficulty, while attaining the same result. Generally speaking, any unusual liberality on the part of a company in dealing with intending shareholders is regarded with suspicion.

Thus, while for the purpose of issuing its capital the payment of brokerage is *intra vires* of a company and unimpeachable, where the services of a broker are reasonably necessary and the broker properly employed and the commission (of so much per share) is a fair and just remuneration for the services rendered,[3] yet where the commission takes the form of a bribe or improper payment, and where the amount is wholly disproportionate to the services rendered by the broker, where, in fact, it is a mere colourable discount, this will be held an improper application of capital.[4]

A company will not be permitted to write off the discount on shares illegally issued at a discount, under the general power that a company has of reducing its capital.[5]

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[1] *Re* Union Fire Ins. Co., McCord's case, 21 O. R., 266.

[2] See *supra*, pp. 69, *et seq.*; Cree v. Sommervail, 4 App. Cas., 648; *Re* Royal Brit. Bank, Nicol's case, 3 De G. & J., 387; *Re* Central Bank, J. D. Henderson's case, 17 O. R., 110.

The Manager of an insurance company, authorized by the directors, with the moneys of the company purchased from the holder thereof, who was ignorant of the object intended, a number of partly paid-up shares of the company on which calls were in arrear, for the purpose of cancellation, taking the transfer to himself as "manager in trust." The company had no power to deal in its own stock. The shares were never cancelled, the dividends thereon being credited to the company. Held, in liquidation proceedings, that in the absence of knowledge by the transferor that the purchase was for an illegal purpose, the manager was properly placed on the list of contributories. (*Re* Union Fire Insurance Co., McCord's case, 21 O. R., 264.)

[3] Metropolitan Coal Consumers Association v. Scrimgeour (1895), 2 Q. B., 604.

[4] In *re* Faure Electric Accumulator Co., 40 Ch. Div., 141; Lydney & Wigpool Iron Ore Co. v. Bird, 33 Ch. Div., 85.

[5] *Re* New Chile Gold Co., 38 Ch. Div., 475.

23. Purchase of shares on stock exchange through agency of a broker—" Bucket Shop " transactions.—Where a person instructs his broker to buy shares for him on the Stock Exchange, without any intention of himself taking delivery of the shares, but the broker does take delivery, and pays the full price by means of loans raised on security of the shares, and resells when instructed, receiving a percentage on each transaction as commission, any profit or loss thereon being credited or debited to the principal, such a transaction is sometimes spoken of as " gambling on the stock exchange;" but it does not follow that the transaction involves a gaming contract.[1] A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a profit by its re-sale;[2] and none the less so where the transactions are carried on by an association or syndicate formed for the purpose.[3] In Canada the main point in determining the validity or otherwise, of such transactions, is that of delivery of the shares. In 1888 the Dominion Parliament passed an Act to suppress " bucket shops," [4] and section 1 of the Act provided that " Everyone who . . . . with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking . . . . makes . . . . any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock . . . .in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery; and everyone who acts, aids, or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."

A proviso was, however, added in the following terms, " But the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof."

But apart from this proviso, where a real contract of purchase has been made and carried out by a broker on behalf of a principal,

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[1] Forget v. Ostigny, P. C. (1895), App. Cas., 318; 11 R., 474.

[2] *Ibid*, and Laughton v. Griffin, P. C. (1895) App. Cas., 104; 11 R., 355.

[3] Laughton v. Griffin, *supra*.

[4] 51 Vict., ch. 42.

delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.[1]

24. Conspiring to induce the purchase of shares.—An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a *bonâ fide* market for its shares, and that the shares were at a real premium, is an illegal transaction, and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares.[2] In Canada this offence is now dealt with in sec. 394 of the Criminal Code, and the penalty may extend to seven years' imprisonment.

[1] Forget v. Ostigny, 11 R., at p. 479.

[2] Scott v. Brown Doering, McNab & Co. (1892), 2 Q. B., 724.

CHAPTER VI.

SHAREHOLDERS.

1. The membership in a company. A question of contract. When complete.
2. Position of charter members. Liability for calls. Prescription.
3. Position of one who agrees to subscribe for stock before incorporation; but not mentioned in the charter. Contributory.
4. Application for shares.
5. Subscription for stock in company prohibited by its charter from commencing business till a certain percentage of stock is taken up. "Commencing operations."
6. Subscription for stock in company before organization. Formation of contract. Allotment notice.
7. Subscription for stocx in a company completely formed and organized.
8. Implied agreements to take shares.
9. Liability of director for qualification shares. Estoppel. Subscription to shares in trust by director.
10. Liability of agent employed by the company on condition of his taking shares, or taking shares on condition of appointment.
11. Consent necessary to make a person liable as shareholder.
12. Registration of person as shareholder is only *prima facie* evidence that he is such. Difference between Canadian and English acts.
13. Notice of allotment.
14. Not necessary to number and ear-mark shares allotted.
15. Subscription for stock in a fictitious name. Liability on same.
16. Distinction between subscription under a fictitious name and fradulent allotment to persons who never contracted to take the shares alloted, or who took them for an illegal *cestui que trust*.
17. Liability of subscriber when company has not fulfilled the requirements of its chartfr. Defences to calls.
18. *Ultra vires* issue of new capital liability of holder of. Acquiescence and Estoppel.
19. Subscription to stock through agent.
20. Misrepresentation in prospectus, etc., a ground of relief of shareholder.
21. Misrepresentations by directors as ground of action against the company.
22. How right to repudiate shares may be lost.
23. Shareholder may be eligilbe to be appointed liquidator.

1. Membership in a company a question of contract—When complete.—The general principles of law applicable to contracts must govern the question of membership in a joint stock company.[1]

[1] Magog Textile & Print Co. v. Price, 14 Can. S. C. R., at p. 671. Per Ritchie, C.J.; Nicol's case, 29 C. D., 421.

It is important to distinguish between the contract of membership actually existing among the shareholders or members of a corporation, and a contract to become a shareholder at a future time; and a contract to become a shareholder at a future time must again be distinguished from a contract to purchase shares, which have already been issued.[1]

As already stated, the Dominion Companies' Act[2] and the Acts of most of the Provinces provide for incorporation by means of Letters Patent. The applicants are mentioned in the Letters Patent as having subscribed for shares; and so soon as the charter issues, they become shareholders. All others become shareholders by application to the company for shares and an allotment, which is the company's acceptance, completes the contract to take shares. When incorporation takes place by the registration of a memorandum of association, those who sign the memorandum are the first shareholders, and the subsequent shareholders are created as before stated. The terms of the memorandum of association or of the charter and by-laws of companies incorporated by Letters Patent are conditions of the contract.

Under the British Columbia Act those who sign the memorandum of association are deemed to have agreed to become members, and upon registration of the company shall be entered as members on the register.[3] They become shareholders *ipso facto* on the incorporation of the company and liable on the shares they have subscribed for.[4] The contract which exists among the members of a company, and which constitutes them a corporate association on the registration of the company, gives the contracting parties the status of shareholders; it invests them with the continuing rights of shareholders, together with the corresponding liabilities; and the performance of this contract will always be specifically enforced, though a failure to perform rarely presents a ground for an action for damages.[5] On the other hand, under the American system, as stated by Morawetz, a contract to become shareholder, or to subscribe for shares in a company at a future day, does not give the contracting party the status

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[1] Morawetz, sec. 46.

[2] *Supra*, p. 31, chap. 3.

[3] R. S. B. C., ch. 44, sec. 30.

[4] And see as to English Acts which are similar; Palmer Comp. Law, 68; 16 Ont. A. R., at p. 512, per Burton, J.A.

[5] Morawetz, sec. 46.

of shareholder until after the contract has been fully executed by taking the shares or actually subscribing upon the books; and, upon a failure to perform the contract, the company would be entitled to recover only the damages suffered,—that is, the difference between the amount which the defendant agreed to pay or contribute on account of the shares, and the value of an equal number of shares in the market.[1] Under the Canadian Companies' Acts, which provide for incorporation by the issue of letters patent, the applicants are named in the letters patent as the first shareholders, and are bound to have subscribed for one-half of the authorized capital. From among these shareholders the provisional directors are named. Subscriptions to stock are offers by the subscribers to become shareholders, and the contract of membership in the company is only complete by the acceptance which is expressed by allotting shares to the subscribers.

2. Position of charter members—Liability for calls—Prescription.—So far as the charter members of the company are concerned, they hold themselves out to the world as the shareholders in and subscribers to stock in the company at the time of its incorporation,[2] and if the amount of the holding of any one of them has not been specified, such an one would be liable in respect of one share at least.[3] The charter members are not in the position of persons having a mere inchoate right to receive shares, but are actual shareholders and members of the company by virtue of the charter in respect of the holding recognized by that instrument,[4] they are therefore liable for calls by the liquidator upon the stock so held without any further act of the directors in allotting such stock, or giving them notice of allotment,[5] and so long as such members take no proceedings to relieve themselves from liability, a mere statement by some of them to certain directors of the company that they will not accept their stock, will not relieve them from their liability as shareholders,[6] nor will the failure of the directors to enforce payment of the shares so relieve them.[7] Prescrip-

[1] *Ibid.*

[2] Per Osler, J., in Boultbee's case, 16 Ont. A. R., at p. 517.

[3] Per Osler, J., in *Re* Haggart Bros. Mfg. Co., 19 Ont. A. R., at p. 587.

[4] *Ibid*, at p. 588.

[5] *Ibid*, at p. 587; In *re* London Speaker Printing Co., 16 Ont. A. R., 508.

[6] In *re* Haggart Bros. Manuf. Co., 19 Ont. A. R., 582.

[7] *Ibid*; and see In *re* London Speaker Printing Co., per Burton, J.A., 16 Ont. A. R., p. 508.

tion does not begin to run against such members until a call has been made by the directors, for ordinarily there is no liability to pay for shares until a call is made.[1]

3. Position of one who agrees to subscribe for stock before incorporation, but not mentioned in the charter—Contributory.—In regard to those who agree to subscribe for stock in a company before incorporation and who are not mentioned in the charter as incorporators, their position may be regarded, 1st. as towards the company; 2nd. as towards the creditors under the winding-up acts. As regards their position towards the company, there can be no common law liability, as there can be no privity of contract between them and a company which was not in existence when they became subscribers,[2] for, as above explained, this contract has not been completed by an acceptance. Their's is at most a mere proposition to take stock, and not a binding promise to take and pay,[3] and certainly does not constitute a contract which could be enforced by them. They could not by their offer oblige the provisional directors to allot any of the shares to them.[4] It may now be safely laid down as our law, that a subscriber to stock in a company before incorporation, whose name has not been inserted in the letters patent nor appeared in the notice applying therefor, and who never received notice of allotment, nor paid calls nor did any other thing after incorporation which might constitute him a member, is not liable in respect of such stock whether he has repudiated or recalled his subscription or not.[5] And even if the

[1] *Ibid.*

[2] In *re* Northumberland Avenue Hotel Co., 33 Ch. Div., 16; Thames Nav. Co. v. Reid, 13 Ont. A. R., 303.

[3] Tessier, J., in Arless v. Belmont Manuf. Co., M. L. R. 1 Q. B., 340; Henry, J., in Nasmith v. Manning, 5 Can. S. C. R., 441.

[4] Halifax Street Carette Co. v. McManus, 27 Nova Scotia, at p. 177; Per Henry, J., in Nasmith v. Manning, 5 Can. S. C. R., 441.

[5] Magog Textile & Print. Co. v. Price, 14 Can. S. C. R., 664; Union Nav. Co. v. Couillard, 21 L. C. J., 71; Rascony v. Union Nav. Co., 24 L. C. J., 133; Arless v. The Belmont Manuf. Co., M. L. R. 1 Q. B., 340; Nasmith v. Manning, 5 Can. S. C. R., 417; Halifax Street Carette Co. v. McManus, 27 Nova Scotia, 173; In *re* London Speaker Printing Co.; Pearce's case, 16 Ont. A. R., 508; Boultbee's case, *ibid*; Rosedale Pressed Brick, etc., Co., Foster's case, 19 Can L. T. (1899), 311.

This view of the law sometimes leads to considerable hardship as regards those whose names are mentioned in the letters patent. For instance, the subscriber's name has been inserted in the letters patent, but fraudulently, and without his consent, he will not be liable.[1] There would

chief promotor of a company after leading others to become incorporated members owing to the large amount of stock he has himelf subscribed to, may withdraw and leave those he may have induced to join to bear the losses of the company.

This happened in the following case and the circumstances were then even less favorable to the defendant:—The defendant with others agreed to apply for letters patent for a company for manufacturing purposes, under R. S. O., 1887, ch. 150, and signed a stock list subscribing for certain shares, and agreeing to pay therefor as provided by the Act and the by-laws of the company. Subsequently a petition purporting to be by thirteen of the subscribers, but omitting the defendant's name, was presented to the Lieutenant-Governor of Ontario for a patent incorporating the petitioners and such others as might become shareholders in the company thereby created a body corporate, etc. The stock list, however, subscribed by the defendant appeared to have been filed in the office of the Secretary of State. The petitioners were accordingly incorporated, "and each and all such other person or persons as now is, or are, or shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act." The defendant did not subsequently to the incorporation subscribe for stock, but on the contrary repudiated his former subscription. Held, that the defendant was not a stockholder, and was, therefore, not liable for calls on the shares which he purported to have subscribed for. (Tilsonburg Agricultural Manuf. Co. v. Goodrich, 8 O. R., 565.)

[1] Banque d'Hochelaga v. Murray, 15 App. Cas., 414; M. L. R. 2 S. C., 201.

A number of persons, among whom was C, agreed to form a company; but at a subsequent meeting in which C took part, it was resolved that as they could not obtain an expected subsidy from the government they would not go on; later some of those interested applied for letters patent and a company was formed, C's name being inserted in the letters patent. C never attended any meeting or took any part in the affairs of the company, and the directors of the company afterwards passed a resolution to exonerate those who had signed the original paper, but who had refused to become shareholders when it was found that no subsidy could be obtained. H, a creditor of the company, obtained judgment against it, and having discussed the company, sued C as a contributory for the amount of his unpaid shares. Held, reversing the judgment of the Superior Court, that C was not liable. (Cantin v. Banque d'Hochelaga, Q. B. 1880, 32 L. C. J., 22.)

Where it appeared that the defendant and others had been incorporated by letters patent issued under the Great Seal of the Province, which letters had been obtained by a fraudulent misrepresentation that the defendant and others had petitioned for the same, and a writ of *scire facias* was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to shew cause why the letters patent should not be declared fraudulent, null and void, "at least in so far as the said defendants were concerned." Held, under C. C. P., arts. 1034 and 1035, that the Code does not authorize a partial annulment of letters patent as had appear to be nothing in our statutory law which would render subscribers before incorporation liable as contributories under the foregoing circumstances.[1]

Of course, the position of a shareholder upon the winding-up of a company towards its creditors is different to his position toward the company. After the winding-up order there are only creditors and contributories before the Court, and no corporation; and shareholders cannot then raise defences which would be available against the corporation as rescission of the contract respecting the shares is then impossible.[2] The description of a contributory under the Winding-up Act does not seem to contemplate that anyone but a shareholder or member of a company shall be placed upon the list, although this would probably be held to include a person who had entered into a binding contract with the company to take shares.[3] The persons mentioned in the Winding-up Act as those who are liable to be placed upon the list of contributories are the shareholders and members of the company. This would include the executors of a deceased shareholder.[4] The subscriber before incorporation is not a member of the company within the meaning of that term as used in section 44 and following of the Dominion Winding-up Act.[5] Sec. 2 (*e*) of the Dominion Companies' Act, R.S.C., ch. 119, describes a shareholder as "every subscriber to or holder of stock in the company, and includes the personal representatives of the shareholder." The Act contains no definition of the term "subscriber." A "sub-

been directed by the Court of Queen's Bench, that they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect. (Banque d'Hochelaga v. Murray, P. C. 1890, 15 App. Cas., 414.)

[1] Pearce's case; Boultbee's case, 16 Ont. App., 508.

[2] *Re* Central Bank of Canada, 25 Can. Law Journal, 238, confirmed in appeal, 18 Ont. A. R., 209.

[3] Pearce's case, 16 Ont. A. R., at p. 513, per Burton, J.A.

[4] *Re* St. John Bld'g Sy., Haye's case, 18 Can. L. T., 346.

[5] R. S. C., ch. 129: "If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purpose of this act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act; and the amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid."

scriber to stock in the company" must mean one bound by a contract with the company, unless the Act has given it a wider meaning, and this it would appear not to have done.[1] It is possible that the subscription form which the subscriber signs may be so worded as to constitute an offer by the company, in which case the subscription is an acceptance. The liability of the subscriber would thus depend on the terms of his subscription, but it is submitted that a mere subscription is not sufficient, and the wording of the Act is misleading.

The Act attempts to protect creditors by the publicity required by the Act to be given as regards the proposed amount of the capital stock, the number and amount of the shares and the names and addresses, etc., of each of the applicants for incorporation.[2] In practice the applicants are frequently merely promotors who transfer their shares immediately after the letters patent are granted. The public have no notice of any other subscribers, nor do any others hold themselves out as responsible. And it is to be noted that if the letters patent make no other definite provision, the stock of the company *so far as it is not allotted thereby*, shall be allotted when, and as the directors by by-law prescribe.[3] Those dealing with the company should not rely on the security of any others than the actual shareholders at the time of the transaction.

4. Application for shares.—It is not doubted in our Courts that an application for shares may be prepared and signed previous to the formation of the company and entrusted to a promotor, broker or other person interested in the company to be made use of or acted upon afterwards. All that has been decided is that a mere agreement to subscribe to stock in a company to be formed cannot, by itself, and without more, constitute the subscriber a member of the company.[4]

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[1] Per Osler, J., in *re* London Speaker Co., 16 Ont., A. R., at p. 516. In Coventry's case (1891, 1 Ch., at p. 211), Bowen, L. J., said: "Sec. 23 of the Companies' Act, 1862, says that every person who has agreed to become a member of a company, and whose name is entered on the register of members, shall be deemed to be a member of the company; but we do not really require that section to tell us that the law of contract is the law we have to apply."

[2] Sec. 4 (*d*), (*e*), (*f*), ch. 119, R. S. C.

[3] Sec. 26.

[4] See per Osler, J.A., In *re* London Speaker Printing Co., 16 Ont. A. R., at pp. 517 and 518.

5. Subscription for stock in company prohibited by its charter from commencing business till a certain percentage of stock is taken up—" Commencing operations."—In regard to companies not subject to the Companies' Acts, such as railroad companies, it is frequently the case that the company obtains its charter, but is not allowed to start operations until a certain amount is subscribed to the capital stock and the company is otherwise organized. For the purpose of obtaining subscriptions to the stock a subscription book or stock list is opened. The position of those who sign this provisional stock sheet has been held to be the same as those who subscribe to shares in a joint stock company not yet incorporated, because, although there may be a charter, yet the company cannot commence operations until the requirements of the charter are complied with, and this may never happen. The charter is merely a franchise conferring the power to form a company.[1] Subscription to such a provisional stock list is said to be, at the most, a unilateral contract, if one at all, and one which could not be enforced by the party subscribing.[2]

Where the charter prohibits the company from commencing operations until a certain percentage of stock is subscribed and a certain amount paid up, the provisional directors have the right to make calls on the stock subscribed for and do all acts for and in the name of the company, within their power, so long as these acts do not amount to " commencing operations." [3]

6. Subscription for stock in company before organization—Formation of contract—Allotment—Notice.—In the case of subscriptions conditional upon the formation or organization of such a company, it has been a difficult question to determine what action if any on the part of the company is necessary to complete the contract. The leading case in this country on the point is Nasmith v. Manning.[4] Manning was induced to sign the stock book of a chartered railway company incorporated but not yet organized. This book was headed by an agreement by the subscribers to become shareholders for the amount set opposite their names, and upon allotment by the company they covenanted to pay ten per centum of the amount of the said

[1] See Nasmith v. Manning, 5 Can. S. C. R., 417.

[2] *Ibid*, per Henry, J., at p. 441.

[3] No. Sydney, etc., Co. v. Greener, 31 N. S. R., 41.

[4] 5 Can. S. C. R., 417.

shares and all future calls. The company upon its organization passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for Manning, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice signed by the secretary, in a daily paper, notifying subscribers to the capital stock of the railway company, that the first call of ten per cent. on the stock was required to be paid immediately to them. Manning never called for or received his certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of the allotment having been made to him. The Supreme Court held, affirming the Ontario Court of Appeal, that the document signed by Manning was only an application for shares, and that it was necessary for the company to have shown notice within a reasonable time of the allotment of shares to Manning, and no notice whatever of such allotment had been proved. From this judgment, Ritchie, C.J., and Gwynne, J., dissented, Strong, J., was absent, and Taschereau, J., stated that he felt great embarrassment in coming to a conclusion, and had vacillated a good deal about it.

The question in this case would appear to differ materially from the case of a subscription to shares in a company about to be incorporated. In the latter case there is no company at the time with which to contract, while in the case under consideration their charter had been granted,[1] and the provisional directors could offer a binding contract for shares in the company, conditioned of course, upon the organization of the company, which was dependent upon the subscription of the required amount of capital. Henry, J., held (Fournier, J., concurring) that the document signed by Manning formed but an offer on his part to accept 50 shares of the company's stock when allotted to him. Taschereau, J., also seemed to consider that this was but an offer to take shares, the acceptance of which by the company needing to be notified to Manning.

Where a party offers to subscribe to stock in a company about to be formed, owing to the chances of over-subscription, the company must always have the option of allotting such stock.[2]

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[1] When a company is incorporated by special Act of Parliament, by charter or by registration, the moment of its formation is coincident with the date of its incorporation. (Lindley Comp., 18.)

[2] European & N. A. Ry. Co. v. MacLeod, 3 Pugs., 3; Lindley, p. 15; Lake Superior Nav. Co. v. Morrison, 22 U. C. C. P., p. 220; Bolt & Iron Co., Hovenden's case, 10 Ont. P. R., 434.

The question really turns upon the form of subscription. Until there is a meeting of the minds of both parties no binding contract exists, just as in any other contract.[1] Even in England it is admitted that where the offer by the company precedes the application, the application is in truth an acceptance of a prior offer and an allotment is not necessary to complete the contract, although it may be necessary to constitute the applicant an actual shareholder.[2] But the mode of dealing with subscribers in that country is different to that which ordinarily prevails here. For some years the popularity of joint stock companies as an investment was so great that it was sufficient to announce that a promising company was being organized, to insure more applications for stock than were wanted. The consequence is that there, allotment and communication thereof to the applicant is the ordinary evidence of acceptance.[3]

It is now well settled in England that, in order to make the contract to take up shares completely binding, there must be the application, the allotment of shares to the applicant, and a communication to him of the notice of allotment.[4] Such is substantially the law in Canada,[5] and certainly where the aplication is made before the company is incorporated.[6]

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[1] Cook v. Oxley, 3 T. R., 653; Routledge v. Grant, 4 Bing., 660.

[2] See Adam's case, 13 Eq., 474; Lindley Comp., 15; Palmer Comp. Law, 71.

[3] Ramsgate, etc. v. Montifiore, L. R. 1 Exch., 109; Hebb's case, L. R., 4 Eq., 9; Gunn's case, L. R. 3 Ch., 40; Pellatt's case, L. R. 2 Ch., 527; Household, etc., Co. v. Grant, L. R. 4 Ex. Div., 216; Ward's case, L. R. 10 Eq., 659.

[4] In *re* Scottish Petroleum Co., 23 Ch. Div., 413, 430.

[5] A person who has signed an application for shares in a company does not become a shareholder till the company has accepted his application and assigned him the shares; and a letter from the secretary of the company informing the applicant that the shares demanded have been assigned to him, there being nothing on record to show that this was authorized by the company, and even the entry of the applicant's name in the books of the company as a shareholder, is not sufficient, in the absence of proof of the assignment (allotment) of the shares, to render the applicant liable as a shareholder. (Common v. Mathews, R. J. Q. 8 Q. B., 138 (1898).

[6] See Boultbee's case, 16 Ont. A. R., per Burton, J.A., at p. 519, citing In *re* Scottish Petroleum Co., *supra*; Nasmith v. Manning, 5 Can. S. C. R., 417; Pearce's case, 16 Ont. A. R., at p. 515.

In *re* Queen City Refining Co. (10 O. R., 264) it was held that the subscriber to stock of a company about to be incorporated under the Ontario Joint Stock Companies' Act, was liable as a contributory upon the winding-up of the company, although no stock had been allotted to him, for the Act

But as stated by Sir Nathanial Lindley in his book on Companies,[1] "Allotment and notice are, in truth, only material where there is no agreement without them. In the ordinary case of an application for shares, there is no agreement in the absence of allotment and notice of it; but there may well be a binding agreement without either of them." In this country it is well known that it is frequently necessary for the company to canvass for subscriptions to its stock. In a leading case decided in New Brunswick,[2] Sir Wm. Ritchie, then Chief Justice of New Brunswick, said: "In the English cases, the application has come from persons for stock; the contract was unilateral until there had been an acceptance by the company; here there was the very reverse; the company sent forth their agents to offer the shares and when the defendant accepted he became a subscriber and a shareholder (if there is any distinction)." And in an Ontario case,[3] Chief Justice Hagarty remarked as follows: "If there had been applications to the directors for shares, offering to take stock, and, as often happened, to an amount exceeding the number to be taken, we can easily see how important the question of allotment would be. A man may signify his readiness to take stock, and desire to have a certain number of shares, and unless some shares were allotted to him, it could not be said that he was the holder of any shares. In the case before us the proceeding was of a totally different character. Parties were canvassed to take stock, and by the act of subscription they actually subscribed for a specific number of shares, and expressly bound themselves to make payments thereon, as might be required by the Board of Directors. Little over half the capital stock was subscribed for, and no question did or could arise from the course adopted as to any act to be done by the directors to allot any number of shares." Again, Mr. Justice Loranger in the Court of

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comtemplates two modes of acquiring stock, one by subscription and the other by allotment. But in a later case it was pointed out that the learned judge who decided the above case was probably under the impression that the subscription was subsequent to the issue of tne letters patent, and this view was strengthened by a later judgment in which the same learned judge referred to his former decision as supporting this contention. (Per Burton, J., in *re* London Speaker Printing Co., 16 Ont. A. R., at p. 513, and per Osler, J., *ibid*, p. 518.)

[1] Pp. 761 and 762.

[2] European Ry. Co. v. MacLeod, 3 Pugs. R., at p. 40.

[3] Lake Superior Nav. Co. v. Morrison, 22 U. C. C. P., at p. 220.

Review, in delivering judgment in Rascony Woollen & Cotton Mfg. Co. v. Desmarais,[1] said: "allotment is not usual in this country, where the procedure is quite different to that adopted in England." [2]

In each case it becomes a question of interpreting the form of the application, and deciding whether or not there is a contract by accepting certain shares or merely an offer to take stock. This is exemplified in the leading case of Nasmith v. Manning, where the grounds of the decision as stated by Henry, J.,[3] were that the signing of the document by Manning applying for shares was simply an offer to take stock in a company not then but subsequently to be organized, and must be looked upon as "very different from the signing of the stock book of a company already in existence." Burton, J., commenting on this decision, remarked that this case is not necessarily applicable to cases arising under the Winding-up Acts,[4] for there it was an execution creditor who was pursuing his statutory remedy and seeking to have execution issued against one of the partners, and it was necessary to show that the defendant was a shareholder in the strictest sense of the term.[5]

If the procedure does not take the form of a proposal by the company, the subscriber will not usually be regarded as a shareholder or contributory in the winding-up, even where he may have signed a subscription form, unless the company has made some recognition of his position as a shareholder, showing that it has accepted his application.[6] It might be different under the old Ontario Joint Stock

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[1] M. L. R. 2 S. C., 382; and see Alley v. Trenholme, 3 R. J. O. (S. C.), 163.

[2] Referring to Nasmith v. Manning, 5 Can. S. C. R., 417.

[3] At pp. 440 and 441.

[4] Per Burton, J.A., In *re* Standard Fire Ins. Co., Kelly's case, 12 Ont. A. R., at p. 487.

[5] *Ibid.*

[6] In *re* Geological Society of Ontario, 16 Ont. A. R., 543; Carlisle v. Saginaw Valley Ry. Co., 27 Mich., 315; Parker v. Northern Central R. Co., 33 Mich., 23; Northern Central Ry. Co. v. Eslow, 40 Mich., 422.

C., after the incorporation of a company under the Ontario Joint Stock Companies' Act, R. S. O. (1877), ch. 150, signed a share subscription book with the following heading: "We, the undersigned, do hereby severally on behalf of ourselves, our and each of our several and respective executors and administrators, acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder; and we do hereby covenant; promise and agree, each with the

Companies' Acts,[1] for it has been held that that Act contemplates two modes of acquiring stock, one by subscription and the other by allotment.[2] Very much depends upon the heading of the stock subscription book or list[3] and the conditions under which it is signed. It is to be noted that a shareholder under our Acts[4] is defined as "every *subscriber* to, or holder of stock in the company, etc." A subscriber in that sense would appear to mean a person who makes a valid contract with the company to take shares, or in other words, one who subscribes for shares in reply to an offer by the company.[5]

7. Subscription for stock in a completely formed and organized company.—The formal and unqualified subscription of the stock book under seal in the case of an incorporated and organized company, and for a stated number of shares would generally be regarded as a valid contract on the part of the company to issue the stock, and, on the part of the subscriber to receive and pay for the stock.[6] This might constitute the subscriber a contributory within the meaning

other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon, when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies' Letters Patent Act, or under any by-laws which may be passed by the said company, *and we request the number of shares for which we subscribe hereunder to be allotted to us.*"

No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C., the company was wound up and he was sought to be held liable as a contributory.

Held, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and *ex proprio vigore* create the liability contended for. (In *re* Zoological Society of Ontario, 16 Ont. A. R., 543.)

[1] R. S. O. 1887, ch. 157.

[2] In *re* Queen City Refining Co. of Toronto, 10 O. R., 264. See this case explained *supra*, p. 122, note.

[3] See In *re* Zoological Society *supra* for form of subscription in that case.

[4] R. S. C., ch. 119, sec. 2*e*.

[5] In *re* London Speaker Company, 16 Ont. A. R., at p. 516, per Osler, J., and see per Burton, J., *ibid*, at p. 513; St. Paul, S. & T. F. Ry. Co. v. Robbins, 23 Minn., 439.

[6] St. Paul, S. & T. F. Ry. Co. v. Robbins, *supra*; *Re* The Queen City Ref. Co., 10 O. R., 264; Rascony Woollen Co. v. Desmarais, M. L. R. 2 S.C., 381; Thompson Corporations, sec. 1138 and numerous cases there cited.

of the Winding-up Acts.[1] But if the form of subscription contains, in addition to what is otherwise an unqualified contract to take shares, a request or condition that the number of shares subscribed for be allotted to the subscriber, this would turn the scales in favour of the

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[1] But in Kelly's case (12 Ont. A. R., 486) the following was the form of subscription to an organized company: "We, the undersigned, do hereby subscribe for ....shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares, and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten per centum of the amount of stock, subscribed by us respectively, within thirty days from the day of our several subscriptions.

In his judgment, Burton, J., said at p. 489 :—"But Mr. Galt contended that the document produced as the subscription for stock was a mere unilateral agreement imposing no obligation upon the company to allot him any shares, and that though it used words importing an agreement, it did not, in substance, differ from an application.

"If the liability of the subscriber had depended upon this document alone, it might possibly be difficult to see upon what precise grounds it could be placed. If, for instance, the winding-up order had been made the day after the document had been signed, and before any action had been taken on it by the company, it might be very difficult, upon the evidence before us, to give an intelligent reason for holding him to be a contributory within the meaning of the Winding-up Act." The learned Judge here cites sec. 48 of the Winding-up Act of that date (45 Vic., ch. 23), and continuing, says: "The appellant here would not, under the circumstances I have referred to, be a shareholder; nor do I think he would have been liable under the agreement, inasmuch as he could not, so far as we can see on the evidence, obtain the stock in respect of which it was given, and which was the only consideration for it. But the liability does not depend upon the agreement alone; the act of the agent in obtaining the subscription was ratified by the company, and Kelly's name was entered in the stock book of the company, and all the notices usually sent to shareholders were sent to him. This was a clear intimation to him that the company recognized his subscription, and the act of the person who professed to act for them, and were prepared to carry out this portion of the contract by granting the shares to which his agreement referred." In this case Kelly was held not to be a contributory because the particular Statute under which the case arose required that "no subscription to stock shall be legal or valid until ten per centum shall have been actually and *bonâ fide* paid thereon into one or more of the chartered banks of this Province," and Kelly had never paid anything on his stock.

In this case Patterson, J.A. (at p. 499) said: "A person bound to take shares, but who has not taken them, cannot under our Winding-up Act be made a contributory, as he might have been under the English Winding-up Act of 1848."

subscriber in the case of a winding-up, in the total absence of any recognition of such subscriber by the company.[1]

With regard to the formation and completion of the contract to subscribe, notice, allotment, etc. much that appears in the previous section applies to the case of companies completely formed and organized.

8. Implied agreements to take shares.—A person may become a contributory without signing the stock book, or any written agreement to take shares.[2] One who has caused his name to be entered on the company's books as a shareholder in respect of shares taken for the purpose of making up the statutory amount, would, on principle, clearly be estopped from afterwards saying that he was not the holder of such shares.[3]

9. Liability of directors for qualification shares—Estoppel—Subscription to shares in trust by director.—Most of the statutes provide that directors must qualify for their position by the ownership, absolutely in their own right, of stock to the amount required by the

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[1] In *re* Zoological and Acclimatization Society of Ontario, 16 Ont. A. R., 543; Nasmith v. Manning, 5 Can. S. C. R., 417.

[2] Per Lord St. Leonards in Spackman v. Evans, L. R. 3 H. L., 171, 208; *Re* Central Bank of Canada, 25 Can. L. J., 238; confirmed in appeal, 18 Ont. A. R., 209; Per Crompton, J., in Wolverhampton v. Hawksford, 11 C. B. N. S., at p. 464; Per Hagerty, C.J.O., in *Re* Standard Fire Ins. Co., 12 Ont. A. R., at p. 495; Palmer Comp., 69.

Where a transferor who is not at the time of the transfer the owner of the specified number of shares, but who subsequently obtains and registers sufficient shares to make up the specified number, and the bank registers the transfer and pays, and the transferee receives dividends on such specified number of shares, the bank and the transferee are estopped from contending that the specified number of shares did not pass to such transferee. (*Re* Central Bank of Canada, 25 Can. L. J., 238, confirmed in Appeal, 18 Ont. A. R., 209.)

Action was brought against defendant as transferee of shares in the plaintiff Bank for calls. There was no valid transfer of the shares under the Act, but defendant had paid calls, giving a receipt for a dividend, combined with others in appointing a proxy, and, being present at the trial, and hearing all the evidence, had not produced any evidence or offered his own testimony in reply. Held, that he must be treated as a shareholder. (Bank of Liverpool v. Bigelow, 3 Russ. & Ches. (N. Sc.), 236.

[3] Union Fire Ins. Co. v. O'Hara, 4 O. R., at p. 369. Per Osler, J. But see Coventry's case (1891), 1 Ch., 202.

by-laws of the company.[1] Or there may be provisions to this effect in the articles of association. There have been numerous decisions in England upon the question as to whether the acceptance of the office of director in a company whose by-laws fix a definite number of shares to qualify, will *primâ facie* render the director liable as a contributory for the stated amount of shares. Until recently it has been difficult to have directors declared *primâ facie* liable as contributories where they had not subscribed for the necessary qualification shares, for it has been determined that the articles of association stating the qualification, binds the members of the company only. It is not in itself a contract between the director and the company; and although the director binds himself to submit to it, it does not go so far as to say that he is to be deemed to be a member of the company.[2] But if there is not an actual agreement to take shares in such a case the courts will now go very far in inferring an implied one,[3] and if the director has been entered on the register as a shareholder for the amount required to qualify, even without his knowledge, and acts as a director he will be regarded as liable for the same.[4]

In order to avoid any difficulty or doubt which may arise respecting a director's liability for his qualification shares, the clause in the charter or articles of association is usually now so worded that the agreement is regarded not only as requiring the director to subscribe to so many shares in so far as the members of the company are concerned, but he is deemed to have thereby taken these shares from the company. This is done by adding the words "and, unless he shall do so, he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."[5]

Where a director has accepted the office and acted as such, the element of estoppel enters into the agreement, and the courts have held that there ought to be inferred an agreement between him and the company, on his part, that he will serve the company on the terms

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[1] Sec. 30, R. S. C., ch. 119. (This applies to directors subsequent to the provisional directors.)

[2] See per Bowen, L.J., in Isaacs' case (1892), 2 Ch., at p. 167.

[3] In *re* Bread Supply Association, 62 L. J. (Ch.), 376, 3 R., 288.

[4] Brown's case, L. R. 9 Ch., 102; Lord Inchiquin's case (1891), 3 Ch., 28.

[5] Isaacs' case (1892), 2 Ch., 158; In *re* Hercynia Copper Co. (1894), 2 Ch., 403; 7 R., 214.

as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and all the benefits which those articles provide for directors.[1]

Where a statute or clause in the memorandum or by-laws says no person shall be *eligible* as a director unless he holds a specified qualification, this makes the possession of the qualification a condition precedent to election, and if the person elected does not possess the qualification he does not become a director *de jure*.[2]

If a director subscribes to shares "in trust" and he holds no other shares which would serve to qualify him as a director, unless he can show by unquestionable evidence that he held the shares in a *bonâ fide* representative capacity, he will be held liable as a contributory to the extent of the unpaid balance thereon, upon the winding-up of the company.[3]

10. Liability of agent employed by the company on condition of his taking shares, or taking shares on condition of appointment.—The same principle applies to the case of an agent or solicitor for the company where it is one of the conditions of the contract between the agent and the company that the agent shall take shares.[4]

Where a person, on the promise by the manager of a company that he should be appointed as solicitor of the company, authorized the manager to subscribe for shares for him; and the manager did not subscribe to the stock book, but caused an account to be opened in the company's books as if he were a shareholder and credited him with certain fees due him for services as a solicitor, it was held that he was liable as a contributory.[5]

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[1] In *re* Bread Supply Association, 62 L. J. (Ch.), 376; 3 R., 288, following Isaac's case, *supra*; Brown's case, *supra*; see also Alley v. Trenholme, R. J. Q. 3 S. C., 163.

[2] Palmer Comp. Law, p. 124; Jenner's case, 7 C. D., 132.

[3] In *re* Western Grain & Produce Co., 14 Can. L. T., 148.

[4] See Davis' case, 41 L. J. (Ch.), 659; National Ins. Co. v. Egleson, 29 Grant's Chy., 406; In *re* Saint John Building Society; *Ex parte* Pugsley, 9 Can. L. T., 497.

[5] Caston's case, 12 Ont. App. Rep., 486, confirmed in Supreme Court, 12 Can. S. C. R., 644; and see Per Osler, J., in Union Fire Ins. Co. v. O'Gara, 4 O. R., at pp. 369, 370. C. having been communicated with by the president of the company agreed to act as a director, and gave his note for $500 in order to obtain a qualification. The president subscribed for 50 shares of stock for him, on which the $500 would pay ten per cent. C. then acted as a direc-

11. Consent necessary to make a person liable as shareholder.—Persons cannot be made shareholders without their consent,[1] so that if a company or some other person has placed shares in a person's name, and complied with all the formalities requisite to make him a member, he will nevertheless not be a member unless he has by agreement or otherwise authorized the acts in question, or ratified them.[2]

12. Registration of person as shareholder is only prima facie evidence that he is such—Difference between Canadian and English Acts.—The fact of having one's name entered on the register of shareholders without showing in what capacity the shares are held, does not amount to a positive representation by the shareholder towards the creditors that he is such. Our Companies' Acts provide that "such books shall be *primâ facie* evidence of all facts purporting to be thereby stated,[3] in any action, suit or proceeding against the com-

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for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on 50 shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not to trouble again about it. All this time his note had been carried by the company, he had paid nothing. The president then absconded and he was notified of a five per cent. call and gave a note for $250 in payment of the same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit. Held, that he was properly placed on the list of contributories. (Chisholm's case, 7 O. R., 448.)

T. signed a power of attorney to C. to subscribe for 20 shares of stock, and delivered it to him *on the understanding that it was not to be used except he became a director of the company*. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued and an advertisement published in a newspaper, and a return made to the government with T.'s name inserted as a director in the two former, and as a member in the latter, but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisements or returns and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call he at once repudiated all liability. Held, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder and that T.'s name must be removed from the list of contributories. (Turner's case, 7 O. R., 448.)

[1] Lindley Partner, Vol. 1, p. 132. Osler, J., in Union Fire Ins. Co. v. O'Gara, 4 O. R., at p. 370.

[2] *Ibid.*

[3] Defendant subscribed on the stock subscription book of a company for ten shares, and wrote his signature as follows: "T. A. Trenholme, in trust for H. Trenholme," but the words "in trust for H. Trenholme" were erased

pany or against any shareholder.[1] The words *primâ facie* indicate that the book is not to be conclusive or binding, but may be contradicted, qualified or explained by evidence on the part of the shareholder.[2] Such an entry can have no greater effect than a written representation directly made by the shareholder to the creditor, that he is a transferee of the shares, but reserving to himself the right to show in what character he holds them, and of thus qualifying or explaining the instrument of transfer.[3]

In regard to the publicity given to the list of shareholders, there is a marked difference between the provisions of the English Companies' Acts and our Statute.[4] The latter provides that " such books shall, during reasonable business hours of every day except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company and their personal representatives, at the head office or chief place of business of the company; and every such shareholder, creditor or personal representative may make extracts therefrom;" whereas under the English Act the share registers are made public records and are open to public inspection on the payment of a very small fee. And this may be of importance in the case of a creditor who claims to have contracted with the company on the security of the unpaid stock.[5]

13. Notice of allotment.—In cases where notice of allotment is necessary to complete the contract to take shares and to constitute the taker a shareholder as towards the company, it is not necessary to prove express formal notice of the allotment, is is sufficient to show that the allottee in fact knew of it,[6] especially if he had

on the stock book. Held, that in the absence of evidence as to the time when said words were erased, the presumption was that they were erased at the time defendant signed the stock book, rather than that the book was subsequently falsified; and it was for the party alleging that the erasure was made subsequently to prove it. Alley v. Trenholme, R. J. Q., 3 S. C., 163.

[1] Sec. 47, Dom. Act, R. S. C., ch. 119.

[2] See Per Strong, J., in Page v. Austin, 10 Can. S. C. R., at p. 165.

[3] *Ibid.*

[4] Sec. 44, Dominion Act.

[5] Sec. 32, comp. Act, 1862.

[6] Levita's case, 3 Ch., 36; Crawley's case, 4 *ibid*, 322; see Nasmith v. Manning, 5 Can. S. C. R., 417. This case turned principally upon the question of the sufficiency of the proof of notice of allotment. The case was tried twice. The judge at the second trial was unable to say whether notice had

acted as a shareholder.[1] Notice by post is sufficient,[2] even if the notice should fail to reach the allottee or his agent, either owing to some fault of the allottee[3] or to some casualty in the post-office establishment.[4] In the Province of Quebec, however, in negotiations carried on by correspondence, the contract is only entered into and formed when the letter containing the acceptance has reached the party who made the offer and has become known to him.[5] If no time is fixed for the acceptance of the application, and it is not accepted within a reasonable time, it will be considered as having been declined.[6]

14. Not necessary to number and ear-mark shares allotted.— When the company has sufficient unallotted original stock in hand to answer the number of shares required, it would not appear necessary to number and ear-mark the particular shares alloted;[7] a share is an incorporeal right to a certain portion of the profits of the company.[8]

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been received. In the Court of Appeal three out of four judges thought not, and in the Supreme Court a bare majority confirmed their holding. Moss, J., in Denison v. Leslie (3 Ont. A, R., 547), said: "As is pointed out in the judgment of the Court, a formal notice need not be shewn; it is only necessary that there should be evidence, whether of conduct or otherwise, sufficient to satisfy the judicial mind that the knowledge of an acceptance of his offer had reached the applicant." But Henry, J., in Nasmith v. Manning (5 Can. S. C. R., 447), said: "Some would appear to think that if the respondent found out through other means than from the directors that they had accepted his application or agreement to take shares, it would bind him. I differ with those who say so. If a notice of allotment be necessary in any case, it is necessary to come directly from one party to the other. Whatever the directors did among themselves could not bind the respondent, unless by some binding act of theirs on which he could rely, they communicated their acceptance to him of his offer to take the shares."

[1] Crawley's case, *supra*.

[2] Household Fire Ins. Co. v. Grant, 4 Ex. D., 216; Harris' case, 7 Ch., 587; Wall's case, 15 Eq., 18; Per Burton, J.A., in Nasmith v. Manning, 5 Ont. A. R., at p. 138, and reiterated by him in *Re* Standard Fire Ins. Co., 12 O. A. R., at p. 487.

[3] Townsend's case, 13 Eq., 148.

[4] Household Fire Ins. Co. v. Grant, 4 Ex. D., 216; Harris's case, 7 Ch., 587.

[5] Underwood v. Maguire, R. J. Q., 6 Q. B., 237.

[6] Ramsgate Hotel Co. v. Montefiore, L. R. 1 Ex., 109; Nasmith v. Manning, 5 Can. S. C. R., 417; *Ex parte* Bailey, 3 Ch., 592; Carmichael's case, 17 Sim., 163; Mathew's case, 3 De G. & Sm., 234; and see In *re* Geological & Acclimatization Society of Ontario, 16 Ont. A. R., 543.

[7] Nat. Ins. Co. v. Egleson, 29 Grant's Chy., at p. 410.

[8] *Ibid*; Claim: Calls upon shares for which the defendant's testator had subscribed and upon which he had paid ten per cent. at the time of

15. Subscription for shares in a fictitious name—Liability on same.—If a person take shares in the name of a fictitious person he will be held liable in respect of the shares, as if they were taken in his own name.[1] Where the application is sent in the name of another not *sui juris*, it has been held to be the same as an application sent in a false or fictitious name. The transaction is a *fabula acta*, and the applicant himself may be put on the list of contributories.[2] But in order to render a person so liable it must be proved that he actually contracted to take shares for himself, merely disguising the fact under another name.[3] Where directors, in order to make it appear that unallotted shares have been allotted, put several hundred of them into the names of their private friends through letters of application signed by themselves, but without any authority at all on the part of their friends to make this application ; this is a gross fraud and would probably, under our Companies' Acts[4] or at common law, render the directors jointly and severally responsible; but not having agreed to take the shares themselves, they could not be held liable thereon as contributories.[5]

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subscription. Defense : By a by-law of the plaintiff, company, no subscriber of stock should be a shareholder until the same had been allotted to him by order of the board. The testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made. Held, on demurrer, bad, for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vic., ch. 93, sec. 2 (0), the plaintiff company's Act of Incorporation (Union Fire Ins. Co. v. Lyman, 46 U. C. Q. B., 453.)

[1] Pugh and Sharman's cases, L. R. 13 Eq., 566; Cox's case, 4 D. J. & S., 53; Bute's case, 13 Eq., 566.

[2] *Ibid*; Richardson's case, 19 Eq., 588; Levita's case, L. R., 5 Ch., 489; Palmer Comp. Law, 70.

[3] See Coventry's case (1891), 1 Ch., 202.

[4] See sec. 49, Dom. Act, R. S. C., ch. 119.

[5] Coventry's case (1891), 1 Ch., 202. C. sent to the directors of a company a letter of application, signed by him "for" his son, naming him, for the allotment of 200 shares. C. was himself one of tne directors, and the application was made under an arrangement between tne directors that, in order to make it appear that the whole of the share capital had been issued, the shares remaining unallotted should be issued to their nominees temporarily until applied for by the public, there being no intention that either the directors or their nominees should be under any liability in respect of such shares, accordingly the son was registered as the holder of the 200 shares. The son, who was residing abroad, was totally unaware of the application or of the registration of the shares in his name. Nothing

16. Distinction between subscription under a fictitious name and a fraudulent allotment to persons who never contracted to take the shares allotted or who took them for an illegal restui que trust.—This statement of the law is the result of a recent English decision,[1] and will probably have the effect of modifying some previous decisions touching this point.

For instance, in an Ontario case[2] it was held that "directors subscribing for shares to enable a bank to go into operation, cannot relieve themselves from liability respecting such shares by declaring them to be 'trust shares,' and that no calls are to be payable on such shares." The directors had passed a resolution as follows: "That it being desirable to commence the organization of the bank without further delay, the directors agree to take up (in addition to their present holdings) the balance of the stock unsubscribed up to $500,000 in trust, to hold the same for such persons as may desire to subscribe for stock; and such subscriptions by directors in trust shall be cancelled or transferred *pro rata*, so as to reduce or cancel each holding in proportion, it being understood that no calls are to be payable on such trust holdings until such time as the stock is transferred to or taken by other parties." The conclusion deduced by the Court from these facts was arrived at partly on the ground among others of an English decision.[3] In this case several directors of a company in order to make up the required number of shares for incorporation, subscribed for stock and agreed among themselves to vest it in the

was ever paid on the shares, either by way of deposit, dividend or otherwise, and no certificate of allotment was ever issued. Subsequently the company passed a resolution for a voluntary winding-up, and, both C. and his son having died, the son never having in any way recognized his position as shareholder, the liquidator placed C.'s executors upon the list of contributories, in respect of the shares. Upon a summons by the executors to have their names removed from the list:—Held, by the Court of Appeal, reversing the decision of Kay, J., that the case was governed by the ordinary law of contract; and that although C. and his co-directors might have rendered themselves jointly and severally liable on the ground of fraud, yet the facts did not establish such an actual contract by C. to take the shares as to justify his executors being placed on the list of contributories in respect of it. (Coventry's case (1891), 1 Ch., 202.)

[1] *Ibid.*

[2] *Re* Central Bank of Canada, 25 Can. L. J., 238; confirmed in Appeal, 18 Ont. A. R., 209.

[3] Preston v. Grand Collier Dock Co., 2 R. & C. Cas., 335; Mangles v. Grand Collier Dock Co., 2 R. & C. Cas., 360.

secretary "in trust for the company;" and they resolved (as in the above case) that no calls should be made on such shares. The transfer to the secretary was never formally executed. The Court compelled the directors to make calls upon themselves and pay up in respect of these shares, and held that they could not set up the trust, or claim that the subscription was fictitious and fraudulent for the purpose of floating the company. When shares are held in trust, the trustee in his quality is regarded as the holder of the shares and as a contributory in respect thereof. But this is only the case where the trusteeship is *bonâ fide* and not colourable or fraudulent; in the latter case the real owner will be liable.[1] But here the trust being in favour of the company, the company could not be the beneficiary for that would be trafficking in its own shares which, as already stated,[2] is unlawful. If the subscription creates a contract the trustee must either hold the shares upon a *bonâ fide* trust, or he is a holder out and out. In the Coventry case,[3] Fry, L.J., in appeal said: "The question is whether or not a contract has been entered into by Millis Coventry with regard to the 200 shares. The evidence of Webb, his co-director, to my mind, conclusively shows that there was no such contract. Webb expressly states that the intention of the directors was that they should not take any of the unallotted shares. In my opinion, there was no real contract at all by any of the directors to take these shares; all they agreed to do was to go through a sham procedure, in order to make it apparent to the public that certain persons, who had not contracted for shares, had contracted for shares, and so the name of Samuel Coventry was entered on the list of shareholders. There was no contract with the company. A contract arises from the intention of two minds directed towards a common object, itself indicated by certain terms. Here there was no intention by either party, the company or Millis Coventry, that he should bind himself to take shares, it was a sham transaction, a *fabula acta*, by means of which the public were to be deceived." Applying these remarks to the facts in the Ontario case (*Re* Central Bank of Canada,[4] it is clear that that transaction was a sham one, and instead, as in the Coventry case, of the father applying for shares in the name of his

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[1] Cox's case, 33 L. J. (Ch.), 145.

[2] *Supra* [3] (1891) 1 Ch., 202.

[4] 25 Can. L. J., 238; confirmed in appeal, 18 O. A. R., 209.

son, and having them allotted to the latter entirely without his knowledge, the parties subscribed for the shares, not for themselves, but in trust for persons to be found later on to take their shares and who could not and did not consent to the subscription. In the case of Mangles v. Grand Collier Stock Co.,[1] the Court said: "There only is an inference drawn from the facts which are all raised on the supposition that the original subscription of these persons was bad, and that, therefore, the project cannot go on at all. Whereas, it does appear to me, on what is stated in the bill, that those ten persons who subscribed are now by law liable to pay up the whole of their subscriptions; and they, as far as it appears to me, might be compellable by law or in this Court, by a bill, to pay; and it would be no answer to any bill filed in this Court to compel payment, to say they intended a fraud to be committed;—it would rather make the matter worse."

This view would not now appear to be warranted by Coventry's case, but the facts were more favorable to that interpretation in this case than in the Ontario case in which it was cited. Cox's case[2] was cited in Coventry's case and was the basis of the judgment rendered by Kay, J., reversed in appeal. In that case it was arranged between the promotors, of whom C. was one, that C. should take 300 shares, and in order to increase the apparent number of shareholders, C. caused 100 of the shares to be transferred into the name of A. and 100 into that of B., and it was held, that in the absence of *bonâ fide* trusteeship on the part of A. and B., and having regard to sec. 200 of the Companies' Act, 1862, C. was properly made contributory for the total number of 300 shares, without prejudice to any application which might be made to add the names of any other person or persons in respect of the 200 shares.

It will be noticed in Cox's case that C. was the actual holder of the shares and would have benefited by any dividend that might have been declared thereon, and his intention in transferring them into the names of A. and B. was merely for the purpose of giving the scheme a more favorable aspect in the market; for it is not generally considered satisfactory to those who wish to invest in mines to see that the shares are chiefly in the hands of one or two persons, whose influence will, in fact, overrule the voices of all other shareholders;

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[2] 2 R. & C. Cas., at p. 366.

[1] 33 L. J. (Ch.), 145.

nor is a company likely to attract shareholders which appears on the face of it to have very few supporters.

Pugh and Sharman's case[1] was also distinguished in Coventry's case. In that case S., who was a large shareholder, wished to take more shares, but the directors refused to allow his name to appear for any larger number. He then, at the suggestion of the secretary and with the concurrence of a local agent of the company, sent in an application for shares signed by his daughter P., a married woman residing elsewhere but then on a visit to him. Her condition was not stated in the application and the father's residence was given. The deposits on application and allotment were paid by S. and he received the notice of allotment and a dividend which was paid and all the notices relating to the company, which were posted to P. at his address. P. signed the application without being informed or knowing what it was, and never told her husband anything about it, and neither of them knew she was on the list till an application was made by the official liquidator:—The Court held, that the case was similar to that of an application for shares in the name of a fictitious person, and that the name of S. must be substituted for P. in the list of contributories. An application for shares in a false name puts a man in the same position as regards liability, as a transfer into a false name.

These cases are distinguishable from Coventry's case inasmuch as in the former there was a genuine intention to take shares, but under a disguise; whereas there was no intention on the part of Coventry to take the shares, but only to deceive the public.

In the Ontario case[2] the Court said: "The understanding set out in the resolution as to 'trust stock' its 'cancellation' unless as prescribed in the Bank Act, and that 'no calls are to be payable,' may be eliminated out of the resolution as void. The moment each director signed the stock subscription book agreeing to take a certain number of shares, he undertook a personal liability to pay all calls upon such shares, from which he could only free himself under the conditions prescribed by the Bank Act." If the result of signing the stock subscription book by a director in trust was to render him a

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[1] L. R. 13 Eq., 566.

[2] *Re* Central Bank of Canada, 25 Can. L. J., 238; confirmed in Appeal, 18 A. R., 209.

contributory, although the signature was made by virtue of a resolution declaring in effect, that the signature was to be made merely for the purpose of showing certain capital as subscribed for, which in reality was not *bonâ fide* subscribed for, and that the subscriber did not claim to hold the shares for himself but merely as trustee, then applying this reasoning to Coventry's case it would follow that the fact that C. had signed an application for shares on behalf of a mere "dummy" and had had them allotted in that guise, would make the person signing the application liable as a contributory, although he had no intention of holding or deriving any profit from the shares. But, as Lindley, L.J., said in Coventry's case[1]: "We must not strain the facts in order to find an agreement where none exists."

In the Ontario case the directors drew up a formal resolution[2] concerning certain shares which were to be taken up apparently by them but in reality under conditions which shewed distinctly that they had no intention of themselves holding the stock. What the Court sought to do in this case was to regard the subscription in the stock book as constituting the contract with the company, whereas in reality the real contract entered into with the company was the resolution passed by the directors, the signing of the stock book being merely the completion of the agreement formulated at the meeting of directors. The signing of the stock book as shareholder in trust being merely part of a fraudulent agreement, could no more render the subscriber liable than the unauthorized signature of an application for shares in the name of another to whom there is an allotment without the intention to become a shareholder, as in Coventry's case. But where the stock book is so signed, as trustee, by a director who has acted as such and has no other share whereby to qualify for the position, he will be regarded as holding out that he was qualified to act, and upon the winding-up of the company will be liable as a contributory for any unpaid balance on such shares unless he can show by unquestionable evidence that he held the shares in a *bonâ fide* representative capacity.[3]

17. Liability of subscriber when company has not fulfilled the requirements of its charter—Defences on calls.—No person can, pro-

[1] (1891) 1 Ch., at p. 210. [2] *Supra*, p. 134.

[3] In *re* Western Grain & Produce Co., Cleghorn's case, 14 Can. L. T., 148.

perly speaking, be said to be member or a shareholder in a company so long as he has only a right to become such. If a person who is not a shareholder omits to do what is necessary to render himself one, he remains a non-shareholder, although very little may be wanting to render him a shareholder.[1] Thus where the act incorporating a company provides that no subscription to stock shall be legal or valid until ten per cent. shall have been actually and *bonâ fide* paid thereon, it has been held that where a subscriber under these conditions has not paid the ten per cent. he will not be regarded as a contributory upon the winding-up of the company.[2] But unless the statute is very formal and precise as to the payment of this ten per cent. being a condition precedent, the subscriber will, upon an action by a creditor, be liable to the extent of his subscription.[3] For instance, under the Railway Act[4] it is the duty of the provisional directors upon a certain amount of shares in the capital stock being subscribed and ten per cent. paid, to call a meeting of the shareholders who should have so paid up the ten per cent. thereof, for the purpose of electing directors. And some of the Special Incorporating Acts contain provisions requiring that on the subscription for shares of the capital stock, each subscriber should pay forthwith ten per cent. of the amount subscribed by him, and that the directors should deposit the same in some chartered bank to the credit of the company. Under such a combination of facts as the foregoing, it has been considered that it would not be *ultra vires* of the directors to accept a

[1] Lindley Comp., p. 44. New Brunswick, etc., Ry. Co. v. Muggeridge, 4 Hurl & Norm.. 160.

[2] *Re* Standard Fire Ins. Co., 12 Ont. A. R., 486. It is true the statute in question enacted that the shares shall be vested in the several persons who shall subscribe for the same, but it went on to provide "that no subscription to stock shall be valid until ten per cent. shall have been actually and *bonâ fide* paid thereon." It has been held in England, under a similar provision, that the object of the section is "to protect the public, and to make the concern more solid, and for that purpose to allow no transfer of shares until they represent some actual capital." (Bramwell, B., in Gloucestershire Ry. Co. v. Bartholomew, L. R., 3 Ex., 15.)

[3] Denison v. Leslie, 3 Ont. A. R., 536. Where ten per cent. was not paid at the time of original subscription of bank shares, nor within 30 days thereafter, as required by the Banking Act, R. S. C., ch. 120, sec. 20, but was paid before the first transfer took place and was accepted by the bank:—Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings. In *re* Central Bank of Canada, Baine's case, 8 Can. L. T., 389.

[4] 1888 (D), sec. 36.

subscription unaccompanied by a present payment of ten per cent.,[1] and it was further held that, as the remainder of the special act would appear to contemplate the possibility of persons being subscribers, and not having paid the ten per cent., the defendant could not set up the non-payment of the ten per cent. in defense to an action by a creditor proceeding by way of *scire facias*.[2]

The provision requiring the payment of ten per cent. has received in Canada an equitable rather than a strict interpretation. For instance, in Denison v. Leslie,[3] Moss, C.J.A., remarked : "It was pressed upon us that by reason of his default in the payment of the ten per cent., the defendant never became entitled to the rights of a shareholder. That is very true, but it does not assist him when he is contending that he is not subject to the same liabilities as a subscriber who had to that extent fulfilled his contract." That would seem to be a reasonable view of the case. But the same reasoning was not adopted in *Re* Standard Fire Ins. Co.[4] It is true that in this case the statute was much more precise in making the payment of the ten per cent. a condition precedent to the full position of stockholder. Under the strict construction of the Act it became a protection to those who had subscribed and been accepted as shareholders, but who had not paid the ten per cent. The Act governing that case provided that no subscription to stock should be legal or valid until ten per cent. shall have been actually and *bonâ fide* paid thereon. Does this not rather mean that where a person has subscribed to stock under such conditions, and his subscription has been accepted by the company, then he becomes so far as the company and its creditors are concerned, to all intents and purposes a shareholder in the company, but liable to have his shares forfeited, or at least to have his rights as an active shareholder suspended until payment of the ten per cent.? To hold otherwise would lead to this anomaly: that those who had paid their ten per cent. would be liable as contributories for the remaining ninety per cent., while those who had not been so diligent would escape. This would be putting a premium on dilitoriness.

It has been said by an Ontario Court[5] that the provision as

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[1] Per Moss, C. J. A.. in Denison v. Leslie, 3 Ont. A. R., at pp. 543, 544.

[2] *Ibid.* At p. 548. [4] 12 Ont. A. R., 486.

[5] In *re* Central Bank; Baine's case, Nasmith's case, Boyd, Chancellor. 8 Can. L. T., 389.

to payment of the ten per cent. is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment. Would not this equitable ownership render the subscriber liable as a contributory upon the winding-up of the company under the Winding-up Act?[1]

In the United States the decided weight of authority and the most carefully considered cases hold that a subscriber for stock cannot escape the responsibilities of a stockholder by showing that he never paid the percentage or fixed amount required by the charter or statute to be paid at the time of subscribing.[2] He will not thus be permited to take advantage of his own wrong and default to the prejudice of others.[3]

Where a person subscribes to stock in an incorporated company, which is not authorized to carry on business until $100,000 of its capital stock has been subscribed for and thirtv per cent. paid thereon, within six months after the passing of the act of incorporation, such subscriber will not be liable to calls made by the company where it had started business after the six months by virtue of a ficititious subscription to its capital,[4] and where the subscriber had not acquiesced, but had withdrawn his subscription within a reasonable time. In such a case the illegality of the charter can be pleaded by way of defense to an action for calls by the company.[5] This would merely result in a stay of proceedings until the Attorney-General could be called upon to take proceedings to have the charter annulled;[6] and

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[1] See secs. 44, 45 R. S. C., ch. 129, as to liability as a member; and as to liability of equitable owner in a certain case, see sec. 48, R. S. C., ch. 119.

[2] Cook Stockholders, 2nd Edit., sec. 173; Illinois River Ry. Co. v. Zimmer, 20 Ill., 654; Haywood & P. P. Ry. v. Bryan, 6 Jones' L. (N. C.), 82, the Court saying, "It would be a strange rule which would allow him to take advantage of the other stockholders' forbearance and his own neglect." Pittsburgh W. & K. R. R. Co. v. Applegate, 21 W. Va., 172. Minnesota & St. L. Ry. Co. v. Bassett, 20 Minn., 535.

[3] *Ibid.*

Brown v. Dominion Salvage & Wrecking Co., Q. B. 1891, 20 R. L., 557; appeal to Supreme Court dismissed for want of jurisdiction, 20 Can. S. C. R. 203.

[5] *Ibid.* This must be pleaded by demurrer in Quebec. Windsor Hotel Co. v. Murphy, 1 L. N., at p. 75.

[6] Banque d'Hochelaga v. Murray, P. C. 1890, 13 L. N., 257. Windsor Hotel Co. v. Murphy, S. C. 1877, 1 L. N., 74; Dominion Salvage & Wrecking Co. v. Attorney-General, 21 Can. S. C. R., 72; sec. 68, Comp. Act (D).

if annulled, the action would be dismissed. But if the time for subscription of the amount required by the charter be not fixed, and the company be simply prohibited from commencing operations till that amount be taken up and a certain proportion paid in, this would not prevent the provisional directors from making calls and doing all acts which fall short of the term "commencing operations," and could not be successfully pleaded in an action for calls.[1]

Mere illegal acts by the company after its valid incorporation or organization, not conducing to forfeiture of the charter, could not be pleaded as a defense to calls upon shares which had been lawfully issued.[2]

Alleged irregularities in the original organization of a company cannot be set up as a defense to calls by the company where the subscriber has assumed the position of shareholder, and has paid a portion of the calls made from time to time on the stock.[3]

18. "Ultra vires" issue of new capital—Liability of holder of—Acquiescence and Estoppel.—Where new capital is issued by a company under conditions wholly *ultra vires* ; for instance, where the whole of the original capital stock has not been allotted and paid in, which is required by the governing statute as a condition precedent to the issue of the new capital, the holder of such stock will not be liable either to execution creditors or as a contributory upon the winding-up of the company.[4] The difficulty consists in determining how far the doctrines of estoppel and acquiescence are applicable under such circumstances. Our Supreme Court has held[5] that when a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers or certificates of stock he supposed to be in existence from questioning the legality of the issue of such stock, and from showing that he never was in

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[1] No. Sydney, etc., Co. v. Greener, 31 N .S. R., 41.

[2] Connecticut & Passumpsic River Ry. Co. v. Comstock, Q. B. 1870, 1 R. L., 589; and see Marmara Foundry Co. v. Murray, 1 U. C. C. P., 29.

[3] Windsor Hotel Co. v. Lewis, Q. B. 1881, 4 L. N., 331; 26 L. C. J., 29, reversing Rainville, J., 30 April, 1879; and see Petrie v. Guelph Lumber Co., 11 Can. S. C. R., 450; Common v. McArthur, 29 Can. S. C. R., 239.

[4] Page v. Austin, 10 Can. S. C. R., 132; In *re* Ontario Express & Transportation Co., 21 Ont. A. R., 646; Stace & Worth's case, 4 Ch., 682; Bank of Hindustan v. Allison, L. R. 6 C. P., 54 and 222.

[5] Page v. Austin, *supra*.

law a shareholder liable for the debts of the company, because there never was any legal stock by which he could become a legal shareholder, so that he never filled the character to which alone the statutory remedy was given.

Lord Justice Lindley says in his work on Company Law[1]: "The holders of shares which the company have no power to issue, in truth, hold nothing at all, and are not contributories," and again[2]: "the person taking them cannot be estopped or otherwise become a member in respect of them." But Mr. Buckley in his work on Company Law[3] points out that "it would appear from Campbell's case[4] that the doctrines of estoppel and acquiescence are applicable under such circumstances, and that, even if these be grounds for disputing the validity of the creation and issue of the shares, yet if the company are estopped from denying that they were well created, persons who in taking such shares have voluntarily entered into contracts of which they have had the benefit cannot subsequently be relieved from them." And Mr. Justice Burton, in his judgment in the case of Page v. Austin while it was before the Ontario Court of Appeal[5] said: "If, in the present case, the defendant had known all about the manner in which the increased stock had been issued, and with that knowledge had accepted the transfer, it might well be that he might be estopped from setting up the want of power in the directors as a defence to an action by the company or on an application to place him on the list as a contributory on winding-up."

19. Subscription to stock through agent.—A valid subscription may, of course, be made through an agent.[6] The authority to take shares for another in a company should be in writing, but it would appear that a verbal authority would be binding.[7] But the mere fact that a party tells an officer of the company, who has called upon him to solicit further subscriptions, that he means to take stock, or will take it, to a certain amount, does not authorize such officer to write

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[1] Fifth Edit., p. 774. [2] At p. 53. [3] Sixth Edit., at p. 73.

[4] 9 Ch., 1, 15; and see Croom's case, 16 Eq., 417, 431; Richmond's case, 4 K. & J., 305.

[5] See extract, 10 Can. S. C. R., at p. 190.

[6] *Re* Standard Fire Ins. Co., 12 Ont. A. R., at p. 494; Cook Stockholders, 2nd Edit., sec. 67, p. 81.

[7] Ingersoll & Thamesford Gravel Road Co. v. McCarthy, 16 U. C. Q. B., 162; and see Union Fire Ins. Co. v. O'Gara, 4 O. R., at p. 365.

his name down as a subscriber;[1] to bind the party it would be necessary to prove that he authorized the agent to sign the stock book for him.[2] And authority to an agent to subscribe is not a subscription in itself.[3] Where, however, a person, on the promise of the manager of a company that he should be appointed solicitor of the company, authorized the manager to subscribe for shares for him ; and the manager did not subscribe to the stock book, but caused an account to be opened in the company's books as if he were a shareholder, and credited him with certain fees due him for services as solicitor, it was held that he was liable as a contributory.[4] In an early Ontario case a subscription by an agent in his own name was held to constitute him a trustee for his principals.[5]

20. Misrepresentation in prospectus, etc., ground for relief of shareholder.—If it can be shewn that a material representation which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be relieved from that contract, the Courts are bound to relieve him from it, and to take his name off any list of shareholders or contributories on which it may have been put.[6]

21. Misrepresentations by directors as ground of action against the company.—As to the question of the company being responsible for misrepresentations on the part of the directors, the rule was laid down by Lord Chelmsford, in Western Bank of Scotland v. Addie[7]

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[1] *Ibid.* [2] *Ibid.*

[3] Granger, etc., Co. v. Vinson, 6 Oregon, 172; and see New Brunswick, etc., Co. v. Muggeridge, 4 Hurl. & Nor., 160.

[4] Caston's case, 12 Ont. App. Rep., 486, confirmed in Supreme Court, 12 Can. S. C. R., 644, and in cases cited at p. 23, *supra*.

[5] Davidson v. Grange, 4 Grant's Chy., 377.

[6] Per Turner, L.J., in Reese River Co., Smith's case, 2 Ch., 604, 609; and see Blake's case, 34 Beav. 639, Ship's case, 2 D. J. & S., 544.

In an action brought by an incorporated company for calls, a plea in bar that the defendant became a holder of the shares by subscription, and was induced to become such subscriber and holder by the fraud of the company, and that he has received no benefit from and has repudiated the shares: —Held, good on demurrer. (Provincial Ins. Co. v. Brown, Denroche, 9 U. C. C. P., 296.)

[7] L. R., 1 H. L. Sc., 145, 157; Nicol's case, 3 De G. & J., 387; Provincial Ins. Co. v. Brown, *supra*.

that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents."

But, as stated in the first part of this work,[1] if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.[2]

22. How right to repudiate shares may be lost—Delay—Company being wound up.—The right to repudiate shares will be lost if not promptly asserted after the facts are known or might have been known had a reasonable diligence been exercised; and *a fortiori* will be lost, if the shareholder has so acted, after he knew the facts, as to have elected to keep the shares and to have waived his right to repudiate them.[3] The question of what is a reasonable time in such case has

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[1] Promotion of Companies, *supra*, p. 13.

[2] Western Bank of Scotland v. Adie, per Lord Chelmsford, L. R. 1 H. L. Sc., at p. 158; but see Lindley Companies, 5th Edit., p. 74.

[3] Montplaisir v. Banque Ville Marie, Q. B., 1889, 18 R. L., 153; 33 L. C. J., 317.

The Stadaconas Insurance Company, incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, C., intending to subscribe for five paid-up shares, paid $500, and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50) by the agent of the company, without C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavoured, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875 the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé*), and the plaintiff received a cheque for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and notwithstanding C.'s repeated endeaalready been dealt with in the chapter on Promotion of Companies.[1]

But while, as against the company, the shareholder may be entitled to relief, if he come in reasonable time, and under proper circumstances to apply for it, yet if the company be wound up, whether voluntarily[2] or by or under the supervision of the Court,[3] or if it stop payment, and its directors issue notices concerning a meeting to pass resolutions for voluntary liquidation[4] and the contest thus becomes one between the shareholders and the creditors of the company, or between the shareholder and his co-contributories as distinguished from the corporation,[5] this equity will be lost.[6] The doctrine is that after the company is wound up it ceases to exist, and

vours to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of $100 each, alleged to have been subscribed by C. in the capital stock of the company.

Held (Sir W. J. Ritchie, *dubitante*), reversing the judgment of the Court below, that the evidence shewed that the appellant never entered into a contract to take 50 shares, that the receipt given for a dividend of ten per cent. on that amount actually paid (*montant versé*) was not an admission of his liability for the larger amount, and he was therefore not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company. (Cote v. Stadacona Ins. Co., 6 Can. S. C. R., 193.)

Of this case, Mr. Justice Ramsay says, in a note to the abstract of the decision of the Court of Appeal, which was reversed, at page 166 of his appeal cases: " In the Supreme Court this judgment was reversed, the Court holding that the taking of ten per cent. was not an acquiescence, as it was taken as interest on the amount the appellant had paid. The only difficulty to this theory is that it is unquestionable the appellant took it as a dividend on his shares as subscribed, and not as interest. To some extent the case was a hard one, and the judgment of the Supreme Court was simply sentimental, *dolo facere, qui suo jure utitur*. If it were not for certain decisions, one would be disposed to say that the principle was strangely misapplied in a case like this. The common law right and the statutory power stand on quite a different footing. The former is common to all men, the latter is a mere privilege, specially granted to a person, and it can hardly be presumed that it was the intention to benefit one man at the expense of another. It is possible that the use of the expression "the law" in English to express both *a law* and *the law*, may, to some extent, explain this extraordinary fallacy."

[1] *Supra*, p. 18.

[2] Stone v. City & County Bank, 3 C. P. Div., 282.

[3] Oakes v. Turquand, L. R. 2 H. L., 325, 367.

[4] Muir v. Glasgow Bank, 4 App. Cas., 337.

[5] Burgess's case, 15 Ch. D., 507.

[6] Buckley Comp., 115 (6th Edition).

rescission is impossible. There are then only creditors and contributories, and no company.[1]

A contract induced by fraud is not void, but voidable at the option of the party defrauded, provided that he avoids it while matters remain in the same position.[2] And by a contract being voidable is meant, not that it is void till ratified, but that it is valid until rescinded, where the rights of third parties intervene;[3] and if before it be rescinded, a winding-up be commenced, or the concern cease to be a going concern, the shareholder can no longer be relieved, but will be held liable as a contributory.[4]

23. Shareholder may be eligible to be appointed liquidator.—The fact that a person is a shareholder of a company is not a valid objection to his appointment as liquidator if all the creditors have agreed upon and recommended such appointment.[5]

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[1] Per Jessel, M.R., Burgess's case, 15 Ch. Div., 507, 509; Per Hodgins, Q.C., Master in Ordinary; *Re* Central Bank of Canada, 25 Can. L. J., 238; confirmed in appeal, 18 Ont. A. R., 209.

[2] Deposit Life Assur. Co. v. Ayscough, 6 E. & B., 761; Mixer's case, 4 De G. & J., 575.

[3] Oakes v. Turquand, L. R. H. L., 325, 375; Reese River Silver Mining Co. v. Smith, L. R. 4 H. L., 64, 73.

[4] Buckley Companies, 116 (6th Edit.)

[5] *Re* New Westminster Gas Co., 5 B. C. L. R., 618, discussing Central Bank of Canada, 15 Ont., 309; *Re* Alpha Oil Co., 12 P. R., 298; and in *re* Northern Assam Co., L. R. 5 Ch., 644.

CHAPTER VII.

CALLS.

1. Power of directors to make calls.—The Dominion Companies' Act provides[1] that "directors may, from time to time, make such calls upon the shareholders in respect of all moneys unpaid upon their respective shares, as they think fit, at such times and places and in such payments or instalments as the letters patent or this Act, or the by-laws of the company require or allow." Directors may make by-laws for the purpose of regulating the making of such calls and the

[1] Sec. 38.

payment thereof.[1] It will be observed that the language used is permissive, and that so far as the statute is concerned, the enactment of a by-law to regulate the mode in which the calls shall be made is not imperative.[2] Where no by-law exists, the calls may be made as prescribed by the directors.[3]

2. Call necessary to render subscription payable.—It is generally recognized that a call must be made in order to render a subscription or any part thereof due and payable to the company. A contract of subscription, unlike other contracts to pay money, is a promise to pay; but, by implication of law, and usually by the terms of the subscription, the payment is to be only at such times and in such part payments as may be designated by the directors in a formal declaration known as a "call." In other words, the subscription is a debt payable at a future time. The time when it shall be paid is indefinite until fixed by a call.[4]

3. Call made by directors before the charter is obtained must be ratified.—A call made by resolution of the provisional directors of a company, which has not at the time obtained its charter, and notice of the call sent out by the secretary after the charter is obtained, and on the strength of the resolution, is not valid; in order to validate the call the directors would have to adopt or ratify their former resolution after the charter has been obtained.[5]

4. When a call is deemed to be made.—At one time it was a subject of doubt whether a call is to be considered as made at the date of the resolution of the directors, or at the date of the notice of

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[1] Sec. 35 (*a*); Where a call is made by four directors, one of whom is not legally a director, the call is valid, three constituting a quorum for the transaction of business in the absence of by-laws providing otherwise. (Bank of Liverpool v. Bigelow, 3 Russ. & Ches., N. Sc.), 236.

[2] Rascony Woollen & Cotton Manufacturing Co. v. Desmarais C. R., M. L. R., 2 S. C., 381; 10 L. N., 35; Union Fire Ins. Co. v. O'Gara, 4 O. R., 359; Portland & Lancaster Steam Ferry Co. v. Pratt, 2 Allan (N. B.), 17.

[3] *Ibid.*

[4] Cook Stockholders, 2nd Edit., sec. 105; the subscription "creates a debt, but the debt does not accrue due until the call is made" (Grissell's case, L.R., 1 Ch. App., 528, 535). In *re* China Steamship & Coal Co. (38 L. J., Ch., 512), the court says "The moment a call is made it is a debt due in every respect," although it cannot be collected by suit until later; see Ryland v. Delisle, P. C., 6 Moore (N. S.), 225.

[5] Toronto Gas Co. v. Russell, 6 U. C. Q. B., 567.

the call. In one Ontario case[1] the latter was considered to be the law; but in an English case it was held that a member is "indebted" in respect of calls as soon as the resolution is passed, and before it becomes payable.[2] Most of our Companies' Acts now provide that "a call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed." [3]

5. When call is not necessary—Payment of subscriptions before called.—If a subscription contains a promise to pay upon a certain day, no call is necessary; for the subscriber is bound to pay, at all events, upon the day named.[4] So also, if by statute or the charter the subscription becomes payable at a certain specified time, a call is thereby dispensed with, and is not required.[5]

A shareholder, on the other hand, may pay at any time all or any part of the amounts due on the shares held by him, beyond the sums then actually called for, provided the directors are willing to receive it.[6]

6. Interest payable to and by shareholder—Rate.—For an advance or advances exceeding the amount of the calls then made, the directors may under the Act allow interest at such rate not exceeding eight per cent. per annum, as the shareholder who pays such sum in advance and the directors agree upon.[7] This may be done even where the governing statute makes no such provision, provided the power is given in the company's articles of association or by-laws incorporated in the letters patent.[8]

On the other hand, under the Act, a shareholder who fails to pay any call due by him on or before the appointed day will be liable to pay interest on the same at the rate of six per cent. per annum from that date.[9]

Where neither the General Act nor the Special Act provide for the payment of interest in such a case, interest in the Province of Quebec will only run from the date of putting in default,[10] and not

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[1] Toronto Gas Co. v. Russell, 6 U. C. Q. B., 567.
[2] Dawes case, 38 L. J. (Ch.), 512.
[3] Sec. 39, Dom. Comp. Act (R. S. C., ch. 119).
[4] Cook Stockholders, 2nd Edit., sec. 106.
[5] *Ibid.*
[6] Sec. 40, Dom. Comp. Act, R. S. C., ch. 119.
[7] *Ibid.*
[8] Lock v. Trotman (1896), App. cases, 461.
[9] Sec. 39, Dom. Comp. Act.
[10] C. C., Art. 1077; Ross v. Fiset, S. C., 1882, 8 Q. L. R., at p. 259.

from the date appointed for payment of the call; and, in the absence of statutory provisions, publication of the notice of the call in a newspaper is not a sufficient notice or putting in default.[1]

7. **What amount of stock may be called at one time.**—It is to be noted that the Act[2] appears to invest the directors with a full discretionary power as to the time and manner of payment of the calls, except in so far as these are determined by the letters patent or by-laws of the company, once the directors have enacted them, and they remain in force. Under very similar statutory provisions it has been held that the directors may require the whole subscription to be paid at one time.[3] But the clause under which it was so held did not contain certain words now found in some of our statutes. For instance, the Railway Acts,[4] Dominion Companies' Act,[5] the New Brunswick Companies' Act,[6] and the British Columbia Company's Act,[7] provide that "The Directors may, from time to time, make such calls of money upon the shareholders," etc., etc. The use of the words "from time to time" would indicate that the intention was that shares should be paid in instalments, which is the usual mode of payment adopted; although the use of the permissive word "may" would not render it imperative on the directors to require payment by instalments. An important element in the interpretation of this section is to be found in the words which follow, "as they deem necessary," in the Railway Acts, and "as they think fit" when they occur in the Companies' Acts. From this it would seem that the necessity of the occasion is the measure of justification for the amount of a call. This is why some of the general acts provide as a safeguard that "no call shall exceed the amount prescribed in the special act, or be made at a less interval than two months from the previous call."[8] Under this provision it has been held that (unless it is necessary to raise the

[1] *Ibid.* [2] Dom. Comp. Act, sec. 38.

[3] Lake Superior Navigation Co. v. Morrison, 22 U. C. C. P., 217; Haun v. Mulberry, etc., Gravel Road Co., 33 Ind., 103. The wording of the Statute under which the former of these decisions was decided was nearly identical with the present wording of the Companies Clauses Act, R. S. C., ch. 118, sec. 17, 18; The Ontario Companies Act, R. S. O., ch. 191, sec. 32; The Manitoba Companies Act, R. S. M., ch. 25, sec. 49; The Quebec Act, R. S. Q., sec 4725.

[4] Sec. 63, Ry. Act, 1888, and likewise the Provincial Acts.

[5] R. S. C., ch. 119, sec. 38. [6] 56 Vic. (1893), ch. 7, sec. 51.

[7] R. S. B. C., ch. 44; First Schedule Table A, sec. 4.

[8] Sec. 63, The Railway Act, 1888, Provincial Ry. Acts likewise.

whole capital at once) several calls made at one time, the payments to be made at intervals of two months, are irregular.[1]

The Dominion Railway Act, however, contains an express provision rendering such calls legal.[2] The objection to this is that the total amount of calls fixed upon on resolution and spreading over a certain period, may probably not become necessary in the time over which they extended, and if so, the residue must be lodged at a bank, or placed elsewhere at the risk of the proprietors.[3]

8. Must be fraud, or "ultra vires" acts to allow shareholders to question directors' right to make calls—Nature of power to make calls.—The directors having the discretionary power of making calls within certain limitations, the wisdom or necessity of making them is exclusively for their determination, and a shareholder who should question the right of the directors to call in all the unpaid stock at one time, could apparently do so only on the ground of fraud[4] or *ultra vires.* But it would appear that if calls were made in such a way as to favor one set of shareholders and impose an unequal burden upon others, an equity might perhaps be found for interference.[5] The power to make calls is in the nature of a trust to be exercised for the benefit of the company.[6]

9. Call made to prevent transfer, or to increase saleable effects.—Where a company is in difficulties, it may be proper to make a call to prevent transfers of shares,[7] no share being transferable until all previous calls thereon are fully paid in ;[8] and where a company is about to sell its undertaking, there is no objection to a call being made with a view to increasing the saleable assets by the amount thereof.[9]

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[1] Stratford & Moreton Ry. Co. v. Stratton, 2 B. & Ad., 518; Bank of Nova Scotia v. Forbes, 4 Russ. & Gild (N. Sc.), 295.

[2] Sec. 63; also New Brunswick Ry. Act, 1891, ch. 18, sec. 27.

[3] See particularly the case Saint John Bridge Co. v. Woodward, 3 N. B., 29; and Provincial Ins. Co. v. Worts, 9 Ont. A. R., 56.

[4] Oglesby v. Attrill, 105 U. S., 605; See also Bailey v. Birkenhead, etc., Ry. Co., 12 Beav., 433; Christopher v. Noxon, 4 O. R., 672; Ross v. Fiset, 8 Q. L.R., at p. 259.

[5] Christopher v. Noxon, 4 O. R., 672; see also Walsh v. N. W. Electric Co., 29 Can. S. C. R., 33; as to unequal assessment, see European & North American Ry. Co. v. MacLeod, 16 N. B., 3.

[6] Palmer Comp. Law, at p. 100.

[7] Gilbert's case, L. R., 5 Ch., 599.

[8] R. S. C., ch. 119, sec. 51.

[9] New Zealand, etc., Co. v. Peacock (1894), 1 Q. B., 622; Palmer Comp. Law, p. 100.

10. Acquiescence in a call—Estoppel.—Where shareholders have assisted in making, and approved of calls, they cannot afterwards object that the calls were improperly made.[1] And where a director seconds a resolution of the directorate that a meeting, at which a call on stock was confirmed by the shareholders, should be held on a day which was not a proper day, such director will be estopped from objecting to the call on this ground.[2]

11. Delegation by directors of power to make calls.—The power vested in the directors is discretionary or legislative, in such a sense that they cannot delegate it to subordinate officers of the company. The well-known rule that delegated power, when discretionary in its nature, cannot be delegated, applies to such a case, unless the statute contains something to the contrary.[3]

12. Intervals between calls.—Our Acts relating to joint stock companies incorporated by letters patent contain no provisions limiting the intervals in which calls are to be made. Some of them[4] provide that "not less than ten per centum upon the allotted shares of stock of the company shall, by means of one or more calls, be called in and made payable within one year from the incorporation of the company; the residue, when and as the by-laws of the company direct." In the Quebec Companies' Act the provision as to the residue is different, it provides that "for every year thereafter, at least a further five per cent. shall in like manner be called in and made payable, until one-half has been so called in."[5]

Where it is provided that no calls are to be made at a less interval than two months from the previous call, calls made on the 1st September, 1st November and 1st January are not within these

[1] Christopher v. Noxon, 4 O. R., 672; a call of four per cent. on the first instalment of five per cent. on the capital stock, made by a *quorum* only, and not by a *majority* of the directors,—Held, a good call under sec. 9 of 12 Vic., ch. 166; plaintiff's act of incorporation (Ontario Marine Insurance Co. v. Ireland, 5 U. C. C. P., 139).

[2] *Ibid*; and Windsor Hotel Co. v. Date, 27 L. C. J., 7.

[3] Cartnell's case, L. R., Ch., 691; Howard's case, L. R., 1 Ch., 561; *Ex parte* Birmingham Banking Co., L. R., 3 Ch., 651; Cook v. Ward, 2 C. P., Div., 255; see Provident Life Assurance Co. v. Wilson, 25 U. C. Q. B., 53; Toronto Gas Co. v. Russell, 6 U. C. Q. B., 567; E. & N. A. Ry. Co. v. Dunn, 16 N. B., 321.

[4] R. S. O., ch. 191, sec. 33; R. S. M., ch. 25, sec. 50; N. B., 56 Vic., ch. 7, sec. 53; R. S. Q., art. 4726.

[5] Art. 4726, R. S. Q.

requirements.[1] The interval specified in the Act, between the day on which a call is payable and the day of the next payment, must be reckoned exclusively of these two days.[2]

13. Illegality of one call does not affect legality of subsequent ones.—The illegality of one call will not vitiate subsequent legal calls, nor proceedings for the forfeiture and sale of the shares thereunder, nor afford a good defense to an action for the recovery of such subsequent calls. Each call gives a separate right of action to the company. The calls are severable, and although the company bring a single action to recover the entire balance due after the sale of shares under the forfeiture, yet the illegality of the first call will not so far vitiate the whole as to prevent the recovery of the amount due under the subsequent calls.[3]

14.—Court may make calls on a winding-up.—When a company has become insolvent and an order has been obtained for winding it

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[1] Buffalo, Brantford & Goderich Ry. Co. v. Parke, 12 U. C. Q. B., 607; Port Dover & Lake Huron Ry. Co. v. Grey, 36 U. C. Q. B., 425; Toronto Gas Co. v. Russell, 6 U. C. Q. B., 567; National Ins. Co. v. Egleson; 29 Grant's Ch. 406.

[2] Raiyway Sleepers Supply Co. (In *re*), 29 Ch. Div., 204; Cloyes v. Darling, 16 R. L., 649; Port Dover & Lake Huron Ry. Co. v. Grey, 36 U. C. Q. B., 425; Moore v. McLaren, 11 U. C. C. P., 534.

Where a statute required thirty days notice to be given for the payment of each instalment of the capital stock and that no amount greater than ten per cent. shall be called in at any one time. Held (Chipman, C. J., *dissentiente*), that the full time of thirty days must elapse between the time appointed for the payment of each separate instalment, and that it is not sufficient merely to give thirty days notice for the payment of each instalment on separate days (Saint John Bridge Co. v. Woodward, 1 Kerr (N. B.), 29.

In another similar case where the statute provided that "no instalment shall exceed ten per cent, or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held.

Held, per Spragge, C. J. O., and Haggerty, J., that the times fixed for the payment of instalments need not be thirty days apart, but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice of the call and the day on which it was payable.

Per Burton and Patterson, J. J. A., that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment. (Provincial Ins. Co. v. Worts, 9 Ont. A. R., 56).

Bank of Nova Scotia v. Forbes, 4 Russ. & Geld (N. Sc.), 295.

[3] European, etc., Ry. Co. v. McLeod, 3 Pugsley (N. B.), 3, 39, 41; Saint John Bridge Co. v. Woodward, 1 Kerr (N. B.), 29.

up, the Court may at any time thereafter, "and either before or after it has ascertained the sufficiency of the assets of the company, make calls and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves, and the Court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may wholly or partly fail to pay their respective portions of the same; Provided, however, that no call shall compel the payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained."[1]

15. Directors may be compelled to make calls when company is insolvent.—Under certain circumstances, and even when a company is insolvent, the Court in England will at the instance of a creditor who is also a shareholder, issue a mandamus or decree compelling the directors to make calls upon the stock of subscribers to the enterprize, in settlement of their indebtedness, rather than have the parties proceed under the Winding-up Act.[2] On the other hand, a company long since disorganized and insolvent cannot sue a shareholder for the balance due on his shares, at the instance of a pretended secretary-treasurer who is no longer a member of the company, and there being no longer any president or directors who claim such position.[3]

16. Call not necessary to allow creditor to proceed against shareholder—Contra as to assignee or receiver.—Where a company becomes insolvent it is not necessary, in order to let in the right of an execution creditor to proceed against a shareholder, or against his estate, that a call should have been made.[4] In a Canadian appeal to the Privy Council[5] Lord Chelmsford said: "The judgment creditors take

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[1] Sec. 49 Winding-up Act, R. S. C., ch. 129.

[2] Harris v. Dry Dock Co., 7 Grant's Ch., 450.

[3] Cie, Cap. Gibraltar v. Lalonde, M. L. R., 5 S. C., 127; Massawippi Ry. Co. v. Walker, S. C., 1871, 3 R. L., 450.

[4] Cockburn v. Starnes, S. C., 1857, 2 L. C. J., 114; Smith v. Lynn, 3 U. C. E. & A., at p. 208.

[5] Wickham v. New Brunswick Ry. Co., L. R., 1 P. C., App., 64, 80.

what belonged to the company, but do not take under them." But where assignees, or receivers were appointed to wind up a company under the provisions of an Insolvent Act, *i.e.*, the Act of 1875, it was held that a call must be made in the usual manner by the assignee or receiver before suit could be brought for the unpaid portion of a share.[1] The receiver, as a general rule, takes all rights of action which the corporation itself originally had, and may enforce them by the same legal remedies.[2]

17. Making a call is not "commencing operations."—Where a corporation is created by a special act, a clause of which forbids it to commence operations until a certain amount of its capital shall have been subscribed, and a certain amount thereof paid up, it has been held that the words "commence operations" are not intended to prevent calls being made on stock subscribed for.[3]

18. Unwritten agreement as to calls cannot vary terms of written agreement.—Where certain shareholders sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement, alleged to have been entered into between all the promoters when the company was formed, it was held that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock and pay the calls when duly made.[4]

19. Notice of call—When necessary.—As a call is to be considered as made when the by-law referring to it is duly passed,[5] and it would be unjust to any person liable to pay a call to treat him as in default unless he has had notice of the making of a call, it is held that such notice must be given to him before he can be dealt with as a defaulter; and this rule applies not only where notice is expressly required to be given by the letters patent, charter, or by-laws,[6] but

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[1] Knight v. Whitefield, Supreme Ct., 16 Nov., 1885, Cassel's Digest, 2nd Edit., 187; Ross v. Fiset, S. C., 1882, 8 Q. L. R., at p. 258; Ross v. Guilbeault, S. C., 1881, 4 L. N., 415.

[2] High on Receivers, sec. 316.

[3] North Sydney Mining, etc., Co. v. Greener, 31 N. S. R., 41, affirming Henry, J.

[4] Christopher v. Noxon, 4 O. R., 672; 1234 Civil Code, Quebec.

[5] Sec. 39, Dom. Comp. Act, and certain Provincial Acts.

[6] See Sec. 41, Dom. Comp. Act, and certain Provincial Acts.

also where there is no express provision upon the subject, and the shareholder has entered into an absolute covenant to pay such calls as may be made.[1]

20. Requirements of notice.—The notice to be valid must be in such form, if any, as may be required by the regulations of the company,[2] and where a notice is required to be signed by the directors, it will not be sufficient if their signatures are affixed by a clerk[3] or by a managing director "by order"[4] or secretary.[5]. An omission by the directors to appoint a place of payment, is fatal.[6] The resolution to make a call need not specify the time and place of payment,[7] but the directors must appoint a time and place.[8] It is also necessary that the meeting of the directors, at which the call is made, shall have been duly convened.[9] Where the Act required that public notice of the call should be given in one or more of the several newspapers published in every district where stock may be held, it was decided that under this Act the publication of notice in every district where stock was held was not a condition precedent to the right of action against shareholders residing in a district in which such notice had been duly published.[10] A variation in the days of payment between the resolution and the notice invalidates a call, but not as to a shareholder, or his testator, who has made payments on or promised to pay such call.[11]

21. Mode of giving notice.—Where there is no statutory provision as to the mode of giving notice, as, for instance, the Ontario

[1] Lindley Companies, 5th Edit., p. 417; Miles v. Bough, 3 Q. B., 845.

[2] See remark of Parke, B., in 2 Ex., 126, cited in Provident Life Ass. Co. v. Wilson, 25 U. C. Q. B., at p. 57.

[3] See Miles v. Bough, 3 Q. B., 845.

[4] Provident Life Ins. & Investment Co. v. Wilson, 25 U. C. Q. B., 53.

[5] See Great North of England Ry. Co. v. Biddulph, 7 M. & W., 243.

[6] *Ibid.*

[7] Mr. Palmer, however, in his work on Company Law, says at p. 99, that care must be taken that the resolution making the call specifies the amount of the call, the time and place, for these are of its essence. He also considers that an entry must be made in the minutes.

[8] Per Parke, B., in Newry & Enniskillen Ry. v. Edmunds, 2 Ex., 118.

[9] Garden Gully, etc., Co. v. McLister, 1 App. Cas., 46; Faure Electric, etc., Co. v. Phillipart, 58 L. T. R., 525; Palmer Comp. Law, p. 99.

[10] Provincial Ins. Co. v. Cameron, 31 U. C. C. P., 523, affirmed in appeal, 9 Ont. A. R., 56.

[11] *Ibid.*

Act,[1] it must be given as required by the common law; that is, in such a manner that the fact of delivery to or receipt by the person to be notified may be proved. There is some conflict as to whether personal notice must be given or whether notice by mail will suffice. In an Ontario case, Ross v. Machar,[2] O'Connor, J., expressed his opinion in an elaborately reasoned judgment to the effect that where the statute provides that notice " shall be given," notice by post is not a compliance with this provision. But this is in opposition to an earlier Ontario case, Union Fire Ins. Co. v. Fitzsimmons,[3] which decided that delivery in good time to the post-office was a good delivery to the shareholder defendant. And in England it has been held in leading cases[4] that notice of an allotment by post is sufficient, even if the notice should fail to reach the allottee or his agent, either owing to the default of the allottee or to some casualty in the post-office establishment. But it has been objected that these English cases proceeded on the ground, now well recognized, that a proposer seeking to contract with another by sending his proposal by post, or at least delivering his proposal by letter through his own messenger, tacitly proposes also, or consents by that act, that the acceptance be sent to him through the same medium; and as a letter addressed to another person when posted leaves the control of the sender, it becomes at once the property of the person to whom it is posted. In this view the acceptance takes effect from the time of posting it, for the sender cannot afterwards recall it. Wilson, C.J., in Union Fire Insurance Co. v. Fitzsimmons,[5] expressed great doubt as to whether this rule could be applied to a mere notice proceeding from the one party and which the other has no special reason to look for.[6] In

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[1] R. S. O., ch. 191, sec. 68. [2] 8 O. R., 417.

[3] 32 U. C. C. P., 602, Wilson, C. J., doubting.

Union Fire Ins. Co. v. O'Gara, 4 O. R., 359.

Where notice of 30 days is required, the mailing of a notice on the 27th June, requiring a call to be paid on the 27th July, is not in time. (National Ins. Co. v. Egleson, 29 Grant's Ch., 406).

Under the circumstances shown in the evidence set out in the report :— Held, O'Connor, J., dissenting, that secondary evidence of the contents of the minute book of the company, showing the making of certain calls, was improperly rejected (Ross v. Machar, 8 O. R., 417).

[4] Household Fire Ins. Co. v. Grant, 4 Ex. Div., 216; Harriss's Co., 7 Ch., 587; Townsend's case, 13 Eq., 148.

[5] *Supra.* [6] 32 U. C. C. P., at p. 619, 620.

Quebec it is necessary that the letter accepting an offer must reach the person making the offer, before a contract is made : it is not sufficient to post the letter of acceptance addressed to him making the offer.[1] In a recent case, Wurtele, J.A., in delivering the judgment of the Court said[2] : "The objection is raised that as soon as the letter containing the acceptance is deposited in the post-office, it ceases to belong to the vendor and becomes forthwith the property of the party to whom it is addressed. But this objection is unfounded, as although by a fiction of law the ownership of the letter passes from the sender to the person to whom it is addressed on its deposit in the post-office, the acceptance contained in it remains nevertheless unknown to the proposer until it really comes into his hands. Until that moment . . . the proposer . . . retains the right to retract his offer. After the deposit and before the receipt of the letter of acceptance, the acceptor can on his part retract his acceptance by means of a more rapid mode of communication, as, for example, by telegraph or by telephone."

22. Proof of notice given.—In Quebec it has been decided that a notice claiming payment of calls mailed to the shareholder is sufficient evidence that such calls were made.[3] And in one American case it was held that proof that a notice of a call was duly mailed and addressed to a subscriber, made a *primâ facie* case of notice of such call.[4] But the Supreme Court of Alabama have reasoned that generally when the law requires notice to be given to a party, but does not specify the mode in which it shall be given, personal notice must be given and proved, before any liability can be fixed on him.[5]

It may be noted that in none of the Railway Acts is personal notice of calls required. Notice in the Official Gazette and local newspapers being sufficient.

Some statutes provide that a copy of the Gazette containing the notice shall, on production thereof, be evidence of the sufficiency of such notice.[6] But it has been held, that to prove a call made on the

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[1] Underwood v. Maguire, R. J. Q., 6 Q. B., 237.

[2] *Ibid*, at p. 250.

[3] Ross v. Converse, Q. B.. 1883, 27 L. C. J., 143; 6 L. N., 67; but see Ross v. Fiset, 8 Q. L. R., at p. 259.

[4] Braddock v. Philadelphia, etc., Ry. Co., 45 N. J. Law, 363.

[5] Grubbs v. Vicksburg, etc., Ry. Co., 50 Ala., 398.

[6] Ry. Act, 1888, sec. 41 and 64.

15th of March, a Gazette of the date of 28th May containing a notice bearing date on the 25th of March of the same year, is not evidence that notice of the first call was given on the latter date;—that is to say, a Gazette cannot be considered as giving notice anterior to the date of its publication, nor as being evidence of any notice of an earlier date than the date of the Gazette itself.[1]

23. Payment of calls in paper.—It has been held that a joint stock company may take a promissory note from a stockholder for an amount due by him on a call on his stock,—there being nothing in the act of incorporation to prohibit it.[2]

In an action by liquidators for calls, the company, now represented by the liquidators, having accepted railway debentures in payment of calls and disposed of the debentures, the liquidators could not ask for the resiliation of this transaction, especially without offering back what had been received.[3]

24. Requirement of charter that call be made—Effect of disregard.—If in the charter under which the company is incorporated, a clause requires that a call of a certain percentage on the capital stock shall be made and paid up within a specified time, this will be considered imperative, and a disregard of it will involve the forfeiture of the charter unless sufficient cause be shown for failure to conform with this provision.[4] Nor is an action for the forfeiture of the charter on this ground demurrable on the ground that this clause is merely directory.[5]

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[1] Buffalo, Brantford & Goderich Ry. Co. v. Parke, 12 U. C. Q. B., 607; By the resolution providing for calls, the mailing of a circular to each shareholder was made an essential part of the notice. The cashier swore that circulars had been prepared printed in part, and that it was the duty of the junior clerk to fill them up and mail them. The clerk swore that he had filled them up and mailed them, but on cross examination said he had not read the print, and did not know what it was about . Defendant did not deny that he had received a circular. The Court having power to draw inferences of fact as a jury, found that notices had been mailed in sufficient time, as required by the Act. (Bank of Liverpool v. Bigelow, 3 Russ. & Ches. (N. S.), 236.

[2] St. Stephen's Branch Ry. v. Black, 2 Han. (New Brunswick), 139, and see Redfield Rys., Vol. 1, p. 181, Ed. of 1888.

[3] Ross v. Angus, S. C., 1883, 6 L. N., 292.

A judgment confirming the discharge of an insolvent is *res judicata*, and the validity of his assignment cannot afterwards be questioned in an ordinary action against him for calls, (*Ibid*).

[4] Casgrain v. The Dominion Burglary, etc., Co., R. J. Q., 6 S. C., 382.

[5] *Ibid*.

Where the company has failed to make a call of the amount required within the time fixed by its charter, but has made a call of a part of this amount in lieu thereof, and proceedings have been taken to have the charter declared forfeited, or, failing forfeiture, to have the company enjoined to discontinue its business until it shall have complied with its charter, the court may make an order that a further call be made within a stated time so as to complete the call of the required percentage of capital.[1]

[1] Casgrain v. The Dominion Burglary, etc., Co., R. J. Q., 6 S. C., 385.

CHAPTER VIII.

TRANSFER OF SHARES.

1. When transfer is complete.
2. Liability of directors on transfer.
3. Directors' right to restrain transfer.
4. Misdescription of transferee—annulment of transfer.
5. Acceptance of transferee releases transferor.
6. Right of transfer—transfer to avoid liability — fraudulent or nominal transfer.
7. Power of rejecting proposed transferees—control by court.
8. Director's right to transfer.
9. Transfer by shareholder indebted to the company—waiver of right to refuse transfer—lien.
10. Has company a lien on its shares at common law?—can it create one by by-law—pledge of shares—*Quasi* possession—right of Stock Exchange to privilege on sale price of member's seat—analogy to case of company.
11. Effect of lien created by general law.
12. Effect of lien created by by-law.
13. Waiver of lien by company.
14. Meaning of "indebted"—when member becomes indebted for calls.
15. Effect of winding-up on transfer.
16. Certificate evidence of title to shares—effect of in hands of *bona-fide* holder—estoppel.
17. Duty of company to warrant certificate—damages for refusal to register transfer.
18. Practice and procedure to effect transfer.
19. Registration of transfer — effect of.
20. Transfer by representative of deceased shareholder.
21. Register *prima facie* evidence of transfer.
22. Registration essential to the exercise of rights of membership.
23. On whom falls duty of registering transfer.
24. Position of pledgee of shares.
25. Transferor estopped from denying title of transferees.
26. Right of creditor of transfer. or as against unregistered vendee.
27. Position of parties to the transfer towards creditors of the company.
28. Unnecessary delay by directors to confirm transfer—effect of.
29. Refusing registration of transfers affecting liability of members.
30. Liability of transferor on delay to have transfer registered.
31. Company not bound to notify transferor of refusal to accept transfer—lapse of time.
32. Transferor responsible for his own laches — should compel purchaser to register transfer.
33. Registered owner is reputed owner—liability on winding-up.
34. Legal and equitable owners' joint and several liability.
35. Means of compelling registration—mandamus—against whom directed.
36. Discretionary power to refuse registration.
37. Refusal to register necessary to warrant mandamus.

1. **When transfer is complete.**—The question of transfer of shares has already been touched upon in its relation to the illegal diminution of capital. Under our Companies' Acts[1] transfers are valid only after entry in the register; but so far as the company and its creditors are concerned in the meanwhile, the transferee will be held jointly and severally liable with the transferor from the date of the actual transfer to the date of its entry in the register. And during that period the transfer will also serve to exhibit the rights of the parties thereto *inter se*. A transfer made by sale under execution, or under the decree, order or judgment of a court of competent jurisdiction is valid before the formality of registration.[2]

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[1] Sec. 48, R. S. C., ch. 119.

[2] *Ibid.*

C. purchased shares in a certain company in 1878; but the papers required to make a formal transfer to him in the books of the company, were not furnished to the company till December 20th, 1881. On February 11th, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the Board of Directors until May 10th, 1883. Before this, however, on November 15th, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no enquiries from the company subsequently to December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding-up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding-up proceedings; nor did he show any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company; Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding-up proceedings. (Sichell's case, L. R. 3, Ch. 119, distinguished.) (*Re* Cole and the Canada Fire Ins. Co., 8 O. R., 93).

2. Liability of directors on transfer.—Under the Companies' Acts it is clear that, in regard to unpaid shares, directors are given a discretion as to the acceptance of any proposed transferee.[1] The Acts also provide that unpaid shares are not to be transferred to men of straw or mere dummies, and that if the directors knowingly do so, they will be held jointly and severally liable to the creditors of the company in the same manner and to the same extent as the transferring shareholders, but for such transfer, would have been.[2] If a dissenting or absentee director wishes to escape liability for what he considers a fraudulent transfer, he must give publicity to his objections in the manner and within the time directed by the Act.[3]

But directors will not be personally liable for misfeasance where they are guilty of a mere error of judgment. Thus, the articles of association of a limited company provided that no transfers of shares not fully paid-up should be registered unless "approved" by the directors. A large number of shares were sold to M. at par on his paying one-fifth down, and M. subsequently transferred such shares to P., who was already a shareholder, and had recently been elected a director, the directors believing that P. was a proper person to take a transfer of the shares, and having been advised by their solicitor that there was no valid objection to the transfer. P. afterwards became bankrupt, being indebted to the company to the extent of four-fifths the par value of the shares. It was held that the directors had duly exercised their judgment upon and "approved" the transfer to P. within the meaning of the articles, and that, dishonest dealing not being charged, the approval of the transfer was not such a misfeasance or breach of trust as would render the directors liable on the winding-up of the company.[4]

3. Directors' right to restrain transfer.—All our statutes provide for the making of by-laws by the directors regulating the transfer of stock.[5] Shares being personal property[6] and the right to sell property being a necessary incident of its ownership, a by-law which would absolutely restrain the right of a shareholder to dispose of and transfer his shares, would be void as against common right, as being

[1] Sec. 49, R. S. C., ch. 119. [2] *Ibid.* [3] *Ibid.*

[4] *Re* Faure Electric Accumulator Co., 40 Ch. Div., 141; 58 L. J. (ch.) 48. Thompson Corp., sec. 2342.

[5] Sec. 35 (*a*) R. S. C., ch. 119. [6] Sec. 25, R. S. C., ch. 119.

opposed to the law of the land, and also as being in restraint of trade, unless such power were given by the charter or the original compact among the corporators.[1] This unlimited right to transfer within certain restrictions must be borne in mind in construing clauses giving directors a discretionary power of rejecting a proposed transferee, as must also the fact that the object of such a clause is the protection of the shareholders.[2] While, therefore, the power cannot be extended to authorize the refusal of a transfer in a case not provided for by the clause,[3] the Court will not be slow to adopt such a construction as shall effectuate the desired object of protection.[4]

4. **Misdescription of transferee—Annulment of transfer.**—The directors having under the Companies' Act (D) the power to object to a transferee, if unpaid shares are transferred to a pauper or man of straw, who is misdescribed, so that the directors are imposed upon and induced to make no enquiry about him, the company can, on ascertaining the facts, repudiate the transfer and place the transferor on the list of contributories.[5] This has been done where the transferee was a clerk, and was paid to accept a transfer, and he was described as a gentleman paying for the transfer.[6] So where the transferee was a ship's steward, paying nothing for the transfer, but was described as of a certain place, where he did not live, and as paying the market price for the shares.[7] Also in another case the transferee was described as "of Cadogan Terrace, gentleman," and the transfer in consideration of £1326, expressed to be paid, and the directors registered the transfer. The transferee was employed in a warehouse at a salary of less than £100 a year, and the consideration was paid only by a promissory note which was not given at the time

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[1] Moore v. Bank of Commerce, 52 Mo., 377; Sargent v. Franklin Ins. Co., 8 Pick (Mass.), 90; Sargent v. Essex Corp., 9 Pick. (Mass.), 202; Moffatt v. Farquhar, 7 Ch. Div., 591; Stranton Iron Co., 16 Eq., 559; Weston's case, 4 Ch., 20; Poole v. Middleton, 29 Beav., 646, 650; Cawley & Co., 42 Ch. Div., 209; Gilbert's case, 5 Ch., 559, 565; Thompson Corp., sec. 1031.

A company incorporated under 27-28 Vic., ch. 23, has not power to refuse to allow a transfer of shares, without assigning a sufficient reason. (Smith v. Can. Car Co., 6 Ont. P. R., 107.

[2] Nicol's case, 3 de G. & J., 387, 433; Buckley Comp., 37.

[3] Pinkett v. Wright, 2 Hare, 120; Stranton Iron Co., 16 Eq., 559.

[4] Allin's case, 16 Eq., 449.

[5] Lindley Comp., 827; see also Dominion and Provincial Acts.

[6] Payne's case, 9 Eq., 223.

[7] *Ex parte* Kintrea, 5 Ch., 95.

the transfer was executed, and which was worth, perhaps, not two shillings in the pound, and probably nothing. Assuming that an out and out sale was intended, it was held that the misdescription of the transferee and misstatement of the consideration were fatal, and that the transferor must be put upon the list.[1]

But the mere fact that a person in a humble station in life has been described by the vague title of "gentleman," does not necessarily constitute such a fraudulent misrepresentation as to allow of the transaction being avoided.[2] If the Court finds that there was no intention to mislead, the mere fact of there having been in the transfer some misdescription is unimportant.[3]

5. Acceptance of transferee releases transferor.—If the directors have accepted the transferee with the knowledge of the facts, the transferor cannot be made a contributory.[4]

6. Right of transfer—Transfer to avoid liability—Fraudulent or nominal transfer.—Where shares are transferable and no restriction on the right to transfer them is imposed by the by-law of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot lawfully prevent a transfer, even if they are *bonâ fide* of opinion that it is for the interest of the company that they should do so.[5]

Thus a director or other shareholder of a company in difficulty, or even *in extremis,* may effect a transfer of his shares, and such a transfer will be valid upon the winding-up of the company, although made avowedly for the purpose of avoiding liability, although made to a man of straw, although made for a nominal consideration, or although a valuable consideration be expressed but be not in fact paid, or even although the consideration be in fact paid *to*, not *by*, the transferee, provided the transaction be *bonâ fide*, an absolute out-and-out

[1] Snow's case, 19 W. R., 1057; *sub nom.* Roger's case, 25 L .T., 406.

[2] William's case, 1 Ch. Div., 576; Master's case, 7 Ch., 292.

[3] Buckley Comp., 34.

[4] Chynoweth's case, 15 Ch. Div., 13; see sec. 49, Comp. Act (D), R. S. C., ch. 119.

[5] Lindley Comp., 464; Moffatt v. Farquhar, 7 Ch. Div., 591; Stranton Iron Co., 16 Eq., 559; Weston's case, 4 Ch., 20; compare *ex parte* Parker, 2 Ch., 685. A company incorporated under 27-28 Vic., ch. 23, has not power to refuse to allow a transfer of shares of its stock, without assigning a sufficient reason (Smith v. Can. Car Co., 6 Ont. Practice Reports, 107.

disposal of the property without any trust or reservation for the benefit of the transferor.[1]

But notwithstanding the length the Courts have gone in holding the right to transfer to be free from all implied restriction, a transfer which is fraudulent in the sense of not being a real transfer out-and-out, or a transfer made for fraudulent purposes, is invalid and the transferor remains liable.[2]

Thus in Eyre's case,[3] a shareholder had presented a winding-up petition, and the directors, in order to stifle enquiry, bought him off by taking a transfer of his shares to a nominee of their own. The company being wound up within two years, it was held that the transfer was not *bonâ fide*, and that the transferor was a contributory.[4] And so held where the transfer was to quiet a dissentient shareholder;[5] also where the transfer was made after a call was proposed.[6]

If the transaction be merely colourable and fictitious, and the transfer be merely nominal, and there be any trust or reservation of benefit in favor of the transferor the transaction is then invalid and the transferor remains liable.[7]

Thus in Budd's case,[8] a solicitor transferred his shares to his farm-bailiff, a man without property. The transferee stated that he had never looked upon himself as owner of the shares, and had always understood that he was to be indemnified. In the winding-up of the company the transferor, as solicitor for the transferee, but without any communication with him, made the company an offer of a certain sum, which he admitted was to have come out of his own

[1] In *re* Provincial Building Society, 30 New Brunswick, 628; De Pass's case, 4 de G. & J., 544; Slater's case, 35 Beav., 391, 35 L. J. (Ch.), 304; Weston's case, 6 Eq., 238, 4 Ch., 20; Battie's case, 39 L. J. (Ch.), 391; Moore v. McLaren, 11 U. C. C. P., 534.

[2] Costello's case, 2 D. F. & J., 302. A transfer of shares in a joint stock company by a shareholder, which is made with the object and has the effect of reducing the capital stock of the company is void; and all resolutions of the company and directors, authorizing such transfer, are illegal and *ultra vires*, (Ross v. Worthington, 5 L. N., 140; Ross v. Fiset, 8 Q. L. R., 251; and see McCord's case, 21 O. R., 264; see also R. S. B. C., ch. 44, sec. 35.

[3] 31 Beav., 177.

[4] Buckley Comp., 6th Ed., pp. 31 and 32. See also Lankester's case, 6 Ch., 905.

[5] Bennett's case, 18 Beav., 339; 5 D. M. & G., 284.

[6] Parker's case, 2 Ch., 685; Gilbert's case, 5 Ch., 559; see sec. 51, Comp. Act (D), R. S. C., ch. 119.

[7] Hyam's case, 1 D. F. & J., 75; Budd's case, 3 D. F. & J., 297.

[8] 3 D. F. & J., 297; 30 Beav., 143.

pocket, to escape all further liability. The transfer was held to be colourable. The relative position of master and servant, and the particular relations between the parties, were held to be important in ascertaining the genuine nature of the transaction.

In Hyam's case[1] a few days before the winding-up of a mining company, H. transferred shares in it to P., a clerk in his employ, and the payment for the mining shares was made by handing to the broker certain bank shares standing in P.'s name, but which, in fact, belonged to H. It was sought to be maintained that the purchase by P. of the mining shares with H.'s money constituted P. a trustee for H., and that, as between the company, the trustee, and the *cestui que trust*, the trustee only was liable.[2] It was held that the transfer of the mining shares to P. was merely colourable, and that H. was liable as a contributory.[3]

7. Power of rejecting proposed transferees—Control by Court.— Where a power of rejecting proposed transferees is reserved to the directors, they must exercise it reasonably,[4] and its exercise will be controlled by the Court.[5] A power of this kind is a fiduciary power to be exercised for the benefit of the company and with due regard to the rights of the transferor; and this whether the power of refusal is discretionary or absolute.[6] But, in order that the directors may be unfettered in the exercise of this power, it has been held that they are not bound to disclose their reasons for rejecting a transferee, provided they have fairly considered the question at a meeting of the board. In the absence of evidence to the contrary, the Court will presume they have acted reasonably and *bonâ fide*,[7] and this applies whether the directors have a general power to refuse registration or only a limited power.[8]

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[1] 1 D. F. & J., 75. [2] See sec. 81, Dom. Comp. Act, R. S. C., ch. 119.

[3] And see Chinnock's case, Joh., 714; Alexander's case, 9 W. R., 410; 3 L. T., 883; Lund's case, 27 Beav., 465; *Ex parte* Hatton, 31 L. J., (Ch.) 340.

[4] Poole v. Middleton, 29 Beav., 646, 651; Slee v. Internat. Bank, 17 L. T., 425; London, Birmingham, etc., Bank, 34 Beav., 332; Robinson v. Chartered Bank, 1 Eq., 32.

[5] Buckley Comp., 36; Upton v. Hutchison, Q. B. (1899), R. J. Q. 8 (Q. B.), 505, 510; 2 Q. P. R., at p. 304.

[6] See per Rigby, J., in *re* Coalport China Co. (1895), 2 Ch., 404, 12 R., at p. 466.

[7] In *re* Gresham Life Assurance Co., *Ex parte* Penney, L. R., 8 Ch., 446; 42 L. J. (Ch.), 183; in *re* MacDonald and The Mail Printing Co., 6 Ont. P. R., 309.

[8] In *re* Coalport China Co. (1895), 2 Ch., 404; 12 R., 462, 64 L. J. (Ch.),710.

In order to obtain the interference of the Court, it is for the complainant to establish by evidence that the directors have exercised their power improperly.[1] If, however, the directors choose to give their reasons for refusing to register the transfer, the Court will then consider whether they are legitimate or not.[2]

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[1] *Ibid.*

[2] Bell v. Bell, 65 L. T., 245; Palmer Comp. Law, p. 88.

The Bank of Liverpool brought an action against S., the appellant, (defendant) as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in that bank.

By the 7th plea, and for defence on equitable grounds, the defendant said, "that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf a transfer and assignment of all the shares and stock which he had held in the Bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said Bank of L. shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and the said Bank of L. be enjoined from further prosecution of this suit."

The plaintiffs filed no replication to this plea, but at the trial of the action which took place before James, J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the Bank of L. held on the 26th June, 1873, it was resolved "that in the opinion of the meeting the Bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the Bank to resume special payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect."

The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the Bank of L. effected a loan of $80,000 from the Bank of S. upon the security of one B., who to secure himself took bonds to lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney executed by defendant and the purchasers respectively were sent to the manager of the Bank of L., in whose favor they were drawn, to enable him to complete the transfer. The directors of the Bank of L. refused to permit the transfer, but the defendant was not notified of their refusal nor did they make any claim against him for any indebtedness on his part to the Bank; and it appeared also from the evidence that subsequently to the resolu-

8. Director's right to transfer.—The right to transfer shares being incident to every shareholder, a director can exercise such right in respect of his own shares, as well as any other member, provided he retains sufficient for qualification purposes. His exercise of this right will not be affected by his knowledge of the fact that a call upon the shares is imminent.[1] In dealing with his shares a director is not in the position of a trustee for the general body of shareholders so as to render such dealings prejudicial to the interests of his *cestui que trust*.[2] But since it is in a director's power, as it is also his duty, to see that all formalities in respect of transfers are duly observed, any irregularities will be construed strictly against him.[3]

9. Transfer by shareholer indebted to the company—Waiver of right to refuse transfer lien.—Directors under the Dominion Companies Act, may decline to register any transfer of shares belonging to any shareholder who is indebted to the company.[4] Another section provides that the directors may deduct from the dividends payable to any shareholder all such sums of money as are due from him to the company, on account of calls or otherwise.[5] These two sections give the company a passive lien as regards the shares themselves, and as regards the dividends, an active lien to retain and apply them towards satisfaction of the shareholders debt.[6] Nor can

tion of the 26th June, 1873, and prior to the sale by the defendant of his shares, a large number of other shares had been transferred in the books of the Bank. In October, 1879, the Bank of L. became insolvent and the Bank of S., the respondent, obtained leave to intervene and carry on the action.

At the trial a verdict was found by the judge in favour of the appellant; but the Supreme Court of Nova Scotia, James, J., dissenting, made absolute a rule *nisi* to set aside the verdict. On appeal to the Supreme Court of Canada it was.

Held, (1) (Reversing the judgment of the Supreme Court of Nova Scotia): That the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares and to have the transfer recorded in the books of the bank; and the seventh plea was therefore good equitable defence to the action. Smith v. Bank of Nova Scotia, Supreme Court, 1882, 8 Can. S. C. R., 558.

[1] *Re* Cawley, 42 Ch. Div., 209; Gilbert's case, 5 Ch., 559; South London Fishmarket Co., 39 Ch. Div., 324; and see Jessop's case, 2 De G. & J., 638.

[2] *Ibid*, and see Moore v. McLaren, 11 U. C. C. P., 534.

[3] *Ex parte* Brown, 19 Beav., 97; *Ex parte* Henderson, *ibid*, 107.

[4] Sec. 52, R. S. C., ch. 119.

[5] Sec. 36, *ibid*.

[6] See Buckley Comp., 459; English Act of 1862, has the same provisions; in Dunlop v. Dunlop (21 Ch. Div., 583), a banking company had, by its deed

any share be transferred until all previous calls thereon are fully paid in.[1] This provision is clearly imperative, but the provision allowing directors to decline to register the transfer of shares belonging to a shareholder who is indebted to the company is permissive only, and if the company do not refuse registration, the transfer will, of course, not be invalid.[2] This was held even under an act which was more stringent in this respect, the act providing that a shareholder "shall not be entitled" to transfer. Such a provision is for the protection of the company and can be waived by it.[3]

10. Has company a lien on its shares at common law? Can it create one by by-law? Pledge of shares—Quasi possession—Right of Stock Exchange to privilege on sale price of members seat—Analogy to case of company.—Some of our companies' acts contain no express provisions giving to companies incorporated thereunder a lien upon the shares of its members for any indebtedness to the company,[4] and it becomes a very important question to determine whether a company has a lien at common law or can create one by by-law. This question is not free from difficulty.

The law in England is thus laid down in Lindley on Company Law.[5] "Each member of an ordinary partnership has a lien on the shares of his co-partners for what is due from them as partners to the firm; and by analogy to this rule every company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares. The writer is not aware of any case expressly establishing such a lien in favour of companies generally; but he conceives that its existence cannot be successfully disputed, except where it is inconsistent within an express right of transfer; and he has not met with any decision or dictum opposed to this view." But the author proceeds to state, "It must, however, be observed that the lien which each partner has on the assets of the partnership, and on the shares of his co-partners, cannot

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of settlement, power to forfeit shares if the holder did not on demand pay all monies due from him to the company; and shareholders indebted to the company could not transfer their shares. It was held that these provisions gave the company no lien or charge on the shares of a person indebted to it, and that no case for contribution arose.

[1] R. S. C., ch. 119, sec. 51.

[2] In *re* Hoylake Ry. Co.. and *Ex parte* Littledale, 9 Ch., 257. [3] *Ibid.*

[4] For instance, The Quebec Act, R. S. Q., sec. 4694, *et seq.*, and especially some of the very old Acts.

[5] At p. 456.

be held to reside in every member of an incorporated company, without considerable modification; for its existence is to a great extent inconsistent with the principle that the company is distinct from the individuals composing it, and would destroy many of the advantages resulting from that principle." And further the same author remarks, "Again, the ordinary partnership lien is inconsistent with an unrestricted right of transfer."[1]

Through all the English decisions the idea runs that a joint stock company is a partnership, with special powers. In Dunlop v. Dunlop[2] a banking company had, by its deed of settlement, power to forfeit shares if the holder did not on demand pay all monies due from him to the company; and shareholders indebted to the company could not transfer their shares. But it was held that these provisions gave the company no lien in the sense of an equitable charge on the shares of a person indebted to it enforceable by an action for their sale.

As already pointed out,[3] our Companies' Acts usually contain an express provision to the effect that companies incorporated thereunder have all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, as if they were incorporated by a special Act of Parliament;[4] and the parties who apply for the letters patent and others who thereafter become shareholders in the company are thereby constituted a body corporate and politic.[5] Thus here, as in the United States, a corporation is a body corporate and politic, and a distinct person, in law, from all its members, and may contract with, sue and be sued by, any of its members; no member has any specific interest or right of property in the money, goods and effects of which the stock is composed; they are the property of the corporation. Shares in the company are regarded as a distinct estate, saleable, transferable and attachable as personal property.[6] This view of the law exactly coincides with the civil law conception of a general partnership which obtains in Quebec,[7] and in that Province would necessarily apply *a fortiori* to the case of a

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[1] Palmer Comp. Law, p. 105, says "a company has, *prima facie*, no lien on the share of a member," Pinkett v. Wright, 2 Ha., 120.

[2] 21 Ch. Div., 583; Thompson Corp., sec. 2320.

[3] *Supra*, p. 1, of chap. 3 on Incorp. of Companies.

[4] Sec. 24, Dom .Act, R. S. C., ch. 119.

[5] Sec. 3, Dom. Act, R. S. C., ch. 119.

[6] Thompson on Corp., sec. 2317; and as in Louisiana, New Orleans, Nat. Banking Assn. v. Wiltz, 10 Fed. Rep., 330.

[7] Damien v. Société de Prets et Placements de Québec, Q. B., 1896, 3 Rev. de Jur., 32.

joint stock company. It has been decided by a Queen's Bench decision[1] that a "general partnership has a legal existence quite distinct from its members considered individually, so that the members are not individually co-proprietors of the partnership property; each partner is merely a creditor for his share of interest in the ideal partnership. Only when the partnership is dissolved do the members thereof become co-proprietors." In an early Ontario case, it was held that a company had no common law lien upon the shares of its members for any indebtedness to the company.[2] This is the law of Louisiana, which is identical with that of the Province of Quebec in this respect;[3] and it is also the established law of the United States.[4] The reason sometimes given for this rule is that secret liens are repugnant to the general policy of the common law.[5] But there is in fact no sufficient ground in law upon which to rest a claim to such a lien. Such possession as a corporation has of its members' shares does not give it a possessory lien for their debts.[6] The corporation really has no possession of stock that it has issued to its members except in case they transfer it to the corporation.[7]

By virtue of the general authority to regulate the transfer of shares conferred upon corporations by statute or special charter, many authorities hold that companies may enact by-laws creating liens upon the shares of their members; and that it matters not that this statutory authority is conferred in the most general terms.[8] In the United States it has been thought the better opinion that a company cannot, under the authority given to it to regulate transfers of stock, create or declare by by-law a secret lien in its favor upon its stockholders' shares to secure their debts to the company.[9] Such a by-law can be made only in pursuance of a general statute, or of some pro-

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[1] *Ibid.*

[2] McMurrick v. Bond Head Harbour Co., 9 U. C. Q. B., 333.

[3] New Orleans Nat. Banking Ass'n. v. Wiltz, 10 Fed. Rep., 330; Bryon v. Carter, 22 La Ann, 98; Byrne v. Union Bank, 9 Rob. (La) 433.

[4] Jones on liens, sec. 375; Thompson Corporations, sec. 2317, citing numerous cases.

[5] Jones Liens, sec. 375; Thompson Corp., sec. 2317.

[6] *Ibid*; But see Child v. Hudson's Bay Co., 2 P. Williams, 207.

[7] *Ibid.*

[8] Child v. Hudson Bay Co., 2 P. Wms., 207; Brent v. Bank of Washington, 10 Pet., 596, 616; Pendergast v. Bank of Stockton, 2 Sawyer, 108; In *re* Bachman 12, N. Bank Register, 223; Jones Liens, sec. 377.

[9] Anglo-California Bank v. Granger's Bank, 16 Rep., 70, 6 Am. & Eng. Corp. Cas., 543; Moore v. Bank of Commerce, 52 Mo., 377; Bryon v. Carter, 22 La Ann., 98.

vision in its special charter.[1] In England a lien conferred upon a company by its articles of association on all shares registered in the name of a member for his debts to the company, is valid.[2] The same would necessarily hold of those by-laws which, under certain of our Companies' Acts are allowed to be incorporated in the letters patent and form part thereof.

Coming down to a consideration of our Canadian Companies' Acts, there would appear to be but two which give an express passive lien on shares belonging to a member indebted to the company.[3] But all our present statutes contain with certain modifications the following provision respecting the transfer of shares. "The stock of the company shall be personal estate, and shall be transferable, in such manner, and subject to all such conditions and restrictions as are prescribed by this act or by the letters patent or by by-laws of the company."[4] One restriction common to all the acts is that no share shall be transferable until all previous calls thereon are fully paid in.[5] Further than this only two of our statutes go. The British Columbia Act, however, does not contain the above restriction, but it gives the right to the company to decline to register the transfer made by a member who is indebted to them.[6]

In the case of Société Canadienne Française de Construction v. Daveluy,[7] decided by the Supreme Court of Canada in appeal from the Quebec Court of Queen's Bench, the exact point decided, so far as it relates to the present subject was, that a company having a general power[8] to make rules for its government and not contrary to the laws in force in Lower Canada, may make a by-law restraining the transfer of shares, the holder of which is indebted to it, and creating a privilege thereon for the amount of the indebtedness; and such by-law was operative against his creditors upon his insolvency, on the

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[1] New Orleans Nat. Banking Ass'n. v. Wiltz, 10 Fed. Rep., 330; Driscoll v. West Bradley and Cary Man. Co., 59 N. Y., 96; Carroll v. Mullanphy Sav. Bank, 8 Mo. App., 249; Choateau Spring Co. v. Harris, 20 Mo., 382; Merchant's Bank v. Shouse, 16 Rep., 442; In *re* Long Island Ry. Co., 19 Wend. (N. Y.), 37; Byrne v. Union Bank, 9 Rob. (La), 433; Steamship Dock Co. v. Heron, 52 Pa. St., 280.

[2] Bank of Africa v. Salisbury Gold Mining Co. (1892), App. Cas., 281; Bradford Banking Co. v. Briggs, 12 App. Cas., 29 approved.

[3] R. S. C., ch. 119, sec. 52; N. B., 1893, ch. 7, sec. 58.

[4] R. S. C., ch. 119, sec. 25.

[5] R. S. C., ch. 119, sec. 52.

[6] R. S. B. C., ch. 44, first schedule Table A, sec. 10.

[7] 20 Can. S. C. R., 449 (1892).

[8] Chapter 69, Consol. Stat. L. Can. (1861), sec. 1, sub-sec. 3.

ground that the creditors had only the same rights in respect of the shares as the shareholders had, viz, to get the shares upon payment of the shareholder's indebtedness to the society.

The society claimed that the shares were pledged to them by virtue of the above by-law and on account of a loan made by it on the security of the said shares, which they were entitled to do by 42 and 43 Vic., ch. 32, sec. 4 (Que.). The borrowing member did, in effect, pretend to transfer the shares to the company by a private writing, but retained his muniments of title, and no transfer was made on the books of the company. Delivery of the symbol being essential to the pledge, it follows that shares cannot be pledged, unless they are evidenced by certificates (here *livrets*), which must be transferred and delivered to the pledgee. If there are no certificates or other muniments of title, there can be no pledge.[1] Strong, J., said[2] "as expressed in Art. 1970 of the C. Code, it is essential to the validity of a pledge that the pledged property shall remain in the possession of the creditor or of a third person agreed upon between the parties. Had the by-laws in question attempted to authorize the creation of a security in any way repugnant to these provisions of the law they would have undoubtedly been absolutely null. They have not, however, attempted to do so. The shares in the building society are shares in the capital stock of the society, and this capital stock necessarily remains in the possession of the society, and the right to deal with the shares in it is, by a provision quite usual, and certainly *intra vires*, made subject to the control of the society acting, of course, through its board of directors. Therefore, when the by-laws provided that the society should have a privilege on a member's shares for whatever he might owe to the society, and that no transfer should be made until the transferor had met all his obligations to the society, they provided for a security which was legal and within the competence of the society to create. The shares as shares in the capital stock of the society, were in a sense in the possession of

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[1] Lallande v. Ingram,, 19 La Ann., 364; Bidstrup v. Thompson, 45 Fed. Rep., 452; Thomp. Corp., sec. 2615. Where a stockholder, for the purpose of securing his creditor, made an assignment of his shares by a separate writing, but never endorsed or transferred the certificates on the books of the company or otherwise, but retained possession of them as before, in which condition they were seized by a receiver appointed under a creditor's bill against him, the receiver having no notice of the attempted assignment,—it was held that the receiver could hold the certificates (Atkinson v. Foster, 134 Ill., 472; Bidstrup v. Thompson, 45 Fed. Rep., 452.

[2] 20 Can. S. C. R., at pp. 454, 455.

the society, and no transfer of them could be made so long as any debt was due by the holder to the society without the assent of the latter."

Patterson, J., without considering the question of transfer of possession as regards third parties, held that the by-law was a binding contract between the society and the shareholder, and that the creditors had only the same rights in respect of the shares as the shareholder himself had when he made the assignment. Ritchie, C. J., appeared to take the same view. This was also the view of Mr. Justice Davidson in the Superior Court.[1] The Queen's Bench considered that the fraudulent transfer in the stock book of the society deprived the society of the possession necessary to support their privilege as pledgees. This was also the view of Mr. Justice Fournier in the Supreme Court.[2] The view which will probably prevail under the civil law was that taken by Mr. Justice Taschereau. The learned judge considered that the transfer of the shares by private writing to the company, while it might be valid between the member and the society, could certainly not be so as regards third parties, and the creditors of the insolvent were third parties in so far as they had rights to defend in connection with transactions made by the insolvent, and especially as against parties claiming a privilege upon the estate. As to the question of the society having a *quasi*-possession of the shares as against the original shareholder sufficient to justify the privilege, Mr. Justice Taschereau points out that shareholders have both the property in and possession of their shares.[3] That is also, as already shown, the law of the United States.[4] It is impossible to introduce into our civil law any such fiction that a company has a *quasi*-possession of its shares, after they have been issued. It is hardly necessary to add that the foregoing remarks apply to shares not fully paid up only and upon which the holder would be liable as a contributory.

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[1] Reported in M. L. R., 7 Q. B., 417.

[2] 20 Can. S. C. R., at p. 461.

[3] Pardessus Drt. Commercial, Nos. 973, 992, 993; Delangle Sociétés Commercials, Vol. 2, pp. 41, 42; 1 Tropling Sociétés, n. 128; 5 Laurent, No. 502, 508; 1 Bedarride Sociétés, No. 318; Smith v. Slaughter House, 30 La Ann., 1378.

[4] "In the absence of a contract, the relation of a corporation to the stock is that of a stranger. The stock is the exclusive, absolute property of the stockholder, and is held by him free from any claim or right of the corporation, in the absence of contract or provisions of the charter or by-laws creating such claim or right." (Farmer's & Merchant's Bank v. Wasson, 48 Iowa, at p. 340.

This idea of *quasi*-possession is derived from the English notion of a company. Thus in Dunlop v. Dunlop[1] a well known case, the Court said, in relation to the transferability of shares : "The shareholders are partners, and by general law a partner cannot retire without the consent of all the other partners. That clause gives him power to transfer his shares on the condition that his debts to the company are paid." This view shows clearly that the actual English idea of a joint stock company is that of a partnership, with special powers, although theoretically they may regard it as having a separate existence

Coming down to the general question whether a company can in Quebec create a lien on its shares without special statutory authority, it is too clear to need discussion, that in this province no privilege can attach except by or under operation of law. Where the law gives no privilege, none can be given by contract or consent.[2] And privileges are not to be implied, they must be express.[3] The statute governing the case under discussion Société C. F. de Construction v. Daveluy,[4] permitted the society to make rules for its government in accordance with the laws in force in Lower Canada.[5] This is evidently insufficient to create the power to make by-laws conferring a privilege on the shares in favor of the society. This was decided in Louisiana under exactly similar circumstances.[6] Now, under the English system of law, it is well understood that liens may be created by agreement.[7] This shows a radical distinction lying at the foundation of the two systems. But a *rapprochement* takes place in that, under the English system, secret liens are not favored.[8]

It is interesting to note that the right to create preference was discussed in McIver v. Montreal Stock Exchange,[9] decided by

[1] 21 Ch. Div., 583, 591.

[2] Art. 1983 C. Code, Que., succession of Rousseau, 23 La Ann., 3; Hoss v. Williams, 24 La Ann., 568; New Orleans Nat. Banking Ass'n v. Wiltz, 10 Fed. Rep., 330; Pont Privileges, No. 24; Domat Liv., 3 tit., 1 s.s., 1, 30.

[3] Pont Privileges, No. 24; Cass. Sirey, 32, 1, 275; 37 1, 878.

[4] 20 C. S. C. R., 449.

[5] Sec. 1, sub-sec. 3, Consol. Stats. L. C., ch. 69.

[6] New Orleans Nat. Banking Ass'n v. Wiltz, 10 Fed. Rep., at p. 332.

[7] In *re* Collie; *ex parte* Manchester & County Bank, L. R., 3 Ch. Div., 481; in *re* Pavy's Patent Felted Fabric Co., L. R., 1 Ch. Div., 631; Wiltshire Iron Co. v. Gt. W. Ry., L. R., 6 O. R., 101, 776; Cavanagh, Money Securities, 375; Palmer Comp., 105.

[8] Steamship Dock Co. v. Heron, 52 Pa. State, 280.

[9] M. L. R., 4 S. C., 112.

Mr. Justice Davidson. The point to be determined in that case was whether a by-law of the Montreal Stock Exchange giving the governing committee the right to sell a member's seat at the board, for cause of insolvency, was reasonable and *intra vires*. It was held that such a by-law was *intra vires* as between the Stock Exchange and its members, but the learned judge appeared to be of opinion that the preferences sought to be established in favor of members by that by-law, although recognized by American authorities, with us would be as so many idle words. He cited in this connection the decision of the House of Lords in Tomkins v. Saffery,[1] where Lord Chancellor Cairns used the following language with reference to a somewhat similar rule of the London Stock Exchange. "They do not seem to me to be rules contemplating or intending in any way to warp or strain, or in any way to elude or defeat the operation of the bankruptcy law of the country, but they are rules which, from the very nature of the case, are and must be subject to one infirmity, namely, that if they are to be effectual they must be applicable to the case of a person who not merely is a defaulter upon the Stock Exchange, but who has no creditors outside the Stock Exchange: because if such a person has creditors outside the Stock Exchange, the general law of the country will step in and must step in and will give to those creditors rights which these rules cannot take away from them, and which I am bound to say, these rules do not profess to attempt to take away from them. Therefore, although everything done in the domestic forum of the Stock Exchange under these rules may be done according to the rules, and may be most wholesome in its operation for the members of the Stock Exchange, still, what is done must be subject to the rights of those who are not amenable to the jurisdiction of the Stock Exchange, and when those higher rights come into conflict with these rules, of course these rules must give way to those higher rights."

Now, if a stock exchange cannot in this province create a preference upon the price of its members' seats, when sold on account of the latter's insolvency, on what ground can it be maintained that a joint stock company can create a preference upon the price of a member's shares as against his creditors ? So far as the law of the province of Quebec is concerned there is no serious distinction between the two cases.

In support of the position that a seat or membership in the Stock Exchange is not property subject to execution, in any form,

[1] 3 App. Cas., 213.

but a mere personal privilege or license to buy and sell at its meetings, it has been stated that it is but the creation of a public mart for the sale of certain commodities, the purchases and sales not being made for the joint benefit of the body; that it is simply a fixed place where merchants may meet, at certain hours, for the transaction of business with each other, but that no member receives any pecuniary profit from the corporation, or from its capital or revenue, except such advantage, in the way of trade, as may result from the right to enter the room of the Exchange, and there transact business; that no person can become a member unless he receives the votes of a certain number of corporators, directors or managers, and that a certificate of membership is not transferable on the books of the association, unless it be to an eligible person, to be approved by the Exchange, in some prescribed manner; that though there may be property, both real and personal, vested in the body, still its possession is merely adventitious and circumstantial to its main purpose or object; that in it a member has no proprietary interest that can be realized upon withdrawal. What he has is but the use of it while he is a member, the property remaining with and belonging to the corporation, while it continues to exist, like a pew in a church, the ultimate property in which—the *res* or subject—is in the congregation in its corporate capacity, and not in the pew holder.[1]

In order to meet these objections and substantiate the opposite opinion that memberships or seats are property, it may be said that notwithstanding the conditions imposed by the rules of the Exchange, a seat is said to have an actual pecuniary value, which the holder is permitted to realize by a sale and transfer, the only restriction being the consent of the Exchange.[2] The same may be said of an interest in a partnership under our Civil Law. It is of the same nature as a share in a company ; [3] the distinguishing feature is considered by modern French authors as lying in the negotiability of a share as compared with the restricted right of transfer of a partnership interest,[4] the restriction in the latter case being exactly of the same nature as in the case of a Stock Exchange seat, viz: the consent of the governing body being a condition precedent.

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[1] Bisbee & Simonds Law of the Produce Exch., sec. 60.

[2] Hyde & Woods, 94 U. S., 523.

[3] Per Cimon, J., in Damien v. Société de Prets et Placements de Québec, confirmed by Queen's Bench, 3 Rev. de Jur., at p. 48 (1896).

[4] Boistel Droit Commercial, p. 162; Vavasseur Drt. Com., Vol. 1, No. 332; Cass. 27 Mars, 1878; Cass 13, Mars, 1882; Trib. de la Seine, 13 Avril, 1877; Deloison, No. 253; Mathieu & Bourguignat, No. 4.

A share in a company has been classified by a well-known common law writer[1] as incorporeal personal property, and this is the classification adopted in this province, both as regards an interest in a partnership or a share in a company.[2]

With reference to the fact that no dividends are paid to members of the Stock Exchange, it has been truly said by an able and learned contributor to the American Law Register.[3] "We are unable to understand how that fact has any controlling influence upon the case. Although dividends are the object usually aimed at, in the organization of corporations (joint stock), still we can easily understand how shares of stock, on which no money dividends are payable, or even contemplated, might from a variety of other reasons, be very desirable, and of a high pecuniary value; and we know of no case making the payment of dividends necessary, in order that such shares of stock should be considered property." It is not stock dividends alone that determine the value of such incorporeal property interests as those in question. Should the Exchange ever accumulate funds or property in excess of the limit allowed by the charter, any member could probably compel a distribution of the surplus among the corporators.[4]

Arguing by analogy from the case of a stock exchange creating preference in favor of its members upon the price of a member's seat when sold by it, which, as already pointed out, is an analogous case, it is to be noted that Tomkins v. Saffery,[5] already quoted, is not an authority that such a preference is illegal as regards the member's creditors. What that case decided was, that the Stock Exchange could not, through its rules, give a preference to its members upon the proceeds of the estate of an insolvent member to the detriment of outside creditors. There was no question as to any property over which it might have a lien. Under the English and American system of law a man cannot, in regard to property which he possesses absolutely as his own without restriction, fetter it, of his own accord, with the condition that it must always stand incumbered by a pre-

[1] McWilliams on Personal Property, p. 7.

[2] See 3 Revue de Jurisprudence, at p. 48.

[3] 22 Amer. Law Register, p. 441.

[4] Bisbee & Simmonds on Produce Exchange, p. 78; see Eliot v. Merchant's Exchange of St. Louis, 14 Mo. App., 234, 17 Cent. Law Jour., 376, in favor of the view that members' certificates are property, also 94 U. S., 523; Hyde v. Woods.

[5] 3 App. Cas., 213.

ferred lien to his fellow-members.[1] But the authorities both of England and the United States hold that the owner of property (in this case the Stock Exchange) can make such a condition in the transfer of that which is his own, and in doing so violate no creditors' rights and no principle of public policy,[2] and therefore, it has been held by the Supreme Court of the United States that a provision in the constitution of a stock exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted—the purchaser not being a member, nor having the right to transact business in the board until he shall be elected by ballot,—is neither contrary to public policy, nor in violation of the Bankrupt Act.[3] This Court also decided that such a seat is property. A leading English case[4] also decided that where a company is empowered to make by-laws for the better government of the company, it could enact a by-law making a restriction on its stock that it shall first be liable to pay the debts due to it from its own members and such by-law was held to be good as against the shareholder's creditors.

In England also, it is not for a moment doubted that if it is expressly enacted in the articles of association that the company shall have a lien on its members shares for all monies which may be due from them to the company on any account whatever, a lien will be created in cases where it would not otherwise have existed ; and the lien so created is not a mere passive right of retainer, but is an equitable charge actively enforceable as against third parties.[5]

We think it may, therefore, be fairly concluded that a share in a joint stock company cannot in this province, be made the subject of a privilege in favor of the company, unless expressly authorized by statute, or unless it is pledged to the company with all the formalities requisite under our law to constitute a valid transfer of possession.

This question is different under the English system of law, and has two distinct phases ; 1st. the right of a corporation to create a preferred lien on its shares as towards the creditors of the shareholder; 2nd. as towards third parties such as a purchaser at judicial sales or other transferees.

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[1] Hyde v. Woods, 94 U. S., 523, 526. [2] *Ibid*, at p. 526. [3] *Ibid*, 523.

[4] Child v. Hudson's Bay Co., 2 P. Williams, 207; and see *re* Lewis, 6 Ch., 818; see also Palmer Comp. Law, p. 105.

[5] *Re* Lewis, 6 Ch., 818; Bank of Africa v. Salisbury Gold Mining Co. (1892), App. Cas., 281; Bradford Banking Co. v. Briggs, 12 App. Cas., 29, approved; Palmer Comp. Law, p. 105.

But in the United States an opposite opinion would appear to prevail, at least in so far as the rights of third parties, innocent purchasers for value, are concerned. Mr. Jones in his work on Liens says :[1] "That such a lien can only be created or authorized by statute is the conclusion in which the latest and best authorities on this point generally concur, although there is still some conflict of opinion." But the grant of the power to "regulate" transfers of shares, which occurs in all our present joint stock companies acts has been held by many authorities sufficient to authorize by-laws creating such a lien.[2]

11. Effect of lien created by general law.—Where, by the general law, or by the articles of association, a lien is given to a company upon the stock of a stock-holder for the indebtedness of the latter, it is valid and enforceable against all the world, and whoever deals with it is charged with notice of all limitations and burdens attached to it by such statute, whether the party lives in or out of the State;[3] and if his shares are sufficiently valuable and the company is empowered to make loans on security one might be made to him solely on the security of the lien.[4]

12. Effect of lien created by by-law.—But where the company itself asserts a right of lien upon the shares held by one of its members by virtue of a by-law merely, there is much judicial authority in the United States, based on the soundest reasoning, to the effect that it cannot make good this lien against a *bonâ fide* transferee of the shares who had no knowledge of it, and this although the certificates which represent the shares recite that they are transferable only on the books of the company, or at the company's office by person or by attorney.[5] "The policy of the law," says Judge Thompson,[6] "has made certificates of shares *quasi*-negotiable, assimilating them as nearly as their character will admit to negotiable instruments.

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[1] Vol. 1, sec. 381 (1st Edition).

[2] Cunningham v. Alabama Life Ins. Co., 4 Ala., 652; Prendergast v. Bank of Stockton, 2 Sawyer (U. S.), 108; Geyer v. Western Ins. Co., 3 Pitts. (Pa.), 41; McCready v. Ramsey, 6 Duer. (N. Y.), 574; *contra*, Bank of Attica v. Manufacturers, etc., Bank, 20 N. Y., 501; Compare Nesmith v. Washington Bank, 6 Pick. (Mass.), 324; Plymouth Bank v. Bank of Norfolk, 10 Pick. (Mass.), 454, and see cases cited in Jones on Liens, vol. 1, sec. 377, though this author seems to hold the contrary opinion, see sec. 381.

[3] Hammond v. Hastings, 134 U. S., 401.

[4] In *re* National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch., 629.

[5] Thompson on Corporations, sec. 2334.

[6] *Ibid.*

A corporation should not, as against a *bonâ fide* purchaser for value of such a security, be allowed to assert a secret lien of which the paper itself contains no intimation. The general policy of the law is against secret liens in respect of personal property; and where the corporation establishes a by-law reserving a lien upon its shares for any debt due it by the holder of such shares, it owes a duty to the public to make known that fact by printing a notice of it on the certificates of the shares, or by other appropriate means." [1]

13. **Waiver of lien by company.**—The company will be considered to have waived its lien when it permits, through its proper officers, a transfer of shares to be made on its books with the usual formalities; [2] but otherwise if the transfer is secured through the fraudulent complicity of the secretary-treasurer, and without the knowledge of the directors.[3] Where a company permitted a shareholder to have his shares transferred on the books, which was the only

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[1] See particularly upon this point the able dissenting judgment of Nisbet, J., in Tuttle v. Walton, 1 Georgia, at p. 43, distinguishing Child v. Hudson Bay Co., 2 P. Williams, 207, noted *supra*, p. 181.

[2] Hodges v. Planters Bank, 7 Gill, J. (Md.), 306; Hill v. Pine River Bank, 45 N. H., 300.

[3] A by-law of a building society required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares, as P. himself had when he made the abandonment of his property, viz: to get the shares upon payment of P.'s indebtedness to the society. (Société Canadienne-Française de Construction de Montréal v. Daveluy, 20 Can. S. C. R., 449.

manner in which an assignment could be made, to a fictitious name, which was known to the officers of the corporation, and he afterwards caused the shares to be transferred to the plaintiff, by a person represented by him to be the holder, as security for a debt due the plaintiff from him, no money being paid on the transfer, it was held, that the lien of the company on the shares, for a debt due from the shareholder, was not thereby divested.[1] Mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it, for this constitutes no waiver on the part of the corporation.[2] The mere assenting by the company to an assignment, made by a shareholder for the benefit of all his creditors, "with no other preference than is, or may be authorized by law," is not a waiver of the lien on shares for debts due by the assignor to the company.[3]

The lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention or which show an intention to waive it.[4] But where an indebted shareholder applied to the company for time, and the indulgence was granted in consideration of his authorizing certain shares, other than those on which a lien was claimed, to be sold on default without the delay prescribed by the articles, it was held that no limitation of the lien on the shares in suit was contemplated by either party, and that a transfer by the indebted shareholder of such shares should not be registered.[5]

Where the company, after being charged with notice that a conflicting lien on the shares has accrued, gives further credit to the shareholder, it will be held to have waived its lien as to such subsequent credits.[6]

14. Meaning of word "indebted," when member becomes indebted for calls.—"Indebted" means "indebted on any account," and not "indebted in respect of the shares which it is proposed to transfer;"[7] it also means "indebted whether solely or jointly and

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[1] Stebbins v. Phœnix Fire Ins. Co., 3 Paige (N. Y.), 350.

[2] Hammond v. Hastings, 134, U. S., 401.

[3] Dobbins v. Walton, 37 Ga., 614; and see Société Canadienne-Française de Construction de Montréal v. Daveluy, 20 Can. S. C. R., 449.

[4] Bank of Africa v. Salisbury Gold Mining Co. (1892), App. Cas., 281.

[5] *Ibid.*

[6] Bradford Banking Co. v. Briggs, 12 App. Cas., 29; in such a case the notice is not notice of a trust. (See section 81 Dom. Comp. Act, R. S. C., ch. 119), but is a notice affecting the company in their capacity as traders (*ibid*).

[7] *Ex parte*, Stringer, 92 B. Div., 436.

severally with others." [1] The lien when it exists at all, extends to any amount in respect of which the shareholder is indebted to the company and not merely to debts in respect of calls, still less of calls on the particular share on which the lien is asserted.[2]

A member is "indebted" in respect of calls as soon as the resolution is passed, and before it becomes payable.[3] Our act provides that a call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed.[4] Therefore, no transfer of shares could be enforced, where a resolution for a call had been passed a few days previously, although the payment might be deferred until some later time, until such previous call has been paid.[5] The object of the above statutory enactment was to dispose of the doubt which was at one time felt, whether a call is to be taken as made at the date of the resolution, or at the date of the notice of the call.

The " indebtedness " must be determined by the state of things existing at the time that the deed of transfer is presented for registration. Upon payment of the amount of such indebtedness the member is entitled to registration, although subsequently to the presentation of the transfer another call may have been made.[6] The obligation on a bill not yet due is an indebtedness which will justify a company in refusing to register a transfer.[7]

15. Effect of winding up on transfer.—So far as the Winding-up Act is concerned, it is provided that all transfers of shares, except transfers made to or with the sanction of the liquidators, under the authority of the Court,......after the commencement of the winding-up will be void.[8] And if a shareholder transfers his shares under circumstances which do not, by law, free him from liability in respect thereof, he will be deemed a member of the company and liable to contribute to the extent of his liabilities to the company or its members or creditors.[9]

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[1] Bentham Mills Co., 11 Ch. Div., 900.

[2] *Ex parte*, Stringer, 9 Q. B. Div., 436.

[3] Sec. 39, R. S. C., ch. 119; Dawes' case, 38 L. J. (Ch., 512). [4] *Ibid.*

[5] See sec. 51, R. S. C., ch. 119.

[6] Cawley & Co., 42 Ch. Div., 209; Reg. v. Inns of Court Hotel Co., 11 W. R., 806; 18 L. T., 551.

[7] London, Birmingham, etc., Bank, 34 Beav., 332; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 No. 149; Buckey Comp., 6th Ed., p. 459.

[8] Sec. 15 (2), R. S. C., ch. 129.

[9] Sec. 45, R. S. C., ch. 129.

16. Certificate evidence of title to shares—Effect in hands of bona fide holder—Estoppel.—Our Companies' Acts[1] contain, in common with the English Act of 1862, a provision to the effect that a share certificate under seal of the company and signed by any officer of the company specifying that the party named therein is a shareholder, is *prima facie* evidence of his title to the share. A certificate is merely the paper representative of an incorporeal right; it is a representation of an implied contract and stands on a similar footing to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property. Hence the proprietary right may exist without the certificate.[2] The certificate, as against the company, amounts to a statement that the company take upon themselves the responsibility of asserting that the person to whom the certificate is granted is the registered shareholder entitled to the specific shares included in the certificate,[3] and further in the case of a *bonâ fide* transferee who has had no notice to the contrary that the amount certified to be paid has been paid;[4] and this even against creditors of the company.[5]

The power of granting certificates is one for the benefit of the company, as affording facilities for dealing in shares by showing at once a marketable title, and thus rendering the shares of greater value; and the issuing of the certificate amounts to a declaration on the part of the company to all the world that the person to whom it is issued is a shareholder, and it is given by the company with the intention that it shall be used by the person to whom it is given. The company is, therefore, estopped from denying the validity of a certificate which has been obtained by fraud or under a mistake against a subsequent *bonâ fide* purchaser for value, accepting a transfer on the

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[1] Dom. Act, sec. 42; Quebec Act, art. 4727; Ontario Act, sec. 34; New Brunswick Act, sec. 56; Manitoba Act, sec. 51; British Columbia Act, sec. 43.

[2] Thompson Corporations, sec. 2348, and cases there cited; and see in *re* Ottos Kopje Diamond Mines (1893), 1 Ch., at p. 628, per Bowen, L. J.; Colonial Bank v. Williams, 15 App. Cas., at p. 277, per Lord Watson.

[3] Bahia & San Francisco Ry., L. R., 3 Q. B., 584; Balkis Consolidated Co. v. Tomkinson (1893), App. Cas., 396.

[4] Buckley Comp., 93; Nicoll's case, Burkinshaw v. Nicolls, 3 App. Cas., 1104, 1027; Waterhouse v. Jamieson, L. R., 2 H. L. (S. C.), 29; Spargo's case, 8 Ch., 407, 410; Bush's case, 9 Ch., 554.

[5] McCracken v. McIntyre, 1 Can. S. C. R., 479; Ford v. Bloomenthal (1897), A. C., 156.

production of the certificate.[1] It is also estopped from denying the validity of the certificate as against the registered owner of the shares, where he has not been guilty of fraud in obtaining it.[2] In both cases an action of damages will lie for refusal to transfer. The British Columbia Act gives power to the company to make a cash compensation for any loss arising from a transfer on a forged instrument.[3]

17. Duty of company to warrant certificate—Damages for refusal to register transfer.—Although the company is estopped from denying the validity of its certificates, yet a certificate does not of itself impose any duty by way of warranty or otherwise upon the company towards a transferee of the shares mentioned in the certificate. But where the company refuses to register the shares mentioned in the certificate, a right of action accrues to the transferee, the measure of damages being the value of the shares at the time of the company's refusal to register.[4] It might be difficult in some cases to determine at what time the actual refusal had taken place; that is to say when the directors had made up their minds to refuse. The directors may take a reasonable time to make reasonable enquiries concerning the transfer.[5] But once the case has been considered, or at all events once the directors have made up their minds to refuse the transfer, that is the date on which the cause of action arises.[6] And this should appear from the minutes of the board.

The certificate purports only to show the legal and not the equitable title, and persons dealing with a certificate without enquiring into who has the beneficial ownership and without obtaining a legal title by transfer, do so at the risk of being ousted by an earlier equitable title.[7]

18. Practice and proceedure to effect transfer.—Upon a transfer of shares the practice is that the transferor lodges with the company the certificates of the shares, and thereupon the company marks the transfer with the words "certificate lodged." This is known as a

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[1] Bahia & San Francisco Ry. Co., L. R., 3 Q. B., 584; Buckley Comp., 6th Ed., 93.

[2] Balkis Consolidated Co. v. Tomkinson (1893), App. Cas., 396.

[3] R. S. B. C., ch. 44, sec. 155.

[4] In *re* Ottos Kopje Diamond Mines (1893), 1 Ch., 618.

[5] Société Générale de Paris v. Walker, 11 App. Cas., 20, 41.

[6] In *re* Ottos Kopje Diamond Mines (1893), 1 Ch., 618.

[7] See Shropshire Union Railways v. The Queen, L. R., 7, H. L., 496; in *re* London and Provincial Telegraph Co., 9 Eq., 653.

"certification." The effect of certification is to represent that the transferor has produced to the company a certificate showing him to be the registered owner, or a certificate showing some other person to be the registered owner, and transfers purporting to transfer the shares from such person to the transferor. But such "certification" does not import a warranty of the transferor's title or of the validity of such document or documents.[1]

The usual share certificate contains on its back a printed assignment or indorsement and also a power of attorney in blank, like the following : " For value received I hereby assign the within named share to..............and appoint..............my attorney to make the transfer on the books of the company." This is signed by the person to whom the shares are issued. In this manner, by the usages of business, of which the courts take judicial notice,[2] the certificate may be passed from hand to hand indefinitely, by the person to whom the certificate is issued simply signing this indorsement and delivering the certificate with the blanks unfilled to his assignee. When it reaches the hands of some one who desires to assume the legal rights of a stockholder, so as to be entitled to vote at corporate elections and to receive dividends, he fills up the blanks, by inserting his own name as transferee, just as the holder of a promissory note indorsed in blank is entitled by the law merchant, to insert any name he pleases above the indorsement as the payee. He also inserts in the second blank the name of the attorney in fact whom he wishes to make the transfer for him on the books of the company. This person is usually the secretary or some other officer of the company, though he may insert the name of whomsoever he pleases. The attorney so appointed does exactly what the original shareholder would have done had he gone to the company's office to make the transfer of the shares to his vendee; he makes an entry on the book kept by the company for that purpose, usually the stock transfer book, to the effect that the shares have been transferred to the new purchaser. Then the certicate is surrendered and a new certificate is issued to the transferee.[3]

19. Registration of transfer—Effect of.—Under our Companies' Acts, companies are obliged to keep a book called the register of transfers, in which are to be entered the particulars of every transfer

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[1] Bishop v. Balkis Consolidated Company, 25 Q. B. Div., 512; W. N., 1890, 160; Buckley Comp., 94 and 95.

Smith v. Rodgers, 30 Ont. Rep., 256.

[3] Thompson Corporations, sec. 2368.

of shares in the capital of the company.[1] And a transfer is of no effect as against the company until registered in the transfer book.[2] The registration passes the legal title to the transferee.[3]

20. Transfer by representative of deceased shareholder.—Any transfer of the shares or other interest of a deceased shareholder, made by his personal representative, shall, notwithstanding such personal representative is not himself a shareholder, be of the same validity as if he had been shareholder at the time of his execution of the instrument of transfer.[4]

21. Register prima facie evidence of transfer.—The transfer book is *prima facie* evidence of all facts purporting to be thereby stated, in any action, suit or proceeding against the company or against any shareholder.[5]

22. Registration essential to the exercise of rights of membership.—As a general rule a company looks only to its books for the purpose of ascertaining who are its shareholders and entitled to the rights of such.[6] Only those whose names are registered in its books as shareholders are entitled to vote at meetings,[7] to receive dividends,[8] and otherwise exercise the right of members.

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[1] Sec. 43 (2), R. S. C., ch. 119.

[2] Where the evidence showed that a bank had adopted the practice of dealing with its shares by way of marginal transfer, the first transfer being made in blank, subject as by marginal note, to the order of a broker, and the ultimate purchaser signing an acceptance in the book immediately under the transfer so signed in blank by the seller, the intermediate dealing of the broker being omitted from extended record in the bank books, and the transferees were duly entered as shareholders in the stock ledger of the bank.

Held, that this amounted substantially to an acceptance of shares transferred in blank, which is lawful where transfer by deed is not prescribed, and the entry in the stock ledger amounted to registration within the meaning of the Act, and though in one case the transferee did not sign the acceptance, yet he subsequently dealt with the shares by selling and transferring them to another, and the transferees were properly placed on the list of contributories, notwithstanding anything in the Banking Act, R. S. C., ch. 120, sec, 29.

(In *re* Central Bank; Baines' case; Nasmith's case, 8 Can L. T., 389).

[3] Buckley Companies, p. 95; Thompson Corporations, par. 2393, and see R. S. C., ch. 119, sec. 81.

[4] Sec. 53, R. S. C., ch. 119.

[5] Sec. 47, R. S. C., ch. 119.

[6] See sections 43 (*b*), 44, 45, 46, 47, Dom. Act, R. S. C., ch. 119.

[7] Secs. 33 (*c*) and 57, R. S. C., ch. 119; People v. Robinson, 64 California, 373; State v. Ferris, 42 Conn., 560; Hoppin v. Buffum, 6 R. I., 513.

[8] See sec. 81, R. S. C., ch. 119.

23. On whom falls duty of registering transfer.—The agreement for the sale of a share does not impliedly bind the vendor to procure the registration of the transfer. His duty is performed when he hands over to the transferee a duly executed transfer, together with the certificate or its equivalent.[1]

24. Position of pledgee of shares.—The pledgee of stock whether holding by the assignment of the certificates simply or whether the assignment is accompanied by a transfer in the books of the company will not be allowed any share in the management of the company; the person pledging the shares is considered as holding the same and subject to liability as a shareholder,[2] and consequently entitled to vote as a shareholder.[3] But the unregistered assignee of shares would have the right to restrain the company from the commission of an *ultra vires* Act.[4]

25. Transferor estopped from denying title of transferee.—Unregistered transfers are good as between the parties to them,[5] but the transferee in such a case merely acquires the equitable title.[6] So far as the transferor is concerned, he is estopped from denying the rights of third parties acquired under the transfer.[7] Where certificates of stock, having on the back blank forms of transfer and of power of attorney to surrender and cancel the certificates, duly signed by the registered holders, are transferred, each prior holder confers on the *bonâ fide* holder for value of the certificates, for the time being, authority to fill in the name of the transferee, and is estopped from denying such authority, and to this extent is estopped from denying the title of such holder for the time being,[8] provided that in the case of a blank transfer, such holder is the person entitled to the certificates.[9] By such delivery an incohate legal title passes, but a title

[1] Skinner v. City of London, etc., Co., 14 Q. B. D., 882; London Founders Ass'n. v. Clarke, 20 Q. B. D., 576; Palmer Comp. Law, p. 89, 90.

[2] R. S. C., ch. 119, sec. 56.

[3] *Ibid*, sec. 57.

[4] Becher v. Wells Flouring Mill Co., 1 Fed. Rep., 276, and see Campbell v. Am. Zylonite Co., 122 N. Y., 455.

[5] Sec. 48, R. S. C., ch. 119.

[6] *Ibid*; Lippett v. American Wood Paper Co., 15 R. I., 141; Union Bank v. Laird, 2 Wheat (U. S.), 390; Colonial Bank v. Hepworth, 36 Ch. Div., 36.

[7] Per Lord Field in Balkis Consol. Co. v. Tomkinson, 1 The Reports, at p. 189.

[8] Colonial Bank v. Hepworth, 36 Ch. Div., 36; Smith v. Rodgers, 30 O. R., 256.

[9] Williams v. Colonial Bank, 38 Ch. Div., 388, 407; Colonial Bank v. Cady, 15 App. Cas., 267; Smith v. Rodgers, *supra*.

by unregistered transfer is not equivalent to the legal estate in the shares, or to the complete dominion over them.[1]

26. Right of creditor of transferor as against unregistered vendee.—As all our Companies' Acts (except British Columbia, which says that until registered, the transferor shall be deemed to remain the holder,)[2] contain an express provision to the effect that, with certain exceptions, no transfer of shares shall be valid *for any purpose whatever* until registered,[3] and under this provision it has been held that shares cannot be effectually transferred as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates thereof together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the company before the attachment.[4]

Such a statutory requirement cannot, however, be introduced effectively by a by-law containing the above provision, for this is merely an arrangement of the company for its own convenience for the purpose of regulating the payment of dividends, etc., and does not affect strangers to the company.[5]

27. Position of parties to the transfer towards creditors of the company.—All our present Companies' Acts except that of British Columbia, render the transferor and transferee as towards creditors of the company, jointly and severally liable where the transfer has not been entered in the register. Under the Imperial Companies' Act of 1862, which is similar to that in force in British Columbia up to 1898,[6] the register of transfers is made the test of liability to creditors upon the winding-up of the company,[7] unless the company has

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[1] Colonial Bank v. Hepworth, *supra*.

[2] R. S. B. C., schedule First, Table A, sec. 8.

[3] Sec. 48, R. S. C., ch. 119.

[4] Fisher v. Essex Bank, 5 Gray (Mass.), 373, 379; and see Johnson v. Laflin, 103 U. S., 804; Sabin v. Bank of Woodstock, 21 Verm., 362.

[5] Sargent v. Essex Marine Ry. Co., 9 Pick. (Mass.), 202; Am. Nat. Bank v. Nashville Warehouse & El. Co., Tenn., Ch. App., 4 March, 1896, A. & E. Corp. cases, N. S., vol. 625.

[6] See R. S. B. C., ch. 44, first schedule, sec. 8.

[7] *Ex parte*, Bibby; in *re* Enterprise Mining Co., vol. 2 part 2 (1884), Brit. Columbia Rep., p. 94, per Gifford, J., in Addison's case, L. R., 5 Ch., 294, 297; Brown's case, 18 Ch. Div., 639; City of Glasgow Bank, Bell's case, 4 App. Cas., at p. 563.

been at fault through delay or neglect to register the name of the transferee.[1]

28. Unnecessary delay by directors to confirm transfer—Effect of.—A transfer, to which no objection is or can be made on the part of the company, ought to be confirmed by the directors at the first meeting at which in the ordinary course of business it can be confirmed, and thereupon registered. If not so confirmed at the first meeting at which, in the ordinary course of business, it can be done, there is "unnecessary delay" within the meaning of section 35 of the Companies' Act, 1862, and the transferor's name will, on his application, be removed from the list of contributories.[2] And there seems no reason why this view should not be adopted in regard to those of our Companies Acts which render the transferor and the transferee jointly and severally liable to the company and its creditors until the transferee's name is properly entered in the transfer book. The principle of the English cases is, and is applicable here, that the contract would have been carried into effect but for the default of the directors, and the order for rectification of the register goes only to do that which ought to have been done in the ordinary course of business before the winding-up.[3] Clearly the company could not take advantage of its own neglect to hold the transferor jointly with the transferee for the amount unpaid on his shares. And although a vendor of shares may not be in a position to claim as against the company or the creditor of the company to have his name removed from the list of shareholders or contributories, he may nevertheless be entitled to be indemnified in respect of the shares by the person who has under the contract for sale become the equitable owner.[4]

In any question of unnecessary delay on the part of the company, it is a condition precedent that no real objection exists to the transferee.[5]

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[1] Hill's case, L. R., 4 Ch., 769; Hercules Insur. Co., 9 Eq., 589; Marshall v. Glamorgan Iron & Coal Co., 7 Eq., 129; in *re* Enterprise Gold & Silver Mining Co., vol. 2, part 2 (1884), B. C. Reports, p. 94.

[2] Buckley Companies, p. 130.

[3] Bentick's case, 18 Sol. J., 224; and see Joshua Murgatroyd's case, 18 Sol. J., 28.

[4] *Ex parte*, Oriental Commercial Bank, L. R., 3 Ch., 791; Hemming v. Maddick, 9 Eq., 175, 7 Ch., 395.

[5] Musgrave and Hart's case, L. R., 5 Eq., 193; Marino's case, L. R., 2 Ch., 596; Shipman's case, L. R., 5 Eq., 219.

29. Refusing registration of transfers effecting liability of members.—A shareholder is not entitled, as of course, on the eve of liquidation to send in a transfer and insist on registration; the directors are entitled and even bound to refuse registration if the facts are such as that the rights of creditors have in fact intervened, although a winding-up has not commenced. If directors, in the fair and *bonâ fide* exercise of their powers, and in circumstances which make it a reasonable act of management, resolve not to record future transfers, which may seriously affect and alter the liability of the members, the resolution will be effectual.[1]

30. Liability of transferor on delay to have transfer registered.—The transferor must not be guilty of laches in having the register of shareholders rectified. Where a shareholder executed a transfer of his shares two years before a winding-up order was made, but neglected to see that the transfer was registered before the winding-up, he was retained as a contributory; for although the company was at fault in delaying to register the transfer yet the shareholder was in default too and was therefore not entitled to relief.[2]

31. Company not bound to notify transferor of refusal to accept transfer—Lapse of time.—A company is under no obligation to send notice to a transferor of its refusal to accept a transfer. It is for the transferor to see that everything is complete; and the fact that a considerable time has elapsed since the transfer was sent in for registration does not affect the company, but leaves its rights exactly the same.[3]

32. Transferor responsible for his own laches—Should compel purchaser to register transfer.—The vendor ought to compel the purchaser to register the transfer, and if he neglects to do so he must suffer for his own default, and his name being on the register at the date of the winding-up must remain there.[4] When the shareholder is in default, and the company is or is not in default too, laches will

[1] Buckley Comp., 131; Alex. Mitchell's case, 4 App. Cas., 548; Rutherford's case, *ibid*, Nelson Mitchell's case, *ibid*, 624.

[2] Walker's case, L. R., 6 Eq., 30; see Shepherd's case, 2 Ch. App., 16, where the delay was 2½ months and held not too long, and Ward & Henry's case, 2 Ch. App., 431; where the delay was 2½ years and held too long.

[3] Gustard's case, L. R., 8 Eq., 438; Shipman's case, L. R., 5 Eq., 219; but see Smith v. Bank of Nova Scotia, 8 Can. S. C. R., 558, as to notice.

[4] Head's case, White's case, 3 Eq., 84.

bar the shareholder's right to relief.[1] But where an order of the Court was obtained on the transfer of shares two years before the winding-up to have his name removed from the register, the company having meanwhile suspended business, and the transferor's name was not removed from the register in pursuance of the order, and consequently appeared on the contributories' list, the Court held that there were no laches on his part, and ordered his name to be removed from the list.[2]

33. Registered owner is reputed owner—Liability on winding-up.—The books of the company being *prima facie* evidence of all facts purporting to be thereby stated,[3] in order to escape liability as against the official liquidator in the winding-up, it is incumbent upon the transferor to show that at some time or other there was (or but for the default of the company there could have been) upon the register a transferee of his who could be made liable at law in respect of the shares.[4] In an Ontario case the defendant, at the request of

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[1] Walker's case, L. R., 6 Eq., 30; Head's case, White's case, L. R., 3 Eq., 84.

[2] *Ex parte*, Bibby. In *re* Enterprise Mining Co., B. C. Reports, vol. 2, part 2 (1884), p. 94.
ports (1884), p. 94.

B, a registered holder of shares in a limited company, transferred them to S, but B., being in arrear for some calls, the transfer was not registered. In August, 1881, B. obtained an order from Vrease, J., that certain payments being made, the company should take his name off the register and substitute S's name. The order was served on the Secretary of the Company, and payments were made by B under the order. The register was not rectified in pursuance of the order.

In February, 1883,—the company having suspended business for over two years,—a winding-up order was made, and in March, 1884, B appeared on a summons before the C. J. to shew cause why he should not be on the contributories' list. The C. J. Held, that B not having taken steps to enforce the rectification, had abandoned the order of August, and directed his name to be placed on the list. In an appeal to the full Court,—Held (reversing the judgment of the C. J.), that there were no laches on the part of B, and that his name must be removed from the list of contributories; and Held, that entries made in the books of the Registrar-General are not notice to creditors of transfer. (*Ibid.*)

[3] Sec. 47, R. S. C., ch. 119 (Dom. Companies' Act).

[4] Curtis case, L. R. 6 Eq., 455.

A deed executed for the purpose of transferring stock, has not the effect of exempting the transferor from being placed on the list of contributories, unless such transfer is completed in accordance with the rules of the Society. In *re* Saint John Building Society, 28 N. B., 597. See also Smith v. Bank of Nova Scotia, 8 Can. S. C. R., 558.

the president of the company,[1] accepted from him a transfer of shares, partly paid up in the association, for the purpose of attending a meeting of shareholders and forming a quorum, and gave the president a power of attorney to re-transfer the shares after the meeting. No re-transfer was made, and the defendant remained in ignorance that the shares stood in his name until the company became financially embarrassed, and it was held that the defendant should be placed on the list of contributories. The Court emphasized the well established proposition that "a person who is once a shareholder must remain a shareholder until he can show that he has in some lawful way got rid of his liability."[2] This case was decided under the Revised Statutes of Ontario, 1887, ch. 157 (Joint Stock Companies Letters Patent Act) which, in common with the rest of the Canadian Acts, except British Columbia, contains the clause[3] rendering the transferee and the transferor jointly and severally liable to the company and its creditors in the case of a transfer which has not been registered.

34. Legal and equitable owners—Joint and several liability.— It would appear to be the object of this provision to render the person who has the equitable title in a share which is in the process of changing hands equally responsible with the holder of the legal title. As to the question of joint and several liability, Ferguson, J., said:[4] "The defendant admits a transfer to and acceptance by him of the shares; but he says that he gave Murray a power of attorney for the re-transfer of the shares. This power of attorney was not produced, nor could it be found, but the learned (trial) judge finds that it had an existence; that is, that it was given as the defendant says. Giving, as I think, the greatest possible force to such a power of attorney, even calling it a transfer, which would be going quite too far in favor of the defendant, as no entry of such a transfer was made in the books of the association, the case would then seem to fall under the provisions of section 52, R. S. O., ch. 157 (1887), and the transferor and transferee would be jointly and severally liable to the association and its creditors. I do not say that such was or is the effect of the power of attorney in this case, but giving it the highest degree of importance

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[1] Ontario Investment Ass'n v. Leys, 25 O. R., 486.

[2] In *re* Patent Paper Manufacturing Co.; Addison's case, L. R., 5 Ch., at p. 297; Spackman v. Evans, L. R. 3 H. L., 238; City of Glasgow Bank:—Bell's case, 4 App. Cas., at p. 563.

[3] Sec. 52 (sec. 29 of present Ont. Act.)

[4] 23 O. R., at p. 501.

that could be contended for, no more than this could be the effect of it."[1] If it had been necessary in this case to decide the point whether the transferor and transferee were jointly and severally liable to the creditors, there would appear to be nothing to prevent them from being so held. Murray, the original transferor being in possession of the power of attorney executed by the defendant for the purpose of re-transfer, this would give him the equitable title to the shares—that is to say he would be the real owner of the shares, and the defendant the apparent owner.[2] It was just such a case as this that sec. 52, R. S. O., ch. 157 (1887), would appear to be designed to meet. Concerning such a rule, Judge Thompson in his work on Corporations[3] says, "it would be utterly illogical and even unjust to hold both the transferor and transferee liable at the same time as the owners of the same shares." But this is also the effect of sec. 77 of the Bank Act, R. S. C., ch. 120 (sec. 96, Bank Act of 1890). The transferor of shares within a certain time before suspension of payment by the bank will be liable as contributory, saving his recourse against the person by whom such shares are actually held. This has been interpreted as rendering also liable the transferee who has been holder during the month (now 60 days) preceding the suspension leaving the parties to the transfer to discuss among themselves their respective liabilities.[4]

35. Means of compelling registration—Mandamus against whom directed.—In the United States it appears to be very generally held that mandamus will not lie, at common law, at the instance of a transferee to compel the transfer of shares, on the ground that a right of action exists against the company for damages for the conversion of the shares in case a transfer is refused.[5] Previous to the English Judicature Act of 1873 and the Ontario Act of 1881, the jurisdiction as to mandamus included the old prerogative writ of mandamus, and the further jurisdiction comprised in the Common Law Procedure Act of 1854 (Imperial), and in Ontario R. S. O., ch. 52 (1877), which permitted an action of mandamus. Under the English Judicature Act and the corresponding Ontario Act, it is enacted that a mandamus

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[1] For case as to power of re-transfer see Adderly v. Storm, 6 Hill (N. Y.), 624.

[2] See Adderly v. Storm, 6 Hill (N. Y.), at pp. 627, 628.

[3] Vol. 3, sec. 3301.

[4] In *re* Central Bank of Canada, Barrie's case, Nasmith's case, 8 Can. L. T., 389.

[5] Thompson Corporations, sec. 2445, and cases there cited.

may be granted "by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."Under the Common Law Procedure Act, 1854, it was considered that the "duty" must be of a *quasi* public character.[1] But the action of mandamus is not restricted to cases in which the prerogative writ would be granted.[2] Although it is still held that a mandamus will not be granted where there is some other remedy equally convenient, beneficial and effectual.[3] In a recent English case[4] a shareholder in a railway company made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule *nisi* for a prerogative writ of mandamus to compel the company to register the transfer having been granted, it was held that inasmuch as the prosecutor had another specific and sufficient remedy, viz: by action of mandamus, the prerogative writ ought not to issue, and the rule must be discharged.[5] Here it was clear that the transferor would have no other remedy than a mandamus in some form to have his name taken off the register in order to avoid liability as a shareholder. In Ontario mandamus will lie at the instance of the transferee of shares to compel the company to make the transfer on its books,[6] and the same holds in the Province of Quebec.[7]

The writ must be directed against the company and not against the directors or an officer personally.[8] There are, however, cases

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[1] Benson v. Paull, 6 E. & B., 273; see also Reg. v. Commissioners of Inland Revenue, 12 Q. B. D., 461; Reg. v. Income Tax Commissioners, 21 Q. B. D., 313.

[2] Reg. v. Lambrown Valley Ry. Co., 22 Q. B. D., 463; Norris v. Irish Land Co., 8 E. & B., 512; Reg. v. Shropshire Union, L. R. 8 Q. B., 420.

[3] Reg. v. Registrar of Jt. Stock Companies, 21 Q. B. D., 131; Bush v. Beavan, 32 L. J., Ex. 54.

[4] Reg. v. Lambourne Valley Ry. Co., 22 Q. B. D., 463.

[5] And see Ward v. South-Eastern Ry., 29 L. J. (Q. B.), 177.

[6] Goodwin v. Ottawa & Prescott Ry. Co., 22 U. C. Q. B., 186; In *re* Goodwin v. The Ottawa & Prescott Ry. Co., 13 U. C. C. P., 254; In *re* Guillot v. The Sandwich & Windsor Gravel Road Co., 26 U. C. Q. B., 246; In *re* Macdonald and The Mail Printing & Pub. Co., 6 Ont. P. R., 309; Smith v. Canada Car Co., 6 Ont. P. R., 107; Crawford v. Prov. Ins. Co., 8 U. C. C. P., 263.

[7] Cunningham v. Beaudet, S. C., 1878, 11 Q. L. R., 168; Macdonald v. Montreal & New York Ry. Co., 6 L. C. R., 232 (1856); Brady v. Stewart, 15 Can. S. C. R., 82; Upton v. Hutchison (Q. B., 1899), 2 Q. P. R., 300; R. J. Q., 8 Q. B., 505.

[8] Cunningham v. Beaudet, 11 Q. L. R., 168; Queen v. Clements, 24 Nova Scotia, 64; Upton v. Hutchison, 2 Q. P. R., 300; R. J. Q., 8 Q. B., 505.

where the writ of *mandamus* must be addressed to the officer of a corporation and not to the corporation itself; it is when the law imposes a specific duty on an officer which he has to fulfill without and independently of any action on the part of the directors or shareholders.[1]

36. Discretionary power to refuse registration.—But it is invariably the case that the duty incumbent on the directors to effect a transfer on the books, is qualified by a discretionary power, and so long as they do properly exercise their discretion in the matter, mandamus will not lie.[2] In the matter of Henry Sandfield Macdonald and The Mail Printing & Publishing Co.,[3] the owners of some paid-up stock in the Mail Printing and Publishing Co. transferred their shares to one H. S. Macdonald, who thereupon requested the directors to permit the completion of the transfer by having proper entries made in the books of the company, pursuant to a by-law which read as follows: "Any shareholder may by leave of the directors, but not otherwise, transfer his share or shares by making an entry of such transfer in a book to be provided for that purpose, such entry to be signed by him and his transferee and witnessed by the managing director." The manager of the company in his affidavit stated, that on receipt of the request to complete the transfer of ten paid-up shares from the former owners, to H. S. Macdonald by a minute of assent to said transfer in accordance with the by-law of the company in that behalf, he at once called together the directors for that purpose, no transfer ever having been made in the company's books without a resolution first assenting to the same; that on the 27 January then last (1876), the directors met and the application of Mr. Macdonald was brought before them; four of the five directors being then present; that after protracted consideration of the subject and for reasons which seemed to them good and sufficient after weighing all the circumstances, the board unanimously came to the conclusion that it was not in the interest of the company that their assent should be given to the proposed transfer; that on the same day the Secretary of the

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[1] Per Wurtele, J., in Upton v. Hutchison, *supra*.

[2] In *re* Macdonald and The Mail Printing Co., 6 Ont. P. R., 309; The case of Smith v. Can. Car Co., 6 Ont. P. R., 107, overruled by In *re* Gresham Life Ins. Society, L. R. 8 Chy. App., 449; and In *re* Coalport China Co. (1895), 2 Ch., 404; 12 R., 462; Upton v. Hutchinson, 2 Que. P. R., 300; R. J. Q., 8 Q. B., 505.

[3] *Supra.*

Company notified Mr. Macdonald's solicitors in a letter which reads as follows: "Gentlemen, I am directed to hand you copy of resolution passed this day at a meeting of the directors of the Mail Printing & Publishing Co., in accordance with by-law No. 14 of the company. Yours, etc."

"Resolved,—That this Board does not assent to the proposed transfer of ten shares from Morland Watson & Co. to H. S. Macdonald." This affidavit also stated that the company was formed for political purposes, and that the directors considered it inimical to these purposes to give the assent asked for, and refused the said application in its merits. Upon an application by the transferee for a writ of mandamus, Chief Justice Hagarty said: "I think costs ought not to be granted under the circumstances. The reasons suggested in the affidavits now filed seem ample to justify the first refusal. Had that refusal been placed, *e.g.*, on the mere ground that the directors considered that the applicant's becoming a stockholder would be against the interests of the company I should consider it quite sufficient. But a simple absolute refusal might mislead parties possibly, and seem like a rough denial of a common right. Granting that it may be made in that short form, I hardly think it fair to award costs. No exception could be taken on personal grounds to the statement I have suggested as to its not being considered in the interests of the company to have the applicant a shareholder, and none of the unpleasant results suggested by the Lords Justices would follow. The unexplained answers might suggest that the objections might be to allowing the assignors to retire from the company and not as to preventing the applicant to enter it."

37. Refusal to register necessary to warrant mandamus.—In order that a mandamus may lie to compel a company to transfer shares there must be a distinct refusal on the part of the company to do so. A refusal in effect though not in direct terms, would be sufficient to give rise to such an action. But no rule can be laid down for determining whether there has been a refusal or not.[1] It has been held that where several demands to transfer the stock were made, and delays and evasive answers were given, without in direct terms refusing, a mandamus could be directed to the company.[2]

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[1] See Per Lord Donovan in Reg. v. Thames & Isis Navigation, 8 A. & E., 904; In *re* Guillot and the Sandwich & Windsor Gravel Road Co., 26 U. C. Q. B., 246.

[2] In *re* Goodwin v. The Ottawa & Prescott Ry. Co., 13 U. C. C. P., 254.

38. Remedies of transferee on non-registration—Equity—Damages.—Equity will, under proper circumstances, compel a company to transfer on its books shares of stock to the owner of the equitable title and to issue to him certificates for the same.[1]

The transferee of shares has also an action at law for damages for undue refusal to transfer his shares.[2] The refusal of the company is deemed a conversion of the shares.[3] Although, in certain cases, the president, where he is the transferor of shares, might perhaps register the assignment himself, yet the refusal of the secretary to do so would form a good ground for an action against the company.[4]

The measure of damages in such actions is the value of the shares at the time of demand and refusal to transfer,[5] also the dividends accrued thereon at that time with interest.[6] Where the plaintiff had sold his shares (which the company had certified him to be the owner of), and was unable to deliver them because of the company's refusal to make transfer on its books, and, in order to make his contract good, he was obliged to buy other shares:—it was held, by the House of Lords, that the price which he was compelled to pay for such shares to fill his orders was the proper measure of damages in an action against the company for refusing to transfer.[7]

An action was brought against a railway company for neglecting to register a transfer of shares in the books of the company which had been transferred by the plaintiff to creditor as collateral security, the arrangement being that the creditor should sell the shares at the best rate, and after deducting the amount of the claim, pay over the balance to the plaintiff; and after repeated demands on the company to register such shares, they were finally registered and sold; but in the interim a great depreciation had taken place in their value, and the plaintiff brought an action by way of damages for the difference.

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[1] Smith v. Bank of Nova Scotia, Supreme Court (1882), 8 Can. S. C. R., 167-169. In *re* Coalport China Co. (1895), 2 Ch., 404; Cushman v. Thayer Man. Co., 76 N. Y., 365; Mechanics Bank v. Seton, 1 Pet. (U. S.), 299; Buckley Comp., p. 36; Thompson Corp., sec. 2425.

[2] McMurrich v. Bond Head Harbour Co., 9 U. C. Q. B., 333; King v. Bank of England, Douglas, 524.

[3] Thompson Corp., sec. 2447.

[4] McMurrich v. Bond Head Harbour Co., 9 U. C. B., 333.

[5] *Ibid*; Hussey v. M. & M. Bank, 10 Pick. (Mass.), 415; Parsons v. Martin, 11 Gray (Mass.), 111, 116; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.), 100.

[6] Baltimore City Pass. R. Co. v. Sewell, 35 Md., 238; Hussey v. M. & M. Bank, 10 Pick. (Mass.), 415; Thompson Corp., sec. 2471.

[7] Balkis Consoldiated Co. v. Tomkinson (1893), App. Cas., 396, affirming Court of Appeal (1891), 2 Q. B., 614.

The Court held, that the plaintiff was entitled to such action and that the measure of damages was the difference between the price of the stock at the time of refusal and the price at the time of the subsequent registration of stock.[1]

39. Transfer of shares which amount to a litigious right—Rights of transferee.—In Quebec when a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it.[2] A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary.[3] B. became holder of forty shares upon transfers from D. *et al.* in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a Superior Court judgment rendered in a suit of one C., other shares, which had been confiscated for similar reasons, were declared to be valid and to have been illegally forfeited. Thereupon B. by a petition for writ of *mandamus* asked that he be recognized as a member of the Society and be paid the amount of dividends already declared in favor of and paid to other shareholders. B.'s action was met, amongst other pleas, by one, setting forth: that B. had acquired, under the transfers in question, litigious rights and that he was only entitled to the price paid, together with legal interest thereon and his costs of transfer. The Supreme Court held, affirming the judgment of the Court below (Fournier & Henry, JJ., dissenting), that at the time of the purchase of said shares, B. was a purchaser of litigious rights within the provisions of Art. 1583 C.C., and under Art. 1582 could only recover from the liquidators the price paid by him with interest thereon.[4] Sec. 4 of Art. 1584 C.C. provides that when the judgment of a court has been rendered affirming the right, or when it has been made clear by evidence and is ready for judgment, then the provisions of Art. 1582 do not apply, but the Supreme Court considered that the exception only applies to the particular demand in litigation which has been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment.[5]

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[1] Grand Trunk Ry. v. Webster, 6 L. C. J. 178 (Q. B., 1861).

[2] Art. 1582 C .Code. [3] Art. 1583 C. Code.

[4] Brady v. Stewart, Supreme Court, 1887, 15 Can. S. C. R., 82.

[5] *Ibid.*

40. Liability of company for registering transfers of shares held in trust—Knowledge—Apparent want of power.—All our Companies' Acts, the Banking Act and the Railway Acts provide that companies, etc., are not bound to see to the execution of any trust, whether express, implied or constructive in respect of any share. In the Railway Act 1888 (D), sec. 77, as amended,[1] this provision is followed by the words "whether or not the company has had notice of the trust; and it may treat the registered holder as the absolute holder of any such share or security, and, accordingly, shall not be bound to recognize any claim on the part of any other person whomsoever, with respect to any such share or security or the dividend or interest payable thereon: Provided that nothing herein contained shall prevent a person equitably interested in any such share or security from procuring the intervention of the court to protect his rights." None of the other acts contain the above amendment. But the provision that the company, etc., shall not be bound to see to the execution of any trust is not to be construed as referring to trusts of which the company has not had notice, for it would require no legislative provision to save the company from responsibility for not seeing to the execution of a trust, the existence of which had not in some way been brought to its knowledge.[2] The provision seems to be directly applicable to trusts of which the company has knowledge or notice; and in regard to these the company, it is declared, is not bound to see to their execution.[3] Its effect is to relieve the company of the duty of making enquiry, and the company could not be held responsible for registering a transfer of shares held in trust, unless it were shown that it was at the time possessed of actual knowledge which would make it improper for them to do so until at least it had taken care to give the beneficiaries an opportunity of protecting their rights.[4] What amount of knowledge

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[1] 55-56 Vic., cap. 27.

[2] Simpson v. Molsons Bank, Privy Council, 1895, 18 Legal News, at p. 170.

[3] *Ibid.*

[4] *Ibid*; see also Bank of England v. Hartga, 3 Vesey, 55; Bank of England v. Parsons, 5 Vesey, 665; Bank of England v. Lunn, 15 Vesey, 583; Gray v. Johnston, L. R. 3 H. of L., 1; *Ex parte*, Santa Barbara Mining Co., 38 W. R., 711 (Coleridge, C. J., 1890).

Under the Imperial Companies Act of 1862, sec. 30, ch. 89, which is as follows: "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 under this Act," it was decided that where the owner of shares at different times, makes in favor of each of two persons, an equitable assignment of such shares, such assignments rank according to their respective would be sufficient to imply that a company must know that a transfer is in breach of a trust is a question which must depend on the circumstances of each case.[1]

But, where the want of authority or power in the transferor is apparent, the company might be held accountable to the true owner. For instance, in Quebec, where shares in a bank stood in the name of a tutor to a minor, and the bank allowed the transfer to be made by the tutor, without the authorization of the Court upon the advice of a family council, as required by the laws of that province,[2] it was held that the bank was liable for the value of the shares (which had been dissipated and lost) on the ground that the tutor had no power to sell.[3] As was said by the Privy Council, " When this excess of power is once established, then the sale is, in fact, the sale of a stranger, and as if a stranger had sold these shares, and had then, by fraud and forgery, induced the bank to make the transfer of them in their books." [4]

Moreover, if a third party acquires stock held in trust or subject to a trust of which the corporation had notice, it would have to account to the true owner for the shares, should it appear that the person from whom it got the shares had not authority to deal with them.[5]

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dates, and the second transferee by giving notice of his assignment to the bank before the first transferee does so, does not thereby acquire any priority over the first transferee, because to hold otherwise would be to convert the bank into a trustee and to bind it with the notice of a trust.

(Société Générale de Paris v. Walker, 11 App. Cas., 20.)

In this case the Earl of Shelborne in the House of Lords made the following observation: " I think that according to the true and proper construction of the Companies' Act of 1862, and of the articles of this company, there was no obligation upon this company to accept or to preserve any record of notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust; and if the company is not affected by it, I do not see how the directors or officers of the company individually can be. See 11 App. Cas., at p. 30.)

[1] *Ibid.* [2] C. Code, art. 297.

[3] Bank of Montreal v. Simpson, 14 Moore P. C., 417; and similarly with the case of guardians, Webb v. Graniteville Manuf. Co., 11 South Car., 396; Atkinson v. Atkinson, 8 Allen (Mass.), 15. See also Bank of Montreal v. Sweeney, 12 A. C., 617.

[4] *Ibid*, p. 450 ; and see Colonial Bank v. Cady, 15 App .Cas. 267 ; see Raphael v. McFarlane, 18 Can. S. C. R., 183.

[5] Sweeney v. Bank of Montreal, 56 L. J. (P. C.), 79; L. R. 12 App. Cas., 617; Raphael v. McFarlane, 18 Can. S. C. R., 183.

Bank stock cannot be held, as regards third parties in good faith, to form

41. Words "in trust" show insufficiency of title of holder.—In such a case where the shares are held by a person "in trust" these words import an interest in some other person and clearly show an infirmity or insufficiency in the holder's title and are enough to put the company upon inquiry.[1] For instance, where a father, acting generally in the interests of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for shares in a company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favor of the minor without any acceptance by or on behalf of the minor being necessary; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares.[2]

The words "in trust," following the names of the official designation of pledgees, transferors, of corporate shares, running through a series of transfers of the legal title thereto, first by the original owner to a manager of a loan company, and subsequently by him and at his request to officers of various moneyed institutions, as security for loans to him personally, are to be construed as meaning that the transferors are trustees of the shares for the institutions for which they were respectively the officers or servants, and not for the original owner.[3]

42. All trustees must join in transfer.—Where the shares are held in trust by several trustees, in order to a valid transfer, all must join in the transfer.[4]

43. Company's liability on forged transfer or indorsement.—A company is liable to a shareholder for recognizing a forged indorsement; the company being, in a certain sense, the trustee of the title of the shareholder, and under the duty of seeing that transfers of the shares of its members shall not be made unless authorized by them,

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part of substituted property, on the ground that they have been purchased with the monies belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof. Arts. 931, 938, 939, C. C. (Per Strong & Fournier, JJ., in Petry v. Caisse d'Economie, 19 Can. S. C. R., 713.)

[1] *Ibid.* [2] Raphael v. McFarlane, 18 Can. S. C. R., 183.

[3] London & Canadian Loan & Agency Co. v. Duggan (1893), App. Cas., 506.

[4] Barton v. London, etc., Ry. Co., 24 Q. B. Div., 77.

it follows that it will be liable to one of its shareholders, as for a conversion of his shares, if it allows them to be transferred on a forged indorsement of the share certificate. The company is bound to know the signature of its shareholder. If, therefore, the power of attorney on the old certificate has been forged, and the company issues a new certificate to the holder, it will be liable to the true owner for the conversion of his shares.[1]

While, in England, it appears to have been formerly the rule that it constituted negligence on the part of the shareholder to afford an opportunity for a forgery and not give information of the same,[2] the opinion which now prevails there seems to be that the negligence which can be pleaded to escape liability must be such as is the proximate cause of the loss:—negligence in or immediately connected with the act by which the loss arises.[3]

44. Liability for fraudulent transfer by broker or agent on blank power of attorney—Remedy—Company estopped as to transferee.—It has been held in England that where transfers have been executed in blank as to particular shares or as to the transferee, and lodged with a broker, and the broker has fraudulently filled up the blanks so as to transfer shares not intended by the transferor, or with the name of a transferee other than the one intended, and the shares have been sold, the transfer is void, and the original owner is entitled to have the certificates delivered up, and their registration in the name of the purchaser restrained;[4] in such a case the remedy of the share-

[1] Thompson Corp., sec. 2556; *Re* Bahia, etc., Ry. Co., L. R. 3 Q. B., 584; In The Bank of Montreal v. Simpson, Privy, Council, 1861, 14 Moore P. C., at p. 450; where the bank allowed the transfer of shares standing in the name of a tutor without the authorization of the Court, etc., the Court said, "When this excess of power is once established, then the sale is in fact the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then by fraud or forgery, induced the bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them." See also R. S. B. C., ch. 44, sec. 155.

[2] Coles v. Bank of England, 10 Ad. & El., 437, 451.

[3] Bank of Ireland v. Evans' Charities, 5 H. of L. Cas., 389; Staple of England v. Bank of England, 21 Q. B. Div., 160, 176; Swan v. North Brit. Australasian Co., 2 Hurl. & Colt., 175, 189; but see further Vagliano v. Bank of England (1891), App. Cas., 107, 232 Q. B. Div., 243.

[4] Tayler v. Great Indian Peninsula R. Co., 4 De Gex & J., 559. Fox v. Martin (1895), 64 L. J., ch. 473; France v. Clarke. 53 L. J., ch. 588; L. R., 26 Ch. Div., 257.

holder may be by bill in equity to compel the corporation to issue him a new certificate for his shares.[1]

But if there is a mercantile usage or recognized practice to the effect that possession of certificates upon which is indorsed a transfer and power of attorney, entitles the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blanks and have the shares registered in the books of the company, a person purchasing or acquiring such certificates in good faith and for value from a broker, entrusted with the same by the owner, will be entitled to hold the shares as against the owner, although the broker in so transferring the certificates acted fraudulently.[2]

As regards an innocent transferee of the shares, the company by admitting the forged transfer to registration or by granting a certificate, estops itself in favor of such transferee.[3]

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[1] Midland R. Co. v. Taylor, 8 H. L. Cas., 751; Hildyard v. South Sea Co., 2 P. Wms., 76.

[2] Smith v. Rodgers (1899), 30 Ont. R., 256, 259, 262; distinguishing Fox v. Martin, *supra*, and France v. Clarke, *supra*, and citing Colonial Bank v. Hepworth (1887), 36 Ch. Div., at p. 44; Colonial Bank v. Cady (1890), 15 App. Cas., 267; Hone v. Boyle, etc. (1891), 27 L. R. Ir., 137, 151; Waterhouse v. Bank of Ireland (1892), 29 L. R. Ir., at p. 394; see also Thompson Corp., sec. 2561.

[3] *Re* Bahia, etc., R. Co., L. R. 3 Q. B., 584; Shaw v. Port Phillip Co., 13 Q. B. D., 103. Palmer Comp. Law, at pp. 95, 96.

T. being the registered holder of five shares in a registered joint stock company, limited, left the share certificates in the hands of her broker. A transfer of the shares to S & G, purporting to be executed by T, together with the certificates, was left with the secretary for registration. The secretary in the usual course wrote to T, notifying her that the transfer had been so left, and receiving no answer, after 10 days, registered the transfer, and removed the name of T. and placed the names of S. & G on the register as holders of the five shares, giving them certificates certifying that they were the registered holders of the five specific shares. A. bargained for five shares in the usual way on the Stock Exchange, and paid the value of five shares, and the specific five shares were transferred to him by S & G, and the name of A was registered as the holder of the shares, and share certificates were given to him. It was afterwards discovered that the transfer to S & G was a forgery, and the Company was ordered to restore T's name to the register by rule of Court under the Company's Act 1862 (Imp.), 25 & 26 V., ch. 89), s. 35. On a case stated under that section:—Held, that the giving of the certificate by the Company to S & G amounted to a statement by the Company, intended by the Company to be acted upon by purchasers of shares in the market, that S. & G. were entitled to the shares, and that A. having acted upon that statement, the company were estopped from denying its truth. That A. was therefore entitled to recover from the company as damages for the loss of the shares, the value of the shares at the time the Company first

45. Company may obtain decision of Court as to ownership of shares of deceased member—Effect—Procedure—Costs.—The Dominion Companies' Act provides that whenever the interest in any shares of the capital stock of the company is transmitted by the death of any shareholder or otherwise, or whenever the ownership of or legal right of possession in any shares changes by any lawful means, other than by transfer according to the provisions of this Act, and the directors of the company entertain reasonable doubts as to the legality of any claim to such shares, the company may make and file, in one of the Superior Courts of the Province in which the head office of the company is situated, a declaration and petition in writing addressed to the Justices of the Court, setting forth the facts and the number of shares previously belonging to the person in whose name such shares stand in the books of the company, and praying for an order or judgment adjudicating and awarding the said shares to the person or persons legally entitled to the same,—by which order or judgment the company shall be guided and held fully harmless and indemnified and released from every other claim to the said shares or arising in respect thereof.[1]

Notice of the intention to present such petition shall be given to the person claiming such shares, or to the attorney of such person duly authorized for the purpose, who shall, upon the filing of such petition, establish his right to the shares referred to in such petition; and the time to plead and all other proceedings in such cases shall be the same as those observed in analogous cases before the said Superior Courts; Provided always, that the costs and expenses of procuring such order or judgment shall be paid by the person or persons to whom such shares are declared lawfully to belong; and that such shares shall not be transferred in the books of the company until such costs and expenses are paid,—saving the recourse of such person against any person contesting his right to such shares.[2]

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refused to recognize him as a shareholder, with interest at 4 per cent. from that time. Bahia, etc., Ry. Co., *supra*.

In Shaw v. Port Philip Co., *supra*, the Company was held to be estopped by a certificate issued by the fraud of its secretary, and which was in fact a forgery, upon the principle that the Company was responsible for the acts of its agent acting within the scope of his authority. Mr. Buckley, in his work on Companies (6th Ed., p. 93), seems to think the Court was in error in deciding this case, as the secretary was acting for his own interest and not for the benefit of the Company, and he cites British Mutual Banking Co. v. Chamwood Forest Co., 18 Q. B. D., 714.

[1] Sec. 50, R. S. C., ch. 119. [2] *Ibid* (2).

46. Transfer by deceased member's representative.—It is provided by the Dominion Act and certain Provincial Acts, that any transfer of the shares or other interest of a deceased shareholder, made by his personal representative, shall, notwithstanding such personal representative is not himself a shareholder, be of the same validity as if he had been a shareholder at the time of his execution of the instrument of transfer.[1]

[1] Sec. 53 R. S. C., ch. 119.

CHAPTER IX.

LIABILITY OF SHAREHOLDERS.

1. LIABILITY LIMITED.
2. LIABILITY TO CREDITORS OF COMPANY.
3. LIABILITY FOLLOWS THE SHARES.
4. WHEN TRANSFEROR IS RELIEVED FROM FURTHER LIABILITY.
5. WHEN SHAREHOLDER IS LIABLE TO CREDITOR OF COMPANY—FIXING LIABILITY.
6. LIABILITY OF EXECUTOR, ADMINISTRATOR, TUTOR, CURATOR, GUARDIAN, TRUSTEE OR PLEDGEE.
7. LIABILITY OF TRUSTEE ON SHARES WHEN THE *cestui qui trust* IS NOT DISCLOSED.
8. COMPANY NOT BOUND TO SEE TO EXECUTION OF TRUST.
9. LIABILITY OF TRUSTEE, EXECUTOR, ETC., UNDER THE BANK ACT.
10. JURISPRUDENCE ON THE LIABILITY OF TRUSTEES.
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12. SPECIAL PROVISION IN CERTAIN ACTS AS TO PLEA OF SET OFF.
13. CONDITIONS NECESSARY TO ALLOW CREDITOR OF COMPANY TO PROCEED AGAINST A SHAREHOLDER—STATUTORY REMEDY TO BE STRICTLY PURSUED.
14. SHAREHOLDER'S LIABILITY TO CREDITORS DIFFERS FROM HIS LIABILITY AS A CONTRIBUTORY.
15. SHAREHOLDER PRECLUDED FROM SETTING UP AGAINST CREDITOR DEFENCES AVAILABLE AGAINST COMPANY.
16. WHERE CAUSE OF ACTION AGAINST SHAREHOLDER ARISES.
17. METHOD OF INSTITUTING ACTION BY CREDITOR AGAINST SHAREHOLDER—WRIT OF SUMMONS—*scire facias.*
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19. DOES CREDITOR PROCEED AGAINST SHAREHOLDER ON THE LATTER'S CONTRACT WITH THE COMPANY, OR DOES HE EXERCISE AN INDEPENDENT STATUTORY RIGHT?—ESTOPPEL—SET-OFF—SUBROGATION IN RIGHTS OF CREDITOR.
20. SET-OFF ON A WINDING-UP—FRAUDULENT TRANSFER BEFORE WINDING-UP.
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22. WANT OF INCORPORATION AS A DEFENCE—ESTOPPEL.
23. EXPIRY OF TIME LIMITED TO COMPLETE ORGANIZATION A DEFENCE—ACQUIESCENCE.
24. FRAUDULENT INSERTION OF NAME IN APPLICATION FOR LETTERS PATENT—*scire facias* BY ATTORNEY-GENERAL—ANNULMENT OF LETTERS PATENT—ADMISSABILITY OF PAROLE EVIDENCE—INTERVENTION OF LIQUIDATOR IN CREDITOR'S ACTION.
25. SUBSCRIPTION BEFORE INCORPORATION MUST BE RATIFIED TO BIND SUBSCRIBER.
26. SUBSCRIPTION WHEN AMOUNT REQUIRED BY THE CHARTER HAS NOT BEEN PAID OR DISPOSED OF.
27. DEFENCE OF INSUFFICIENCY OF SUBSCRIBED CAPITAL—ACQUIESCENCE—INTERVENTION OF ATTORNEY-GENERAL.
28. FORFEITURE OF CHARTER AS A DEFENCE AGAINST COMPANY CREDITORS.

1. Liability limited.—The shareholders are not, as such, responsible for any act, default or liability of the company or for any engagement, claim, payment, loss, injury, transaction, matter or thing relating to or connected with the company, beyond the amount unpaid on their respective shares in the capital stock thereof.[1] In British Columbia the shareholders may be similarly liable,[2] or their liability may be limited to such amount as they undertake to contribute to the assets of the company in the event of its being wound up,[3] or their liability may be unlimited.[4] It all depends on the terms of the Memorandum of Association.[5] The other Provinces have similar provisions to the Dominion Act.

2. Liability to creditors of company.—Until the whole amount of his shares has been paid up, each shareholder is individually liable to the creditors of the company to an amount equal to that not paid up thereon ; but he will not be liable to an action therefor by any creditor until an execution at the suit of such creditor against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, not exceeding the amount unpaid on

[1] Sec. 54, R. S. C., ch. 119. [2] R. S. B. C., ch. 44, sec. 11.
[3] *Ibid*, sec. 12. [4] *Ibid*, sec. 13. [5] *Ibid*, sec. 10.

his shares, will be the amount recoverable, with costs, from such shareholder; and any amount so recoverable, if paid by the shareholder, will be considered as paid on his shares.[1]

The above is the law as it exists in England and in those States of the Union which have followed the English practice. Thus it has been held in the United States that shareholders can only be made liable in respect of such debts as might have been enforced against the corporation;[2] and in England the shareholders at large of an English joint stock company are not liable in respect of the bonds of the company, unauthorized, and not issued in pursuance of a general meeting, although in the hands of a *bonâ fide* purchaser for value, without notice of their infirmity.[3] Nor are shareholders liable for debts of the corporation barred by limitation.[4] The shareholder is liable only to the extent of the balance unpaid on his shares, but in addition to this he is liable for the costs of the action,[5] and it is sometimes held that he is liable for interest on such sum from the date of the commencement of the suit against him, although it results in charging him with a sum in excess of that for which he was individually liable.[6]

3. Liability follows the shares.—The law as stated by Judge Thompson is that in the absence of special statutory provisions, the general rule, applicable alike to the English joint stock company and the American corporation, is, that liability as contributories or to creditors *follows the shares*, and attaches, not merely to those who were members at the time, or before, the debt was contracted, but to those who were such either, 1st. when by reason of the stoppage dissolution, or winding-up[7] of the company, the right to transfer shares ceased; or, 2nd. in the case of direct proceedings by creditors against shareholders, when the right of the creditor against the shareholder

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[1] Sec. 55 R. S. C., ch. 119.

[2] Van Hook v. Whittock, 7 Paige (N. Y.), 373; Buffington v. Bardon, 80 Wis., 635; S. C. 50 N. W. Rep., 776.

[3] Athenaeum, etc., Society v. Pooley, 31 L. T., 70; 4 Jur. (N. S.), 371.

[4] Van Hook v. Whittock, 3 Paige (N. Y.), 409.

[5] *Supra.*

[6] Nasmith v. Dickey, 44 U. C. Q. B., 414; Burr v. Wilcox, 22 N. Y., 551; Mason v. Alexander, 44 Ohio St., 318; Wehrman v. Reakirt, 1 Cin. Sup. (Ohio), 230, 239; see sec. 39 R. S. C., ch. 119; Contra, Munger v. Jacobson, 99 Ill., 349; Cole v. Butler, 43 Maine, 401, 405; Sackett's Harbour Bank v. Blake, 3 Rich. Eq. (S. C.), 225, 233.

[7] Castello's case, L. R. 8 Eq., 504; Symon's case, L. R. 5 Ch., 298.

became fixed in an appropriate proceeding.[1] It follows that in an action to enforce the individual liability of a shareholder under a statute, a recovery may be had against him, although he was not a shareholder when the creditor's cause of action accrued.[2]

4. When transferor is relieved from further liability.—Lord Justice Lindley states the general rule to be that a member of a company, whose shares have been duly transferred, surrendered, or forfeited, is discharged, as between himself and the other members, from all liability, as well in respect of past as of future transactions : the acceptance by the company of the transfer or surrender, or the declaration by the company of the forfeiture, being, generally speaking, equivalent to a release by the company of the member whose shares are thus dealt with, from all liability in respect of them. Where this is the case, he is not liable, on the subsequent winding-up of the company, to be put on the list of contributories with the present members.[3] Our acts, however, provide that in the case of forfeiture, the holder of the shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof.[4] In the case of a transfer of unpaid shares, the transferee is held jointly and severally liable with the transferor to the company and its creditors, until regularly entered in the transfer book.[5] If, however, a *bonâ fide* transfer conveying the shares absolutely to the transferee has been permitted by the directors and is duly registered in the books of the company, the transferor is discharged from liability in respect of the shares so transferred.[6]

5. When shareholder is liable to creditor of company—Fixing liability.—The Dominion Act states, in effect, that a shareholder shall

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[1] Thompson Corp., sec. 3170 ; Nixon v. Green, 11 Ex., 550 ; affirmed 25 L. J. Ex., 209; S. C. 3 Hurl. & Norm., 686; Dodgson v. Scott, 2 Ex., 457; Longley v. Little, 26 Maine, 162; Bond v. Appleton, 8 Mass., 472; Child v. Coffin, 17 Mass., 64; Middletown Bank v. Magill, 5 Conn., 28; Deming v. Bull, 10 Conn., 409; Root v. Sinnock, 120 Ill., 350.

[2] Thompson Corp., sec. 3170. Root v. Sinnock, 120 Ill., 350.

[3] Lindley Comp., 5th Edit., p. 816.

[4] Sec. 41, R. S. C., ch. 119. In some of the Provincial Acts the last part does not appear.

[5] Sec. 48, R. S. C., ch. 119.

[6] Thompson Corp., sec. 3172 (quoting Lindley); Buckley Comp., 6th Ed., pp. 27-28.

not be liable to an action for the unpaid portion of the shares held by him, at the instance of a creditor, until an execution at the instance of such creditor against the company has been returned unsatisfied in whole or in part,[1] and under a similar provision of the English Companies' Clauses Consolidation Act[2] it was held that the liability attaches to those who are stockholders at the time of the return, *nulla bona*, of the execution against the corporation, at which date the liability of the stockholders to the creditor became fixed.[3]

6. Liability of executor, administrator, tutor, curator, guardian, trustee or pledgee.—All our Companies' Acts provide that no person, holding stock in the company as an executor, administrator, tutor, curator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estate 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 interdicted person or the person interested in such trust fund would be if living and competent to act and holding such stock in his own name; and no person holding such stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same and shall be liable as a shareholder accordingly,[4] and the owners, not the pledgees, are entitled to vote as shareholders at all meetings of the company.[5]

7. Liability of trustee on shares when the *cestui qui trust* is not disclosed.—As to whether the above provision applies to the case where a person holds stock in his own name, without disclosing the trust, etc, on the books and perhaps, in the case of a transfer, on the transfer as well, is a point of some difficulty. In a recent Quebec case[6] it was held that where stock is subscribed for by a mandatory or trustee in his own name, and not as mandatory or trustee, he will be liable to the creditors of the company as a shareholder, without prejudice to the creditors' rights against the mandator or *cestui qui trust*, also. The reasons on which this decision is based would seem to be applicable to the civil and common law alike. So far as the civil law is concerned the law is that a mandatory who acts in his own name is liable to the third party with whom he contracts without prejudice to

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[1] Sec. 55, *ibid*. Provinces likewise.

[2] Ch. 16, sec. 36.

[3] Nixon v. Green, 11 Ex., 550; Nixon v. Brownlow, 3 H. & N., 686.

[4] Sec. 56, R. S. C., ch. 119. Provinces likewise.

[5] Sec. 57 *Ibid*.

[6] Molsons Bank v. Stoddart, S. C., 1890, M. L. R., 6 S. C., 18.

the rights of the latter aginst the mandator also.[1] The same rule prevails in regard to trustees.[2] Their liability is joint and several.[3] But although both systems of law provide that trustees contracting on behalf of the trust estate, and disclosing for whom they are acting, are not personally liable on the contract, yet when a trustee subscribes or holds shares in a company in trust for another person not disclosed, another principle comes into play and the trustee is liable to pay calls and to respond, in the event of insolvency, to creditors. The reason is that all the Companies' Acts provide that the company shall not be bound to see to the execution of any trust. The general rule in regard to all companies is that the person whose name rightfully appears on the books of the corporation is the shareholder both as to the corporation and as to the public.[4]

8. Company not bound to see to execution of trust.—Clauses exempting companies from the onus of seeing to the execution of trusts existed in the earliest English Acts, and in the same language as our present companies' acts, viz.:—" The company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the shares may be subject."[5] In regard to this clause it has been held that as the company is relieved from responsibility for trusts it has no right to take advantage of one created independently of it, between other parties.[6] Thus under this clause it has been uniformly held that the person registered as shareholder is liable upon the shares registered in his name, though he may be merely a trustee and registered as such.[7] In a recent Quebec case[8] decided by the Privy Council, affirming the decision of the Court of Queen's Bench, it was held that where a statute incorporating a bank provides that " the bank shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of

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[1] Art. 1716, Quebec Civil Code; Story Agency, secs. 163, 266, 269.

[2] Quebec Act respecting trusts, 42-43 Vict., ch. 29, sec. 9 ; Story Agency, sec. 266 note.

[3] Gillespie v. City of Glasgow Bank, 4 App. Cas., 632.

[4] See Thompson Corporation, sec. 3192.

[5] The Companies' Clauses Act, 8 Vict., ch. 16, sec. 20.

[6] Newry, etc., Ry. Co. v. Moss, 14 Beav., 64, 69.

[7] Lumsden v. Buchanan, 4 Macq., 950; Muir v. City of Glasgow Bank, 4 App. Cas., 337; Holt's case, 1 Sim. (N. S.), 389; Stover v. Flack, 30 N. Y., 64; Glasgow Bank Cases, 4 App. Cas., 547; Cree v. Comerail, 4 App. Cas., 648.

[8] Simpson v. Molsons Bank [1895], A. C., 270; 64 L. J. P. C., 51; 11 R., 427, reported in R. J. Q., 4 Q. B., 11, under the name of Stewart v. Molsons Bank.

the shares of the bank may be subject," such provision must relate to, and free the bank from, liability for trusts of which the bank had knowledge or notice, as the bank could not, apart from the statute, incur liability by not seeing to the execution of a trust of which they had no knowledge.

9. Liability of trustee, executor, etc., under the Bank Act.—The Bank Act 1890,[1] which also contains the usual clause exempting trustees from personal liability, has this addition, which does not appear in our Companies' Acts :—" But if the testator, intestate, ward or person so represented is not so named in the books of the bank, the executor, administrator, guardian or trustee shall be personally liable in respect of such stock as if he held it in his own name as owner thereof."

10. Jurisprudence on the liability of trustee.—The following jurisprudence deals with the liability of trustees :—The Quebec case of Molsons Bank v. Stoddart[2] held that a person subscribing for stock in a company as trustee, without indicating the trust upon the books of the company, will be held jointly and severally liable with the *cestui que trust* to the creditors of the company. The New York Court of Appeals has held similarly under exactly the same statutory provisions.[3] In an Ontario case of Page v. Austin decided in the Common Pleas,[4] Wilson, C.J., and Galt, J., the two judges sitting in the case, held that where stock was transferred as collateral security, in order that the transferee may avail himself of the clause relieving holders of stock as collateral security from liability,[5] the nature of the transfer must appear in the transfer book and probably in the transfer itself. This point was not dealt with when this case went before the Court of Appeals, but Patterson, J.A., stated that the consideration which he had given to that question had not led him to doubt the correctness of the judgment pronounced upon it. He could not say, however, that he had considered it as maturely as if it were then to govern his decision.[6] When this case went before the Supreme Court,[7] Strong and Henry, JJ., held that the mortgages of the shares was not estopped from proving that the transfer of the shares was by

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[1] Sec. 44.

[2] S. C. 1890, M. L. R., 6 S. C., 17; see also Gillespie v. City of Glasgow Bank, 4 A. C., 632.

[3] Stover v. Flack, 30 N. Y., 64; but see Burgess v. Seligman, 107, U. S. 20.

[4] 30 U. C. C. P., 108.

[5] R. S. C., ch. 119, sec. 56.

[6] 7 Ont. A. R., at pp. 8-9.

[7] 10 Can. S .C. R., 132.

way of mortgage, although the transfer was absolute in form, and entered in the books of the company as an absolute transfer, Gwynne, J., dissenting. But the case did not turn on that point, which makes these holdings *obiter dicta*.

Mr. Justice Strong laid great stress upon the section contained in our Acts which provides that "such books shall be *primâ facie* evidence of all facts properly purported to be thereby stated in any suit or proceeding against the company or against any shareholder." The learned judge considered that the statute did not make an exception to the general rules of evidence, by declaring that the books shall be evidence of all facts purporting to be thereby stated in any suit or proceeding against any shareholder, but only to a limited extent; that is to say that they shall be *primâ facie* evidence, which expression *ex vi termini* necessarily implies that a fact established by them may be rebutted.[1] The learned judge also held and cited authorities to the effect that parol evidence is admissible to shew a transfer of shares, absolute in form, to have been intended by way of security merely.[2]

This argument would have no force in the Province of Quebec, for it has been lately held by the Supreme Court that a deed of transfer absolute on its face cannot be explained by verbal evidence to show that it was made to the transferee merely as *prête nom* for another party, or as a mere security to the transferee for a debt since paid and now held for the benefit of that other party; not even where there is a commencement of proof in writing.[3]

11. Official holding shares under ultra vires or fraudulent trust.— Neither has it any application to the case of an official of the company who holds shares in trust for the company under conditions that are *ultra vires*, unlawful or fraudulent.[4] In such a case the trustee will be held to his liability as a shareholder, while his right to indemnity may be repudiated.[5]

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[1] *Ibid*, at p. 162.

[2] *Ibid*, at p. 163, citing Burgess v. Seligman, 107 U. S., 20; McMahon v. Macey, 51 N. Y., 155; subscription to shares in a company is a commercial matter; Per Dorion, C. J., in Christian v. Valois, 3 L. N., at p. 60.

[3] Bury v. Murray, 24 Can. S. C. R., 77; and see Wilson v. Société de Construction de Soulanges, 3 L. N., 79; National Ins. Co. v. Chevrier, S. C., 1878, 1 L. N., 591; Dick v. Canada Jute Co., S. C. 1886, 30 L. C. J., at p. 188; Jones v. Montreal Cotton Co., Q. B. 1878, 24 L. C. J., at p. 110.

[4] *Re* Union Fire Ins. Co., McCord's case, 21 O. R., 264.

[5] *Ibid*; Lindley Comp., 5th Edit., 804, foot-note O citing:—*Ex parte* Daniell, 1 De Gex. & J., 372; 23 Beav., 568; Nickoll's case, 24 Beav., 639; Davidson's case, 3 De Gex & S., 21.

This question is dealt with under the title of "Transfer of Shares," and under the title of "Shareholders."

12. Special provision in certain acts as to plea of set off.—It has already been pointed out that the Dominion Act gives any creditor of a company incorporated thereunder the right to sue any of the shareholders of the company to recover any amount that may be unpaid on his shares, when the execution against the company is returned unsatisfied in whole or in part.[1] The Ontario Act, R. S. O., ch. 191, sec. 37, and British Columbia Act, R. S. B. C., ch. 44, sec. 51, are substantially the same, but they add that "any shareholder may plead by way of defense, in whole or in part, any set off which he could set up against the company, except a claim for unpaid dividends, or a salary or allowance as a president or director of the company.

13. Conditions necessary to allow creditor of company to proceed against shareholder—Statutory remedy to be strictly pursued.—With regard to executions against the company, all the Court requires of the creditor is that he make proof of having made reasonable attempts to obtain payment from the company and to discover assets *presently* available for his satisfaction, and that such attempts have been unsuccessful.[2] A mere general assertion by a solicitor's clerk, that writs of *fieri facias* have been issued against the company and returned *nulla bona*, is not sufficient. But if attempts have been made to discover assets, and those attempts have been fruitless, and a writ of *fi. fa.* has issued against the company, and been returned *nulla bona*, that will be sufficient until it is shown affirmatively that the company has assets;[3] and even if the company has assets which have not been taken in execution, still, if the court is satisfied that they are insufficient to satisfy the plaintiff, the action would lie.[4] The making of calls by

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[1] Sec. 55 R. S. C., ch. 119.

[2] Moore v. Kirkland, 5 U. C. C. P., 452; Lind. Comp., 291.

[3] Hitchens v. The Kilkenny R. R. Co., 15 C. B., 459. Rastrick v. Derbyshire R. Co., 9 Ex., 149.

[4] Lindley Comp., 291.

A shareholder in a company is not liable to an action for unpaid stock by any creditor of the company until an execution at the suit of such creditor has been returned unsatisfied in whole or in part. Until the return of *nulla bona* in whole or in part, there is no right of action. Christie v. Howarth, 8 Can. L. Times, 433.

Held, also, that notwithstanding the plaintiff obtained a judge's order, made *ex parte*, for the issue of a *scire facias*, it could not avail against the express language of R. S. C., c. 119, sec. 55. *Ibid.*

The return of *nulla bona* is that act which fixes the shareholder's liability the directors is not a condition precedent to the creditor's right to recover.[1]

The remedy given by the statute to an execution creditor must be strictly pursued: he must therefore bring the defendant within the precise terms of the statute by showing that he is in the strictest sense a shareholder.[2] But where the creditor produces a stock list, which purports to possess the defendant's signature as a subscriber for shares, it is only necessary, for execution to issue, that the creditor make out a *primâ facie* case that the signature is that of the defendant.[3] The creditor is not entitled to sue a person merely because he has dealt with and been treated by the company as a shareholder, and might, upon the principle of estoppel, be liable in that character to the company itself;[4] nor is the creditor disabled from recovering against a person who has not ceased to be a member according to the regulations, although he has been treated by the company's officers as no longer an actual shareholder.[5] The statutory remedy whereby the unsatisfied execution creditor of the company is entitled to proceed against any shareholder in satisfaction of his judgment against the company, is opposed to the common law, and must, therefore, be strictly pursued.[6]

14. Shareholder's liability to creditors differs from his liability as a contributory.—In determining whether a person is a contributory or not, the question is a different one, and decisions under the winding-up acts are not applicable to the above statutory remedy.[7]

15. Shareholder precluded from setting up against creditor defence available against company.—A stockholder, sued for a debt of the

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to be such, and without that essential ingredient there is no right to resort to the Court. *Ibid.*

[1] Moore v. Kirkland, *supra*,

[2] Denison v. Leslie, 3 Ont. A. R., 536.

[3] Hamilton v. Stewiacke, etc., Co. & Fraser (1897), 30 N. S. R., 166; The Steel Co. of Canada, 5 R. & G., 31, per Thompson, J.

[4] Denison v. Leslie, 3 Ont. A. R., per Moss, C. J. A., at p. 541; and see McCracken v. McIntyre, 1 Can. S. C. R., 479.

[5] *Ibid*; and see Ness v. Armstrong, 4 Ex., 21; Moss v. Steam Gondola Co., 17 C. B., 180; Bailey v. Universal Provincial Life Assn., 1 C. B. (N. S.), 557; Woodruff v. Corporation of Peterborough, 22 U. C. Q. B., 274.

[6] Woodruff v. Corp. of Peterborough, 22 U. C. Q. B., at p. 281, per Hagarty, J., quoting Ness v. Angas, 3 Ex., 810, and Ness v. Armstrong, 4 Ex., 21.

[7] Denison v. Leslie, per Moss., C. J. A., 3 Ont. A. R., at p. 543. See also Hamilton v. Stewiacke, etc., Co., 30 N. S. R., 166, 170.

company, after a return of *nulla bona* as to the latter, cannot make use of any defence which the company might have pleaded, even successfully, though by the Ontario Act, R. S. O., ch. 191, sec. 37, and the British Columbia Act, R. S. B. C., ch. 44, sec. 51, he may plead any set off which he could set up against the company, with certain exceptions,[1] except in the case of fraud or collusion.

16. Where cause of action against shareholder arises.—In Quebec it has been held that the cause of action against the shareholder arises where the company has its principal office, and where judgment is rendered for the debt due by the company and execution is issued, and not at the place where the shareholder subscribed for his shares, if outside the district of the head office.[2] Where an action was brought in Ontario against a shareholder, there resident, of a company whose head office was in another province where judgment had been obtained by the plaintiff against the company, and execution had been returned thereon unsatisfied, it was held that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario.[3]

17. Method of instituting action by creditor against shareholder —Writ of summons—Scire facias.—It seems to have been uncertain in Ontario, when the earlier cases were decided, whether the action against the shareholder should be commenced by writ of summons or by writ of *scire facias*. In the earlier Ontario cases the remedy was generally enforced by action commenced by ordinary writ of summons,[4] and in fact the language of the statute would seem to lend itself to such an interpretation, for it declares that a shareholder shall not be liable to an action before an execution against the company has been returned unsatisfied in whole or in part.[5] But it is now admitted that the remedy may be enforced by writ of *scire facias*. While this may be the more appropriate form of proceeding against a shareholder within the jurisdiction, it does not follow, seeing the particular phrasing of the Act, that an action which is not *scire facias*

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[1] Ray v. Blair, 12 U. C. C. P., 257.

[2] Welch v. Baker, 21 L. C. J., 97.

[3] Brice v. Munro, 12 Ont. A. R., 453; and see Jenkins v. Wilcock, 11 U. C. C. P., 505.

[4] Tyre v. Wilkes, 13 U. C. Q. B., 482; 18 U. C. Q. B., 46 and 126; Moore v. Kirkland, 5 U. C. C. P., 452; Jenkins v. Wilcock, 11 U. C. C. P., 505; Fraser v. Hickman, 12 U. C. C. P., 584.

[5] Fraser v. Hickman, per Draper, J., 12 U. C. C. P., at p. 586.

will not lie.[1] And it has been held by the Ontario Court of Appeals that it is not necessary that the execution should have issued out of the court in which the action is taken, but that if any execution be returned unsatisfied even in another province, the action lies against the shareholder.[2]

In Quebec the action is commenced by a writ of summons in the ordinary form.

In Nova Scotia, by the English Common Law Procedure Act, which was followed in that province, a writ of revivor with the alternative, in simple cases, of a writ of summons or rule to show cause, was, in most cases, substituted for a writ of *scire facias*; but there was not any equivalent in that act to subsections *b*, *c* and *d* of Rule 23, and *scire facias* was used in proceedings against shareholders to obtain execution. When the English judicature rules were amended in 1883, the new subsections *b*, *c* and *d* were added to Order 42, Rule 23 (which rule is now the same as the Nova Scotia Order 40, Rule 23), and the proceedings under that rule against shareholders were authorized. This rule gives as full and adequate a remedy, with the same opportunity of defending, as the old proceedings under *scire facias* or revivor. Since the amendment in 1883 the proceeding of *scire facias* does not seem to have been made use of. An application under Order 40, Rule 23, would seem, therefore, to have been substituted for proceedings by *scire facias* against shareholders, or perhaps it is more correct to say that the judgment creditor may proceed under this rule to enforce his judgment against shareholders, as well as by writ of *scire facias*.[3]

18. Who are contributories—Extent of liability—Distinction between contributory and shareholder.—When a company has become insolvent and is being wound up under the Winding-up Act, R. S. C., ch. 129, the liability of shareholders depends upon who are or are not contributories. This act defines "contributory" as meaning a "person liable to contribute to the assets of a company" under the act.[4] This language is borrowed from an identical definition in the (English) Companies' Act of 1862, sec. 74. "Contributory" also, in all proceedings for determining the persons who are to be deemed

[1] Brice v. Munro, *supra*; Page v. Austin, 7 Ont. A. R., 1; Gwatkin v. Harrison, 36 U. C. Q. B., 478.

[2] Brice v. Munro, *supra*.

[3] Hamilton v. Stewiacke, etc., Ry. Co., 30 N. S. R., per Ritchie, J., at pp. 14-15.

[4] Sec. 2 (f).

contributories and in all proceedings prior to the final determination of such persons, includes any person alleged to be a contributory.[1] So far as this definition in itself goes the word "contributory" might include any debtor of the company, were it not that the Winding-up Act by its internal evidence shows that while a contributory is regarded as a debtor, it is not every debtor that is to be classed as a contributory.[2] This point is now rendered certain by section 16 of the Winding-up Amendment Act,[3] amending sec. 73 of the Winding-up Act. This latter section gave rise to some doubt as to its scope,[4] and the amendment reads thus: "Section seventy-three of the said act shall apply to all persons indebted or liable in any way to the company in the same manner and to the same extent as it now applied to contributories." Were the matter to stop here we might adopt in their entirety the English constructions put upon the word "contributory;" because section 2 (f) of our Winding-up Act corresponds with section 74 of the part of the English Companies' Act relating to winding-up. But as "contributory" is only defined in these sections as "a person liable to contribute to the assets of a company," it is clear that reference must be made elsewhere in order to determine who such persons are. In the English Act (1862) this is done by referring to section 38 defining the liability of members of a company being wound up. This section is of doubtful assistance to us because under our Acts we have nothing which exactly corresponds to it, the distinguishing feature of this section being, that it recognizes different classes of contributories, and the matter resolves itself to a great extent into the question whether or not the person sought to be made a contributory is a present or past member of the company.[5] We must therefore first look into our own Acts in order to determine who are "persons liable to contribute to the assets of a company," *qua contributories.* Sections 42 to 55 of the Winding-up Act are placed under the heading of "contributories," and all those sections are to be construed in relation to that heading.[6] At the outset it is seen that a contributory is not necessarily a shareholder.[7] The list of contributories must distinguish between those who are contributories in

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[1] *Ibid.*

[2] *Re* Central Bank & Yorke's case, 15, O. R., 625.

[3] 52 Vic., ch. 32.

[4] Ings v. President, etc., of Bank of P.E. Island, 11 Can. S. C. R., 265; In *re* Central Bank of Canada; Yorke's case, 15 O. R., 625.

[5] See Buckley Companies, p. 143 (6th Edit.)

[6] Privy Council Judgment, laying down that rule on a case coming under the "Railway Act of Canada."

[7] Secs. 43, 45, R. S. C., ch. 129.

their own right and those who are contributories as representatives of or liable for the debts of others.[1] Also, although a shareholder may have transferred his shares to another with all the formalities necessary to constitute a valid transfer as between the parties thereto and the company, and the company has accepted and placed the transferee on its books, yet if the transfer were made under such circumstances as to constitute a fraud on the company's creditors, and therefore illegal, then although the transferor is no longer a shareholder, he will be claimed a member of the company for the purpose of the act and will be liable to contribute as such.[2] Thus, so far, it is clear that there are three kinds of contributories, viz., shareholders, members and their representatives, etc.

In providing for the extent of the liability of these kinds of contributories the Act states that "Every shareholder or member of the company, or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors as the case may be, under the act, charter or instrument of incorporation of the company or otherwise; and the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under the Act."[3]

It is submitted that importance should be attached to the distinction between a shareholder as contributory and a member as contributory, for as already shewn,[4] the decisions are somewhat conflicting as to what constitutes a person a shareholder or member of a company sufficiently to bring him within the scope of the Winding-up Act. As just pointed out, sec. 45 is conclusive that a person who has ceased to be a shareholder may yet, under certain circumstances be held liable as a member. As to what constitutes a person a member of a company, for the purpose of the Winding-up Act, other than this one instance, the acts do not explain. Lindley in his work on Companies[5] defines a member or shareholder as "a person who has agreed to become a member, and with respect to whom all conditions precedent to the acquisition of the rights of a member have been duly observed. Where all these circumstances are combined, there is membership in the fullest and most accurate sense. This, indeed, would be too obvious to require express statement were it not useful to have present to the mind a standard, by which to judge of other

[1] Sec. 43.
[2] Sec. 45, and see B. C. Act, R. S. B. C., ch. 44, sec. 35.
[3] Sec. 44.
[4] *Supra*.
[5] Pp. 46, 47.

cases. In practice difficulties are only presented where this standard is not reached; and the important question really is to what extent it can be departed from and membership be nevertheless constituted."

The learned author then proceeds to point out that there are endless cases in the books in which persons not shareholders in the strict and proper sense of the word, have nevertheless been held to be contributories on the winding-up of the company. This principle is well illustrated by Yelland's case.[1] In that case a company being completely registered, two shares were allotted by the letter of the Managing Director to an applicant for shares. Shortly afterwards the applicant paid £10 to the company's office by way of deposit on the shares, and the secretary forwarded to him an acknowledgment of the receipt of his deposit. The contract between the applicant and the company was thus rendered complete. The company's deed of settlement provided, that, immediately upon execution of the deed, the person executing being otherwise duly entitled, should be entered on the register of shareholders, and duly returned to the Joint Stock Companies' Registration Office and should thenceforth, but not before, assume the liabilities and privileges of a shareholder. The applicant did not execute the deed, but the company inserted his name on the register of shareholders, and returned his name to the registry office. It was held that the applicant had authorized the company to put his name on the register without his execution of the deed, and that his name had been properly placed on the list of contributories.

It is impossible, in the present state of the law, to lay down any definite rule adaptable to all cases, which will define accurately in each case who is and who is not a contributory within the meaning of the Winding-up Act. The question appears to have two phases to it, 1st. whether there is a sufficient contract between the person sought to be made a contributory and the company, so as to render him a member of the company for the purpose of the Winding-up Act. 2nd. whether having once been a shareholder, he has sufficiently retired from that position so as to be no longer considered a member within the meaning of the Winding-up Act. Both of these phases involve the application of numerous subsidiary principles in order to their correct determination. For instance, it has already been pointed out[2] that the mere fact of a director acting as such will sometimes render him liable as a shareholder to the extent of his qualification shares,

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[1] 5 De Gex & Smale, 395; affirmed by the Lords Justices in Appeal on the 22nd May, 1852.

[2] *Supra*, p. 127.

although he has not subscribed for any. This is only an instance of a rule now well recognized in England that a person may become a contributory to a company by his acts, although he has not made himself legally a member of it.[1] How far this rule is applicable to our law has been partly seen in the chapter relating to subscription to shares, and will be still further dealt with in considering defences to actions by execution creditors and to calls made by liquidators under the Winding-up Act.

19. Does creditor proceed against shareholder on the latter's contract with the company, or does he exercise an independent statutory right?—Estoppel—Set off—Subrogation in rights of creditor.—One of the important questions which arises, where a shareholder is sued by a creditor for the amount unpaid on his shares, is whether the creditor proceeds to exercise the rights of the corporation, in which case the shareholder is entitled to avail himself of any defense which he might have availed himself of if the company itself had been suing him for a call on his shares; or whether he proceeds under the statute which gives the creditor a distinct right of action? This question is fully considered under the defence of set-off and the conclusion there arrived at is, that while it is true the execution creditor is not subrogated in the rights of the company against the shareholder, as they existed when the action was brought against the shareholder, yet this does not always go to the extent of adopting the principle that under the statute the creditor sues entirely on a statutory liability, and not upon the contract entered into by the shareholder with the company.[2]

The principle of estoppel often steps in to cut off the defences which the shareholder might otherwise maintain. These have been briefly dealt with in the chapter on Subscription to Shares.

It has been seen that under the Ontario and British Columbia Companies' Acts the shareholder sued may plead by way of defence, in whole or in part, any set-off which he could set up against the company, except a claim for unpaid dividends, or a salary, or allowance as a president or a director of the company.[3]

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[1] Spackman v. Evans, L. R., 3 H. L., 171, 208, Per Lord St. Leonards.

[2] See also remark of Lord Chelmsford in Wickham v. New Brunswick and Canada Ry. Co., 3 Moore (N. S.), 416, at p. 438: "The judgment creditors take what belonged to the company, but do not take under them."

[3] Sec. 37 R. S. O., ch. 191; R. S. B. C., ch. 44, sec. 51 (a). As to president's salary in Quebec, see Ryland v. Delisle, L. R. 3 P. C., 17; 6 Moore P. C. (N. S.), 225.

After plaintiff had commenced an action against the defendant to recover

The Dominion Act has no such provision. In an action by a company against one of its shareholders, while the company is a going concern, the shareholder has the same right to set-off any debt, which may be due to him from the company, which he would have if sued by a natural person.[1]

As to whether, apart from the Winding-up Act, the shareholder can plead the company's indebtedness to him as a set-off against the unpaid balance of his stock, in an action by the creditor, seems to depend largely upon whether the statute gives the creditor an independent status, or whether it simply by subrogation places him in the shoes of the company. It is not doubted under the English law that mutuality between the cross demands, is an essential requisite in all cases of set-off.[2] This is also the law of Quebec.[3] In the Ontario case of Macbeth v. Smart,[4] it was decided that a shareholder, in an action against him by a judgment creditor of the company, could not

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from him in respect of his unpaid stock in a joint stock company the sum of $442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company, one B. recovered a judgment against the company for $4,333.08 and assigned it to one G., who assigned part of the money recovered to the extent of $500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim.

Held, that the procuring of such assignment by defendant, being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but *Semble*, if the set off had occurred to the defendant in his own right, although after action brought, it would have been otherwise. G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a judgment against defendant for $526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment so recovered against them to the extent of $500.

Held, that the judgment so recovered, and the payment thereunder, constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial.

Field v. Galloway, 5 O. R., 502 ; and see Nasmith v. Dickey, 44 U. C. Q. B., 414, decided under an act not containing the set-off clause. The set-off claimed was for promotor's services in organizing the company, but it was not allowed.

[1] Garnet, etc., Mining Co. v. Sutton, 3 Best & Smith, 321, Per Patterson, J., in Maritime Bank v. Troop, 16 Can. S. C. R., at p. 461.

[2] See Per Strong, J., in Maritime Bank v. Troop, 16 Can. S. C. R., at p. 459; Per Patterson, J., in the same case, at p. 464.

[3] Art. 1187, C. Code.

[4] 14 Grant's Chy., 298 (1868).

set off in equity, a debt due to him by the company before the judgment was recovered. This case was very thoroughly considered and was supported by an English case which held to the same effect.[1] In that case Cockburn, C.J.,[2] said: "What answer is it for a shareholder to say: 'The company is indebted to me as well as to you.' The one party has a judgment against the company; the other a mere right of set-off." And Draper, C.J., in the Macbeth case said: "Admitting for argument's sake, the equity alleged to arise from Macbeth's position and dealings with the company to the fullest extent, I cannot understand that it is to prevail over a legal right conferred by an express statute."[3] Again, it was particularly pointed out in the Privy Council in Ryland v. Delisle,[4] that "the creditor under the Act is in a different position to that of the company;" and it has not been generally noticed that the Privy Council made the same remark in a case in appeal from New Brunswick:—Wickham v. New Brunswick and Canada Ry. Co.[5] Lord Chelmsford in this case said[6]: "The judgment creditors take what belonged to the company, but do not take under them." Draper, C.J., who voiced the same opinion in Macbeth v. Smart, said : " Smart does not derive the power or right to have recourse for the payment of his debt to the shareholders, by or through the company, for the statute does not give it to the company, but their creditors. It is not, therefore, to my apprehension, a sound view to treat him on the footing of an assignee of the company, deriving his rights only from them.[7] The reasoning and principle of Macbeth v. Smart were fully adopted by Gwynne, J., then of the Ontario Court of Queen's Bench, in the case of Benner v. Currie,[8] which was a still stronger case, if anything, for there the defendant had himself recovered judgment against the company, on which a *fieri facias* had been returned *nulla bona*. The Court said that the plea formed no defense, for the plaintiff was not claiming in the right of the company, but by virtue of a specific statutory remedy; and the decision of Macbeth v. Smart was in principle applicable, notwithstanding the fact of defendant having a judgment and execution. Again, in McGregor v. Currie,[9] Hagarty, C.J., of the Ontario Court of Common Pleas, adopted the reasoning of both Macbeth v. Smart and Benner v. Currie, and also the Quebec case of Ryland v. Delisle.[10].

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[1] Wyatt v. Darenth Valley Ry. Co., 2 C. B. N. S., 109. [2] At p. 114.
[3] 14 Grant's Chy., at p. 313. [4] 6 Moore (N. S.), at p. 234.
[5] 3 Moore (N. S.), 416. [6] At p. 438. [7] 14 Grant's Chy., at p. 314.
[8] 36 U. C. Q. B., 411 (1875). [9] 26 U. C. C. P., 55.
[10] 6 Moore (N.S.), 225; and see Nasmith v. Dickey, 44 U. C. Q. B., at p. 427.

But while it is true that these cases decide that the execution creditor is not subrogated in the rights of the company against the shareholder, such as they stood at the time of the action brought against the shareholder, yet it must be guarded against giving them an extreme opposite view and regarding them as authority for the proposition that in an action brought by a creditor under the above enactment, the creditor sues on a statutory liability imposed upon the shareholder by the statute, and not upon the contract entered into by the shareholder with the company.[1] To do so would be to hold the innocent purchaser for value of shares from the original shareholder as fully paid up by the company, but which were not really so, liable to an execution creditor for the amount unpaid on the shares. The Supreme Court decided that the purchaser in such case would not be so liable.[2] This case is a strong additional authority in support of the contention that the shareholder could not set off against the creditor a debt due by the company, which in an action for calls would have constituted a good subject of set-off against the company.[3]

In Ryland v. Delisle,[4] what was claimed by the defendant was not a right of set-off as in Macbeth v. Smart,[5] but that the liability had been extinguished and satisfied by the compensation of a debt due by the company to the shareholder prior to the bringing of the action, a very different question from that of set-off ; for had the debts by and to the company been mutually exigible at the same time (which they were not because the company had not made the calls, and the defendant was therefore not then actually indebted to the company, while the company was indebted to him for salary), by the law of Quebec, as to compensation,[6] they would have extinguished each other *ipso jure*, and there would have been no more a liability remaining which the creditor could enforce against the shareholder than in the case of payment to the company by the shareholder of the full amount of his shares before the bringing of the creditor's action. This case recognizes the right of the creditor to sue as an original right conferred by the statute, not one derived through the company.[7]

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[1] See Per Strong, J., in McCraken v. McIntyre, 1 Can. S. C. R., at pp. 515, 524.

[2] McCraken v. McIntyre, 1 Can. S. C. R., 479, reversing Ontario Court of Appeal (The Chief Justice and Ritchie, J., dissenting).

[3] See Per Strong, J., at p. 517.

[4] 6 Moore (N. S.), 225.

[5] 14 Grant's Chy., 298.

[6] Arts. 1187-1188, C. Code.

[7] Per Strong, J., in McCraken v. McIntyre, 1 Can. S. C. R., at p. 518; and see Ryland v. Routh, 1 L. C. L. J., 114.

The company and the execution creditor whose execution has been returned *nulla bona* are both creditors *in solido*, and up to the time of an action being brought by the creditor against the shareholder, he may, if he does so without fraud, pay either the company or the execution creditor at his election,[1] and he may pay one such creditor in preference to another.[2]

20. Set-off on a winding-up—Fraudulent transfer before winding-up.—In regard to the Dominion Winding-up Act,[3] the question of set-off is dealt with under section 57 in the following language :—"The law of set off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act." This section has been dealt with by the Supreme Court in the case of The Maritime Bank Liquidators v. Troop.[4] The particular question to be decided in that case was whether a contributory of an insolvent bank, who was also a creditor, could set-off the debt due to him by the bank against calls made in the course of the winding-up proceedings in respect of the double liability imposed by the Banking Act. The Court decided that he could not. It is to be noted, in respect of this case, that the contributory was such by virtue of his double liability only and not on account of any unpaid portion of his shares, which had all been paid up. In rendering his judgment, Mr. Justice Strong[5] pointed out that this double liability constituted in equity and substance, a debt due, not to the bank, but to the creditors of the bank, whilst the debt which the shareholder sought to set off was a debt due, not from the creditors of the bank, but from the banking corporation itself; consequently there were not in any sense "mutual debts." In this judgment Taschereau and Gwynne, JJ., concurred. Mr. Justice Patterson's judgment proceeded further, holding that, "I am satisfied that the intention to be gathered from the statutes is that a contributory cannot set off against calls made in the course of the winding-up, either for capital or for double liability, an independent debt owed to

[1] *Ibid*, at p. 525.
[2] Per Wilson, C. J. O., in Field v. Galloway, 5 O. R., at p. 511.
[3] R. S. C., ch. 129.
[4] 16 Can. S. C. R., 45, reversing the Supreme Court of New Brunswick.
[5] *Ibid*, at p. 459.

him by the company."[1] And further the learned judge said:—"I say nothing of calls for capital which may have been made but not paid before the winding-up. It may be open to question whether they are not covered by section 57, and so taken out of the English rule which classes them with calls made under the direction of the Court."[2]

This section 57 of the Winding-up Act merely applies to joint stock companies the principle laid down in the case of Riddell v. Goold,[3] where it was held that compensation cannot take place to the prejudice of rights acquired by the insolvent's creditors by reason of the abandonment; and, therefore, creditors are without right of compensation for claims maturing after the abandonment. Under the Winding-up Act, as in other cases of judicial liquidation, the company or the debtor lose their rights in the estate which is being wound up under the direction of the Court for the benefit of all the creditors. However, if the debts are both due and exigible before the insolvency, the set-off is an accomplished fact before the liquidator is appointed.[4]

A distinction was made, however, under sec. 107 of the Insolvency Act of 1875 (which is very similar in its terms to sec. 57 of the Winding-up Act) with regard to debts falling due after the insolvency when the transactions leading thereto began prior to such insolvency. In the case of Miner v. Shaw[5] it was held that under such circumstances compensation accrued.

The same principle of set-off applies to the right of a shareholder, who is also a creditor, as applies to the ordinary creditor. He must pay up what he owes like other debtors, and then get his dividends like other creditors.[6]

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[1] *Ibid*, at p. 471.

[2] *Ibid*, at pp. 471, 472. Where a director, who is also president of a company, was appointed by the board of directors and acted as solicitor for the company:—Held, in winding-up proceedings that he was entitled to profit costs in respect of cases in court conducted by him as solicitor for the company, but not in respect of business done out of court, and was entitled to set off the amount of such costs against the amount of his liability as shareholder. *Re* Minaico Sewer Pipe, etc., Co., Pearson's case, 26 O. R., 289.

[3] M. L. R., 5 S. C., 170.

[4] See Exchange Bank v. St. Amour, 13 R. L., 443; Maritime Bank v. Troop, 16 Can. S. C. R., 456.

[5] 23 L. C .J., 150.

[6] Grissell's case, L. R., 1 Ch., 528; Black's case, L.R., 8 Ch., 254; Calisher's case, L. R. 5 Eq., 214; Barnett's case, L. R. 19 Eq., 449; Sawyer v. Hoag, 17 Wall (U. S.), 610; Scovill v. Thayer, 105 U. S., 143; Scammon v. Kimball.

The Winding-up Act formerly provided that when a debt due or owing by the company has been transferred within thirty days next before the commencement of winding-up under the act and under circumstances to render such transfer fraudulent, or at any time afterwards, to a contributory who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under the Act, for the purpose of enabling such contributory to set up, by way of compensation, or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory.[1] This provision until amended applied only to contributories, that is to say, to persons who are shareholders or members.[2] As to debtors the law of set-off as administered by the courts is applicable as if the company were a going concern.[3] But the fact that a debtor was also a shareholder of the company, and so liable as a contributory, did not make him a contributory *quoad* the debt which arose out of an independent transaction;[4] to such a debt sec. 73 of the Winding-up Act did not apply.[5]

This section has been amended in the Winding-up Amendment Act,[6] and is thereby made applicable " to all persons indebted or liable in any way to the company, in the same manner and to the same extent as it now applies to contributories."

21. Payment to one creditor or to company a defence—Colourable payment.—While payment in good faith by a shareholder to a judgment creditor is, for the purposes of the Act and to the extent of

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92 U. S., 362; Handley v. Stutz, 139 U. S., 417; Maritime Bank Liquidators v. Troop, *supra*; Auriferous Properties [1898], 1 Ch., 691; [1898] 2 Ch., 428.

In proceedings under the Winding-up Act, a claim by a shareholder against an insolvent company for an amount alleged to be due for interest on calls paid before their due date, will be rejected from collocation as against the creditors of the company ,the same being an equity between him and his co-shareholders, and as such cannot be allowed, after a winding-up order, to prejudicially affect the creditors of the company. Mitchell v. Royal Pulp Co., S. C. 1896, 2 Rev. de Jur., 215. This judgment confirmed by the Court of Queen's Bench in Angus v. Pope, R. J. Q., 6 Q. B., 45.

[1] Secs. 73 and 72, R. S. C., ch. 129.

[2] In *re* Central Bank of Canada & Yorke, 15 O. R., Per Boyd, C., at p. 629.

[3] *Ibid*, p. 625.

[4] *Ibid*, following Ings v. President, etc., of the Bank of P. E. Island, 11 Can. S. C. R., 265.

[5] *Ibid*.

[6] 52 Vic., ch. 32, sec. 16; as to applicability of this section see sec. 10.

payment, a good defence to an action by another creditor of the company, a merely colourable payment, *e.g.*, to a trustee for the defendant, will not avail.[1]

It was held a good defence in an action by judgment creditors of a company against a municipal corporation, as a shareholder in the company, that in pursuance of an agreement at the time of subscription, the municipal corporation had paid for its stock to the contractors of the road as the road progressed, said contractor having a 999 years' lease of the road, and having mortgaged their lease to trustees to secure payment to such municipalities of 6 per cent. on the sums subscribed by them[2].

Where in another action by a creditor the defendant pleaded that, before the commencement of the suit, the company sued him for the same monies, and that after being served with the writ of summons in that case, and before declaration in either case and after commencement of the creditor's suit, he paid the company in full; it was held no defence as it was not averred that such payment was made in ignorance of plaintiff's claim.[3]

22. Want of incorporation as a defence—Estoppel.—When an action is brought to collect a subscription either directly or indirectly for the benefit of the company's creditors, it is well established that, as a general rule, the subscribers cannot defeat the action by the defence that the company was not an incorporation, by reason of its not having fully complied with the terms of the statute providing for such an incorporation.[4] Not only is the subscriber estopped, by the act of subscribing, from setting up this defence, but he is bound also by the rule that the existence of a company cannot be inquired into, except by a direct proceeding by the Attorney-General on behalf of the Crown.[5] It is sufficient if the company exist *de facto.*

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[1] Nasmith v. Dickey, 42 U. C. Q. B., 350; 44 U. C. Q. B., 414, and see Field v. Galloway, 5 O. R., 502.

[2] Woodruff v. Corp. of Town of Peterborough, 22 U. C. Q. B., 274.

[3] Tyre v. Wilkes, 13 U. C. Q. B., 482.

[4] Windsor Hotel Co. v. Lewis, Q. B. 1881, 26 L. C. J., 29; Windsor Hotel Co. v. Murphy, S. C. 1877, 1 L. N., 74; Cie du Ch. de Fer de Peage de la Pointe Claire v. Valois C. Ct., 1881, 4 L. N., 334; Hughes v. The Cape Gibraltar Villa Co., C. R. 1889, 34 L. C. J., 24, confirming S. C. 1889, M. L. R. 5 S. C., 129; Cook on stockholders, 2nd Edit., sec. 184; Thompson Corporations, sec. 3683; Cie de Nav. Union v. Christin, S. C. 1880, 4 L. N., 162.

[5] See chapter on Incorporation of Companies, *supra*, p. 33; Common v. McArthur, 29 S. C. R., 239.

23. Expiry of time limited to complete organization—A defence—Acquiescence.—The subscriptions to the capital stock of a company are presumed to be made under the guarantee that the company will be organized on the lines laid down in its charter. Where the capital of a company is not subscribed within the delay required by the charter, and other conditions precedent are not performed, a subscriber to the capital stock of the company, who, without any delay, notifies the provisional directors that in consequence of defective organization he wishes to withdraw his subscription and have no further relations with the company, will not be held liable on an action against him for calls made by the company.[1] To defeat the company's right to calls in such a case there must be nothing amounting to acquiescence on the part of the shareholder.[2]

24. Fraudulent insertion of name in application for letters patent—Scire facias by Attorney-General—Annulment of letters patent—Admisability of parole evidence—Intervention of liquidator in creditor's action.—In a case which went to the Privy Council,[3] the defendants, who were sued for unpaid subscriptions to stock by an execution creditor of the company, were never recognized as shareholders and no allotment of stock was ever made to them. They had proposed the formation of a joint stock company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a government subsidy, without which it was distinctly understood that the company should not be formed. The conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders .Thus the execution creditor (a bank) could not have lent money on their names, and was therefore, in no respect led astray by the fact that their names were used without their permission in the petition for incorporation. The promotors

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[1] Brown v. Dominion Salvage Co., Q. B. 1891, 20 R. L., 557; appeal to Supreme Court quashed for want of jurisdiction, 20 Can. S. C. R. 203, and see Quebec & Richmond Ry. Co. v. Dawson C. Ct., 1951, 1 L. C. R., 366; and Cook stockholders, sec. 186; Massawippi Valley Ry. Co. v. Walker, 3 R. L., 450.

[2] Windsor Hotel Co. v. Lewis, *supra*; and see Windsor Hotel Co. v. Murphy, *supra*.

Semble,—that a purchaser, *subsequently* to incorporation, of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. MacDougall v. Union Nav. Co., Q. B. 1877, 21 L. C. J., 63.

[3] Banque d'Hochelaga v. Murray, P. C. 1890, 13 L. N., 257; for a similar case see Squires v. Brown, 22 How. Pr., 35, 47.

had acquiesced in the withdrawal of the defendants, and at a later period formally approved thereof, and, from the time of their severance from the project, the defendants ceased to be considered or even reputed to be subscribers to the undertaking. They were never notified of any further proceedings, nor were they ever required to pay any call. They took no part in any further proceedings and their names were never entered in the stock ledger, nor in any book purporting to be kept in conformity with the governing statute. Their Lordships were of the opinion that the names of the defendants were fraudulently inserted in the petition for the letters patent, without their sanction or authority, and that the solemn declaration of one, Gerhard Lomer, verifying the petition, was false. There was, therefore, no ground for making them liable except the statements in the letters patent. In the progress of the defendant's suit, they had moved the Attorney-General to file an information against the company in order to have the letters patent declared fraudulent, null and void. The Attorney-General filed the information alleging amongst other things, that the said letters patent had been obtained by fraudulently suggesting that the defendants and others had petitioned for the grant of the same, and were desirous that the same should be granted, and alleging *that the defendants had represented that they could not adequately defend themselves without the benefit of a scire facias*; and prayed that a writ of *scire facias* should issue and be made known to the company, the liquidator who was appointed to wind up the company, and to the execution creditor, ordering them and each of them to appear and shew anything which they or either or any of them might have or know why the letters patent should not be declared fraudulent, null and void, at least in so far as the said defendants were concerned; and further that the Court being more surely informed of all the premises should then declare by the judgment to be rendered on the information that the letters patent were fraudulent, null and void, at least in so far as the said defendants were concerned.

Their Lordships declared that the letters patent must be entirely annulled and not only as to the defendants; and that the letters patent being annulled, there is an end to the action at the suit of the execution creditor and of the interveners, the liquidators, against the defendants as shareholders in the incorporated company.

It is to be noted in this case that the judge of the Superior Court held that as the defendants had signed an unconditional agreement to form a company and to take a specified number of shares therein, parol evidence could not be adduced to prove that the formation of the company was conditional upon the granting of a subsidy by the Government, and that as this agreement had been left in the hands of the chief promotor, who had used it fraudulently for the purpose of obtaining the letters patent, knowing that the parties thereto had retired from the scheme owing to the failure to secure the Government subsidy, the signatories must be held responsible for the acts of the promotor whom they constituted their agent; and notice of the issue of the letters patent having been made public in their names, they should have taken some method of making known in an equally public manner their repudiation of the letters patent.[1]

But when an agreement of this kind is made the basis of a fraudulent application for letters patent, there could be little doubt that in attacking the letters patent as fraudulent, all evidence is admissible to that end, which will throw any light upon how the letters patent were obtained, for the Quebec Code of Civil Procedure expressly provides[2] that they may be declared null and be repealed by the Superior Court :—(1) when such letters patent were obtained by means of some fraudulent suggestion, or (2) where they have been granted by mistake or in ignorance of some material fact.

Two other points of importance were confirmed in this case. The first being that the defendant can move the Attorney-General to obtain a writ of *scire facias* for the purpose of defeating the plaintiff's action against him. Secondly, that the liquidator of an insolvent company is entitled to intervene in an action by a creditor against a shareholder of such company for unpaid calls.

25. Subscription before incorporation must be ratified to bind subscriber.—In an Ontario case,[3] where the alleged contributory signed the stock book before the incorporation of the company, and the shares were allotted to him after the incorporation, and there was no proof of formal notice of allotment, though correspondence had passed between the alleged contributory and the secretary of the company, in which the latter insisted that the former was a shareholder, it was held on appeal, confirming the decision of the Master in Ordinary, and following an earlier Ontario case,[4] that subscription was of

[1] M. L. R., 2 S. C., 201, sub. nom. Banque d'Hochelaga v. Garth.

[2] Art. 1007.

[3] In *re* Rosedale Pressed Brick, etc., Co.; Foster's case, 19 Can. L. T. (1899), 311.

[4] Tilsonberg Mfg. Co. v. Goodrich, 8 O. R., 565.

no avail unless there was a subsequent ratification, and in the absence of such the alleged contributory was not a shareholder by estoppel. Similar decisions have been rendered in Quebec.[1]

26. Subscription when amount required by the charter has not been paid or disposed of.—The statute or charter creating a company often prescribes that each subscriber to the capital stock shall, at the time of subscribing, pay to the corporation a fixed sum or a specified proportion of the subscription. These statutes vary somewhat in their provisions, some declaring the subscription to be void unless the percentage is paid, others merely prescribing that it shall be paid. An examination of the cases shews that each case is decided upon the particular language of the governing statute. But unless the statute states precisely that where the percentage is not paid the subscription shall be invalid, the subscriber will generally be held liable as a contributory.[2]

Where the statute provides that " no subscription to stock shall be legal or valid until ten *per centum* shall have been actually and *bonâ fide* paid thereon into one or more of the chartered banks of this province, to be designated by the directors, and not to be withdrawn therefrom except for the purposes of the company," a subscriber who has paid nothing on his stock will not be held liable as a contributory.[3] Especially is this the case when such a statutory enactment is proceeded by the provision that the persons named in the charter and those to be associated with them are only to become a body corporate after having complied with the requirements of the act as to the subscription of stock.[4]

But under the above statutory provisions it has been held that where the subscriber gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, such power of attorney containing these words " and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof ; " and where the ten per cent. was not, in fact,

[1] Union Nav. Co. v. Couillard, 21 L. C. J., 71; Q. B. 1877; Rascony v. Union Nav. Co., 24 L. C. J., 133, Q. B. 1878; see also *supra*.

[2] Denison v. Leslie, 3 Ont. A. R., 536; In *re* Central Bank; Bain's case; Nasmith's case, 8 Can. L. T., 389; East Gloucestershire Ry. Co. v. Bartholomew, L. R. 3 Ex., 15; Purdy's case, 16 W. R., 660; McEwen v. West L. W. Co., L. R. 6 Ch., 655 ; see *Ante* chapter on Subscription to shares—conditions precedent.

[3] *Re* Standard Fire Ins. Co., 12 Ont. A. R., 486. [4] *Ibid.*

enclosed, but the amount was placed to the credit of the subscriber in the books of the company, and a certificate of stock issued to him which he held for several years; the company having failed, it was held, in proceedings to have the subscriber placed on the list of contributories, in which proceedings he gave evidence to the effect that the sum to his credit was for professional services to the company, he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services; that he was rightly placed on the list of contributories.[1] Where a statute provided that no subscription to stock shall be valid, unless ten per cent. shall have been paid thereon within five days after subscription, and an amending statute provided that all subscriptions of stock shall be valid on which ten per cent. shall have been actually and *bonâ fide* paid, it has been held that a person who subscribed before the amending act, but who did not, within the five days following his subscription pay ten per cent. thereon would nevertheless be held liable as a shareholder upon payment afterwards of the ten per cent.[2]—See also on this point chapter on Shareholders.

27. Defence of insufficiency of subscribed capital—Acquiescence —Intervention of Attorney-General.—It has already been pointed out[3] that a company is justified in starting business before the whole of the capital stock has been subscribed, unless otherwise provided by its charter.

Most of our Companies' Acts require that one-half of the proposed capital of a company to be incorporated thereunder must be subscribed for and ten per cent. paid up before the letters patent will be granted. Others do not require this as a condition precedent to the granting of the letters patent, but require that the petition to the Lieutenant-Governor must state the amount of stock taken by each applicant, and also the amount, if any, paid in upon the stock of each applicant.[4] The object of this latter requirement is to enable the Government to form an opinion whether or not the amount of capital provided, and the amount proposed to be paid in before the charter is granted, is adequate to the object and purpose of the incorporation,

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[1] Caston's case, 12 Can. S. C. R., 644.

[2] Port Dover & Lake Huron Ry. Co. v. Grey, 36 U. C. Q. B., 425.

[3] Chapter on Capital Stock.

[4] See Manitoba Act, sec. 7 (a) R. S. M., ch. 25, and B. C. Act, R. S. B. C., ch. 44, sec. 11.

and sufficient to justify the Government in granting letters patent, to which, when granted, such extensive power is annexed by the Statute.[1] Under the act the letters patent shall not be held void or voidable by any irregularity in respect of any matter preliminary to the issue of the letters patent, and these are conclusive evidence that all the requirements of the Act, including the payment of the ten per cent., have been fulfilled, and the company thereby becomes completely formed and constituted, with full powers of exercising *all* the functions of an incorporated company,[2] which includes the making and enforcement of calls on the capital subscribed. Under these circumstances the defence of insufficiency of subscribed capital could not possibly avail the defendant, because the effect of letters patent so issued is the same as if a special act provided that it should be competent for the company to go into complete operation, to make calls and sue therefor, whenever such proportion of capital is subscribed as by the letters patent is recited as being subscribed before their issue.[3]

The foregoing is not applicable to cases under those acts, such as the old British Columbia Act of 1890, under which companies are incorporated by certificate of the registrar of companies without any requirements making known the amount of stock taken, and the amounts paid thereon.[4] In such cases, where the articles of association do not require that a certain amount shall be subscribed before commencing business, it would be no answer to an action for calls by the liquidator, that only a small or even an insignificant amount of the shares have been taken up,[5] for funds may be needed to enable the company to commence operations. A subscriber will be specially liable where he was one of the original incorporators or signers of the memorandum of association, or deed.[6] Even if the defence existed it would be considered as waived by the subscriber participating as a

[1] See Per Gwynne, J., in Lake Superior Nav. Co. v. Morrison, 22 U. C. C. P., at p. 223, and see sec. 6 Dom. Act, R. S. C., ch. 119.

[2] Secs. 24, 68, 78 Dom. Act, R. S. C., ch. 119.

[3] See Per Gwynne, J., in Lake Superior Nav. Co. v. Morrison, 22 U. C. C. P., at pp. 224, 225.

[4] Under the present British Columbia Act, the memorandum of association of a company limited by shares, which is filed with the Registrar, must show the number of shares taken by each subscriber, R.S.B.C., ch. 44, sec. 11.

[5] Ornamental Pyrographic Co. v. Brown, 2 H. & C., 64 ; McDougall v. Jersey Hotel Co., 2 Hem. & M., 528; Lyon's case, 35 Beav., 646.

[6] Watts v. Salter, 10 C. B., 477.

shareholder and committee-man for several months,[1] or acting as director.[2] The subscriber always has this course open to him if the directors are about to proceed with an entirely inadequate subscribed capital, he may apply to have his name removed from the subscription list.[3]

The fact that the capital stock of a company has not been wholly subscribed is not a defence to an action by the company against a shareholder for calls on shares subscribed for by him.[4]

Where a Special Act, incorporating a company, enacts that the company shall not commence operations until a certain amount of its capital stock has been subscribed and a certain amount paid thereon, this would not prevent calls being made on stock subscribed for, nor prevent the board of provisional directors, created by the Act, from doing any acts for and in the name of the company, within their power, so long as such acts fall short of what may properly be termed "commencing operations," even although the amount of stock required by the Act has not been subscribed, nor the requisite amount thereof paid in, the power to issue shares and make calls being complete from the date of incorporation. The subscription and payment called for by the Act are not a condition precedent to the creation of a body corporate, but are merely a limitation upon the power of the company to commence operations until the prerequisite is complied with.[5]

If such a company should start business or commence operations without the required amount of capital being subscribed and paid in thereon, this might be a ground for forfeiture of the charter.[6]

But where the act of incorporation fixes a delay within which a certain amount of capital stock must be subscribed for and a certain percentage thereof deposited before a meeting of shareholders could be called to elect directors or to otherwise proceed with the organization

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[1] Sharpley v. Louth & E. C. Ry. Co., L. R., 2 Ch. Div., 663.

[2] Hagar v. Cleveland, 36 Md., 476; and see Lake Superior Nav. Co. v. Morrison, 22 U. C. C. P., p. 217.

[3] Elder v. New Zealand Land Co., 30 L.T., 285; and see Brown v. Dominion Salvage Co., Q. B. 1891, 24 R. L,. 557; Cass v. Ottawa Agricultural Ins. Co., 22 Grant's Chy., 512; Howland v. McNab, 8 Grant's Ch., 47.

[4] Rasconey Woollen, etc., Co. v. Desmarais, Ct. of Rev. 1886, M. L. R. 2 S. C., 381.

[5] N. Sydney Mining, etc., Co. v. Greener, 1898, 31 N. S. R., 41, 50, 51.

[6] Dom. Wrecking & Salvage Co. v. Atty-Gen. of Can., 21 Can. S. C. R., 72, 84, 86.

of the company, this is a condition precedent to the organization, and if the delay expires without such subscription and deposit having been accomplished, the powers of the provisional directors lapse, the corporation becomes effete;[1] and a subscriber for shares in such a company, on being sued for the amount of his subscriptions, could plead this as a defence;[2] and especially if he had lost no time in repudiating the acts of the directors in proceeding to commence business.[3] See also remarks and decisions at p. 232.

He could also at least, in the Province of Quebec, secure the intervention of the Attorney-General to have the charter declared forfeited, and avail himself of the forfeiture as a defence to the action.[4]

28. Forfeiture of charter as a defence against company creditors. —To what extent the forfeiture would avail a shareholder as a valid defence against the creditors of the company, appears to some extent in the *dicta* of the judges in the Supreme Court case of Dominion Salvage Co. v. The Atty-General.[5] Gwynne, J., vigorously dissented from the majority of the court on the ground that a winding-up order having been granted, to subsequently declare the forfeiture of the charter, on the ground that it had lapsed, would do infinite mischief and injustice to parties who (during the two years that the company did *de facto* carry on the operations for which they were incorporated), became creditors of the company in the *bonâ fide* belief that they had *de jure* the existence which *de facto* they appeared to have. In his opinion all parties interested should be remitted to the proceedings in liquidation instituted under the Winding-up Act where the rights of all parties having a just claim to exemption from liability to contribute to the payment of the debts of the company can be protected.[6] The majority of the court through Taschereau, J., held otherwise, and cited Banque d'Hochelaga v. Murray[7] to the effect that though the company whose charter was impeached was in liquidation under a winding-up order anterior to the Attorney-General's information, yet the Privy Council granted its conclusions. In the United

[1] *Ibid*; Brown v. Dom. Salvage, etc., Co., Q. B. 1891, 20 R. L., 557.

[2] Brown v. Dom. Salvage, etc., Co., *supra*; Dom. Wrecking, etc., Co. v. Atty-Gen. of Can., *supra*.

[3] *Ibid.*

[4] Banque d'Hocshelaga v. Murray, P. C. 1890, 13 L. N., 257; and see Dominion Salvage & Wrecking Co. v. Atty-General of Canada, 21 Can. S. C. R., 72; Atty-Gen. v. Bergen, 29 N. S. R., 135.

[5] *Supra.*

[6] *Ibid*, at p. 98.

[7] 15 App. Cas., 414.

States it seems to be undoubted that where a corporation has been ousted by a judgment in *quo warranto* proceedings, this does not affect the right of its creditors nor the liability of its stockholders, in respect of its debts contracted prior to the judgment of ouster, though it may lead to a different procedure to enforce that liability.[1]

29. Defence of non-subscription as required by charter at common law.—In regard to companies incorporated by special Act of Parliament, it would appear that outside of the Province of Quebec, the common law would be applicable to their dissolution.[2] At common law, an Act of Parliament incorporating a company cannot be declared forfeited, annulled, set aside or repealed except by the same Parliament which passed it.[3] Under these circumstances it would appear not to be a good plea for a defendant subscriber to set up that the required capital had not been subscribed nor the business commenced within the delay required by the act of incorporation.[4]

30. Extinguishment of franchise by non-user or abuse—Special provision as to railway companies—Creditors' rights.—Ordinarily a franchise is not extinguished by reason of non-user or abuse; but such non-user or abuse will enable the parliament granting the franchise to either declare it forfeited or to pass a new act recognizing the continued existence of the corporation.[5] Under the Dominion Companies' Act relating to companies incorporated by letters patent, the charter of the company becomes forfeited by non-user during three consecutive years, or if the company does not go into actual operation within three years after it is granted.[6] The Courts in England have occasionally suspended their judgment in cases where parties are sued under an Act of Parliament, when they saw reason to apprehend that the judgment which they would be bound to pronounce, might occasion extensive hardship or inconvenience, which the Legislature would

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[1] Thompson Corporations, sec. 3686, citing Rowland's v. Meader Furniture Co., 38 Ohio St., 269.

[2] See arguments of counsel in Dominion Salvage & Wrecking Co. v. The Atty-General of Canada, 21 Can. S. C. R., 72.

[3] *Ibid*; see Lindley Comp. (5th Edit.), p. 609; Canada Car & Manufacturing Co. v. Harris, 24 U. C. C. P., 380.

[4] Port Dover & Lake Huron Ry. Co. v. Gray, 36 U. C. Q. B., 425.

[5] Toronto & Lake Huron Ry. Co. v. Crookshank, 4 U. C. Q. B., 309; Matter of New York Elevated Ry. Co., 70 N. Y., 337, 338; Marmora Foundry Co. v. Murney, 1 U. C. C. P., 29.

[6] R. S. C., ch. 119, sec. 83.

most probably interpose to prevent, if an opportunity were afforded to them for that purpose.[1]

Our railway acts invariably provide that if the construction of the railway is not commenced and a certain amount of the capital stock is not expended thereon within a certain time after the passing of the Act authorizing the construction of the railway; or if the railway is not finished and put in operation in so many years from the passing of such Act, then the powers granted by these Acts shall cease and be null and void as respects so much of the railway as then remains uncompleted.[2] It has been held that the cessation of a railway company by non-performance of the conditions of its charter within the time specified, does not extinguish its liability or that of its stockholders to pay the debts contracted during its existence.[3] Whatever may be that state of disorganization into which a company has fallen, the creditors are entitled to exercise their rights against it and the shareholders.[4] And where an Act of the Legislature has become forfeited by a non-fulfilment of some of its conditions, the Legislature may waive the forfeiture, and by special enactment continue the existence of the Act.[5]

31. Defence of "ultra vires" issue of stock by company—Estoppel.—The Supreme Court case of Page v. Austin[6] has decided that the subscriber to shares in a company, the issue of which was wholly *ultra vires* of the company, as, for instance, where the capital stock is increased by the issue of new shares before the statutory condition precedent has been complied with, is not liable thereon to an execution creditor proceeding by way of *scire facias* against him; and he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. This decision was followed by the Ontario Court of Appeal

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[1] Toronto & Lake Huron Ry. Co. v. Crookshank, 4 U. C. Q. B., at p. 313, per Robinson ,C.J.

[2] Dom. Ry. Act, 1888, sec. 89; R. S. O., ch. 207, sec. 44 (5); R. S. Q., art. 5176 (3); R. S. M., ch. 130, sec. 124; N. B. 1891, ch. 18, sec. 35 (5); R. S. N. S., ch. 53, sec. 27 (6).

[3] Ray v. Blair, 12 U. C .C. P., 257.

[4] Hughes v. Cie de Villas de Cap Gibraltar, C. R. 1889, 34 L. C. J., 24, confirming S. C. 1889, M. L. R., 5 S. C., 129; Port Dover & Lake Huron Ry. Co. v. Grey, 36 U. C. Q. B., 425.

[5] Toronto & Lake Huron Railroad Co. v. Crookshank, 4 U. C. Q. B., 309.

[6] 10 Can. S. C. R., 132.

in *Re* Ontario Express and Transportation Co.,[1] and was held to apply to the winding-up proceedings where it was sought to make the subscriber a contributory.

Hagarty, C.J.O., remarked in this case at p. 654 that the court was bound by Page v. Austin (*supra*), and continued, "I have always entertained the strongest opinion that where the rights and claims of creditors are involved, no person taking shares can be heard seeking to escape liability on account of irregularities in the issue of the stock, or the neglect of some prescribed formalities, so long as the issue or creation of the stock was substantially lawful and authorized by charter."

32. Defence of irregularity in by-law on which calls are based.—The Supreme Court, however, in the case of Knight v. Whitfield,[2] which was decided on the ground that no regular call had been made, nevertheless expressed the opinion (per Fournier and Henry, Judges) that an irregularity in the by-law, upon which an application for supplementary letters patent was based, would be sufficient to relieve the shareholders from liability for calls made under that by-law. It did not appear from the books of the company that the by-law had been approved by two-thirds of the shareholders at the general meeting called to ratify the same. The opinion of the Court would seem to be that any shareholder might plead this irregularity when sued by the liquidator of the company for calls on shares upon the new stock.

33. Purchase of shares at a discount in good faith and without notice—Estoppel—Directors' liability for such issue—Remedy.—Where shares are acquired in good faith as fully paid up, without any notice from the transferor that they are not so, the holder will not be liable to the creditors of the company for the amount unpaid,[3] and

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[1] 21 Ont. A .R., 646, and see Knight v. Whitfield, Supreme Ct., 1885, Cassel's Dig., 2nd Edit., p. 187.

[2] 1885, Cassel's Digest, 2nd Edit., p. 187.

[3] Certain shares in a company incorporated by letters patent, issued under 27 & 28 Vic., ch. 23, were alloted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was alloted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant enquired of the Secretary of the company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year after-

certainly he cannot be compelled to contribute the difference at the instance of another shareholder.[1] And the representation in the certificate that the shares are fully paid up will be a good plea to an action by the company, even when the shares are still held by the original allottee, though it may not be held conclusive evidence of the statement.[2]

Where, however, shares have been illegally issued below par, the holder of these shares, who acquired them with knowledge of the facts, is not thereby relieved from liability for calls for the unpaid balances of their par value;[3] and he might be called upon to contribute a sufficient amount to adjust the rights of all the company's contributories *inter se*.[4]

If the shares are taken in the course of business for valuable consideration, the burden of proof lies upon the person who asserts that he who took the shares had notice that they were not actually paid up.[5] But under the English Companies' Act of 1898 it has been held that relief may be refused the purchaser of such shares when placed on the list of contributories on the ground of matter of prejudice, although it does not amount to bad faith or gross negligence or illegal conduct on the part of the applicant for relief.[6] The directors who issue such shares are guilty of a breach of trust, and the shareholder who takes them with notice of the real facts is a participator in such breach of trust, and may be made jointly liable with the directors

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wards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share book the amount mentioned was "Shares, two, at $300=$600."

Held,—reversing the judgment of the Court of Appeal for Ontario (1 Ont. A. R., 1), that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 Vic., ch. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares (The Chief Justice and Ritchie, J., dissenting), McCraken v. McIntyre, 1 Can. S. C. R., 479 (1877); Blumenthal v. Ford [1897], A. C., 156; N. W. Electric Co. v. Walsh (1898), 29 Can. S. C. R., at pp. 50 & 51. And see in *re* The Building Estates Brickfields Company, Parbury's case, 65 L. J. R. (N. S.), 104.

[1] Fraser River Mining, etc., Co. v. Crockett, 5 B. C. L. R., 82.

[2] North-West Electric Co. v. Walsh (1898), 29 Can. S. C. R., at p. 50.

[3] *Ibid*, at pp. 43, 44, 50, 51.

[4] Welton v. Saffery [1897], A. C. ,299; N. W. Electrict Co. v. Walsh, *supra*.

[5] Burkinshaw v. Nicholls, 3 App. Cas., 1004.

[6] In *re* Roxburghe Press, Spiers & Bevans' Case [1899], W. N., 1 (1); [1899], 1 Ch., 210.

therefor.[1] The remedy is the usual equitable remedy in such cases, of a decree for the restoration of the shares illegally alienated, or of their value in the event of their having passed into the hands of a *bonâ fide* purchaser without notice.[2] This remedy can be enforced by a suit in the name of the company and, in the case of a winding-up under the English Companies' Act, by the official liquidator suing in the name of the company. It cannot, however, be made available by a judgment creditor against a holder of shares improperly issued as paid up by treating such shares as unpaid and making the holder thereof liable thereon under sec. 55 of the Dominion Companies' Act.[3]

34. Liability of holder of shares, issued as paid up for promotion services.—Under the old Ontario Joint Stock Companies' Act,[4] it has been held that where a person joins in the petition of incorporation,

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[1] Per Strong, J., in Page v. Austin, 10 Can. S. C. R., at p. 149.

N., a director and shareholder of a railway company, agreed to lend the company $100,000, taking among other securities for the loan 168 shares held by B., which were to be paid up. B. owned 188 shares on which he had paid an amount equal to 40 per cent. of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares, and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered in the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B.

A judgment creditor of the railway company whose writ of execution had been returned *nulla bona* brought an action against N. for payment of his debt, claiming that only 40 per cent. had been paid on the 75 shares and that the remaining 60 per cent. was still due the company thereon. A judgment in favor of N. was affirmed by the Divisional Court (20 O. R., 86), but reversed by the Court of Appeal (18 Ont. A. R., 658), on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it.

Held, reversing the judgment of the Court of Appeal, Gwynne, J., dissenting, that the company having got the benefit of the loan by N., were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares upon the security of which the loan was made and creditors, not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to. Neelon v. Town of Thorold, Supreme Court 1893, 22 Can. S. C. R., 390.

[2] Carling's case, 1 Ch. Div., 115.

[3] Per Strong, J., in Page v. Austin, 10 Can. S. C. R., at p. 150.

[4] R. S. O. 1887, ch. 157, now repealed and replaced by R. S. O. 1897, ch. 191.

wherein he appears as having taken a certain number of shares, but there is no statement therein as to whether the amount paid on the shares is in cash or transfer of property, or how otherwise, such person should be held liable upon the winding-up of the company at least for the number of shares voted to him by resolution of the directors, and probably for the full number of shares mentioned in the petition, and this although the shares were issued as paid up in pursuance of a resolution of the directors, confirmed subsequently to incorporation, whereby such person was to be paid for services, rendered in connection with the formation of the company, in paid-up stock.[1]

It was argued in this case that there was no section in the old Ontario Act corresponding to sec. 27 of the Dominion Companies' Act or sec. 25 of the English Act of 1867. These sections require payment of the whole amount of the shares in cash. It would appear that anything which amounts to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of these sections;[2] as it is a rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money back-

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[1] *Re* Collingwood Dry Dock Ship Building & Foundry Co., Weddell's case, 20 O. R., 107. The principal sections of the old Ontario Act cited by the Court in support of its judgment in this case were :—Sub-sec. 2 of sec. 7 :—"The petition must state the facts required to be set forth in the notice (required to be published in the Gazette of the intention to apply for letters patent), and must further state the amount of stock taken by each applicant and also the amount, if any, paid in on the stock of each applicant. (Applicant declared in his petition, on which the letters patent were issued, that he had taken 200 shares of the capital stock.) Sub-sec. 3: "The petition must also state whether the amount is paid in cash, or by transfer of property, or how otherwise." Sub-sec. 4 :—In case the petition is not signed by all the shareholders, whose names are proposed to be inserted in the letters patent, it shall be accompanied by a memorandum of association signed by all the persons whose names are to be so inserted, or by their attorneys, lawfully authorized in writing, and such memorandum shall contain the particulars required by the next preceding section." Sec. 43:—No by-law for the allotment or sale of stock at any greater discount or at any less premium than what has been previously authorized at a general meeting . . . shall be valid or acted upon until the same has been confirmed at a general meeting.

[2] Spargo's Case, L. R., 8 Ch., per Mellish, L. J., at p. 411, and James, L.J., at p. 412.

wards and forwards;[1] so if a sum of money were actually due and owing by the company to a person for promotion or other services rendered by the latter, and payment of which sum could be enforced by an action at law, it would seem to be legal for the company to allot and for the promotor to take fully paid-up shares to the extent of the amount owing him by the company, or in other words, to set-off the company's indebtedness against the amount payable upon the shares. But if his claim for such services were not so owing him by the company, he could not take the shares without incurring liability to pay their nominal value unless under a written contract duly filed with the Secretary of State as required by section 27 of the Dominion Companies' Act.

35. Prospectus as proof of agreement by directors to take shares.—But where the prospectus of a company, approved and issued by the directors after the registration of the company, and inviting subscriptions for the preference shares and debenture capital, stated that the directors would take all the ordinary shares which were not taken by the vendors to the company. The vendors (who were two of the directors) and others took all the ordinary shares except 367. No ordinary shares were ever allotted to any of the other directors, and none of these directors was ever placed on the register of shareholders in respect of any ordinary shares. In the winding-up of the company, there being no evidence, except the prospectus, of any agreement between the company and one of the non-vendor directors that he should take any ordinary shares; it was held that the prospectus was not satisfactory proof of an agreement binding the company to allot and the director to accept such shares, and that he was not liable in respect of any ordinary shares, either on the ground of agreement or on the ground of estoppel.[2]

36. Compromise—Release of shareholder by company.—It has already been shown that in the case of a *bonâ fide* compromise between the corporation and the shareholder of a disputed claim, the shareholder will be released from all liability.[3] But a company cannot release a shareholder from his obligation to pay to the prejudice of its

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[1] *Ibid*, per Mellish, L. J., at p. 414. See also CHAPTER V.—CAPITAL STOCK, issue of shares at a discount, *supra*, p. 69.

[2] In *re* Moore Bros. & Co., C. A. [1899], W. N. 18 (5); [1899], 1 Ch., 627, reversing decision of Wright, J. [1898], W. N., 71.

[3] *Supra*, p. 106.

creditors, except by fair and honest dealing and for a valuable consideration.[1] In Quebec where a joint stock company sold off its whole stock and effects, and by resolution discharged its shareholders of the payment of the ten per cent. still due on its stock, it was held, that on an attachment against a shareholder then in arrears, he might be condemned to pay the balance so due on his stock to a judgment creditor of the company.[2] He would also be placed on the list of contributories on the winding up of the company.[3] It has been decided under the English Companies' Act that after a winding-up order has been made against a company, an alleged contributory can file his contract with the company that the shares he subscribed for should be considered as fully paid up.[4]

37. Defence of conditional subscription and non-compliance with condition by company.—The question whether a shareholder can escape liability to the creditors of a company on the ground that it has not complied with the conditions of the subscription to its shares, depends upon whether both parties have assented to the agreement, whether the parties representing the company could bind it, whether the condition is precedent or subsequent, and whether it has been waived.[5] Apart from the difficulty of admitting parol testimony to prove a subscription to stock to be conditional, where the subscription is unconditional on its face, there are other reasons why a condition, in order to be valid, should be expressed in the subscription and not by a secret qualification. Where the subscription appears on its face to be conditional, no person could complain that he was induced to contract with the company upon the faith of the defendant's subscription being unconditional. But if a secret condition were to be read into the subscription it would constitute a fraud upon such person.[6]

As an example of a subscription upon a condition precedent to the subscriber becoming a shareholder, may be cited the case of sub-

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[1] Sawyer v. Hoag, 17 Wall (U. S.), 610; Common v. McArthur, 29 Can. S. C. R., 239; *supra*, p. 106.

[2] Dancase v. Richards, Q. B. Quebec, 5 Sept., 1876, Ramsay's Appeal cases, p. 166.

[3] Common v. McArthur, 29 Can. S. C. R., 239.

[4] In *re* May's Metal, etc., Syndicate [1898], W. N., 159.

[5] See Lindley Comp., pp. 17, 778.

[6] Port Dover & Lake Huron Ry. Co. v. Grey, 36 U. C. Q. B., at pp. 437, 438; National Ins. Co. v. Hatton, Q. B. 1879, 24 L C.. J., 26.

scription to shares in a railway company on condition that the road be located in a certain direction.[1] Until the fulfilment of the condition imposed no action at law would lie in favor of the railway company as against the subscriber.[2] If the road is located so near to the place indicated in the agreement as to substantially fulfil the condition, before the offer is withdrawn, the subscriber will become bound as a member of the company and vested with all the rights and obligations attaching to that position.[3]

An Act incorporating a railway company provided that its capital stock should be applied first to the payment of necessary expenses and disbursements (whether incurred before or after the passing of the Act) in connection with the organization, making of plans, etc. ; and that all the remainder of such money should be applied to working, equipping and maintaining the road and its branches and the purposes of its charter; and one F. subscribed for shares by a writing stating that they were for the special purpose of constructing a certain branch of the company's line, and that he agreed to pay the par value thereof in such manner and time as called for under the terms of the charter, the first call of 10 per cent. to be paid on allotment. Judgment having been obtained against the company by a creditor, the latter asked leave to issue execution against F. for the amount of his shares. Held, granting leave to execute, that if F.'s subscription was legal, which the Court questioned, it was one with a condition subsequent, which meant, at most, a collateral contract with the company, and could not be held to affect his position in the company as a shareholder, as between himself and creditors.[4]

38. Defence of private agreement with him who solicited the subscription—Parole evidence of prior agreement with company.—A company will not be bound by a private agreement between a subscriber and those who solicited him to become a shareholder that he would pay for his stock in supplies to the company ;[5] nor when the agreement is to pay for stock in service ;[6] nor when the agreement is made with

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[1] Stanstead, Shefford & Chambly Ry. Co. v. Brigham, 17 L. C. R., 54; Morawetz Corp., vol. 1, sec. 79.

[2] Rogers v. Laurin, Q. B. 1863, 13 L. C. J., 175.

[3] Stanstead, Shefford & Chambly Ry. Co. v. Brigham, S. C. 1866, 17 L. C. R., 54; Connecticut & Passumpsic Ry. Co. v. Comstock, 1 R. L., 589 (Q.B. 1870).

[4] Hamilton v. The Stewiacke, etc., Co. & Fraser, 1897, 30 N. S. R., 166, 170.

[5] Christin v. Union Nav. Co.; Ramsay's Digest, 391 (Q. B. 1882).

[6] Nat. Ins. Co. v. Hatton, 24 L. C. J., 26 (Q. B. 1879), 2 L. N., 238.

a provisional director of a railway company, a chief promoter of the company, on condition that the subscriber shall receive the contract for building the road.[1]

A subscription for shares in a company is generally a contract in writing, and therefore might not be proveable by parol evidence, unless the writing has been lost or destroyed or cannot be produced and until the absence of the original is accounted for. Nor can the terms of the contract entered into by a subscriber be varied by parole evidence of a special agreement or condition made prior to or contemporaneous with the subscription, unless it is intended to show fraud or mistake.[2] This is also the law of Quebec,[3] and in that Province this rule would also obtain even where there is a commencement of proof in writing.[4]

39. Illegal acts by directors or irregularity in their appointment no defence.—Illegal acts on the part of the directors of a company cannot be set up in defence to an action for calls by liquidators or assignees representing the creditors of the company.[5] Directors are in effect the agents or trustees of the shareholders, and the latter could not plead by way of defence the laches of their agent with which the plaintiff is in no way connected. The irregularities in the nomination or appointment of the directors of a railway company, incorporated under a special charter, or in the time of holding its first meeting, will not discharge the liability of the shareholders towards execution creditors.[6] The special charter creates a corporation absolutely, and whatever irregularity exists first in the election of directors cannot

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[1] Wilson v. Ginty, 3 Ont. A. R., 124; and see Jones v. Montreal Cotton Co., Q. B. 1878, 24 L. C. J., 108; 1 L. N., 450.

[2] Morawetz Corporations, sec. 77, and numerous cases there cited; Christopher v. Noxon, 4 O. R., at p. 679; Coté v. Stadacona Fire Ins. Co., 6 Can. S. C. R., 193; Redfield Rlys, sec. 48 (3); No. Sydney Mining, etc., Co. v. Greener, 1898, 31 N. S. R., 41.

[3] Wilson v. Société de Construction de Soulanges, S. C. 1880, 3 L. N., 79; National Ins. Co. v. Chevrier, S. C. 1878, 1 L. N., 591; Dick v. Canada Jute Co., 1886, S. C., 30 L. C. J., at p. 185; Banque d'Hochelaga v. Garth, S. C. 1886, M. L. R., 2 S. C., 201; Jones v. Montreal Cotton Co., Q. B. 1878, 24 L. C. J., at p. 110; Cie de Nav. Union v. Christin, S. C. 1878, 2 L. N., 27, confirmed in Q. B. 1880, 3 L. N., 59; Connecticut & Pasumpsic Ry. v. Comstock, 1 R. L., 589 (Q. B.)

[4] Bury v. Murray, 24 Can. S. C. R., 77.

[5] Ross v. Can. Agricultural Insur. Co., 5 L. N., 23; Common v. McArthur, 29 Can. S. C. R., 239, 245.

[6] Ryland v. Ostell, S. C., 1858, 2 L. C. J., 274.

be tried in an action to recover the unpaid portion of a subscriber's shares; it is the latter's business to test the validity of the election, at the time by mandamus.[1]

40. Non-allotment may not be a defence on an action for calls.—It has been held by the Quebec Court of Review that an allotment of stock is not necessary before instituting an action for calls against a shareholder who has subscribed for a specific number of shares.[2]

41. Call not necessary to let in right of company creditor—Contra with regard to assignee.—Whilst a company cannot usually maintain an action against a shareholder without first making a call and giving him notice thereof, yet, when the company becomes insolvent, it is not necessary, to let in the right of an execution creditor to proceed against a shareholder, or against his estate, that the call should have been made.[3] But where assignees or receivers are appointed to wind up a company under the provisions of an insolvent act, it would appear that a call must be made in the usual manner by the assignee or receiver before suit can be brought for the unpaid portion of a share.[4] In winding-up proceedings under the Winding-up Act[5] calls are made by the court.

42. Application for relief after commencement of winding-up proceedings.—It has already been shewn that while as against the company the shareholder may be entitled to relief, if he comes in reasonable time, and under proper circumstances to apply for it; yet if the company be wound up whether voluntarily[6] or by or under the supervision of the Court,[7] or if it stop payment, and its directors issue notices convening a meeting to pass resolutions for voluntary liquidation[8] and the contest thus becomes one between the shareholders and the creditors of the company, or between the shareholder and his co-

[1] Cockburn v. Tuttle, S. C. 1858, 2 L. C. J., 285.

[2] Rascony Woollen, etc., Co. v. Desmarais (1886), M. L. R., 2 S. C., 381.

[3] Cockburn v. Starnes, S. C. 1857, 2 L. C. J., 114; Smith v. Lynn, 3 U. C. E. & A., at p. 208.

[4] Knight v. Whitfield, Supreme Ct., 16 Nov., 1885, Cassel's Digest, 2nd Edit., p. 187.

[5] R. S. C., ch. 129, sec. 49.

[6] Stone v. City & County Bank, 3 C. P. Div., 282.

[7] Oakes v. Turquand, L. R., 2 H. L., 325, 367.

[8] Muir v. Glasgow Bank, 4 App. Cas., 337.

contributories as distinguished from the corporation,[1] this equity will be lost.[2] And in England an application by a shareholder to be relieved from liability on his shares on the ground of misrepresentation in an action or proceeding commenced after the presentation of a winding-up petition, but before the order for winding-up on that petition is made, has been refused.[3]

A winding-up order does not cause the company to cease to exist as a corporate body. It is only when the affairs of the company are wound up that it ceases to exist.[4] But the winding-up order entirely alters the position of the parties.[5] The proceedings against the shareholder under a winding up order is by one who represents creditors as well as the company, and who consequently stands in a higher right than a mere representative of the company.

43. Defence of secret representations of agent procuring the subscription.—Outside the question of fraud, secret representations of the agent or promoter procuring the subscription are not admissible to vary its terms, where it is taken in writing, and consequently form no defence by the shareholder to an action against creditors.[6] But if by such representations he subscribes for shares in a company under the belief that he is taking shares in an entirely different one of a somewhat similar name, no contract at all has been entered into and the subscriber will be entitled to have his name removed from the list of contributories although he may have taken no step before the winding-up commenced to have it declared that he was under no liability.[7]

44. Transfer and forfeiture as defences—Proof by creditor—Proof of transfer.—The question of the transfer of shares is considered in another chapter. But in dealing with the liability of shareholders toward creditors of the company some distinctions may be more clearly defined. In the Dominion Companies' Act it is declared[8]

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[1] Burgess case, 15 Ch. Div., 507. [2] Buckley Comp., 6th Ed., 115.

[3] In *re* Gen. Railway Syndicate, Whiteley's case [1899], W. N., 34; [1899], 1 Ch., 770; Kent v. Freehold, etc., Co. (1868), L. R. 3 Ch., 493.

[4] Sec. 15 (2) R. S. C., ch. 129.

[5] See Common v. McArthur, 29 S. C. R., at p. 242.

[6] National Ins. Co. v. Chevrier, S. C. 1878, 1 L. N., 591; *supra*, p. 248; Payson v. Withers, 5 Biss (U. S.), 269.

[7] Baillie's Case [1898], 1 Ch., 110; Cundy v. Lindsay (1878), 3 App. Cas., 459.

[8] Sec. 41, R. S .C., ch. 119.

that notwithstanding shares are declared forfeited for non-payment of calls, the holder of such shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof.

This clause, with the exception of the last part, appears in the British Columbia Act,[1] but does not appear in the Companies' Clauses Act nor in other Provincial Acts. The clause would appear to lend some weight to the view that anyone retiring from the position of shareholder, whether by forfeiture or transfer, would still retain his liability to those creditors who contracted with the company, perhaps on the strength of the name of such shareholder. This would appear to be the general rule in the States, and is thus stated by Judge Thompson in his work on Corporations[2] : "Roundly stating the governing principle, it is that if the stockholder had made an out-and-out *bonâ fide* transfer of his shares, *prior to the time when the corporation contracted the particular debt,* he is not liable to the creditor." It has also been thus held in the Province of Quebec,[3] but the contrary view is taken in England, where it is held that the liability exists only in regard to those who are shareholders at the time of the sheriff's return of *nulla bona.*[4]

Such a claim, if applicable, would necessarily apply only to the case of an execution creditor who is suing the shareholder on an execution against the company returned *nulla bona*. For when the company is being wound up, it is no longer a question of a particular debt, but the general indebtedness of the company, and, in that case the transferor of shares, whose transfer has been accepted and duly entered in the books of the company, would appear to be relieved of all liability thereon. That this view should obtain both in the case of an execution creditor as well as in a winding-up would appear to be rendered clear by the Dominion Companies' Act,[5] which provides

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[1] R. S. B. C., ch. 44, First Schedule, Table A, sec. 21; see also sec. 60 of Act.

[2] Sec. 3721; and see Tucker v. Gilman, 121 N. Y., 189 (N. Y. Ct. of App., 1890).

[3] Cockburn v. Beaudry, S. C. 1858, 2 L. C. J., 283.

The fact that the plaintiff's debt accrued and was due whilst such shares stood in defendant's name, will entitle plaintiff to recover, even though it were proved that the defendant had transferred his shares (*ibid*).

[4] Nixon v. Brownlow, 3 H. & N., 686.

[5] R. S. C., ch. 119, sec. 49.

that if the directors of a company allow a transfer of shares not fully paid, to be made "to a person who is apparently of not sufficient means to fully pay up such shares, the directors shall be jointly and severally liable to the creditors of the company in the same manner and to the same extent as the *transferring shareholder, but for such transfer, would have been.*" If the transferee were to all appearances as good as the transferor the creditors in general would have no sound reason to complain. The intention of the Act would appear to place upon the directors the burden and the risk of allowing doubtful transfers.

The burden of proof would apparently be on the creditor who alleged that he contracted with the company on the strength of certain names appearing on the stock book, for a person about to become a creditor is not entitled to inspect the books of the company; it is only those who are already shareholders or creditors who are entitled to that privilege.[1]

In a Quebec case it was held that verbal testimony of the secretary of a company to the effect that it appeared by the books of the company that the shares originally standing in the name of defendant had been transferred before the institution of plaintiff's action, who sues as a creditor of the company to recover the amount unpaid on such shares, is insufficient to establish the fact of such transfer.[2] It was there said that "such evidence might do as between the company and the defendant, but the transfer of stock cannot be proved in this way as between the plaintiff, who is a stranger to the company and its books, and the defendant." It would appear from counsel's argument in this case to be incumbent on the defendant to produce one or other of the duplicate transfers and prove their absolute execution.

Private writings in the Province of Quebec have no date against third persons but from the time of their registration, or from the death of one of the subscribing parties or witnesses, or from the day that the substance of the writing has been set forth in an authentic instrument—the date may nevertheless be established against third persons by legal proof.[3] This, however, does not apply to writings of a commercial nature. Such writings are presumed to have been made on the day they bear date, in the absence of proof to the contrary.[4]

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[1] Sec. 44 R. S. C., ch. 119 (Dom. Comp. Act).

[2] Cockburn v. Beaudry, S. C. 1858, 2 L. C. J., 283; see articles 1225, 1226, C. Code Que.

[3] Art. 1225 C. Code Que.

[4] Art. 1226 C. Code Que.

Whether the entries in a company's books are commercial writings would seem to depend upon whether the company is a commercial one or not. For instance, it has been held that a subscription to shares in a railway company is not a commercial matter,[1] but that in the case of a trading company the subscription is a commercial matter.[2] But all the Companies' Acts now provide that the books of the company shall be *primâ facie* evidence of all facts purporting to be therein stated, in any suit or proceeding against the company or against any shareholder.[3]

All transfers of shares, except transfers made to or with the sanction of the liquidators, under the authority of the Court, after the commencement of the winding-up of the company, will be void.[4] And it is also provided in the Winding-up Act[5] that if a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, he shall be deemed a member of the company for the purposes of the Act and shall be liable as a contributory for the amount due on his shares.

It has already been pointed out[6] that a forfeiture which is collusive will not relieve the shareholder from liability as a contributory. The powers given directors as to forfeiture is intended to be exercised only when the circumstances of the shareholder render it expedient in the interests of the company and cannot be employed for the benefit of the shareholder.[7] In the Dominion Companies' Act[8] it is expressly provided that even a *bonâ fide* forfeiture will not relieve the shareholder from liability for the full amount unpaid on the forfeited shares to those who were creditors of the company at the time of forfeiture, deducting any sums subsequently received by the company in respect of such shares. The resolution declaring the forfeiture must be acted upon in order to relieve the shareholder from liability as such. Thus, on the 14th May, 1853, the directors of a company passed a resolution, declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution,

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[1] Connecticut & Passumpsic Rivers Ry. Co. v. Comstock, Q. B. 1870, 1 R. L., 589, 605.

[2] Christin v. Valois, Q. B. 1880, Per Dorion, C. J., 3 L. N., at p. 60.

[3] See sec. 47 R. S. C., ch. 119, Dom. Act; sec. 27 R. S. C., ch. 118, Comp. Clauses Act.

[4] Sec. 15 (2) Winding-up Act, R. S. C., ch. 129.

[5] Sec. 45 R. S. C., ch .129. [6] *Supra*.

[7] Common v. McArthur, 29 Can. S. C. R., 239.

[8] Sec. 41 R. S. C., ch. 119.

and had become forfeited for non-payment of a call made on the previous 21st Jan., should be sold on the 20th June, unless previously redeemed. The company had not afterwards treated defendant as a shareholder, nor had he acted as such. The resolution for the sale of the stock had not been acted on by the company, a statute having passed before the day named for sale, making new provisions as to forfeiture or abandonment of shares which had not been complied with. It was held that the defendant was still liable as a shareholder.[1]

45. Defence of "ultra vires" Acts.—It has also been pointed[2] out that unless authorized by its charter or in the method indicated in the general Act, a company cannot reduce its capital nor buy its own shares, nor accept a remission of them from the shareholders, such acts are *ultra vires*, and do not free the shareholders from liability towards creditors of the company.[3]

46. Defence of change of company name.—It is no defence that, after the defendant subscribed for the shares, the corporation changed its name.[4] Where the defendant was sued on his alleged subscription to the capital stock of the "National Express and Transportation Company under the name of the National Express Co.," and defended on the ground that he subscribed only to the stock of the company last named, it was held that the burden of proof was on the plaintiff to show the legal identity of the two companies; and that the minutes of the meetings of the subscribers to the company of which defendant was a member, being properly identified, were admissible in evidence against him, for the purpose of showing that, in the incorporation of the second company, there was no material change or departure from the character and purposes of the corporation originally projected.[5]

In another case, to an action for calls alleged to be due by the defendant to the Canada Car and Manufacturing Company, the defendant pleaded on equitable grounds, that he subscribed for the shares and became a shareholder in a company called "The Canada Car Company," incorporated by letters patent for certain specified pur-

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[1] Smith v. Lynn, 3 U. C. Error & Appeal, 201.

[2] *Supra*, p. 95.

[3] And see Ross v. Fiset, 8 Q. L. R., 251; Ross v. Dusablon, 10 Q. L. R., 74; Ross v. Worthington, 5 L. N., 140.

[4] Thompson Corp., sec. 3687, citing Howard v. Glenn, 85 Ga., 238.

[5] Semple v. Glenn, 91 Ala., 245, 259. See secs. 10, 11, 12 Dom. Comp. Act, R. S. C., ch. 119.

poses, and not otherwise; that afterwards, and without the assent and against the will of defendant, that company applied to the Dominion Parliament and obtained an Act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Company, the now plaintiffs ; that by the said Act greater powers were conferred upon the plaintiffs than were possessed by the Canada Car Company and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Company, or the defendant when he became a shareholder thereof; and that the defendant never agreed to become a shareholder of or invest his money in a company possessing the powers of the plaintiffs, whereby the defendant is relieved from liability. The Court held the plea to be clearly bad; for the Act was binding on all the shareholders, whether assenting or not to the application for it. The proper Court in which to have raised the point argued was the Court of Parliament of the Dominion in which the Act complained of was passed.[1]

47. Examples of insufficiency of contract.—In addition to what has already been said as to what constitutes a sufficient contract to constitute a person a subscriber the following case may be cited. The defendant had taken shares in a company, for which he had subscribed his name; and more stock being required, the secretary called on defendant to solicit a further subscription. Defendant told him he would take another £100 and the secretary afterwards, in defendant's absence, put down his name for these shares. It was held not sufficient to charge defendant.[2]

A person had filled in an application for shares at the office of a company and at the same time written out a cheque for the amount of the deposit. Hearing on the same day that the investment was not a good one, he returned to the office and gave a verbal notice of withdrawal of his application to a clerk of the company, and demanded the return of his cheque. The clerk said he could not return the cheque as the secretary was out. The applicant called again later in the day and found the office closed. The following day he stopped payment of his cheque at the bankers. Four days after his applica-

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[1] Canada Car and Manufacturing Co. v. Harris, 24 U. C. C. P., 380.

[2] Ingersoll & Thamesford Gravel Road Co. v. McCarthy, 16 U. C. Q. B., 162; see Coté v. Stadacona Ins. Co., 6 Can. S. C. R., 193; and see *supra* subscription by agent, ch. 6, sec. 19.

tion, the company sent the applicant an allotment letter, which he immediately returned to the company. At the directors' meeting at which the allotment was made it appeared from the minutes that the company's pass book was before the directors, from which they might have discovered that the applicant's cheque had been refused payment, but there was no evidence to show that the directors were actually aware of the entry. The company entered the applicant's name on the register of shareholders, but beyond this nothing was done by either the applicant or the company. Two years afterwards the company was ordered to be wound up, and the liquidator put the applicant's name on the list of contributories. It was held that the verbal notice of withdrawal of the application was sufficient, and the evidence showed that the clerk was so far left in the charge of the company's office that communications made to him were made to the company.

Directors when proceeding to allotment should examine the company's pass book to see whether the cheques for payment of the deposit have been honored.[1]

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[1] In *re* Brewery Assets Co., Truman's case (1894), 3 Ch., 272; 63 L. J. Ch., 635; 8 R., 508.

CHAPTER X.

DIRECTORS.

1. Number required.—Our Companies' Acts provide that the affairs of the company shall be managed by a board of directors. The Dominion Act requires not more than fifteen and not less than three,[1] as does the Nova Scotia Act.[2] The New Brunswick Act requires not less than three,[3] likewise the Ontario Act;[4] the Manitoba Act not less

[1] R. S. C., ch. 119, sec. 28.

[2] R. S. N. S., ch. 79, sec. 26.

[3] N. B. 56 Vic., ch. 7, sec. 27.

[4] R. S. O. 1897, ch. 191, sec. 40.

than three and not more than nine,[1] likewise the Quebec Act[2] and the Companies' Clauses Act.[3] In British Columbia the number is left to the subscribers of the memorandum of association.[4]

2. First or provisional directors—Their powers.—In the Companies' Act it is provided that the persons named as such in the letters patent shall be the directors of the company until replaced by others duly appointed in their stead.[5] Although those named in the letters patent are first or provisional directors,[6] yet, as a company incorporated by letters patent is entitled to embark at once upon its enterprise, these directors must necessarily be endowed with full powers until others are appointed, hence the above express enactment to that effect.[7]

On the other hand when incorporation is sought by special act of Parliament the subscription of a certain amount of capital is in this country invariably a condition precedent to the election of directors, so the Companies' Clauses Act which governs all such companies except railway companies, banks and insurance companies, provides[8] that the persons named as directors in the special Act shall be the first or provisional directors of the company, and shall remain in office until replaced by directors duly elected in their stead.

The Railway Act[9] requires the subscription of twenty-five per cent. of the capital and ten per cent. to be paid thereon before the provisional directors can call a meeting to elect the number of directors prescribed by the special Act, and the powers of the provisional directors are limited to the opening of stock books, the procuring of subscriptions of stock, receiving payments on account thereof, and causing plans and surveys to be made, and depositing money received

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[1] R. S. M., ch. 25, sec. 24. [2] R. S. Q., art. 4712.

[3] R. S. C., ch. 118, sec. 7. Where a call is made by four directors, one of whom is not legally a director, the call is valid, three constituting a quorum for the transaction of business in the absence of by-laws providing otherwise. Bank of Liverpool v. Bigelow, 3 Buss. & Ches. (N. Sc.), 236.

[4] R. S. B. C., ch. 44, First Schedule, Table A, sec. 52; and Second Schedule, sec. 25.

[5] R. S. C., ch. 119, sec. 29. Under the British Columbia Act, until directors are appointed, the subscribers of the Memorandum of Association are deemed to be directors. R. S. B. C., ch. 44, Schedule 1, sec. 53; Schedule 2, sec. 26.

[6] Sec. 4 (f), Dom. Act, R. S. C., ch. 119.

[7] See Eales v. Cumberland Black Lead Mine Co., 6 H. & N., 481.

[8] Sec. (8) R. S. C., ch. 118. [9] 51 V., ch. 29 (D).

on subscriptions in a chartered bank.[1] But their powers do not extend to appointing any one of themselves to any office of profit or emolument in the company,[2] and it is doubtful whether they can institute proceedings to obtain bonuses from municipalities,[3] or hire superior servants.[4]

Where, however, a provisional director employs a publisher of a paper to do certain work on behalf of the company in advertising and promoting its undertaking, and the board, being fully cognizant of his acts, does not object to or repudiate them, the company will be estopped from denying his authority, and will be held liable for the price of the services performed.[5]

3. Organization without directors may be fraudulent.—Where the governing statute requires the appointment of a board of directors, a scheme of organization which dispenses with it until a large proportion of the proposed works are completed would be regarded as a fraud on the dissenting shareholders, since it puts it out of their power to exercise control over the principal expenditure.[6]

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[1] Secs. 33 & 35. *Ibid*; sec. 33 of the Railway Act 1888 (D) provides that the provisional directors shall hold office as such until the first election of directors, and may forthwith open stock books and procure subscriptions of stock for the undertaking. It has been held under a similar enactment that the word "forthwith" here means after the meeting of the provisional directors, and not forthwith after the passing of the Act (McLaren v. Fisken, 28 Grant's Chy., 352).

Five of the nine provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such adjournment, without advertisement or notice under the statute.

Held, that the meeting of the six directors did not constitute a duly organized meeting of directors; though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournement, it might have cured the irregularity. (*Ibid.*)

[2] Michie v. Erie & Huron Ry. Co., 26 U. C. C. P., 566.

[3] North Simcoe Ry. Co. v. City of Toronto, 36 U. C. Q. B., 101.

[4] Odell v. Boston, etc., Coal Co., 29 N. S. R., 385.

[5] Allen v. Ontario & Rainy River Ry. Co., 29 Ont. R., 510, following Mahoney v. East Holyford Mining Co. (1875), L. R. 7 H. L., 869, and commenting on Wood v. Ont. & Quebec Ry. Co. (1874), 24 C. P., 334.

[6] Thompson Corp., sec. 3850, citing as an example Terwilliger v. Great Western Tel. Co., 59 Ill., 249. An agreement depriving the shareholders of the power of electing directors is invalid. James v. Eve, L. R. 6 H. L., 335.

4. Power to increase or decrease number of directors.—The company may, under the Dominion Act, by by-law increase to not more than fifteen, or decrease to not less than three, the number of its directors, or may change the company's chief place of business in Canada; but no by-law for either of the said purposes shall be valid or acted upon unless it is approved by a vote of at least two-thirds in value[1] of the stock represented by the shareholders present at a special general meeting duly called for considering the by-law; nor until a copy of such by-law, certified under the seal of the company, has been deposited with the Secretary of State, and has also been published in the Canada Gazette.[2] The safer interpretation of this section is that at least two-thirds in value of the issued stock of the company must be voted in favour of the by-law, although no authority can be cited to support this.

5. Election of directors—Means of compelling it.—If at any time an election of directors is not made or does not take effect at the proper time, the company shall not be held to be thereby dissolved, but such election may take place at any subsequent general meeting[3] of the company duly called for that purpose; and the retiring directors shall continue in office until their successors are elected.[4]

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[1] *I.e.*, face value; see Purdom v. Ontario Loan and Debenture Co., 22 O. R., 597.

[2] Sec. 31 R. S. C., ch. 119; Ontario same as Dominion, but no restriction as to number of directors (R. S. O. 1897, ch. 191, sec. 45); New Brunswick same as Ontario (N. B. 1893, 56 Vic., ch. 7, sec. 34); Quebec same as Dominion, except that maximum number is fixed at not more than nine (R. S. Q., sec. 4713). In British Columbia, a company limited by shares is given power to increase or reduce the number of directors, in general meeting; and no restriction is placed on the number, nor is any publication or deposit with the Provincial Secretary or other officer required (R. S. B. C., ch. 44, sched. 1, sec. 63).

[3] The meeting is special also for the particular purpose, see Austin Mining Co. v. Gimmel, 10 O. R., 697.

[4] R. S. C., ch. 119, sec. 34; R. S. Q., art. 4716; R. S. M., ch. 25, sec. 29; R. S. O., ch. 191, sec. 44; N. B. 1893, 56 Vic., ch. 7, sec. 33; Comp. Clauses Act, R. S. C., ch. 118, sec. 12. For Brit. Columbia, see R. S. B. C., ch. 44, sched. 1, sec. 62.

The Act 6 George IV. (New Brunswick) relating to Savings Banks, declared that all moneys, etc., belonging to the institution were vested in the trustees for the time being, for the use and benefit of the institution, and of the respective depositors therein. By regulations made under the authority of the Act, the management of the Savings Bank was vested in a president and eight directors who were to be chosen annually. Held, that the presi-

When the annual meeting does not take place on the day appointed, in consequence of an injunction suspending the holding of such meeting, and the injunction is subsequently dissolved, then, in the Province of Quebec, service of notice upon the president and secretary or other appropriate officers, together with a copy of the judgment dissolving the injunction, is sufficient to put the company in default to call the meeting, and a mandamus may issue in the name of a shareholder under art. 992 of the Quebec Code of Civil Procedure to compel the company to call the meeting if they should refuse or fail to do so.[1] Mandamus will always lie to compel the governing body to order an election, if, in disobedience or neglect of the statute or valid by-law, they refuse or fail to order an election of a board at the appointed time.[2] And it is not a defense that no demand had been made that such an election be held.[3]

6. Vacancies in board—How filled.—Vacancies occurring in the board of directors may be filled, for the remainder of the term, by the board from among the qualified shareholders of the company.[4] The by-laws may prescribe the manner in which vacancies in the directorate shall be filled. It would appear that the power to fill vacancies under the statute is only exerciseable in the interval between the vacancy arising and the date for the next election,[5] after that the vacancy must be filled by the stockholders. This power of filling vacancies in the board can only be exercised by a quorum, and where

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dent and directors so chosen were the trustees under the Act, and that they continued in office after the expiration of the year, none others having been chosen in their places, and were liable to the plaintiff for money deposited in the Bank. Gilchrist v. Wyer, Supreme Ct. of New Brunswick, 1837; 2 N. B. (Berton), 249 (391 New Edit.)

[1] Hatton v. Montreal, Portland & Boston Ry. Co., M. L. R., 1 S. C., 69, confirmed in appeal on this point, although modified on others. M. L. R., 1 Q. B., 351.

[2] People v. Albany Hospital, 61 Barb. (N. Y.), 397; People v. Cummings, 72 N. Y., 433.

[3] People v. Albany Hospital, 61 Barb. (N. Y.), 397.

[4] R. S. C., ch. 119, sec. 33 (e); "may be filled in the manner prescribed by the by-laws" (The Railway Acts); Quebec R. S. Q., art. 4715 (5), same as Dominion; Man. R. S. M., ch. 25, sec. 28 (e), same as Dominion, except it adds the words "unless the by-laws otherwise direct"; Ontario R. S. O. 1897, ch. 191, sec. 43 (4), same as Manitoba; New Brunswick, 56 Vic., ch. 7, sec. 31 (5), same as Dominion; British Columbia, see R. S. B. C., ch. 44, sched. 1, sec. 64.)

[5] Per Moss, C.J., in Kiely v. Kiely, 3 Ont. A. R., at p. 443.

the majority of the existing board resign, the board cannot be filled by the action of the remaining minority, unless such minority constitutes a quorum.[1] A director who becomes bankrupt or ceases to attend to his duties does not thereby necessarily vacate his office.[2]

7. **Removal of director before expiry of term.**—A company whose directors are appointed for a definite period, has no power unless specially granted in its charter to remove them before the expiration of that period;[3] and if the articles of association contain no power to remove them before the expiration of that period, but authorize the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give the power to remove directors, before a valid resolution can be passed removing any of them.[4]

8. **Qualification of director—Continuing qualification.**—Our statutes invariably provide that no person shall be elected or appointed as a director, unless he be a shareholder, owning stock absolutely in his own right and not in arrears in respect of any call thereon.[5] The

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[1] New haven Local Board v. Newhaven School Board, 30 Ch. Div., 350; Moses v. Thompkins, 84 Ala., 613.

[2] Phelps v. Lyle, 10 A. & E., 113. Under the British Columbia Act the office of director shall be vacated if he becomes bankrupt or insolvent; R. S. B. C., ch. 44, Schedule 1, sec. 57.

[3] Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. Div., 1. At a meeting of the directors of a company a by-law was passed providing that they should hold office for one year and until their successors were appointed, which was subsequently confirmed by the shareholders at the annual general meeting of the company, and certain persons were appointed directors.

Held, that the by-law so passed could only be repealed at the next annual general meeting of the company, and therefore a by-law passed during the directors' year of office by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid. (Stephenson v. Vokes, 16 Can. L. T., 223.)

[4] *Ibid.* Where a company's charter empowers shareholders in special meeting convened to depose directors in charge and appoint others in their stead, the notice of meeting must state clearly whether it is intended to depose directors or merely elect new ones to fill vacancies already existing, otherwise the meeting will be irregular and illegal. (Milot v. Perrault, 12 Q. L. R., 193.

A resolution nominating other directors does not exclude from office those already in charge, unless their dismissal is pronounced. (Milot v. Perrault, 12 Q. L. R., 193.)

[5] R. S. C., ch. 119, sec. 30; R. S. Q., art. 4713; R. S. M., ch. 25, sec. 26; N. B. 1893, 56 Vic., ch. 7, sec. 29; R. S. O. 1897, ch. 191, sec. 42; Comp. Clauses

British Columbia Act, however, has no such provision.[1] Some of the Acts provide that the amount of the shares required to qualify must be such as required by the by-laws.[2] And some provide that the major part of the directors shall at all times be persons resident in Canada,[3] and some require that they shall be subjects of Her Majesty, by birth or naturalization.[4] Where the statute or the articles of association merely state that a director's qualification is the holding of one hundred shares, he may qualify although he holds them jointly with another person.[5] The mere fact of accepting the office of director and acting as such will constitute such director a shareholder to the extent of the qualification shares, with all the attendant liabilities.[6]

The statutes state that the director must own his qualification shares absolutely in his own right. In view of the word "absolutely" he must not only have legal right to deal with the shares, but must

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Act, R.S.C., ch. 118, sec. 9. A Subscription for shares accepted and acquiesced in by the directors constitutes the subscriber a shareholder as to such shares so as to render him eligible for election as a director. Alley v. Trenholme, R. J. Q., 3 S. C., 163.

[1] R. S. B. C., ch. 44.

[2] R. S. C., ch. 119, sec. 30; New Brunswick, 56 Vic., ch. 7, sec. 29.

[3] Sec. 30, Dom. Act, R. S. C., ch. 119; art. 4713, R. S. Que.; Comp. Clauses Act (D); R. S. C., ch. 118, sec. 9.

[4] R. S. Q., art. 4713; Comp. Clauses Act, R. S. C., ch. 118, sec. 9.

[5] In *re* Glory Paper Mills, Dunster's case (1894), 3 Ch., 473; 7 R., 456.

[6] Where a person accepts the office of director and acts as such, he is rightly placed on the list of contributories for his qualification shares; an agreement to take them being inferred between himself and the company. In *re* Bread Supply Association, Konrath's case, 3 The Reports, 228; 62 L. J. Ch., 376, 68 L. T., 434, following Isaac's case (1892), 2 Ch., 158.

Where a person has accepted the office of a director of a company, there ought to be inferred an agreement on his part with the company that he will serve the company on the terms as to qualification and otherwise contained in the articles of association. In *re* Hercynia Copper Co., Richardson's case, following Isaacs' case, *supra* (1894), 2 Ch., 403; 7 R., 214.

But where, by the articles of association of a company it is provided that directors who do not acquire their qualification shares within a specified period (*e.g.*, three months) from their appointment shall be deemed to have agreed to take such shares from the company, directors who do not acquire the qualification, and resign within the time so limited, are under no obligation to take shares from the company, and cannot be placed on the list of contributories in respect of any agreement implied by the articles. In *re* Bolton & Co., Dale's case (1894), 3 Ch., 356; 7 R., 504. In *re* Issue Co., Hutchinson, *et al.*, cases, 64 L. J. Ch., 131; [1895], 1 Ch., 226. See also Palmer Comp. Law, pp. 75, 76, 123.

have the beneficial ownership of them. In England where the words were "in his own right" this question has given rise to some doubt.[1]

Where the by-laws of the company provide that a director should not only be qualified when elected, but that he should continue to be so, a director will cease to be qualified when he disposes of his stock, and where the statute required the affairs of the company to be managed by a board of three directors, the board would be incomplete and incompetent to manage the affairs of the company when the third director had been disqualified as above.[2]

9. Appointment of directors—Quorum—Time of elections.—The Dominion Act provides that directors must be elected by the shareholders, in general meeting of the company assembled at some place within Canada—at such times, in such manner, and for such term, not exceeding two years, as the letters patent, or, in default thereof, as the by-laws of the company prescribe.[3] There must be a majority of the subscribers to determine who are to be the first directors.[4]

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[1] Bainbridge v. Smith, 41 Ch. Div., 462; Cotton, C. J., questioning Bulbrook v. Richmond Consol. Mining Co., 9 Ch. Div., 610, but Lindley, L .J., unholding it.

[2] Toronto Brewing & Malting Company v. Blake, 2 O. R., 175.

[3] Sec. 32 R. S. C., ch. 119; in New Brunswick election must be annual (56 Vic., ch. 7, sec. 30); Manitoba same as Dominion (R. S. M., ch. 25, sec. 27); Quebec same as Dominion (R. S. Q., art. 4714); Ontario in effect nearly the same as Dominion (R. S. O. 1897, ch. 191, secs. 40, 43 (1), 47 (c); Companies' Clauses Act same as Dominion, omitting the words "at some place in Canada." (R. S. C., ch. 118, sec. 10.) Under the British Columbia Act, in a company limited by shares, one-third of the directors retire every year. (R. S. B. C., ch. 44, sched. 1, secs. 58 to 61.)

Where an act of incorporation required that an annual meeting for the choice of directors should be held at such time "as by the by-laws and regulations of the corporation should be appointed," an election made at a meeting held under an order of the directors, at which meeting all the stockholders were not present, is invalid. The law regulating the annual meeting should be made by the stockholders, and not by the directors merely. *Semble.* That in the absence of any by-law on the subject, an election at a meeting so called, at which all the stockholders were present and voted, would not be void. (Portland & Lancaster Steam Ferry Co. v. Pratt, 2 All. (N. B.), 17.)

An election of directors made at a meeting of which all the shareholders have not been notified, is void. (Milot v. Perrault, C. R. 1886, 12 Q.L.R., 193.)

[4] London & Southern Counties Freehold Land Co., 31 Ch. Div., 223.

The act of incorporation of a company provided that there should not be less than three directors, each of whom should be a shareholder. The company consisted of three shareholders, who were the directors. Upon the

After the first election a quorum is determined by the directors themselves.[1]

With the proviso that directors shall not hold office for more than two years[2] and in the absence of any other provision in such behalf, in the letters patent or by-laws of the company, the election of directors must take place yearly, and all the directors then in office must retire, but, if otherwise qualified, they shall be eligible for re-election.[3]

10. Notice of meeting of shareholders and of directors.—Unless the by-laws provide otherwise, notice of the time and place for holding general meetings of the company must be given at least twenty-one days previously thereto, in some newspaper published in the place where the head office or chief place of business of the company is situated, or if there is no such newspaper then in the place nearest thereto in which a newspaper is published.[4] The notice must state explicitly

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death of one of them a meeting was called to appoint a new director, when one S., to whom the deceased director had bequeathed his shares, was declared elected by one of the two directors, although the other refused to concur in the appointment.

Held, upon demurrer to the bill filed to declare the election invalid and for other relief, reversing the decree of Proudfoot, V.C. (25 Grant's Chy., 465), that no election was necessary to make S. a director, there being only three shareholders, each of whom was qualified to be a director. (Kiely v. Kiely, 3 Ont. A. R., 438.)

[1] Sec. 35 (e), Dom. Act, R. S. C., ch. 119.

[2] This tenure of office cannot be enlarged against the wishes of the holders of a majority of the stock by by-law. (Elkins v. Cambden R. Co., 36 N. J. Eq., 467.)

[3] R. S. C., ch. 119, sec. 33 (a); Manitoba R. S. M., ch. 25, sec. 28 (a); R. S. Q., art. 4715 (1); R. S. O., ch. 191, sec. 43 (1); Companies' Clauses Act, R. S. C., ch. 118, sec. 11 (a). In New Brunswick the election must be annual, 56 Vic., ch. 7, sec. 30. See R. S. B. C., ch. 44, sched. 1, secs. 58 to 61.

[4] R. S. C., ch. 119, sec. 33 (b); Ontario, notice of ten days also, in the case of companies having a capital exceeding $3,000, either by publishing the same in the Ontario Gazette or by mailing the same as a registered letter, duly addressed to each shareholder at his last known post-office address, at least ten days previous to such meeting (R. S. O. 1897, ch. 191, sec. 50 ; Manitoba thirty days' notice (R. S. M., ch. 25, sec. 28 (b); Quebec notice of ten days required (R. S. Q., art. 4715 (2); New Brunswick fourteen days' notice required (N. B. 1893, 56 Vic., ch. 7, sec. 31 (2); and if no newspaper published in the place where the head office is, notice must be given in the Royal Gazette. In British Columbia seven days' notice is required (R. S. B. C., ch. 44, sched. 1, sec. 35, and sched. 2, sec. 10.)

The act of incorporation required the first meeting of the company to be the day, hour and place, otherwise the meeting will be illegal, unless the shareholders are all present and consenting, whether in person or by proxy.[1]

On the other hand the mere fact that the meeting of the board of directors, at which the stockholders' meeting was summoned, was convened without the proper notice, is not a good ground for challenging the validity of the action of the stockholders' meeting, provided it was otherwise regularly summoned.[2] It is to be noted that even where a meeting of shareholders is not held in Canada where the statute expressly requires it to be so held and no matter how irregularly summoned, the proceedings bind all who participate in them without dissent.[3]

11. Meetings of the company—Quorum.—The directors may make by-laws fixing 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 requirements as to proxies, and the procedure in all things at such meetings.[4]

But every such by-law and every repeal, amendment and re-enactment thereof, unless in the meantime confirmed at a general meeting

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called by A. by giving notice in one or more of the newspapers published in St. John, "for not less than three consecutive weeks immediately before the day appointed." Held,—1st. That a newspaper containing such a notice, and having the name of A. thereto, was evidence of the notice, and that A. having attended the meeting, it would be presumed that the notice was inserted by his authority; 2nd. That it was not necessary that three weeks should elapse between the publication of the first notice and the day of meeting; but that a publication in the newspaper for three consecutive weeks was sufficient; 3rd. That it would not be presumed that the newspaper was published more than once a week—that fact (if material) should have been shown affirmatively. (Portland & Lancaster Steam Ferry Co. v. Pratt, 2 All. (N.B.), 17.)

An election of directors made at a meeting called by a certain number of shareholders of the defendant company before the expiration of the delay fixed by 28 Vic., ch. 32 (Can.), is irregular and void. (Williamson v. Demers, S. C. 1881, 12 R. L., 71.)

[1] San Buenaventura Min. Co. v. Vassault, 50 Cal., 534; Brown v. Electric Min. Mach. Co., 22 Pitts. L. J. (N. S.), 343.

[2] Browne v. La Trinidad, 37 Ch. Div., 1.

[3] Henderson v. Bank of Australia, 45 Ch. Div., 330; Handley v. Stutz, 139 U. S., 417; Banque d'Epargne de Montréal v. Geddes, 19 R. L., 684.

[4] Sec. 35 (e), R. S. C., ch. 119; R. S. M., ch. 25, sec. 30; R. S. O. 1897, ch. 191, sec. 47 (e); R. S. Q., art. 4717 (15 *et seq.*); N. B. 1893, 56 Vic., ch. 7, sec. 36 (e); Comp. Clauses Act, R. S. C., ch. 118, sec. 13 (e). For British Columbia see R. S. B. C., ch. 44, sched. 1, secs. 29 *et seq.*; sched. 2, secs. 4 *et seq.*

of the company, duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, at and from that time only, cease to have force.[1] Where no annual meeting takes place for the election of directors, or where, if held no election takes place, then the shareholders of one-fourth in value of the subscribed stock are competent to convene a special general meeting for the election of directors.[2] The directors can pass a by-law determining the quorum for these special general meetings held at the instance of the shareholders,[3] but it would be *ultra vires* for the by-law to limit the number who may sign the notice calling such meeting, as it would be directly opposed to the statute, which enables the meeting to be convened by one-fourth in value of the subscribed capital.[4]

Where the statute or by-laws provide that meetings of the stockholders shall be called by the directors, the action of the board of directors is necessary to convene a legal meeting; the president of the company has no authority to call it.[5]

12. Procedure at meetings of company—Voting.—In the absence of other provisions in the by-laws or letters patent, at all general meetings of the company, every shareholder shall be entitled to give one vote for each share then held by him; such votes may be given in person or by proxy—the holder of any such proxy being himself a shareholder;

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[1] R. S. C., ch. 119, sec. 35; R. S. O. 1897, ch. 191, sec. 47, same, adding "and in that case no new by-law to the same or the like effect shall have any force, until confirmed at a general meeting of the company; provided, however, that the company shall have power either at the general meeting, called as aforesaid, or at the annual meeting of the company, to appeal, amend, vary or otherwise deal with any by-laws which have been passed by the directors, but no act done or any right acquired under any by-law shall be prejudicially affected by any such repeal, amendment, variation or other dealing;" R.S.M., ch. 25, sec. 30, same as Ontario down to the word "provided;" R. S. Q., art. 4717, same as Dominion; N. B. 1893, 56 Vic., ch. 7, sec. 36 (g), same as Dominion. For British Columbia see R. S. B. C., ch. 44, sched. 1, secs. 29 *et seq.*; sched. 2, secs. 4 *et seq.*

[2] R. S. C., ch. 119, sec. 74, Austin Mining Co. v. Gemmel, 10 O. R., 696; R. S. M., ch. 25, sec. 30 (a); R. S. Q., art. 4721; N. B. 1893, 56 Vic., ch. 7, sec. 40.

[3] Austin Mining Co. v. Gemmel, 10 O. R., 696; and statutory provision, *supra.*

[4] *Ibid*, at p. 705.

[5] Hatton v. Montreal, Portland & Boston Ry. Co., S. C. 1884, M. L. R. 1 S. C., 69; modified in appeal on another point, M. L. R. 1 Q. B., 351; State v. Pettinell, 10 Nevada, 141.

but no shareholder shall be entitled, either in person or by proxy, to vote at any meeting unless he has paid all the calls then payable upon all the shares held by him. All questions proposed for the consideration of the shareholders shall be determined by the majority of votes, the chairman presiding at such meeting having the casting vote in case of an equality of votes.[1] The election of directors shall be by ballot.[2]

13. Control of courts over corporate elections.—Corporate elections will be set aside by courts which possess the power to superintend them, when the successful party has succeeded by means of fraud, or illegal practices.[3] Very much doubt seems to have been entertained as to whether equity possesses the jurisdiction to interfere in the election of directors. The general ground on which the juris-

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[1] R. S. C., ch. 119, sec. 33 (c); at all the general meetings of the company, every shareholder shall be entitled to as many votes as he owns shares in the company and may vote by proxy, R. S. M., ch. 25, sec. 28 (c); R. S. O. 1897, ch. 191, sec. 63; R. S. Q., art. 4715 (3); but New Brunswick, 56 Vic., ch. 7, sec. 31 (3), same as Dominion; Company Clauses Act (D), sec. 11 (c), same as Manitoba, Ont. & Que. In British Columbia in a company limited by shares every member has a vote for every share up to ten; beyond the first ten, he has a vote for each additional five shares up to 100, and beyond the first 100, an additional vote for every ten shares. R. S. B. C., ch. 44, sched. 1, sec. 44. In a company limited by guarantee and not having a capital divided into shares, every member has one vote and no more. *Ibid*, sched. 2, sec. 19: But both schedules provide that no member can vote unless he has paid all moneys due by him to the company; and votes may be given either personally or by proxy, but the proxy must be a member of the company. *Ibid*, sched. 1, secs. 47, 48 and 49, and sched. 2, secs. 21, 22, 23.

[2] *Ibid.*

Where the duty of the scrutineers is plainly in conflict with their interest as candidates for the directorate, as it must necessarily be, especially where there are some difficult points which they have to adjudicate upon in their judicial capacity as scrutineers, they will be disqualified from acting, and the election will be set aside, and a new election ordered. (Dickson v. McMurray, 28 Grant's Chy., 533.)

[3] Davidson v. Grange, 4 Grant's Chy., 377.

An election of officers obtained by trick or artifice cannot be considered a *bonâ fide* election, but where shares have been actually purchased and paid for, the fact of their being purchased with a view to influence the election is no objection. (Toronto Brewing & Malting Co. v. Blake (Ch. Div.), 2 O. R., 175.)

Where a suit is pending to have declared illegal a new issue of shares, this will not prevent an action to have directors unseated, who acquired their majority from the said shares. (Milot v. Perrault, C. R. 1886, 12 Q.L.R., 193.)

diction of equity is denied is, that courts of law exercise an ample and effective jurisdiction over the subject by *quo warranto* (mandamus or some other special proceeding), and that the party complaining has an adequate remedy at law.[1] But in an Ontario case it was decided that a court of equity had jurisdiction to set aside an election of directors of a corporate body by persons who are subscribers nominally but not *bonâ fide*.[2] In this case the Chancellor said[3] : "It may be that the jurisdiction of equity in relation to such companies has not been as yet fully developed," Mozley v. Alston,[4] and Lord v. The Governor and Company of Copper Mines,[5] and other cases to which reference was made, "do certainly evince a reluctance to interfere in what is called their internal management; but they certainly do not negative the jurisdiction of the Court in a case circumstanced like the present —on the contrary, they, in my opinion, affirm it." Esten, V.C., and Spragge, V.C., concurred in the view that the court had jurisdiction. It was also held in this case that a suit for the purposes of setting aside an election of directors of a corporation, on the ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself.

14. Quo warranto as means of testing corporate elections.—As to whether the proceeding by *quo warranto* is available against a private corporation in testing the validity of a corporate election, appears to be open to doubt in some jurisdictions. It is universally admitted in the United States that it will lie in such a case.[6] In a New Brunswick case[7] Ritchie, C.J., delivering the judgment of the Supreme Court of New Brunswick, said: "We esteem it clear law that a writ of *quo warranto* cannot be granted where there is no usurpation of the rights or privileges of the Crown,"[8] and it was consequently held that an information in the nature of a *quo warranto* will not lie against a person for usurping an office in a private cor-

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[1] Owen v. Whitaker, 20 N. J. Eq., 122; but see a later N. J. case, Johnston v. Jones, 23 N. J. Eq., 216, where a court of equity interfered on the ground of fraud.

[2] Davidson v. Grange, 4 Grant's Chy., 377.

[3] At p. 381.

[4] 1 Phil. Ch., 790.

[5] 2 Phil., 740.

[6] Angell & Ames on Corporations, secs. 700, 704, 731, 745; People v. Peck, 11 Wend., 604.

[7] *Ex parte*, Gilbert *et al.*; In *re* Albert Mining Co., 15 N. B., 29.

[8] Citing Darley v. The Queen, 12 Ch. & Fin., 520; Rex v. Ogden, 10 B. & C., 230; *Ex parte* Smyth, 8 L. T. (N. S.), 458; Q. B.

poration, the rights of the Crown or the public being in no way affected.

In an early Ontario case,[1] Robinson, C.J., while not deeming it necessary to pass upon the point, said: "I assume that it may be (the proper object of a proceeding *quo warranto*) where the object is not to call in question by what right such subordinate officer of the corporation pretends to hold his office, but whether the corporation itself has not as a body acted in disregard of the provisions of its charter."[2] In a later Ontario case[3] the point was squarely decided, and it was held that the office of director in a railway company is not an office for which an information in the nature of a *quo warranto* would lie. In a still later Ontario case[4] it was queried by the same Chief Justice who sat in the former cases (Robinson, C.J.) whether *mandamus* or *quo warranto* was the proper remedy for setting aside an alleged illegal election of directors of a company, whose object was the making and improvement of a harbour, which, it was pointed out, is a matter in which the public trade and revenue are materially concerned, and in which the Crown is concerned. The point was not decided, the court holding the remedy had been applied for too late.

In Quebec under the old Code of Procedure, art. 1016 *et seq.* there was some doubt as to whether *quo warranto* would lie to test the validity of an election to office in a private corporation. The words of art. 1016 C.C.P. relative to the subject are "Any office in any corporation, or *other* public body or board." The Court of Appeal interpreted this as applying to cases of usurpation of an office in any corporation whatever, without any distinction.[5] This is the view adopted in the New Code of Procedure,[6] the language now being, "Any office in any corporation, or public body or board." The omission of the word "other" before "public body" renders plain the meaning which was formerly obscured by the presence of this word.

15. Proceeding by mandatory injunction.—Undoubtedly the court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed.[7]

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[1] The Queen v. The Bank of Upper Canada, 5 U. C. Q. B., 338.
[2] At p. 339.
[3] The Queen v. Hespeler, 11 U. C. Q. B., 222.
[4] In *re* Moore v. Port Bruce Harbour Co., 14 U. C. Q. B., 366.
[5] Gilmour v. Hall, Q. B. 1886, M. L. R. 2 Q. B., 374.
[6] Art. 987.
[7] Toronto Brewing & Malting Co. v. Blake, 2 O. R., 175.

But although an election of directors may have been clearly illegal (where for instance, the voters were each allowed only one vote without regard to their number of shares, whereas each share should have given a vote) if the parties chosen have continued ever since in discharge of the duties, and the application to oust them be not made until more than eight months after the election, the courts will refuse to interfere by *mandamus* or *quo warranto* for a new election.[1] And in Quebec, in determining an application by a shareholder for an injunction, the court will look to the circumstances of the case, and adopt the course which is most for the advantage of the whole body of shareholders. So, where a shareholder asked for an interim order to restrain persons from voting on certain shares, and it appeared that the shares had been held by the defendants for more than a year, to the knowledge of the petitioner, an injunction was refused, more especially as the petitioner had a remedy by *quo warranto* if he were wronged by an illegal vote.[2]

16. Voters' qualification—Who are " bona fide " shareholders.—It is clear that the Acts intend that the shareholder entitled to vote shall be a *bonâ fide* shareholder.[3] This is not always easy to determine. For instance in the case of a company, such as a railway company, which is entitled to elect the regular directors only upon the subscription of a certain amount of capital stock, the first election of directors is often a matter of great importance, and at this time it may be that no calls have been made and it may be that the statute did not require any deposit as a condition precedent to becoming a shareholder. Under these conditions it is a very easy matter to become a shareholder entitled to a large number of votes. Where the statute makes the mere signature of any person, in the stock book of the company, sufficient to constitute such a person a member of the company, and to invest him without any further act on his part with the same rights and privileges as are conferred by the Act on those named therein as members of the company, such person should be treated as a *bonâ fide* holder of such stock unless circumstances could be shown which make it manifest that such stock was not taken *bonâ fide*. The mere fact of his means not being such as to enable him to answer calls

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[1] In *re* Moore v. Port Bruce Harbour Co., 14 U. C. Q. B., 365.

[2] Gilman v. Robertson, S. C. 1884, 7 L. N., 60.

[3] Davidson v. Grange, 4 Grant's Chy., 377; Stewart v. Mahoney, 54 Cal., 149.

from time to time, would not suffice to show *mala fides*, for he might feel convinced, honestly though mistakenly; or, on the other hand, he might anticipate correctly that he should be able from some source to meet the calls, or to sell the whole or a portion of the stock to advantage.[1] On the other hand, if half a dozen railroad laborers in the employ of one of the contractors on the railway were to subscribe each for a large amount of stock, it would not be held to be a *bonâ fide* taking of stock; and if it were proved that they did so at the bidding of their employer, with an undertaking on his part simply to save them harmless, it could not be doubted but that such a taking of stock must be held to be in fraud of the Act.[2]

17. Effect of slight irregularities on election.—It is generally regarded that slight irregularities in matters of form will not void an election otherwise fairly held.[3]

In England it has been held that where all the subscribers to a memorandum of association concurred in the appointment of the first directors, the fact that they did not meet together for the purpose of coming to their determination did not invalidate their act; and also that a resolution passed at a general meeting at which an election to fill vacancies might have been held, authorizing the existing directors to continue in their offices, was tantamount to a re-election of them.[4]

18. Holders of stock in representative capacity may vote.—Our Companies' Acts provide that every executor, administrator, curator, guardian or trustee shall represent the stock held by him, at all meetings of the company, and may vote as a shareholder; and every person who pledges his stock may represent the same at all such meetings and, notwithstanding such pledge, vote as a shareholder.[5]

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[1] See per Spragge, V.C., in Davidson v. Grange, 4 Grant's Chy, at p. 385.

[2] *Ibid.*

[3] The English cases go rather far in this respect. See *Re* Great Northern Salt, etc., Works, 44 Ch. Div., 472.

[4] *Ibid*; and see Remarks of Lindley, L.J., In *re* Newman & Co., 12 R., pp. 235, 236; [1895], 1 Ch., 674.

[5] R. S. C., ch. 119, sec. 57; R. S. B. C., ch. 44, sec. 33; R. S. M., ch. 25, sec. 47, with addition of "Tutor;" R. S. Q., art. 4735, "Every person holding and possessing shares in the name of another shall represent the stock in his hands, at all meetings of the company, and may vote accordingly as a shareholder; and so with every person who pledges his stock;" R. S. O. 1897, ch. 191, sec. 36, same as Dominion; New Brunswick 1893, 56 Vic., ch. 7, sec. 71, same as Dominion.

19. Directors de facto v. Directors de jure.—A person who is ineligible to the office of director, or whose election was irregular, cannot be a director *de jure*, yet he does by his election become a director *de facto*, if he enters upon the discharge of his duties,[1] and the company may be held bound by his acts as against an outsider. In Crawford v. Powell,[2] Lord Mansfield laid down the principle that the election of a disqualified person is not wholly void, but is only voidable. But a Board of Directors claiming an election at a meeting at which a majority of the stock is not represented, cannot as against another Board holding over from a previous election, about which no question is raised, be regarded as officers *de facto*.[3]

20. Company may be bound by acts of "de facto" directors if within authority given directors; otherwise contra.—If persons are held out, so to speak, as directors, if they act as directors, and the shareholders or previous Board do not take any steps to prevent them from doing so, outsiders are entitled to assume that they are directors; and, as between the company and such outsiders, the acts of such directors *de facto* will bind the company[4] if within the authority given to directors.[5] But the case is different where a company is seeking to enforce against a member duties purporting to be imposed upon him by persons to whom he and his co-shareholders have never delegated the authority of imposing such duties, such as making calls, forfeiting shares and other matters of internal administration;[6] such acts done by persons purporting to act as directors but who are not such in fact are not binding on the shareholders[7] unless the latter have acquiesced in their

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[1] Mahoney v. East Holyford Mining Co., L. R., 7 H. L., 869; see also Briton Medical Co. v. Jones, 61 L. T., 384; Dawson v. African, etc., Co., 14 T. L. R., 30 (C. A.)

[2] 2 Burrows, 1013; 1 W. Black, 229.

[3] Ellsworth Woollen Mfg. Co. v. Faunce (Me.), 19 Eng. & Am. Corp. cases. 155.

[4] Mahoney v. East Holdford Mining Co., L. R. 7 H. L., 869; Buckley Comp., 6th Ed., 192.

[5] Cartmell's case, 9 Ch., 691; Allen v. Ont. & Rainy R. Ry. Co., 29 O.R., 510.

[6] Howbeach Coal Co. v. Teague, 5 H. & N., 151; doubted in York Tramways Co. v. Willows, 8 Q. B. Div., 685. But see London & Southern Counties Land Co., 31 Ch. Div., 223; Garden Gully Co. v. McLister, 1 App. Cas., 39.

[7] *Ibid.*

acts;[1] nor will the company be bound when the person, knowing of the invalidity of the appointment, seeks to take advantage of their acts to protect himself ; for instance where a *mala fide* transfer of shares is accepted by the *de facto* directors.[2]

21. " De jure " directors become provisional directors in default of election.—There is a clause in our statutes[3] which provides that upon the failure to elect directors at the proper time, such election may take place at any subsequent general meeting of the company duly called for that purpose; and the retiring directors shall continue in office until their successors are elected. It would appear that this clause, if it applies to *de facto* directors, would not confer on them any better title to office than they had before.[4] If the first election of directors does not take place or take effect at the proper time, and the office is usurped by *de facto* directors, when their time comes to retire, which, under the Act would be at the end of a year,[5] the *de jure* directors would be the provisional directors as named in the letters patent.[6] The clause which provides[7] that " the election of directors shall take place yearly, and all the directors then in office shall retire" does not apply to the provisional directors so long as directors have not been appointed in their stead.[8]

22. Acts of directors or officers after cessation by company of its functions.—Notwithstanding the clause stated above that the retiring directors shall continue in office until their successors are elected, where there has been an abandonment for many years, by the last board of directors of the company, of their official functions, and they thereafter meet, and attempt, or the secretary-treasurer or other officer attempts on their behalf to do an official act, it will not be

[1] Thames Haven Dock, etc., Co. v. Hall, 5 Man. & Gran., 274. And it may be noted that the House of Lords has held that a rate is not rendered invalid by the fact that it was made by vestrymen *de facto* but not *de jure* (Scadding v. Lorant, 3 H. L. Cas., 418), Buckley, p. 193.

[2] Murray v. Bush, L. R. 6 H. L., 77; see also Staffordshire Gas Co., 66 L. T., 414.

[3] Sec. 34, Dom. Comp. Act, R. S. C., ch. 119.

[4] John Morley Building Co. v. Barras (1891), 2 Ch., 386.

[5] Sec. 33 (a) Dom. Act, R. S. C., ch. 119.

[6] Sec. 29 Dom. Act, R. S. C., ch. 119.

[7] Sec. 33 (a) Dom. Act, R. S. C., ch. 119.

[8] John Morley Building Co. v. Barras, *supra*.

upheld as the act of directors *de facto*.[1] But in an action for calls in an English Court, the defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the company had ceased to exist. The court held that, as the cause had been set down for trial, and the defendant had known the facts for a long time, the application was too late; and that, as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application.[2]

The company, and the company only, may bring an action to restrain a *de facto* director from acting as director or representing himself as such. An individual shareholder has not this right.[3]

23. Illegality of election as defence to actions.—The right of *de facto* directors of a company to act as directors cannot be questioned collaterally by the defendant in an action brought against him by them.[4] In an action against the defendant, the plaintiff-company's own officer, to compel a delivery up of the books and papers to a new secretary appointed by the plaintiffs, where the defendant pleaded that he was still secretary, as the directors who appointed the new secretary were not duly elected, the court held that as there was an election of officers, directors *de facto*, and a suit in the company's name, an officer of the company could not be permitted to withhold what belonged to the company; and in any event, the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings.[5] But in the English case above cited[6] the court rejected a summary application to set aside the proceedings in an action for calls, the directors who instituted the proceedings having acted in that capacity for some time. The court, in addition to technical reasons for not allowing the summary application, seemed to be of the opinion that it was not competent to a defendant in an action for calls, to insist

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[1] Compagnie de Cap Gibraltar v. Lalonde, M. L. R., 5 S. C., 127; Thames Haven Dock Co. v. Hall, 5 Man. & Gr., at p. 288, Per Erskine, J.; Orr Water Ditch Co. v. Reno Water Co., 17 Nev., 166; Bartholomew v. Bentley, 1 Ohio St., 37.

[2] Thames Haven Dock, etc., Co. v. Hall, *supra*.

[3] Foss v. Harbottle, 2 Ha., 461; Palmer Comp. Law, 126, 160.

[4] Thompson Corp., sec. 3897.

[5] Austin Mining Co. v. Gemmel, 10 O. R., 696.

[6] Thames Haven Dock, etc., Co. v. Hall, 5 Manning & Granger, 274.

as a defense that every minute direction of the Act has not been complied with.[1]

24. Forcible assumption of office.—Where there are conflicting claimants to the position of president of a company, and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president.[2]

25. Quorum of directors; what constitutes it.—Rules under Bank Act.—It has already been stated that the various Joint Stock Companies' Acts of this country provide, as a minimum number, that the affairs of the company shall be managed by a board of not less than three directors. But none of these Acts state what number shall constitute a quorum; this is left to the directors to determine by by-law. Neither do these acts fix the period within which the first meeting for the election of directors must be held.

There is no doubt that, in regard to a definite number of persons, such as a board of directors, the usual rule is that a majority constitutes a quorum provided they are properly convened and acting together as a deliberative body.[3] But in an English case[4] it was decided by Lord Romily, Master of the Rolls, after having very carefully considered the question that where the articles of association of a company do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum; hence, a forfeiture of shares by two out of six directors may be valid. But it is stated where the governing instrument prescribes the number of directors by which the business of the company is to be conducted, the language is mandatory, and less than that number cannot perform an act to which the concurrence of the directors is essential.[5] Sir N. Lindley

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[1] Per Maule, J., at p. 289; also Dawson v. African, etc., Co., C. A. (1898), 1 Ch., 6.

[2] Toronto Brewing and Malting Co. v. Blake, 2 O. R., 175.

[3] Thring Joint Stock Cos., p. 95; Kyd on Corporations, 401, 411; *Ex parte* Willocks, 7 Cow (N.J.), 402; St. Louis Colonization Ass. v. Hennessay, 11 Mo. App., 555; Edgerly v. Emerson, 23 N.H., 555; Cram v. Bangor House, 12 Me., 354.

[4] Lyster's case, L. R., 4 Eq., 233; and see English & Irish Rolling Stock Co., Lyon's case, 35 Beav., 646.

[5] Bottomley's case, 16 Ch. Div., 681.

states the rule to be that "if the affairs of a company are entrusted to the management of not less than a fixed number of directors, it is *primâ facie* not bound by the acts of a fewer number." A number of decisions are cited to sustain this view.[1] The author, however, appears to make an exception when he adds:—"It must not be supposed that the majority of a duly convened and duly constituted board of directors cannot act for the whole board and bind the company. Business could not be carried on if such a rule were to prevail. The decisions referred to above do not apply to such a case."

According to this view, if, under our Acts, a company is governed by a board of three directors, and these were duly convened to a board meeting, and only two attended, these would constitute a quorum, and if they agreed, their decision would bind the company. But if they disagreed, no business could be done. It is scarcely to be supposed that the Companies' Acts were ever intended to lead to such a contingency. It is suggested that effect must be given to the use of the word "board" in the sections of our Acts under discussion. Thus, "the affairs of the company shall be managed by a board of . . . not less than three directors." The word "board" is sometimes used in the sense of "quorum." For instance, the Dominion Banking Act of 1871,[2] section 32, enacts that "At all meetings of the directors of the bank not less than three of them shall constitute a board or quorum for the transaction of business." The present Banking Act[3] puts it this way, "The number of directors . . . shall not be less than five and not more than ten, and the quorum thereof . . . shall not be less than three." Webster defines a board as follows, "A table at which a council or court is held. Hence, a council, convened for business, or any authorized assembly or meet-

[1] Lindley Comp., 5th Edit., p. 155; citing Card v. Carr, 1 C. B. (N. S.), 197; *Ex parte* Howard, L. R., 1 Ch., 561; Kirk v. Bell, 16 Q. B., 290; Brown v. Andrew, 13 Jur., 938; Holt's case, 22 Beav., 48; Nichol's case, 3 DeGex & Jones, 387; Moody v. London Ry. Co., 1 B. & S., 290; *Ex parte* Birmingham Banking Co., L. R., 3 Ch., 651.

[2] 34 N., ch. 5.

[3] 1890, 53 N., ch. 31, sec. 18.

Where the quorum of directors of a company was fixed at three, by a special statutory provision, and the company was subsequently amalgamated with another company, and it was provided by the Act of Amalgamation that the board of directors of the Amalgamated Company should not be less than five nor more than seven directors (without expressly changing or regulating the quorum), that the original provision, making three directors a quorum continued in force (Fairbanks v. O'Halloran, Q. B. 1888; M. L. R., 4 Q. B., 163).

ing, public or private, etc."[1] Thus, it is submitted that under our Acts a quorum of directors cannot consist of less than three in matters requiring to be decided at a board meeting.

But where an Act provides, as does the Banking Act,[2] that the number of directors shall not be less than five and not more than ten, and the quorum thereof shall not be less than three, the language is mandatory as to the number of directors and not merely directory; consequently if a company governed by such terms had merely four qualified directors, the fifth being disqualified on account of bankruptcy or other cause, a call made or forfeiture of shares declared by the four directors, although beyond the number required to constitute a quorum, would be invalid.[3] Under such statutory provisions it is necessary that the company's affairs be administered by not less than the stated number of directors who are qualified and have the power to attend duly convened meetings if they please. Once there is the requisite number of qualified directors who have been duly convened, it matters not how many attend the meeting, provided there is a quorum.[4] On the other hand, where a statute provides, as in the old Banking Act,[5] that "at all meetings of the directors not less than three of them shall constitute a board or quorum for the transaction of business," if a call be made by four directors, one of whom was illegally appointed, yet the call would be valid, three out of the four directors who made it being legally qualified and constituting a quorum.[6]

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[1] The board of directors to whom the authority to bind the corporation is committed, is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together as a body (Filon v. Miller Brewing Co., 15 N. Y. Supp., 57; 38 N. Y. State Rep., 602.)

[2] *Supra*, p. 279.

[3] Bottomley's case, 16 Ch. Div., 681.

Five of the nine provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such adjournment, without advertisement or notice under the statute.

Held, that the meeting of the six directors did not constitute a duly organized meeting of directors; though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment, it might have cured the irregularity (McLaren v. Fisken, 28 Grant's Chy., 352.)

[4] See the above case. [5] 1871, 34 N., ch. 5, sec. 32,

[6] Bank of Liverpool v. Bigelow, 3 Russ & Chesley (N. Sc.), 236; and see Victoria Mutual Fire Ins. Co. v. Thompson, 32 U. C. C. P., 476.

It must be borne in mind that a provision for a quorum does not dispense with the due convening of a meeting. The directors must all be summoned. If they have been, or such of them as can be reached by notice, and if all the directors or a quorum be present, the meeting can proceed to business.[1]

26. Power of directors to delegate their functions—Instances.—Under the English Companies' Act of 1862, directors are expressly given the power by Art. 68 of Table A to delegate any of their powers to committees consisting of such member or members of their body as they think fit. But under our Acts no such power exists, and the directors themselves, being agents, the rule *delegatus non potest delegare* is applicable to them and they can not delegate authority to a committee or agent to perform acts, the exercise of which requires great discretion and judgment.[2]

As the directors are directed, from time to time, to elect from among themselves a president and if they see fit, a vice-president of the company and all other officers thereof,[3] they can delegate to these officers the performance of acts purely ministerial. The power of making calls is non-ministerial and being specially given to the directors by our Companies' Acts cannot be delegated by them;[4] likewise the allowance of transfers,[5] the payment of dividends,[6] and the allotment of stock.[7]

Other matters of still greater importance are not even assigned to the directors, but rest in the corporation as a whole to be exercised at a special general meeting, such as the passage of a by-law authorizing the directors to borrow money, or to mortgage the property of the company,[8] determining the remuneration of the president or any director and the confirmation of by-laws made by the directors for the issue, allotment or sale of stock below previous rates, etc.;[9] the in-

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[1] Palmer Comp. Law, p. 130.

[2] Howard's case, L. R., 1 Ch., 561; Cartmell's case, L. R., 9 Ch., 691; Rex v. Gravesend, 4 Dow & Ry., 117; 2 Barn. & Cress., 602; Art. 1711, Quebec Civil Code; McDonald v. Rankin, M. L. R., 7 S. C., 46; and see important case, Quebec & Richmond Ry. Co. v. Quinn, P. C. 1858, 12 Moore, 232.

[3] Sec. 33 (f) Dom. Act, R. S. C., ch. 119; sec. 35 (d), *Ibid.*

[4] Sec. 38 Dom. Act, R. S. C., ch. 119; *Re* Bolt & Iron Co.; Hovenden's case, 10 Ont. P. R., 434.

[5] Sec. 49, *Ibid.*

[6] Secs. 35 and 58, *Ibid.*

[7] *Re* Bolt & Iron Co.; Hovenden's case, *supra.*

[8] Sec. 37 Dom. Act, R. S. C., ch. 119.

[9] Sec. 35 (2), *Ibid.*

crease or reduction of capital or subdivision of shares.[1] Where the power of allotting shares is vested in the directors, they cannot delegate the power to a committee.[2] And where the power is vested in directors to purchase on behalf of the company shares in the company, they could not delegate this power to the general manager.[3]

27. Power of directors to invest one person with supreme control.—From what has been said before, it will be seen that it is not competent for the majority or probably for the whole of the directors, assembled as a board, to invest one person, such as the president, with the permanent and supreme control of the corporate affairs, because such an arrangement would be in direct violation of that clause of our Acts which requires that "the affairs of the company shall be managed by a board of not less than three directors."

28. Directors can only act as a board.—It appears to be the better opinion that in all matters involving the exercise of a legislative or judicial discretion, which the directors cannot delegate to others, they can only bind the company by acting together as a board.[4] So, where the prescribed quorum in a company being three, the secretary fixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview and at another interview, the verbal promise of a third to sign the letter of authority, it was held that, as the seal was not affixed by the authority of the directors, meeting as a board, the bond was therefore void.[5] The will of the board is expressed and evidenced by the passing of a resolution.[6]

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[1] Sec. 20, *Ibid.* [2] Howard's case, L. R., 1 Ch., 561.

[3] Cartmell's case, L. R., 9 Ch., 691.

[4] O'Dell v. Boston, etc., Ry. Co., 29 N. S. R., 385, 387.

[5] D'Arcy v. Tamar, etc., Ry. Co., L. R· 2 Ex. 158; 2 Hurie & Colt, 463; Butler v. Corwall Iron Co., 22 Conn., 335; Baldwin v. Canfield, 26 Minn., 43; Bosanquet v. Shortridge, 4 Ex., 699; O'Dell v. Boston, etc., Ry., *supra*; but compare Collie's claim, L. R., 12 Eq., 259, which holds the contrary.

[6] The interests of two companies were for a time identical, the stock being owned by the same persons. It being desired to give one of the companies an independent interest by bringing in new shareholders, an agreement (as alleged) was affected between the companies by which an allowance should be made to one company by the other for the loss suffered by the former in the past in the purchase of material during the time that the interests of the two companies were identical. Held:—that a contract of this nature, applying to transactions in the past could only be proved by a resolution of the directors or by an agreement in writing, and not by the mere

A single director has no power unless appointed manager. The Acts commit the management of the business of a company to a board of not less than a certain number of directors, and while there may be much of routine business that is managed by one or more under the name of managing director or some other name, the company is not bound, and it would be unsafe that it should be bound in matters out of the ordinary course, by any other than the regularly constituted authority[1] and apart from any question of ratification.[2]

29. Sense in which directors are agents.—As to Provisional Directors, see *supra*, p. 260 et seq.

Judge Thompson is of the opinion that while directors cannot be regarded in a strict sense as agents,[3] because they derive their powers largely from the law, and not by a mere delegation from the stockholders who elect them, yet they are agents in such a sense that in many cases their acts, otherwise voidable become valid by the ratification of the stockholders.[4] They are managing partners.[5] The view of Mr. Palmer, however, is that directors in the eye of the law are agents, and this appears to be correct. Not only in the case of directors but in all agency contracts there are many of the agent's obligations which are derived solely from the law.

30. Power of directors that of administration and management—Examples of administrative powers.—Without going into the question as to whether directors are general agents, or special agents only, a question upon which opinions have greatly differed in England,[6] the general Acts are clear that in all matters of administration their powers are supreme except where expressly limited by the statute and

verbal evidence of the president of the company sought to be charged. Young v. Consumers Cordage Co., R. J. Q., 9 S. C., 471, reversed in appeal, R. J. Q., 7 Q. B., 67, but confirmed by the Privy Council.

[1] Hamilton & Port Dover Ry. Co. v. Gore Bank, 20 Grant's Chy., 190, 195; Hartford Bridge Co. v. Granger, 4 Conn., 142.

[2] Reuter v. The Electric Telegraph Co., 6 E. & B., 341.

[3] But Mr. Palmer, in his work on Company Law, says directors in the eye of the law *are agents*, pp. 119 & 120.

[4] Charitable Corporation v. Sutton, 2 Atk., 400; Bank v. Rutland Ry. Co., 30 Vt., 159, 169; Lindley Comp. Law, 5th Edit., 155; Grant v. United Switchlock Rail Co., 30 C. D., 135; Thompson Corp., sec. 3968.

[5] Forest of Dean Coal Co., 10 Ch. Div., 450, 451.

[6] Lindley on Partnership, 4th Edit., 249.

requiring the sanction of the shareholders.[1] As a striking example of the interpretation put upon that clause of the Dominion Act[2] which provides that "The directors of the company may administer the affairs of the company in all things," etc., it has been held by the Supreme Court[3] that an assignment by the directors of all the estate and property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

The company itself cannot act in its own person, for it has no power; it can act only through its directors.[4] Our Acts distinctly provide that the affairs of the company shall be managed by a board of directors.[5] So that the management of the business cannot be exercised by the stockholders, nor can the directors be overruled by the stockholders, nor have the shareholders the power to instruct them or to control their action.[6] It has been held that a vote by the shareholders of a company, to issue bonds to purchase a certain property and rights, is voided by a resolution of the board of directors declining to carry out the arrangement, where the charter and by-laws give only the directors power to borrow.[7] (See section 36 *post.* for further examples of powers of administration.)

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[1] Sec. 35 Dom. Act, R. S. C., ch. 119; see Hovey v. Whiting, Supreme Ct. 1887, 14 Can. S. C. R., at p. 534.

[2] *Ibid.*

[3] Hovey v. Whiting, *supra*; confirming 13 Ont. A. R., 7, wherein Donly v. Holmwood, 4 Ont. A. R., 555, was distinguished; in the Supreme Court this case was doubted. See also p. 285 *et seq.*, section 33

[4] Ferguson v. Wilson, L. R., 3 Ch., 77, 89.

[5] Sec. 28 Dom. Act, R. S. C., ch. 119.

[6] Quebec Agricultural Implement Co. v. Hebert, 1 Q. L. R., 363; Cann v. Eakins, 23 N. Sc., 475; see Guildford v. Anglo-French Steamship Co., 9 Can. S. C. R., 303, confirming Supreme Ct. Nov. Scotia, 2 Russ. & Geld., a person who contributes a ship in payment of his share of stock is not part owner of ship; and the fact that he is appointed captain and is shareholder has nothing to do with the question of his right of action for alleged wrongful dismissal by the directors.

In Quebec Agricultural Implement Co. v. Hebert it was held that the shareholders could not administer the affairs and franchises of the company otherwise than through the medium of the directors. The directors had resigned, and the shareholders appointed a person as assignee to be assisted by a council of advisers composed of three of the late directors, with full power to wind up the affairs. The person so appointed proceeded, in the company's name, to call in and sue for the amount of a share subscribed by the defendant. It was held that the action would not lie.

[7] Cann v. Eakins, 23 N. S., 475.

31. Remedies of shareholders dissatisfied with directors.—If the shareholders are dissatisfied with the directorate, their remedy is to appoint a new board at the next election of directors; or, if the existing directors are acting in breach of their trust, the shareholders may appeal to the courts for their remedy.[1]

32. Limitation on powers of directors—By-laws must be confirmed by company—Rules of Railway Acts.—There is limitation placed upon the actions of directors; they are given by the Acts power to make by-laws not contrary to law or to the letters patent for the purposes enumerated in the statute and which relate to matters of administration.[2] These by-laws, however, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company, duly called for that purpose, will only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, at and from that time only, cease to have force.[3] And in our Railway Acts, both Dominion[4] and Provincial, it is provided that the directors shall be subject to the examination and control of the shareholders at their annual meetings, and shall be subject to all by-laws of the company, and to the orders and directions from time to time made (or given)[5] at the annual or special meetings; but such orders and directions must not be contrary to the express directions or provisions of the general or special Act.

33. Company's sanction required to acts beyond administration—Sale of assets and good will—Assignment.—In regard to some matters of more importance than acts of mere administration, such as the borrowing of money, giving security therefor, and increasing or decreasing the capital stock, our Canadian Companies' Act invariably require the sanction of the shareholders at a general meeting.

Although, as has been already stated,[6] the directors may assign, without the consent of the shareholders, all the estate and property of a company to trustees for the benefit of creditors, yet, being agents or trustees for the purpose of carrying on the company's business, they have no power, without a direct authorization from the shareholders, to determine its business and defeat the object of its charter, by selling

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[1] See remarks of Blackburn, J., in Taylor v. Chichester Ry. Co., L. R., 2 Ex. App., 378.

[2] Sec. 35 Dom. Act, R. S. C., ch. 119.

[3] Sec. 35, *Ibid.*

[4] Ry. Act of 1888 (D), sec. 56.

[5] These words omitted in the Provincial Acts.

[6] *Supra*, p. 284.

out *en masse*, its corporate assets and good will.[1] But in regard to the case of an assignment by directors of the whole of the company's property in favor of its creditors, it cannot be said that the affairs of a company cease to require the management and administration of those to whom is specially entrusted the management of its affairs when it becomes unable to pay its debts in full. The insolvency makes it to be the first duty of those having entrusted to them the management and administration of the whole of the affairs of the company to take prompt measures to secure the assets of the company for distribution among all the creditors proportionately and equally without preference or priority, and the balance, if there be any, after payment of all the debts in full, for the shareholders.[2] When the company is in insolvent circumstances, the greatest care is necessary, and the best management is required to prevent the assets of the company being wasted in litigation or lost by sacrifice at forced sales under execution, in order to preserve equal distribution among the creditors, and if possible something out of the wreck for the shareholders of whose affairs the directors are given the management and administration.[3] In one Ontario case, Donley v. Holmwood,[4] it was held that the directors of a joint stock company could not, without being authorized by the shareholders, make a voluntary assignment in insolvency under the Insolvent Act, 1875. But it has been pointed out in a later case[5] that the *ratio dicidendi* of the former decision was that the immediate effect and necessary consequence of such an assignment, if valid, would be to change the legal status of the company, to transfer the right to administer its affiars in making calls upon shares, suing for and collecting its debts, etc., to an official assignee, and to wind it up or place it in liquidation. And it was further pointed out that the Court of Common Pleas, in the former case, expressed themselves of opinion that the power to make an assignment for the benefit of creditors was to be looked upon as something very different from a power to execute an assignment under the Insolvent Act. But Mr. Justice Gwynne in the Supreme Court was of opinion that the judgment in Donley v. Holmwood could not be sustained in so far as it is

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1 Thompson Corp., sec. 3983.

2 Per Gwynne, J., in Hovey v. Whiting, 14 Can. S. C. R., at p. 534; see also Merrick v. Trustees, etc., 8 Gill (Md.), 59.

3 *Ibid.*

4 4 Ont. A. R., 555.

5 Whiting v. Hovey, 13 Ont. A. R., at p. 33, confirmed in Supreme Court see *supra*.

rested upon any supposed general principle of law applicable to all cases, or upon the language of Willes, J., in Wilson v. Miers.[1]

34. Responsibility of company for *ultra vires* acts of directors —Seal of company—Apparent authority—Benefit received—Executed contract.—The distinction must here be pointed out between objections raised by the shareholders as *ultra vires* of the directors and the objections of outsiders. The company is not bound by any acts done by the directors for business in which the company has no power to engage,[2] and these are the only acts which, if the directors do, are *ipso facto* void. But not only do acts of the directors bind the company when done within the scope of their authority but also, where the acts of directors, however irregular, belong to a class of acts which class is authorized by the object stated in the letters patent of incorporation, or, in England, deed of settlement; in these cases the company is absolutely bound when the acts are done with strangers who act *bonâ fide* with the company, and when these acts are done with the shareholders of the company, then these acts are voidable only, and the other shareholders must take active steps to set aside the transaction,[3] and where there is no dishonesty time bars the remedy.[4] But if directors neglect the acts which are within their authority and which they ought to perform, neither a court of law nor of equity will allow them afterwards to take advantage of their own neglect.[5] It is not to be presumed that what has been done is *ultra vires*, and therefore

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[1] 10 C. B. (N. S.), 364; and see Merrick v. Trustees, etc., 8 Gill (Md.), 59; Thompson Corp., 3986, in favor of the view that directors may assign for benefit of creditors.

[2] Montreal Assurance Co. v. McGillivray, 13 Moore P. C., 87.

[3] Per Romilly, M. R., in Spackman v. Evans, L. R., 3 H. L., 171, 244; see Whiting v. Hovey, 13 Ont. A. R., 7, confirmed in Supreme Ct., 14 Can. S.C.R., 515; Greenstreet v. Paris, 21 Grant's Chy., 229; Merchant's Bank of Canada v. Hancock, 6 O.R., 285; Bank of Toronto v. Cobourg, etc., Ry. Co., 10 O.R., 376.

In the Supreme Court case of Neelon v. Town of Thorold (22 Can. S.C.R., 390), the Chief Justice said (at p. 395): "It has long been the doctrine of the Courts, as I understand it, that mere irregularities in the internal proceedings of corporations and joint stock companies do not affect persons contracting with the corporation or company. I do not think that such doctrine is the less applicable in the present case for the reason that Mr. Neelon (the person contracting with the company) was himself a director and had notice of all that was done."

[4] Spackman v. Evans, L. R., 3 H. L., 171, Romilly, M.R., dissenting on this point; Greenstreet v. Paris, 21 Grant's Chy., at p. 235.

[5] Bargate v. Shortridge, 5 H. L. Cas., 297.

when an instrument is produced under the seal of the company it is *primâ facie* to be taken that the seal was properly affixed.[1]

In regard to acts which are *ultra vires* of the company altogether, as being outside the objects which the company has power to entertain, it is said that the special powers given to the ultimate authority within the company—whether it be the directors, or a general council, or a majority at a general meeting—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the purposes of the original bond of association.[2]

One strong feature in determining the liability of a company for the illegal acts of its directors *ultra vires* the company is where the company has received substantial benefit from such acts. It is a well established rule that where a company has obtained the benefit of an executed contract, it will not be allowed to repudiate the contract on the ground of any informalities in connection therewith.[3] This principle is also recognized in the Civil Law, for the Quebec Civil Code enacts[4] that "a stipulation that the obligation is contracted for the partnership binds only the partner contracting, when he acts without the authority, express or implied of his co-partners; unless the partnership is benefitted by the act, in which case all the partners are bound." So where the shareholders benefit by the act of their directors, unless they repudiate it immediately they will be held to have acquiesced in it.[5] Thus, a railway company may be held liable on a subscription to secure the location of an agricultural fair with a view to increasing its traffic, although there is a defect of power to make

[1] D'Arcy v. The Tamar, etc., Ry. Co., L. R., 2 Ex., 158, per Bramwell, B., at p. 162; Whiting v. Hovey, *supra*; see Fellows v. The Albert Mining Co., 16 N. B., 203; see also Palmer v. Mail Printing Co., 28 O. R., 656; Garland, etc., Co. v. Northumberland, etc., Co., 19 Can. L. T., 274; 31 Ont. R., 40.

[2] Pickering v. Stephenson, L. R., 14, Eq., 322; Buckley Comp., 6th Ed., 493.

[3] Neelon v. The Town of Thorold, 22 Can. S. C. R., 390; Bernardin v. Municipality of Dufferin, 19 Can. S. C. R., 581; Canada Central Ry. Co. v. Murray, remarks of Gwynne, J., therein, 8 Can. S. C. R., at p. 334; Clarke v. Sarnia Street Ry. Co., 42 U. C. Q. B., 39 ; Forrest v. G. N. W. Central Ry. Co., 12 Man. L. R., 472, 19 Can. L. T., 152.

[4] Art. 1855.

[5] Société de Construction d'Hochelaga v. Soc. de Construction Metropolitaine, 4 Dorion Q. B. Rep., 199; Indianapolis Rolling Mill Co. v. St. Louis, etc., Ry. Co., 120 U. S., 256. The head of a corporation may bind the body corporate by any contract from which it may derive a benefit (Royal Institution for the Advancement of Learning v. Desrivières, Stuart's K. B. Rep., p. 224.)

such a contract, if it is not in violation of the charter and the company has thereby induced one to expend money in reliance thereon.[1] And under the Civil Law, where the manager of a bank doing business as a limited partnership has not the power to hypothecate the property of the bank, (a restriction which is also placed upon directors under our Acts,) although a hypothec placed by him as security for a loan to the bank would be void, yet the bank would be liable for the amount of the loan where it benefits by it.[2]

But the general rule that where a contract is executed the law implies a promise,[3]—or to state it in another way, where a contract has been executed there is a moral necessity that the other party to the contract should pay the value in spite of any irregularities in the contract[4]—does not always apply to the case of a company where the contract has been entered into by some one not having the power to bind the company, and the latter has not given its assent. For instance, if the secretary of a company, with the sanction of two directors of a company take it upon themselves, without calling a meeting of the board, to agree with an execution creditor of the company to delay execution against the company's construction material in consideration of certain other security for the debt being given (viz., moneys coming to the hands of the execution creditor from certain garnishee proceedings taken by him against debtors of the company); if the board of directors upon hearing of this arrangement consider the terms too hard and unreasonable, they can repudiate it especially where the execution creditor was not prejudiced by the delay which had been granted.[5]

35. Acquiescence as a remedy for "ultra vires" acts of directors.—Acquiescence is not so easily presumed[6] in the case of acts onerous to the company or one or more of its shareholders. In such case, although some acts of directors which are *ultra vires* may be rendered

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[1] State Board, etc., v. Citizens Street Ry. Co., 44 Ind., 407, and see Clarke v. Sarnia Street Ry. Co., 42 U. C. Q. B., 39; but see Tomkinson v. South Eastern Ry. Co., 35 Ch. Div., 675, which holds the contrary.

[2] Nancy, 26 March, 1879; 91 Journal du Palais, 217.

[3] East London Waterworks Co. v. Bailey, 4 Bing., 287.

[4] Hall v. Mayor of Swansea, 5 Q. B., 526; Pim v. Municipal Council of Ontario, 9 U. C. C. P., 304; Forrest v. G. N. W. Central Ry. Co., 12 Man. L.R., 472; 19 Can. L. T., 152.

Hamilton & Port Dover Ry. Co. v. The Gore Bank, 20 Grant's Chy., 190; see also Almour v. Law, 26 Nova Scotia Rep., 340, 347.

[6] O'Dell v. Boston, etc., Coal Co., 29 N. S. R., 385.

valid by acquiescence, yet this can only be by the individual acquiescence of every shareholder.[1] In the absence of full information mere lapse of time cannot grow into acquiescence.[2] Length of time may, in many cases, materially assist in establishing acquiescence; but it is not the time but the acquiescence which changes what would otherwise be a void act into a valid one.[3]

36. **Further instances of administrative powers.**—It has been stated that the directors may administer the affairs of the company in all things.[4] This means that their authority extends to all acts reasonably necessary for management.[5] Thus a board of directors or a managing partner of a civil law partnership can give a gratuity to those who have rendered special services to the company, where the profits of the year or state of business of the company will justify it.[6] They can compromise with an insolvent debtor of the company,[7] or with shareholders in regard to disputed claims.[8] They may also grant a pension for the benefit of the family of a deceased servant of the company for it may benefit the company to treat its servants with liberality.[9]

37. **Extraordinary powers given directors by by-laws or special statutes.**—There are decisions to the effect that where the charter of a company or the governing statutes provide that in the management of its affairs the directors shall have all the powers which the corporation itself possesses, not incompatible with the by-laws and the laws of the country, and there is nothing in the by-laws incompatible with the exercise by the directors of the power to borrow money, issue bonds, or to convey in mortgage the lands of the company as security, then, and then only, can they exercise such power in the absence of

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[1] Brotherhood's case, 31 Beav., 365; Smallcombe v. Evans, L. R., 3 H. L., 249; Spackman v. Evans, Lord Cransworth, L. R., 3 H. L., p. 190; Houldsworth v. Evans, Lord Cransworth, *Ibid*, p. 276; Riche v. Ashbury Ry. Carriage Co., L. R., 9 Ex., 224, 232.

[2] Spackman v. Evans, L. R., 3 H. L., at p. 233.

[3] Evans v. Smallcombe, L. R., 3 H. L., at p. 260.

[4] *Supra*, p. 283 *et seq.*

[5] See West of England Bank, *Ex parte* Broker, 14 Ch. Div., 317.

[6] Hampson v. Price's Candle Co., 34 L. T., 711; 24 W. R., 754; Pardessus Droit Commercial, vol. 4, p. 92; 4th Edit., 1831.

[7] Pardessus loc. cit.; Preirst v. Mira, Journal du Palais, 1842, vol. 2, p. 126.

[8] *Supra*, chapter on Capital Stock, p. 107.

[9] Henderson v. Bank of Australia, 40 Ch. Div., 170.

express permission.[1] And this would apply to Canadian companies incorporated by special Act, in which these powers were expressly given to the directors. But under our Companies' Acts the general rule is that directors may only borrow money and issue bonds, debentures or other securities therefor or mortgage or pledge the property, real or personal, to secure any sums borrowed by the company, when authorized to do so by a by-law for the purpose passed and approved by the votes of shareholders, representing at least two thirds in value of the subscribed stock of the company represented at a special general meeting duly called for considering the by-law.[2] In certain of the Provincial Acts, the proportion of shareholders required to sanction the loan differs from the Dominion Act.[3]

38. Incidental powers of directors of trading companies.—In the case of a trading corporation, however, the directors could authorize their manager to deposit goods in a warehouse and raise money on the security thereof for the prosecution of the business of the company, and it would not be necessary, in such a case, that the above mentioned by-law should exist, as a condition precedent to such a proceeding.[4] The directors having the right to pass by-laws for the conduct of the affairs of the company[5] and having the power to enter into any *intra vires* contract on behalf of the company,[6] then in the case of a trading company they could necessarily authorize their manager to conduct the financing of the company, within the limits of the necessities of every day operations. But in regard to procuring extensive loans and the issue of bonds and debentures therefor, or pledging or hypothecating the property of the company as security therefor, while a by-law passed by the shareholders is necessary to authorize the directors to take such steps, yet, on the principle already laid down[7] where no complaint is made by the shareholders, or the company, though aware of the facts, because of any irregularity or informality in the raising of money by the manager, and pledging the property of the company therefor, an outsider, such as an execution creditor, or a subsequent purchaser of the mortgaged estate, would not be allowed

[1] Australian Company & Mounsey, 4 K. & J., 733; *Ex parte* Nat. Bank, L. R., 14 Eq., 507; Patent File Co., L. R., 6 Ch., 83.

[2] Sec. 37 Dom. Act, R. S. C., ch. 119.

[3] For instance, the British Columbia requires the sanction of three-quarters of the shareholders, R. S. B. C., ch. 44, secs. 100 and 122.

[4] Merchant's Bank of Canada v. Hancock, 6 O. R., 285.

[5] R. S. C., ch. 119. sec. 35 (g). [6] *Ibid.* sec. 35. [7] *Supra*, p. 287.

to interfere, there being no imputation of fraud or illegality in its broad and culpable sense.[1]

39. **Company's power to mortgage.**—It is to be remarked that even in the absence of express power granted to a company to mortgage its property, every company in this country has the power to mortgage its property for the purposes of its undertaking.[2] Therefore, although most of our Acts expressly give the power to "hypothecate or pledge the real or personal property of the company to secure any sums borrowed by the company,"[3] this must not be considered as implying that the company's powers to mortgage are to be limited to that object; it may mortgage its property for other purposes provided the mortgage is within the scope of the powers conferred upon the company.[4] Thus a company can mortgage its property to guarantee the debt of its contractor, contracted for materials to be used by the company.[5]

40. **Power of directors to issue negotiable paper—By-law.**—All the Companies' Acts in this country expressly confer the power to make, indorse, and accept bills and notes.[6] Section 76 of the Dominion Companies' Act which is typical of all the Joint Stock Companies' Acts of the Provinces, provides that "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 by-laws 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 . . . 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 by-law or special vote or order," etc. The language of this section requires that before commercial paper is issued by the company, the Board of Directors should pass a by-law designating which officers of the com-

[1] Merchant's Bank of Canada v. Hancock, *supra*; and Greenstreet v. Paris, 21 Grant's Chy., 229.

[2] Bickford v. Grand Junction Ry., 1 Can. S. C. R., 696; see remarks of Strong, J., at p. 730.

[3] R. S. C., ch. 119, sec. 37 (b).

[4] Bickford v. Grand Junction Ry., 1 Can. S. C. R., 696.

[5] *Ibid;* and see In *re* Pyle Works (1891), 1 Ch., 173. See also on this subject, CHAPTER XII.—FINANCIAL MATTERS.

[6] R. S. C., ch. 119, sec. 76, as an example of all the Companies' Acts.

pany shall sign such paper on behalf of the company. In default of any such general by-law, a special resolution of the Board would be required to render valid each promissory note or bill of exchange issued by the company. The practice is to pass a general by-law in regard to all commercial paper, designating the officers who are authorized to sign and execute these documents.[1]

This section enables companies to draw, accept and indorse bills of exchange, etc., but the company acts by its directors, as appears from the language of section 35 of the Dominion Act and the corresponding sections in the Provincial Acts. By these sections the directors may make, or cause to be made, any description of contract which the company may, by law, enter into.[2] The necessity for a general by-law or special action by the Board of Directors was pointed out in an early case,[3] in which it was held that under a former Dominion Companies' Act, containing precisely the same wording as the present in this respect, the company could not issue promissory notes unless the power were formally given by the by-laws of the company. The decision proceeds to state that as in the case under consideration the by-laws provided that "the president and secretary shall have power to draw cheques, to sign deeds, stock certificates, all contracts authorized by the board of directors, and all matters and documents of special import, that the notes in question had not been proved to have been authorized in such a manner as to bring them within the

[1] That this is the true interpretation is apparent from Hovey v. Whiting, 14 Can. S. C. R., 515. The agreement in this case could not have been upheld had such a contract come under sec. 76, because in that event it would have been necessary to have proved a by-law to enable the directors to make such an agreement.

Where it is sought to make the directors subject to this clause, they are expressly included therein. Thus in an old Act incorporating the Marmora Foundry Company, (16 Vic., ch. 253, 1853), section 20 provides that: "Every contract, agreement, engagement or bargain by the company, or by any one or more of the directors on behalf of the company, or by any agent or agents of the company, and every promissory note made or endorsed, and every bill of exchange drawn, accepted or endorsed by such director or directors, or by any officer on behalf of the company, or by any such agent or agents in general accordance with the powers to be devolved to and conferred on them respectively under the said by-laws, and in pursuance of the same or any of them, shall be binding upon the said company."

[2] Peruvian Ry. Co. v. Thames & Mersey Marine Ins. Co., L. R., 2 Ch., 617; and see General Estate Co., *Ex parte* City Bank, L. R., 3 Ch., 758.

[3] Coates v. The Glen Brick Co., Superior Ct., Montreal, 30 Nov., 1870, 1 Rev. Crit., 121.

category of contracts authorized by the board of directors, the company was not bound thereby. This is all that appears in the note of the case. If, as would appear from this short summary, the notes sued upon had been signed by the president and secretary, the conclusion that the company would not be bound by them would at first sight appear to be incorrect, for the Act states that "notes signed by an officer of the company in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company." If there were no by-law defining his power in this respect, *primâ facie* the company would not be liable on the notes, although the note would be held good as an acknowledgment of indebtedness till denied specially.[1] The apparent inconsistency in this case arises from the fact that the wording of the by-law seemed to require that no promissory note should be issued without the special authorization of the board of directors. In fact, it did not confer a general power to issue notes upon the president and secretary; and, although there is no full report of the case, this would appear to be the decision of the learned judge.

41. Resumé of general law as to issue of commercial paper by companies.—In regard to the general law relative to the issue of promissory notes by companies, the following resumé of the principal features of the subject are taken from a judgment of Cross, J., rendering the decision of the Court of Appeal in Montreal in the case of Société de Construction du Canada v. La Banque Nationale.[2] After reviewing the English authorities, the learned judge concludes :

1st. That a commercial corporation may validly make and issue negotiable promissory notes and other negotiable instruments.[3]

2nd. That a corporation specially authorized by its charter, or having power to make by-laws for the purpose, and having made such by-laws, may do the like.

3rd. That a non-commercial corporation, irrespective of any such by-laws, may do the like if the nature and character of the business it is authorized to transact warrants it.

4th. That although the making and issuing of such instruments by a corporation may be *ultra vires*, it is only so in a secondary sense, and will be binding on the corporation, unless the transaction be

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[1] Société de Construction du Canada v. La Banque Nationale, Q. B., Montreal, 1880, 3 Leg. News, 130.

[2] 1880, 3 Leg. News, 130.

[3] And see Berton v. Central Bank, 5 Allen (10 N. B.), 493.

sought to be restrained at the instance of some one interested as a corporation.

5th. That if a promise be held out to the public by an incorporated company that they will pay to the order of a person named, that person can transfer the instrument by indorsement, so that the company cannot set up in compensation against the holder any debt that such transferor may afterwards come to owe the company.

The learned judge also held that in the absence of any special denial, authority of officers of an incorporated company to make notes will be presumed, and also that the note was given for consideration.[1]

The subject of the issue of bills and notes will be further considered in other parts of this work.

42. Powers specially delegated to directors to regulate by by-laws to be ultimately sanctioned by the shareholders.—Among the powers specially enumerated in our Companies' Acts as being delegated to the directors to regulate by by-laws, such by-laws to be subject to the ultimate approval of the shareholders[2] are the following :—

(a) The regulation 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 number of the directors, their term of service, the amount of their stock qualification and their remuneration, 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;[3]

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[1] Citing among others Snarr v. Toronto, P. & B. & S. Society, 29 U. C. Q. B., 317.

[2] Sec. 35 Dom. Comp. Act, R. S. C., ch. 119.

[3] Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment (Falkiner v. Grand Junction Ry. Co., 4 O. R., 350.)

The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future (*Ibid*).

Where the directors of a railway company passed a by-law, enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at $1000 per annum, which by-law was afterwards, at a meeting of shareholders, repealed;

Held, that the by-law was within the competence of the directors under

(e) The time and place for the holding of the annual meeting of the company, the calling of meetings, regular and special, of the board of directors and of the company, the quorum, the requirements as to proxies and the procedure in all things at such meetings;

(f) The imposition and recovery of all penalties and forfeitures which admit of regulation by by-law;

(g) The conduct, in all other particulars, of the affairs of the company.

In regard to the remuneration of directors, some qualifications must be pointed out. No doubt the Act explicitly provides that directors may fix their remuneration by by-law, but this by-law has to receive the sanction of the shareholders convened at a special general meeting or annual meeting, and if not confirmed at the meeting the by-law will cease to have effect from the date of the meeting. If not confirmed there may have been an intervening period that is, the period between the passing of the by-law and its rejection at the annual meeting, wherein the directors were the sole judges as to the amount of their remuneration. Or it may be that no by-law relative to this subject has been passed. Unless authorized to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting, the directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets.[1] This would apply where the directors allowed their president a salary of $1200 for the year then current, without the consent of the shareholders, and although the indebtedness of the company on this account was ordered by the directors to be certified under the corporate seal, neither the president nor the directors being considered as servants of the company and as such entitled to remuneration for their labour according to its value.[2]

C. S. C., ch. 66, sec. 47, and that the shareholders could not undo the arrangement in respect of past services of the solicitor received by them (*Ibid*).

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure, Held,—that their appointment of a solicitor need not be under the corporate seal (Caston's case, 10 Ont. P. R., 339).

Directors may dismiss the manager of a company without notice, when the latter is insolvent and insubordinate (Dick v. Canada Jute Co., S. C. 1886, 30 L. C. J., 185).

[1] In *re* G. Newman & Co., per Lindley, L.J. (1895), 1 Ch., 674, 12 R., 228; Fellows v. The Albert Mining Co., 3 Pugs. (16 N.B.), 203 .

[2] Fellows v. The Albert Mining Co., *supra*; Dunston v. The Imperial Gas Light Co., 3 B. & Ad., 125.

The shareholders at a meeting duly convened for the purpose can, if they think proper, remunerate directors for their trouble, or make presents to them for their services, out of the assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this; but to make presents out of profits is one thing, and to make them out of capital, or out of money borrowed by the company, is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors, so as to bind the company in its corporate capacity.[1] But if the permanent by-laws of a company fix the directors' fees at a reasonable amount, they will be entitled to them, although no profits are ever made by the company.[2] A director can sue for remuneration which the company has agreed to pay him.[3] To take remuneration beyond what is payable under the Act or by-laws is a misfeasance, and directors who are parties to it are jointly and severally liable for the amount thus illegally paid.[4]

44. Obtaining increased powers for the company.—In regard to obtaining increased powers for the company, this is left primarily to a certain proportion of the shareholders assembled at a special general meeting called for the purpose, who give the directors authority[5] to proceed, if they see fit,[6] in carrying out the formalities necessary to that end.

45. Manner of changing amount of capital stock or subdividing the shares.—But in regard to increasing or decreasing the capital stock or subdividing the shares, the directors take the initiative and pass a by-law for the purpose. This by-law must afterwards be confirmed by the votes of shareholders representing at least two-thirds in value of all the subscribed stock of the company, at a special general meeting duly called for considering the same, and afterwards confirmed by supplementary letters patent.[7]

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[1] In *re* Newman & Co. (1895), 1 Ch., 674; 12 R., 228; Per Lindley, L.J.

[2] *Re* Lundy Granite Co.; Harvey Lewis case, 26 L. T., 673.

[3] Orton v. Cleveland Co., 3 H. & C., 868; Nell v. Atlantic Co., 11 T. L. R., 407, C. A.

[4] In *re* Newman (1895), 1 Ch., 674; Oxford, etc., Soc., 35 Ch. D., 502; Leeds Estate Co. v. Shepherd (1897), 36 Ch. D., 809.

[5] R. S. C., ch. 119, sec. 13.

[6] *Ibid*, sec. 14, "The directors may," etc.

[7] *Ibid*, secs. 17 to 20: Even where the charter of a company allows the capital to be increased, the directors cannot augment the original capital

46. Allotment of stock.—It is to be noted that unless the by-law passed for the increase of capital prescribes the manner in which the shares of the increased capital shall be allotted, the control of such allotment shall rest absolutely in the directors.[1]

But once a by-law is passed at the annual general meeting of the company providing for the allotment of new stock by the shareholders, the directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves.[2]

In regard to the ordinary allotment of stock, this is made at such times and in such manner as the directors prescribe by by-law unless the letters patent or supplementary letters patent make other definite provision.[3]

47. Payment of stock.—It has already been stated[4] that directors may under our Acts, pass by-laws regulating the payment of stock, etc. Such by-laws will have force without the sanction of the shareholders until a general meeting has been called to confirm them, or, in the absence of such a meeting, until the next annual meeting of the company.[5] But the directors are not bound to make such by-laws, and as they may under the Acts make any contract which the company may by law, enter into,[6] it would appear that in the absence of such by-laws they could allot and arrange for the payment of shares in materials supplied, or by services to be rendered, or in any other equivalent of their full value, provided the formalities as to registration of a written contract to that effect were fulfilled as required by the Statute.[7] But they could not issue shares for less than their nominal value.[8] It is not *ultra vires* of the directors to take subscriptions of stock without receiving at the same time the statutory 10 per cent.[9]

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where the business of the company (in this case a toll-bridge company) does not require it, and there is sufficient cash on hand to meet all the requirements of the business, and especially where such increase is sought to be made with a view to maintaining the directors in office (Perreault v. Milot, Q. B. 1886, 14 R. L., 417).

[1] R. S. C., ch. 119, sec. 18 (2).

[2] Stephenson v. Vokes, 16 Can. L. T., 223.

[3] Sec. 26, R. S. C., ch. 119. See also CHAPTER V.—CAPITAL STOCK.

[4] *Supra*, p. 295.

[5] Falkiner v. Grand Junction Ry. Co., 4 O. R., 350.

[6] See sec. 35, R. S. C., ch. 119.

[7] Sec. 27, *Ibid*; see British Seamless Paper Box Co., 17 Ch. Div., 467.

[8] McCraken v. McIntyre, 1 Can. S. C. R., 479; and see also CHAPTER V.

[9] Denison v. Leslie, 3 Ont. A. R., 536.

48. Appointment of liquidator ends powers of directors.—Upon the appointment of a liquidator under the Winding-up Act[1] all the powers of the directors cease except in so far as the court or the liquidator sanctions the continuance of such powers. But the mere fact that a company is wholly insolvent does not deprive the directors of their powers.[2]

49. Fiduciary duty of directors to the shareholders—Power of contracting with company.—Directors are not only agents, but to a certain extent trustees.[3] They are trustees to this extent, that broadly speaking they will not be allowed to enter into engagements in which they have, or can have, a personal interest, conflicting, or which may possibly conflict with the interests of those whom they are bound by fiduciary duty to protect.[4] So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the transaction; for it is enough that the parties interested object.[5] The civil law and the law of England are the same upon these points.[6] The rule is as applicable to the case of one of several directors as to a managing or sole director.[7] The above is broadly speaking the rule on this subject, because to particularize, it must be stated that, although the directors are in a certain sense the trustees of the company, they are also the trustees of the whole body of shareholders who appointed them;[8] and while it is true that they cannot enter into engagements in which their personal interests are conflicting, or which may possibly

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[1] R. S. C., ch. 129, sec. 34.

[2] Hovey v. Whiting, 14 Can. S. C. R., 515, 534. See also CHAPTER XIII.—WINDING-UP OF COMPANIES.

[3] See per Kay, J., in Faure Electric Accumulator Co., 40 Ch. Div., p. 151; Aberdeen Ry. Co. v Blakie, 1 Macq. H. L., 461; Great Luxembourg Ry. Co. v. Magnay, 25 Beav., 586; Imperial Mercantile Credit Assn. v. Coleman, L. R., 6 H. L., 189; Albion Steel Co. v. Martin, L. R., 1 Ch. Div., 580; Bennett's case, 5 De Gex. M. & G., 284; *Ex parte* Bennett, 18 Beav, 339; Ernest v. Corysdill, 2 De Gex. F. & J., 175; *Re* Anglo-Greek Steam Nav. Co., 35 Beav., 399; Williams v. Page, 34 Beav., 661; York, etc., Ry. Co. v. Hudson, 16 Beav., 485; Greenstreet v. Paris, 21 Grant's Chy., at p. 232.

[4] Aberdeen Ry. Co. v. Blaikie, 1 Macq. H. L., 461; Daniel v. Gold Hill Mining Co., 6 B. C. L. R., 495.

[5] *Ibid.*

[6] *Ibid*; Dig. Lib. XVIII. t. i. c. 34, s. 7.

[7] Per Baggally, J., in North-West Transportation Co. v. Beatty, 12 App. Cas., at p. 593.

[8] Cumberland Coal & Iron Co. v. Parish, 42 Maryland, 598; Great Luxembourg Ry. Co. v. Magnay, 25 Beav., 586; Gaskell v. Chambers, 26 Beav., 360.

conflict, with the interests of the company as represented by the then shareholders,[1] yet if they do enter into any such engagement, it may be affirmed or adopted by the company as represented by the majority of its then body of shareholders, and the minority, who consider that their interests will be harmed by the transaction, have no remedy, provided that the transaction is not positively fraudulent or oppressive towards them.[2] And further than this, the director who technically abuses his fiduciary position by entering into a contract with his other directors for the sale of certain of his property to the company, can vote as a shareholder, in proportion to the shares held by him, in determining the adoption or ratification of the contract by the company.[3] And the mere fact that such a director has individually a majority of votes, acquired in a manner authorized by the constitution of the company, will not be deemed oppressive towards the dissenting shareholders when voting at the meeting to conform or reject the transaction.[4]

Under the British Columbia Act directors are forbidden to enter into contracts with the company.[5]

50. Duty of directors as trustees of the company—*Intra vires* **and** *ultra vires* **Acts.**—While the directors are clearly trustees of the shareholders as regards matters which are within their powers, yet they are essentially trustees of the company itself in matters which require the express confirmation of the shareholders. For example, if the statute permits directors to be remunerated for their services according to by-laws and they appropriate salaries to themselves without a by-law having been sanctioned by the shareholders, the directors would, as already seen[6] be abusing their fiduciary position towards their *cestuis que trustent*, the then shareholders; but if the latter saw fit to acquiesce in the action of the directors, there would no longer be a breach of trust. The company, as a company, that is to say as it may be represented by its future shareholders, would have no ground of complaint, because the act being *intra vires*, if it did not meet with their approval, a new by-law could be passed reducing the rate of

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[1] Daniel v. Gold Hill Mining Co., 6 B. C. L. R., 495. Where a mineral claim was sold at a price so inadequate that it was apparent the sale was a scheme to benefit the purchaser and the directors, the sale was set aside. (*Ibid.*)

[2] North-West Transportation Co. v. Beatty, 12 App. Cas., 589; and see Bank of Toronto v. Cobourg, etc., Ry. Co., 10 O. R., 376.

[3] *Ibid.* [4] *Ibid.* [5] R. S. B. C,, ch. 44, sched. 1, sec. 57. [6] *Supra*, pp. 296, 297.

remuneration or the old by-law could be quashed. But where the directors make a misapplication of the capital in such a manner as to be wholly *ultra vires*, then the question arises whether they are committing a breach of trust toward their *cestui que trust*, the company, This depends upon certain circumstances. In the case of persons who own the entire capital of the company and intend to remain the sole proprietors they may make any honest agreements amongst themselves as to the appropriation of their own property.[1] But where it is intended that the shares of the company shall pass into the hands of the public, then a misappropriation of the capital would be a fraud on the future shareholders, although the whole body of present shareholders might have sanctioned it in the honest belief that it was for the best interests of the company,[2] and the transferee of shares, belonging to a shareholder who acquiesced in the misappropriation, would not be prevented from suing the directors for breach of trust, by the fact that his transferor had knowledge which would have disabled him from suing.[3] Where directors have acted *ultra vires*, it is no defence that the acts in question were done for the benefit of the company, if they knew, or ought with due care to have known, that such acts were *ultra vires*.[4]

Sir Nathanial Lindley in his work on Companies,[5] says: " Directors should remember that they are not the masters but the servants of the shareholders," etc. It is submitted that the word "servants" is here inadvisedly used;[6] that they can more safely be likened to agents or managing partners.[7] It is surprising, however, to notice the amount of pains that have been taken by various courts and authors in endeavouring to ascertain some general term descriptive of the relations between directors and the shareholders: on the very face of it the subject matter is incapable of any general definition. The question must largely turn upon the relations existing at the particular moment, between the directors and the shareholders. It is also to be

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[1] In *re* Gold Company, 48 L. J., Ch., 281; 40 L. T., 5; In *re* Ambrose Lake Tin Co., 14 Ch. Div., 390; 49 L. J., Ch., 457; In *re* British Seamless Paper Box Co., 17 Ch. Div., 467; 50 L. J., Ch., 497.

[2] London Trust Co. v. Mackenzie, 62 L. J., ch. 870; 3 R., 597; 68 L. T., 380.

[3] *Ibid.* [4] *Ibid.* [5] 5th Edit., at p. 364.

[6] See Fellows v. The Albert Mining Co., 3 Pugs., 16 N. B., 203; Dunston v. Imperial Gas Light Co., 3 B. & Ad., 125.

[7] See Forest of Dean Coal Co., 10 Ch. Div., 450; London Financial Ass'n v. Kelk, 26 Ch. Div., 107, 143; Aberdeen Ry. Co. v. Blaikie, H. L., 1 Macq., at p. 471.

noted that in all cases in this country the powers of directors are largely defined by the statutes and not by the shareholders, and in regard to practically all matters relating to the administration and management of the affairs of the company the directors take the initiative, and indeed are the only ones who can take the initiative in framing by-laws for that purpose. Where the directors have the controlling vote by virtue of their controlling interest as shareholders they sanction their own by-laws, and are indeed masters of the situation. It is not improper for a director to acquire stock in order to obtain control of the company if no improper means are used by him.[1]

51. Right of third parties to impugn acts of directors before winding up.—If the shareholders have the power to ratify acts of the directors in breach of their trust, it is clear that so long as the shareholders do not complain of a particular transaction, and where it is not *ultra vires*, it is not competent for third parties, creditors of the company, to impugn the position of the directors,[2] as long as the company is not brought under the Winding-up Act.

52. Right of liquidator to impugn acts of directors after commencement of winding up.—When the company is being wound up under the Winding-up Act, R. S. C., ch. 129 (D), then, any breach of his fiduciary position committed by a director prior to the winding-up order, may be brought home to him by the liquidator appointed under the Act or any creditor.[3] Section 83 reads as follows, "When in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, etc., has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, nothwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, etc., and compel him to repay any moneys so misapplied or retained, or for

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[1] Christopher v. Noxon, 4 O. R., 672; North-West Transportation Co. v. Beatty, 12 App. Cas., 589.

[2] Bank of Toronto v. Cobourg, etc., Ry. Co., 10 O. R., 376.

[3] Sec. 83 Winding-up Act (D); R. S. C., ch. 129. The object of this section is to substitute a summary procedure for a more lengthy one; it does not impose new liabilities (Bentinck v. Fenn, 12 App. Cas., 652, 669; Archer's case (1892), 1 Ch., at p. 334.)

which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the Court thinks fit."

53. Consequence of breach of trust by director.—Apart from this statutory enactment, the consequence of a breach of trust on the part of a director is that he is bound to account for all profits made by him by the employment of the assets of the company, and for all profits made by him at the expense of the company unless he can show that the company, with a full knowledge of all the facts, has agreed to allow him to retain such profits for his own benefit.[1] But it is seen that when the company is ordered to be wound up, the company, as represented by the shareholders, has no power to acquiesce in the breach of trust: the matter is then in the hands of the court, put in motion by the liquidator, a creditor or contributory. Where a director, having a judgment and execution of his own against the property of the company, acting in good faith, purchased the same at a sale by mortgagees, under a power of sale, for $8,400, and sold it in the following year, for $23,000, it was held in winding-up proceedings, that he could not purchase for his own benefit but held the land as trustee for the company, and was accountable for any profit received on a re-sale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust, within R. S. C., ch. 129, sec. 83.[2] Where a sale of company property was made under such circumstances that it was apparent that the sale was a sham one for the benefit of the purchaser and directors, the sale was set aside by the Court.[3]

54. Contracts between director and liquidator.—Upon the appointment of a liquidator under the Winding-up Act all the powers of the directors cease unless continued by the Court or the liquidator,[4] and with the cessation of the directors' powers ceases their fiduciary rela-

[1] Lindley Comp. (1889), p. 365; and see Tylee v. The Queen, 7 Can. S. C. R., at p. 683; In *re* G. Newman & Co. (1895), 1 Ch., 674.

[2] *Re* Iron Clay Brick Manufacturing Co.; Turner's case, 19 O. R., 113; and see Tobin Canning Co. v. Fraser, 81 Tex., 407.

[3] Daniel v. Gold Hill Mining Co., 6 B. C. L. R., 495.

[4] R. S. C., ch. 129, sec. 34.

tions to the company or its shareholders.[1] Hence a sale to the directors by the liquidators, when the powers of the former have not been expressly continued by the latter, is valid.[2]

55. Secret contracts by director with promotor.—There must be the fullest disclosure to the company by the directors. Perhaps the most fruitful source of breaches of trust arises in connection with secret agrements between promotors and directors. The usual method used to be that the directors subscribed for the necessary number of shares to qualify them as directors. They then issued to the promotors certain shares which they were to receive as paid-up shares under the scheme of organization, who in turn immediately transferred the necessary number to the directors. They then proceeded to formally make the contract of purchase of the property, which according to the scheme, the company was organized to purchase : the promotors pocketed their respecive shares of the so-called " promotion-money," the bubble burst, and the innocent shareholders, who had *bonâ fide* subscribed for shares which were not paid up, were called upon as " contributories " to make up a fund for the payment of outstanding debts. In these cases the English Courts of Equity hold the directors who have taken part in the conspiracy, to the substance of the liability which they in form hold themselves out as having fulfilled.[3] The above method has been cleverly varied, as instanced in a later case. The new method consisted in the promotor getting a friend to become a director upon the terms that, if he should at any time desire to part with the shares which he was to take in order to qualify him as a director, the promotor would purchase them from him at the price which he should pay for them. The director took the qualification shares and paid for them at par out of his own money. He then proceeded to act for some time as director, but never disclosed to his co-directors or to the company his agreement with the promotor. He subsequently resigned, and of course upon his request the promotor paid him the sum which he paid for his qualification shares. Now, it is apparent that whatever abuse there may be about such a transaction,

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[1] Chatham National Bank v. McKeen, 24 Can. S. C. R., 348, confirming 27 Nova Scotia, 305, reported subnom. *re* Mabou Coal & Gypsum Co.

[2] *Ibid.*

[3] Thompson Corp., sec. 4038; see Carling's case, L. R., 20 Eq., 580; Eden v. Ridsdales Land, etc., Co., 23 Q. B. Div., 368; and see Hay's case, L. R., 10 Ch., 593, 604.

the director made no direct profit from it, at least he was no better off than before, and it seemed to be thought that for this reason there was no breach of trust or misfeasance for which the director could be held liable at the instance of the liquidator upon a winding-up, but the English Court of Appeal in Archer's case[1] held, reversing the judgment of Kekewich, J., that as the price obtained by the director from the promotor for his shares when he retired and sold out, was in excess of their actual value at that time, whatever profit or benefit accrued to him by his secret agreement with the promotor belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company for which he was accountable with interest. The real abuse in this case consisted in the company not being told of the existence of the bargain in order that they might elect whether they would let their director keep the advantage or not. Its existence not being disclosed, then, inasmuch as the indemnity became fruitful, the money which arose from it became money for which the director who had kept it secret was bound to account to the company. Although in one sense there was no loss to the company, yet in another sense there was. The loss was that the company did not get that benefit from the indemnity which ought to have been theirs, but that somebody else got it. The object of a clause that a director shall hold, say fifty shares for qualification purposes, is amongst others that the company shall have this security, that the director has a stake in the concern while he is acting as director, and that he shall not be simply in the position of a person who can, without loss to himself, play ducks and drakes with the company's property.[2] As pithily stated by Bowen, L.J.,[3] "the director is really a watch-dog, and the watch-dog has no right, without the knowledge of his master, to take a sop from a possible wolf."

56. Director as an ordinary shareholder in regard to his own shares.—In the matter of dealing with his shares, a director is in general as free as any other shareholder. He is not a trustee for the general body of the shareholders, so as to be unable to deal with his shares in a manner prejudicial to the interests of his *cestuis que trustent*, but in a vast variety of circumstances is just as free to deal with his shares—except perhaps his qualification shares, which he cannot deal with without giving up his directorship—as any other person.[4]

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[1] (1892), 1 Ch., 322. [2] Per Bowen, L. J., at p. 341. [3] *Ibid.*

[4] In *re* National Provincial Marine Ins. Co., Gilbert's case, L. R., 5 Ch., 559; Thompson v. Canada Fire & Marine Ins. Co., 9 O. R., 284.

And if directors truly and reasonably believed that they were acting in the interests of the company, they are not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold their shares at prices which gave them large profits.[1]

57. Power of directors to contract with the company.—All our Railway Acts contain special provisions relating to the disqualification of directors whose interests are or possibly may be, inimical to those of the company.[2] Where a director is interested in a contract with the company, the contract is not void even though it disqualifies the director ;[3] the contract is merely voidable, and while the company could enforce a contract entered into between the company and a director of the company for the benefit of the director or his firm, such a contract cannot be enforced by the director or his assigns against the company.[4] With regard to the nature of the contracts which disqualify a person interested in them from being a director, it has been held that they must be contracts made with the company in the prosecution of its undertaking, and that there is nothing to prevent a banker of a company from being one of its directors.[5]

Directors may lend money to the company and take security therefor,[6] and may enforce the payment of the same like any other creditor, but such contracts will be subject to severe scrutiny, and under the obligation of acting in the utmost good faith.[7]

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[1] Hirsche v. Sims (1894), App. Cas., 654; distinguishing McKay's case, 2 Ch. Div., 1; and Weston's case, 10 Ch. Div., 579.

[2] Sec. 57 Dom. Ry. Act, 1888; Provincial Statutes likewise. See also British Columbia Companies' Act, R. S. B. C., ch. 44, Table 3, sec. 57.

[3] Foster v. Oxford, etc., Ry. Co., 13 C. B., 200.

[4] Flanagan v. Gt. W. Ry. Co., L. R., 7 Eq., 116; see Aberdeen Ry. Co. v. Blaikie, 1 Macq., 461; see MacDonald v. Riordan, R. J. Q., 8 Q. B., 555, confirmed in Supreme Court; Thomas v. Brownville, etc., Ry. Co., 109 U. S., 522; Munson v. Syracuse Ry. Co., 103 N. Y., 58; Pneumatic Gas Co. v. Berry, 113 U. S., 322.

[5] Sheffield & Manchester Ry. Co. v. Woodcock, 7 M. & W., 574 ; see Regina v. Gaskarth, 5 Q. B. Div., 321.

[6] Neelon v. Town of Thorold, 22 Can. S. C. R., 390.

[7] Thompson Corp., sec. 4068.

The office of director, under the British Columbia Act, becomes vacant if he is concerned in or participates in the profits of any contract with the company; or if he holds any other office or place of profit under the company. This is not the case when the director is a member of a company which has entered into a contract or done any work for the company of which he is

58. Rules as to the bringing of actions to restrain acts of directors.—Where a company is incorporated, and its directors have done or are doing that which some shareholders desire to bring an action to redress or prevent, Sir Nathaniel Lindley in his work on Companies[1] thus summarizes the rules which are to be observed, (and these are substantially the same as require to be observed under the Civil law, and consequently the law of Quebec[2]).

1. If the matter complained of is one which gives a right of action to the company as a collective whole, the company ought to sue in its corporate name, and an action by one member on behalf of himself and others is improper.[3]

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a director; he nevertheless, shall not vote in respect of such contract or work, and if he does so vote, his vote shall not be counted. R. S. B. C., ch. 44, Table A, sec. 57.

[1] At p. 570.

[2] McDonald v. Rankin, S. C., 1890, M. L. R. 7, S. C. 44; plaintiff, in his quality of shareholder in the Consolidated Bank of Canada, and as transferee (cessionnaire) of several other shareholders, brought an action against a director of the bank for damages suffered by reason of the bad administration of the directors. Defendant contended that the right of action by the shareholders against the directors for bad administration belonged to the bank itself, which could abandon its right of action against them; that this abandonment by the bank or the majority of the shareholders would bind all the shareholders and would take from them the right to proceed against the directors in their personal names. With this view the Court concurred, stating that it conformed to the French jurisprudence, and went on to say: "If the corporation or the majority of the shareholders in meeting assembled, had discharged the directors from all responsibility for their administration, I would dismiss the action as having ceased to exist; but this pretension is not founded in fact, and even the defendant did not plead the abandonment of the right of action by the corporation......The only resolution adopted by the majority of the shareholders was that an action should not be instituted in the name of the bank and with its funds. This resolution did not, certainly, take away the right of action from the shareholders; its real object was to let the shareholders sue in their own names if they judged proper." Accordingly plaintiff's right of action was allowed. It was also held that when several shareholders assign their claims to one of their number, not selling them to him, but constituting him procurator *in rem suam*, the defence of litigious rights could not be pleaded, this form of association *ad litem*, *i.e.*, the joinder of several creditors to bring a joint action against the same defendant, being recognized by the civil law. *Ibid*; see also Hamilton v. Desjardins Canal Co., 1 Grant's Ch., 1.

[3] Citing Gray v. Lewis, L. R., 8 Ch., 1035; Russell v. Wakefield Waterworks Co., 20 Eq., 474; thus also McDonald v. Rankin, S. C., 1890, M. L. R., 7 S. C., 44, (Quebec).

2. Again, if the complaint relates to some matter of internal management as to which a majority is competent to decide, the action should be brought by the majority in the name of the company.[1]

3. But if those who have the management of the affairs of the company will not bring an action in its name when the shareholders require it, having a right to do so, or if directors or shareholders have done or are about to do that which is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others, or in the latter case by a member suing alone,[2] may be sustained, for otherwise the dissentients would be without redress.[3]

59. Right of action against directors for fraud or misfeasance.— For acts of fraud or misfeasance, done by directors, whereby an injury to a shareholder has resulted, the latter has an action against the directors on precisely the same grounds as other strangers would have.[4] Strangers have any appropriate remedy against the directors of a company which one man may ordinarily have against another in the ordinary relations of civil society not resting in contract.[5]

When a company becomes insolvent and is being wound up under the Dominion Winding-up Act,[6] then any misfeasance, breach

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[1] Citing McDougall v. Gardiner, 1 Ch. Div., 13; Moseley v. Alston, 1 Ph., 790; Foss v. Harbottle, 2 Hare, 461; and see McDonald v. Rankin, *supra*.

[2] Citing Simpson v. Westminster Palace Hotel Co., 8 H. L. Cas., 712; Russell v. Wakefield Water Works Co., 20 Eq., 474, at p. 481; Hoole v. Great Western Ry. Co., L. R., 3 Ch., 262; thus also McDonald v. Rankin, M. L. R., 7 S. C., 44 (Quebec); where several shareholders assign their claims to one of their number, not selling them to him but constituting him procurator in *rem suam*, the defence of litigious rights cannot be pleaded, this form of association *ad litem*, *i.e.* the joinder of several creditors to bring a joint action against the same defendant, being recognized by the civil law (*Ibid*).

Action prescribed by thirty years, (*Ibid.*)

[3] *Ibid*, and Mason v. Harris, 11 Ch. Div., 97.

[4] Thompson Corporations, sec. 4092; McDonald v. Rankin, M. L. R., 7 S. C., at p. 47; Banque d'Epargne v. Geddes, M. L. R., 6 S. C., 243; Rhodes v. Starnes, 22 L. C. J., 113; see also Bonhomme v. Bickerdike, R. J. Q., 17 S. C., 28, confirmed in Queen's Bench, 24th April, 1900.

Thompson Corp., sec. 4092; Banque d'Epargne v. Geddes, M. L. R., 6 S. C., 243; see Therien v. Brodie, S. C., 1893, R. J. Q., 4 S. C., 23, where it was held that "In the absence of gross fault or fraud, there is no privity between the directors of a company and non-shareholders as regards the public; the directors merely occupy the position of agents of a disclosed principal, viz.: the Company.

[6] R. S. C., ch. 129.

of trust or misapplication of money by the present or past directors is subject to sec. 83 of that Act which gives any creditor, or contributory or liquidator the right to move the Court to investigate the conduct of such director or directors and compel him or them to repay any moneys so misapplied or retained, with interest, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, breach of trust or misfeasance as the Court thinks fit.

60. Responsibility of a director for unlawful acts of the board.— In determining what is sufficient to charge a director with participation in the unlawful acts of the managing body, or of passive negligence in failing to oppose or thwart them, the facts of each particular case must be the controlling factor. A director who was an original party to an unlawful scheme, whereby the funds of the company were dissipated, did not discharge himself from liability by showing that he afterwards went in and protested against it, and did nothing more. He should have called his colleagues together, laid before them his protest in a firm manner, and demanded action upon it, and if necessary, he should have filed a bill in equity to restrain the illegal action.[1] A director who was not a party to the original unlawful transaction, but who signed a cheque, by which part of the moneys were disbursed, in pursuance of it, was in a situation no better; he being under the duty of knowing, his liability is in the same position as though he had done the act with full knowledge.[2] But a director whose only fault was passive negligence, who paid no attention to the affairs of the company; who had but a vague notion of what was going on ; who trusted everything to the other directors, confided in them and took it for granted that everything was all right, was held not liable with the others, though his standing in a court of equity was so poor that he was charged with the costs of the proceedings against himself.[3] If, however, a director does not really exercise his judgment he will be liable.[4] The rule is, in the words of Jessel, M. R., that directors are bound to use all reasonable dili-

[1] Joint Stock Discount Co. v. Brown, L. R., 8 Eq., 381, 402.

[2] *Ibid*, 404, 405, (Brown's case).

[3] *Ibid*, (Gillespie's case); see also Land Credit Co. v. Fernoy, L. R., 8 Eq., 7. See also In *re* National Bank of Wales, C. A. (1899), W .N., 121 ; [1899] 2 Ch., 629.

[4] New Masbona Land Co. (1892), 3 Ch., 577.

gence in the discharge of their duties, having regard to their position, though probably an ordinary director who only attends the board occasionally cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership ; but they are bound to use fair and reasonable diligence in the management of their company's affairs, and to act honestly.[1]

Directors whose sole connection with an improper application of assets is their being present at the directors' meeting which confirms the minutes of the meeting at which the improper application was resolved upon, cannot be thereby held to concur in the improper application.[2]

The mere participation in the passing of a resolution which if carried out would be *ultra vires*, does not involve directors who did not participate in the carrying out of the resolution. They are liable for what they do and not only what they resolve to do.[3]

But while a director is responsible for a want of due care or diligence, he will not be responsible for mere errors of judgment or imprudence which do not constitute either negligence or misfeasance.[4]

The liability of directors is joint and several where all have joined or are presumed to have jointed in the wrongful act, and the plaintiff is entitled to relief against any one of them without making the others parties to the suit.[5] But the rule that there is no contribution among wrongdoers is generally applicable where the parties have been guilty of actual fraud, or of a wilful breach of the law, and not merely where the act is not illegal in itself but merely *ultra vires*. In the latter case there may be contribution.[6]

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[1] Forest of Dean Co., 10 Ch. Div., 452; see also In *re* National Bank of Wales, *supra*.

[2] *In re* Lands Allotment Co. (1894), 1 Ch., 616.

[3] Cullerne v. London, etc., Building Society, 25 Q. B. Div., 485 (Ct. of Appeal), Pickering v. Stephenson, L. R., 14 Eq., 322, commented on and disapproved. A resolution of a board of directors to enter into a contract with a third party gives no right of action to such third party until formally communicated to and accepted by him, (Girard v. Bank of Toronto, 2 L. N., 406, 3 L. N., 115, C. R., 1879).

[4] Marzette's case, 28 W. R., 541.

[5] Attorney-General v. Wilson, 1 C. R. & Ph. 1, 28; Parker v. McKenna, 10 Ch., 96; McDonald v. Rankin, M. L. R., 7 S. C., 44.

[6] Ashhurst v. Mason, L. R., 20 Eq., 225; Ramskill v. Edwards, 31 Ch. Div., 100; and as to Quebec, see Royal Electric Co. v. Wand, 1894, R. J. Q., 5 S. C., 383.

61. Directors' responsibility for wrongful acts of the company.—Directors may be made jointly liable with the company for wrongs or frauds imputable to the company[1] upon an action *ex contractu*,[2] but they are not, as a general rule, responsible for the contracts and torts of the company without some individual fault on their part personal to themselves. In the absence of such gross fault or fraud, there is no *lien de droit* between the directors of a company and non-shareholders. As respects their liability to the public, directors occupy merely the position of agents of a disclosed principal.[3] A director who is a party to a fraud or to the commission of any tort is personally liable.[4]

62. Responsibility of directors for unlawful acts of officers appointed by them.—It is a rule of law common to both systems that an agent is not liable for the wrongs committed by a subordinate agent appointed and controlled by him, where he has the power to appoint such agent, unless the evidence shows that he authorized the wrong, or in some way participated in it; the reason being that the agent doing the wrong is not his agent, but the agent of the common principal. The doctrine of *respondeat superior* does not apply to him but to the principal.[5] Directors have the power, as already seen, to appoint certain officers to perform the routine work of the company; for the malversations of these, the directors, in the absence of gross fault amounting to fraud, are not liable to third parties,[6] but they would be liable to their principals, the company, where they had selected notoriously unfit officers or agents.[7]

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[1] *Re* National Bank, L. R., 10 Eq., 298; and see Quebec & Richmond Ry. Co. v. Quinn, 12 Moore, P. C., 232.

[2] New Brunswick Ry. Co. v. Conybeare, 9 H. L. Cas., 725, 740; Western Bank of Scotland v. Addie, L. R., 1 H. L., (Sc.), 145, 157.

[3] Thérien v. Brodie, R. J. Q., 4 S. C., 23, 25.

[4] Collin v. Thompson's Trustees, 4 Macq., 424, 432.

[5] Art. 1711, Quebec Civil Code; Symes v. Lampson, Q. B., 5 L. C. R., 17; Thompson Corporations, sec. 4097; and see Quebec & Richmond Ry Co. v. Quinn, 12 Moore, P. C., 232.

[6] The widow of an employee sued the directors in damages for the death of her husband, caused by the explosion of a boiler in the company's factory. Held:—That they were not personally liable for the want of attention of those in charge of the boiler at the time of the explosion, although the proof showed a want of that minute, careful and watchful attention to the management of the boilers which the use of such hazardous articles demands. Thérien v. Brodie, *supra*.

[7] Art. 1711, Quebec Civil Code; McDonald v. Rankin, M. L. R., 7 S. C., 44 and 51; Thompson Corp'ns, sec. 4097.

Directors cannot divest themselves of their personal responsibility. While they are at liberty to appoint such assistants as may be required to carry on the business of the corporation, they are nevertheless responsible to the company for the fault and misconduct of the employees appointed by them, unless the injurious acts complained of be such as could not have been prevented by the exercise of reasonable diligence on their part.[1] A director who is acting honestly himself is entitled to trust the officers of the company not to conceal from him what they ought to report to him, if he has no reasonable grounds for suspecting that they are deceiving him.[2] As regards responsibility to third parties, the rule of *respondeat superior* does not apply to the directors, for where they have employed sub-agents to do the company's work, the company is the principal, and is liable for the fraud of the sub-agents.[3] The directors will, however, be liable where they have personally and knowingly derived a benefit from the fraud.[4]

63. Measure of directors' liability for their wrongful acts—Estoppel of shareholders.—It is a rule of the civil as well as the common law that directors of a company considered as its agents are bound to exercise reasonable skill and all the care of a prudent administrator in the management of its business.[5] Nevertheless, if the mandate be gratuitous, the Court may moderate the rigor of the liability arising from the fault of the mandatory.[6] Where, however, the question is one of breach of duty, paid directors are not under the English law entitled to a more favorable view in the eyes of the Court than ordinary unpaid trustees ;[7] and directors are liable for

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[1] McDonald v. Rankin, M. L. R., 7 S. C., 44; Ouderkirk v. Central Nat. Bank, 119 N. Y., 263; Williams v. McKay, 46 N. J. Eq., 52.

[2] *In re* National Bank of Wales, C. A. (1899), W. N., 131; [1899] 2 Ch. 629.

[3] Weir v. Barnett, 3 Ex. Div., 32; affirmed on Appeal, 3 Ex. Div., 238.

[4] *Ibid*; Weir v. Bell, 3 Ex. Div., 238; Court of Appeal not at all unanimous in their opinions.

[5] Art. 1710, Quebec Civil Code; McDonald v. Rankin, M. L. R., 7 S. C., 44; Erskine Inst. Lib., 3 tit., 3 sec. 36, p. 699 ; Paley Prin. & Agent, p. 6 ; Jones Bailment, pp. 61, 62, 114, In *re* New Mashonaland Exploration Co. (1892), 3 Ch., 577.

[6] *Ibid.*

[7] Joint Stock Discount Co. v. Brown, 8 Eq., 381, 396; Parker v. Lewis, 28 L. T., 91, 98.

negligence in performing their duties.[1] "If, acting fairly, honestly and reasonably, they mistake the legal powers of the company, they may not be made answerable. But if they, in fact, know, or with due care ought to have known, that the acts done are beyond the powers of the company, then if they do those acts even in the honest belief of necessity in the interests of the company, they take the risk of the consequences."[2] If, however, circumstances are such that the third persons dealing with them must be taken to have known that these acts were beyond the powers of the company, the directors would not be personally liable.[3] Such acts as allowing overdrafts by insolvent persons without proper security, the impairment of the capital of a bank by the payment of unearned dividends, the furnishing of false and deceptive statements to the Government,[4] the expenditure of the funds of the bank in illegal purchases of its own shares, are acts of gross mismanagement amounting to *dolus malus*, and render the directors personally liable, jointly and severally, for losses sustained by the shareholders by reason thereof.[5] But directors acting only partially *ultra vires* but in the true and reasonable belief that they are acting in the interests of the company, are not chargeable with *dolus malus* or breach of trust merely because in promoting the interests of the company they are also promoting their own, or because they afterwards sell shares at prices which give them large profits.[6]

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[1] General Light Co., Marzette's case, 42 L. T., 206; 28 W. R., 541; McDonald v. Rankin, M. L. R., 7 S. C., 44.

[2] Per Wright, J., in London Trust Co. v. Mackenzie, 3 The Reports at p. 603; 62 L. J. Ch., 870; see *In re* New Mashonaland Exploration Co. (1892), 3 Ch., 577.

[3] Struthers v. Mackenzie, 17 Can. L. T., 166; 28 O. R., 381. An association was forbidden by its act of incorporation to buy goods on credit. The plaintiffs sued the manager, treasurer and directors personally. Held:—They could not recover as they must be taken to have known of the statutory inability. *Ibid.*

[4] In this country at least this would render the offenders liable to imprisonment; see Arts. 365, Criminal Code; 85 and 89. Bank Act, 1890; Regina v. Weir, R. J. Q., 8 Q. B., 521.

[5] McDonald v. Rankin, M. L. R., 7 S. C., 44.

[6] Hirsche v. Sims (1894), App. Cas., 654; 64 L. J. P. C., 1; 11 R., 303.

The measure of damages for issuing fully paid shares at a discount is the difference between the price at which shares were actually issued and their par value; but not the difference between the par value and any higher amount which the shares might have fetched in the market. (*Ibid*).

If directors of a company do acts in a matter in which they have no authority, those acts are null and void ; but if they neglect the acts which are within their authority, and which they ought to perform, neither a Court of law or equity will allow them afterwards to take advantage of their own neglect.[1]

Under Sec. 83 of the Dominion Winding-up Act[2] which makes directors liable if it appear that they have been guilty of misfeasance or breach of trust in relation to the company, they are not chargeable with liability for imprudence unless it has been *crassa negligentia* resulting in loss.[3] And this is the rule aside from the statutory provision made of enforcing rights which must otherwise have been enforced by action.[4]

If a director acting not only beyond his own power but also beyond any power the company confers upon him, part with money of the company, the fact that he acted *bona fide* and with the approval of a majority of the shareholders will not avail him as a defence to an action by the company to compel him to replace the money.[5] This, however, does not apply to acts which the directors have the

[1] Bargate v. Shortridge, 5 H. L. Cas., 297. [2] R. S. C., ch. 129.

[3] *Re* Liverpool Household Stores Assn., 62 L. T. (N. S.), 873; *Re* British Guardian Life Assur. Co., 14 Ch. Div., 335; Marzette's case, 28 W. R., 541; Overend, Gurney v. Gibb, L. R., 5 H. L., 480. In this latter case, Lord Hatherley said, at p. 494: "I should like to say one word as regards the case of Turquand v. Marshall (4 Ch., 376)......I certainly never intended to lay down the strong proposition that a person acting for another as his agent is not bound to use all the ordinary prudence that can be properly and legitimately expected from any person in the conduct of the affairs of the world, namely, the same amount of prudence which, in the same circumstances, he would exercise on his own behalf."

Rolfe, B., in Wilson v. Brett; 11 M. & W., 115, said: "The notion that directors are only liable for 'gross' negligence appears to be unfounded ; no such point was decided in Overend Gurney v. Gibb; *supra*, and it has been said that gross negligence is the same thing as negligence with the addition of a vituperative epithet." See also Grill v. General, etc. Co.; L. R., 1 C. P., 603; National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch., 629.

[4] Buckley Comps., 400; Coventry & Dixon's case, 14 Ch. Div., 660, 670 and 673; Overend v. Gurney, L. R., 5 H. L., 480.

[5] *In re* Faure Electric Accumulator Co., 40 Ch. Div., 141; Cullerne v. London, etc. Building Soc., 25 Q. B. Div., per Lindley, L. J., at p. 490; Pickering v. Stephenson, L. R., 14 Eq., 322; disapproved in this respect.

The liquidator in the winding up of the company can recover from the directors dividends improperly paid by them, even though the creditors of the company have been satisfied. In *re* National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch., 629.

power to do but which they have done erroneously and in an exaggerated manner, but in good faith with the sanction of the company.[1] And where directors have declared fictitious dividends, shareholders who have attended the annual meetings and authorized such dividends after examining statements of the company's affairs submitted by the directors, cannot proceed personally against the directors for damages claimed to have been sustained by them,[2] neither can those shareholders who had a right to attend such meetings, but who absented themselves.

The reports made and accounts rendered by the directors in the course of their duty, though made and issued to the shareholders only, as to the state of affairs of the company, are considered the representations of the company, not only to the shareholders, but to

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[1] Banque d'Epargne v. Geddes, M. L. R., 6 S. C., 243. But see *supra*, page 308.

[2] Banque d'Epargne v. Geddes, M. L. R., 6 S. C., 243; 19 R. L., 684; but see Prevost v. Allaire, 11 L. C. R., 293. In the first case a charitable institution, formed for the relief of the poor, appointed delegates to establish a savings' bank. These delegates elected a president and directors who adopted certain regulations, and among others, one prohibiting any profit to the officers of the institution. Deposits weré received, to be repaid with interest, and promissory notes were discounted upon the credit of individuals. Upon these discounts a percentage was taken by the directors, and a portion of the funds was appropriated to their own use for their services. The bank or business, so established, was ultimately closed, as being insolvent, and a portion of the debts, due as special deposits, were bought up by the directors at a composition in the pound.

Held, in an action of assumpsit against the president and several of the directors, brought by one of the depositors, who had been one of the above mentioned delegates, for the full amount of his deposits ;

1st. That, without reference to the question of fraud, *délit* or *quasi délit*, the president and directors had become traders by mixing themselves up with a commercial banking business, and were jointly and severally liable to each depositor, for the amount of his deposits. And that had the plaintiff approved of the proceedings of the directors, submitted annually at meetings of the depositors, his approval, obtained by means of false statements, could not operate to his prejudice.

2. That the charitable institution had no interest in the matter, and consequently that no action of account, *pro socio* for or against it would lie ;

3. That the president and directors had become a copartnership, or an unincorporated company, and that the action was properly brought against any one or more of them, under the provisions of the Act, 12 Vic., ch. 45. (Mr. Justice Duval and Mr. Justice Badgley dissented from this judgment).

[3] *Ibid;* Banque d'Echange v. Campbell, S. C., 1885, 15 R. L., 373.

the public, if they are published and circulated by the authority of the directors or a general meeting.[1]

64. Responsibility of directors for injuries caused to third parties by their reports to the company.—Directors of a company are personally liable for injury caused to third parties by the false representations contained in a report of the directors to the shareholders, but the injury must be the immediate and not the remote consequence of the representation, and it must appear that the false representation was made with the intent that it should be acted upon by such third persons.[2] But directors are not liable for untrue representations made to the shareholders if they honestly believed them to be true and had at the time reasonable grounds for this belief;[3] and a shareholder cannot claim damages against directors for having been induced to purchase shares, by misrepresentation, if he has continued to hold them without objection long after he had knowledge, or full means of knowledge, of the untruth of the representations on which he bought them.[4]

65. Responsibility of directors to holders of debenture certificates.—Where directors contract to issue debentures which they have no power to issue, and issue invalid debenture certificates, the holders of such certificates will have an action against such directors, on the ground that they held themselves out as having authority to issue them, when in fact they had no such authority.[5] But in the case of of Elkington v. Hunter,[6] in which it was attempted to make the president personally liable on the ground that a resolution had been passed at a meeting at which he presided to issue to the plaintiff certain debentures in payment of goods supplied, when, as a matter of fact, the only debentures available were deposited with the company's

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[1] Rhodes v. Starnes, 22 L. C. J., 113; Parker v. McQuesten, 32 U. C. Q. B., 273; Nature of fraudulent misstatements considered and authorities reviewed in this case.

[2] *Ibid;* Quebec Civil Code, Art. 1053; per Lord Cairns in Peak v. Gurney, L. R., 6 E. & I. App., p. 377; but see per Bramwell, B., in Bedford v. Bagshaw, 4 H. & N., at p. 548.

[3] *In re* National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch., 629.

[4] *Ibid*; See more fully on this subject CHAPTER II., PROMOTION OF COMPANIES.

[5] Fairbanks Excrs. v. Humphreys, 18 Q. B. D., 54.

[6] (1892), 2 Ch., 452.

bankers as security for an overdraft, and could only be available on payment of the amount due the bankers, it was held that the president was not personally liable ; and in this case the previous case of Fairbanks vs. Humphrey, was distinguished.

66. Liability of directors on transfers of shares.—All our statutes contain certain express provisions respecting the liability of directors. For instance, directors are jointly and severally liable for allowing transfers of shares to persons who are not apparently of sufficient means to fully pay up such shares.[1] Any director present when any such transfer is allowed may avoid liability by entering forthwith, and any director then absent within twenty-four hours after he becomes aware thereof and is able to do so, on the minute book a formal protest and publishes a public protest in a newspaper of the locality in which the head office is situated within eight days thereafter.[2]

67. Liability of directors on illegally declaring a dividend.— Directors are also jointly and severally liable for declaring a dividend when the company is insolvent, or the payment of which renders the company insolvent, or impairs the capital stock thereof ; and their liability lies towards the company as well as the individual shareholders and creditors thereof for all the debts of the company then existing, and for all thereafter contracted during their continuance in office, respectively.[3] Directors are also responsible for sanctioning the payment of dividends out of capital, and the liquidator in the winding-up of the company can recover from them the amount of dividends improperly paid by them.[4] But any director may avoid such liability by adopting the precaution alluded to in the preceding section.[5]

68. Liability of directors on lending money to shareholders.— The same joint and several liability exists where the directors make or in any wise assent to a loan by the company to a shareholder (except in the case of loan companies).[6] Their liability exists towards the company,—and also the creditors of the company for all debts of the company then existing, or contracted between the time of the making of such loan and that of the repayment thereof.[7]

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[1] R. S. C., ch. 119, sec. 49. See *Supra*, pp. 109, 164. [2] *Ibid.*

[3] R. S. C., ch. 119, sec. 58. See also CHAPTER V., section. 14.

[4] *In re* National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch. 629.

[5] R. S. C., ch. 119, sec. 58. [6] R. S. C., ch. 119, sec. 59. [7] *Ibid.*

69. Liability of directors for employees wages.—Directors are also made jointly and severally liable to the clerks, laborers, servants and apprentices of the company, for all debts not exceeding six months' wages due for service performed for the company whilst they are such directors respectively ; but no director will 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 ; and the amount unsatisfied on such execution will be the amount recoverable with costs from the directors.[1] The word "servants" as above used does not include higher grades of employment, but is controlled by the word "laborers," which precedes it upon the principal *noscitur a sociis.*[2] Thus a person employed as foreman of works, who hires and dismisses men, makes out pay rolls, receives and pays out money for wages, and does no manual labor, and in addition to receiving pay for his own services at the rate of $5 a day, payable fortnightly, is paid for the use of machinery belonging to him and of horses hired by him, is not a laborer, servant or apprentice within the meaning of the Act, and cannot recover against the directors personally.[3]

70. Liability of directors on documents issued in company's name without word "Limited."—The Acts also contain penalties against directors using or authorizing the use of the company's name on any seal or document which may bind the company, or on any notice, official publication or advertisement, without the word 'limited' after it. The penalty under the Dominion Act is two hundred dollars, and in addition personal liability to the holder of any bill of exchange, promissory note, cheque or order for money, or goods so signed for the amount thereof, unless the same is duly paid by the company.[4] The Ontario Act requires the use of the word "limited" *unabbreviated*, and if such a contraction as "L'td" is used where "Limited" is required, the directors will be held jointly and severally

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[1] R. S. C., ch. 119, sec. 60.

[2] Welch v. Ellis, 22 Ont. A. R., 255, 259.

[3] *Ibid;* and see Coffin v. Reynolds, 37 N. Y., 640 ; Dean v. DeWolf, 16 Hun., 186; Balch v. New York, etc. Ry. Co., 46 N. Y., 521; Wakefield v. Fargo, 90 N. Y., 213.

[4] R. S. C., ch. 119, sec. 79 (4).

liable for the contract entered into.[1] In the case, though, of companies incorporated under the Ontario Act prior to 13th of April, 1897, directors will not be held liable as above for the use of the abbreviated word until after January 1st, 1900.[2] And further this provision is "held to apply and to have applied from the passing thereof to then and now past as well as future cases or transactions, except in any case in which judgment has been heretofore delivered."[3]

71. Liability of directors for publishing prospectus without disclosing contracts with promotor.—It is also deemed fraudulent for the directors to knowingly issue a prospectus which does not specify the dates and names of the persons to any contract entered into by the company or directors thereof, and where the person complaining has taken shares in the company on the faith of such prospectus, and has not had notice of such contract, they will be held liable for the damages caused.[4]

72. Right of director for indemnity for expenses and costs.—Every director of a company, under the Dominion Companies' Act,[5] and his heirs, executors and administrators, and estate and effects respectively, may, with the consent of the company, given at any general meeting thereof, from time to time, and at all times, be indemnified and saved harmless out of the funds of the company, from and against all costs, charges and expenses, whatsoever which he sustains or incurs in or about any action, suit or proceeding which is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him in or about the execution of the duties of his office ; and also from and against all other costs, charges and expenses which he sustains or incurs, in or about, or in relation to the affairs thereof—except such costs, charges or expenses as are occasioned by his own wilful neglect or default.[6]

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[1] R. S. O., ch. 191, sec. 23 (2); Howell Lithographing Co. v. Brethour, 30 O. R., 204.

[2] 61 Vic., ch. 19, sec. 4 (Ont.)

[3] 62 Vic., ch. 11, sec. 20 (Ont.), 2nd session.

[4] R. S. C., ch. 119, sec. 80; Palmer Comp. Law, 242; see CHAPTER II., PROMOTION OF COMPANIES.

[5] *Ibid*, sec. 82. [6] *Ibid*, sec. 82.

73. Penalties for wrongs by directors in connection with company's books.—Directors who knowingly make or assist in making any untrue entry in the company's books, or who refuse or wilfully neglect to make any proper entry therein, or to exhibit the same, or to allow the same to be inspected and extracts to be taken therefrom are guilty of a misdemeanor.[1]

74. Penalty for default to send statements to Provincial Secretary.—Many of the Acts require that the company shall send an annual statement of its affairs to the Provincial Secretary and hold the directors liable to a penalty for wilfully authorizing or permitting the company to default in this respect.[2]

There are other statutory criminal offences which have been dealt with in other chapters.

75. Responsibility of directors after retirement. — When a director resigns his office and his resignation is accepted by the board, his responsibility for further acts of the board is at an end ; so if his name were to appear as one of the directors in reports issued by the board, he having taken no part in their preparation or in advising the business with which they deal, he would not be liable for the statements contained in them, or, if the matter dealt with were the payment of a dividend, the recommendation of the dividend, even though he knew his name appeared in the reports.[3]

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[1] R. S. C., ch. 119, sec. 45.

[2] R. S. O., ch. 191, sec. 79 (7 and 8); R. S. M., ch. 25, sec. 78; R. S. B. C., ch. 44, sec. 38.

[3] *In re* National Bank of Wales, C. A. (1899), W. N., 131; [1899], 2 Ch. 629.

CHAPTER XI.

MINISTERIAL OFFICERS AND AGENTS.

THE PRESIDENT.

1. Powers of president — Ratification — Benefit derived. — The directors shall, from time to time, elect from among themselves a president and, if they see fit, a vice-president of the company ; and may appoint all other officers thereof.[1] As to what acts of the president bind the company and what do not, much that has been already stated in regard to directors is applicable here.[2] Our Joint Stock Companies' Acts do not define the powers of presidents: these are determined by the by-laws, and in many trading corporations their powers are very extensive. They have no more power, however, merely by virtue of their office, than any other director to make promises binding on the company. The facts to be determined are, 1. Whether any by-law authorizes the president to do the particular act and 2. Whether within the apparent scope of his authority, that is to say whether the company has held out the president to the public as being authorized.[3] Where a president acts beyond his own powers but not beyond the powers of the company, the company can always ratify his acts.[4] Mere knowledge by the directors of the act of the president, without repudiating it within a reasonable time, will constitute acquiescence,[5] and any act of a president on behalf of a company by which the company derives a substantial benefit, will be binding on it, if not *ultra vires* of the company, if it retains the benefit.[6] Apart from these cases, however, a president has not *ex officio*

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[1] R. S. C., ch. 119, sec. 33 (f); Ontario Act, R. S. O., 1897, ch. 191, sec. 43 (4); makes no provision for vice-president and contains the additional words, "and may remove at pleasure" before the words "all other officers thereof;" likewise the Manitoba Act, R. S. M., ch. 25, sec. 28 (f); New Brunswick Act, 56 Vic., ch. 7, sec. 31 (6), substantially same as Dominion. The Railway Acts, 1888 (D.), sec. 52, contain the words "and shall hold his office until he ceases to be a director, or until another president has been elected in his stead." When there are conflicting claimants to the position of president of a company and one claimant takes forcible possession of the company's premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the company, though it be uncertain who is the rightful president. (Toronto Brewing & Malting Co. v. Blake, 2 O. R., 175).

[2] *Supra*, pp. 281 *et seq.*

[3] Almon v. Law, 26 N. S., 340.

[4] North-West Transportation Co. v. Beatty, 12 App. cas., 589.

[5] Société de Construction d'Hochelaga v. Soc. de Const. Metrop., 4 Dorion, Q. B. Rep., 199; Indianapolis R. M. Co. v. St. Louis, etc. Ry. Co., 120 U. S., 256.

[6] Bridgewater Cheese Factory Co. v. Murphy, 26 Can. S. C. R., 443; affirming 23 Ont. A. R., 66; Oakes C. W. Co., 143 N. Y., 430; Royal Institution for the Advancement of Learning v. Desriviérs; Stuart's Rep. (K. B.), p. 224; Neelon v. Town of Thorold, 22 Can. S. C. R., 390, and see Art. 1855, Quebec Civil Code. Where the president of an incorporated company made a promissory note in the company's name without authority and discounted it with the company's bankers, the proceeds being credited to the company's

any greater power than any other director to bind the company by independent contract.[1] But in regard to his routine duties, the president possesses such powers as, by usage and necessity, are incident to his office and the usual course of business.[2]

2. Rule as to acts of the president with regard to third persons.— It is submitted, that so far as third persons are concerned, all they have to enquire into when contracting with the president is, whether the contract is within the scope of his implied powers, taking into consideration such by-laws as they are bound to take notice of; and that third persons cannot be presumed to have notice of all the by-laws of a company with which they deal.[3] No doubt, persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement, or articles of association, or, under our Companies' Act, those by-laws which are incorporated with the letters patent and form part thereof;[4] yet strangers to the company

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account, and paid out by cheques in the company's name to their creditors whose claims should have been paid by him out of the moneys which he had previously misappropriated, the bankers, who took in good faith, were held entitled to charge the amount of the note, when it fell due, against the company's account (Bridgewater Cheese Factory Co. v. Murphy, *supra*); Wood v. Shaw, 3 L.C. J., 169; Moore v. Ontario Investment Co., 16 O. R., 269.

[1] Almon v. Law, 26 Nova Scotia, 340; Hodges v. Rutland etc. Ry. Co., 29 Vt., 220; Blew v. Bear River Co., 20 Cal., 602.

[2] See Hatton v. M. P. & B. Ry. Co., M. L. R., 1 S. C., 69, confirmed in Queen's Bench, M. L. R., 1 Q. B., 351; Chicago, etc., Ry. Co. v. Coleman, 18 Ill., 297; Mitchell v. Deeds, 49 Ill., 416.

The president or other principal officer of a corporation, taking a chattel mortgage for and in the name of the corporation, does not act as its agent, but as principal in the exercise of its corporate powers and may therefore make the affidavit of *bona fides* under C. S. U. C., cap. 45, without authority in writing, (Bank of Toronto v. McDougall, 15 U. C. C. P., 475; and see MacMurrich v. Bond Head Harbour Co., 9 U. C. Q. B., 333).

Contract between contractor and directors of an incorporated company signed by the president describing himself as "President Victoria Bridge Co." and by the plaintiff. The plaintiff had received £350 from the company on account. Held that the president was not personally liable upon the agreement, (Johnson v. Hamilton, 13 U. C. Q. B., 211); and see Canada Central Ry. Co. v. Murray, 8 Can. S. C. R., 313, for similar case.

[3] Morawetz Corp., p. 370; L'Hôpital du Sacré Cœur v. Lefebvre, S. C., 1891, 17 Q. L. R., 35.

[4] Ernest v. Nicholls, 6 H. L. Cas., 401; Fountaine v. Carmarthen Ry. Co., 5 Eq., 316, 322.

dealing with its directors or officers cannot be affected by by-laws, which may under the statute or articles of association be from time to time made and varied by the directors, unless notice of such by-laws be proved.[1]

It is not within the apparent scope of a president's power to promise a third person who had a claim against the company for rent that the company would pay the rent,[2] whereupon the landlord refrained from distraining. In another case, where the stock of two companies was owned by the same parties, and desiring to give one an independent interest by bringing in new shareholders, it was agreed that an allowance be made to the enlarged company for loss suffered by it in the past in the purchase of material ; held, that such an agreement could only be proved by a resolution of the directors or by an agreement in writing, and not by the mere verbal evidence of the president of the company about to be charged.[3]

3. Responsibility of company for acts of "de facto" officers.—A corporation is bound by the contracts of its officers *de facto*, acting within the apparent scope of their authority; and it need not be shewn that they have been regularly elected, in order to make their acts binding upon the company.[4]

4. Authority of president implied by certain acts of the company.—If it can be shown that the president acted similarly on other occasions in the company's affairs, and his authority to bind it was recognized by the company, or afterwards did acts recognized by it so as to mislead a third party or to justify him in thinking the president's powers extended to making the company liable on another occasion, then the company would be liable for contracts with such third party as being induced by its representations,[5] although such contracts were not strictly in accordance with the requirements of the company's by-laws.

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[1] Royal Bank of India's case, L. R., 4 Ch., 252; Fairchild v. Ferguson, 21 Can. S. C. R., per Gwynne, J., at p. 489; McEdwards v. Ogilvie Milling Co., 4 Man., at p. 6; see also *infra*, pp. 330, 339.

[2] Almon v. Law, 26 Nova Scotia, 340.

[3] Young v. Consumers Cordage Co., R. J. Q., 9 S. C., 471; confirmed by P. C., reversing decision of Queen's Bench.

[4] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.), 124; and see Toronto Brewing, etc., Co. v. Blake, 2 O. R., 175; Almon v. Law, *supra*; CHAPTER X., sections 19 & 20.

[5] See remarks of Townshend, J., Almon v. Law, 26 N. S., at p. 347, citing Evans Agency; see Thompson Corp., sec. 4626.

5. **Responsibility for commercial paper signed by president or officers.**—Under the Companies Act, bills and notes must be signed in the name of the company, by its agents or officers in the ordinary exercise of the powers conferred upon them under the by-laws of the company ; otherwise the company is not liable, and the agent or officer is personally responsible.[1] Where a note was signed "A. G. Bowes, President Gazette Publishing Co.," it was held in an action against the company on the note, that the action would not lie as the note was made by Bowes, etc., the addition was a mere *designatio personæ*. It would have been otherwise had the signature been "Gazette Publishing Company, A. G. Bowes, Pres."[2] Under the above provisions, where the directors had not been appointed as required by the charter, it was held that authority would be presumed, and that a note signed by the president was good in the hands of a holder in good faith who had given value to the company.[3] The president and secretary of a club are not personally liable for the notes they have signed in the name of the club, although the latter is not authorized by the statute under which it is incorporated to make notes, the want of such authorization being a matter of law which the holder of the notes is bound to know ;[4] and if the association were prohibited by charter from issuing notes at all or accepting drafts, they would not be personally liable for signing them in their own name for the association.[5] Where a contract is entered into by a contractor with the directors of a company, and the contract is signed by the president himself thus "President Victoria Bridge

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[1] See sec. 76, R. S. C., ch. 119.

[2] Canada Paper Co. v. Gazette Pub. Co., 13 Can. L. T., 151. But see Fairchild v. Ferguson, 21 Can. S. C. R., 484; In an action brought by indorsees on a promissory note signed by defendants as president and secretary of a company, the judge of the County Court found that at the date of the note the company was not incorporated, and rejected evidence offered by plaintiff to show that at the time of negotiating the note the company was incorporated; Jardine v. Rowley, 3 Russ. & Geld (Nova Scotia), 244; see Bills of Ex. Act, sec. 26, 90.

[3] Curvier v. Ottawa Gas Co., 18 U. C. C. P., 202.

[4] Bank of Ottawa v. Harrington, 28 U. C. C. P., 488;

[5] Where a co-operative association was prohibited by its act of incorporation from buying goods on credit, and the treasurer accepted drafts for the association for the goods bought by it, he was held not personally liable upon the implied representation of authority of the association as this would be a question of law; Struthers v. Mackenzie, 28 O. R., 381, 17 Can. L. T., 166.

Co.," and the contractor, and the latter receives certain payments from the company, an action will not lie against the president personally for the balance due on the contract. The company alone is bound in such a case.[1] But where the superintendent of a company writes to its president and directors, expressing his readiness to cease his connection with it, on the company's guaranteeing to him the continuance of his salary at the present rate for six months after his retirement, and the president replied as follows on the same date, "We are in receipt of your favor of this date upon the subject of your retiring from the office you now hold under us. We will be happy to meet you in the way set forth ; and we hereby pledge ourselves to carry out the provisions mentioned in your behalf. Signed, Geo. H. Cheney, President, on behalf of myself and the directors of the G. T. T. Co.," it was held that the undertaking in the president's reply amounted to a personal guarantee.[2]

THE SECRETARY.

6. Status and duties of secretary.—The secretary is an officer of the company, and is not merely an officer of the managers or directors by whom he is appointed.[3] The secretary is the keeper of the company's records,[4] and is therefore the proper person to prove its books as a witness.[5] In the Dominion Companies' Act,[6] the expression "manager" includes the secretary and cashier.

7. Responsibility of the company for acts of the secretary—Acquiescence by company.—The fraudulent representation of a company's secretary made respecting debenture stock, was held in an English case not to bind the company,[7] because it was a thing done with private ends in view, the secretary being in league with a person who had been issuing forged debenture stock. But Judge Thomp-

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[1]Johnson v. Hamilton, 13 U. C. Q. B., 211, and see Canada Central Ry. Co. v. Murray, 3 Can. S. C. R., 313.

[2]Boyd v. Cheney, 5 U. C. C. P., 494; Richards, J., diss. See also McDougall v. Covert, 18 U. C. C. P., 119; Simpson v. Carr, 5 U. C. C. P., 326.

[3]Ehrenzeller v. Union Canal Co., 1 Rawle (Pa.), 181, 188; Thompson Corp., sec. 4692.

[4]See sec. 43 R. S. C., ch. 119.

[5]Thomp. Corp., sec. 4695, citing Smith v. Natchez Steamboat Co., 1 How. (Miss.), 479.

[6]R. S. C., ch. 119, sec. 2 (f).

[7]British Mutual Banking Co. v. Charnwood Ry. Co., 56 L. J. Q. B., 449.

son considers this holding obviously unsound.[1] In another English case[2] decided at the same time, a letter of a secretary, in answer to an enquiry from plaintiffs, who were about to advance money to contractors working for the company, defendant, stating that the latter had certain retention money belonging to the contractors, which was not so, was held not to bind the company, it not being within the scope of the secretary's general authority to make such representations.

While the secretary of a company has not usually the power, *ex officio*, to bind the company by means of letters or documents signed officially,[3] yet the company can become bound by ratification,[4] and he may, by the circumstances of the case, be presumed to have had larger powers granted to him than is usually the case.[5] It has been held in a Quebec case that the secretary of an insurance company may consent to the removal of goods insured from the building described in the policy to another building.[6] Judge Thompson in his work on Corporations[7] considers the principle of this holding unsound, unless justified by special facts which the case does not show.

8. Secretary's power to indorse and to accept drafts.—The secretary may, in accordance with the ordinary course of business of the company, indorse its negotiable paper.[8] The evidence of his authority may be shown by proving that he has frequently indorsed such paper, and that his acts in this respect have been ratified by the directors.[9] Netiher the secretary nor the accountant of a company has inherent power to accept drafts upon it.[10]

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[1] Thompson Corp., sec. 4696.

[2] Barnett v. South London Tram. Co., 56 L. J. Q. B., 452.

[3] Common v. Mathews (1898), R. J. Q., 8 Q. B., 138, 141; Williams v. Chester etc. Ry. Co., 5 Eng. L. & Eq., 497.

[4] N. E. Ins. Co. v. DeWolf, 8 Pick. (Mass.), 56; Fawcett v. New Haven Organ Co., 47 Conn., 224.

[5] Salt Lake Foundry etc. Co. v. Mammoth Min. Co., 6 Utah, 351, S. C., 23 Pac. Rep., 760.

[6] Chalmers v. Mut. Fire Ins. Co., 3 L. C. J., 2.

[7] Sec. 4697, note 11.

[8] Wood v. Shaw, S. C., 1858, 3 L. C. J., 169; Dunlap's Paley, 155, 6, note 1; Storey on Agency, secs. 50, 52, 53; see Jardine v. Rowley, 3 Russ. & Geld (Nov. Sco.), 244.

[9] *Ibid.*

[10] Ryan v. Montreal & Champlain Ry. Co., 4 L. C. J., 38 (Q. B., 1859).

MANAGER OR MANAGING DIRECTOR.

9. Status of manager.—The manager of a company is a mere employee of the board of directors, has no franchise in his office, but holds it like any other agent or servant, subject to the terms of the particular contract under which it is assumed.[1]

10. Power of manager to bind company—Proof.—As to a managing director, such personage would have no power whatever, merely as director to act as agent of the company and bind it alone.[2] Whatever power he may have to bind the company by his acts must be derived from his position as manager, which may be proved from his written appointment or the fact that he has long and openly acted in that capacity without objection, and if his services as such have been invariably accepted.[3] The law commits the management of companies to a board of directors, and while there may be much routine business that is managed by one or more under the name of managing director or some other name, the company is not bound in matters out of the ordinary course, by any other than the regularly constituted authority.[4]

11. Manager must act in general accordance with the powers given him—Examples.—In referring to contracts entered into by the manager or any agent or officer of a company, attention should first be directed to clause 76 of the Dominion Companies' Act, which is also to be found in all our Provincial Acts. This is a statutory enactment of which third parties are presumed to have notice.

Under this clause the manager or any agent or officer of the company may make, without attaching the seal of the company, a contract and make and accept bills and notes on behalf of the company and not be individually liable thereon. But it is to be noted, the act is to be done in general accordance with his powers as such under the by-laws of the company, although the other party to the contract need not prove that it was in pursuance of the by-laws. This means that when it is sought to make the company liable on a contract made by such officer or agent, something more must be shown

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[1] Thompson Corp., sec. 4847.

[2] See *supra*, p. 283.

[3] Canada Central Ry. Co. v. Murray, 8 Can. S. C. R., 314; Walker v. Detroit etc. Ry Co., 47 Mich., 338.

[4] Hamilton & Port Dover Ry. Co. v. Gore Bank, 20 Grant's Ch., at p. 195, per Spragge, C.

than that the person signing occupied the character or position he professed to hold. It should be shown that his act was in general accordance with the powers or duties conferred on him by the constitution or governing body. If in such general accordance, it would be unnecessary to prove a strict pursuance thereof. A reasonable latitude would be permitted in the exercise of the powers.[1] Although the contracting party need not prove that the contract entered into was in strict compliance with the by-laws, yet if not under seal he must prove that it was in general accordance with the powers conferred upon the officer making it.[2] There are some acts the doing of which devolve by statute upon the directors, through the medium of by-laws ; of these statutory provisions the public are bound to take notice. For instance, the directors may make by-laws for the appointment of the company's agents, officers and servants, and unless such by-law has been passed permitting the manager to appoint agents to the company, he could not do so, for this is not within the scope of his duties.[3] The appointment of a special agent for the sale of the company's products upon commission, is not such an agent within the meaning of the above statutory provision,[4] as would require to be appointed by by-law, but even such an appointment is beyond the powers of the manager where it extends to a lengthy period, for instance, five years.[5]

12. Power of manager of trading company to bind it.—It is generally acknowledged that the manager of a trading corporation

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[1] See Taylor v. Cobourg etc. Ry. & Mining Co., 24 U. C. C. P., per Hagarty, C. J., at p. 208.

The defendants, by resolution of the board of directors, authorized their manager to purchase from the plaintiff, on certain terms of credit, a machine necessary for the carrying on of the defendant's business. The defendant's manager bought the machine, but on different terms, the plaintiff having no knowledge of the board's resolution; and the defendants received and used the machine : Held, reversing Meredith, J., in part, that the purchase was within the scope of the manager's authority and that the defendants were liable for the price of the machine. Thompson v. Brantford etc. Co., 25 O. A. R., 340.

[2] *Ibid.* [3] *Ibid.* [4] *Ibid.*

[5] *Ibid*; A company being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due to the company, the costs of which, as between attorney and client, the company was to pay. Held, that the officers of the company had authority without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. (Hamilton & Port Dover Ry. Co. v. Gore Bank, 20 Grant's Ch., 190).

has power to bind the company by contracts within the ordinary routine of business.[1] The depositing of goods of a company in a warehouse, and the raising of money on the security thereof, may be an important constituent for the successful prosecution of a company's business, and such a matter as would fall within the competence of the directors to cause to be done through their manager; and where this is the course of dealing in a company, the company will be considered as having held the manager out as possessing such powers.[2] Where the by-laws authorize the general manager to compromise claims and to do other acts which would occasionally require legal advice, he may retain a solicitor whenever it is in his judgment prudent to do so.[3] This authority, however, would cease upon the suspension of the company.[4] The retainer need not be under the corporate seal.[5]

13. Rule as to strangers dealing with manager.—In accordance with what has already been said, an innocent stranger, dealing with the corporation through an agent, will not be affected by any limitation of his authority contained in the by-laws or other private instruments of the company, of which he has no notice.[6] Therefore, what a stranger has to consider in entering into a contract with the manager, acting on behalf of the company is, whether the contract is one within the scope of a manager's ordinary duties, and if not within such scope he should ascertain whether there is a by-law empowering the manager to enter into such contract, or, what would amount to the same thing, whether the company has always held the manager out as having such power, by adopting and acquiescing in such contracts in the past. And further, if the company, having received

[1] Story on Agency, 9th Edit., p. 57, sec. 53; Pollock on Contracts, 2nd Edit., p. 133; South of Ireland Colliery Co. v. Waddle, L. R., 3 C. P., 463; Thompson Corp., sec. 4849.

[2] Merchant's Bank of Canada v. Hancock, 6 O. R., 285.

[3] Clarke v. Union Fire Ins. Co., 10 Ont. P. R., 339.

[4] *Ibid.*

[5] *Ibid.*

[6] *Supra*, p. 323; and see Hamilton Coal Co. v. Bernhard, 40 N. Y. St. Rep., 875. Where a company's directors passed a resolution authorizing the manager to purchase a machine, which he did, but on different terms from those prescribed by the resolution, the seller having no knowledge of this resolution, it was held, reversing in part, Meredith, J., that this purchase was within the scope of the manager's authority, and that the company was liable for the price of the machine. Thompson v. Brantford etc. Co., 25 Ont. A. R., 340.

the benefit of an *intra vires* contract, entered into on its behalf by the manager, ratifies such contract and adopts it, it cannot afterwards repudiate it on the ground that the manager had exceeded his powers, or that he had contracted in his own behalf as contractor for the construction of the company's works.[1]

14. Difficulties of determining if contract be made on behalf of the company or of a contractor, etc., constructing its works—Examples. —It is clearly a question of very considerable difficulty in some instances to determine whether a contract is entered into on behalf of a company, or on behalf of a contractor constructing the company's work, as instanced in the Supreme Court Case of Canada Central Railway Co. v. Murray.[2] This action against the railway company turned upon an agreement entered into by one F. with T. & W. M. for the fencing of a railway. The agreement was signed by T. & W. M. of the one part and F. of the other part. It appeared that F. controlled nine-tenths of the stock and publicly appeared to be and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. & W. M. built the fence and the railway had the benefit of it. Upon the trial before a jury, the latter found that T. & W. M. when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to F., and a general verdict was found for T. & W. M. for the amount of their claim. On appeal to the Supreme Court of Canada, it was held, affirming the judgment of the Court below, that it was properly left to the jury to decide whether the work performed, of which the railway company had received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence. [Ritchie, C. J., and Taschereau, J., dissented from this judgment, on the ground that there was no evidence that F. had any authority to bind the company, T. & W. M. being only sub-contractors, nor evidence of ratification.] The Court also held that although the contract was not under seal, the action was maintainable.

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[1] Canada Central Ry. Co. v. Murray, 8 Can. S. C. R., 313, 334.

[2] *Ibid.*

Cases of this kind, unless very clear, properly form questions for the jury. In an Ontario case[1] the plaintiff had furnished lumber for putting up sheds, pens, etc., on the occasion of the Provincial Agricultural meeting at Hamilton, and had done work in preparing the required accommodation. The defence was, that the society which is an incorporated body, was liable and not the defendant individually. There was evidence to show that the defendant was one of a committee, who undertook to superintend the preparations, and the learned judge left it to the jury to find whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable ; but the jury were told that if he contracted only as representing or on behalf of the corporation, then he would not be personally liable. On motion for new trial, the verdict being for the plaintiff, it was held that the ruling of the learned judge at the trial was correct.

There is another Ontario case bearing much resemblance to the above case of Canada Central Railway Co. v. Murray. This is the case of McDougall v. Covert.[2] This was an action against the president and the managing director of a railway company for breach of an agreement to carry lumber on the line at a stipulated price. At the date of the agreement the president and managing director of the main line were also lessees of the branch line which formed part of the line for which the agreement was made. By reason of the company having been long insolvent the main line had been solely within defendant's control, as principal bondholders of the company; and what they did personally was in substance, therefore, done on the company's behalf. The jury were asked to find whether the agreement was made by defendants acting as agents for and directors of the company, of which plaintiffs had notice; and having found in the negative and assessed damages in favor of plaintiffs, the Court refused to interfere with their verdict, as contrary to law and evidence, by granting a new trial.

15. Power of manager to bind trading company by note for goods bought—Parole evidence.—It is competent for the manager of a trading company to bind the company by a promissory note given by him in the name of the company for goods delivered to the company in the course of its business.[3] If there is any ambiguity as to

[1] Simpson v. Carr, 5 U. C. Q. B., 326. [2] 18 U. C. C. P., 119.
[3] Fairchild v. Ferguson, 21 Can. S. C. R., per Gwynne, J., at p. 487.

whether the note is the personal note of the manager or made on behalf of the company, parole evidence of all the circumstances surrounding the making of the instrument, as to the intent with which, and the consideration for which, it was executed, is admissible.[1] Where the manager of a company, in payment for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay," and signed "R., Manager O. L. Co.," it was held by the Supreme Court that as the evidence established that both R. and the payees of the note intended to make the company liable, and as R. had authority, as manager, to make a note on which the company would be liable, and as the form of the note was sufficient to effect that purpose, the manager could not be held personally liable, but that the company itself was liable.[2]

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[1] *Ibid*; Lindus v. Melrose, 2 H. & N., 293; Young v. Schuler, 11 Q. B. Div., 651.

[2] Fairchild v. Ferguson, *supra*; see also Madden v. Cox, 5 Ont. A. R., 473; Gilbert v. McCannany, 28 U. C. Q. B., 389; Robertson v. Glass, 20 U. C. C. P., 250; City Bank v. Cheney, 15 U. C. Q. B., 400; Bank of Montreal v. Smart, 10 U. C. C. P., 15.

Under the terms of the following letter, the signer was held to have intended to make himself, and was personally, liable.

"Messrs. R. & B., Gentlemen: We, the undersigned, acting as director and secretary of the Montreal Omnibus Co., hereby agree to see the account that Brown & St. Charles have against the company duly settled, provided the said account shall be made out and agreed upon as either the Court or arbitrators appointed shall decide. Signed, R. Kerr, as President of the Montreal Omnibus Co."

Although the above letter was evidently incomplete, having been intended to be signed by more than one individual, yet the signer waived the right he might have had to treat it was an incomplete document by signing and delivering it to the plaintiff's agents. (Kerr v. Brown, Q. B., 1878, 23 L. C. J., 227).

L. arranged with the Canada Agency Association, an English company, investing money in Canada, and having defendant R. as their manager, and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L., and the expenses, etc., the manager sent to L.'s order a cheque for the balance signed by R. and H., the defendants. L. having made a claim for a larger amount, brought an action against R. and H. to recover the amount he claimed to be due him. Held, that the defendants were not liable as they never received any money to the use of the plaintiff, having no control over the money except as manager and director of the Canada Agency Association, and were in no wise acting as individuals on their own behalf, but solely as officers of the company. That the evidence did not establish any privity between the plaintiff and the defendants in respect of the money claimed, and without such privity the action would not lie. (Heward v. Logan, 14 U. C. C. P., 592).

16. Necessity of corporate seal on contracts by the company—Examples.—In consequence of clause 76 of the Dominion Companies' Act and a similar clause in all the Provincial Companies' Acts, which states "and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, etc.," the vexed question of the necessity of a corporate seal on corporate contracts is largely done away with. It has been generally considered that the engagement of a superior servant or official must be under seal,[1] but otherwise in the case of an inferior servant.[2] It then became a very delicate question to determine who were superior and who inferior servants. A civil engineer was considered a superior servant.[3] A clerk engaged for $800 per annum, having important duties to perform and his engagement being for a somewhat extended period, was held to be a servant whose engagement must be under seal.[4] A timekeeper was not a superior officer.[5] These decisions are entirely at variance with an early Manitoba case[6] which professed to follow the line of English decisions to the effect that contracts for purposes connected with the objects of the incorporation need not be under seal, and that the engagement of a chief engineer to supervise the construction of the line of railway was such a contract.[7]

So far as our Joint Stock Companies' Acts are concerned, it has been held that the appointment of a manager by two directors of a company, who were in the habit of hiring all the company's officers, did not require a seal, but could be by parol.[8] In this case Mr. Justice Taylor of the Manitoba Queen's Bench thought that "the plaintiff having been hired by those officials who hired all the persons holding positions similar to that of the plaintiff (local manager) there was evidence to go to the jury as to whether the contract had not been made by an agent, officer or servant of the company in

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[1] Armstrong v. Portage, Westbourne & N. West Ry. Co., 1 Man., 344, (1884), Q. B.

[2] *Ibid.* [3] *Ibid.*

[4] Hughes v. The Canada Permanent Loan & Savings Soc., 39 U. C. Q. B., 221.

[5] Gordon v. Toronto Man. & N. West Land Co., 2 Man., 318.

[6] Murdoch v. Manitoba S. W. Colonization Ry. Co., Man. Q. B. Rep., Temp. Wood, p. 334.

[7] *Ibid.*

[8] McEdwards v. The Ogilvie Milling Co., 4 Man., 1.

accordance with his powers as such officer under the by-laws of the company, or otherwise."[1]

Mr. Justice Killam thought that from the mere fact of acquiescence in the exercise of such powers (by the official) or from the acquiescence of the company in the plaintiff's appointment, it may be inferred that all formalities necessary to give the official authority to make the appointment had been duly observed.[2]

17. **Power of company to dismiss manager.**—Although most of the Companies' Acts provide that "The directors shall, from time to time, elect from among themselves a president of the company; and may also appoint and remove at pleasure all other officers thereof," this does not apply to any officers but only to the principal officers usually found with a joint stock company, such as vice-president, secretary, etc. It would not appear to apply to the case of a manager.[3] And if a manager were dismissed under such a clause, the authority must be strictly pursued, and could be exercised only at a regular meeting of directors.[4]

18. **Causes which justify the dismissal of manager.**—A manager may be dismissed for drunkenness, but what degree of drunkenness will justify his dismissal is a question for the jury.[5] And where by the terms of engagement a manager of a mercantile agency binds himself to devote his whole time, influence, and talents to the successful prosecution of the business, being paid a salary of $5000, the failure of either party to keep their respective agreements, to render the contract void; if under these circumstances a general manager speculates in margins in the stock and grain exchange, through brokers and "bucket shops," thus sinking all his private means, and becoming indebted beyond his ability to pay, and also enters into speculations with various merchants, whose ratings he fails to alter, although in his judgment transactions of that nature materially affect the credit of those engaging in them, his dismissal will be justifiable, especially where he refuses to give up speculating when requested.[6] Insolence and insubordination on the part of a

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[1] This was the language of the particular Statute. The Dominion Act does not contain the words "or otherwise." As to the effect of these words see 4 Man., at p. 7.

[2] McEdwards v. The Ogilvie Milling Co., *supra*. See also pp. 341 *et seq.*, *infra*.

[3] *Ibid*, at p. 8 and 9. [4] *Ibid*, at p. 9. [5] *Ibid*.

[6] Priestman v. Bradstreet, 15 O. R., 558; see also Pearce v. Foster, 17 Q. B. Div., 536.

manager of a company towards the directors, has been held a sufficient cause to justify his dismissal by the directors without notice.[1]

19. Receiver: His duties.—When certain companies become insolvent the Court can appoint a receiver at the instance of the bondholders to give effect to their mortgage. In this country the duties of a receiver are merely to superintend and control the finances of the company and account to the Court for the same; the management of the company is not interfered with, but is left to the board of directors as usual, or in the hands in which the legislature has placed it.[2]

20. Position of an undertaking when Court assumes management.—Where the Court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant and officer of the Court, and upon any question arising as to the character or details of the management, it is the Court must direct and decide. Managers, when appointed by the Court, are responsible to the Court, and no orders of any of the parties interested, in the business over which they are appointed managers, can interfere with this responsibility.

The Court will in no case assume the management of a business or undertaking except with a view to the winding-up and sale of the business or undertaking.. The business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends.[3] If a company is brought under the Winding-up Act,[4] a winding-up order having been granted by the Court, then the liquidator may, with the approval of the Court, and upon previous notice to the creditors, contributories, shareholders or members, carry on the business of the company as far as is necessary to the beneficial winding-up of the same.[5]

21. Liability of manager appointed by debenture holders.—Sometimes the debenture holders appoint trustees to carry on the

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[1] Dick v. Canada Jute Co., S. C., 1886, 30 L. C. J., 185.

[2] Abbott's Ry. Law, pp. 130, 131.

[3] Kerr Receivers, 2nd Amer. Edit., p. 277; see Bartlett v. West Metropolitan Tramways Co. (1893), 3 Ch., 437, appointing manager of Tramway Co. No manager can be appointed by the Court to a railway company in this country. (Allan v. Man. & N. W. Ry. Co., 10 Man., 106), but this holding appears doubtful in view of the amendment of the railway law, and in the light of Bartlett, N. West Metrop. Tramway Co., *supra*.

[4] R. S. C., ch. 129. [5] *Ibid*, sec. 31; see also CHAPTER XIII., post.

business for their benefit, and if they appoint a manager to manage the business, the question whether he has undertaken any personal liability in the conduct of the business is a question of fact in each case, and it is immaterial whether such person is or is not called a receiver.[1]

22. Position of paid managing director.—The position of the managing director rendering services for which remuneration is given, is not that of a servant hired by the company. His position is aptly defined as a working member of the company who gets paid for the work he does.[2] The rules as to hiring and notice between master and servant are therefore not applicable and the measure of the rights of the salaried managing director is to be settled by what is provided in that behalf by the charter and by-laws of the company.[3]

23. Right of managing director to remuneration for services.—Outside of the provisions of the by-laws and charter of the company no remuneration is recoverable. Thus where a by-law provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting," and the only provision made at a general meeting was as follows : "The salary of the managing director was fixed until October 31 next (1883), as at the rate $4,000 per annum," the managing director could not recover for services rendered subsequent to October 31, 1883.[4] If he should, after that date, appropriate moneys of the company to himself in payment of his services, this would constitute a breach of trust.[5]

24. Right of bank cashier to discount paper of company in which he is interested.—Any one standing in the position of an agent cannot be allowed to put his duty in conflict with his interests.[6] But this would not apply to the case of a bank manager and cashier who discounts bills for the benefit of companies with whom he is connected, and in which he is interested, if it appears that the tran-

[1] Owen v. Cronk (1895), 1 Q. B., 265, 14 R., 229.

[2] *In re* Leicester Club & County Racecourse Co., 30 Ch. Div., at p. 633.

[3] *Re* Bolt & Iron Co., 14 O. R., at p. 216; confirmed in appeal, 16 Ont. A. R., 397.

[4] *Ibid.* [5] *Ibid.*

[6] Bank of Upper Canada v. Bradshaw, P. C., 1867, 4 Moore (N. S.), at p. 420.

sactions were in the ordinary course of business of the bank, that he has not exceeded the power and authority with which he was intrusted, and that no case of bad faith can be proved against him.[1]

25. Power of directors to appoint subordinate agents.—The power of directors to appoint subordinate agents, and to make contracts with them touching their compensation and the tenure of their agency, is not open to question.[2] For many purposes the officers and agents of the company may employ persons to perform service for it, and such employment, being within the scope of the agent's or officer's duty, binds the corporation.[3]

26. Liability of company for acts of its agents—"Holding out" doctrine—Ostensible authority—Damages—Reputed agents.—Corporations are bound by the acts of their agents, the same as natural persons.[4]

Judge Thompson aptly points out, in his work on Corporations[5] that the central principle which governs the subject of agency, and which is often lost sight of, is that one man can never be made civilly answerable for the acts of another man unless he has, first, clothed him with power to do those acts ; or second, clothed him with power to do acts which include those acts ; or, third, allowed him, through negligence or otherwise, to possess, in the face of the public, the appearance of such power. In every such case the power really emanates from the principal.

A person dealing with an agent of a company must take notice of what that agent's powers are.[6] For instance, in the case of managing officers and general agents, these are held out by the company as having powers commensurate with the general usage of the business.[7] But such powers could not be ascribed to inferior officers

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[1] *Ibid.*

[2] McEdwards v. The Ogilvie Milling Co., 4 Man., 1.

[3] Quebec & Richmond Ry. Co. v. Quinn, P. C., 1858, 12 Moore, 232 ; Thompson v. Brantford etc. Co., 25 O. A. R., at p. 345, per Burton, C.-J. O.

[4] New Brunswick & Canada Ry. Co. v. Conybeare, 9 H. L. Cas., 711.

[5] Sec. 4884.

[6] Bryant, Powis & Bryant v. Banque du Peuple (1893), App. Cas., 170.

[7] Thompson Corps., sec. 4892, citing Minor v. Mechanic's Bank, 1 Pet. (U. S.), 46, 70; Fulton Bank v. New York etc. Canal Co., 4 Paige (N. Y.), 127.

A company's agent or officer wrote promising to convey land to the defendants for the purpose of erecting a sawmill thereon. Held, that a mere letter by the officer permitting the erection of the sawmill on the land could not be construed as a license to the defendant to overflow the plaintiff com-or special agents.[1] And an agent can never be presumed to be clothed with powers in conflict with the charter or governing instrument : of these the third party must take notice, but not of the private by-laws of the company.[2]

In regard to those agents who are not the general agents of the company or its managing officers, persons dealing with them must enquire as to the extent of their authority,[3] in the absence of their being held out by the company as possessing the powers which it is sought to attribute to them ; and this authority whether given by a written power of attorney or inferred from a train of circumstances, must be construed strictly.[4]

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pany's land to any extent necessary for working his mill, without showing that the probable effect of building the mill and putting up the dam, was known to and contemplated by the parties at the time.

Held also, that the plaintiffs, as a corporation, could not be bound, with respect to such an injury as was shown in this case, by anything done by their ordinary agents, without special authority. (Canada Company v. Pettis, 9 U. C. Q. B., 669).

The manager and agent of an insurance company has no power as such to insure a house against fire, and to give delay for the payment of the premiums. (Montreal Assurance Co. v. McGillivray, 13 Moore, Privy Council, 87).

In a case where a promissory note was given for the premium of a fire policy, which was never issued, and the building was destroyed by fire after the note had become due and dishonoured, the Privy Council held that the insured could not recover, as the powers of the manager and agent, being public must be taken to have been known to the insured, and that the acts of the manager and agent in the transaction were *ultra vires* and void, not being within the general scope of his authority as such and, therefore, not binding upon the assurance company, (*Ibid*).

[1] *Ibid.*

[2] *Supra*, pp. 323, 330; Boudousquie de l'Assurance, No. 85; Commercial Bank of Canada v. Great Western Ry. Co., 3 Moore, P. C. (N. S.), at p. 314.

[3] Bryant, Powis & Bryant v. Banque du Peuple (1893), App. Cas., 170.

[4] *Ibid*, S. C., 1891, 17 Q. L. R., 103, confirmed in Privy Council as above cited.

Under a power of attorney given by the Tobique Mill Company to their agent, to manufacture logs into lumber at the mills, and transport the same to market and sell, and dispose thereof for the company's benefit; Held, that the agent was not authorized to deliver over the lumber at the mills without the knowledge of the directors in payment of securities given by him, on behalf of the company, for debts contracted in the course of his agency. Such delivery vests no property in the creditor. (Lombard v. Winslow, 1 Kerr (N. B.), 327).

An agent who is authorized by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto, If the company holds its agent out as having authority to do a specific act, then it is bound by that act, if it is within the scope of his general and ostensible authority, notwithstanding it may exceed the private instructions as between the principal and the agent; provided, however, that such private instructions are not known to the third person.[1]

It is important to note that where an agent has authority, his abuse of it does not affect a third person dealing with him in good faith.[2]

Thus "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constitutent, as to all persons dealing in good faith with the agent: such persons are not bound to enquire into facts *aliunde*. The apparent authority is the real authority."[3]

Thus a company is responsible in damages or otherwise for the fraud, deceit and wrong of its agent committed in the course of the service and for the company's benefit, though no express command or privity of the principal be proved.[4] And a company will be liable to an action for libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or wherever the company has expressly authorized or directed such publication.[5] But no authority can be inferred in

to do certain specified acts, including indorsement of bills and other acts for the purpose therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power. (Bryant, Powis & Bryant v. Banque du Peuple (1893), App. Cas., 170). But a power of attorney to draw and accept bills and notes includes the power to make and sign promissory notes. (Quebec Bank v. Bryant, Powis & Bryant, 17 Q. L. R., 78)).

[1] Montreal Assurance Co. v. McGillivray, P. C., 1859, 13 Moore, 87, 124; Bryant, Powis & Bryant v. Banque du Peuple, *supra*; see also Allen v. Ontario etc. R. W. Co., 29 O. R., 510.

[2] Bryant, Powis & Bryant v. Quebec Bank (1893), App. Cas., 170; Thompson v. Brantford etc. Co., 25 O. A. R., at p. 345, 347.

[3] Farmers and Mechanics Bank v. Butchers and Drovers Bank, 16 N. Y., 141. Approved in Bryant, Powis & Bryant v. Quebec Bank, *supra*, but wrongly attributed to another case.

[4] Mackay v. Commercial Bank of New Brunswick, L. R., 5 P. C., 394; Moore v. Ont. Investment Assn., 16 O. R., 269.

[5] Odgers Libel & Slander, p. 368; Carroll v. Penberthy Injector Co., 16 Ont. A. R., 446; Tench v. Gt. West. Ry Co., 32 U. C. Q. B., 452; Browne v. Le Maire etc., 17 L. C. J., 46; Quebec Civil Code, art. 356.

a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel, by his mere admissions to any person that he had published a libel on another person by their authority.[1] And where the occasion is a privileged one, it has been doubted whether express malice can be imputed to the corporation to take the case out of the privilege;[2] but the better opinion would appear to be that it can,[3] for an action for deceit will lie against a corporation.[4] An action for libel may be brought by one corporation against another.[5]

Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with him *bona fide*, and without notice of the irregularity in his appointment.[6] And the Courts have gone so far as to hold that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed.[7]

27. Necessity of company's seal to contracts.—The vexed question of the necessity of the company's seal being attached to all its important contracts has already been touched upon.[8] It is undoubted that the law of England was, and to a large extent now is, that in regard to all contracts which are of ordinary occurrence in the particular business of a company, the corporate seal is not required but that it is required in matters of unusual and extraordinary character, which are not likely to arise in the routine of business.[9] This rule was strictly adhered to in those provinces of Canada which have followed most closely the legal tradition of England. Thus in an early New Brunswick case a company was held not liable on an executed contract entered into on its behalf by its agent for the

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[1] Carroll v. Penberthy Injector Co., *supra*.

[2] Freeborn v. Singer Sewing Machine Co., 2 Man., 253.

[3] Odgers, p. 368; Tench v. Great Western Ry. Co., 32 U. C. Q. B., 452; Moore v. Ontario Invest. Ass'n., 16 O. R., 269; and see article on "Malicious Corporations," 15 Can. L. T., 293.

[4] Moore v. Ontario Investment Ass'n, 16 O. R., 269.

[5] L'Institut Canadien v. Le Nouveau Monde, S. C., 1873, 17 L. C. J., 296.

[6] Lindley Comp., 159.

[7] *Ibid*; Allen v. Ontario etc. Ry. Co., 29 O. R., 510.

[8] *Supra*, sec. 16, p. 334.

[9] Broom's Common Law, p. 564; see Lindley Comp., 226.

delivery of a large quantity of logs at its mill, the contract not being under seal, and hence the presumption that the agent was authorized to make the contract and that the contract was the contract of the company, which the presence of the seal would have afforded, was absent.[1] The Courts of Ontario early departed from this view in one important respect: the case of executed contracts was taken out of the rule requiring a seal,[2] and this is now the law of the Dominion in respect of the English law provinces.[3] In regard to executory contracts, the most enlightened rule is that adopted by Pollock, B., in the Australian Steam Navigation Co. v. Marquette,[4] and approved by Gwynne, J., in the Bernardin case,[5] viz.:—" It is now perfectly established by a series of authorities, that corporations may, with respect to those matters for which they are expressly created, deal without seal : This principle is founded on justice and public convenience, and is in accordance with common sense."[6] But if the contract be not made in pursuance of the charter or act of incorporation, the contract, to bind the company, must be under seal.[7] That the latter words of Pollock, B. quoted above are justified is evidenced by the law of the Province of Quebec, which never required the presence of the corporate seal to corporate contracts, which is in accord with the general law governing the form of contracts in that Province.

In respect of those matters which are not within the ordinary scope of the corporate charter, no action can be maintained upon parol agreements entered into on behalf of the corporation, unless it has retained the benefit of the agreement.[8]

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[1] Seelye v. Lancaster Mill Co., 3 N. B. (1 Kerr), 377.

[2] See Pim v. Municipal Council of County of Ontario; 9 U. C. C. P., 302 and 304; Clark v. Hamilton & Gore Mechanics Institute, 12 U. C. Q. B., 178.

[3] Bernardin v. Municipality of North Dufferin, 19 Can. S. C. R., 581; Canada Central Ry. Co. v. Murray, 8 Can. S. C. R., 333; Forrest v. G. N. W. Central Ry. Co., 12 Man. L. R., 472; 19 Can. L. T., 152.

[4] 11 Ex., 228. [5] *Supra.*

[6] To this effect Calvin v. Provincial Insur. Co., 20 U. C. C. P., 267; Whitehead v. Buffalo & Lake Huron Ry. Co., 7 Grant's Ch., 351; Thompson v. Brantford etc. Co., 25 Ont. A. R., per Burton, C. J. O., at p. 345. This is also the law of the United States, which goes still further. (Dillon Mun. Corp., 4th Edit., sec. 192; Cook Stockholders, sec. 721).

[7] Garland Manfg. Co. v. Northumberland etc. Co., 19 Can. L. T., 274, 31 O. R., 40.

[8] Hamilton v. Niagara Harbor & Dock Co., U. C. Q. B., 6 O. S., 381; Great Western Ry. Co. v. Preston & Berlin Ry. Co., 17 U. C. Q. B., 477.

28. Effect of seal.—It is to be noted, per *contra*, that even if the corporate seal be affixed to a contract, this is only a presumption of corporate authority to make the contract, for if the corporation can prove that the seal had been affixed in disregard of some statutory formality or injunction, which is not merely directory but indispensable as a condition precedent to the affixing of the seal, the contract cannot be enforced against the corporation if executory.[1]

In all our Joint Stock Companies' Acts[2] the modern view has been adopted, as instanced by section 76, for example, of the Dominion Act.

29. Ratification by company of act of agent.—A corporation, like an individual makes itself liable by affirming the unauthorized act of its agent.[3]

A ratification, to be imputable to a company, must be made directly by its shareholders, or indirectly through their agents acting within the limits of their real or apparent authority; and in order to establish ratification by the shareholders or their agents, it must be shown. 1. That the parties alleged to have ratified the contract had full knowledge of the facts; or having their attention drawn to it, did not choose to inquire into it.[4] 2. That they have in some way recognized and adopted it.[5] If these two essential points

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[1] Waterous Engine Works Co. v. Corporation of Palmerston, 21 Can. S. C. R., 556.

[2] As well as the Companies' Clauses Act, R. S. C., ch. 118, sec. 35, which governs all companies incorporated by special Act of Parliament, except railway companies and banks, and insurance companies.

[3] N. E. M. Insurance Co. v. DeWolf, 8 Pick., 56.

[4] Banque Jacques Cartier v. La Banque de Montreal, 13 App. Cas., 111; Ryan v. Terminal City Co., 25 N. Sc., 131; Conant v. Miall, 17 Grant's Ch., 574.

[5] O'Brien v. Credit Valley Ry. Co., 25 U. C. C. P., 275; Baby v. Great West. Ry Co., 13 U. C. Q. B., 291; Bury v. Corriveau Silk Mills, M. L. R., 3 S. C., 218; Soc. de Construction d'Hochelaga v. Soc. de Construct. etc., 4 Dorion's Q. B. Rep., 199; Hamilton & P. D. Ry. Co. v. The Gore Bank, 20 Grant's Ch., 190.

Where a corporation becomes aware that a sale of an immovable made to its supposed agents or representatives is informal, and for a period of eighteen months, during which it continues to deal with the property as its own, it takes no action to have the sale set aside, it will be held to have ratified the same and to be bound by it, as if originally made in due form of law. (L'Hôpital du Sacré-Cœur v. Lefebvre, 17 Q. L. R., 35, Andrews, J., Que. S. C., 1891).

Where a sale of an immovable is made, for a price payable by instalare established, there will still remain for consideration the question whether the recognition and adoption have been in proper form.[1] Further acquiescence must be in relation to a transaction to which effect may be given thereby.[2]

30. Effect on company of notice to and knowledge by agent.— Since the case of Fitzherbert v. Mather[3] it has been an undoubted rule of law that notice to an agent is notice to his principal; but what shall be deemed sufficient, in the case of constructive notice to a principal in order to bind him through his agent, has been the source of considerable litigation.

In England the rule now is that the knowledge of an agent is the knowledge of his principal, and his principal is affected thereby, whether such knowledge be acquired by the agent in the course of his employment or otherwise.[4]

31. Revocation of agency—Right to indemnity.—An agency, for which no term has been stipulated, is revocable at will, even where the agent has given a consideration for the agency.[5] The

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ments, to the supposed agents or legal representatives of a corporation, and the latter takes possession of the property and uses it and pays one or more of the instalments, it will be held to have ratified such sale, and the same shall be as binding on it as if originally made in due form of law. (*Ibid*). But where plaintiff was hired by three provisional directors under an agreement by which the latter jointly and severally promised and agreed to engage and hire plaintiff as engineer for a period of one year at a salary of $250 per month, the fact that he was paid at the rate of $250 per month by the treasurer of the company would be no evidence of ratification by the company of the above contract; and would not even, of itself, be evidence of an implied contract of general hiring. O'Dell v. Boston etc. Ry. Co. (1897), 29 N. S. R., per Ritchie, J., at p. 387, citing Bayley v. Rimmell, 1 M. & W., 506; Broxham v. Wagstaff, 5 Jur., 845, Parke, B.; but see McDonald, C. J., *diss. contra*.

[1] Lindley Comp., pp. 177, 178.

[2] Banque Jacques Cartier v. Banque de La Cité & District de Montréal, 13 App. Cas., 111. .

[3] 1 T. R., 12.

[4] Dresser v. Norwood, 17 C. B. (N. S.), 466; and see Carter v. Molson, 10 App. Cas., 664; Ryan v. The Terminal City Co., Ltd., 25 N. Sc., 131.

[5] Cantlie v. Coaticook Cotton Co., M. L. R., 4 Q. B., 444, affirming M. L. R., 3 S. C., 9; and see Rhodes v. Forwood, 1 App. Cas., 256; a person appointed by a number of subscribers for stock in a proposed company to collect, receive and remit their subscriptions to the head office of the company, is not the agent of the latter, and has no claim against the company for such services. (Quebec & Halifax Steam Nav. Co. v. Cunard, 2 N. B., 90).

revocation, however, is subject to the obligation in the part of the principal to indemnify the agent for any actual loss suffered by him by reason of the revocation of the mandate.[1]

The agent's claim to indemnity cannot be extended so as to include loss of profits which he would have made if the agency had been continued, but merely such expenses as he incurred in order to carry on the business, and which, in the particular circumstances of the case, may be seen to have been contemplated at the time the appointment was made.[2]

32. Agent's right to remuneration for services.—It is the rule of the common law as well as the civil law, that in the ordinary course of *commercial* agencies, a compensation is always understood to belong to the agent, in consideration of the duties and responsibilities which he assumes, and the labor and services which he performs.[3] An agent will not be entitled to commission, if the contract under which he is acting gives grounds for the presumption that the commission forms part of the consideration of the contract.[4] The commission stipulated payable to an agent for securing subscriptions to stock "after the first call" is payable as soon as the first call has been made, whether the amount thereof has been paid or not.[5]

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[1] *Ibid.* [2] *Ibid.*

[3] Story Agency, secs. 326, 327; Renaud v. Walker, 13 L. C. J., 180.

[4] Renaud v. Walker, *supra*. The right of an agent to retain money for agency and commission is exercisable only upon the specific money on account of which the specific charge is made. (Quebec & Halifax Steam Nav. Co. v. Cunard, 2 N. B., 90).

[5] Hubert v. Barthe, Q. B. 1879, 2 L. N., 227.

CHAPTER XII.

FINANCIAL MATTERS.

1. Companies' borrowing powers—Difference between Canadian and American law.
2. Powers of companies to borrow and mortgage when acts are silent.
3. Right of company to confer the power to borrow upon directors.
4. Position of debt created by directors borrowing beyond authorized limit—liability of directors.
5. Power of ratification by the company of "ultra vires" borrowing by directors.
6. Doctrine of equitable right of subrogation by company to lender on an "ultra vires" loan.
7. Application to Quebec of the principles of the law of partnership.
8. Powers of directors in Quebec to borrow—their liability.
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10. Distinction between the company's liability for loans for ordinary purposes and loans on capital account.
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18. Difficulty of determining what powers the company possesses by implication.
19. When act restricts borrowing power to a certain amount, when does it become exhausted?
20. Power of companies or corporations to mortgage (a) property, (b) franchises—public corrporations—sale of railway under execution.
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29. Effect of trust deeds for securing the payment of mortgage bonds issued by companies.
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31. Mortgage with power of sale.
32. Method of securing payment of bonds or debentures.

1. Companies' borrowing powers—Difference between Canadian and American law.—In treating in this country of a company's power to borrow money, it is proper to remark at the outset, that the American decisions are not safe guides to the Canadian judge and practitioner. In the United States the directors wield all the powers of the corporation in respect of those matters which do not involve constituent changes in the organization or character of the corporation itself.[1] Under the English law the directors of ordinary trading companies, whose regulations are silent on the subject of borrowing, have an implied power to borrow for the purposes of the business of the company;[2] but the directors of other companies have, it is conceived, no such implied power.[3] Our Legislatures have invariably followed the English law in respect of the borrowing powers of companies, and although in the Dominion[4] and Provincial Companies' Acts

[1] Thompson Corp., sec. 5700.

[2] Lindley Comp., 5th Edit., p. 190, and cases there cited. See also Farrell v. Carribou Gold Mining Co., 30 N. S. R., 199.

[3] *Ibid*; citing judgment of Bowen, L.J., in 36 Chy. Div., 685; and see Vavasseur Societies, No. 821.

[4] R. S. C., ch. 119, sec. 35.

directors are given the power to make for the company any contract which the company may, by law, enter into, yet, following in the lines of the English decisions in respect of the borrowing powers, which draw a distinction between the powers of the company itself and the powers of the directors, it is enacted in the Dominion Statute[1] that:—
"The directors may, when authorized by a by-law for that purpose, passed and approved of by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company represented at a special general meeting duly called for considering the by-law: (a) Borrow money upon the credit of the company and issue bonds, debentures or other securities for any sums borrowed, at such prices as are deemed necessary or expedient; but no such debentures shall be for a less sum than one hundred dollars; (b) Hypothecate or pledge, the real or personal property of the company to secure any sums borrowed by the company; but the amount borrowed shall not, at any time, be greater than seventy-five per cent. of the actual paid-up stock of the company; provided always that the limitations and restrictions on the borrowing powers of the company contained in this section shall not apply to or include moneys borrowed by the company on bills of exchange or promissory notes drawn, made, accepted, or endorsed by the company."[2]

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[1] *Ibid*, sec. 37, as amended by 60-61 V., ch. 27.

[2] No limit for borrowing under Manitoba Act, R. S. M., ch. 25, sec. 71; likewise the Ontario Act, R. S. O., ch. 191, sec. 49; and the British Columbia Act, R. S. B. C., ch. 44, sec. 122; limit of borrowing power under N. B. Stat. 1893, sec. 91, same as Dominion; using words "commercial paper" generally.

The power to borrow was given under the Quebec Statute by the Act 54 Vic., ch. 35, which added the following to Art. 4705 of the Revised Statutes:

"The Company may, by a simple resolution, issue notes payable to order or to bearer, for the settlement of accounts or other current matters; it may further, on a resolution of the two-thirds of the actual shareholders present at a meeting specially convened for the purpose, issue bonds or debentures to the amount of the two-thirds of the total value of the immoveable property.

"Such bonds or debentures, after their registration in the office or offices of the registration division or divisions in which the immoveables of the said company are situated (which must be described in a notice to that effect given to the registrar), constitute a privileged claim in favor of the holders thereof against the company, and give a right of preference over all other debts and claims against the company, posterior to the issuing of such debentures."

New Brunswick Act of 1893, 56 Vic., ch. 7, sec. 91, contains the following departure from the text of the Dominion Act, "or deposit the same (that is

2. Powers of companies to borrow and mortgage when Acts are silent.—The Companies' Clauses Act[1] contains no provision relative to the borrowing power or its concomitant, the power to mortgage. It is expected that the Special Act will contain all such matters. But sometimes the power to borrow is omitted through oversight or otherwise,[2] and it becomes necessary to determine what are the general powers of companies in this respect. As regards corporations in general incorporated by Special Act it has been held that in determining whether such a company has by implication power to borrow, you must look first whether it is to carry on an undertaking requiring the expenditure of money, and secondly, whether means are provided for putting the company in funds for the purpose. If there are no such means, then you may infer a power to obtain funds, and this may infer a power to borrow. But if means are provided, *e.g.*, by raising capital or by calling up more capital, or by a limited power of borrowing which may seem within reason sufficient for the purpose, then no Court can measure whether in the event those means will be sufficient or not. Those means being provided, you cannot infer at the same time a power to borrow money.[3]

In regard to trading companies whose regulations are silent on the subject of borrowing, these, as already stated,[4] have an implied power to borrow for the purposes of the business of the company;[5] but an institution like an agricultural society, though it may have certain limited powers of buying and selling, is in no sense a trading corporation; and when it does not appear that the power to borrow is necessary to the accomplishment of its objects, nor in any way incident to the operations which it is entitled to undertake, the law as to the borrowing powers of trading companies does not apply to it.[6]

As to corporations in general requiring money for the prosecution of their business: if the possession of money is essential for the

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the bonds, debentures or other securities) as collateral security for any promissory note or overdraft of the company" at such prices, etc., etc.

[1] R. S. C., ch. 118.

[2] As in the case of The Commercial Bank of Canada v. The Great Western Ry. Co. of Canada, 3 Moore P. C. (N. S.), 295.

[3] Wenlock v. River Dee Co., 36 Ch. Div., 675 n, 677 n, 682 n; Farrell v. Carribou Gold Mining Co., 30 N. S. R., 199.

[4] *Supra*, p. 347; General Auction, etc., Co. v. Smith (1891), 3 Ch., 432.

[5] *Ex parte*, Pitman & Edwards, 12 Ch. Div., 707; English Channel Steamship Co. v. Rolt, 17 Ch. Div., at p. 720; Farrell v. Carribou Co., *supra*.

[6] In *re* Rockwood Agricultural Society, 20 Can. L. T. (1900), 25.

purpose of carrying on the business, and if the company find itself in temporary difficulties for want of money, the directors may obtain loans if they can, to prevent the disaster of the stoppage of the company.[1]

If the company has express or implied power to borrow, and the Act under which it is incorporated does not limit the amount, it may from time to time borrow as much as it wants.[2]

3. **Right of company to confer the power to borrow upon directors.**—Where the company has the power to borrow, whether express or implied, it can confer this power on the directors, at a meeting of shareholders, for this is a matter in which a majority can bind a minority.[3]

4. **Position of debt created by directors borrowing beyond authorized limit—Liability of directors.**—If the directors, having power under the charter to borrow to a limited amount, borrow money on debentures at a time when the liabilities already exceed the limit, the debentures are considered in England as void.[4] In such a case the directors may be personally liable in damages for their implied representation that they had authority to issue debentures.[5] But it appears they would only be liable when the implied representation of authority is one of *fact*: they are not liable for such a representation or warranty of *law*.[6] Or if the money be borrowed by a company which

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[1] See Walmsley v. Rent Guarantee Co., per Proudfoot, V.C., 29 Grant's Chy., at p. 489, citing from Green *Ultra vires*, pp. 263, 264, 271 & 276. A Rent Guarantee Co. has no implied power to borrow money (*Ibid*). Building Societies have no power to borrow, except such as is conferred by statute (Lindley Comp., 189, 190).

[2] Palmer Comp. Law, p. 188.

[3] Bryon v. Metropolitan Saloon Omnibus Co., 3 de Gex. & J., 123.

[4] Chapleo v. Brunswick Building Soc., 6 Q. B. Div., 696; Blackburn Building Soc. v. Cunliffe, 29 Ch. Div., 902; *Ex parte* Watson, 21 Q. B. Div., 301; *Ex parte* Pooley Hall Colliery Co., 21 L. T., 690; English Channel Steamship Co. v. Rolt, 17 Ch. Div., 715.

[5] Firbanks v. Humphreys, 18 Q. B. Div., 54.

[6] No action can be maintained against the responsible parties upon an implied representation or warranty of authority in law to do an act, but only upon an implied representation or warranty of authority in fact to do it; and where there is an express statutory enactment prohibiting a company from buying on credit, the vendor must be taken to have known of such statutory inability (Struthers v. Mackenzie; Ontario High Court of Justice, 1897, 17 Can. L. T., 166).

cannot borrow, the Courts in England consider there is no debt, and the lender cannot at law recover.[1] See also section 9 of this chapter.

5. Power of ratification by the company of "ultra vires" borrowing by directors.—If the borrowing be not *ultra vires* the company, but only of the directors' powers under the articles, the company may ratify.[2] And provided the lender take care that the directors are not exceeding the limits of the company's governing instrument as to the nature and extent of the loan,[3] he is entitled to presume that the limit of the directors' particular powers is not being exceeded.[4]

6. Doctrine of equitable right of subrogation by company to lender on an "ultra vires" loan.—In England, where a debt has been contracted which, owing to want of power, the company is not obliged at law to repay, the Courts admit the creditor to the equitable right of subrogation in so far as he is able to trace the application of the loan, that is, he can stand in the place of the creditors whose debts have been paid with his money,[5] and is entitled to any securities which the company has obtained by means of the money.[6]

It may be stated with confidence that this view of the law has no application in the Province of Quebec. If the English view were adhered to, that at law the company is not liable on an *ultra vires* loan, then in that Province the lender could not recover by means of an equitable fiction. In order that there should be subrogation in such a case, under the Quebec law, it would be necessary that the act of loan and the acquittance should be notarial (or executed before two subscribing witnesses); that in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt and

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[1] *Ex parte* Watson, 21 Q. B. Div., 301; Blackburn Soc. v. Brooks, 29 Ch. Div., 902.

But a person is not precluded from recovering money advanced to a party for the liquidation of liabilities incurred by the latter to a company, or from enforcing any security for its repayment, because that company in such transactions exceeded the power conferred on it by its charter (Cayley v. McDonnell, 8 U. C. Q. B., 455).

[2] Irvine v. Union Bank of Australia, 2 App. Cas., 366; Grant v. United Kingdom Switchback Co., 40 Ch. Div., 135. See also CHAPTER X., secs, 34, 35.

[3] Chapleo v. Brunswick Building Soc., 6 Q. B. D., 712, 713, 715.

[4] Irvine v. Union Bank of Australia, 2 A. C., 366.

[5] *Ex parte* Williamson, L. R., 5 Ch., 309, 313; Cunliffe v. Blackburn Bldg. Soc., 9 App. Cas., 857.

[6] Wenlock v. River Dee Co., 19 Q. B. Div., 155.

that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose.[1] In short, in Quebec conventional subrogation cannot be implied, and there is no legal subrogation to meet this case.[2]

7. Application to Quebec of the principles of the law of partnership.—In deciding this issue in Quebec we must, except perhaps in the case of a Dominion Statute containing an express provision on the subject,[3] apply the general law of partnership[4] as has been done in England in the same case.[5] Now, the English law of partnership is quite different from that of Quebec upon this point. In England, the law is thus stated in Lindley on Partnership:[6] "Where, however, money borrowed by one partner in the name of the firm, but without the authority of his copartners, has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of

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[1] Art. 1155, Que. Civ. Code. [2] See art. 1156, C. Code.

[3] See per Patterson, J., in Exchange Bank v. Fletcher, 19 Can. S. C. R., at p. 288.

[4] Art. 1864, Quebec Civil Code.

"Les sociétés commerciales par actions sont de veritables sociétés régies par les principes ordinaires du droit civil, et l'incorporation ne constitue pas la société qui y existait auparavant comme société ordinaire, mais que cette incorporation crée, au profit des associés des privilèges qui sont mentionnés dans l'acte et constitute un être moral pour représenter les dits associés" (Per Mathieu, J., in Windsor Hotel Co. v. Date, 27 L. C. J., at p. 10).

Per Taschereau, J., in Young v. MacNider, 25 Can. S. C. R., at p. 283: "As said by Sir Montague Smith, in the Privy Council in the case of Bell v. Corp. of Quebec (5 App. Cas., 84), English and American decisions are not governing authorities in the Province. Except as to the rules of evidence, Art. 1206 C. C., and to a certain extent as to promissory notes, by a special article of the Code (Art. 2340) in force as to this case, the commercial law of the Province of Quebec, as a general rule, is the French law.

"Upon the contention that a commercial contract is governed by the English law in the Province of Quebec, Aylwin, J., said, in the Montreal Assurance Co. v. McGillivray (8 L. C. R., 423):—

"'A more dangerous error than this could not be committed; commercial contracts like all others are governed by the law of Lower Canada. It is in proof only of commercial matters that the rules of evidence of the law of England are to be resorted to.'"

[5] "Companies (established under private Acts of Parliament, charters, or letters patent) certainly differ very materially from ordinary firms; but so far as their acts, charters, or letters patent have not provided, they are governed by the ordinary law of partnership" (Smith's Mercantile Law, by Pomeroy, sec. 85).

[6] P. 191.

the amount which he can show to have been so applied; and the same rule extends to money *bonâ fide* borrowed and applied for any other legitimate purpose of the firm. This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money, and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bonâ fide* incurred by him for the legitimate purpose of relieving the firm from its debts or of carrying on its business." The law of Quebec is that all obligations contracted in the name of the partnership are binding on the partnership where it has benefited by them.[1] And this applies to joint stock companies as well as partnerships, for the civil law will not allow a person to enrich himself at the expense of another[2] in connection with a transaction which is neither *malum prohibitum* nor *malum in se*.[3]

Another argument in favor of this view lies in Art. 1047 Civil Code, which says, " He who receives what is not due to him through error of law, or of fact, is bound to restore it." Thus, if a company receive money from a party on a contract, and such contract has in fact no legal existence, owing to its totally *ultra vires* but not immoral character, the legal result is that the company is bound to return it.[4]

8. Powers of directors in Quebec to borrow—Their liability.— In Quebec directors must be regarded as governed by the common law of the Province where the statutes are silent.[5] In regard to their borrowing powers, these are the same under the Joint Stock Companies' Acts as at common law: they cannot borrow for the company without the consent of the shareholders assembled at a general meeting.[6] But if it could be established that usage in commercial matters

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[1] Art. 1855, C. Code; Commercial Mutual Building Society v. Sutherland, M. L. R., 4 Q. B., 52.

[2] Vavasseur Soc. Civ. & Com., Nos. 194, 821; Cass., 24 Mars, 1852, Dalloz, 52-1-109.

[3] Rolland v. Caisse d'Economie, etc., 24 Can. S. C. R., 405, distinguishing Bank of Toronto v. Parkins, 8 Can. S. C. R., 903, which was a case of *malum prohibitum*; Ville d'Iberville v. Banque du Peuple, R. J. Q., 4 Q. B., 268, 286.

[4] In *re* Langlois v. Caisse d'Economie, etc., R.J.Q., 4 S.C., 65, confirmed in Queen's Bench, R. J. Q., 3 Q. B., 315, on the same grounds, and in Supreme Court, 24 Can. S. C. R., 405. Ville d'Iberville v. Banque du Peuple, *supra*.

[5] Vavasseur Soc. Civ. & Com., No. 821; and see per Bossé, J., at p. 320, in Rolland v. Caisse d'Economie, etc., R. J. Q., 3 Q. B.

[6] Cass., 22 Janv. 1867, Dalloz, 67-1-168; Vavasseur, No. 821, and see strong words of Cross, J., in Corp. of County of Drummond v. South-Eastern Ry. Co., 24 L. C. J., at foot of page 287 and at top of page 288.

in the Province permits directors or managing directors to contract small loans in the course of the daily business of the company, then such loans would appear to be valid.[1] As already stated,[2] directors who exceed the company's powers in contracting loans for it do not bind the company unless the latter has had the benefit of the loan; they are otherwise personally liable for the loan, unless the party with whom they were contracting was fully acquainted with or held to know the directors' powers in the premises;[3] that is to say, they are personally liable to third parties acting in good faith[4] when the latter are debarred from recovering from the company.

9. Liability of company for "ultra vires" loan.—It has been pointed out that where a debt has been created by a company in excess of its statutory limits, the English law is that the company is not bound.[5] But if the directors merely exceed their particular powers and not the powers of the company, and parties deal with them in making the company a loan, not knowing and not being required to know whether the internal regulations of the company have been observed or not, the company will be bound.[6] By the *American law*, where there is a limit imposed by statute upon a company in respect of the amount of debts which they can incur, a creditor who does not know that the limit has been exceeded, and who has no reasonable ground to believe that such is the fact, may enforce the obligation of the contract against the company; and it is held under that law that although parties dealing with corporations will be conclusively bound to know the extent of the powers which the statute law has accorded to them, yet where their power to act in a given case depends upon their previous action, which from its very nature is known only to them, and not to the public dealing with them—in other words, where the question is whether their power has been exhausted, and this

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[1] Art. 1864, Quebec Civ. Code. [2] *Supra*, sec. 4 of this chapter, p. 350.

[3] An association was by its act of incorporation prohibited from buying goods on credit. The plaintiffs sued certain directors and officers of the association for the price of goods sold. Held, they were not personally liable, and moreover, the plaintiffs must be taken to have known of the statutory inability. Struthers v. McKenzie, 17 Can. L. T., 166; 28 O. R., 381.

[4] Vavasseur Soc. Civ. & Com., No. 821; implication from Art. 363 Quebec Civ. Code; and see per Hall, J., in Ville d'Iberville v. Banque du Peuple, 1895, R. J. Q., 4 Q. B., at p. 287.

[5] *Supra*, sec. 4 of this chapter, p. 350.

[6] See Howard Patent Ivory Manufac. Co., 38 Ch. Div., Per Kay, J., at p. 170; Royal Brit. Bank v. Turquand, 5 E. & B., 248; 6 E. & B., 327.

depends upon a knowledge of antecedent *extrinsic facts*, which knowledge is in the breasts of the corporate officers, and not accessible to the public—then there is an *implied warranty*[1] on the part of the corporation, through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt,—so that to allow the corporation to avoid the repayment of the debt on this ground, where it has had and enjoyed the benefit of the contract, would be to allow it to make its own wrong the means of defeating the innocent public ;[2] this the Courts will not allow.[3]

In Canada this view has been adopted[4] for the above reasons, and it must prevail on statutory grounds. In effect, all our Joint Stock Companies' Acts, as well as the Companies' Clauses Act, provide that every contract made by any agent, officer or servant of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company.[5] It would therefore appear not to be necessary that an officer contracting a loan for the company should be acting strictly within the limits of his powers in order to bind the company. All that could be required of the creditor is, that he enquire whether the officer has the power to contract loans for the company, and that he is exercising his power in general accordance with his delegated authority and the terms of the statute.[6]

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[1] Our courts will not allow an action to be maintained upon an implied representation or warranty of authority *in law*; the implied warranty must be a matter of *fact* to give rise to a right of action. Struthers v. MacKenzie, 28 O. R., 381; 17 Can. L. T., 166.

[2] Thompson Corp., sec. 5705.

[3] Ossipee Hosiery, etc., Man. Co. v. Canney, 54 N. H., 295; Wood v. Corry Waterworks, 44 Fed. Rep., 146 ; Allis v. Jones, 44 Fed. Rep., 146 ; Sherman Center Town Co. v. Morris, 43 Kan., 282; Humphrey v. Patons Mercantile Assoc., 50 Iowa, 607.

[4] Ville d'Iberville v. Banque du Peuple, R. J. Q., 4 Q. B., at p. 280. Clarke v. Sarnia Street Ry. Co., 42 U. C. Q. B., 39; and to be implied from Struthers v. McKenzie, *supra*.

In Quebec at common law the officers of a corporation bind it in all matters which do not exceed the limits of the powers conferred on them. These powers are determined by law, by the by-laws of the corporation, or by the nature of the duties imposed (Art. 360, C. Code).

[5] Sec. 76, R. S. C., ch. 119.

[6] See also Struthers v. McKenzie, 17 Can. L. T., 166; 28 O. R., 381.

10. Distinction between the company's liability for loans for ordinary purposes and loans on capital account.—In this connection a distinction should be drawn between promissory notes executed by the officers of the company in payment of purchases made within the scope of their authority and special loans of money to be used as capital in the financing of the business. The former would appear to be perfectly valid, and within the power of the officers to bind the company; but in the latter case, the validity would depend somewhat on the nature of the loan.

11. Precautions to be taken by lender when company's borrowing limit is not stated.—Where, as in the case of the Manitoba Companies' Act,[1] the Act of Ontario[2] and that of British Columbia,[3] as well as in very many private acts, the borrowing limit is not stated, the question is still further simplified. The position is this:—that the party contracting with the company's directors must read the statute governing the company and its charter or letters patent[4] or deed of settlement; he is not bound to do more when he is not himself a director or shareholder. And if he finds from these that the authority of the directors might be made complete by a resolution, he will have a right to infer the fact of a resolution authorizing the directors to do that which they have held themselves out as having the power to do in the contract of loan.[5] But this applies only where the words of the statute are affirmative in that they empower directors to borrow on certain conditions.[6] Where the language of the Act or governing instrument regarding the borrowing powers is negative, and prohibitory, without the sanction of the shareholders, and the lender has knowledge that the purpose of the loan is not in the usual course of the company's business, he must ascertain at his peril, whether the terms of the statute or governing instrument have been complied with.[7]

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1 R. S. M., ch. 25, sec. 71.   2 R. S. O., ch. 191, sec. 49.

3 R. S. B. C., ch. 44, sec. 122.

4 See sec. 5 (6), Dom. Companies' Act, R. S. C., ch. 119.

5 Royal British Bank v. Turquand, 6 El. & Bl., 327; see Commercial Bank of Canada v. Great Western Ry. Co., 3 Moore P. C. (N. S.), at pp. 313, 314; Neelon v. Town of Thorold, 22 Can. S. C. R., 390, 395; In Howard v. Patent Ivory Co., 38 Ch. Div., at p. 170, the lenders could not recover on their loan because they were themselves directors and were therefore held to have knowledge of the company's internal affairs.

6 *Ibid*; as in all our Companies' Acts which contain borrowing powers.

7 Commercial Bank of Canada v. Great Western Ry. of Canada, 3 Moore P. C. (N. S.), at p. 313, 314.

12. Company estopped from pleading want of formality when benefit is received.—As a further distinction from the foregoing, it may be stated that where a company has had the benefit of a loan made to it, it is estopped from pleading any want of formality in connection with the making thereof or any irregularity which is not *ultra vires*.[1] And in certain cases this will hold good even where the money is lent to the company by one of its directors.[2] See also section 47 of this chapter.

13. General doctrine of "ultra vires" contracts.—It will be convenient at this point to discuss the general doctrine of *ultra vires* contracts in this country in so far as any doctrine is ascertainable from the decided cases.

14. Application of English decisions in "ultra vires."—In the first place, it may be stated that in ascertaining what contracts are *ultra vires* and what are not the English decisions are applicable to all our Provinces, including the Province of Quebec, not because they are necessarily binding upon the latter Province but because they have been regarded by common consent as applicable.[3]

15. Consequence of "ultra vires" contracts under a Dominion statute.—Regarding the consequence of such contracts where the governing statute is a Dominion one, the point would seem to be one of considerable difficulty. It was recently said by a Supreme Court Judge[4] that: "The Banking Act must receive the same construction in all parts of the Dominion. What it allows or prohibits in Quebec it must allow or prohibit in all the other Provinces. If the article enunciates a rule of law peculiar to one Province which is to govern in that Province the operation of this statute, each Province may also establish a rule of interpretation to prevail within its borders, and

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[1] Neelon v. Town of Thorold, 22 Can. S. C. R., 390; opinion of Bowen, L.J., in Miles v. New Zealand Alford Co., 32 Ch. Div., 289; and see Bernardin v. North Dufferin, 19 Can. S. C. R., 581; and by implication from Waterous Engine Co. v. Town of Palmerston, 21 Can. S. C. R., 556, the action being disallowed in this case because the contract was executory; Pickard v. Central Bank, 10 N. B., 472.

[2] *Ibid.*

[3] Per Strong, J., in Compagnie du Cap. Gibralter v. Hughes, 11 Can. S. C. R., at p. 556; and see Judgments in Exchange Bank v. Fletcher, 19 Can. S. C. R., 278; Bank of Toronto v. Perkins, 8 Can. S. C. R., 603 ,etc.

[4] Patterson, J., in Exchange Bank v. Fletcher, 19 Can. S. C. R., at p. 288.

the uniformity of the law on this important branch of trade and commerce, which was to be secured by confiding it to the exclusive legislative jurisdiction of the Dominion Parliament, will be in peril. The Provincial Legislature has no power to modify the operation of a Dominion Statute by formulating a new canon of construction."

In Bank of Toronto v. Perkins,[1] Stron,g J., stated with less confidence that " The foregoing considerations (a conclusion, based on a judgment of the Privy Council, that a transfer made to a bank was void by the Bank Act) are founded on the principles of statutory interpretation which are established by English law, which would appear to be applicable to the construction of a statute of the Dominion applying alike to all the Provinces. . . . If, however, this is an incorrect assumption and the interpretation of the statute is to be governed by the law of the Province of Quebec, the question is not open for discussion, for it is expressly concluded by the 14th Article of the Civil Code, which declares that prohibitive laws import nullity, although such nullity be not therein expressed."

It may be noted, in conclusion, that both these banking cases were confirmatory of the decisions of the Quebec Court of Appeals, likewise the recent case of Rolland v. La Caisse d'Economie.[2]

16. Power of enforcing " ultra vires " contracts—Examples.— Treating the law of *ultra vires* in its general and proper sense; that is, concerning the competency and power of a corporation under its charter to make contracts, the rule now is that a company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as are reasonably incidental thereto, nor to exercise its powers in the attainment of the authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.[3] So far as an *ultra vires* contract is executory, it is agreed on all hands that no action will lie on it.[4] The difficulty lies in determining the effect of *ultra vires* upon an executed contract. The American doctrine is that where a private corporation has entered into a contract in excess of its granted

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[1] 8 Can. S. C. R., at p. 615. [2] 24 Can. S. C. R., 405.

[3] Charlebois v. Delap, 26 Can. S. C. R., 221; Mann v. Edinburgh Northern Tramway Co. (1893), App. Cas., 69; this is the practical effect of Art. 358 C. C., Quebec; see Compagnie de Villas du Cap Gibralter v. Hughes, 11 Can. S. C. R., at p. 556.

[4] See for instance Compagnie de Vil. du Cap Gibralter v. Hughes, 11 Can. S. C. R., at p. 546.

powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.[1]

The same rule of course applies *a fortiori* when the action is brought by the corporation against an individual who has, for instance received a loan from the corporation.[2] This principle was admitted by the Supreme Court in Rolland v. Caisse d'Economie.[3] This was a case under the Bank Act, and it is to be presumed that the Supreme Court is going to give but one interpretation to that Act for all the Provinces. It was there held that assuming the act of the bank in lending money, on the pledge of certain securities was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not of itself and *ipso facto* a radical nullity of public order of such a character as to disentitle the bank under Arts. 989 and 990 of the Quebec Civil Code, from claiming back the money with interest. But where a Bank Act contains a direct prohibition to a bank to lend money on certain securities, then the bank could not recover on a loan made in disregard of this prohibition.[4] The effect of such a prohibition, however, would not prevent a borrower from recovering back securities pledged to the bank for the loan: the prohibition only applies to the bank.[5]

In Quebec the law provides that any loan society, incorporated under the laws of the Parliament of Great Britain and Ireland, or of the Dominion of Canada for the purpose of lending or investing moneys, and authorized by statute, etc., to lend money in that Province, may receive a license from the Provincial Secretary authorizing it to carry on business therein.[6] It has been recently held by the Court of Queen's Bench that a loan company, established under the laws of Ontario, may, even in the absence of such license from the Provincial Secretary, lend money in the Province of Quebec on the security of hypothec; there being nothing prohibitive in the law or the section above quoted[7] nor any expression which takes from foreign companies the power which the common law of the Province gives them to enter into contracts therein.[8]

[1] Thompson Corp., sec. 6016; Morawetz Corp., sec. 693.

[2] Morawetz, sec. 693.

[3] 24 Can. S. C. R., 405.

[4] Bank of Toronto v. Perkins, 8 Can. S. C. R., 603; Bank of Montreal v. Geddes, 3 L. N., 146.

[5] Exchange Bank v. Fletcher, 19 Can. S. C. R., 278; Rolland v. Caisse d'Economie, per Judge Taschereau, 24 Can. S. C. R., at p. 414.

[6] R. S. Q., 5470.

[7] *Ibid.*

[8] The Birkbeck Investment, etc., Co. v. Brabant (1899), R. J. Q., 8 Q. B., 311, 320, reversing judgment of Superior Court.

In Quebec, if an individual loans money, even to a municipal corporation, and receives a negotiable instrument as evidence of the loan, if this instrument is void for want of power in the municipality to make it, this will not prevent the lender from recovering on a count for money had and received.[1] But in Manitoba it has been recently held that if a municipal corporation borrows money without the passage of a by-law, which the Act required as imperative, the lender cannot recover.[2] Had this latter case gone to the Supreme Court it is doubtful whether that Court would have taken the same view, seeing the dicta of its judges in Waterous Engine Co. v. Corporation of Town of Palmerston.[3]

17. Rules do not apply in cases of illegal or quasi-fraudulent application of company's funds.—Whatever the Canadian law outside the Province of Quebec may be in respect of municipal corporations, it has already been decided that in regard to contracts which are *ultra vires* a commercial corporation, but which are not prohibited by the statute, they are binding on the corporation to the extent to which they have been executed and resulted in a corresponding benefit to the shareholders.[4] But this rule would not apply in the case of an illegal or quasi-fraudulent application of the company's funds. For instance, if a contractor were to enter into a construction contract with a railway company, the agreement providing that the contractor should transfer a certain number of shares held by him to some of the directors and a bonus or commission to one of them for securing him the contract, they to be included in the contract price, even although the shareholders for the time being assented to his agreement, it would be *ultra vires* to the extent that when the contract was performed the contractor could not recover so much of the contract price as included these illegal amounts.[5] But the railway company having got the government subsidy as a result of the completion of the contract,

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[1] Ville d'Iberville v. Banque du Peuple, R. J. Q., 4 Q. B., at 286, Per Hall, J.; Corp. of Grantham v. Couture, Q. B. 1879, 24 L. C. J., 105.

[2] MacArthur v. Town of Portage la Prairie, 9 Man., 588.

[3] 21 Can. S. C. R., 556.

[4] Clarke v. Sarnia Street Ry. Co., 42 U. C. Q. B., 39, and citing *Ex parte* Chippendale, 4 De Gex. & M. & G., 19; Bank of Australia v. Brillat, 6 Moore P. C., 152; McDonald v. The Upper Canada Mining Co., 15 Grant, 179; The Whiting Arms Co. v. Barlow, 20 Am., 504; but see *dicta* of Judges in Cie de Villas du Cap Gibralter v. Hughes, 11 Can. S. C. R., 537.

[5] See *dictum* of King, J., in Charlebois v. Delap, 26 Can. S. C. R., at p. 244; and see Mann v. Edinburgh Northern Tramway Co. (1893), App. Cas., 69.

would have to abide by the contract to the extent to which it was legal, it could not repudiate the whole.[1]

18. Difficulty of determining what powers the company possesses by implication.—It has already been stated that a corporation has all the capacities for engaging in transactions which are impliedly given it by reasonable implication from the language of the creating instruments.[2] The existence of such implied powers is fully admitted but the difficulty consists in determining what they are. This was instanced in the Supreme Court case of Compagnie de Villas du Cap Gibralter v. Hughes.[3] The question which there arose was whether a non-permanent building society organized under ch. 69, Con. Stats. of Lower Canada has power, immediately after organization and before any money has been paid upon the stock subscribed, to make a purchase of building lots and to enter into a contract for the building of houses thereon. The Court held, Strong & Gwynne, JJ., dissenting, that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not *ultra vires.*

19. When Act restricts borrowing power to a certain amount, when does it become exhausted?—The Dominion[4] and similar Acts provide that the amount borrowed shall not, at any time, be greater than seventy-five per cent. of the actual paid-up stock of the company. Enactments of this kind are open to the doubt as to whether the borrowing power is exhausted upon the first occasion for its use, for the Dominion Parliament[5] saw fit to amend the Railway Act of 1888,[6] striking out the following words:—"But no bonds or debentures shall be issued until twenty *per centum* of the cost has been actually expended on the work." The section, now reads as follows:—"The power of issuing bonds conferred upon the company hereby or under the Special Act shall not be construed as being exhausted by such issue, but such power may be exercised from time to time, upon the bonds constituting such issue being withdrawn or paid off and duly cancelled, and the limit to the amount of bonds, debentures or other securities fixed in the Special Act shall not be exceeded." This amendment was probably rendered necessary because the words "at

[1] See Per Gwynne, J., in Charlebois v. Delap, *supra*, at p. 233.

[2] *Supra*, sections 1 and 2 of this chapter, and 12 of CHAPTER IV.

[3] 11 Can. S. C. R., 537.

[4] Sec. 37 (b), R. S. C., ch. 119.

[5] 55-56 Vic., ch. 27, sec. 4.

[6] Sec. 93.

any time" were not present in the Railway Act as they are in the Companies' Act. The words "at any time" mean "at any one time," for even where directors are empowered "to borrow from time to time on behalf of the Company such sums of money, not exceeding in the whole, at any one time, £1000, as the directors think necessary or advisable," when the directors have borrowed up to £1000 and there are existing loans unpaid to that amount, the borrowing power of the directors is exhausted[1] for the time being.

20. Powers of Companies or Corporations to mortgage (a) property, (b) franchises—Public corporations—Sale of railway under execution.—The power to borrow implies the power to mortgage.[2] *Primâ facie*, corporate bodies are bound by all contracts under their common seal.[3] When the Legislature constitutes a corporation, it gives to that body, *primâ facie*, an absolute right of contracting and of making a mortgage to secure a debt which it has contracted; and no enabling power is requisite to confer the authority to mortgage.[4] But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is *ultra vires*.[5]

The franchise which calls a corporation into existence, that is, its right of existing or being a corporation, cannot be alienated or

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[1] See per Kay, J., in Howard v. Patent Ivory Manuf. Co., 38 Ch. Div., at p. 170.

[2] In *re* Nash Brick and Pottery Manufacturing Co., 3 Geld. & Ox. (Nov. Sc.), 254. Where by the act of incorporation the power to make rules, regulations and by-laws authorizing a society to borrow money was recognized, and the members expressly given the power to make such proper rules, in accordance with which they authorized the directors to "borrow money for the use and on the assets of the company," it was held, following Murray v. Scott (1894), 9 App. Cas., 519, that the society had the right to borrow and mortgage its property as security. *Re* Farmers Loan and Savings Co., 30 Ont. Rep. (1899), 337. See also Palmer Comp. Law, p. 188, and authorities there cited.

[3] Shrewsbury & Birmingham Ry. Co. v. North-Western Ry. Co., 6 H. L. Cas., 113.

[4] Bickford v. Grand Junction Ry. Co., 1 Can. S. C. R., at p. 730.

[5] Shrewsbury, etc., Ry. Co. v. North-Western Ry. Co., *supra*; and see Per Strong, J., in Bickford v. Grand Junction Ry., 1 Can. S. C. R., 730; In *re* Rockwood Agricultural Soc., 20 Can. L. T., 25.

incumbered;[1] also, no franchise which involves the performance of public duties or functions, can be assigned or mortgaged, without first having obtained the right or consent so to do from the authority which granted the franchise which is sought to be assigned or mortgaged.[2] With these limitations, every corporation has the power to mortgage its property for the purposes of the undertaking, unless the power be otherwise limited by its charter or by statute.[3] But our Supreme Court has gone a little further than this and held[4] that even in the case of a corporation having public duties or functions to perform, such as railway companies, if the statutes have conferred upon it express power to mortgage its property for the payment of loans and debentures, this statutory power to mortgage for a *special* purpose does not restrict the *general* power of the corporation incidental to its existence to deal with its property by way of mortgage.[5] Applied to private corporations this proposition is generally admitted,[6] but as quasi-public corporations are not presumed to have the power to encumber such of their property as is necessary to the performance of their duties, this Supreme Court decision, so far as this proposition is concerned, is probably not in accordance with leading

[1] 55 Alb. L. J., p. 231 (1897); Per Strong, J., in Bickford v. Grand Junction Ry. Co., 1 Can. S. C. R., 737-738: as to the definition of the term "franchise" see remarks of Strong, J., in this case, pp. 737 & 738, as follows:—

"The use of the word 'franchise' seems to have led to some confusion in considering the rights of railways in this country. Strictly, the expression is not accurate as applied to a corporation constituted by Act of Parliament; it should be confined to corporations created by Royal grant or charter, the word 'franchise' meaning a privilege granted by the Crown in the exercise of the Royal prerogative. It has, however, been sometimes applied to statutory corporations in a more extended signification than even analogy warrants, as meaning not only the right conferred on a number of individual persons to constitute a corporate body, but also as importing powers in derogation of private rights of property conferred on such a body by statute."

[2] Shrewsbury & Birmingham Ry. Co. v. Northwestern Ry. Co., 6 H. L., 113; Riche v. Ashbury Ry. Carriage Co., L. R., 11 Ex., 224; Whiteside v. Bellchamber, 22 U. C. C. P., p. 241; Galt v. Erie, etc., Ry. Co,. 14 Grant's Chy., 499; Phelps v. St. Catharines & Niagara Central Ry. Co., 19 O. R., 501.

[3] Bickford v. Grand Junction Ry. Co., 1 Can. S. C. R., 696.

[4] Per Strong, J., in Bickford v. Grand Junction Ry. Co., 1 Can. S. C. R., at p. 730-731.

[5] Thus also Allen v. Montgomery Ry. Co., 11 Ala., 437; Mobile, etc.. Ry. Co. v. Talman, 15 Ala., 472.

[6] Thompson Corp., sec. 6134.

English and American authorities;[1] but it appears now to be the established law in Canada.[2]

The case of Bickford v. Grand Junction Railway Co.[3] is of such importance that it requires extended notice. The Grand Junction Railway Co., having statutory authority to borrow money, issue debentures, bonds or other securities, for the sums as borrowed, to hypothecate the lands, tools and other property of the company, and to sell or dispose of property required for the purpose of the company, entered into an agreement with a contractor for building its road, by which the contractor was to receive in payment certain municipal and other securities, and the balance in the first mortgage bonds of the company upon the completion of the work. After building a portion of the road, the contractor was unable to procure iron for it, and the railway company, to enable him to obtain it, made a mortgage, to Buchanan, as trustee, of a portion of its road, to secure the payment to the Bank of Montreal of the notes of the contractor given for the price of the iron; providing, however, that, in the case of his failure to pay the notes, the mortgagee's sole recourse should be against the property and not against the company, and that there should be no right of action against the company for the price of the iron. The vendors of the iron retained a lien upon it until it should be laid upon the track. The contractor, after laying a small part of the iron, became insolvent and a large quantity of the iron which had been delivered to him, but which had not been laid upon the road, was sold by vendors at a large loss upon the price at which the iron was purchased. The holders of the mortgage on the railway then sought to enforce it for the value of the iron actually laid upon the track as well as for the loss resulting from the re-sale of the iron. The railway company, while not objecting to paying the price of the iron actually placed upon the road, objected to paying the loss arising from the re-sale, and contended that the mortgage was *ultra vires*.

The Court of Appeal of Ontario started with the principle, that without express legislative authority a mortgage of the corporate property of a railway company could not be made; and from this deduced the conclusion, that a mortgage, to be effectual, must be within the terms of the authority given to create it. The only authority the

[1] See Jones on Railroad Securities, sec. 10; Thompson Corp., sec. 6134.

[2] Charlebois v. Great N. West Ry. Co., 9 Man. 1, 13; and see Winnipeg & Hudson's Bay Ry. Co. v. Mann, 7 Man., 81; Haley v. Halifax Street Ry. Co., 25 N. Sc., at p. 148, per Ritchie, J.

[3] 1 Can. S. C. R., p. 696.

company had to mortgage its property was given to secure the repayment of money borrowed for the purpose of completing or maintaining the road; whereas the debt secured by the mortgage in this case was that of the contractor. The mortgage was a pledge, by way of collateral security, that the contractor should pay his own debt; and the Court regarded such a mortgage as beyond the power of the company, and invalid, even if assented to or ratified by every stockholder. The Court also declared that, inasmuch as the authority given to the company was to mortgage its property, tolls and revenues, the company could mortgage only the whole undertaking, and that a mortgage of a portion of the line which the company was constituted to build was void.[1]

On appeal from the judgment of the Court of Appeal of Ontario, the Supreme Court of Canada reversed the judgment and held the mortgage valid.[2] The Court laid down the proposition that every corporation has the power to mortgage its property for the purposes of the undertaking, unless this power be limited by its charter or by statute; although such limitation may be deduced either from the object of the corporation being limited to certain specified objects, or from its property being subject to charges or trusts in favor of the public, with which a mortgage would be inconsistent.[3] The Act of Incorporation, however, conferred express power on it to mortgage its property for the payment of loans and debentures. This statutory power to mortgage for a special purpose does not restrict the general power of the company incidental to its existence to deal with its property by way of mortgage; but it indicates that, in the view of the Legislature, borrowing money was not so obviously within the necessary general powers of the company as to be considered as conferred without express words.[4] The mortgage, moreover, was within the scope of the powers conferred upon the company to construct and work a railway. The rails, for the price of which the mortgage was given, were indispensable to enable the company to carry out its undertaking. The company might have purchased them directly from the vendors. It was found more convenient, however, to make a contract for the construction of the railway, by which the contractor undertook to furnish the iron. Having power to give a mortgage to secure the price of rails it can make no difference that they gave the mortgage as security for the contractor, and not as direct purchasers. Indirectly, it is given to secure the price of the rails. "Had the

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[1] 23 Grant's Chy., 302.
[2] 1 Can. S. C. R., 696.
[3] Per Strong, J., at p. 730.
[4] Per Strong, J., at p. 731, 732.

mortgage been given for any object foreign to, or inconsistent with, the purposes of the incorporation, then, no doubt, it would have been *ultra vires* of the company. A familiar instance of a railway company exceeding the limits of its undertaking is afforded by a well-known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorized enterprise, it would, of course, have been *ultra vires*; but it is manifest that such was not the case here, and that the sole object of the corporation was to attain the end for which it had been created."[1] Furthermore, the mortgage cannot be considered wholly void when it creates a good charge upon any part of the company's property, although it includes franchises and property which may be so impressed with a trust in favor of the public that it is beyond the power of the company to deal with them. "Conceding," says the Court, "that the mortgage, if confined to the franchise, and to the railway and its adjuncts, would have been void as being a charge on subjects *extra commercium*, it does not follow that it may not be a good charge on the other lands over which the company had power of free disposition, and for that reason alone the order of the Court below should be reversed." [2]

It was pointed out in a later case[3] that the single question that was before the Supreme Court in the Bickford case, was that of the validity of the mortgage, and the case decided nothing more than that the mortgage was not invalid, and the nature and extent of the mortgagee's remedies were in no way determined.

The Ontario Courts have taken the English view of the policy of the law and have held that the lands and property of a railway company cannot be sold under execution, and that the only remedy open to a mortgagee was in the appointment of a receiver.[4]

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[1] Strong, J., at pp. 732, 733. [2] 1 Can. S. C. R., at p. 737.

[3] Charlebois v. Gt. N. W. Ry. Co., 9 Man., at p. 13.

[4] Peto v. Welland Ry. Co., 9 Grant's Chy., 455; Phelps v. St. Catharines Ry. Co., 19 O. R., 501; Galt v. Erie & Niagara Ry. Co., 14 Grant's Chy., 499. In this case the question was raised if the rule was otherwise in the case of the unpaid vendor's lien. A railway company mortgaged land to secure purchase money, subsequently laid down rails upon the mortgaged land and worked the railway. Held, that the mortgagees were entitled to maintain ejectment and that such mortgage was not *ultra vires*; that the public rights cannot stand in the way of mortgagees claiming by ejectment. (Galt v. Erie & Niagara Ry. Co., 19 U. C. C. P., 357); and see Lincoln Paper Mills Co. v. St. Catharines Ry. Co., 19 O. R., 106.

In England, the undertaking of a railway company, duly sanctioned by the legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the company.[1] This rule appears to rest upon these considerations,—that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the legislature, as disclosed in the general railway statutes, and in the Special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.[2] A different result was arrived at by the Court of Queen's Bench for Lower Canada in Corporation of the County of Drummond v. South-Eastern Ry. Co.,[3] and the Judicial Committee of the Privy Council in the case of Redfield v. Corporation of Wickham[4] declared that the Dominion Parliament has recognized the rule that a railway or a section of a railway may, as an integer, be taken in execution and sold, like any other immoveable, in ordinary course of law.

The present state of the Canadian law upon this subject, outside the Province of Quebec, seems to be this. The mortgagees of a railway are entitled to the appointment of a receiver of the road, as of right.[5] They cannot have a manager of the railway appointed, there being, it is said, no legislative authority for the transfer of the responsibility of management from the hands of the company. And although they cannot sue for possession or foreclosure, they can bring a suit for the sale of the mortgaged railway or part of the railway.[6]

21. Can a sequestrator or receiver be appointed in Quebec to the property of a railway and other public companies?—In Quebec it was formerly decided that the Court had not power to appoint a sequestrator or receiver to a railway, that the law regarding sequestration of property does not extend to the judicial sequestrators of bodies cor-

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[1] Gardner v. London, Chatham & Dover Ry., L. R., 2 Ch., 201; In *re* Bishop's Waltham Ry. Co., L. R., 2 Ch., 382.

[2] Per Lord Watson in Redfield v. Corporation of Wickham, 13 App. Cas., at p. 474.

[3] 24 L. C. J., 276.

[4] *Supra.*

[5] Allan v. Man. & N. W. Ry. Co., 10 Man., 106; Phelps v. St. Catharines and Niagara Ry. Co., 19 O. R., 501.

[6] Allan v. Man. & N. W. Ry. Co., *supra.*

porate.[1] Although to-day the question may be considered a delicate one, yet it was decided in the case of Lambe v. Montreal & Sorel Ry. Co.[2] that a sequestrator can be appointed to the property of a railway company. In 1893 the Quebec Legislature passed an Act[3] empowering the Lieutenant-Governor in Council to authorize the Commissioner of Public Works to cause the property of a railroad company, subsidized by the Province, which has become insolvent and does not continue the undertaking, to be sequestrated and sold. The sequestrator is appointed by the Superior Court or by one of the judges thereof. All Provincial railways fall under its provisions;[4] but it is questionable whether the statute applies to a Federal railroad or one declared to be for the general advantage of Canada, or whether the provisions of the statute are inoperative as to the latter. The Quebec Court of Queen's Bench in 1896 by a bare majority decided that the property of such a company could be sequestrated and sold,[5] Hall and Wurtele, JJ., dissenting on the ground that a Provincial statute like the present had no force with regard to a Dominion railway. In Quebec the right of a mortgagee of a railway to have it sold in satisfaction of his mortgage has always been recognized,[6] and is endorsed by the decision of the Privy Council in Redfield v. Corporation of Wickham.[7]

Other companies, such as gas and electric light companies, street railways, turnpike roads and canal companies, waterworks, harbour and ferry companies are similar to railways in this, that they receive their franchise as such upon the consideration that the public convenience will be served thereby.

22. Rights of mortgagees of public companies and position of debenture holders.—Concerning the rights of mortgagees of such organizations, the principle just laid down is applicable. There seems

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[1] Morrison v. Grand Trunk Ry., 5 L. C. J., 313; Per Monk, J., in Corp. of County of Drummond v. South-Eastern Ry. Co., 24 L. C. J., at p. 291.

[2] Decided in 1891 by Ct. of Review, but not reported, see Abbott's Ry. Law, p. 126.

[3] 56 Vic., ch. 36.

[4] Bay des Chaleurs Ry. Co. v. Nantel, R. J. Q., 5 Q. B., per Wurtele, J., at p. 81.

[5] Bay des Chaleurs Ry. Co. v. Nantel, R. J. Q., 5 Q. B., 64.

[6] Morrison v. G. T. Ry., 5 L. C. J., 313; Corp. of County of Drummond v. South-Eastern Ry., 24 L. C. J., 276 (Q. B. 1879); Hochelaga Bank v. Montreal, Portland & Boston Ry., 4 L. N., 333; Ontario Car Co. v. Quebec Central Ry. Co., 10 L. N., 12.

[7] 13 App. Cas. 467; 33 L. J. P. C., 170.

to be no conclusive reason why such companies cannot mortgage certain of their franchises, as the taking of lands, operating the railway, taking tolls, and exercising the other rights and powers usually conferred on public companies, as in Bickford v. Grand Junction Railway;[1] and if they default, the mortgagees can have a receiver appointed to control the revenues in their behalf.[2] It has been held that where the Act of incorporation provided that the company could borrow on mortgage, the mortgagees being given the right to enforce payment of the arrears of interest or principal by the appointment of a receiver, if the defaulting company's affairs are in such condition that after paying out running expenses there will be no funds in hand out of which the principal and interest due the bondholders can be paid, the debenture-holders would thus be without a remedy further than that expressly given by the Act, which was the appointment of a receiver, and the petition to wind up could not be allowed.[3]

In 1892, however, the English Court of Chancery decided the contrary, and refused to follow the case *in re* Herne Bay Waterworks Co., holding that while a person seeking to enforce a security cannot get anything more than the security gives him, yet as an ordinary creditor of a company might present a petition to wind it up and obtain an order on it, there was no reason why a debenture-holder, whose debt was payable and who had exhausted all his remedies except a winding-up petition without obtaining payment of his debt, should be in a worse position than an ordinary creditor who has got no security upon the undertaking.[4] In this country, as in England, this difficult question turns upon the interpretation of the Winding-up Act.[5]

It is now settled law, after much doubt, that if a quasi-public company can be brought under the terms of the Winding-up Act, then the debenture-holders can secure the appointment not only of a receiver of the tolls of a company, but of a manager to manage the business in the interests of the debenture-holders, thus taking it entirely out of the hands of the original company,[6] and this exercise

[1] 1 Can. S. C. R., at p. 738, per Strong, J.

[2] Haley v. Halifax Street Ry. Co., 25 Nova Scotia, 140, 148, 156.

[3] See for instance the case of In *re* Herne Bay Waterworks Co., 10 Ch. Div., 42.

[4] In *re* Borough of Portsmouth Tramways Co. (1892), 2 Ch. Div., 362, 366, 367.

[5] R. S. C., ch. 129.

[6] Bartlett v. West Metropolitan Tramways Co. (1893), 3 Ch., 437.

of the debenture-holders' remedy, if insufficient, will not deprive them of their rights as ordinary creditors to present a winding-up petition.[1] In one Ontario case[2] a Harbour and Road Company, having authority under its charter to mortgage the harbour, tolls, etc., to secure parties making loans to it, mortgaged the harbour and tolls, and being in arrears for interest, was foreclosed by the mortgagee who entered into possession. He leased to a third party, who had occasion to sue for tolls, and the only objection made by the Court was, that he should have sued in the corporate name and not in his own. In Quebec hypothecary creditors have the right to have the hypothecated property brought to sale and not being governed by such English precedents as Gardner v. London, Chatham & Dover Ry. Co.,[3] which decided that the "undertaking" of a railway company, pledged in a mortgage debenture, is a going concern, and cannot be broken up or interfered with by the mortgagee, it has been there uniformly held, that a corporation having quasi-public functions to perform will not be allowed to repudiate its mortgaged indebtedness on the ground that a change of proprietors would interfere with the obligations which the corporation owes to the public;[4] although by the appointment of a sequestrator, our Courts attain the results and in effect adopt the principles laid down in the cases of Gardner v. London, Chatham & Dover Ry. Co.,[5] Markins v. Percy Ibbotson & Sons,[6] Edwards v. Standard, etc., Syndicate.[7] The English practice is to appoint a receiver or manager or both, and the object of such appointment is to enable the property to be sold as a going concern.

23. Application of Winding-up Acts to quasi-public companies.— Our Winding-up Act applies 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. The Act specially excepts railroad companies and telegraph companies. Railroad and telegraph companies have been held to be trading companies.[8] That is why in our Winding-up Act the defini-

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[1] In *re* Borough of Portsmouth Tramways Co. (1892), 2 Ch. Div., 362.

[2] Whiteside v. Bellchamber, 22 U. C. C. P., 241.

[3] L. R., 2 Ch., 201.

[4] Corp. of County of Drummond v. South-Eastern Ry. Co., 24 L.C.J., 276.

[5] L. R., 2 Ch., 201. [6] (1891) 1 Ch., 133. [7] (1893) 1 Ch., 574.

[8] In *re* Ennis & West Clare Ry. Co., 3 L. R. (Ir.), at p. 107; Kierzkowski v. Grand Trunk Ry. Co., 8 L. C. R., p. 3.

tion of the expression "trading company" expressly excepts railway and telegraph companies therefrom. It does not expressly except anything else. "Trading Company" is defined as "any company, except a railway or telegraph company carrying on business similar to that carried on by . . . carriers . . . or by persons who . . . seek their living by . . . the manufacture, workmanship or the conversion of goods or commodities or trees."[1] The English Companies' Act 1862, sec. 199, provides for the winding-up of any partnership association or company, except railway companies incorporated by Act of Parliament, not registered under the Companies' Act. The same difficulties arose under this Act that have arisen in connection with this subject generally, but the courts have finally decided that a tramway company incorporated by special Act does not fall within the exception of a "railway company," and therefore may be wound up.[2] Also a ferry company[3] incorporated by Act of Parliament, although it was urged that the company was in its nature similar to a railway company, was ordered to be wound up. So also a telegraph company (excepted under our Act),[4] and a waterworks company,[5] and the fact that the preamble of the special Act incorporating the company states that the construction of the work would be for the public advantage, will not prevent the Court from issuing a winding-up order.[6]

As a still further indication of what is intended by the term "trading company" as explained in our Winding-up Act, it may be mentioned that the old English Winding-up Act, 7 & 8 V., ch. 111, was made applicable to all companies incorporated by Act of Parliament for trading or commercial purposes. Under this Act it was held that an incorporated canal company is a commercial company or a company associated for commercial purposes.[7] In another case[8] it

[1] Sec. 2 (c), R. S. C., ch. 129.

[2] Brentford, etc., Tramway Co., 26 Ch. Div., 527; Borough of Portsmouth Tramway Co. (1892), 2 Ch., 362; Bartlett v. West Metropolitan Tramways Co. (1893), 3 Ch., 437; and for Canada see Haley v. Halifax Street Ry. Co., 25 N. Sc., 140; Toronto Railway Co. v. The Queen; 25 Can. S. C. R., 24; and see per Taschereau, J., at p. 32. But see the Privy Council report of this case, P. C. 1896, App. Cas., 551.

[3] *Re* Isle of Wight Ferry Co., 2 H. & M., 597.

[4] In *re* Electric Telegraph of Ireland, 22 Beav., 471.

[5] Barton, etc., Water Co., 42 Ch. Div., 585.

[6] *Ibid*; and Borough of Portsmouth Tramways Co., *supra*.

[7] *Ex parte* Croysdill. In *re* Warwick Canal Co., 7 De Gex McN. & G., 199.

[8] *Ex parte* Burge, 1 D. & Sm., 588.

was doubted whether a pier company with power to levy tolls for the use of the pier, etc., is a trading or commercial company within the meaning of the Act.

It would seem that our Winding-up Act is intended to include street railway and ferry companies as being companies "carrying on business similar to that carried on by . . . carriers." Street railways are not railways,[1] and may be wound up.[2] Gas and electric light companies are companies "carrying on business similar to that carried on by persons who . . . seek their living by the manufacture, workmanship or the conversion of goods or commodities or trees." They are trading companies.

It is no objection to the winding-up of a company that the company cannot be fully wound up and its property sold without an application to Parliament,[3] for it is the constant course of Courts in England to sanction in chambers an application to Parliament.[4]

24. Corporate securities.—Before proceeding further it will be advisable to throw some light upon the various kinds of corporate securities. The English decisions are only a safe guide here when it is understood how far English debentures differ from those in vogue in this country.[5] The distinction between a mortgage under the English law and a hypothec under the French law is well understood;[6] and this distinction must be borne in mind when the property mortgaged is in the Province of Quebec.

25. Debenture, meaning of—Floating security—When it becomes effective.—Lindley in his work on Companies[7] thus describes "debentures" as they are understood in England: "The word debenture,

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[1] Toronto Railway Co. v. The Queen, 25 Can. S. C. R., 24; see Per Taschereau, J., at p. 32, but reversed in Privy Council; (1896) App. Cas., 551; Haley v. Halifax Street Ry. Co., 25 N. Sc., 140; Booth on Street Railways, sec. 1; Brentford Tramways Co., 26 Ch. Div., 527; Borough of Portsmouth Tramways Co. (1892), 2 Ch., 362; Bartlett v. West Metrop. Tramways Co. (1893), 3 Ch., 437.

[2] *Ibid.*

[3] Barton Water Co., 42 Ch. Div., 585; Wey & Arun. Junction Canal Co., 4 Eq., 197.

[4] *Re* Bradford Navigation Co., L. R., 10 Eq., 331; and see on this point Corporation of County of Drummond v. South-Eastern Ry., 24 L. C. J., at foot of p. 288.

[5] See remark of Cross, J., in Corp. of Drummond v. South-Eastern Ry. Co., 24 L. C. J., at p. 290.

[6] See *infra*, section 28, p. 374.

[7] P. 196.

though of frequent occurrence in connection with companies, has no definite legal meaning.[1] What is called a debenture may be a mere promise to pay, a covenant to pay under seal, or a mortgage or charge under the seal of the company. If, as is usually the case, it purports to give the holder a charge on the undertaking or the general property of the company, the charge given is what has been called a "floating security," that is, it charges the property of the company for the time being, but does not prevent the company from dealing with its property in the ordinary course of its business.[2] Consequently, if the company, after having issued debentures of this nature, mortgages a specific part of its property in the ordinary course of its business, or to obtain an advance of money necessary to carry on that business, the specific mortgagee, whether he had notice of the previous issue of debentures or not, has priority over the debenture-holders.[3] On the appointment of a receiver by a debenture-holder, or on the commencement of a winding-up, the floating nature of the security is at an end, and the charge then becomes effective on the property of the company existing at that time, but not as a rule on capital not called up."[4]

26. Conception of debenture in this country.—The conception of a debenture in this country is in effect a promissory note payable at a term of years, with interest coupons attached, payable at terms of months, the payment of which is secured by a mortgage or hypothec upon the property in such a manner that the holders of these debentures become privileged creditors, provided always they are issued in accordance with the requirements of the Provincial law.[5]

27. Position of holders of bonds or debentures.—It is largely because debentures, as understood in England and sometimes in

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[1] Brit. India Steam Nav. Co. v. Commissioners of Inland Revenue, 7 Q.B. Div., 165; Edmonds v. Blaina Furnaces Co., 36 Ch. Div., 215; Topham v. Greenside Fire Brick Co., 37 Ch. Div., 281; Levy v. Abercorris Slate Co., 37 Ch. Div., 260; see also *infra*, p. 383.

[2] See Panama, etc., Mail Co., L. R., 5 Ch., 318; Marine Mansions Co., L. R., 4 Eq., 601; New Clydach Co., L. R., 6 Eq., 514; Gardner v. London, Chatham & Dover Ry. Co., L. R., 2 Ch., 201; *Ex parte* Moor, 10 Ch. Div., 530; Moor v. Anglo-Italian Bank, 10 Ch. Div., 681; Wilmott v. London Celluloid Co., 34 Ch. Div., 147; Manila Ry. Government Stock, etc., 12 The Reports, 409; (C. A., 1895).

[3] Moor v. Anglo-Italian Bank, 10 Ch. Div., 681; *Ex parte* Pitman and Edwards, 12 Ch. Div., 707; Wheatly v. Silkstone Coal Co., 29 Ch. Div., 715.

[4] *Ex parte* Bradshaw, 15 Ch. Div., 465; English Channel Steamship Co. v. Rolt, 17 Ch. Div., 715; compare Howard v. Patent Ivory Co., 38 Ch. Div., 188; see also *Re* Farmers Loan & Savings Co., 30 Ont. R., 337.

[5] See *infra*, p. 383, for further remarks on the definition of "debentures."

Ontario, are mere charges on the "undertaking" as a going concern, or as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt, that the Court in the Ontario case of Phelps v. St. Catharines Ry. Co.[1] decided that so long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize or take or sell or foreclose any part of the property of the company. And it was largely for the same reason that in the English case of Blaker v. Herts and Essex Waterworks Co.,[2] Kay, J., refused to direct the sale of a waterworks company. In neither of these cases did the Court have to consider the effect of a legal mortgage of the whole of the company's property and franchise.[3] In a more recent case this English holding was disapproved of by the Court of Appeals.[4] But in all cases the status of the bond-holders will depend upon the terms of the deed of trust, which naturally will vary in accordance with the practice where it is made.

28. Distinction between the English and Quebec laws as to mortgage and hypothec.—In Quebec some confusion has arisen from adopting some features of the English form of debenture. Although in the Province of Quebec the term mortgage is constantly used as the translation of *hypothèque*, yet the two terms express something quite different. But the effect of using the two words together in a debenture founded on a statutory form, thus: "do hereby mortgage and hypothecate the real estate," does not lose the mortgagee his hypothecary right.[5] When the title "of obligations" in the Civil Code of

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[1] 19 O. R., 501. [2] 41 Ch. Div., 399.

[3] Turner, L.J., in Gardner v. The London, Chatham & Dover Ry. Co. (L. R., 2 Ch., at p. 221), said: "My opinion is that, upon the true construction of this debenture, it proceeds upon the footing of the railway being treated as a continuing and going concern, and it operates only to charge the railway and the works connected with it, and the tolls and sums of money of the like nature, arising from it, in favour of the debenture mortgage. Had it been intended to go further, and to charge the capital of the railway company, and the surplus lands, as it was contended before us that it does, there can be no doubt that apt words could have been found for that purpose, and I think that such would have been inserted in the instrument." A mortgage of the undertaking does not ordinarily, unless the intention is apparent by the deed, pass the land itself or constitute any charge upon it. (Wickham v. New Brunswick etc. Ry. Co., L. R., 1 P. C., 64, 79.)

[4] Marshall v. South Staffordshire Trams (1895), 2 Ch., 36.

[5] See per Ramsay, J., in Corp. of Drummond v. South-Eastern R. Co., 24 L. C. J., at p. 284.

Quebec was being prepared, the incorrect expression "mortgage" was carefully excluded, as expressing something quite different from *hypothèque*, and there being no English word, the word "hypothec" was borrowed from the Scotch law.[1] Under the Quebec Civil Code[2] hypothec is a real right upon immoveables made liable for the fulfilment of an obligation, in virtue of which the creditor may cause them to be sold in the hands of whomsoever they may be, and have a preference upon the proceeds of the sale in order of date as fixed by that Code.[3] This is substantially the same in its results as a mortgage under the English law, where the mortgagee has and exercises a power of sale instead of foreclosure. Laying aside any distinction between an equitable mortgage and a legal mortgage, the main distinction between the English law and the civil law is, that under the former the mortgagee can, if he prefer that remedy, have possession of the mortgaged estate as the result of final foreclosure. The fact that the mortgage deed contains a power of sale will not prevent the mortgagee applying to the Court for foreclosure. To obtain a foreclosure of the equity of redemption upon default in the payment of a mortgage, is what a mortgagee is entitled to.[4] On the other hand, the Court has no power to direct a sale of a mortgaged property after foreclosure has been ordered, without the consent of the defendant, although it may be shown that the mortgaged premises are not worth the amount due under the mortgage.[5] Under the modern rules of Court, the Court has invariably the power to direct a sale of the property instead of a foreclosure, on such terms as the Court may think fit.

29. Effect of trust deeds for securing the payment of mortgage bonds issued by companies.—In the case of Wallbridge v. Farwell[6] decided by the Supreme Court in appeal from the Province of Quebec as well as in the case of Redfield v. Wickham,[7] decided by the Privy Council in appeal from the same Province, the Courts had to consider the effect of trust deeds for securing the payment of mortgage bonds issued by companies, said trust deeds and the special Acts governing the cases, using the phraseology of the English law. The

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[1] *Ibid*, at p. 285. [2] Art. 2016, and see Arts. 2040-2044.

[3] Arts. 2009, 2047, 2130.

[4] Credit Foncier Franco-Canadien v. Andrew, 9 Manitoba, 65.

[5] Credit Foncier Franco-Canadien v. Schultz, 10 Manitoba, 158; confirmed by the full Court, 12 July, 1894.

[6] 18 Can. S. C. R., 1. [7] 13 App. Cas., 467.

deed of trust conveyed the railway to trustees in trust for the bondholders, and stipulated that the company should remain in full possession of the railway, as if the deed had not been passed, until ninety days after default of payment of the bonds or interest thereon, after which ninety days the trustees were empowered to enter into possession. The deed then provided that in case of default of payment, during six months, the trustees would become full owners of the road, after certain notices and lapse of time therein specified.[1] So far as the Privy Council had to pass upon this point their Lordships "did not doubt that the effect of the trust conveyance, . . . followed by possession in terms of the deed, was to vest the property of the railway and its appurtenances in the appellants, and to reduce the interest

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[1] A company, for the protection of its debenture holders, transferred its road to trustees selected by the said debenture holders, but had the administration and operated it for its own profit so long as it faithfully paid the interest on the debentures and the other obligations assumed by it in the act of trusteeship. The Quebec Government was to pay this interest during the first ten years. Among the obligations of the company was that of paying to the trustees, each year, a certain proportion of its net profits, and to place another proportion of these profits in the names of those and in the manner designated by these trustees in order to form a fund to meet the interest after these ten years. The company also obliged itself to pay a certain sum annually to the trustees as salary. The trustees were vested with the titles, rights and privileges stipulated in favor of the debenture-holders; and, amongst other things, if the company made default to fulfil any one of its obligations, they might take over the road and operate it themselves, and also proceed against the company collectively or individually. One-fifth in value of the debenture-holders, on advancing the costs, might compel the trustees to bring an action.

Held:—1. That the trustees, in their own names and qualities, might bring one action to recover from the company (a) their salary, (b) the proportion of the annual net profit, and (c) to force the company to place such other proportion.

2. That they might bring this action without the previous authorization of the debenture-holders; and, that the company could not complain of the want of this authorization.

3. That the company could not apply the net profits of one year to pay the deficit of the former year, even if this deficit was caused by necessary improvements to the road.

4. That the company, in paying for these improvements, paid a debt owing by itself, and extinguished the privilege that he who made these improvements might have had; and it had no subrogation of this privilege against the debenture-holders. (Hatherton v. Temiscouata Ry. Co.; 1896, R. J. Q., 12 S. C., 481. This judgment was confirmed at Quebec by the Court of Review on the 30th September, 1896.)

of the South-Eastern Railway Company to a bare right of redemption." [1] Mr. Justice Taschereau, delivering the judgment of the Supreme Court in Wallbridge v. Farrell,[2] decided that the deed constituted, before the trustees took possession " a hypothecation of the railway, which hypothecation took the character of an antichresis (or pledge of immoveables), when the trustees took possession, or to use the English law terms of their Lordships of the Privy Council, in the Redfield case—" a conveyance by a debtor to his creditor, coupled with possession, with right of redemption, in security of a debt."

It is to be noted that the above trust deed was entered into by virtue of a statute expressly permitting the terms thereof; as was also the trust deed referred to in Hatherton v. Temiscouata Ry. Co.[3]

30. Pledge and irredeemable mortgage.—In the Province of Quebec the law permits of such a combination of hypothec and antichresis or pledge of immoveables.[4] The Civil Code permits the pledge of lands and other immoveables,[5] and the creditor may stipulate that in default of payment he shall be entitled to retain the property pledged.[6] Under the English law such a stipulation in a deed of mortgage would be invalid without statutory authority. Equity will not suffer any agreement in a mortgage to prevail which will change the latter into an absolute conveyance upon any condition or event whatever.[7] But there is no principle of law or equity which prohibits a conditional contract for the sale of real or personal property, or forbids a vendor to make an absolute conveyance of the property sold, subject to an agreement that he shall be entitled to a reconveyance upon the repayment of the purchase money, etc.[8] The Courts will, however, disallow such defeasible conveyance if they consider from all the circumstances of the case that it is intended as a mere cover to an irredeemable mortgage,[9] and construe the instrument as a mortgage.

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[1] 13 App. Cas., at p. 473. [2] 18 Can. S. C. R., at p. 13. [3] *Supra*, p. 376.

[4] Wallbridge v. Farwell, *supra*; Cass. Sirey, 56-1-667; Dalloz, 56-1-116.

[5] Art. 1967 C. Code. [6] Art. 1971 C. Code.

[7] Clark v. Henry, 2 Cowen, 324; Williams Real Property, 426; Thornborough v. Baker, 2 Lead. Cas. in Equity (4th Amer. Edit.), 1983 *et seq.*

[8] Hare's note to Thornborough v. Baker, 2 Lead. Cas. in Equity (4th Amer. Ed.), 1993, *et seq.* This is also the Civil Law, see Troplong, Nantissement, p. 508.

[9] Poindexter v. McCannon, 1 Devereux's Equity, 373.

31. Mortgage with power of sale.—Most mortgages to secure a company's debentures now contain a power of sale. This is a provision or stipulation whereby the mortgagee, or his assigns, upon default of payment of interest, or of principal, for a certan specified time, has the right to sell and absolutely dispose of the property, upon giving proper notice, but without any proceedings in a Court, recouping themselves the amount of the debt and costs out of the proceeds of the sale, and accounting to the mortgagee or his representatives for the balance. In Ontario, it is provided by statute that such a power of sale shall, by implication, be inserted and contained in every mortgage where no express power is found therein. But in corporation mortgages, in addition to the power of sale, the right is frequently given to the trustees to enter and take temporary but more or less extended possession of the company's property and hold the same as security for the payment and discharge of the debt.[1]

32. Method of securing payment of bonds or debentures.—In this country the mode of securing the payment of corporation bonds or debentures is by deed of hypothec and mortgage or deed of trust in the nature of a mortgage, to trustees as representing the bondholders. Each mortgage bond contains the trustees' certificate indorsed thereon to the effect that the bond is secured by deed of hypothec and mortgage. Trust companies and safe deposit companies now frequently and satisfactorily fulfil the position of paid trustees in such cases, and it would appear to be no objection that such companies are foreign ones.[2]

In Quebec conventional hypothecs with certain exceptions cannot be granted otherwise than by acts in notarial form.[3] But it is not there considered necessary, as is sometimes the case in France, that the mandate given by the shareholders to the directors or other officers to mortgage the company's property, should likewise be in notarial form.[4] At common law no particular form is necessary to constitute a mortgage.[5] It must be in writing,[6] but issued by a corporation it

[1] As for instance in Green v. Ruggles, 31 N. B., at p. 680.

[2] Connecticut and Passumpsic Rivers Ry. Co. v. Comstock, 1 R. L., 589; Art. 79 C. C. P.

[3] Art. 2040 C. Code.

[4] Per Lacoste, C.J., in Damiens v. Société de Prêts et Placements de Québec, 3 Rev. de Jur., at p. 82, 83 (Q. B. 1896).

[5] Jones Mortgages, vol. 1, sec. 60. [6] *Ibid.*

must be under seal. Both the Civil law and the Common law require that it specify the debt to secure which it is given, and the property upon which it is to take effect.[1]

33. Registration of debentures—Debenture Registration Act—Ontario and Manitoba Acts re transfers of property.—All mortgages in Canada, whether under the civil law or the common law, must be registered, as in the case of a deed of land, unless a special statute dispenses with registration.[2] But in addition to this there are important statutes in some Provinces requiring the registration of all debentures whether issued by a municipal or any other corporation, except railway or ecclesiastical corporations. The Debenture Registration Act of Quebec[3] contains provisions respecting the nature and effect of corporate debentures as well as their registration. A similar Act for the Province of Ontario has recently been repealed.

Under this Act " the clerk or secretary, (or person acting as such,) of any corporate body (other than railway companies or religious corporations),[4] must, within two weeks after the final passing of any by-

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[1] Quebec Civil Code, Arts. 2042, 2044; Jones on Mortgages, vol 1, sec. 60.

Where the debentures were headed "Land Mortgage Debenture" and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the President and Secretary, under whose signatures were the following words:—"The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada." Held, that these instruments created a charge upon the property of the Company. *Re* Farmers' Loan & Savings Co., 30 O. R., 336.

Per Rose and MacMahon, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order. *Ibid.*

Per Meredith, C.J., that the charge was such as entitled debenture-holders to be paid out of the assets of the company, in priority to the depositors in the company and other creditors. "The instrument . . . is described as a 'land mortgage debenture.' Had the word 'land' been omitted, this description would point plainly to a well-known form of security, a debenture which is both an obligation for the payment of the money which is payable by the terms of it, and a mortgage on the property of the company by which it is issued, or some part of it, or secured by such a mortgage, and the addition of the word 'land' appears to me indicative of the nature of the property on which the mortgage is represented to exist." *Ibid*, at p. 354.

[2] As for example 32 Vic. (Que.), ch. 56, sec. 17.

[3] R. S. Q., Arts. 4617 *et seq.*

[4] R. S. Q., Art. 4626.

law made and passed by such corporation for the purpose of raising money by the issue of debentures, and before the sale or contract for the sale of any such debentures, issued or intended to be issued thereunder, transmit to the registrar of the county or registration division in which such municipal corporation or other corporate body, or its principal office is situated, a copy duly certified, as hereinafter provided, of each and every by-law made and passed as aforesaid by such municipal corporation or other corporate body, together with a return in the form specified in the schedule A thereunto annexed, shewing: the title or objects of each such by-law, the amounts to be raised thereunder, the number of debentures to be issued thereunder, the amounts thereof respectively, the dates at which the same respectively fall due, the assessed value of the moveable and immoveable property belonging to such corporation or corporate body, etc.[1]

"The registrar of the county or registration division in which such . . . corporate body or its principal office is situated, shall receive and file in his office the several by-laws required to be transmitted to him as hereinbefore provided, and shall cause to be entered, in a book provided for that purpose, true and correct copies of the returns hereinbefore required.[2]

"The registrar of each county or registration division, as aforesaid, shall provide a book of registration, wherein he shall, at the request of the original or any subsequent holders or transferees thereof respectively, from time to time, cause to be entered and registered the name of such original or subsequent holders, or transferees, and such holder or last registered transferee in such book of registration shall be deemed *primâ facie* the legal owner and possessor thereof.[3]

"All by-laws mentioned in Art. 4617 R. S. Q., shall be attested and authenticated by the seal of such corporate body and by the signature of the head thereof.[4]

"The certified copies of all by-laws hereinbefore referred to and transmitted as aforesaid, and also the returns mentioned in Art. 4617 R. S. Q., and the books of entry of such returns and of registration, shall be open to public inspection and examination, and access had

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[1] Art. 4617 R. S. Q.

[2] Art. 4620 R. S. Q., referring to returns required by Art. 4617 R. S. Q.

[3] Art. 4621 R. S. Q.

[4] Art. 4622 R. S. Q.

thereto at all reasonable times and hours upon payment of certain fees as thereinafter provided.[1]

"Any clerk, secretary, or secretary-treasurer as aforesaid, of any corporation or corporate body as aforesaid, neglecting to perform, within the proper period, any duty devolving upon him in virtue of this Act, shall be subject to a fine of two hundred dollars, or, in default of payment thereof, to imprisonment until such fine be paid, but for a period not exceeding twelve months, to be prosecuted in the name of the Attorney-General, in any Court having competent jurisdiction."[2]

This Act provides that such debentures issued as aforsaid shall not be impeachable in the hands of a *bonâ fide* holder for value, without notice.[3]

The Act further provides that "any debenture issued, under the formalities required by law, by any corporation or corporate body, payable to bearer or to any person named therein or bearer, may be transferred by delivery, and such transfer shall vest the property of such debenture in the holder thereof and enable him to maintain an action thereupon in his own name."[4] And further, "Any debenture issued as aforesaid, payable to any person, or to any person or order, is (after general endorsement thereof, by such person) transferable by delivery from the time of such endorsation, and the transfer vests the property thereof in the holder, and enables him to maintain an action thereupon in his own name."[5]

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[1] Art. 4623 R. S. Q.

The following fees shall be paid to registrars under this Act:—

For registration of each certified copy of by-laws, the sum of....	$2.00
For registration of any returns as prescribed in schedule A., for each return, the sum of....	1.00
For registration of the name of holder or transferee, of any number of debentures not exceeding five, the sum of....	0.25
Over five and not exceeding fifteen, the sum of....	0.50
Over fifteen and not exceeding thirty, the sum of....	0.75
Upwards of thirty, the sum of....	1.00
For making search, inspecting each copy of by-law, and examining entries connected therewith....	1.00

Art. 4624 R. S. Q.

[2] Art. 4627 R. S. Q.

[3] Art. 4631 R. S. Q.

[4] Art. 4628 R. S. Q. In Quebec choses in action are assignable, but the debtor must be notified by writing of the assignment (Art. 1571, C. Code). Debentures, however, are not subject to such formality, and may be transferred by mere delivery, without notice to the debtor. (Art. 1573, C. Code.)

[5] Art. 4629, R. S. Q.

Ontario has an enactment similar to the latter part of the Quebec Act in the Act respecting the Law and Transfer of Property.[1] It reads as follows: "The bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order shall (after general indorsation thereof by such person) be transferable by delivery from the time of the indorsation.

"Any such transfer shall vest the property of such bonds or debentures in the holder thereof to enable him to maintain an action in his own name."

The Manitoba Statutes[2] contain an enactment similar to the above Ontario Statute, but differing in one important respect. It omits the words "and if payable to any person or order shall (after general indorsation thereof by such person) be transferable by delivery," etc.

The Quebec Act also provides[3] that "any such debenture issued as aforesaid, is valid and recoverable to the full amount thereof, notwithstanding its negotiation by such corporation at a rate less than par, or at a rate of interest greater than six per centum per annum."

It has been seen that the Debenture Registration Act provides that debentures issued thereunder shall not be impeachable, in the hands of a *bonâ fide* holder, for value, without notice. This has also been held in respect of statutes such as the above, which render debentures transferable by delivery or wherever debentures are at law transferable,[4] even where debentures are stolen before being regularly issued.[5] But a *bonâ fide* holder acquiring after dishonour takes subject not merely to the equities of prior parties to the paper but also to those of all parties having an interest therein.[6]

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[1] R. S. O., ch. 119, sec. 38. Debentures are at common law non-assignable so as to enable the assignee to sue therein in his own name, because they are choses in action. Geddes v. Toronto Street Ry. Co., 14 U. C. C. P., 513; McKenzie v. Montreal & Ottawa Junction Ry. Co., 27 U. C. C. P., 224; Gott v. Gott, 9 Grant's Chy., 165.

[2] R. S. M., ch. 1, sec. 7.

[3] R. S. Q., art. 4631.

[4] McKenzie v. Montreal & Ottawa Ry. Co., 29 U. C. C. P., 333, 338; Imperial Land Company of Marseilles, L. R., 11 Eq., 478, Per V. C. Malins, at p. 490; Trust & Loan Co. v. Hamilton, 7 U. C. C. P., 98, 100. As to what constitutes notice see Young v. MacNider, 25 Can. S. C. R., 272; Ry. Co. v. Sprague, 103 U. S., 762.

[5] Trust & Loan Co. v. Hamilton, 7 U. C. C. P., 98; and see Jones v. Municipality of Albert, 21 N. B., 200.

[6] Young v. MacNider, 25 Can. S. C. R., 272.

34. What is meant by "debenture."—The word "debenture" is generally very loosely used, and it becomes important to determine what is a debenture within the meaning of the Debenture Registration Acts. This is what Mr. Justice Chitty has to say of the word in Edmunds v. Blaina Furnaces Co.[1] : "The term 'debenture' has not, so far as I am aware, ever received any precise legal definition. . . . But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under Acts of Parliaments, which when you turn to the Acts of Parliament themselves are not so described. The "debentures" of a railway company are frequently spoken of; but the Companies' Clauses Act of 1845 speaks of 'bonds and mortgages' and not 'debentures'; in argument, however, they are frequently so called. In the same way the instruments of a company incorporated under the Act of 1862, of which a register must be kept, are commonly called debentures, but the term in the Act is 'mortgages' and 'charges.' It is an expression used frequently in the law Courts, both by counsel and Judges, and it is a very convenient term; but it has no legal definition. That is the opinion of Mr. Justice Grove and of Lord Justice Lindley as expressed in the case of British India Steam Navigation Company v Commissioners of Inland Revenue[2] (referred to previously in this chapter, sec. 25). The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures without any one being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. So that there are debentures which are secured, and debentures which are not secured." The foregoing will serve to show what may be implied from the word "debenture" as used in the Quebec Debenture Registration Act.

35. Consequences of non-registration of debentures.—As to the consequences of not registering under this Act. It provides that any clerk, secretary or secretary-treasurer who neglects to comply with the provisions of the Act shall be subject to a penalty of $200, or, in default of payment, to imprisonment.[3] This would seem to be the only consequence of non-compliance with the Act.

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[1] 36 Ch. Div., at p. 218. [2] 7 Q. B. Div., 165. [3] Art. 4627 R. S. Q.

Doubt seems to exist in the minds of some whether, under the laws of the Province of Quebec, a hypothec capable of registration can be granted on immoveable property situated in the Province, to trustees to secure repayment of an issue of negotiable or other debentures to all persons who, from time to time, may be or become the holders of all or any of the same.[1]

36. Special provision of Quebec Companies' Act as to bonds creating privilege.—Concerning companies incorporated under the Quebec Companies' Act, the amendment[2] to that Act now provides that bonds or debentures issued by such companies after their registration in the office or offices of the registration division or divisions in which the immoveables of the company are situated (which must be described in a notice to that effect given to the registrar), constitute a privileged claim in favor of the holders thereof against the company, and give a right of preference over all other debts and claims against the company, posterior to the issuing of such debentures.

37. Necessity of Debenture Act in Quebec—Difference in other Provinces.—The necessity of an Act like the Debenture Registration and Transfer Act in the Province of Quebec was even more apparent than in the Province of Ontario to which it applied jointly with the former Province at the date of the Union of the two Provinces. Statutes have been passed conferring statutory mortgage upon debenture-holders of certain companies and specially exempting them from the necessity of registration, anything in Art. 2084 Civil Code to the contrary notwithstanding.[3] In the Province of Quebec chattel mortgages are not permitted at common law. Special statutes allow mortgages of chattels in the case of ships and as provided in the Bank Act,[4] and where special power to do so is given by the act of incorporation granted by the Provincial legislature having jurisdiction in such matters. In Ontario it is otherwise, and the Bills of Sale and Chattel Mortgage Act[5] provides for the registration of debentures in

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[1] See "An Act respecting the Eddy Company, Que., 58 Vic., ch. 73 (1895).

[2] 54 Vic., ch. 35.

[3] As for example 32 Vic. (Que.), ch. 56, sec. 17. This was a railway act, and railways are exempted from the provisions of the Debentures Registration Act; but other means are provided in the Railway Acts to give publicity to such debentures (see Railway Act 1888, sec. 94 (3).

[4] 53 Vic., ch. 31.

[5] R. S. O., ch. 148, sec. 23. As to registration of corporate mortgages of personal property in New Brunswick, see 56 Vic., ch. 5, sec. 15 (1) (2) (3) (4): in Nova Scotia, 56 Vic., ch. 39, amending R. S. N. S., ch. 92.

so far as they constitute a charge upon all the company's goods and chattels.

In Quebec where a special Act declares that the company's mortgage bonds "shall constitute a first charge upon its machinery, plant, franchises, rates, revenues and rents[1]" in addition to the hypothec upon its immoveables, there would be no mode of recording the charge other than that upon its real estate. The Debenture Registration Act provides a method which shows at a glance the company's complete standing with regard to the bonds and debentures it has issued.

In the Provinces other than Quebec, an instrument conveying an interest in land, and also fixtures thereon, needs only to be registered in the registry office for lands[2] in the county where the real estate is situated; it need not be filed in the registry office as a chattel mortgage or bill of sale.[3] There is no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.[4] Goods and chattels which are not fixtures must, of course, be registered under the Bills of Sale Act.[5]

38. Effect of a non-registered bond.—The consequence of neglecting to register the by-laws authorizing the issue of debentures has not been passed upon by the Courts. The decision would depend on whether the usual mortgage to trustees to secure the several bondholders does, in fact, as under the Quebec law, give the several bondholders a privileged claim. If not the bond will be merely an evidence of the company's indebtedness and will convey no privilege. If it does give a privileged claim, then the question is whether the

[1] See Coaticook Light & Power Co., 60 Vic. (Que.), ch. 79, sec. 16.

[2] New Brunswick has a new Lands Registry Act, 57 Vic., ch. 20.

[3] Warner v. Don, 26 Can. S. C. R., 388; Robinson v. Cook, 6 O. R., 590; Jones on Railroad Securities, 156; for New Brunswick see 56 Vic., ch. 5, sec. 27.

[4] *Ibid.*

[5] 51 Vic., ch. 23 (Nova Scotia), has exempted deeds of trust or mortgages made by railroad companies for the purpose of securing their bonds, from the application of the Bills of Sale Act, R. S. N. S., ch. 92; and 56 Vic., ch. 39 (Nova Scotia), has exempted from the application of sections 4 and 5 of the said Bills of Sale Act, mortgages or deeds of trust made to secure the bonds or debentures of any incorporated company, sections 4 and 5 relate to the affidavit of *bonâ fides*; as to affidavit of *bonâ fides* in New Brunswick see 56 Vic., ch. 5, sec. 15 (1).

Debenture Registration Act[1] is merely directory or imperative. If it can be supposed that the mortgage bonds confer a privileged right upon their holders without registration under this Act, by complying with the ordinary registration Acts, it may be possible to disregard the express provision of the preamble to the original Act, to the effect that one of the principle objects of the Act is to confer a "priority of lien."

39. Penalties for non-registration of bonds.—If the special statute constituting a corporation declares that its bonds shall be a first charge upon its whole property, it would appear to be clear that this special statute must prevail, but in the large number of cases where there is no such special statute or provision therein, and admitting, for the sake of argument, that the privilege in favor of the bondholder exists by virtue of the deed of mortgage to which each bond makes special reference, then it would appear that the Debenture Registration Act is merely directory and the only consequence that the secretary or secretary-treasurer is subject to the penalty therein set forth.[2] This would appear to be clear from the interpretation put upon the section of the English Companies' Act[3] which provides for the registration of corporate mortgages, in default of which the officer permitting the omission is subject to a penalty. It has never been doubted by the Courts that this section is directory only, and a mortgage is not void for want of registration.[4] It has been persistenly pointed out[5] that the one consequence of neglecting to register, is that which the section specially provides, and the same may be said of our own Act. It seems scarcely possible that an Act designed to the better security of the holders of debentures[6] should be so construed as to render debentures additionally insecure by omission to comply with the Act. But it is submitted that enough has been shewn to indicate the delicacy of the situation and the urgent necessity, in the Province of Quebec at least, of registering under the Act.

40. Debentures as negotiable instruments—Days of grace—Interest—Form.—In framing a debenture to bearer, the object is, as far as possible, to endow it with the characteristics of a negotiable

[1] R. S. Q., 4617 *et seq.*

[2] R. S. Q., 4627.

[3] Sec. 43, Companies' Act, 1862.

[4] *Ex parte* Valpy and Chaplin, L. R., 7 Ch., 289; Wright v. Horton, 12 App. Cas., 371.

[5] Globe Iron Co., 48 L. J. (Ch.), 295, Per Jessel, J.

[6] Preamble to 22 Vic., ch. 91 (1858), R. S. C. (1859).

instrument, and in particular to make it transferable free from equities; to make it transferable by delivery; to render the delivery of the debenture and any interest coupon a good discharge to the company; to enable the bearer to sue the company in his own name, if necessary; and to insure a good title to any person who acquires the debenture *bonâ fide* for valid consideration, notwithstanding any defect in the title of the person from whom he acquires it.[1] There is good reason to believe that debentures to bearer are negotiable by the Law Merchant, that is by the general custom of merchants.[2]

It has been decided by the Canadian Courts[3] that municipal debentures, as commonly understood and according to the general usage, are negotiable instruments, transferable by endorsement or by mere delivery; and this appears to be so independently of the Debenture Registration Act, and there is no reason why other debentures should not be so regarded. They are as strictly negotiable as are bank bills.[4] It has been held that such a debenture cannot bear a condition on the face of it, making its validity dependent upon obligations to be performed in future.[5] But in a Supreme Court case[6] which related to Quebec Turnpike Trust bonds issued under special acts and ordinances, the Chief Justice stated[7] that he had much doubt whether these bonds, especially having regard to the statutory authority under which they were issued, and to the way in which they were dealt with in the market, were for the purpose of the case to be considered as ordinary mercantile securities such as bills and notes. Many American cases would seem to shew that they are. Taschereau and Fournier, JJ., held emphatically that such debentures are not promissory notes. The bonds or debentures in this case were payable to bearer and transferable by delivery. But it is to be noted that they were payable out of a certain fund, and differed in that respect from ordinary corporate debentures. Judge Andrews in the Superior Court considered them to be in effect promissory notes,[8] and they were so treated by the Queen's Bench.[9]

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[1] Palmer Comp. Law, at p. 204.

[2] *Ibid*, pp. 204, 208.

[3] MacFarlane v. Corp. of St. Cesaire, 14 Can. S. C. R., 738, confirming Q. B., 2 M. L. R., 160; also Eastern Townships Bank v. Municipality of Compton, 7 R. L., 446, and Jones v. Municipality of Albert, 21 N. B., 200.

[4] Jones Railroad Securities, sec. 197.

[5] MacFarlane v. Corp. of St. Cesaire, *supra*.

[6] Young v. MacNider, 25 Can. S. C. R., 272.

[7] At p. 277.

[8] R. J. Q., 4 S. C., at p. 211; see Article 1573, Civ. Code.

[9] 1894, R. J. Q., 3 Q. B., 539, citing Allen v. Cole, decided by Mr. Justice Tuck in New Brunswick, 1894.

It has been held in an early Ontario case that a debenture or coupon could not be considered a promissory note where the company had no power to make promissory notes,[1] which seems to imply that such an instrument would be a promissory note where the company has power to make notes.

Detached coupons containing an absolute promise to pay a certain sum to bearer on a certain date, must necessarily come within the definition of a promissory note as given in section 82 of the Bills of Exchange Act 1890. In this case it is difficult to see why all the incidents of a promissory note, as set out in the Bills of Exchange Act should not apply. In most cases, however, debentures contain provisions which preclude their coming within the definition of promissory notes, as the right of the company to pay the amount thereof at its option on giving notice. It has not yet been settled in the United States whether such a coupon is entitled to the three days' grace.[2] If they are out and out promissory notes, the question must necessarily be answered in the affirmative. And it would be equally difficult to escape the conclusion that the indorser of such a coupon, dishonoured by the company issuing it, would be as liable as the indorser of an ordinary promissory note.[3] But it would appear to be unlawful under our Companies' Acts for a company to issue such coupons payable to bearer if they are out and out promissory notes.[4] If they are in the form of mere promises to pay a stated amount at a stated date, without reference to any payee, then they cease to be promissory notes,[5] for there must be at least two parties to every contract, and until there is another party designated in a document purporting to be a promissory note, either by name or as bearer, there can be no contract.[6] It would seem reasonable, however, to treat the coupon

[1] Geddes v. Toronto Street Ry. Co., 14 U. C. C. P., 513 : see an old Ontario case as to meaning of coupon, McKenzie v. Montreal & Ottawa Junc. Ry. Co., 27 U. C. C. P., 224.

[2] Affirmative:—Evertsen v. National Bank, 66 N. Y., 18 ; Negative :—Chaffee v. Middlesex Ry. Co., 146, Mass., 224; Agents v. Commonwealth, 18 Grat., 773; Daniels Neg. Insts., sec. 1490a.

[3] See Bull v. Sims, 23 N. Y., 570; Campbell v. Polk Co., 3 Iowa, 467; Fairchild v. Ogdensburg Ry. Co., 15 N. Y., 337; Hodges v. Shuler, 22 N. Y., 114; Daniels Neg. Insts., sec. 429.

[4] See for instance sec. 76, Dom. Comp. Act, R. S. C., ch. 119. Nothing in this act shall be construed to authorize the company to issue any note payable to the bearer ; but see *infra*, sec. 41, p. 390.

[5] See definition of prom. note, Bills of Ex. Act, 53 V. (D), ch. 33, sec. 82.

[6] See Brown v. De Winton, 6 C. B., 336; 12 Jur., 678; Jackson v. York, etc., Ry. Co., 49 Me., 147; 43 Me., 232.

as a part of the bond, in which case the debenture-holder would be the payee because the coupon is as much subject to the terms of the trust deed as the debenture itself.

Interest runs on these coupons from the dates on which they respectively fall due without the necessity of putting the debtor in default,[1] and this is the law in Quebec;[2] but interest has been denied in New Brunswick.[3]

The fact that debentures are under seal does not detract from their negotiable chatacter, and though a statute makes them a charge on all the property of the company, with a right of foreclosure and sale, this is something superinduced upon the security by virtue of the statute.[4]

Debentures may be made payable to bearer,[5] and the issuing of debentures in blank to be subsequently filled in, upon delivery, by the managing director, does not invalidate the debentures.[6]

If debentures are promissory notes, it would appear at first sight that to issue such debentures payable to bearer would be in contravention of those clauses in our Companies' Acts which forbid companies to "issue any note payable to the bearer thereof."[7] It is certain they are not notes "intended to be circulated as money or as the notes of a bank," because they are not payable on demand,[8] which is one of the features of obligations circulating as money. It would appear that the above provision relates not so much to the form of the instrument as to the intention that it shall not circulate as a bank note.[9]

41. Bonds secured by collateral—Not bank notes.—The Dominion Companies' Act and others provide that companies incorporated there-

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[1] Daniels Neg. Insts., sec. 1505; Jones R.R. Securities, sec. 332.

[2] Desrosiers v. Montreal, Portland & Boston Ry. Co., 28 L. C. J., 1.

[3] Jones v. Municipality of Albert, 21 N. B., 200.

[4] Bank of Toronto v. Cobourg, etc., Ry. Co., 7 O. R., 1; see sec. 82 (3), Bills of Exchange Act, 1890.

[5] Geddes v. Toronto Street Ry. Co., 14 U. C. C. P., 513.

[6] Bank of Toronto v. Cobourg, etc., Ry. Co., 7 O. R., 1; but see Jones on Railroad Securities, citing English authorities to the contrary, sec. 204; American authorities same as Ontario.

[7] Sec. 76, Dominion Companies' Act, R. S. C., ch. 119.

[8] Hubbard v. New York, etc., Ry. Co., 36 Barb. (N. Y.), 286.

[9] Mumford v. Am. Life Ins. & Trust Co., 4 N. Y., 463; McMaster v. Reed's Executors, 1 Grant (Pa.), 36; Hubbard v. New York Ry. Co., 36 Barb. (N. Y.), 286.

under may raise money by the issue of bonds, debentures or other securities, and it is merely optional whether the sums so raised are secured by collateral or not. It has been held that unsecured bonds, that is to say, bonds which are mere evidences of indebtedness, payable to bearer, at a date certain, and, therefore, well within the terms of sec. 82 of our Bills of Exchange Act, 1890, do not fall within a statutory prohibition against issuing notes for a circulating medium in the similarity of a bank note.[1] But under our Bills of Exchange Act a note is none the less a note because it also contains a pledge of collateral security with authority to sell or dispose thereof.[2]

42. Necessity of presentation of bonds or debentures for payment at the place payable.—Bonds or debentures are usually made payable on delivery at a certain bank, and it is provided that delivery of the bonds and coupons to the company issuing them is a good discharge for the latter. In such a case the bonds or debentures, etc., must be presented at the stated bank before their payment can be enforced.[3] And in an action for damages by way of interest from the date the bonds are due to the date they are actually paid, it would be a good defence for the company, if sued in covenant on the bond, to set up non-presentation at the particular bank, even if it could be proved that there were no funds at the bank at the time to meet the indebtedness.[4] But the contrary would seem to be the case where the company is sued by way of debt on the bond.[5]

43. Position of indorser of a bond or debenture.—If debentures are negotiable instruments, having all the qualities of commercial paper, the logical conclusion would be that an indorser thereof would be bound as is the indorser of an ordinary promissory note. It has been held in the United States that a railway company which has transferred, by indorsement, a negotiable bond issued by a municipal corporation, is bound as an indorser of negotiable paper, if its liability be fixed by a proper demand and notice.[6] A person who

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[1] McMaster v. Reed's Executors, *supra*, p. 389. [2] 53 V., ch. 33, sec. 82 (3).

[3] McDonald v. Great Western Ry., 21 U. C. Q. B., 223; Osborne v. Preston & Berlin Ry. Co., 9 U. C. C. P., 241; see also Becher v. Corporation of Amherstburgh, 23 U. C. C. P., 602.

[4] Montreal City Bank v. Corporation of Perth, 32 U. C. C. P., 18.

[5] Fellowes v. Ottawa Gas Co., 19 U. C. C. P., 174; *Re* Thompson & Victoria Ry. Co., 9 Ont. P. R., 119.

[6] Bonner v. City of New Orleans, 2 Woods (U. S. Circuit), 135.

negotiates the sale of a debenture does not bind himself that the corporation will pay the amount of the debenture.[1]

44. Bonds issued at a discount.—The Companies' Acts enact that bonds or debentures may be issued at such prices as are deemed necessary;[2] and such is the general law as laid down by the cases.[3] The considerations which render the issue of the shares of a limited company at a discount illegal have no application to debentures, or debenture stock.[4] A discount is really the same thing as an increase in the rate of interest: the discount is only the present value of the difference in the rate of interest calculated over the currency of the debenture.[5]

45. Detachment of coupons from bonds.—On motion of the holder of bonds with coupons attached, the Court will order such of the coupons as are not in litigation to be detached by the Clerk of the Court and delivered over to the party moving.[6]

46. Company's liability for debts when statutory requirements are not complied with.—When statutory requirements are merely directory and not imperative, the omission to comply with them would not render void the particular act done under the authority of the statute; so where a statute required all evidences of debt issued by a company to be signed by the president and treasurer, this would be looked upon as directory merely, and the signature of the secretary instead of the treasurer would be sufficient.[7]

Where a mining company was empowered to borrow money and mortgage its property upon a vote of the stockholders and directors, it was held that the company was liable on a loan obtained by the directors without such vote, for the lender was justified in assuming that there had been a meeting and vote of the shareholders in the

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[1] Sceally v. McCallum, 9 Grant's Chy., 434.

[2] Dom. Act, R. S. C., ch. 119, sec. 37 (a).

[3] Anglo-Danubian Steam Co., 20 Eq., 339; Compagnie Generale, Campbell's Case, 4 Ch. Div., 470.

[4] Buckley Companies, 171. [5] Palmer Comp. Law, 218.

[6] Montreal, Portland & Boston Ry. Co. v. Banque d'Hochelaga, 27 L.C.J., 164 (Q. B. 1883).

[7] City Bank v. Cheney, 15 U. C. Q. B., 400; and see In *re* Farlinger & The Village of Morrisburg, 16 O. R., 722; Lewis v. Brady, 17 O. R., 377; Grand Trunk Ry. Co. v. Corporation of Levis, 10 R. L., 612.

manner directed.[1] And likewise with the omission of the preliminaries of corporate meetings, such as the publication of notices or with regulations as to the manner of conducting such meetings, or the appointment and election of directors.[2] But where the irregularity is one which appears on the face of the instrument itself, the purchaser is bound to take notice of it.[3] This would apply to necessity of the lender looking into the regularity of meetings, examining by-laws, etc., referred to previously in this chapter, secs. 8 and 11.

47. Position of mortgage trustee—Remedy of bondholders.—It is the duty of a mortgage trustee to protect the security he has taken for the bondholders to the utmost of his ability.[4] He can be plaintiff in an action to enforce the rights conveyed by the trust deed;[5] but commonly the action is brought by the debenture-holder himself and the company and trustee made defendants. If the trustee be remiss in his duty to protect the security, the bondholders may themselves maintain an action to prevent a diversion of the property or otherwise enforce their rights.[6]

The trustees have no power at common law to assent for the bondholders that an unsecured debt may be paid in preference to their secured bonds.[7]

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[1] Royal British Bank v. Turquand, 6 El. & Bl., 327; Tyson's Reef Co., 3 W. W. & A. B. Cases at law, 162.

[2] Township of Brock v. Toronto & Nipissing Ry. Co., 17 Grant's Chy., 425; Fountain v. Carmarthen Ry. Co., L. R., 5 Eq., 316; Worcester Corn Exchange, 3 De G. M. & G., 180; Anderson v. Duke, etc., Gold Mine Co., 1 Australian Jurist, 161.

[3] Athenaum Life Assur. Co., 4 K. & J., 549; Geddes v. Toronto Street Ry. Co., 14 U. C. C. P., 513; Commercial Bank of Canada v. Great North-Western Ry. Co., 3 Moore (N. S.), 313-314.

[4] Jones on Railroad Securities, secs. 358, 362.

[5] Hatherton v. Temiscouata Ry. Co., R. J. Q., 12 S. C., 481.

[6] *Ibid*; as to who are trustees in a particular case see N. S. Central Ry. v. Halifax Banking Co., 21 Can. S. C. R., 536.

[7] Duncan v. Mobile & Ohio Ry. Co., 2 Woods, 542. A written instrument after reciting that the G. S. R. Company had made a mortgage to trustees to secure bonds, of which $825,000 had been issued; that the subscribers to the instrument "were holders of the bonds aforesaid, as security for loans or owners, to the amounts set opposite their names respectively;" that it was proposed to borrow a sum not exceeding $50,000, to be used in paying claims against the company, and to secure the person advancing the same by a lien on the property of the company which should have preference over the claims of "the subscribers as holders of said bonds"—set forth that it was mutually agreed between the subscribers thereto, "holders of bonds"

In Quebec it has been held that the holder of railway bonds, constituting a privileged claim upon the moveable property of the company, may, for the protection of his rights, proceed against such property by an attachment in revendication in the nature of a conservatory attachment.[1]

48. Notice to trustee is notice to the bondholders.—Notice to trustees under an ordinary mortgage deed is notice to the holders of the bonds secured by the mortgage. Therefore, actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance.[2] And the fact that the bonds are treated as negotiable, and pass from hand to hand like bank bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage.[3]

49. When a bond is issued—Effect.—A bond is not issued in the proper sense until it is delivered,[4] although the word "issue" may be considered to be used in a less proper sense to signify the preparation, signing and sealing of the documents, and the placing of them absolutely out of the possession and control of the company.[5] It is

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of said company, the trustees and the company that the trustees should hold the property in preference to the claims of "bondholders" as security for the said sum which might be advanced by any person to the company for said purposes, and that the proceeds of sale should be first used in payment of said sum, before being applied in payment of the claims of "bondholders;" that the subscribers thereto "as bondholders" would on demand, have foreclosure proceedings instituted; that the company was to give notes for the amount . . . and that the subscribers thereto, "holders of bonds," should, on transfer of the bonds held by them, notify the transferee of the agreement;

Held:—1st. That the instrument was binding on the bondholders subscribing, though other bondholders did not subscribe to it; 2nd. That the assent of all the trustees was not necessary; 3. That it was not necessary that notes should be given in accordance with the agreement. (Green v. Ruggles, 31 N. B., 679; confirmed by Privy Council, 21 Canadian Gazette, 415.) As to power of majority to bind minority of bondholders see Follit v. Eddystone Granite Quarries (1892), 3 Ch., 75; Hay v. Swedish & Norwegian Railway Company, 5 Times L. R., 460, 461.

[1] Wyatt v. Senecal, 4 Q. L. R., 76.

[2] Miller v. Rutland & Washington Ry. Co., 36 Vt., 452.

[3] Per Barret, J., in same case, p. 484.

[4] Mowatt v. Castle Steel Co., 34 Ch. Div., 58.

[5] Per Killam, J., in West Cumberland Iron Co. v. Winnipeg & H. B. Ry. Co., 6 Man., at p. 395.

delivery which constitutes the issue in the sense of the Company Acts. This is important, for in the hands of the company that issues the bonds the property before delivery is merely in the piece of paper on which the instruments are written. It is only when issued to another party as obligee or promisee in respect thereof, that the instruments could take effect as the obligations of the company, or that there could be said to be any property in the obligations to be pledged by a pledge of the papers containing them.[1] The distinction is seen where bonds are merely deposited with a bank or some third party as collateral security for the creditor. In such a case there being no delivery or pledge of the chose in action in such a way as to immediately incur an obligation on the part of the company, the latter could not set up as against the creditor any irregularity in their issue, for they would not have been " issued " at all in the legal sense.[2]

50. Pledge of bonds or debentures.—Under the English system of law it would appear to be competent for a company, by its officers, to sign and seal such instruments and deposit them as security with a party making advances to it, upon the terms that such party should not be the holder of them, that they should create no obligation to him, but that his only right should be to sell them, as the company might, and repay himself from the proceeds, he making them, thus, the obligation of the company to the purchasers.[3] In Quebec the foregoing resembles the definition of pledge.[4] The law of Quebec merely gives the pledgee privilege upon the price of the article pledged while it remains in his possession; and it must be seized and sold in the usual course of law. The ownership remains with the pledger. But in Quebec the creditor may stipulate that in default of payment he shall be entitled to retain the thing pledged.[5]

51. Mortgage of future property.—Concerning the English system of law it may be said that while at common law " a man cannot grant or change that which he hath not,"[6] yet it has long been settled that courts of equity will uphold and give effect to mortgages of future property in so far as they do not conflict with the rights of

[1] *Ibid*, at p. 394.

[2] See Winnipeg & H. B. Ry. Co. v. Mann, 7 Man., at pp. 93 & 94.

[3] West Cumberland Iron Co. v. Winnipeg & H. B. Ry. Co., 6 Man., at p. 395.

[4] Arts. 1966, 1969 & 1972 Civ. Code.

[5] Arts. 1970 & 1971 Civ. Code.

[6] Perkins, A Profitable Book; Grant's, sec. 65.

subsequent creditors and purchasers without notice.[1] In the Province of Quebec mortgages can at common law only affect immoveables;[2] and this principle is adhered to in the amendment to the Quebec Companies' Act,[3] and a conventional mortgage of after-acquired immoveable property would be for all practical purposes an impossibility, for such a mortgage to be valid must specially describe the immoveable hypothecated,[4] and the contract would merely be an undertaking to grant a mortgage on after acquired property, which it quite a usual condition in the case of companies whose immoveables are likely to increase as the company's operations are extended. It is a well known rule that a valid mortgage can only be granted by those who are capable of alienating the immoveables which they subject to it.[5]

In so far as a mortgage includes after-acquired property, the mortgage attaches in equity as a lien or charge upon such property as soon as acquired by the mortgagor, according to recent authorities both English and American. In equity what is in form a conveyance operates, by way of present contract, to take effect and attach to the subject of it as soon as it comes into being; the agreement to convey then ripens into an actual transfer.[6]

A mortgage of future property, therefore, only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives, and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance, can displace such mortgage for purchase money. And in such a case a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for

[1] Seaburn v. Powell, 2 Vern., 10; Doe v. Pott, 2 Doug., 710; Noel v. Bewley, 3 Sim., 103; *Ex parte* Cotton, 6 Jur., 1045; Metcalf v. Archbishop of York, 1 Mylne & Cr., 547, 553; Langton v. Horton, 1 Hare, 549; Holroyd v. Marshall, 10 H. L. Cas., 191; Robertson v. Morton, 1 Drury & W., 195. As to purchaser without notice see particularly Haley v. Halifax Street Ry. Co., 25 N. Sc., 140, 147, 153.

[2] Arts. 2016, 2022, C. Code. [3] 54 Vic., ch. 35, sec. 1. [4] Art. 2042, C. Code.

[5] Art. 2037 C. Code; see Union Bank v. Nutbrown, 10 Q. L. R., 287.

[6] See Jones Railroad Securities, sec. 122; Haley v. Halifax Street Ry. Co., 25 N. Sc., 140.

As to the effect of mortgage of after-acquired property where company's property is transferred by legislative enactment to another company, see Haley v. Halifax Street Ry. Co., *supra*.

the protection of subsequent, not prior, purchasers and creditors.[1] Thus a mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage.[2] But this rule does not apply to an unpaid vendor's lien where the material supplied by the vendor becomes amalgamated with the immoveable mortgaged, as in the case of rails sold to a railway company and laid and spiked on to the sleepers. This is the rule both under the Quebec law and the English law.[3]

In England since the Judicature Act 1875 (sec. 10), it has been doubted whether a company can charge its after-acquired property as against its other creditors.[4] Jessel, M.R., has suggested that it would be contrary to the policy of the bankruptcy laws that a mortgage security should effect after acquired property.[5] The insolvency law applicable to companies in this country is the Winding-up Act. A mortgage of after-acquired property by a company would appear to be invalid under this Act when made in contemplation of insolvency.[6]

Frequently the right to charge after-acquired property is given by general Acts or special Statutes. The Dominion Railway Act[7] provides that bonds, debentures, etc., of railway companies shall be a first preferential claim and charge upon the . . . real and personal property thereof, at any time acquired. And this, of course, in the Province of Quebec would override the Provincial law respecting the mortgage of future property. The Act enacts, in effect, a special statutory mortgage.

52. Mortgage of uncalled capital.—In Quebec, the charging of uncalled capital is as impossible, without special statutory authority, as the mortgaging of after acquired property. Privileges under the Quebec law result solely from the law and not from contract.[8]

Under the English system of law the power of a company, limited by shares, to charge uncalled capital has always been regarded by the

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[1] United States v. New Orleans Ry. Co., 12 Wall, 362-365, per Bradley, J.; Willoink v. Morris Canal & Banking Co., 3 Green (N. J.), ch. 377.

[2] Jones on Mortgages, sec. 158; Williamson v. N. J. Southern Ry. Co., 28 N. J. Eq., 277, 298.

[3] Wallbridge v. Farwell, 18 Can. S. C. R., 7; and see Galveston Ry. Co. v. Cowdrey, 11 Wall, 459.

[4] Florence Land Co., E. P. Moor, 10 Ch. Div., 530, 535, 543, 547.

[5] *Ibid*, at p. 535.

[6] R. S. C., ch. 129, sec. 71.

[7] 1888, sec. 95.

[8] Art. 1983, C. Code.

Courts with disfavor.[1] But it appears never to have been held beyond the powers of a limited company to create such a charge.[2] It is now settled that a charge on uncalled capital can be created by a limited company provided there be some language in the governing instrument such as the memorandum of association, articles of association, letters patent, statutory charter or even special resolution which can be so construed.[3]

It has been held that the words "to receive money on loan or deposit or otherwise, and upon any security of the company or upon the security of any property of the company without giving security," are sufficient to permit the directors to create a charge over the whole of the uncalled capital of the company.[4] So, too, a power to mortgage the property *and rights* is sufficient.[5] Also a power to mortgage the company's "assets;"[6] or to raise money "in various modes" or "in such other manner as the company may determine."[7] But a power to charge "property" or "property and funds" does not authorize a mortgage of uncalled capital,[8] and a charge upon "real and personal estate" does not charge the uncalled capital;[9] and even the words "property both present and future" are insufficient.[10]

53. Mortgage of proceeds of call.—Under a power to mortgage, a mortgage of arrears of a call already made is valid,[11] and so is a mortgage of the proceeds of a call, not yet made, but already determined upon, although so determined upon with a view to giving a charge upon it.[12]

54. Powers of companies to mortgage for purposes other than to secure loans.—It will be noticed that these Companies' Acts which give the express power to hypothecate or pledge the property of the

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[1] Per Lord Magnaghton in Newton v. Debenture-Holders of Anglo-Australia Investment Co. (1895), App. Cas., 244; 11 R., at p. 440. [2] See *Ibid.*

[3] Newton v. Debenture-Holders of Anglo-Australia Investment Co. (1895), App. Cas., 244; 11 R., 438; In *re* Pyle Works, 44 Ch. Div., 534. [4] *Ibid.*

[5] Howard v. Patent Ivory Co., 38 Ch. Div., 156.

[6] Page v. International Co., 68 L. T., 435.

[7] Jackson v. Rainford (1896), 2 Ch., 340; Palmer Comp. Law, 189.

[8] Bank of South Australia v. Abrahams, L.R., 6 P.C., 265, 271; Bower v. Foreign Gas Co., W. N. 1877, 222.

[9] Colonial Trusts Corporation, 15 Ch. Div., 465.

[10] Streatham Estates Co. (1897), 1 Ch., 15.

[11] Humber Iron Works, 16 W. R., 474, 667.

[12] Sankey Brook Coal Co., 9 Eq., 721; Pickering v. Ilfracombe Ry. Co., L. R., 3 C. P., 235, 247; Buckley Comp., 6th Ed., p. 167.

company, provide that such hypothecation is "to secure any sums borrowed by the company."[1] It is only where the mortgage is given for money borrowed that a by-law passed and approved by the shareholders is absolutely necessary as a condition precedent.[2] Therefore, where a mortgage is given by officers of a company, having power to give mortgages, and for purposes, within the scope of its business, other than the borrowing of money, the mortgagee may take it for granted that all is being done in due course, the mortgage being under seal.[3] Where a company has power to acquire land for the purposes of its incorporation, it has the power to give a mortgage for and to bind itself by covenant to pay the purchase money.[4]

55. Company's power to make loans—Loan Companies.—Unless a company's charter contains express power to make loans, the power to do so cannot generally be implied as in the case of borrowing.[5] Loan companies incorporated by letters patent are governed by special clauses of the Dominion Companies' Act devoted solely to such companies.[6] A "Loan Company" means a company incorporated for any of the purposes to which the powers of loan companies extend, as provided in the Act.[7] Among these purposes are stated to be the making of loans and its incidents;[8] acting as agents and lending money either on their own behalf or as agents for others,[9] receiving money on deposit,[10] etc. In the Province of Quebec it is provided that any loan, etc., society incorporated under the laws of the Parliament of Great Britain and Ireland or of the Dominion of Canada[11] for the purpose of lending or investing moneys, and authorized by its charter to lend money in that Province, may receive a license from the Provincial Secretary authorizing it to carry on business therein.[12] It

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[1] R. S. C., ch. 119, sec. 37 (b). [2] R. S. C., cap. 119, sec. 37.

[3] Sheppard v. Bonanza Nickel Mining Co., 25 O. R., 305, citing Royal British Bank v. Turquand, 6 E. & B., 327, etc.

[4] *Ibid*; see also *supra*, pp. 362 *et seq.*

[5] Thompson on Corporations, sec. 5711; Walmsley v. Rent Guarantee Co., 29 Grant's Chy., 484.

[6] Secs. 86 to 103, R. S. C., ch. 119. These sections now only apply to loan companies formed and incorporated prior to 11th August, 1899. Those incorporated since that date are governed by 62-63 Vic., ch. 41. see sec. 46.

[7] Sec. 2 (c), R. S. C., ch. 119. [8] R. S. C., ch. 119, sec. 88.

[9] R. S. C., ch. 119, sec. 89. [10] R. S. C., ch. 119, sec. 91.

[11] 62 V., ch. 46, sec. 1, adds "or of the Legislature of any of the other Provinces of Canada, wherein such institutions incorporated in the Province of Quebec may exercise the same rights."

[12] R. S. Q., 5470; see also art. 5472.

has been recently decided by the Court of Queen's Bench that an Ontario Loan Company, provided the power to loan or mortgage in Quebec be given by its charter, may, even in the absence of the permission of the Provincial Secretary, lend on the security of mortgage in that Province.[1] Since this decision was rendered, the Legislature has enacted that "Saving pending cases, any institution or corporation or loan and investment society duly incorporated under the laws of the Legislature of any of the other provinces of Canada, wherein such institutions incorporated in the Province of Quebec may exercise the same rights, which has hitherto done such loaning and investment business in this province, and which shall, within one year from the coming into force of this Act, obtain the license referred to in the said articles 5470 and 5472 of the Revised Statutes, is hereby declared to have always had and to have lawfully exercised all the powers and privileges enumerated in article 5472 of the Revised Statutes."[2]

56. Provincial requirements as to license by companies incorporated outside province.—It would appear to follow from Birkbeck, etc., Co. v. Brabant,[3] that as every mutual benefit society or benevolent association incorporated in any Province in Canada, which authorizes similar societies and associations of the Province of Quebec to transact business within its limits in virtue of certain legislative provisions, may be authorized to carry on business in the Province of Quebec within certain limits on obtaining a license to that effect from the Lieutenant-Governor in Council,[4] such societies and associations would not be prevented from enforcing the performance of contracts made with them in that Province, within the said limits, on account of not having first obtained the required license from the Lieutenant-Governor in Council.[5] But where the statute says "No foreign mutual benefit and aid association or mutual insurance company, which is not already, under the laws of Canada, obliged to make a deposit with the Federal Government, or which does not come under articles 5264 to 5375, inclusively, of these Revised Statutes, is allowed to carry on any business in the Province, unless it has obtained an authorization from the Lieutenant-Governor in Council,"[6] such asso-

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[1] Birkbeck, etc., Co. v. Brabant, R. J. Q., 8 Q. B., 311.

[2] 62 Vic. (Que.), ch. 46, sec. 3. [3] *Supra.*

[4] 61 V. (Que.), ch. 39. [5] Birkbeck, etc., Co. v. Brabant, *supra.*

[6] R. S. Q., 5375a, as added by 59 V., ch. 34. The societies and associations referred to in 61 V. (Que.), ch. 39, are specially exempted thereby from the operation of this statute beyond what is expressly provided by that Act, 61 V.

ciation or company could not carry on business in the Province of Quebec without first having obtained the necessary authorization.[1] In this position also are mining companies, the principal office whereof is situate outside the Province of Quebec. They are prohibited from selling their stock, etc., in that Province unless previously authorized by the Lieutenant-Governor.[2]

In Manitoba any foreign company may obtain a license from the Lieutenant-Governor in Council authorizing it to carry on its business in that Province.[3] Unless such company obtains such license, it cannot hold or acquire real estate in the Province[4] nor any mortgage of real estate, nor bonds of any kind, nor lend money on the security thereof.[5]

In Ontario, extra provincial companies, with certain exceptions,[6] are required to take out a license to carry on business in that Province,[7] and it is enacted that no such corporation shall so carry on business until such license is granted and unless it is in force.[8] But taking orders for or buying or selling goods, etc., by travellers or by correspondence, if the corporation has no resident agent or representative or no office or place of business in Ontario, shall not be deemed such a carrying on of business as to require a license.[9] The onus of proving such corporation has no such agent, etc., or office,

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[1] Quebec Civil Code, art. 14; see remarks of Sir Alexander Lacoste, C.J., in Birkbeck Co. v. Brabant, *supra*, at p. 320.

[2] 63 Vic. (Que.), ch. 33, sec. 11. [3] 60 Vic. (Man.), ch. 2, sec. 2 (1).

[4] *Ibid*, sec. 9. [5] *Ibid*, sec. 11.

[6] The exceptions are corporations created by or under the authority of Class I. An Act of the Legislature of the late Province of Upper Canada, or by Royal Charter of the Government of that Province; Class II. An Act of the Legislature of the late Province of Canada, or by Royal Charter of the Government of that Province, and carrying on business in Ontario at the date of the commencement of this Act (July 1st, 1900; 63 V., ch. 24, sec. 22 (Ont.); Class III. Corporations which have before the commencement of this Act (July 1st, 1900) received from the Government of Ontario a license to carry on business in Ontario, or which have been authorized by Act of the Legislature of Ontario to carry on business in Ontario, provided that such license or Act is in force at the date of the commencement of this Act; Class IV. Corporations now or hereafter licensed or registered under the provisions of *The Ontario Insurance Act* or of *The Loan Corporations Act*; Class V. Corporations liable to payment of taxes imposed by chapter 8 of the Ontario Statutes for 1899, intituled *An Act to supplement the revenues of the Crown in the Province of Ontario*; Class VI. Corporations not having gain for any of their objects: 63 V., ch. 24, sec. 2.

[7] 63 Vic., ch. 24, sec. 3 (Ont.). [8] *Ibid*, sec. 6. [9] *Ibid*, sec. 6.

etc., in Ontario, or was not carrying on business there, rests upon the accused.[1] The above applies to such corporations carrying on business only from the first of November, 1900.[2] If a corporation requiring such license, carries on business without the same, it incurs a penalty of fifty dollars for every day it so offends; and cannot maintain any suit or action in respect of any contract made in Ontario, in whole or in part, while thus in default. "Provided, however, that upon the granting or restoration of the license, or the removal of any suspension thereof, such action, suit or other proceeding may be maintained as if such license had been granted or restored or such suspension had been removed before the institution thereof."[3]

An extra provincial company may also apply for and receive a license to acquire and dispose of, etc., real estate in the Province of Ontario.[4]

In British Columbia no extra provincial company having gain for its purpose and object shall carry on any business in that Province unless duly licensed or registered; and it seems not to be able to carry on business there by an agent, until so licensed or registered, even though it may have no resident agent or office in the Province. The penalty for carrying on business without a license, etc., is fifty dollars per day. Proof as to compliance with the law rests upon the company. The above applies from the first of January, 1898, to such companies carrying on business in the Province;[5] and also to an extra provincial company, notwithstanding that it has already been registered as a foreign company under the provisions of any Act.[6] An extra provincial insurance company may obtain a special license.[7]

In Nova Scotia any corporation incorporated under the laws of the Parliament of the Dominion of Canada for the purpose of lending or investing moneys, authorized by its act of incorporation to lend money in that Province, and whose head office is in that Province, may transact any loaning business (except banking) therein on the security of mortgages, debentures, etc.,[8] and may acquire, hold and dispose of such real estate as is necessary for the protection or realization of its investment.[9]

[1] 63 Vic. (Ont.), ch. 24, sec. 6.
[2] *Ibid*, sec. 6.
[3] *Ibid*, sec. 14.
[4] *Ibid*, sec. 19.
[5] R. S. B. C., ch. 44, sec. 123.
[6] *Ibid*, as added by 61 Vic., ch. 13, 1898.
[7] R. S. B. C., ch. 44, sec. 125.
[8] 50 Vic. (N.S.), ch. 29, sec. 1.
[9] *Ibid*, sec. 2.

57. Right to invest surplus capital.—But where a company has called up more capital than is needed for the business, or has on hand a large sum derived from the profits of the business, an investment of it till required would be proper and justifiable.[1] And it would appear that a trading, mining or manufacturing company may extend financial aid to a customer whenever the exigencies of its own business make such a course expedient.[2]

A company which has made an illegal loan of its funds may recover them from the borrower unless the governing statute says that it shall not,[3] or unless the contract violates some rule of public order or good morals.[4]

58. Company's power to receive money on deposit.—It would be *ultra vires* of an ordinary company to receive money on deposit,[5] although, having received it, it would be liable for the money even should it be misapplied by the officers of the company.[6] And in the case of a company incorporated by special charter (and therefore subject to the Companies' Clauses Act), and having power given it by that charter to, among other things, transact an agency business and procure loans, it has been held that this provision in its charter does not authorize such a company to itself make loans and discount notes.[7]

59. Right of company to discount notes.—Unless empowered by a special Act, no company could lawfully discount notes for other parties; to do so would appear to be clearly in violation of the banking laws as provided in the various Companies' Acts.[8] The word "discounted" is used in sec. 37 (b) of the Dominion Companies' Act

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[1] Walmsley v. Rent Guarantee Co., 29 Grant's Chy., 484, 488; McFarlan v. Triton Ins. Co., 4 Denio (N. Y.), 392, 397, Per Brown, C.J.

[2] See Holmes v. Willard, 125 N. Y., 75; Platt v. Birmingham, etc., Co., 41 Conn., 255, 267.

[3] Rolland v. Caisse d'Economie, 24 Can. S. C. R., 405; Bank of Toronto v. Perkins, 8 Can. S. C. R., 603; Davis Sewing Machine Co. v. Best, 30 Hun. (N. Y.), 638.

[4] *Ibid*; Germantown, etc., Ins. Co. v. Dhein, 43 Wis., 420.

[5] Walmsley v. Rent Guarantee Co., 29 Grant's Chy., 484. [6] *Ibid.* [7] *Ibid.*

[8] As for instance sec. 76, R. S. C., ch. 119; Walmsley v. Rent Guarantee Co., 29 Grant's Chy., 484; New York Firemen Ins. Co. v. Ely, 5 Conn., 560; Same v. Bennett, 5 Conn., 574, 578; A loan by a building society on the security of a promissory note (the transaction being in effect an ordinary discount) is not illegal. (Société Permanente du Construction v. Rossiter, C. R. 1881, 4 L. N., 269.)

A provincial legislature can confer upon a corporation the right to engage in the ordinary commercial sense rather than in its strict meaning. In limiting the borrowing powers of companies thereunder it provides that "the limitation made by this section shall not apply to commercial paper discounted by the company." The meaning is clear, but the party who discounts a note is strictly speaking the one who advances the money thereon, and the Act would better express the intention if it read "discounted for the company."

60. Power of companies to give and receive promissory notes.—While the power of companies to give and receive promissory notes in the course of their business has been rather extensively dealt with in those chapters relating to Directors and Ministerial Officers and Agents, yet it may not be out of place to summarize the matter at this point.

The English doctrine starts upon the principle that without a special authority, express or implied, a corporation has no power to make, indorse, or accept bills or notes,[1] while the American doctrine starts upon the opposite principle that, with very few exceptions, every private corporation has, unless restrained by its charter or by positive law, the implied power to issue negotiable paper in payment or settlement of any debts which it may incur in the course of its legitimate business, or in respect of any matter or thing which it is authorized by its charter or governing statute to do, and which is not foreign to the purposes of its creation.[2]

The English doctrine, in practice, however, comes down to this: that a power to issue bills need not be given in express terms, and a corporation may issue bills where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing of bills,[3] or where the business of the corporation is one which cannot, in its ordinary course be carried on without bills.[4]

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in such matters relating to Banking as are not specially restricted by the Federal Banking Act (*Ibid*).

All that the Banking Act Prohibits to non-bankers is the issue of notes intended to circulate as money (*Ibid*).

The conferring upon a corporation of the power to discount notes is merely extending to a corporation what any private individual can do (*Ibid*).

But see New York Fire Ins. Co. v. Bennett, 5 Conn., 574; Same v. Ely, 5 Conn., 560.

[1] Byles on Bills, 13th Edit., p. 71.

[2] Thompson on Corporations, sec. 5730.

[3] Per Cairns, J., in Peruvian Ry. Co. v. The T. & M. Marine Ins. Co., L. R., 2 Ch. App. Cas., at p. 622.

[4] Per Byles, J., in Bateman v. Mid-Wales Ry. Co., L. R., 1 C. P., at p. 510.

In Canada this subject is governed, in the first place, by sec. 22 of the Bills of Exchange Act 1890, which enacts that "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract; Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation." This is a matter declared by the British North America Act to be within the jurisdiction of the Dominion Parliament exclusively, but because the Dominion Parliament has not enacted any general law regulating the making of bills and notes by corporations governed by Provincial Acts, it is difficult to contend, as some authors have done,[1] that Provincial Legislatures cannot grant to corporations the power to become parties to bills and notes. If legislatures have not this power, then the Quebec Act, 54 Vic., ch. 35, is unconstitutional, and the right of corporations incorporated under Quebec Acts to make bills and notes will have to depend upon " the law for the time being in force " other than the above Act. Apart from this amendment, however, the various Companies' Acts of the Provinces are substantially the same now as they were before Confederation, and it is upon these Acts that the present discussion turns.

All that is here considered is, whether the right to give and receive promissory notes can be construed from the language of the Dominion or Provincial Companies' Letters Patent Acts or Companies' Clauses Acts. The language in all the Dominion Acts is idencal in respect of the powers of companies governed thereby, and is somewhat more extensive than the language of the Provincial Acts. The Dominion Companies' Act[2] provides that "Every company incorporated under this Act . . . shall . . . be invested . . . with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking." The wording of the Nova Scotia Joint Stock Companies' Act[3] is identical with this, but all the other Provincial Companies' Letters Patent Act omit the words " or incidental." Thus under the Dominion Companies' Act and the Nova Scotia Act any company may do that which is not only strictly

[1] Weir Bills & Notes, p. 16, and p. IX. Introduction; and see Girouard Bills & Notes, p. 61; see as bearing upon this point Attorney-General of Ontario v. Attorney-General of Dominion of Canada (1894), App. Cas., 189, and Clement Constitution, pp. 216, 399.

[2] R. S. C., ch. 119, sec. 24. [3] R. S. N. S., ch. 79, sec. 10.

requisite to the successful carrying on of its business but also that which is incidental thereto.

It requires no discussion to arrive at the conclusion that the giving and receiving promissory notes is an incident of all modern commercial corporations.[1]

The language used in the Dominion Companies' Clauses Act[2] and the Companies' Clause Acts of the Provinces is, "shall be invested with all the powers, privileges and immunities necessary to carry into effect the intention and objects of this Act and of the special Act, and which are incident to such corporation, or are expressed or included in the "Interpretation Act." Here again the language would enable a commercial corporation to make and receive promissory notes.

This question, however, is settled in its broadest sense by a leading English case.[3] In that case the memorandum of association contained the words, "In order to the attainment of the main object of the company (the formation of a *société anonyme* in Peru for the construction of railways there) they may do, either in the United Kingdom or Peru, or elsewhere, whatsoever they from time to time think incidental or conducive thereto." It was held that, although the object with a view to which the company was incorporated was not one which would confer on the company, as incident to carrying on its business, the power of issuing negotiable instruments, yet that these words were so wide as necessarily to include a power of that kind.

The Companies' Letters Patent Acts of the Provinces of Quebec, Ontario, New Brunswick and Manitoba do not contain the words "or incidental to." These Acts merely state that every company governed thereby can do all things requisite to the carrying on of its undertaking. Whether these words are broad enough to imply the power under discussion is not necessary to consider, for all these Provincial Acts, except that of the Province of Quebec, enable companies to borrow money and issue not only bonds and debentures but other securities as well.[4] The Companies' Act of the Province of Quebec has been amended so as to expressly confer the right "by a simple reso-

[1] See Kingston Marine Ry. Co. v. Gunn, 3 U. C. Q. B., 368, 371.

[2] R. S. C., ch. 118, sec. 5.

[3] Peruvian Ry. Co. v. Thames & Mersey Marine Ins. Co., L.R., 2 Ch., 617.

[4] Talladega Ins. Co. v. Peacock, 67 Ala., 253; and see Commercial Bank v. Newport Man. Co., 1 B. Mon. (Ky.), 13; Mead v. Keeler, 24 Barb. (N. Y.), 20; Partridge v. Badger, 25 Barb. (N. Y.), 146, 171; Hamilton v. Newcastle, etc., Ry. Co., 9 Ind., 359; but see Brockville & Ottawa Ry. Co. v. Canada Central Ry. Co., 41 U. C. Q. B., 431.

lution to issue notes, payable to order or to bearer, for the settlement of accounts or other current matters."[1] From the fact that it was thought necessary to pass this special enactment conferring the power in question it might be inferred that the bare power to do that which is "requisite to carry on the undertaking" is not sufficient in itself to confer such power.

There is a clause which exists in all our Companies' Acts[2] and which provides that "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 by-laws 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 by-law, or special vote or order; and the person so acting as agent, officer or servant of the company shall not be thereby subjected individually to any liability whatsoever to any third person therefor: Provided always that nothing in this Act shall be construed to authorize the 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 or insurance."

This clause occurring in the Quebec Act, it was evidently thought not to confer upon companies governed thereby, the power to make bills and notes; and this is the view taken in England of sec. 47 of the Companies' Act of 1862 which is similar in purpose and effect to the above clause.[3]

It will be noted that the above amendment to the Quebec Act[4] enables a company to issue notes payable to bearer, but nothing is said about art. 4746 R.S.Q., which, in common with the other Companies' Acts provides that "nothing in this article shall be construed

[1] 54 Vic., ch. 35, amending Act 4705, R. S. Q. It is suspected that this Act is *ultra vires*, see *supra*, p. 404, discussion.

[2] For example, R. S. C., ch. 119, sec. 76.

[3] Per Lord Cairns, in Peruvian Ry. Co. v. Thames and Mersey Marine Ins. Co., L. R., 2 Ch., 617, overruling Halford v. Cameron's, etc., Ry. Co., 16 Q. B., 442; Aggs v. Nicholson, 1 H. & M., 165, 25 L. J. (Ex.), 348. Buckley Comp., p. 179.

[4] 54 Vic., ch. 35.

to authorize the company to issue any note payable to the bearer thereof." This is, however, at best only a negative provision respecting notes to bearer, and would doubtless have to give way to the positive enactment contained in the Amending Act.

Where a company has not power to draw bills, and drawing one, requests another party to indorse it for accommodation; if the bill, after being discounted for the company, is dishonoured by it and paid by the indorser, yet the company will be liable to the latter as for money paid for its use.[1]

In view of the possibility of the Quebec amendment to the Companies' Act proving to be unconstitutional, it may be well to cite some of the conclusions of the Courts of that Province as to the power of corporations to make bills and notes. It would appear that under the Quebec Companies' Act, before it was amended, the company could give itself the power to issue promissory notes by passing a by-law to that effect.[2] And the result of the jurisprudence of the Province now is that a negotiable promissory note made by a corporate body, not specially authorized by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the person named therein, and will be held good as an acknowledgment of indebtedness; and the indorsee of such note may recover the amount thereof from the corporation, promissor, on the mere production of the note, in the absence of a plea specially denying the existence of the debt, or that valid consideration was received by the corporation.[3] This supposes that the officer signing the note was not exceeding his authority in this respect, and that such want of authority was not pleaded by the corporation. But even if the officer were exceeding his authority, the corporation would be liable where it had done something amounting to ratification.[4]

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[1] Brockville & Ottawa Ry. Co. v. Canada Central Ry. Co., 41 U.C.Q.B., 431.

[2] Coates v. Glen Brick Co., 2 R. L., 625; and see Société de Construction, etc. v. Banque National, Q. B., 1880, 24 L. C. J., at p. 229.

[3] Société de Construction du Canada v. Banque Nationale, Q. B., 1880, 24 L. C. J., 226; Corporation of Grantham v. Couture, Q. B. 1879, 24 L. C. J., 105; Corporation of Assumption v. Baker, Q. B. 1881, 4 L. N., 370; Ville d'Iberville v. Banque du Peuple, 1895, R. J. Q., 4 Q. B., 268.

[4] Banque Jacques-Cartier v. Les Religieuses Sœurs Hospitalières de St-Joseph, 1892, R. J. Q., 1 Q. B., 215.

CHAPTER XIII.

DISSOLUTION AND WINDING-UP OF COMPANIES.

1. How and when corporations may be dissolved.—Corporations are dissolved,—1. By any act of the legislature declaring their dissolution. 2. By the expiration of the term or the accomplishment of the object for which they were formed, or the happening of the condition attached to their creation. 3. By forfeiture legally incurred. 4. By the natural death of all the members, the diminution of their number, or by any other cause of a nature to interrupt the corporate existence, when the right of succession is not provided for in such cases. 5. By the mutual consent of all the members, subject to the modifications and under the conditions relating to ecclesiastical and secular corporations of a public character. 6. By voluntary liquidation.[1] 7. By forced liquidation.[2]

As the Dominion Parliament or Provincial Legislatures have the right to create certain companies, so have they the right to withdraw charters granted by them to this end. Both our Parliament and our Legislatures are supreme within their respective jurisdictions. But a Provincial Legislature cannot dissolve a company created by the Dominion Parliament,[3] nor sanction a Dominion company, having public duties to perform, to transfer its property, liabilities, powers and rights to another body.[4]

If the charter or governing statute of the company fixes a definite period[5] of time at which its corporate life shall expire, when that period is reached, the company is *ipso facto* dissolved, without any direct action to that end, either upon the part of the State or of its members.[6]

Corporations, it is said[7] are dissolved upon the happening of the condition attached to their creation ; but this means rather that such corporations will be liable to have their charters forfeited upon proceedings taken to that effect by the Attorney-General. It is the law, both in Ontario and Quebec, and also in the other Provinces, that as a general rule nothing short of a decree by some judicial power will put an end to the existence of the functions of a corporation.[8] When all the members of a corporation are dead, so that there is no one to proceed against, then of course there is no corporate

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[1] Quebec Civil Code, Arts. 368, 369; see also Blackstone, 484; R. S. Q., Art. 5797, and the various voluntary Winding-up Acts of the Provinces.

[2] Dominion Winding-up Act, R. S. C., ch. 129, secs. 8 *et seq.*

[3] Bourgouin v. M. & O. Ry. Co., 5 App. Cas., 381, 402. [4] *Ibid.*

[5] As for instance the Brit. Col. Act, 1890, 53 V., ch. 6, sec. 3, which limits the existence of companies incorporated thereunder to fifty years.

[6] Thompson Corp., sec. 6651. [7] *Supra.*

[8] See Arts. 978 *et seq.* C. C. P.; Casgrain v. Dominion Burglary & Guarantee Co., R. J. Q., 6 S. C., 382; Brooke v. Bank of Upper Canada, 4 Ont. P. R., 162; Roy v. Cie de Ch. de Fer Q. M. & C., 11 L. N., 359; Windsor Hotel Co. v. Murphy, 1 L. N., at p. 75.

body in fact or in law remaining and there must be an absolute dissolution without any process, from the actual necessity of the case.[1]

Morawetz, in his work on corporations[2] points out that there is a broad and fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist, and that much confusion may be avoided by bearing in mind this distinction.

The franchise to exist and carry on business as a corporation continues indefinitely, unless the time of its duration is expressly limited in the grant. If the corporation should be guilty of any wrongful act or neglect of duty which would give the state a right to declare the franchise forfeited, the franchise would nevertheless continue until the forfeiture has been claimed and enforced by the state, through the proper legal proceedings.[3] Where a charter requires that within six months from the date of the passing of the Act of incorporation, a subscription of $100,000 capital must be secured and thirty per cent. paid thereon, these are conditions precedent to the legal organization of the company with power to carry on business ; and where these conditions are not fulfilled, within the six months, the Attorney-General is entitled under Art. 978 C. C. P. of Quebec to have the company's charter declared forfeited.[4] Other conditions are not conditions precedent but are nevertheless imperative. For instance a provision in the charter that "a further call of ten per cent. on the capital stock of the company shall be made and paid up" within a specified time, is imperative, and a disregard of such provision involves the forfeiture of the charter unless sufficient cause be shown for failure to conform thereto.[5]

The mere omission to elect directors, and ceasing to do business for some time does not of itself work a dissolution of the company so as to prevent creditors from executing against it.[6] Neither does the sale or disposal by a corporation of all its property of itself work such a dissolution of the corporation as disables it from thereafter exercising its corporate powers;[7] nor does the insolvency of a cor-

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[1] Brooke v. Bank of Upper Canada, *supra*, per Wilson, J., at p. 166.

[2] Sec. 1002, 2nd Edit. [3] Morawtz Corp., sec. 1003.

[4] Dominion Salvage & Wrecking Co. v. Attorney-General, 21 Can. S. C. R., 72.

[5] Casgrain v. Dominion Burglary Co., 1894, R. J. Q., 6 S. C., 383, 385.

[6] Hughes v. La Cie des Villas du Cap Gibralter, 18 R. L., 205; and see sec. 34 R. S. C., ch. 119, and the Provincial Acts to the effect that failure to elect directors does not dissolve companies; Thompson corporation, secs. 6655, 6664; Brooke v. Upper Canada Bank, 4 Ont. P. R., 162.

[7] Compagnie du Chemin de Fer v. Cité de Québec, R. J. Q., 6 S. C., 189.

poration *ipso facto* dissolve it.[1] But when it is necessary to consider a business corporation dissolved in order to effectuate the rights of its creditors against its stockholders, a total insolvency accompanied by a non-user of its franchise and a permanent cessation of its business, will be regarded as a *surrender* of its franchises and an *ipso facto* dissolution.[2]

The abandonment or surrender by the corporators of their franchises is a question both of fact and intent.[3] The general doctrine is that a corporation, organized for the pecuniary gain of its members, which has not assumed *public duties* in consideration of the grant of its franchises, and with the continuance of whose existence the state has no special concern, may dissolve itself by the voluntary action of its members, without the consent of the state.[4] While the facts showing such a surrender are not available for the purpose of procuring a dissolution of a corporation, in order to defeat an action brought in its name,—yet, without special reference to the rights of creditors, a corporation may become defunct for all purposes, by its own voluntary act,—that is to say, the act of its members—and it does become defunct for all purposes whenever there has been an abandonment of its franchises, committed under such circumstances, or continued for such a length of time, as renders it morally or legally impossible for it to resume them.[5]

In Quebec secular corporations of a public nature, other than those formed for the mutual assistance of their members, cannot be dissolved by mutual consent without a formal and legal surrender or the authority of the legislature, as the case may be.[6] The same rule applies to banks, to railway, canal, telegraph, toll-bridge, and turnpike companies, and generally to private corporations which have obtained privileges which are exclusive or exceed those resulting by law or from incorporation.[7]

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[1] Thompson Corporations, sec. 6666, and see sec. 15 (2) Winding-up Act, R. S. C., ch. 129; and see per Johnson, J., in Hughes v. Cie des Villas de Cap Gibralter, *supra*, at p. 208; Hovey v. Whiting, 14 Can. S. C. R., at p. 533.

[2] Thompson Corp., sec. 6666.

[3] Thompson Corp., sec. 6659.

[4] Quebec Civil Code, Arts. 368, 370; Brice *Ultra Vires* (Edit. by Green), p. 796; Thompson Corp., sec. 6631.

[5] Thompson Corp., sec. 6681.

[6] Art. 369, C. Code, Quebec.

[7] *Ibid*; a Federal railway company cannot transfer its property and franchises to a Provincial Government without the sanction of the Dominion Parliament. (Bourgoin v. Cie du Chemin de Fer, 5 App. Cas., 381.)

2. Procedure to obtain forfeiture of charter or annulment of letters patent.—It has already been pointed out in another part of this work that forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation.[1] A distinction must be pointed out between the forfeiture of the charter of a company incorporated by letters patent and one incorporated by act of Parliament.

At common law the proper preceding to annul letters patent is by *scire facias* at the instance of the Attorney-General.[2] The Quebec Code of Civil Procedure has, in effect, so provided.[3] But it is generally admitted under the English law, and in the case of Dominion Salvage Co. v. Attorney-General[4] counsel for both sides so admitted, that *scire facias* will not lie against a company incorporated by Act of Parliament[5] unless a statute otherwise provides. The Quebec Code of Procedure expressly provides for the forfeiture, at the instance of the Attorney-General, of the charters of companies incorporated by special act of Parliament.[6] Some doubt seems to have arisen as to the name to be given to such a proceeding, but it is now definitely settled that whether erroneously called a *scire facias* or by another name, so long as the conclusions taken are those authorized by the Code, and the proceedings instituted and prosecuted by the proper officer, that is sufficient.[7]

Considerable doubt seems to have existed as to which Attorney-General should interfere in the case of a company incorporated by the Dominion Parliament. Without having decided whether and in what case the Attorney-General for the Province, where the company has its place of business, could exercise the right of interference, in such a case, the Supreme Court has decided that the Attorney-General of Canada could certainly do so.[8] A number of

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[1] *Supra*, p. 33.

[2] Brice *Ultra Vires* (Edit. of Green, 1880), pp. 786, 789; Dominion Salvage & Wrecking Co. v. Attorney-General, 21 Can. S. C. R., 72.

[3] Arts. 1007 *et seq.* [4] *Supra.*

[5] Grant on Corporations, p. 42, and note, pp. 307-8; Lindley Companies; Canada Car Co. v. Harris, 24 U. C. C. P., 380.

[6] Arts. 978 *et seq.* C. C. P.; Dominion Salvage & Wrecking Co. v. Attorney-General, 21 Can. S. C. R., 72.

[7] Dominion Salvage & Wrecking Co. v. Attorney-General, *supra*; see Attorney-General v. Colonial Building Society, 9 App. Cas., 157.

[8] Dominion Salvage & Wrecking Co. v. Attorney-General of Canada, 21 Can. S. C. R., 72.

Quebec cases have decided that the Attorney-General for the Province has this power.[1]

The Attorney-General of the Province of Quebec is the sole *dominus* of a suit instituted by him in his official capacity, whether there be a relator or not.[2] It is doubtful whether, in a suit brought by the Attorney-General under Art. 978, C. C. P., any other party is entitled to appear and prosecute as an intervenor.[3] But the remedy provided by Art. 978, C. C. P. does not deprive a person of his right at common law against a corporation. Any person may seek redress before the tribunals of the country against corporations by whose acts his rights or property may be injuriously affected, or by whom he may be in any way aggrieved, in the same manner and to the same extent as he could do so against individuals under similar circumstances.[4]

3. **Dissolution under the Winding-up Acts.**—The Provinces have their Winding-up Acts, and the Dominion has a compulsory Winding-up Act[5] as well as a voluntary Winding-up Act.[6] The difference between a voluntary winding-up and a dissolution by mutual consent of the members is this:—dissolution by mutual consent means what the term implies, viz., the mutual consent of all the members to dissolve the company. This might happen where the object for which the company was formed had become impossible, and business not having commenced there is nothing to wind up.

At common law a company for private objects may at any time dissolve itself by a resolution of the majority.[7] The various Provinces have acts for the voluntary winding-up of companies. It does not appear to be absolutely necessary that a company should wind itself up under one of these Acts. Even under the Dominion Compulsory Winding-up Act it has been held that while it is competent for the creditors to avail themselves of the provisions of that Act, this would not make illegal another proceeding adopted in their interests and at their request.[8]

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[1] Turcotte v. La Compagnie de Ch. de Fer de l'Atlantique au Nord-Ouest, 17 R. L., 398; Casgrain v. Dominion Burglary & Guarantee Co., R.J.Q., 6 S. C., 382; Loranger v. Montreal Telegraph Co., 5 L. N., 429.

[2] Casgrain v. Atlantic & N.W. Ry., 1895, App. cas., 282.

[3] *Ibid.*

[4] Hunt v. Corp. of Quebec, 4 Q. L. R., 275.

[5] R. S. C., ch. 129.

[6] 52 Vic., ch. 32; see *Re* Ontario Forge & Bolt Co., 25 O. R., 407.

[7] Brice *Ultra Vires*, pp. 791 *et seq.*

[8] Hovey v. Whiting, 14 Can. S. C. R., at pp. 537, 538; see also *supra* pp. 284, 285.

4. Position of corporations after dissolution.—In Quebec the Civil Code provides that saving the case of the voluntary liquidation of joint stock companies, a dissolved corporation is, for the liquidation of its affairs, in the same position as a vacant succession. The creditors and others interested have the same recourse against the property which belonged to it, as may be exercised against vacant successions and the property belonging to them.[1] In the voluntary winding-up of a company, however, regard must be had to the provision, contained in all our statutes, to the effect that the affairs of the company shall be managed by a board of not less than three directors.[2] If a company be not dissolved, its affairs must be managed by this minimum number of directors, and if these have resigned and there are no directors to take proceedings to recover debts owing to the company, then the Court will order either that the company proceed to the election of new directors or the appointment of a curator as provided by Arts. 371 *et seq.*, C. C .P.[3] There must be some official who can lawfully represent the company and give valid receipts to debtors paying up. If the company be not dissolved but be in the process of winding itself up outside of the Voluntary Winding-up Act, there must be directors in existence who can appoint such an official. The shareholders could not among themselves appoint an assignee to represent them in the winding-up. If the company be not dissolved the law gives no status to such an assignee to sue for the company, and if the company has declared itself to be dissolved or is dissolved, then the winding-up must either be under the common law method provided by the Code of Procedure, which requires the appointment of a curator to it as in the case of an insolvent estate, or under the Voluntary Winding-up Act by means of an official liquidator.[4]

A winding-up under a voluntary winding-up act is the only practical mode of voluntary winding-up a joint stock company where the business is extensive, because it provides certain modes of giving publicity to the winding-up, and this fixes definitely the date and fact of the dissolution as regards third parties.

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[1] Art. 371 C. Code.

[2] Quebec Agricultural Implements Co. v. Hebert, 1 Q. L. R., 363; Compagnie d'Instruments Agricole v. Hebert, 2 Q. L. R., 182.

[3] Compagnie d'Instruments Agricole v. Hebert, 2 Q. L. R., 182.

[4] See two cases next above.

5. **Amalgamation may operate dissolution.**—The amalgamation or consolidation of two companies may lead to the dissolution of one or both of the amalgamating companies. Amalgamation may be used in different senses. The amalgamation of companies, so far as it means or involves a transfer of the corporate *persona*, is impossible, save by the direct interposition of the Legislature.[1] One general Act of the Dominion contains such a power, and that is that part of the Companies' Act which relates to Loan Companies.[2] But a corporation may, in an indirect manner, transfer its *persona* to another corporation, and thus accomplish nearly the same purposes as would be effected by a direct amalgamation.[3] This it may do by transferring its property, funds, rights and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding-up.[4] A corporation may amalgamate in the

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[1] Green's Brice's *Ultra Vires*, p. 611.

A statute gave the bondholders of the Cobourg & Peterborough Ry. Company an option to convert their bonds into stock, and enacted that this "converted bonded stock" and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of 8 per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the company was authorized to unite with another company, and it was declared, that the two companies, and those who should become shareholders in the new company under the acts relating to the Cobourg & Peterborough Ry. Co., and under the deed of union, should constitute the new company.

Held, that the union did not extinguish the right of the bondholders to elect.

The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the Act should be valid "to all intents and purposes in the same manner as if incorporated in the Act."

Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary, but did not give them legislative authority over the rights of other persons.

A statute authorized two companies to unite into one company by either a complete or partial union; and either of joint or separate, or absolute, or limited liabilities to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies. Held, that the new company thereby assumed all the liabilities of the old company to third parties. Cayley v .Cobourg & Peterborough & Marmora Ry. Co., 14 Grant's Chy., 571.

[2] R. S. C., ch. 119, secs. 98-102, as amended by 50-51 Vic., ch. 20, sec. 10.

[3] Green's Brice's *Ultra Vires*, p. 612. [4] *Ibid*, 608.

sense of transferring its assets without the consent of its creditors, except and so far as by its contracts with these it has agreed not to do so.[1] But it cannot, without express stipulation in its contracts, compel its creditors to accept a *novatio* of their claims.[2]

According to the Loan Companies' Act as amended[3] "The company may *unite*, *amalgamate* and *consolidate* its stock, property, business, and franchises with those of any other company or society incorporated or chartered to transact a like business, and any other business in connection with such business, or with those of any building, savings or loan company or society heretofore or hereafter incorporated or chartered, *or may sell its assets* to any such other company or society, which is hereby authorized to sell the same, and for the purpose of carrying out such purchase or sale, the company so purchasing may assume the liabilities of the company so selling, and may enter into such bond or agreement of identity with the company, or the individual shareholders thereof, or both, as may be necessary, and may enter into all contracts and agreements necessary to such *union*, *amalgamation*, *consolidation*, *sale*, *purchase* or *acquisition*."

Under the Loan Companies' Act of 1899 (D),[4] power is given to two or more loan companies to amalgamate.[5]

THE WINDING-UP ACTS.

6. Scope and application of Dominion and Provincial Winding-up Acts.—The Dominion Winding-up Act[6] applies to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock,[7] and incorporated trading companies, doing business in Canada, wheresoever incorporated.[8] As to what are trading companies within the meaning of the Act reference must be made to a former discussion on this point.[9]

[1] Green's Brice's *Ultra Vires*, p. 619. [2] *Ibid*, 620.

[3] See p. 415 *supra*, note 2.

[4] 62-63 V., ch. 41. [5] *Ibid*, sec. 39. [6] R. S. C., ch. 129.

[7] The words "capital stock" here mean, and must be taken as always having meant, a capital stock either *de jure* or *de facto*. See 62-63 Vic., ch. 43 (D.), sec. 5. [8] *Ibid*, sec. 3.

[9] *Supra*, pp. 370, 371.

The Provisions of the Dominion Winding-up Act, R. S. C., ch. 129, do not apply to social clubs incorporated under Art. 5487 *et seq.* R. S. Q., the Winding-up Act applying to incorporated trading companies, and not to civil corporations such as social clubs. (In *re* Montreal City Club, R. J. Q., 1895, 8 S. C., 527.

The Nova Scotia Winding up Act, R. S. N. S., ch. 80, is made specially aplicable to clubs (sec. 2).

In its compulsory operation upon incorporated companies the Winding-up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of section 3, sub-section (b) when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings under the Winding-up Act can be instituted only by creditors and only when the company is insolvent[1] By "the Winding-up Amendment Act 1889," the rights of the shareholders to bring the company under the operation of the Winding-up Act are enlarged, and even in the case of insolvency the petition may now be made by a shareholder.[2]

This act authorizes voluntary winding-up proceedings at the instance of the company or a shareholder.[3] But the provision for voluntary winding-up is not extended, like the Winding-up Act, to all corporations. It is confined by sec. 3 to companies 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 Provinces of Nova Scotia, New Brunswick, Prince Edward Island, or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada."

This obviously is intended to exclude companies incorporated by provincial legislation since confederation under the exclusive legislative jurisdiction given to the Provinces. Ontario, Quebec and Manitoba, are not named and misapprehension as to the four Provinces which have retained their anti-confederation names is shut out by the reference to the legislative authority of the Parliament of Canada.[4]

The Winding-up Amendment Act[5] also applies to companies incorporated under a Provincial Act where the latter contains a

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[1] Per Patterson, J., in Shoolbred v. Clarke, 17 Can. S. C. R., at pp. 274, 275; *Re* Union Ranch Co. of Canada, 15 O. R., 307.

[2] 52 Vic., ch. 32 (D); *Re* Ontario Forge & Bolt Co., 25 O. R., 407, 410.

[3] *Ibid*; *Re* Ontario Forge & Bolt Co., 25 O. R., 407.

[4] *Ibid*; *Re* Ontario Forge & Bolt Co., 25 O. R., 407.

The provisions of 52 Vic., ch. 32 (D. 1889) which are not made applicable to proceedings under the Winding-up Act, do not, in consequence of section 3, apply to cases in which it is sought to wind up a company incorporated in Manitoba. (*Re* Lake Winnipeg Transportation, etc., Co., 7 Man. 255.)

[5] 52 V., ch. 32.

clause to the effect that "the provisions of any Act for the time being in force in this Province relating to the winding-up of companies shall apply to all companies and associations which shall be incorporated under this Act,"[1] and so is applicable to those companies which were incorporated under the British Columbia Act of 1890.[2]

[1] In *re* B. C. Iron Works Company, 6 B. C. L. R., 536.

[2] An appeal was entered by the Bank of B.N.A., a creditor of the company, from an order of Irving, J., of 25 November, 1898, winding up the B.C. Iron Works Co., and made upon the petition of a shareholder in the said company, the petition shewing that the capital stock of the company was impaired to a greater extent than twenty-five per cent. thereof, and that the lost capital would not likely be restored within one year. The company was a Provincial one, incorporated under the B. C. Companies' Act of 1890. Section 4 (d) of the Winding-up Amendment Act (D.), 52 V., ch. 32, provides that the Court may make a winding-up order "when the capital stock of the company is impaired to the extent of twenty-five per cent. thereof, and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year.

McColl, C.J. :—The appellant creditor appeals on the ground that the Dominion Act under which the winding-up order was made does not apply to this company, which was incorporated under the Companies' Act 1890 (Provincial). By sec. 44 of this Act it is provided :—" 44. The provisions of any Act for the time being in force in this Province relating to the winding-up of companies shall apply to all companies and associations which shall be incorporated under this Act, or which have been or hereafter shall be incoroprated by or under any Act or Ordinance of or in force in this Province, or of or in the late Colonies of Vancouver Island and British Columbia, or either of them, except to companies registered and incorporated under the Companies' Act, 1878, or Part II., Companies' Act, 1878 (Provincial)."

This, I think, clearly brought into force the provisions of the Winding-up Amendment Act, 1889 (Dominion), which enables a company to be wound up in the circumstances of the present company. By the Act of 60 Vict., cap. 2, sec. 153, the Dominion Acts relating to the winding-up of companies are expressly brought into force as regards companies incorporated under the Act. By sec. 160 of the same Act the Companies' Act, 1890, was repealed, subject to the saving clause contained in sub-sec. (a) of the section, which is as follows :—" (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 any company incorporated under the said repealed Acts, or any or either of them."

This did not, of course, preserve the machinery of the Dominion Acts for the purpose of winding-up companies incorporated under that Act, and left them without any means of being wound-up in the circumstances of the present company until the passage of the Act, 61 Vict., cap. 13, sec. 14, which amends sub-sec. (a), referred to, by adding thereto the following:—

"And the companies thereby incorporated shall, except as in this Act

It has been argued that the third section of the Winding-up Amendment Act goes to show by the omission of the names of the Provinces of Ontario, Quebec and Manitoba, that the Winding-up Act does not apply to companies incorporated in those Provinces, but the Courts have held otherwise,[1] and that the Dominion Winding-up Act is *intra vires* the Dominion Parliament, and applies to companies incorporated by Provincial Legislatures.[2]

Some of the Provinces have Winding-up Acts.[3] These Provincial Acts do not profess to deal with insolvency, nor are they in their character insolvent laws. The object of these Acts is to wind up the affairs of companies incorporated in the Province, where a resolution to that effect has been passed by the company, or where the Court may so order it, on the application of a contributory on its being made to appear that it is just and equitable, that it should be done. This may take place though no debts whatever may be due by the company, and the Acts cannot be called into operation by a creditor of the company.[4] The Provincial Acts do not apply to companies incorporated in a Province, where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency.[5]

The Dominion Winding-up Act applies to all incorporated trading companies doing business in Canada, wheresoever incorporated. It does not apply to railway or telegraph companies, or to building societies which have not a capital stock.[6] A company incorporated under an Act of the Province of Ontario and carrying on business in Ontario, is "doing business in Canada" within the mean-

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is specially provided, continue to be governed by the provisions of the said repealed Acts to them respectively applicable."

The result is that the order was rightly made, and the appeal must be dismissed with costs. Court unanimous. In *re* B. C. Iron Works Co., *supra*.

[1] Shoolbred v. Clarke, 17 Can. S. C. R., 265; *Re* Lake Winnipeg Transportation L. & T. Co., 7 Man., 255; *Re* Iron Clay Brick Mfg. Co., 19 O.R., 113, 119.

[2] *Re* Clarke & Union Fire Ins. Co., 16 Ont. A. R., 161; *Re* Iron Clay Brick Co., 19 O. R., at p. 119.

[3] Ontario:—R. S. O., ch. 222; Que., R. S. Q., Art. 4773 *et seq.*; Nova Scotia, R. S. N .S., ch. 80; New Brunswick, Consol. Statutes N.B., p. 1070, contained in the appendix to those statutes.

[4] Per Ritchie, C.J., in *re* Wallace Huestis Greystone Co., Russell, 1873-1882, pp. 461, 462 (N. Sc.).

[5] *Re* Iron Clay Brick Mfg. Co., 19 O. R., 113.

[6] R. S. C., ch. 129, sec. 3; Allan v. Hanson, 18 Can. S. C. R., 667, 672, as to what is meant by "capital stock," see *supra*, p. 63 *et seq.* and 416, footnote 7.

ing of sec. 3 of R. S. C., chap. 129.[1] In the important case of Allen v. Hanson[2] the Supreme Court held that this provision[3] is *intra vires* of the Parliament of Canada; and that it applies to foreign companies, provided they are doing business in Canada, and doing business as an incorporated company.

All the Winding-up Act seeks to do in the case of foreign corporations is to protect and regulate the property in Canada and protect the rights of creditors of such corporations upon their property in Canada.[4] Where a liquidation has already been instituted in the foreign country where the company was incorporated, the effect of the winding-up in Canada can only be to entitle the liquidator appointed under it to realize the assets, and after paying all creditors whether within this jurisdiction or not, to remit the balance (if any) of the assets to the liquidator in the foreign country to be applied and distributed as may there be directed by the proper forum.[5] In other words this winding-up is subsidiary to the same proceeding previously instituted in the forum of the domicile of the corporation.[6]

It is a principle of the English law that the attachment or assignment by involuntary proceedings under the bankruptcy laws of a foreign country in which a bankrupt is domiciled affects or transfers the title to his purely personal property in England;[7] and where a company incorporated under the laws of a foreign state, and having its offices and place of business in that state, is restrained by an order of the Court of that state from exercising any of its corporate franchises and from collecting its debts, and a temporary receiver is appointed to the property of the company, our Courts would

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[1] *Re* Ontario Forge & Bolt Co., 25 O. R., 407.

[2] 18 Can. S. C. R., 667; see also Merchants Bank of Halifax v. Gillespie, Moffet & Co., 10 Can. S. C. R., 312; In *re* Steel Co. of Canada, 5 Russ. & Geld (N. Sc.), 49; Salter v. St. Lawrence Lumber Co., 28 N. S. R., 335; but see *Re* Halifax Sugar Refining Co., 22 N. Sc., 71; where a petition to wind up a company (incorporated under the English Act) under the Canadian Winding-up Act was not allowed, on the ground that even assuming that winding-up proceedings could be had here as auxiliary to those in England (a liquidator having already been appointed in England), there was no purpose to be served by such proceedings.

[3] R. S. C., ch. 129, sec. 3.

[4] Per Ritchie, C.J., in Allen v. Hanson, 18 Can. S. C. R., at p. 673.

[5] See Per Strong, J., in same case, at p. 647.

[6] *Ibid.*

[7] Brand v. Green, 20 Can. L. T., 279, 281, citing Solomons v. Ross, 1 H. Bl., 131n.; Jollet v. Deponthien, 1 H. Bl., 132n.

probably not allow an action brought against the company, in a Province where a debt was owing to it, by a plaintiff residing outside such Province, after the making of the order restraining the company from collecting its debts, as before mentioned, but before the final judgment dissolving the company; for though the order of the Court of the state where the company was incorporated enjoining the company from collecting or alienating its assets, of which the debt in the said Province was one, cannot be enforced out of that state, yet it raises an equity which cannot be wholly disregarded by our Courts, and especially by the Courts in those Provinces whose rules permit them to take judicial notice of the laws of such foreign state.[1] Such foreign receiver can *ester en justice* in the courts of this country to oppose the seizure of the effects of the company, and their seizure by a judgment creditor, after such order, will not be upheld by our Courts where the laws of the foreign state do not allow such a seizure after the appointment of a receiver.[2]

7. **When company is deemed insolvent.**—Under the Dominion Winding-up Act[3] a company is deemed insolvent.

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

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

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

(d) If it has otherwise acknowledged its insolvency;

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

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

(h) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or

[1] *Ibid.*

[2] Barker v. Central Vermont Ry. Co., R. J. Q., 14 S. C., 467.

[3] R. S. C., ch. 129, sec. 5.

taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure;

A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.[1]

Aother section of the Act[2] uses the term "creditor" only and not, as does the above section, a creditor whose debt is "then due." It has been held that the distinction is not unmeaning.[3]

Where there is a local statute providing for the mode of serving process on corporations, this must be adhered to where it is possible; and if the creditor's demand is improperly served where proper service was possible, the court will dismiss the petition.[4] A petition which claims that the creditor, petitioner, had been unable to obtain payment of a debt due to him, and prayed for an order wind up the company is not equivalent to showing that the company was "unable to pay its debts as they became due," and is consequently not a sufficient allegation of the company's insolvency within the meaning of sec. 5, clause *a* of the Act; and a creditor who seeks to bring a case within this clause, must show that he has proceeded in the manner provided for in that section.[5]

To bring a company within clause (*d*) there must be something

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[1] R. S. C., ch. 129, sec. 6; A winding-up order may be obtained against a company when it is in fact insolvent, though sixty days have not elapsed since the service on such company of a demand for payment of an overdue debt; but when a petition for a winding-up order is presented before the expiration of such delay, the petitioner is required to prove the insolvency of the company, unless it be acknowledged, or unless one of the other cases in which a company is deemed insolvent exists (Eddy Mfg. Co. v. Henderson Lumber Co., M. L. R., 6 S. C., 137).

[2] R. S. C., ch. 129, sec. 8.

[3] *Re* Atlas Canning Co., 5 B. C. L. R., 661.

[4] *Re* Qu'Appelle Valley Farming Co., 5 Man., 160, 164; *Re* Rapid City Farmer's Elevator Co., 9 Man., 574.

[5] *Re* Rapid City Farmer's Elevator Co., *supra*.

actively done by it as an acknowledgment,[1] so a company does not "acknowledge" insolvency by allowing judgment against it to remain unpaid;[2] neither does the non-appearance of a company to oppose a petition for a winding-up order amount to an acknowledgment of insolvency sufficient to bring it within this section.[3]

In order to bring a company within clause (e) it is not sufficient to swear that an assignment or transfer of the property of the company was made, to defraud, defeat or delay its creditors; the facts must be stated and then it is for the Court to say whether, upon these facts, the transfer was, or was not, of that character.[4]

Under clause (h) the company cannot be deemed insolvent within the meaning of the Act because an execution has been returned *nulla bona* by a County Court bailiff. It may be within the spirit of the clause, but it is not within the letter of it.[5] Nor because it is alleged that by virtue of an execution and seizure, the sheriff had entered upon the premises of the company, and proceeded to sell and dispose of the goods of the company, and that he had already sold under such execution the greater portion of the goods and intended to proceed under the execution and sell and dispose of, and was then from day to day selling and disposing of the remainder thereof.[6] It must be proved that the company had permitted execution, under which the property had been seized or levied upon, to remain unsatisfied till within four days of the time fixed by the sheriff for the sale thereof. Under such a purely statutory power, the Court can only act where the case is brought strictly within the Act.[7] In computing the time under clause (h) the day fixed for the sale is exclusive.[8]

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[1] *Re* Qu'Appelle Valley, etc., Co., *supra*, at p. 164. [2] *Ibid.*

[3] *Re* Lake Winnipeg Transportation, Lumber & Trading Co., 7 Man., 255. The petitioner, who was president of the company, as well as a large creditor, stated in his affidavit that from his knowledge of said company's affairs he knew it to be unable to pay its debts in full, but gave no comparative statement of its assets and liabilities. Held, not sufficient evidence of insolvency (*Re* Lake Winnipeg Transportation, etc., Co., 7 Man., 255).

[4] *Re* Qu'Appelle Valley Farming Co., 5 Man., 160.

[5] *Re* Rapid City Farmers' Elevator Co., 9 Man., 574.

[6] *Re* Manitoba Milling & Brewing Co., 11 Can. L. T., 313.

[7] *Ibid.* The provisions of sections 5 & 6 of the Winding-up Act are exclusive, and a petitioner for a winding-up order must strictly prove the existence of one or more of the circumstances there set forth, or his petition will be dismissed. (*Re* Rapid City Farmers' Elevator Co., 9 Man., 574).

[8] *Re* Lake Winnipeg Transportation, etc., Co., 7 Man., 256.

It has been held in a Quebec case that where a company is insolvent, and the insolvency is alleged in the petition, the petitioning creditor for a winding-up need not allege and prove that he made a demand of payment as required by sec. 6 of the Act.[1] In a case decided in Manitoba,[2] however, the Court came to the conclusion that a creditor who seeks to bring a case within clause (a) of section 5 of the Winding-up Act must show that he has proceeded in the manner provided for in section 6; it is only after failure to pay, *upon a demand served as directed by section 6*, that a company is to be deemed unable to pay its debts as they become due, and the petitioner, to succeed must bring himself strictly within the terms of the Act. In the Quebec case the company was indebted to McKay *et al.*, in a sum of $261,033.54, and the latter petitioned the Court for a winding-up order, alleging insolvency. The company contested the petition, on the ground, *inter alia*, that no demand of payment had been made on it as required by sec. 6 of the Winding-up Act. As the grounds of insolvency alleged by petitioners was inability on the part of the company to pay its debts, to them, it was clearly a case falling within the provisions of clause (a) of section 5 of the Act.

8. Applications for winding-up order and appointment of liquidator—Notice—Discretionary power of Court—Injunction to stay proceedings.—When a company becomes insolvent, a creditor for the sum of at least two hundred dollars, or a shareholder, except in the case of banks and insurance corporations, holding shares in the capital stock[3] of the company, to the amount of at least five hundred dollars, may, after *four days' notice of the application to the company*, apply by petition to the Court in the Province where the head office of the company is situated, or if there is no head office in Canada, then in the Province where its chief place or one of its chief places of business is situated, for a winding-up order.[4] It has been held that the petition must be signed by the petitioner himself in person and not by his attorney.[5]

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[1] Mackay v. L'Association Coloniale de Construction et de Placements, 13 R. L., 383.

[2] *Re* Rapid City Farmers' Elevator Co., 9 Man. L. R., 574.

[3] "Capital Stock" here means capital stock either *de jure* or *de facto*; see 62-63 V., (D.), ch. 43, sec. 5.

[4] R. S. C., ch. 129, sec. 8, as amended by 62-63 V., ch. 43, sec. 5.

[5] *Ex parte* Lozier, Supreme Court of N. B., 17 Can. L. T., 179.

The distinction between the language of this section, in which the term "creditor" only is used, and that of section 6 of the Act, which refers to a creditor whose debt is "then due," has been noted; and a creditor whose debt is not yet due is a good petitioning creditor for winding-up under section 8, when the company has become insolvent.[1]

There must be evidence to enable the Court to act.[2] So it is necessary that the petition should be supported by a sufficient affidavit filed before presentation of the petition.[3]

The petition must allege facts which justify a winding-up order, and it is not enough that a sufficient case be shown in evidence; a sufficient case must be stated on the petition, that the order may be *secundum allegata et probata*.[4] Hence the omission to allege essential facts in the petition cannot be supplied by circumstances which have arisen *ex post facto*.[5]

Notice of application for a winding-up order need be given to the company only, and need not be served upon creditors, contributories or shareholders of the company;[6] except, perhaps, those creditors who have brought actions against the company and whose actions would be stayed by the winding-up order.[7]

It is a substantial objection to a winding-up order appointing a liquidator, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by sec. 20 of the present Winding-up Act. An order so made will be set aside.[8] The proper time to give such notice is when the order is made.[9] But under the present Act it is no longer necessary that the winding-up order *shall* contain the appointment of a liquidator. The Court now *may* or *may not* appoint such an official in making the order, at its discretion.[10] And by the Winding-up Amendment Act,[11] the Court may, by any order made after the winding-up order and the appointment of a liquidator, dispense with

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[1] *Re* Atlas Canning Co., 5 B. C. L. R., 661. [2] *Ibid.*

[3] Kootenay Brewing, etc. Co., 6 B. C. L. R., 112.

[4] In *re* Wear Engine Works Co., L. R., 10 Ch. App., per James, L.J., at p. 191.

[5] Kootenay Brewing, etc., Co., *supra.*

[6] *Re* Qu'Appelle Valley Farming Co., 5 Man. L. R., 160. 162.

[7] Clarke v. Union, etc., Co., 10 O. R., 489, Proudfoot, J.

[8] Shoolbred v. Union Fire Ins. Co., 14 Can. S. C. R., 624; *Re* Steel Co. of Canada, 5 Russ & Geld (N. Sc.), 49.

[9] *Re* Qu'Appelle, etc., Co., *supra.*

[10] Sec. 20 R. S. C., ch. 129. [11] 52 V., ch. 32, sec. 11.

notice to creditors, contributories or members of the company as required by the Winding-up Act where in its discretion such notice may properly be dispensed with; and before the first appointment of a liquidator, as above, the Court may appoint provisionally a liquidator of the estate and effects of the company.[1]

Only those creditors of the company who have entered appearances need be served with notice of application of the liquidator for his discharge.[2]

In Nova Scotia it has been held that a judge has no jurisdiction to wind up a company such as the English judges appear to have; the Act being different;[3] but in Ontario a judge has decided that such an order, upon petition, may be made by a judge in Chambers.[4]

Sec. 9 of the Dominion Winding-up Act gives a wide discretionary power to the Court to grant or refuse a winding-up order; so where, upon an application for such an order, it appeared that the company had previously made a voluntary assignment for the benefit of its creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused.[5] A winding-up order would likely not be granted where there were no assets, and the petitioning creditor would therefore get nothing by the order.[6] But when on a petition for an order, which was contested on the ground of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partly paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted.[7]

A claimant for unliquidated damages on account of alleged fraudulent representation is not a creditor so as to entitle him to present a petition.[8] Nor is a person claiming a debt of uncertain nature.[9] Nor is an hypothecary creditor, who is not a *personal*

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[1] Sec. 26 R. S. C., ch. 129.

[2] *Re* McDougall Distillery Co., 18 Can. L. T., 421. [3] *Ibid.*

[4] *Re* Toronto Brass Co., 18 Can. L. T., 413.

[5] Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R., 107.

[6] In *re* Georgian Bay Ship Canal, etc., Co., 18 Can. L. T., 223; 29 O. R., 358, citing *Re* Chapeltown Colliery Co., 24 Ch. D., 259. [7] *Ibid.*

[8] Pen-y-Van Colliery Co., 6 Ch. Div., 477; Emden Winding-up, 51.

[9] European Banking Co., L. R., 2 Eq., 521; Emden, *Ibid.*

creditor of the company, but can only bring an hypothecary action against it on account of the immoveables which it holds.[1] And where the creditors of a company agreed to extend the time for payment of their debts, those creditors who had executed the deed of extension were estopped from presenting a winding-up petition until the period of extension had expired.[2] The assignee of a debt may present a petition but it must contain evidence that he was a creditor when he made the demand.[3] The executor of a creditor of a company is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition.[4] A secured creditor may present a petition without forfeiting the benefit of his security, and the winding-up is equally good whether it is obtained by a secured creditor or an unsecured creditor.[5] Where a debenture holder exercises his remedy as such, this does not deprive him of his right as an ordinary creditor to present a winding-up petition, and he is entitled to an order.[6] That the petitioner is an execution creditor is no bar to his filing a petition where there are several execution creditors.[7]

As great damage might be done to a perfectly solvent company by the presentation of a winding-up petition by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they *bonâ fide* believe they are not indebted, the Court will grant an injunction issued by the company to restrain the creditor from presenting a petition;[8] or if the petition has been presented the Court may, on motion, stay all proceedings under it or dismiss it.[9]

A petitioner for a winding-up order may discontinue proceedings

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[1] Leduc v. Kensington Land Co., R. J. Q., 16 S. C., 213. This case has been appealled to the Queen's Bench.

[2] *Re* Atlas Canning Co., 5 B. C. L. R., 661.

[3] *Re* Rapid City Farmers' Elevator Co., 15 Can. L. T., 412.

[4] Masonic & General Life Ass. Co., 32 Ch. Div., 373.

[5] Moor .v Anglo-Italian Bank, 10 Ch. Div., 681, 689; Emden, 52.

[6] *Re* Borough of Portsmouth Tramways Co. (1892), 2 Ch., 362 (In *re* Herne Bay Waterworks Co., 10 Ch. D., 42, and In *re* Exmouth Docks Co., L. R., 17 Eq., 181, not followed).

[7] *Re* Lake Winnipeg Transportation, etc., Co., 7 Man., 255, 257.

[8] Buckley Companies, 211, citing Cadiz Waterworks Co. v. Barnett, 19 Eq., 182; Niger Merchants Co. v. Capper, 18 Ch. Div., 557; Cercle Restaurant Co. v. Lavery, 18 Ch. Div., 555.

[9] Gold Hill Mines, 23 Ch. Div., 210; Compagnie Générale, *Ex parte* Neuchatel Co., W. N. 1883, 17.

on settlement of his claim; and other creditors, who have not themselves petitioned, are not entitled to be substituted for such petitioner, for the purpose of continuing the proceedings, and an application to that effect will be refused;[1] but where the other creditors had themselves petitioned, the order should be granted.[2]

Creditors may show cause against the making of a winding-up order where they have had notice.[3]

9. When winding-up commences.—The winding-up of the business of a company is deemed to commence at the time of the service of the notice of presentation of the petition for winding-up;[4] so if the petition does not allege sufficient facts to justify the making of a winding-up order, it cannot be amended by alleging facts which have arisen since the date of its filing, as other persons' rights might be injuriously affected.[5]

10. Inquiry by Court—Procedure.—If the company oppose the application for a winding-up order, the Court may, in its discretion, adjourn the proceedings and order an inquiry.[6]

Upon the service on the company of an order made by the Court for such an inquiry, the president, directors, officers and employees of the company and every other person must respectively exhibit to the accountant or other person named for the purpose of making such enquiry, the books of account of the company and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control respectively; and they must also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company.[7] Any party required to give such information will be punished by the Court for refusal.[8]

After a report on the inquiry, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the Court may either refuse the application or make the winding-up order.[9]

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[1] Doyle v. Atlas Canning Co., 5 B. C. L. R., 279.

[2] In *re* Joseph Hall Man. Co., 10 P. R., 485; Doyle v. Atlas, etc., Co., *supra*.

[3] *Re* Lake Winnipeg Transportation Co., 7 Man., 255; see also Sec. 19 of Winding-up Act (D.), R. S. C., ch. 129.

[4] Sec. 7 R. S. C., ch. 129.

[5] *Re* Kootenay Brewing, etc. Co., 6 B. C. L. R., 112, 114.

[6] See sec. 10 R. S. C., ch. 129.

[7] Sec. 11 R. S. C., ch. 129.

[8] *Ibid.*

[9] Sec. 12 R. S. C., ch. 129.

11. Actions against company may be restrained.—The Court may, upon the application of the company, or of any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit.[1] Until the order is made and even in the interval between the presentation of the petition and order, the creditor may issue execution, or enforce an execution previously issued, provided he is not otherwise restrained,[2] just as he may during the same interval proceed with an action until stopped,[3] by the winding-up order.

12. Effect of winding-up order on the carrying on of business of company, and on legal proceedings and attachments.—The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof.[4]

All transfers of shares, except transfers made to or with the sanction of the liquidators, under the authority of the Court, and every alteration in the status of the members of the company, after the commencement of such winding-up, shall be void; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up.[5] The transfer of shares under the above circumstances has already been dealt with.[6]

When the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes.[7] Following on this provision, the Act also provides[8] that every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.[9] These sections must be read

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[1] Sec. 13, R. S. C., ch. 129.

[2] See Universal Disinfector Co., 20 Eq., p. 163, Buckley, Companies, 234.

[3] Buckley, Companies, 234.

[4] Sec. 15 R. S. C., ch. 129.

[5] *Ibid*, subsec. 2.

[6] *Supra*, p. 185.

[7] Sec. 16 R. S. C., ch. 129.

[8] Sec. 17, *Ibid*.

[9] The defendant company being insolvent, a winding-up order was issued by the Supreme Court of New Brunswick under the provisions of the Winding-up Act, R. S. C., ch. 129. The company was a foreign body corporate, having offices in London, G.B., and in the Provinces of Quebec and New

together, and section 17 must be held as only avoiding attachments, sequestrations distresses or executions when leave to put them in force has not been given under sec. 16.[1]

There are many suits to which a company is a necessary party in which the plaintiff does not want to enforce any rights against the company. All he wants is to ascertain his rights and enforce them against others.[2] So leave ought to be given to a servant of the company under Section 16 of the Act to bring an action against the company for arrears of wages, so that he might, on the execution being returned unsatisfied, proceed to sue the directors pursuant to the provision contained in the Companies' Acts[3] which renders directors liable for wages of clerks, etc., within a certain time.[4] It appears

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Brunswick. After the making of the winding-up order, a quantity of laths, the property of the company, which had been shipped before the order was made, for delivery in Boston, was levied upon under a writ of attachment at the instance of plaintiff in an action for the recovery of an alleged debt.

Held, that the liquidator was entitled to take proceedings under the provisions of the Judicature Act, sec. 12, sub-sec. 5, to set aside the attachment.

Held, also, that the attachment put in force against the estate or effects of the company after the making of the winding-up order was void.

Held, also, that the claim sought to be recovered by plaintiff was clearly one which could be dealt with in the winding-up proceedings. (Salter v. St. Lawrence, etc., Co., 28 N. S. R., 335.)

The company owned its business premises in the city of Ottawa, subject to a mortgage to J. R. Allen, who commenced an action for foreclosure. Upon a winding-up order being made, Allen filed his claim, and the liquidators, under sec. 62 of the Winding-up Act, R. S. C., ch. 29, with the approval of the Court, consented to his taking the property, and also consented to judgment for immediate foreclosure in the action. Subsequently the City Corporation filed with the liquidator a claim for $641 for arrears of taxes, and $902 for arrears of water rates.

Held, as to the taxes, that the only remedy which the city corporation had was to apply to the Court under sec. 16 of the Act for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce it to grant such leave. In *re* Ottawa Porcelain and Carbon Co., 20 Can. L. T., 179, citing In *re* Oak Pits Colliery Co., 21 Ch. D., 322.

[1] *Re* Lake Winnipeg Transportation Co., 7 Man., 602; 604; *Re* Empire Brewing & Malting Co., 8 Man., 424; *Re* Exhall Mining Co., 5 D.J. & S., 377; *Ex parte*, Carnelly, 35 Ch. Div., 656.

[2] In *re* Universal Disinfector Co., L. R., 20 Eq., 162, 165, per Sir George Jessel, M.R.

[3] For instance, see 60 R. S. C., ch. 119.

[4] *Re* Lake Winnipeg Transportation Co., 7 Man., 602.

that actions against the company will be allowed after a winding-up order has been granted where the rights of third parties will not be affected. For instance leave has been given to bring an action of ejectment.[1]

The making of the winding-up order will be sufficiently proved by the production of an affidavit of one of the liquidators setting forth that a winding-up order has been granted, when it was made and that liquidators of the company have been appointed.[2]

13. Effect of winding-up order on status of company.—The making of the winding-up order has the effect of changing the status of the company so as to prevent the granting of a motion for peremption of suit under Art. 280 of the Quebec Code of Civil Procedure.[3]

14. Court may stay winding-up proceedings.—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 it deems fit.[4] "This section is commonly used," says Mr. Buckley,[5] "for re-construction purposes where, for instance, the company wants to raise further capital to pay its debts and go on again. The further capital cannot be created and issued in the winding-up, and yet the winding-up cannot be stayed so far as relates to the payment of debts. The difficulty is met by taking an order under this section staying all proceedings in the winding-up, except for the necessary purposes (*e. g.* ascertaining and satisfying the debts) and directing meetings of the members to vote new capital, elect a new board of directors, and so on."

15. Wishes of creditors, etc., how ascertained—Amount of claim —Votes on shares—Proof of claims.—The Court may, as to it seems just, as to all matters relating to the winding-up, have regard to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence, and may, if it thinks it ex-

[1] Strand Hotel Co., W. N. 1868, 2.

[2] Salter v. St. Lawrence, etc., Co., 28 N. S. R., 335, 341.

[3] Queen's Hotel Co. v. McLaren, R. J. Q., 12 S. C., 171.

[4] Sec. 18, R. S. C., ch. 129.

[5] Buckley, Companies, p. 260 (sec. 89 Eng. Act of 1862).

pedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting and to report the result of such meeting to the Court,[1] or direct that a chairman be appointed by the persons entitled to be present at such meeting; and in case the appointed chairman fails to attend the said meeting, the persons present at the meeting may elect a chairman qualified, who shall perform the duties prescribed by the Winding-up Act.[2]

In the case of creditors, regard shall be had to the amount of the debt due to each creditor, and in the case of shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company; and the Court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting.[3] The liquidator may give a written notice to creditors whose claims he thinks required proof, and which have been sent to him, or of which he has notice, to prove their claims, on a day fixed, before the Court, which may allow or not such claims; and the claims of creditors who do not so attend to prove them shall be disallowed, unless the Court grant further time.[4]

16. Appointment of liquidators—Security—Provisional liquidators.—The Court, in making the winding-up order, may appoint a liquidator or more than one liquidator of the estate and effects of the company.[5] And in accordance with the preceding section of the Act (No. 19) the wishes of the creditors in relation to the appointment, may be considered. In this country a Court has abstained from laying down the rule that the nominee of the petitioning creditors should have a preference and followed that for guidance to be found in the English cases under the Winding-up Acts.[6] The Court followed the reasoning in *Re Northern Assam Tea Co.*,[7] where the laying down of any hard-and-fast rule, that the nominee of the petitioner shall have a preference is disapproved, as throwing out an additional bait for

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[1] Sec. 19 R. S .C., ch. 129.

[2] Sec. 13 Winding-up Amendment Act, 52 Vic., ch. 32.

[3] R. S .C., ch. 129, sec. 19 (2).

[4] Sec. 14, Winding-up Amendment Act, 52 Vic., ch. 32, as amended by 55-56 V., ch. 28, sec. 1.

[5] R. S. C., ch. 129, sec. 20.

[6] *Re* Alpha Oil Co., 12 Ont. P. R., 298. [7] L. R., 5 Ch., 644, 647.

trafficking in winding-up petitions. "The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal, will act upon their recommendation."[1] So where, upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the Sheriff of L., and opposed the nominee of the petitioning creditors, and the Sheriff, who resided in the county where the company's operations were carried on, and where all its books and assets were, was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the Court appointed him liquidator.[2] In another case where all the creditors of an insolvent company had agreed upon and recommended the appointment of a certain person as liquidator, it was held that the fact that he was a shareholder in the company was not a valid objection to his appointment.[3]

As it is in the discretion of the judge to appoint such of the parties recommended as he thinks best in the interest of all concerned, such discretion is not reversible on appeal unless exercised on some erroneous principle.[4]

Canvassing for votes by a liquidator will be severely discountenanced by the Court.[5] It is also generally desirable that a liquidator should be neither a creditor nor a shareholder of the company to be wound up; he should be a disinterested person.[6]

By the Winding-up Amendment Act[7] the Court may, by any order made after the winding-up order and the appointment of a liquidator, dispense with the notice to creditors, contributories, shareholders or members of the company as required by Section 20 of the Winding-up Act, where in its discretion such notice may properly be dispensed with.

Under the Winding-up Act[8] an incorporated company may be

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[1] *Per* Boyd, C., in *Re* Alpha Oil Co., 12 Ont. P. R., 299; see the Commercial Bank of Manitoba, 9 Man., at pp. 346, 347.

[2] *Re* Alpha Oil Co., *supra*.

[3] *Re* New Westminster Gas Co., 5 B. C. L. R., 618.

[4] *Re* Bank of Liverpool, 22 N. Sc., 97; *Re* Albert Average Assurance Asscn., L. R., 5 Ch. Ap., 597.

[5] *Re* Commercial Bank of Manitoba, 9 Man., 342.

[6] *Re* Central Bank of Canada, 15 O. R., 309.

[7] 52 Vic., ch. 32, sec. 11.

[8] Sec. 21 R. S. C., ch. 129.

appointed liquidator to the goods and effects of a company, and it may act through one or more of its principal officers designated by the Court.

If it thinks fit the Court may, after the appointment of one or more liquidators, appoint additional liquidators.[1]

If more than one liquidator is appointed, the Court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators.[2]

The Court may also determine what security shall be given by a liquidator on his appointment.[3]

If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the Court.[4]

The Court may, at any time after the presentation of the petition and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company.[5] The powers of such provisional liquidator may be limited and restricted by the order appointing him.[6] A provisional liquidator is not, although served, entitled to appear on a winding-up petition, and if he appear his costs will be refused.[7] He is in the position of a receiver *pendente lite*.[8] The appointment of a provisional liquidator is not only provisional but contingent also in this sense that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding-up being made. If no such order is made the appointment ought not to interfere with the rights of third parties.[9]

17. Resignation, removal or discharge of liquidator—Filling vacancy.—A liquidator may resign or may be removed by the Court on due cause shown, and every vacancy in the office of liquidator shall be filled by the Court.[10] To satisfy the words "due cause shown" it is not necessary to prove against the liquidator anything amounting to misconduct or personal unfitness. The Court may take into consideration all the circumstances, and if it finds that it is, on the whole, desirable that the liquidator should be removed, it may

[1] Sec. 22 R. S. C., ch. 129.
[2] Sec. 23 R. .S C., ch. 129.
[3] Sec. 24 R. S. C., ch. 129.
[4] Sec. 25, *Ibid.*
[5] Sec. 26, *Ibid.*
[6] Sec. 12, 52 Vic., ch. 32.
[7] General International Agency Co., 36 Beav., 1.
[8] Buckley, Comp., 1250.
[9] *Ibid*, 247; Dry Docks Co., 39 Ch. Div., 306, 314.
[10] Sec. 27 R. S. C., ch. 129.

remove him.[1] Thus an application to remove a liquidator was granted upon the grounds, 1st. That creditors to the amount of $29,123.23 out of a total of $29,451.39 requested the change; 2nd. that the proposed liquidators would act without remuneration; and 3rd. that the business connection of one of the proposed liquidators would be of value to the company.[2] A liquidator may appeal against the order removing him.[3]

It was enacted in 1892 that "whenever a company is being wound up and the realization and distribution of its assets has proceeded so far that in the opinion of the Court it becomes expedient that the liquidator should be discharged, and the balance remaining in his hands of the moneys and assets of the company can be better realized and distributed by the Court, the Court may make an order discharging the liquidator and for payment, delivery and transfer into Court, or to such officer or person as the Court may direct of such moneys and assets, and the same shall be realized and distributed, by or under the direction of the Court, among the persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the liquidator; the Court may likewise make an order directing how the books, accounts and documents of the company and of the liquidator may be disposed of, and may order that they be deposited in Court or otherwise dealt with as may be thought fit.[4]

In Nova Scotia a judge seems to have power to discharge a liquidator, upon his application, on due notice of such application having been given to those creditors of the company who had entered appearances.[5]

18. Remuneration of liquidator.—The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the Court directs, upon such notice to the creditors, contributories, shareholders or members, as the Court orders; and if there is more than one liquidator, the remuneration shall be distributed amongst them, as the Court directs.[6] It may also determine remuneration of inspectors.[7]

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[1] Per Molins, V.C., in Marseilles Extension, etc., Co., L. R., 4 Eq., 692, 694; British Nation Assurance Society, L. R., 14 Eq., 492.

[2] *Re* Assiniboine Valley Stock & Dairy Farming Co., 6 Man., 105.

[3] Adam Eyton, Ltd., 36 Ch. Div., 299; see sec. 74 R. S. C., ch. 129.

[4] 55-56 V., ch. 28, sec. 2.

[5] *Re* McDougall Distillery Co., 18 Can. L. T., 421.

[6] Sec. 28 R. S. C., ch. 129. [7] *Ibid*, as amended by 62-63 V., ch. 42, sec. 2.

In England the Courts have laid down a scale of remuneration of liquidators.[1] One of our Courts has followed this scale, not as absolutely binding, but as a guide.[2] A judge has pointed out that, in England, the scale of remuneration is much higher, at all events in connection with litigation, than in this country; and that if the remuneration given judges and officers of the Court can be taken as a guide, it would be about $1 here for each £1 in England.[3] In this case the Court allowed $300 for 379 hours' work (*i.e.*, 47 days and 3 hours, day of eight hours). The assets consisted almost entirely of land (4,500 acres) which at a low valuation should realize $6 an acre. That would make their value $27,000; but it did not appear whether they were subject to any incumbrance by way of mortgage, or liens, for unpaid purchase money. Calculated upon the English scale and assuming that the whole amount would be divisible among unsecured credtors, the remuneration would be £4 or say $20 for each day of eight hours. In the former case[4] the judge allowed $5 for each 8 hours of time occupied, adding $100 for the liquidator's report, and

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[1] The English scale is as follows:—

LIQUIDATORS.

			Per day of 8 hours.
Group A.—Class	I.	Where the assets divisible among the unsecured creditors shall not amount to £500	£1
"	II.	Where they shall amount to £500 and not to 2,000	2
"	III.	" " " 2,000 " 5,000	3
Group B.—Class	IV.	" " " 5,000 " 10,000	4
"	V.	" " " 10,000 " 50,000	6
Group C.—Class	VI.	" " " 50,000 " 100,000	8
"	VII.	" " " 100,000 " 500,000	10
"	VIII.	" " " 500,000 and over.	12

CLERKS.

	1st Class.	2nd Class.	3rd Classs.
	s. d.	s. d.	s. d.
Group A.........	2 0	1 6	1 0 per hour.
Group B.........	3 0	2 6	1 0 "
Group C.........	3 6	2 6	1 0 "

See Buckley Companies, 5th Ed., 270. This tariff was adopted by the Judges of the Court of Chancery in 1868; and even in England it is not binding upon the judges but is intended as a guide to them in exercising their discretion. (Mysore Reefs, etc., Co., 34 Ch. D., 14.)

[2] *Re* Saskatchewan Coal Mining Co., 6 Man., 593.

[3] Taylor, J., in *Re* Assiniboine Valley S. & D. Farming Co., 6 Man., 184; and see per Boyd, J., in *Re* Central Bank, 22 O. R., at p. 255.

[4] *Re* Saskatchewan Coal Mining Co., 6 Man., 593.

for interest upon moneys advanced by the liquidator in the expenses of the winding-up before he realized from the assets of the company. In this case the assets divisible among the unsecured creditors fell far short of £500. The Court has no power to refer to the master the consideration of the amount to be allowed to the liquidator.[1]

A Nova Scotia judge fixed the liquidator's commission at five per cent.[2]

The application by the liquidator to fix his remuneration should be supported by an affidavit shewing the number of hours devoted by him and his clerks to the business of the liquidation.[3] No charge can be made for time spent in procuring his own appointment or opposing his discharge.[4]

Sec. 28 intends that the remuneration is not necessarily to be increased because there may be three liquidators instead of one.[5] The recompense for services is often a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them.[6] Payment by percentage is not imperative on the Court, and where the assets are very large, is not admissible.[7] The Court will not interfere to determine the proportion in which the remuneration ascertained to be due to joint liquidators shall be divided between them.[8]

In fixing the liquidator's commission or compensation, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidators.[9] The liquidator's compensation should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one.[10]

19. Description of liquidator in legal proceedings.—In all proceedings connected with the company a liquidator shall be described as the "liquidator of the (name of company)" and not by his individual name only.[11]

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[1] *Ibid.* [2] *Re* McDougall Distillery Co., 18 Can. L. T., 421.

[3] *Re* Assiniboine Valley S. & D. Farming Co., 6 Man., 184. [4] *Ibid.*

[5] *Re* Central Bank of Canada, 15 O. R., 309. [6] *Ibid.*

[7] Buckley, Comp., 271; Agra & Masterman's Bank, L. R., 7 Eq., 102.

[8] Langham Hotel Co., 17 W. R., 463; 20 L. T., 163.

[9] *Re* Central Bank, Lye's claim, 22 O. R., 247. [10] *Ibid.*

[11] Sec. 29 R. S .C., ch. 129; Salter v. St. Lawrence, etc., Co., 28 N. S. R., 335, 339. There is no case on record where the liquidator personally, or by name, became a party to any suit or proceeding in the Court. Salter v. St.

20. Powers, duties and status of liquidator.—The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled; and he shall perform such duties in reference to winding-up the business of the company as are imposed by the Court or by the Winding-up Act.[1]

The liquidator may, with the approval of the Court, and upon such previous notice to the creditors, contributories, shareholders or members, as the Court orders :

(a) Bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be.[2]

The Court may provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Winding-up Act[3] or the Winding-up Amendment Act,[4] without the sanction or intervention of the Court.[5] Apart from such subsequent order the liquidator cannot sue without permission from the Court and with such notice to the creditors, contributories, shareholders or members as the Court may prescribe;[6] and it is not sufficient that this permission be a general one given to recover all debts owing to the company; the permission must be a special one to recover the particular debt.[7] It is too late to ask the permission of the Court after the action has been commenced; the authorization to sue must precede the action.[8]

The liquidator represents at the same time both the creditors and the company, and a question of considerable nicety sometimes arises as to how far he can enforce the rights of the creditors as independent of, and paramount to, those of the company, and how far he can enforce them only in right of the company.[9] "The result of the decisions and *dicta* on this subject," says Mr. Buckley, in his work on Company Law,[10] "is perhaps this, that although the liquidator is

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Lawrence, etc., Co., *Iibd*, per Meagher, J., at p. 339. Upon his appointment, he becomes the representative of the company, with power, subject, of course, to the control of the Court, to use its name. He cannot, therefore, be regarded as a third party, or a stranger to the suit. *Ibid.*

[1] Sec. 30 R. S. C., ch. 129. [2] Sec. 31 R. S. C., ch. 129.

[3] R. S. C., ch. 129. [4] 52 Vic., ch. 32. [5] *Ibid*, sec. 12.

[6] Ross v. Perras, 1894, R. J .Q., 5 S. C., 470; confirmed on appeal. Molleur v. Cie de Pulpe, etc., du St-Lawrence, S. C. 1887, M. L. R., 3 S. C., 273.

[7] Freygang v. Daveluy, 1892, R. J. Q., 2 S. C., 505; Molleur v. Cie du Pulpe, etc., *supra*.

[8] Ross v. Perras, 1894, R. J. Q., 5 S. C., 470; confirmed on appeal.

[9] See Buckley, comp., p. 272. [10] *Ibid.*

substituted for, and enforces the rights of creditors in right of the company, yet that the winding up order calls into existence new rights and new liabilities which did not exist before, and that equities which might have been set up against the company cannot prevail against the liquidators as representing the creditors."

The powers of a liquidator of a limited company are more extensive than those of the company prior to the winding-up order; for instance, he can enforce contributions from the members of the company which the company itself could not have enforced.[1] But the liquidator cannot make a claim which the company by its default could not have made when it was a going concern.[2] So also the laches of the company may prevent the liquidator from enforcing rights which he otherwise could do.[3]

Where it is a question of getting in property belonging to the company itself before the winding-up order is made, the liquidator must sue in the name of the company.[4] Where a company is put into liquidation, there is no occasion, neither is it proper, for the liquidator to take up suits pending in the name of the company.[5] The latter still retains its corporate state and corporate powers which continue until the affairs of the company are wound up.[6] The company therefore can and should sue in its corporate name; the liquidator is simply an officer of the Court, charged with the winding-up under the supervision of the Court, and acts in place of the directors and other officers whose powers cease upon the appointment of the liquidator.[7] The property of the company does not vest in the liquidator, but by virtue of his appointment and the provisions of the Act, he holds the same relation to it as the Board of Directors or other governing body of the company would, if proceedings to wind up the company had not been commenced.[8]

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1 Per Jessel, M.R., in Nat. Funds Asscn., 10 Ch. Div., 118, 123.

2 Emden, p. 140; Joint Stock Discount Co., Sichell's Case, L. R., 3 Ch., 119; General Floating Dock Co., 15 W. R., 476; 15 L. T., 526.

3 *Ibid*, p. 140; European Central Ry. Co., Parson's Case, L. R., 8 Eq., 656; Florence Land, etc., Co., 29 Ch. Div., 421.

4 Turquand v. Kirby, L. R., 4 Eq., 123; Sarnia Agricultural Implement Manuf. Co. v. Hutchison, 17 O. R., 676; but see Samson v. Manicouagan Fish & Oil Co., 17 Q. L. R., 65.

5 Ross v. Perras, 1894, R. J. Q., 5 S. C., 470, confirmed in appeal; Fairbanks v. Pioneer Beet Root Sugar Co., 20 R. L., 99.

6 Sec. 15 (2) R. S. C., ch. 129; Ross v. Perras, *supra*.

7 Ross v. Perras, *supra*; sec. 34, R. S. C., ch. 129.

8 Salter v. St. Lawrence, etc., Co., 28 N. S. R., per Meagher, J., at p. 338.

The company having power to sue under the statute, if they choose to run the risk of costs, it would seem they may sue without the sanction of the Court.[1]

Where, in the course of the winding-up, the liquidator endeavours to get from a contributory the amount of his contribution, he may sue as liquidator with the sanction of the Court.[2] The liquidator represents the creditors in regard to actions pertaining to the latter. Therefore an action demanding the nullity of a payment made by a company to a creditor, who was at the time cognizant of the former's insolvency, being in the nature of an *actio Pauliano*, can be instituted by the liquidator.[3]

The liquidator may also (b) carry on the business of the company as far as is necessary to the beneficial winding-up of the same.[4] The "necessity" is to be determined by the Court having regard to all the circumstances of the case, and includes what may be called "a mercantile necessity," or something which under all the circumstances will be highly expedient.[5] It must be borne in mind that it is only for the purpose of administration and realization that the business can be continued.[6]

He may (c) sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company or sell the same in parcels.[7] It is to be noted

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[1] Sarnia Agricultural Implement Mfg. Co. v. Hutchison, 17 O .R., 676, 678, Per Proudfoot, J.

[2] Turquand v. Kirby, L. R., 4 Eq., 123, 127; see Sarnia Agricultural Implement Mfg. Co. v. Hutchison, 17 O. R., 676; *Re* Bolt & Iron Co., 10 Ont. P. R., 434.

[3] Kent v. Blandy, R. J. Q., 6 Q. B., 196.

[4] R. S. C., ch. 129, sec. 31 (b).

[5] Buckley Comp., 277; Wreck Recovery Co., 15 Ch. Div., 353.

[6] *Ex parte*, Emmanuel, 17 Ch. Div., 35.

[7] Sec. 31 (c) R. S. C., ch. 129. The words "peremptory" or "peremptorily," applied to a sale of the property of a company in a winding-up proceeding, do not always mean "absolutely final," there being a discretion in the Court under special and urgent circumstances whether they shall have that meaning or not.

A sale by tender (not saying that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

In winding-up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time when the sale was to be "peremptorily closed." At the time fixed one that although this clause enables the liquidator, with the sanction of the Court, to transfer the property of the company in liquidation to another company, this transfer must be the outcome of, and preceded by, a *bonâ fide* sale of the property to such company.[1]

This clause would not appear to afford any ground for a scheme of reconstruction where there is a minority which opposes the reconstruction;[2] but our Winding-up Act contains an amendment similar to the *English Joint Stock Companies Arrangement Act*, 1870, which provides that there shall be a power in the majority to bind the minority with the sanction of the Court. See pp. 443, 444, *infra*.

The liquidator may (d) do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company.[3]

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tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train; one on behalf of the largest beneficiary under the mortgage, to enforce which the sale was being held, and the other by a stranger which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last which was the highest tender.

Held, that he was justified in so doing. *Re* Alger and the Sarnia Oil Co., 21 O. R., 440; confirmed in appeal, 19 Ont. A. R., 446.

[1] *Re* Agra & Masterman's Bank, L. R., 12 Eq., 512 (note).

[2] *Re* Albert Life Assur. Co., L. R., 6 Ch., 381; *Re* Sun Lithographing Co., 24 O. R., 200.—Decided.

The A. Life Insurance Co. purchased the businesses of several companies, and indemnified them against their liabilities. Some of the policy-holders of the amalgamated companies accepted the liability of the A. Company, and some did not. Afterwards the A. Company and the other companies were ordered to be wound up. A scheme of reconstruction was proposed for the sanction of the Court, under which the contributories of the A. Company and the other companies were to pay certain contributions; and the assets of the A. Company, and also the contributions when called up, were to be handed over to a new company, which was to take the business and pay the policies when they arrived at maturity with a deduction of £5 per cent. on their amounts.

The scheme had been accepted by a majority of three-fourths in value of the creditors present at meetings of each of the companies, and also by a large majority of the shareholders.

Held,—that the Court had no jurisdiction to sanction the arrangement; such a scheme is not a sale within the 95th section (31st section, Canadian Act), of the Companies' Act, 1862. *Re* Albert Life Assurance Co., *supra*; but this case was decided before the English Joint Stock Companies Arrangement Act, 1870, had come into force, *Ibid*, p. 386.

[3] R. S. C., ch. 129, sec. 31 (d).

(e) He may also prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and take and receive dividends in respect of such balance in the matter of the bankruptcy, insolvency or sequestration as a separate debt due from such bankrupt or insolvent, and ratably with the other separate creditors.[1]

(f) Also draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company; raise upon the security of the assets of the company, from time to time, any requisite sum or sums of money; and the drawing, accepting, making or indorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or indorsed by or on behalf or such company in the course of the carrying on of its business;

(g) Also do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets.[2]

21. Appointment of solicitor by liquidator.—The liquidator may, with the approval of the Court, appoint a solicitor or law agent to assist him in the performance of his duties.[3] The policy of the statute contemplates the prosecution of the winding-up by one disinterested solicitor, whose services will not be decided by the assertion of antagonistic claims. Hence a solicitor who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the sanction of the Court to his acting also as solicitor for the liquidators. Nor will the Court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim.[4]

22. Right of liquidator to compromise.—The liquidator may, with the approval of the Court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or other debtor or person apprehending liability to the company, and all questions in any way relat-

[1] *Ibid*, sec. 31 (e).

[2] R. S. C., ch. 129, sec. 31. 62-63 V., ch. 42, sec. 3 adds "and no delivery of the whole or any part of the assets of the company shall be necessary to give a lien to any person taking security upon the assets of the company."

[3] Sec. 32, R. S. C., ch. 129. [4] *Re* Charles Stark Co., 15 Ont. P. R., 471.

ing to or affecting the assets of the company or the winding-up of the company upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon; and may take any security for the discharge of such debts or liabilities, and give a complete discharge in respect of all or any such calls, debts or liabilities.[1]

Another section[2] of the Winding-up Act also provides that the liquidators may, with the approval of the Court, make such compromise or other arrangement as the liquidators deem expedient with creditors or persons claiming to be creditors, or persons 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.

Read by the light of English decisions on sections analogous to the above sections (33 and 61) of our Act,[3] there is no power given in these sections to enforce a compromise upon dissentient minorities, and there is no power to compel the liquidator to consent to a compromise.[4] The Court has no power to compromise *per se*. The only power is in the liquidator with the sanction of the Court.[5] To remedy this a statute was passed in England (The Companies' Act of 1870, 33 & 34 Vic., ch. 104 (Imp.)), by which a statutory majority of creditors is able to bind a minority; and in 1899, the Dominion Parliament enacted as follows:—" Where any compromise or arrangement is proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily, or by or under the supervision of the Court, under the provisions of the *Winding-up Act* or of any amendment thereto, and the creditors of the company, or by and between any such creditors or any class or classes of such creditors and the company, the Court, in addition to any others of its powers, may, on the application in a summary way of any creditor or of the liquidator, order that a meeting of such creditors or class or classes of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number representing three-fourths in value of such creditors or class or classes of creditors present, either in person or by

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[1] Sec. 33 R. S. C., ch. 129. [2] Sec. 61, *Ibid*.

[3] *I.e.*, sections 159 and 160 Companies' Act, 1862 (Eng.)

[4] Per Boyd, C., in *Re* Sun Lithographing Co., 24 O. R., p. 203, citing *Re* Albert Life Assur. Co., L. R., 6 Ch., 381, and In *re* East of England Banking Co., Pearson's Case, L. R., 7 Ch., 309.

[5] See Per James, L.J., In *re* East of England Banking Co., Pearson's Case, *supra*.

proxy, at such meeting, agree to any arrangement or compromise, such arrangement or compromise, if sanctioned by an order of the Court, shall be binding on all such creditors, or on such class or classes of creditors as the case may be, and also on the liquidator and contributories of the company."[1] Before this enactment, it was held that under our Act any feasible scheme of compromise ought at least to be initiated or recommended by the liquidator before it is worth while to enter upon its consideration, but even when thus introduced all may be frustrated by an opposing minority.[2] Although Section 19 of the Winding-up Act is emphatically of a wide discretionary scope in all matters that can be governed by the wishes of the creditors, or in which it may be usful to have regard to the wishes of the creditors; yet it is not meant to empower the enforcement of a compromise differently from the specific provisions relating to that subject.[3]

The power of the Courts of first instance to authorize the liquidator of a company in liquidation to compromise in the name of the company and to settle pending cases is a discretionary power, and the Courts of Appeal should not interfere with this discretion unless the Court below has exercised it in an unreasonable manner.[4] The liquidator is not obliged to consult the creditors of the company before demanding from the Court authorization to consent to a compromise.[5]

23. Position of Directors on appointment of Liquidator.—Upon the appointment of the liquidator, all the powers of the directors shall cease, except in so far as the Court or the liquidator sanctions the continuance of such powers.[6] But though the powers of directors cease when the winding-up order is made, their duties do not.[7] It is true they have no control over the affairs of the company after the winding-up has commenced, but that does not prevent their continuing to be officers of the company.[8] They have no power to answer interrogatories without the consent of the Court.[9]

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[1] 62-63 V., ch. 42, sec. 3.

[2] Per Boyd, C., In *re* Sun Lithographing Co., 24 O. R., at p. 204.

[3] See *Ibid.* [4] Morin v. Bilodeau, 1898, R. J. Q., 8 Q. B., 330.

[5] *Ibid.* [6] Sec. 34 R. S. C., ch. 129.

[7] Madrid Bank v. Bayley, L. R., 2 Q. B., 37.

[8] Per Blackburn, J., in Madrid Bank v. Bayley, *supra.*

[9] *Ibid.* The company defendant, before the appointment of a liquidator, was summoned to answer interrogatories upon articulated facts, but a liquidator was appointed before the day fixed for answering. The rule was con-

As the directors' control over the affairs of the company ceases after the winding-up, their fiduciary relations to the company, or its shareholders, are at an end, and a sale to them by the liquidator of the company is valid.[1]

24. Duty of Liquidator with regard to company's funds—Ownership and disposal thereof—Answerable to the Court.—The liquidator must deposit at interest in some chartered bank or post-office savings bank or other Government savings bank designated by the Court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars.[2]

Such deposits must not be made in the name of the liquidator individually, on pain of dismissal, but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator.[3]

At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal,—of which production mention shall be made in the minutes of such meeting; and the absence of such mention shall be *primâ facie* evidence that such pass book was not produced at the meeting.[4]

The liquidator must also produce such pass book whenever ordered so to do by the Court, and on his refusal so to do, he may be treated as being in contempt of Court.[5]

The liquidator shall be subject to the summary jurisdiction of the Court in the same manner and to the same extent as the ordinary officers of the Court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or

tinued by consent to a subsequent day, and on that day no one appearing to answer, default was entered.

Held,—Inasmuch as by section 34 of the Winding-up Act, upon the appointment of a liquidator all the powers of the directors cease, except in so far as the court or the liquidator sanction their continuance, the directors after the appointment of a liquidator could not authorize any person to answer for them unless their powers had been specially continued to that effect. The company was therefore relieved from the default and the liquidator allowed to answer. Graham v. Casselman Lumber Co., 1893, R. J. Q., 4 S. C., 91.

[1] Chatham Nat. Bank and McKeen, 24 Can. S. C. R., 348.

[2] Sec. 35, R. S. C., ch. 129.

[3] Sec. 36, *Ibid.*

[4] Sec. 37, *Ibid.*

[5] Sec. 38, *Ibid.*

demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever; and obedience by the liquidator to such order may be enforced by the Court under the penalty of imprisonment, as for contempt of Court or disobedience thereto, and he may be removed, in the discretion of the Court.[1]

The liquidator must, within three days after the date of the final winding-up of the business of the company, deposit in the bank appointed or designated as hereinbefore provided (Sec. 35) any other money belonging to the estate then in his hands not required for any other purpose authorized by the Act, with a sworn statement and account of such money, and that the same is all that he has in his hands; and he will incur a penalty not exceeding ten dollars, and not less than ten per cent. per annum interest upon the sums in his hands for every day on which he neglects or delays such payments; and he shall be deemed to be a debtor to Her Majesty for such money, and may be compelled as such to account for and pay over the same.[2]

The money so deposited must be left for three years in the bank, subject to be claimed by those entitled thereto, and shall be then paid over, with the interest, to the Minister of Finance and Receiver-General, and if afterwards claimed, shall be paid to the person entitled thereto.[3]

The liquidators of an insolvent bank passed their final accounts, and paid into court a balance remaining in their hands. It appeared that by orders, issued either through error or by inadvertence, the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act. It was held by the Supreme Court, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.[4] It has since been decided by the Ontario High Court of

[1] Sec. 39 R. S. C., ch. 129. [2] Sec. 40 R. S. C., ch. 129. [3] Sec. 41, *Ibid.*

[4] In *re* Central Bank of Canada, Hogaboom's Case, 28 Can. S. C. R., 192; 18 Can. L. T., 212.

Justice that the above judgments were conclusive on the point that the money was the property of the Receiver-General, subject to the liability of paying it over to the persons entitled thereto.[1]

25. Contributories—Their liabilities and rights—Jurisdiction of court.—As soon as may be after the commencement of the winding-up of a company the Court shall settle a list of contributories.[2] This list must distinguish between those in their own right and those in a representative capacity.[3] Executors may be placed on the list.[4] The liability of shareholders upon the winding-up has already been dealt with.[5]

This liability creates a debt accruing due from such shareholder at the time when his liability commenced, but payable at the time or respective times when calls are made for enforcing such liability; and in the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate.[6]

The Court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories as trustee, receiver, banker, agent or officer of the company, to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *primâ facie* entitled.[7]

This section is applicable only to the contributories and officers

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[1] Same case, 30 O. R., 320; 19 Can. L. T., 66.

[2] Sec. 42, R. S. C., ch. 129. [3] Sec. 43, *Ibid.*

[4] The liquidators applied to have the executors of one, Edward Hayes, deceased, placed on the list of contributories, and for leave to add interest, It appeared that some time before Hayes died his name was placed on the list of contributories, but the amount he was liable to contribute was never paid.

Held,—That under the Winding-up Act, R. S. C., ch. 129, ss. 43 & 44, the Court has authority to place executors on the list of contributories.

It was ordered that the executors be placed on the list of contributories, but that under the circumstances no interest be allowed.

The executors applied for leave to appeal to the full Court, but leave was refused. In *re* St. John Building Society, 17 Can. L. T., 346.

[5] *Supra*, pp. 154 *et seq*: 220 *et seq.*; see also CHAPTER VI.

[6] Sec. 46 R. S. C., ch. 129. [7] Sec. 47, *Ibid.*

of the company, and ought not to be extended to include other persons.[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, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act.[2]

The jurisdiction given by this section will not be confined to cases in which the debt is not disputed by the contributory, or in which the facts are very plain and straightforward, and there is no point of law to be determined. The object of this and like sections is to avoid a double process, and to do complete justice in the winding-up.[3] And, therefore, it is only in rare instances that an action should be brought.[4]

A holder of fully paid-up shares, who is indebted to the company, will not be put on the list of contributories in order to bring him within the summary jurisdiction of the section.[5]

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[1] Buckley Comp., 285. In the course of proceedings taken in Scotland for winding-up the plaintiff's company, an order was made by a Scotch Court under sec. 100 of the Imperial Companies' Act, 1862 (sec. 47 Dominion Act), for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any Court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose.

Held,—That there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish Courts.

And an order striking out the defence in the action on the ground that it was *res judicata* by the order of the Scottish Court was rescinded.

Semble, that the order of the Scottish Court should have been limited to such books and papers as were in the hands of the defendant at its date (British Canadian Lumber & Timber Co. v. Grant, 12 Ont. P. R., 301.)

[2] R. S. C., ch. 129, sec. 48. [3] Buckley, Comp., 288. [4] *Ibid.*

[5] Marlborough Club Co., L. R., 5 Eq., 365; Scheoder's Case, L. R., 11 Eq., 131, 134, 138.

The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves; and the Court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same: Provided, however, that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.[1]

As to what persons are contributories, see chapter on Liabilities of Shareholders.[2]

"Debts and liabilities" means estimated debts and liabilities. The intention of the section is to provide a fund for payment of the debts when established; and it is not, therefore, the duty of the Court to wait until claims have been established against the company before making a call.[3]

The Court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post-office savings bank, or other Government savings bank, to the account of the Court, instead of to the liquidator; and such order may be enforced in the same manner as if it had directed payment to the liquidator.[4]

The Court shall adjust the rights of the contributories among themselves, and distribute, among the persons entitled thereto, any surplus remains.[5] Although the interpretation clause of the Winding-up Act[6] describes a contributory as a "person liable to contribute to the assets of a company" under the Act, yet this in no way defines the persons on whom the liability created by it is to attach, but it refers to a liability under the Act, and leaves it to be collected from

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[1] Sec. 49 R. S. C., ch. 129. [2] CHAPTER IX., *supra* p. 220 *et seq.*

[3] Buckley, Comp., 289; Contract Corporation, L. R., 2 Ch., 95; Barnard's Banking Co., 36 L. J. (Ch.), 215.

[4] Sec. 50 R. S. C., ch. 129. [5] Sec. 51, *Ibid.*

[6] Sec. 2 (f) R. S. C., ch. 129.

other parts of the Act on whom the liability was intended to be fixed. This liability is fixed by Section 44 on every shareholder or member who is a debtor of the company. Until the Court has finally settled the list of contributories, anyone alleged to be indebted to the company may be placed on the list; even the holders of fully paid-up shares.[1] It may happen that the calls made during the liquidation are excessive, and section 51 provides that the Court shall adjust the rights of the contributories among themselves, and distribute among the persons entitled thereto, any surplus that remains.

To make this adjustment equitably it may be necessary to make a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders,[2] and this after the debts of the company have been provided for.

If, after payment of the debts, there are surplus assets, the fully paid-up shareholders are entitled, where the articles of association do not provide otherwise, to receive the difference between the amount paid up on their shares and that paid upon the other shares of the company.[3]

A provision in the charter or governing instrument for payment of a preferential dividend to one class of shareholders will not alter the rule of distribution of the assets in the absence of any provision for the distribution of capital.[4]

"It is useful to introduce into the charter or memorandum and articles power to divide surplus assets in specie, for otherwise it is conceived," says Mr. Buckley, in his work on Company Law,[5] "they must be sold and the proceeds divided. In the case of speculative or unsaleable assets this may involve great loss."

The Court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for moneys, goods

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[1] Ang'esea Colliery Co., L. R., 2 Eq., 619. [2] *Ibid.*

[3] Scinde, Punjaub & Delhi Corp., L. R., 6 Ch., 53 N.; Buckley Companies, 293; *Ex parte* Maude, L. R., 6 Ch., 51.

[4] Buckley Comp., 293; *Ex parte* Maude, L. R., 6 Ch., 51; Emden, pp. 400, 401.

[5] P. 295.

and chattels to be seized, and him and them to be safely kept until such time as the Court orders.[1]

If the business of a company is being wound-up under this Act, all books of the company, and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded.[2] But they are no more than *primâ facie* evidence.[3]

After a winding-up order has been made, the Court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the Court thinks just, and any books and papers in the possession of the company may be inspected in conformity with the order of the Court, but not further or otherwise.[4]

Special circumstances must generally be shewn in order to obtain an order for inspection of the books; but where the debts are large, and the transactions of the company have been complicated, the Court will make an order for inspection without any special reason being given for it.[5] The order is to be made *primâ facie* only for the purpose of the winding-up for the benefit of those interested in the winding-up.[6]

No contributory, creditor, shareholder or member shall vote at any meeting unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally.[7]

26. Creditors' claims—Clerks' privilege—Purchaser of debt.— When the business of a company is being wound-up under this Act,[8] 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, as far as possible, of the value of all such debts or claims as are subject to any contingency or sound only in damages, or which, for some other reason, do not bear a certain value.[9]

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[1] Sec. 52 R. S. C., ch. 129. [2] Sec. 53 R. S. C., ch. 129.

[3] Barangah Oil Co., Arnot's Case, 36 Ch. Div., 702, 712.

[4] Sec. 54 R. S. C., ch. 129.

[5] *Ex parte* Buchanan, 15 W. R., 99; Imperial Land Co. of Marseilles, W. N. 1882, 173.

[6] Buckley, Comp., 347. [7] Sec. 55 R. S. C., ch. 129.

[8] The Dominion Winding-up Act, R. S. C., ch. 129.

[9] Sec. 56 R. S. C., ch. 129.

Clerks and other persons in or having been in the employment of the company in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order.[1]

A contributory of the company, having bought up a debt of the company for a less sum than is actually due thereon, may prove for the full amount of the debt, and not merely for what he has paid for it.[2] But it is otherwise in the case of a person standing in a fiduciary relation towards the company, for to such an one the rule will apply which forbids a trustee to make a profit by buying up an incumbrance on the trust estate.[3]

27. Law governing claim.—There is nothing in section 56 of the Winding-up Act[4] which alters or interferes with the *lex loci contractus* in the case of a claim.[5] Therefore a debt contracted by a company must be governed by the law of the Province where the contract was made, no matter where the company is wound up. Thus, although under the English and Ontario law, while a landlord could enter a claim for future rents upon the insolvency of a company, he could not prove for them nor rank for dividends in respect of them until such future rents had matured into a claim for payment[6] except in the case where the lease provides for acceleration of rent. But in Quebec the common law is that the rent not yet exigible, by the terms of the lease, becomes so upon the insolvency of the tenant.[7] Therefore the lessor can, upon the insolvency of a company being wound up in Ontario, when he makes option to void the lease, made to the

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[1] Sec. 56 (2), *Ibid.* Claims for arrears of salary, made by persons occupying the positions of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. (Fane v. Langley; Lavinder v. Langley, 20 Can. L. T., 9.)

[2] Humber Ironworks Co., L. R., 8 Eq., 122.

[3] See Buckley, Comp., 353; Imperial Land Co. of Marseilles, *Ex parte* Larking, L. R., 4 Ch. Div., 566.

[4] R. S. C., ch. 129.

[5] *Re* Harte & Ontario Express, etc., Co., 22 O. R., 510.

[6] *Ibid*; Buckley, Comp., p. 335.

[7] Civil Code, arts. 1092, 1624; Menard v. Pelletier, 7 L. N., 511.

company in the Province of Quebec, in accordance with a provision thereof giving him the right of making such option in the event of the insolvency of the lessee, prove and be paid for his claim for the whole rent, taxes, etc., to the end of the term for which the lease was made.[1]

28. Set-off.—The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company were not being wound up under this Act.[2] The question of set-off by contributories has already been dealt with.[3]

29. Disposal of company's assets—Filing claims.—The property of the company shall be applied in satisfaction of its liabilities and the charges incurred in winding-up its affairs; and unless it is otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining shall be distributed amongst the members or shareholders, according to their rights and interests in the company.[4]

The court may fix a certain day or certain days on or within which creditors of the company and others who have claims thereon may send in their claims.[5]

When the liquidator has given such notices of the said day as are ordered by the Court, the liquidator may, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, distribute the assets of the company, or any part thereof, amongst the persons entitled thereto, having regard to the claims of which the liquidator then has notice; and the liquidator shall not be liable to any person of whose claim the liquidator had not notice at the time of distributing the said assets, or a part thereof, as the case may be, for the assets or any part thereof so distributed.[6] The Court may, if it see fit, discharge the liquidator and distribute the assets itself, or supervise such distribution.[7]

It has already been pointed out how the liquidator may compromise with creditors, and may compromise rents due the company.[8]

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[1] *Re* Harte, etc., *supra*. [2] R. S. C., ch. 129, sec. 57.

[3] *Supra*, Chapter on LIABILITY OF SHAREHOLDERS, pp. 228 *et seq.*

[4] Sec. 58, R. S. C., ch. 129. [5] Sec. 59, *Ibid.*

[6] Sec. 60, *Ibid.* [7] 55 56 V., ch. 28, sec. 2. [8] *Supra*, pp. 442 *et seq.*

30. As to secured claims and creditor's security—Rank on dividend sheet.—If a creditor holds security upon the estate of the company, he must specify the nature and amount of such security in his claim, and must therein, on his oath, put a specified value thereon; and the liquidator, under the authority of the Court, may either consent to the retention of the property and effects constituting such security or on which it attaches, by the creditor, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment, and in case of such retention the difference between the value at which the security is retained and the amount of the claim of such creditor shall be the amount for which he may rank as aforesaid; and if a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim.[1]

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[1] Sec. 62, R. S. C., ch. 119.

A company owned its business premises in the city of Ottawa, subject to a mortgage to J. R. Allen, who commenced an action for foreclosure. Upon a winding-up order being made, Allen filed his claim, and the liquidators, under sec. 62 of the Winding-up Act, with the approval of the Court, consented to his taking the property, and also consented to judgment for immediate foreclosure in the action.

Subsequently the city corporation filed with the liquidators a claim for $641. for arrears of taxes, and $902. for arrears of water rates.

Held, as to the taxes, that the only remedy which the city corporation had was to apply to the Court under sec. 16 of the Act for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce it to grant such leave. In *re* Ottawa Porcelain and Carbon Co., 20 Can. L. T., 179, citing In *re* Oak Pits Colliery Co., 21 Ch. D., 322.

If the distress in this case had been levied before the beginning of the winding-up, then, as in In *re* Army and Navy Clothing Co., decided by Boyd, C., 11th January, 1898, the Court would, there being no right of action for the taxes, have preserved to the company the right of distress, on the principle that where there is not a right of action, and therefore no priority between the parties, the distrainor may pursue his only remedy (distress) as

It has been decided by a British Columbia Court that a motion by a liquidator for a direction that a creditor deliver over to him certain securities cannot be allowed, and that such an application should be by summons, the rule being in effect a statutory one.[1]

Although this section is in imperative form as to requiring that the creditor shall specify the nature and amount of such security in his claim, etc., yet where a creditor files a claim without professional advice, and omits to mention any security, he will be allowed to withdraw his claim and file an amended one if so advised;[2] and this wherever the omission has arisen by inadvertence.[3]

The object of the section is simply to deny to a creditor the unreasonable privilege of claiming for one hundred cents in the dollar upon an insolvent estate and at the same time holding on to a security which, in order to realize his one hundred cents, or whatever the estate will pay, ought to be brought into hotch-pot and realized accordingly. Hence the Act says you must "elect;" either turn your security into the estate at such value as you put upon it, or relinquish your claim upon the remainder of the assets: you cannot have both.[4] The principle on which the liabilities and rights of

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if no liquidation existed; but where a right of action exists, even though there is also a right to distrain, then the creditor is within the Act, and must prove as an ordinary creditor.

The provisions of the final clause of s-s. 1 of s. 135 of the Assessment Act with regard to goods in the hands of a liquidator apply only to proceedings under the Joint Stock Companies' Winding-up Act.

By 35 V., ch. 80, s. 11, power is given to fix rates which an owner shall pay, and such rates, if unpaid, are to be a lien or charge upon the real estate, but by s. 13a personal liability to pay the rates is created against the owner. The city corporation, by by-law passed in 1890, fixed the insolvent company's water rates, and had assessed it by name from year to year since.

Held, that a liability to pay was thereby imposed, and this liability is a sufficient foundation for a valid claim by the corporation to rank on the estate in the hands of the liquidator for the amount of the water rates. The corporation are not bound to prove as secured creditors, notwithstanding their lien upon the property arising under sec. 11, because the lien is upon property in which the insolvent company is not interested, having already surrendered it to a prior mortgagee, and the liquidator could not give it up to the claimant as required by sec. 62 of the Winding-up Act. *Ibid*, citing *Ex parte* West Riding,etc., Co., 19 Ch. D., 105, 112.

[1] *Re* Nelson Saw Mill Co., 6 B. C. L. R., 156, citing Reg. v. City of London Court (1892), 1 Q. B., at p. 290.

[2] *Re* Lake Winnipeg Transportation Co.; Bergman's Claim, 8 Man., 463.

[3] *Re* Henry Lister & Co. (1892), 2 Ch., 417, 422.

[4] In *re* Thunder Hill Mining Co., 5 B. C. L. R., per Davie, C.J., at p. 26.

secured creditors in a winding-up are to be determined is not one of "forfeiture," especially in respect of causes which they cannot control, but one of "election;"[1] and this is clearly shewn by the English decisions.[2] In Moor v. Anglo-Italian Bank[3] the late Master of the Rolls said: "You must carefully distinguish between the notion of forfeiture and the decisions on the doctrine of election in bankruptcy, which relate to a totally different subject."[4] Then again he says, "It is a new doctrine of forfeiture to be brought into bankrupt law, if the petitioning creditor is to lose his security without getting anything out of the bankrupt's estate; it is no longer election, it is forfeiture, and forfeiture must be discovered in some Act of Parliament or section of an Act of Parliament, and there is no such section to be found."[5]

The section[6] says that a creditor holding a claim based on negotiable instruments shall be considered to hold security within the meaning of the section. Such a holder must be a person who can maintain an action in his own name on a bill or note.[7]

If the security consists of a mortgage upon ships or shipping, or upon real property, or of a registered judgment or an execution binding real property and excepted from the operation of section sixty-six of this Act,[8] the property mortgaged or bound shall be assigned

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[1] In *re* Thunder Hill Mining Co., 5 B. C. L. R., 21, 29.

A mortgage had been made by a company to a trustee for B. and certain other of its creditors jointly, as security for their claims against it.

Upon a winding-up, B., when called upon to value his security under sec. 62 of the Winding-up Act, swore that it was only of nominal value, and offered to assign his interest in the mortgage to the liquidator for nothing. The liquidator desired to have the whole security valued, so that he could take it over and rank all the creditors represented by it on the estate accordingly, and upon their being unable to agree as to the value, Mr. Justice Drake struck creditors off the list and relegated them to their security.

Upon appeal to the Full Court:

Held, per Davie, C.J., and McCreight, J. (Walkem, J., concurring), overruling Drake, J.: That the principle of the Act is that of election and not forfeiture. That the appellant had the right to value his own interest in the security and to maintain his claim upon the estate except as reduced by that valuation; that the right of the liquidator was limited to requiring an assignment of B.'s interest in the security, or permitting its retention at the value placed upon it; and that the Court had no right to forfeit the claim of B. upon the estate and relegate him to a security he considered valueless. (*Ibid.*)

[2] *Ibid*, at p. 29. [3] 10 Ch. Div., 681. [4] *Ibid*, at p. 689.

[5] *Ibid*, at p. 690. [6] R. S. C., ch. 129, sec. 62.

[7] In *re* Thunder Hill, etc., Co., 5 B. C. L. R., 21, 31. [8] R. S. C., ch. 129.

and delivered to the creditor, subject to all previous mortgages, judgments, executions, hyopthecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens, and upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such previous mortgages, judgments, executions, hypothecs and liens ; and if there are mortgages, judgments, executions, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors, or upon their filing their claims specifying their security thereon as of no value, or upon his paying them the value by them placed thereon, or upon his securing the estate of the company to the satisfaction of the liquidator or against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens.[1]

This section must be read with reference to, and as the complement of, section 62, which relates to the valuing of securities, so that under section 63 it is not only mortgages, registered judgments, or executions excepted from the operation of section 66, which are preserved and entitled to priority,[2] but liens as well.

Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the Court to consent to the retention of the security by the creditor or shall require from him an assignment and delivery thereof.[3]

In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established, as provided by the Winding-up Act.[4]

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[1] Sec. 63, R. S. C., ch. 129.

[2] *Re* Empire Brewing & Malting Co., 8 Man., 424, 425.

[3] Sec. 64, R. S. C., ch. 129.

[4] Sec. 65, *Ibid*; The petitioner was a creditor of the company for professional services rendered as their solicitor, and in his petition he asked that his claim might be declared to be a first charge on the assets of the company, and that it might be declared to be a solicitor's lien upon all the books and papers of the company in the hands of the liquidator, and that the liquidator might be ordered to hold the books and papers as subject to his lien. At the time the winding-up order was made, the petitioner had in his possession in his own office what he described as the books and papers of the company, but he specially mentioned the letters patent incorporating the company, the

31. Liens on company's property.—No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment, debt, or of the interest thereon by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company; nor shall any lien, claim or privilege be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced;[1] but this section shall not affect any lien or privilege for costs, which the plaintiff possesses under the law of the Province in which such writ, attachment, garnishee order, or other process of proceeding was issued.[2]

This section does not interfere with the filing of a mechanics' lien which was registered before notice of the winding-up petition. Such a lien is not created by the proceedings taken under the order giving leave to file the bill in equity, but arises by virtue of doing the work, and by the registration of the statement of claim under the Mechanics' Lien Acts.[3]

32. Creditors proving claims.—The liquidator may give notice in writing to creditors who have sent in their claims to him, or of

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subscription and stock books, the by-laws, resolutions, minutes, proceedings of the company, and the day-book and ledger. After the winding-up order had been made, all these books and papers were taken from his office without his knowledge or consnt by the manager of the company, who gave them to the liquidator, who then had them.

Held, that the petitioner was entitled to a solicitor's lien on the letters patent and the ledger and day-book in the hands of the liquidator, for the amount of his bill of costs; no lien that he could have on the books and papers of the company would in itself entitle him to priority over the other creditors of the company in the payment of his account; it was clear if he was entitled to a lien on these books and papers when they were in his possession, he had not lost his lien by their having been taken away from him without his knowledge or consent. (*Re* Western Grain & Produce Co., 14 Can. L. T., 145.)

As to when the winding-up is deemed to commence, see sec. 7, R.S.C., ch. 129; *supra*, p. 428.

[2] Sec. 66, R. S. C., ch. 129.

[3] *Re* Empire Brewing & Malting Co., 8 Man. 424.

whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the Court on a day to be named in such notice, and prove their claims to the satisfaction of the Court ; and the Court may allow or disallow the said claims ; and in case any creditor does not attend in pursuance of such notice his claim shall be disallowed, unless the Court sees fit to grant time for the proof thereof.[1]

33. Objections to claims.—Any liquidator,[2] creditor or contributory or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared;

(2) If a claim or a dividend is objected to, the objections shall be filed in writing with the liquidator, together with evidence of the previous service of a copy thereof on the claimant;

(3) The claimant shall have six days to answer the objections, or such further time as the Court allows, and the contestant shall have three days to reply, or such further time as the Court allows ;

(4) Upon the completion of the issues upon the objections, the liquidator must transmit to the Court all necessary papers relating to the contestation, and the Court shall then, on the application of either party, fix a day for taking evidence upon the contestation and hearing and determining the same;

(5) The Court may make such order as seems proper in respect to the payment of the costs of the contestation by either party, or out of the estate of the company;

(6) If, after a claim or dividend has been duly objected to, the claimant does not answer the objection, the Court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right;

(7) The Court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the Court thinks just.[3]

34. Fraudulent preferences and contracts.—All gratuitous contracts, or conveyances or contracts without consideration, or with a

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[1] Sec. 14 Winding-up Amendment Act, 52 Vic., ch. 32, as amended by 55-56 V., ch. 28, sec. 1.

[2] Sec. 15, *Ibid*, amending sec. 67, R. S. C., ch. 129.

[3] Sec. 67, R. S. C., ch. 129.

merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever (whether such person is its creditor or not), within three months next preceding the commencement of the winding-up or at any time afterwards,—and all contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements and in respect to which a windig-up order under this Act is afterwards made, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious (whether such person is its creditor or not) shall be presumed to be made with intent to defraud its creditors.[1]

Contracts or conveyances for consideration, which have the effect of injuring or obstructing creditors made by a company unable to meet its engagements with a person ignorant of such inability (whether a creditor or not), before such inability has become public and notorious, but within thirty days next before the commencement of winding-up, is voidable and may be set aside by the Court upon such terms as to the protection of such person from actual loss or liability, by reason of such contract, as the Court orders.[2]

Sec. 70 provides that anything done by the company with a view

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[1] Sec. 68, R. S. C., ch. 129.

[2] Sec. 69, *Ibid.* A mortgage of land made by an incorporated company in favor of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of secs. 68 to 71, inclusive, of the Winding-up Act.

Held, nothwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under sec. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements, and it was not material under this section whether the mortgagee was or was not ignorant of such liability; but the transactions, being within the thirty days, was voidable, and should, therefore, be set aside, that being the effect of the words "may be set aside."

Held, also, that the words of sec. 69, "Upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," were not applicable to the giving of a mortgage as security for a past debt.

Held, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following Lawson v. McGeoch, 22 O. R., 474, 20 A. R., 464, and distinguishing Webster v. Crickmore, 25 A. R., 97, that the presumption referred to in sec. 71 (that the property was pledged, etc., in contemplation of insolvency if so done within thirty days before commencing to wind up) is rebuttable. Kirby v. Rathbun Co., 20 Can. L. T., 333.

to fraudulently impede, obstruct or delay its creditors in their remedies against it, or to defraud its creditors, is null and void where such effect is produced, and where the thing is done and intended *with the knowledge of the person dealt with*, whether such person is its creditor or not.

Securities given for payment by a company in contemplation of insolvency—that is to say, within thirty days before the commencement of the winding-up under the Act, or at any time thereafter—may be recovered back by the liquidator.[1]

Also, payments made by the company within thirty days before the winding-up, when it is unable to meet its engagements in full, *to a person knowing such inability, or having probable cause for believing it to exist*, will be void, and the amount paid may be recovered back by the liquidator. If, however, the payee has given up same valuable security in consideration of such payment, such security or the value thereof will be restored to him upon the return of such payment.[2]

Debts due or owing by a company which are transferred within the time and under the circumstances mentioned in the next preceding section,[3] or at any time afterwards, to a contributory or person indebted or in any way liable to the company, who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under the Act, for the purpose of enabling such contributory or person indebted or in any way liable to the company to set up, by way of compensation or set-off, the debt so transferred, cannot be set up by way of compensation or set-off against the claim upon such contributory or person indebted or in any way liable to the company.[4]

35. Appeals.—Any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may, by leave of a judge of the Court, appeal therefrom, if the question to be raised on the appeal involves future rights, or if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings, or if the amount involved in the appeal exceeds five hundred dollars :

2. Such appeal shall lie,—

In Ontario, to the Court of Appeal for Ontario;

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[1] Sec. 71, R. S. C., ch. 129. [2] Sec. 72, *Ibid.* [3] Sec. 72, *Ibid.*

[4] See 73, *Ibid*, as amended by the Winding-up Amendment Act, 1889, 52 V., ch. 32, sec. 16.

In Quebec, to the Court of Queen's Bench;

In any of the other Provinces, and in the North-West Territories, to the full court:

3. In Keewatin.—In the District of Keewatin any person dissatisfied with an order or decision of the court or a singue judge, in any proceeding under this Act may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada :

4. Practice.—Security on appeal; and time for, limited.—All appeals shall be regulated, as far as possible, according to the practice in other cases of the Court appealed to: but no such appeal shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the Court appealed from allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the Court that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent.[1]

If the party appellant does not proceed with his appeal, according to the law or rules of practice, as the case may be, the Court appealed to, on the application of the respondent, may dismiss the appeal, with or without costs.[2]

An appeal shall lie to the Supreme Court of Canada, by leave of a judge of the said Supreme Court, from the judgment of the Court of Appeal for Ontario, the Court of Queen's Bench in Quebec, or the full Court in any of the other Provinces or in the North-West Territories, as the case may be, if the amount involved in the appeal exceeds two thousand dollars.[3]

36. Procedure.—The proceedings under a winding-up order must be carried on as nearly as may be in the same manner as an ordinary suit or proceeding within the jurisdiction of the Court.[4]

Where, in the winding-up, the realization and distribution of the assets has proceeded so far that in the opinion of the Court it becomes expedient that the liquidator should be discharged, and the balance remaining in his hands of the moneys and assets of the company can be better realized and distributed by the Court, the latter can make an order discharging the liquidator and for payment, delivery and transfer into Court, or to the officer or person appointed by it,

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[1] Sec. 74, R. S. C., ch. 129. [2] Sec. 75, *Ibid.* [3] Sec. 76, *Ibid.*

[4] Sec. 21, Winding-up Amendement Act, 1889, 52 V., ch. 32. And see Shoolbred v. Clarke, 17 Can. S. C. R., 265.

of such moneys and assets. The Court may also make further orders respecting the disposal of the books, etc., of the company.[1]

The Court has the same power and jurisdiction to cause or allow the service of process or proceedings to be made on persons out of the jurisdiction of the court as in ordinary suits within the jurisdiction of the Court.[2]

The powers conferred by this Act upon the Court may, subject to the appeal in this Act provided for, be exercised by a single judge thereof; and such powers may be exercised in chambers, either during term or in vacation:

2. After a winding-up order is made, the Court may, from time to time, by order of reference, refer and delegate, according to the practice and procedure of such Court, to any officer of the Court, any of the powers conferred upon the Court by this Act, or any Act amending the same, as to such Court may seem meet, subject to an appeal, according to the practice of the Court in like cases.[3]

Every order of the Court or judge for the payment of money or costs, charges or expenses made under this Act, shall be deemed a judgment of the Court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any Superior Court obtained in any suit may bind lands or be enforced in the Province where the Court making the same is situate. The practice from time to time in force in the Superior Courts or in any Superior Court in the Province where any such order is made, with respect to the discovery of assets of judgment debtors, shall be applicable to and may be availed of in like manner for the discovery of the assets of any person who by such order is ordered to pay any money or costs, charges or expenses.[4]

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[1] Sec. 2, 55-56 Vict., ch. 28, An Act to further amend the Winding-up Act.

[2] Sec. 19, Winding-up Amendment Act, 52 Vict., ch. 32.

[3] Sec. 77, R.S.C., ch. 129, as amended by Winding-up Amendment Act, 1889, 52 Vict., ch. 32, sec. 20. An appeal lies to the Court from the ruling of the Master in Ordinary as to the distribution of the moneys repaid into Court by trustees of an estate, being the balance in the hands of the liquidators of an insolvent bank after passing their final accounts, which had been erroneously paid out to the trustees. (In *re* Central Bank of Canada, Hogaboom's case, 19 Can. L. T., 67.)

The judgments of the Court of Appeal and the Supreme Court are conclusive on the point that the money is the property of the Receiver-General for Canada under R. S. C., ch. 129, sec. 41, subject to the liability of paying it over to the persons entitled thereto. (*Ibid.*)

[4] Sec. 78, R. S. C., ch. 129, as substituted by 58-59 V., ch. 18.

This section has been given a rather strict construction in the Provinces.[1]

Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may be attached and garnished in the same manner as debts due to a judgment debtor may be attached and garnished by a judgment creditor in any Province where the attachment and garnishment of debts is allowed by law.[2]

In any action, suit, proceeding or contestation under this Act, the Court may order the issue of a writ of *subpoena ad testificandum* or of *subpoena duces tecum*, commanding the attendance, as a witness, of any person who is within Canada.[3]

The Court may, after it has made a winding-up order, cummon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, estate or effects of the company; and the Court may require any such officer or person to produce any book, paper, deed writing or other document in his custody or power relating to the company.[4]

The Court or the person so named may examine, upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner aforesaid, concerning the affairs, dealings, estate or effects of the company, and may reduce to writing the answers of any such person, and require him to subscribe the same; and if such person, without lawful excuse, refuses to answer the questions put to him, he shall be liable to be punished as for contempt of Court.[5]

When, in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, nothwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such

[1] Sec. 9 Man., 62, 64; 30 N. B., 251. [2] Sec. 79, R. S. C., ch. 129.
[3] Sec. 80, *Ibid.* [4] Sec. 81, *Ibid.* [5] Sec. 82, *Ibid.*

director, manager, liquidator, receiver, officer or employee, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the Court thinks fit.[1]

The Courts of the various Provinces, and the Judges of the said Courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding-up of the business of the company or any matter or proceeding relating thereto may be transferred from one Court to another with the concurrence, or by the order or orders, of the two Courts, or by an order of the Supreme Court of Canada.[2]

When any order made by one Court is required to be enforced by another Court, an office copy of the order so made, certified by the Clerk or other proper officer of the Court which made the same, and under the seal of such Court, shall be produced to the proper officer of the Court required to enforce the same, and the production of such copy shall be sufficient evidence of such order having been made; and thereupon such last-mentioned Court shall take such steps in the matter as are requisite for enforcing such order, in the same manner as if it was the order of the Court enforcing the same.[3]

The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the Court, shall apply, as far as practicable to all pleadings and proceedings under this Act; and any Court before which such proceedings are being carried on shall have full power and authority to apply the appropriate rules as to amendments of the proceedings.[4]

No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded under the rules and practice of the Court.[5]

Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the Court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada, before any judge of a Court of record, any commissioner for taking affidavits to be used in any Court in Canada, any notary public, the

[1] R. S. C., ch. 129, sec. 83. [2] *Ibid*, sec. 84. [3] *Ibid*, sec. 85.
[4] *Ibid*, sec. 86. [5] *Ibid*, sec. 87.

chief municipal officer of any town or city, and British consul or vice-consul, or any person authorized by or under any statute of Canada, or of any Province, to take affidavits.[1]

All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal, or stamp or signature, as the case may be, of any such court, judge, notary public, commissioner, justice, chief municipal officer, consul, vice-consul, liquidator or other person attached, appended or subscribed to any such affidavit, affirmation or declaration, or to any other document to be used for the purpose of this Act.[2]

Any powers by this Act conferred on the Court are in addition to and not in restriction of any other powers subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, for the recovery of any call or other sums due from such contributory or debtor, or his estate; and such proceedings may be instituted accordingly.[3]

All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.[4]

In Ontario the judges of the High Court of Justice; in Quebec, the judges of the Court of Queen's Bench; and in the other Provinces, the judges of the Court, or a majority of the judges in each case, of whom the chief justice shall be one, from time to time may make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and may make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel, and by or to officers of Courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act.[5]

Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, unless otherwise specially provided, shall, as nearly as may be, be the same as those of the Court in other cases.[6]

37. Unclaimed dividends.—All dividends deposited in a bank and remaining unclaimed at the time of the final winding-up of the business of the company, shall be left for three years in the bank

[1] R. S. C., ch. 129, sec. 88. [2] *Ibid*, sec. 89. [3] *Ibid*, sec. 90.
[4] *Ibid*, sec. 91. [5] *Ibid*, sec. 92. [6] *Ibid*, sec. 93.

where they are deposited, subject to the claim of the person entitled thereto,—and if still unclaimed, shall then be paid over by such bank, with interest accrued thereon, to the Minister of Finance and Receiver General,—and if afterwards duly claimed, shall be paid over to the persons entitled thereto.[1]

38. Offences and prosecutions.—Every person who, with intent to defraud, or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty of a misdemeanor and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any goal or place of confinement for any term less than two years, with or without hard labor.[2]

When a winding-up order is made, if it appears in the course of such winding-up that any past or present director, manager, officer or member of the company is guilty of any offence in relation to the company for which he is criminally liable, the Court may, on the application of any person interested in such winding-up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.[3]

39. Application of the remaining provisions of the Winding-up Act.—The remaining sections of the Winding-up Act from sec. 98 to sec. 104, both inclusive, apply to banks only, not including savings banks;[4] and from this last section to and including section 114 to life insurance companies only;[5] and the remaining provisions of the Act to insurance companies other than life.[6]

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[1] *Ibid*, sec. 94: See also In *re* Central Bank of Canada, Hogaboom's case, 19 Can. L. T., 66; 28 Can. S. C. R., 192, where it was held that money paid into court by trustees to an estate, pursuant to the order of the court, being the balance in the hands of the liquidators of an insolvent bank after passing their final accounts, which had been erroneously paid out to the trustees, was the property of the Receiver-General for Canada, subject to the liability of paying it over to the persons entitled thereto. It was also held that the Receiver-General was entitled to intervene although the three years from the date of the deposit had not expired; and also that even if he was not entitled to intervene, the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out. (28 Can. S. C. R., 192.)

[2] *Ibid*, sec. 95. [3] *Ibid*, sec. 96.

[4] *Ibid*, sec. 97. [5] *Ibid*, sec. 105. [6] *Ibid*, sec. 115.

APPENDIX.

A.

FORMS RELATING TO DOMINION LETTERS PATENT.

(By kind permission of W. E. Hodgins, M.A., Barrister-at-Law, of the Department of Justice, Ottawa.)

Notice of Application for Letters Patent

(To be inserted in six successive numbers of the "Canada Gazette.")

Notice is hereby given that within one month after the last publication of this notice in the Canada Gazette, application will be made to His Excellency the Governor-General-in-Council for a charter of incorporation by letters patent, under the provisions of "The Companies' Act." Revised Statutes of Canada, chapter 119, incorporating the applicants, and such other persons as may become shareholders in the proposed company, a body corporate and politic, under the name and for the purposes hereinafter mentioned.

1. The proposed corporate name of the company is "The Company," (Limited).

(As to the name see Sec. 4 (a), Cap. 119, R.S.C.)

2. The purposes, within the purview of the Act, for which incorporation is sought, are

(It should be stated that the company intends to do business "throughout the Dominion of Canada.")

3. The chief place of business of the said company is to be the of in the Province of

4. The intended amount of the capital stock is dollars.

5. The number of shares is to be and the amount of each share is to be of the value of dollars.

6. The names in full, and the address and calling of each of the applicants are as follows :

(The applicants must not be less than five.)

of whom the said

(The majority of the provisional directors shall be residents of Canada.)

are to be the first or provisional directors of the said company.

Dated at the day of A.D., 19 .

Solicitors for Applicants.

Petition for Incorporation.

To His Excellency, the Governor-General-in-Council:

The petition of

(State names in full, address and calling of applicants.)

Humbly Represents:

1. That your petitioners are desirous of obtaining a charter of incorporation by letters patent under the provisions of "The Companies' Act," Revised Statutes of Canada, Chapter 119, incorporating your petitioners and such others as may become shareholders in the company, thereby created, a body corporate and politic, under the name of "The Company," (Limited), which is not the name of any other known company, incorporated or unincorporated, nor liable to be confounded therewith, nor otherwise on public grounds objectionable.

2. That your petitioners have given one month's previous notice of their intention to apply for the said letters patent, by inserting the same in the issues of the Canada Gazette, of the following dates, , viz. :

3. That the purposes or objects of the said company, within the purview of the Act, for which incorporation is desired, are

4. That the operations of the said company are to be carried on at , and elsewhere throughout the Dominion of Canada.

5. That the chief place of business of the said company, is to be at the of in the Province of in the Dominion of Canada aforesaid.

6. That the amount of the capital stock of the said company is to be dollars.

7. That the said stock is to be divided into shares, of the value of dollars each.

8. That the said are to be the first or provisional directors of the said company.

9. That your petitioners have taken the amount of stock, and paid in thereon the several amounts, set opposite to their respective names, as follows :

Petitioners' Names in full.	No. of Shares taken.	Amount of Stock subscribed for.	Amount paid in on Stock subscribed.	How paid.
Total.				

10. The aggregate of stock so taken amounts to dollars, being one-half of the total amount of the stock of the company, and the aggregate paid in on the stock so taken amounts to dollars, being per cent. thereof, such aggregate has been paid in to the credit of the Receiver General of Canada, and is now standing at such credit in the Bank in the of as appears by the certificate of , manager of the said bank at aforesaid, which is hereto annexed.

Your petitioners therefore pray,

That your Excellency will be pleased to grant a charter of incorporation by letters patent under the Great Seal to your petitioners and such others as may become shareholders in the company, thereby created a body corporate and politic, for the purposes and objects aforesaid, under the name of "The Company," (Limited).

And your petitioners, as in duty bound, will ever pray.

Dated at the of in the of , this day of A.D., 19 .

Signed and Executed
in the Presence of:

(To be signed by the applicants personally.)

Declaration as to the Identity of Petitioners for Incorporation.

(*To be annexed to Petition.*)

Canada: } In the Matter of the Application of
Province of } and others for Letters Patent of Incorporation as "The Company," (Limited).

To Wit:

I, of the of do solemnly declare,

1. That I was personally present and did see sign their respective names to the petition (hereunto annexed) praying for letters patent of incorporation as "The Company," (Limited).

2. That I know the said

3. That the signatures are in the proper handwriting of the said parties respectively.

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, 1893.

Declared before me at in
the this day
of A.D., 19 .

Declaration as to the Truth of the Statements of the Petition for Incorporation, and as to the Proposed Corporate Name Being Unobjectionable.

(*To be annexed to Petition.*)

Canada: } In the Matter of the Application of
Province of } and others for Letters Patent of Incorporation as "The Company," (Limited).

To Wit:

I, of the of in the , do solemnly declare,—

1. That the several allegations and statements made and contained in the petition for incorporation of "The Company," (Limited), hereunto annexed, are, to the best of my knowledge and belief, true and correct.

2. The proposed corporate name "The Company," (Limited), is not, as I verily believe, the name of any other known company, incorporated or unincorporated, or liable to be confounded therewith, or otherwise on public grounds objectionable.

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, 1893.

Declared before me at the city
of in the Province
of this day of
A.D., 19 .

Declaration of Insertion in Canada Gazette of Notice of Intention to Apply for Letters Patent.

(*To be annexed to Petition.*)

Canada: } In the Matter of the Application of
Province of } and others for Letters Patent of Incorporation as "The
Company," (Limited).

To Wit:

I, of the of in the do solemnly declare,—

1. That I have searched the files of the Canada Gazette and find that notice of the intention of the petitioners therein mentioned to make application for Letters Patent of Incorporation, as "The Company," (Limited), a copy of which is hereto annexed, marked "A," was duly inserted in the issues of the Canada Gazette of the dates following, that is to say 19

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, 1893.

Declared before me at the city
of in the Province
of this day of
A.D., 19 .

Certificate of Bank Deposit.

(*To be annexed to Petition.*)

In the Matter of Applications of
and others for Letters Patent of Incorporation as "The
Company," (Limited).

I, (*name and position*) of the (*name of Bank*) at the of in the Province of do hereby certify,—

That there is deposited in this Bank to the credit of the Receiver General of Canada, the sum of dollars, and said sum is now remaining at such credit.

Dated at aforesaid this day of A.D., 19 .

WITNESS:

Declaration Verifying Signature to Deposit Certificate.

(*To be annexed to Petition.*)

Canada:
Province of
To Wit:

In the Matter of the Application of and others for Letters Patent of Incorporation as "The Company," (Limited).

I, of the in the Province of , do solemnly declare :

1. That I was personally present and did see the annexed certificate of deposit duly signed by who is the manager (agent or cashier) of the (*name of Bank*) at the of aforesaid.

2. That I know the said

3. That I am the subscribing witness to the said document.

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, 1893.

Declared before me at the City
of in the Province
of this day of
A.D., 19 .

Petition for Supplementary Letters Patent Increasing Capital Stock.

TO HIS EXCELLENCY, THE GOVERNOR-GENERAL-IN-COUNCIL:

The petition of the directors of "The Company," (Limited), humbly showeth:

1. That your petitioners are the directors of the said "The Company," (Limited).

2. That the said "The Company," (Limited), were duly incorporated by letters patent bearing date the day of A.D., 19 under the provisions of

3. That the capital stock of the said company is dollars, divided into shares of the value of dollars each.

4. That the whole of the said capital stock has been taken up and per cent. thereon paid in.

5. That your petitioners have, under the provisions of section eighteen of "The Companies' Act," made a by-law increasing the capital stock of the said company, as therein provided, from the sum of dollars to the sum of dollars, such increase to be divided into shares of the value of dollars each.

6. The said increase in the capital stock has been considered to be necessary and expedient for the following reasons, viz.:

7. That the said by-law was approved by the votes of shareholders representing at least two-thirds in value of all the subscribed stock of the company, at a special general meeting duly called for considering the same, held at the of on the day of A.D., 19

Your petitioners therefore pray:

That your Excellency will be pleased to grant Supplementary Letters Patent under the Great Seal, confirming the said by-law passed on the day of A.D., 19 for increasing the capital stock of the said "The Company," (Limited).

And your petitioners, as in duty bound, will ever pray.

WITNESS:

Dated at this day of A.D., 19 .

"A."

Certified copy of a by-law passed by the directors of "The Company," (Limited), for increasing the capital stock of the said company, at a meeting held at on the day of A.D., 19 , and duly approved by the shareholders of the said company at a meeting held on the day of A.D., 19 .

BY-LAW NO.

A by-law to increase the capital stock of "The Company," (Limited).

WHEREAS, the capital stock of "The Company," (Limited), is the sum of dollars, divided into shares of dollars each, all of which has been taken up and per centum thereof paid in.

AND WHEREAS, it has been deemed expedient, in order to the due and proper carrying on of the business of the said company, that the said capital stock should be increased.

Therefore the directors of the said "The Company," (Limited), enact as follows:—

That the capital stock of the said company be increased from the sum of dollars to the sum of dollars, such increase to be divided into shares of the value of dollars each, (the said additional shares of stock to be allotted in such manner as to the directors of said company shall seem best).

Passed the day of A.D., 19 , and approved the day of A.D. 19 .

CERTIFIED:

Secretary. President.

Dated at this day of A.D., 19 .

(Seal.)

Statutory Declaration in Support of Petition for Supplementary Letters Patent Increasing Capital Stock.

Canada: Province of Quebec. } I, of the of in the Province of do solemnly declare:

TO WIT:

1. That I am the of the said "The Company," (Limited), and have a personal knowledge of the matters hereinafter declared.

2. That the paper writing hereunto annexed, and marked "A," is a true copy of a by-law passed by the directors of the said company on the day of A.D., 19 , for increasing the capital stock of the said "The Company," (Limited, from the sum of dollars, to the sum of dollars, such increase to be divided into shares of the value of dollars each,

which said by-law was approved by the votes of shareholders representing at least two-thirds in value of all the subscribed stock of the company, at a special general meeting of the company, duly called for considering the same, and held at the   of   on the   day of   A.D., 19   .

3. The statements and allegations made and contained in the petition of the directors of the said company for supplementary letters patent, bearing date the   day of   A.D., 19   , are, to the best of my knowledge and belief, true and correct.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at   in
the   of   this
day of   A.D., 19   .

Petition for Grant of Supplementary Letters Patent Changing the Name of Company.

To His Excellency, the Governor-General-in-Council:

The petition of "The   Company," (Limited),

Humbly Showeth:

1. That your petitioners were duly incorporated under the provisions of (*here state under what Act the company was incorporated*), by letters patent under the Great Seal, bearing date the   day of   A.D., 19   .

2. Your petitioners are desirous of changing the present corporate name of the company from that of   to that of   and a resolution to that effect was duly passed at a meeting of the   of the company, held at   on the   day of   A.D., 19   , a copy of which is hereunto annexed, marked "A."

3. The proposed corporate name of your petitioners' company is not that of any other known incorporated or unincorporated company, or liable to be confounded therewith, or otherwise on public grounds objectionable.

4. The proposed change of name is made in good faith, and is not desired for any improper purpose.

Your petitioners therefore pray:

That Your Excellency may be pleased to grant to them Supplementary Letters Patent under the Great Seal, changing their present corporate name from that of "The ,"
to that of "The ."

And your petitioners, as in duty bound, will ever pray.

Secretary. President.

(Seal.)

Dated at this day of A.D., 19 .

"A."

Certified copy of a resolution passed at a meeting of the "The Company," (Limited), held on the day of A.D., 19 .

RESOLVED:

That the present corporate name of this Company be changed from that of to that of , and that supplementary Letters Patent changing the said corporate name be forthwith applied for.

President (or Vice-President).

Secretary.

Dated the day of A.D., 19 .

Declaration Verifying Truth of Petition Praying for Change of Corporate Name.

Canada:
Province of

In the matter of the application of "The Company," (Limited), for supplementary Letters Patent changing corporate name of the Company.

To Wit:

I, of the of in the of do solemnly declare,

1. That I am the of the said company, and have a personal knowledge of the matters hereinafter declared.

2. That the statements and allegations made and contained in the annexed petition of the said company for grant of supplementary

Letters Patent, changing the present corporate name of the said company, are, to the best of my knowledge and belief, true and correct.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at the
of in the of
this day of A.D., 19 .

Notice of Intention to Apply for Supplementary Letters Patent Extending the Powers of the Company.

NOTICE is hereby given that, within one month from the last publication of this notice in the Canada Gazette, and within six months from the day of A.D., 19 , being the date of the passing of a resolution by the shareholders of the company, authorizing them so to do, the Directors of "The Company," (Limited), will, under the provisions of "The Companies' Act," Revised Statutes of Canada, Chapter 119, apply to the Governor-in-Council for the grant of supplementary Letters Patent under the Great Seal, extending the powers of the company to the following purposes or objects, viz.: as defined in the said resolution.

Dated at this day of A.D., 19 .

Petition for Supplementary Letters Patent Extending the Powers of the Company.

TO HIS EXCELLENCY, THE GOVERNOR-GENERAL-IN-COUNCIL:

The petition of the directors of "The Company," (Limited), humbly showeth:

1. That your petitioners are the directors of "The Company," (Limited).

2. The said company was duly incorporated under the provisions of by letters patent bearing date the day of A.D., 19 .

3. The purposes or objects for which the said company was incorporated are the following:—

4. That it has been deemed expedient by the said company that the powers heretofore granted them should be increased so as to embrace and include

5. That the said "The Company," (Limited), by a resolution passed by the vote of shareholders representing at least two-thirds in value of the subscribed stock of the company, at a special general meeting, called for the purpose by notice, a copy of which is hereunto annexed, marked "A," and held at the of on the day of A.D., 19 , did authorize your petitioners to apply for supplementary letters patent extending the powers of the said company as hereinbefore mentioned, such extended powers being within the purview of the "The Companies' Act," which said resolution is in the words following, viz:—

6. That your petitioners in accordance with the provisions of "The Companies' Act," have given one month's previous notice in the Canada Gazette of their intention to apply for supplementary letters patent confirming the said resolution, and extending the powers of the company as therein mentioned.

Your petitioners therefore pray:

That your Excellency will be pleased to grant, under the provisions of the said Act, supplementary Letters Patent confirming the said resolution so passed by the shareholders as aforesaid, and extending the powers of the company as therein mentioned.

And your petitioners, as in duty bound, will ever pray:

WITNESS:

Dated at this day of A.D., 19 .

Declaration as to Passing of Resolution Verifying Notice and Petition for Supplementary Letters Patent Extending Powers of Company.

Canada:
Province of Quebec.
} In the matter of the application of "The Company," (Limited), for supplementary Letters Patent extending the powers of the Company.

To WIT:

I, of the of in the of do solemnly declare:

1. That I am the of the said "The Company," (Limited), and have a personal knowledge of the matters herein declared.

2. That the paper writing hereto annexed and marked "A," is a true copy of a resolution passed at a special general meeting of the

company, duly called for that purpose and held at the of on the day of last past, by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company, which said resolution authorized the directors of the company to apply for supplementary Letters Patent extending the powers of the said company as therein mentioned.

3. That the petitioners have given at least one month's previous notice in the Canada Gazette of their intention to apply for such supplementary Letters Patent.

4. The statements and allegations made and contained in the petition of the directors of the said "The Company," (Limited), hereto annexed, for the granting of such supplementary Letters Patent as aforesaid, are to the best of my knowledge and belief true and correct.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at
in the this day
of A.D., 19 .

"A."

Certified copy of a resolution passed at a special general meeting of "The Company," (Limited), held at on the day of , 19 .

RESOLVED,

That the powers granted to this company be extended so as to embrace and include
and that the directors of the Company be authorized to apply for supplementary Letters Patent extending the powers and objects of the company as herein mentioned.

President.

Secretary.

Dated this day of 19 .

Declaration Verifying Insertion in the Canada Gazette of Notice of Intention to Apply for Supplementary Letters Patent Extending the Powers of Company.

Canada: } In the matter of the application for supplementary Letters Patent extending the powers of "The Company," (Limited).
Province of Quebec. }

To Wit:

I, of the of in the of do solemnly declare,—

1. That the notice of the intention of the directors of the said "The Company," (Limited), to apply for grant of supplementary Letters Patent extending the powers of the said company, a copy of which is hereto annexed, marked "A," was duly inserted in the issues of the Canada Gazette of the dates following, that is to say, 19 .

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at
this day of A.D. 19 .

"A."

Take notice that a special general meeting of the shareholders of "The Company," (Limited), for the purpose of considering the advisability of extending the powers of the company, so as to embrace and include the manufacture (or sale) of
will be held at the company's chief place of business in the
of on the day of 19 , at the hour
of o'clock in the noon.

Dated at this day of 19 .

Secretary.

Certified a true copy.

Petition for Supplementary Letters Patent Subdividing Shares of Company.

To His Excellency, the Governor-General-in-Council:

The petition of the directors of "The Company," (Limited),

Humbly Showeth:

1. That your petitioners are the directors of the said "The Company," (Limited).

2. That the said "The Company," (Limited), were duly incorporated by Letters Patent bearing date the day of A.D. under the provisions of "The Companies' Act," Revised Statutes of Canada, Chapter 119, with a capital stock of dollars divided into shares of the value of dollars each.

3. That your petitioners have under the provisions of section seventeen of the said Act, made a by-law sub-dividing the existing shares of the company into shares of a smaller amount, that is to say, providing that the shares of the value of dollars each of present capital stock of the company, be sub-divided into shares of the value of dollars each.

4. That the said by-law was approved by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company, at a general meeting of the company duly called for considering the same, and held at the of on the day of A.D. 19 .

Yours petitioners therefore pray:

That your Excellency will be pleased to grant supplementary Letters Patent under the Great Seal confirming the said by-law passed on the day of A.D. 19 , sub-dividing the existing shares of the company into shares of a smaller amount.

And your petitioners, as in duty bound, will ever pray.

Witness:

Dated at this day of A.D., 19 .

Statutory Declaration in Support of Petition for Supplementary Letters Patent Subdividing Shares of Company.

Canada: } I, of the of in the
Province of } Province of do solemnly declare:
To Wit:

1. That I am the of "The Company," (Limited), and have a personal knowledge of the matters hereinafter declared.

2. That the paper writing hereunto annexed and marked "A," is a true copy of a by-law passed by the directors of the said company on the day of A.D. 19 , sub-dividing the existing shares of the capital stock of the company into shares of a smaller amount, as therein provided, which said by-law was approved 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 held at the of on the day of last past.

3. The statements and allegations made and contained in the petition of the directors of said company for supplementary Letters Patent, bearing date the day of A.D., , are to the best of my knowledge and belief, true and correct.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at in
the of this
day of A.D. 19 .

"A."

Certified copy of a by-law passed by the directors of "The Company," (Limited), for sub-dividing the existing shares of the capital stock of the company into shares of a smaller amount, at a meeting held on the day of A.D. 19 , and duly sanctioned by the shareholders of the said company at a meeting held on the day of A.D. 19 .

BY-LAW NO.

A by-law to sub-divide the existing shares of the capital stock of "The Company," (Limited), into shares of a smaller amount.

WHEREAS the capital stock of the company is the sum of dollars, divided into shares of the value of dollars each ;

And whereas it has been deemed expedient to divide the said shares into shares of a smaller amount ;

THEREFORE the directors of the said " The Company," (Limited), enact as follows :—

The shares of the value of dollars each, at present constituting the capital stock of the company, shall be subdivided into shares of the value of dollars each, and that until otherwise ordered the capital stock of the company shall consist of shares of the value of dollars each.

Passed the day of A.D. 19 , and approved the day of A.D. 19 .

Certified.

Secretary. President.

Dated at the day of A.D. 19 .

(Seal.)

Statutory Declaration in Support of Application for Confirmation of By-Law Increasing (or Decreasing) Number of Directors.

Canada: Province of } I, of the of in the Province of do solemnly declare.

To WIT:

1. That I am the of " The Company," (Limited), and have a personal knowledge of the matters hereinafter declared.

2. That the paper writing hereunto annexed, and marked "A," is a true copy of a by-law passed by the directors of the said company on the day of A.D. 19 , for increasing (or decreasing) the number of directors of the said " The Company," (Limited), which said by-law was approved by a vote of not less than two-thirds in value of the stock represented by the shareholders of the company present at a special general meeting of the company, duly called for considering the same, and held at the of on the day of last past.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at
in the of
this day of A.D. 19 .

"A."

Certified copy of a by-law passed by the directors of "The Company," (Limited), increasing (or decreasing) the number of directors of the said company, at a meeting held at on the day of A.D. 19 , and duly approved by the shareholders of the said company at a meeting held on the day of A.D., 19 .

BY-LAW NO.

A By-law to increase (or decrease) the number of directors of "The Company," (Limited).

WHEREAS the board of directors, as at present constituted, consist of members ;

And whereas it has been deemed expedient to increase (or decrease) the number of directors of "The Company," (Limited);

THEREFORE the directors of "The Company," (Limited), enact as follows:—

That until otherwise ordered or provided, the number of directors of "The Company," (Limited), be increased (or decreased) to

Passed the day of A.D. 19 , and approved the day of A.D. 19 .

Certified.

Secretary. President.

Dated at this day of A.D., 19 .

(Seal.)

Statutory Declaration in Support of Application for Supplementary Letters Patent Confirming By-Law Changing Chief Place of Business of Company.

Canada: Province of To Wit: } I, of the of in the Province of do solemnly declare.

1. That I am the of "The Company," (Limited), and have a personal knowledge of the matters hereinafter declared.

2. That the paper writing hereunto annexed and marked "A," is a true copy of a by-law passed by the directors of the said company, on the day of A.D. 19 , for changing the chief place of business of the said "The Company," (Limited), from the of in the Province of to the of

in the Province of , which said by-law was approved by a vote of not less than two-thirds in value of the stock represented by the shareholders present at a general meeting of the company duly called for considering the same, and held at the of in the Province of on the day of A.D. 19 .

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at
this day of A.D. 19 .

"A."

Certified copy of a by-law passed by the directors of "The Company," (Limited), changing the chief place of business of the company, at a meeting held at on the day of A.D. 19 , and duly approved by the shareholders of the said company at a meeting held on the day of A.D. 19 .

BY-LAW NO.

A by-law to change the chief place of business of "The Company," (Limited), from the of to the of

Whereas the chief place of business of the company is the of in the Province of ;

And whereas it has been deemed expedient that the same should be removed to the of in the Province of ;

Therefore the directors of "The Company," (Limited), enact as follows:—

That the chief place of business of "The Company," (Limited), be and the same is hereby, changed from the of in the Province of to the of in the Province of

Passed the day of A.D., 19 , and approved the day of A.D. 19 .

Certified.

Secretary. President.

Dated at this day of A.D. 19 .

(Seal.)

Notice of Intention by an Existing Company of Application for Re-Incorporation, Under the Provisions of "The Companies' Act."

NOTICE is hereby given that within six months from the last publication of this notice in the Canada Gazette, application will be made by "The Company," a body corporate and politic, incorporated under the provisions of to His Excellency the Governor-General-in-Council, for the grant of a charter of incorporation by Letters Patent under the Great Seal of Canada, incorporating the shareholders of the said company as a company, under the provisions of "The Companies' Act," Revised Statutes of Canada, Chapter 119.

The name of the said company is to be "The Company," (Limited).

The purposes or objects of the said company are to be

The chief place of business within the Dominion of Canada is to be the of in the Province of

The intended capital stock of the said company is to be dollars, divided into shares of the value of dollars each.

The first directors of the company are to be

Dated at this day of
A.D. 19 .

Solicitors for the Applicants.

Statutory Declaration Verifying Insertion of Notice of Intention to Apply for Re-incorporation, Under "The Companies' Act."

Canada: Province of	In the matter of the application of "The Company," for Letters Patent of incorporation as "The Company," (Limited).

To WIT:

I, of the of in the of do solemnly declare,—

1. That I have searched the files of the Canada Gazette and find that notice of the intention of the petitioners therein mentioned to make application for letters patent of incorporation, as "The Company," (Limited), a copy of which is hereto annexed, marked "A," was duly inserted in the issues of the Canada Gazette of the dates following, that is to say, 19 .

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at the
of in the of
this day of A.D. 19 .

Petition of an Existing Company for Re-incorporation, Under the Provisions of "The Companies' Act."

To His Excellency, the Governor-General-in-Council:

The Petition of "The Company,"

Humbly Showeth:

1. That your petitioners were duly incorporated under the provisions of with a capital stock of dollars, divided into shares of the value of dollars each, and are now a valid and subsisting corporation.

2. That your petitioners have given four weeks' previous notice of their intention to apply for Letters Patent, by inserting the same in the issues of the Canada Gazette, of the following dates, viz. :

3. That the purposes or objects for which the said company was incorporated were
and your petitioners desire that similar powers be now granted to them by Your Excellency in Council; and in addition thereto they desire, in accordance with notice previously given, that the following additional powers be granted to them, viz. :—

4. That the operations of the company are to be carried on at

5. That the chief place of business of the company is to be at the of in the Province of

6. That the amount of the capital stock of the company is to be dollars, divided into shares of dollars each.

7. The following are to be the first directors of the company :—

8. At a special general meeting of your petitioners' company, duly called for the purpose, and held at the of on the day of it was resolved, by a vote of the shareholders

representing in value two-thirds of the subscribed capital stock of the company present at such meeting, to apply to Your Excellency in Council, for the grant to your petitioners of a charter by Letters Patent of incorporation under the provisions of "The Companies' Act," under the name of "The Company," (Limited), which is not the name of any company incorporated, or unincorporated, or liable to be confounded therewith, or otherwise on public grounds objectionable.

Your petitioners therefore pray:

That Your Excellency will be pleased to grant to your petitioners a charter by Letters Patent of incorporation, incorporating the shareholders of the said company, now being a valid and subsisting corporation, as a company, under the provisions of "The Companies' Act," under the name of "The Company," (Limited), with the capital stock, and for the purposes or objects before mentioned.

And your petitioners, as in duty bound, will ever pray:

(Seal.)

The Company

By

President.

Secretary.

Declaration Verifying Truth of Petition for Re-incorporation, and as to Proposed Corporate Name.

Canada: Province of } In the matter of the application of "The Company," for Letters Patent of incorporation under the provisions of "The Companies' Act," as "The Company," (Limited).

To Wit:

I, of the of in the of do solemnly declare,—

1. That I am the of the said "The Company," and have a personal knowledge of the matters hereinafter declared.

2. That the several allegations and statements made and contained in the petition hereunto annexed, are to the best of my knowledge and belief, true and correct.

3. The proposed corporate name "The Company," (Limited), is not, as I verily believe, the name of any other known company, incorporated or unincorporated, or liable to be confounded therewith, or otherwise on public grounds objectionable.

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at the
of in the of
this day of A.D. 19 .

Forms of Power of Attorney.

(1) Power of Attorney to subscribe for stock and to sign petition for incorporation of proposed company.

KNOW ALL MEN BY THESE PRESENTS

that I of the of in the of , do hereby nominate, constitute and appoint of the of in the of , my true and lawful attorney for me and in my name to subscribe for shares of the value of dollars each in "The Company," (Limited); and also to sign my name to any petition or other paper or document required to be signed by me as such stockholder in making application for grant of Letters Patent, incorporating said company under "The Companies' Act," hereby ratifying and agreeing to ratify and confirm all and whatsoever my said attorney shall lawfully do in these premises.

As witness my hand and seal this day of A.D. 19 .

Signed and Sealed in the
presence of:

(Seal.)

(2) Statutory Declaration Verifying Execution of the Above Power of Attorney.

Province of Canada:	I, of the of in the County of and Province of , do solemnly declare.

To Wit:

1. That I was present and did see the within named duly sign, seal and execute the within power of attorney.

2. That the name , within written, is the proper handwriting of the said

3. That I know the said , and that the said power of attorney was executed at

And I make this solemn declaration conscientiously believing the same 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, 1893.

Declared before me at the
of
in the Province of this
day of A.D. 19 .

(3) Another Form of Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS

that I, of the of in the of , do hereby nominate, constitute and appoint of the of in the of my true and lawful attorney for me and in my name, place and stead, and for my sole use and benefit to execute and sign a petition to His Excellency the Governor-General in Council for the incorporation by letters patent under the Great Seal of Canada, of "The Company," (Limited), and to sign and execute all such papers and documents as are requisite and necessary for procuring such incorporation, and to do for me and in my name and stead, all and every such thing which may be necessary and requisite for procuring such incorporation.

And for all and every of the purposes aforesaid, do hereby give and grant to my said attorney, full and absolute power and authority to do and execute all acts, deeds, matters and things necessary to be done in and about the premises, and also full power and authority for my said attorney to appoint a substitute or substitutes and such substitution at pleasure to revoke: I hereby ratifying and confirming and agreeing to ratify and confirm and allow all and whatsoever my said attorney shall lawfully do or cause to be done in the premises by virtue hereof.

In witness whereof I have hereunto set my hand and seal at this day of 19 .

Signed, sealed and delivered in presence of:

(Seal.)

(4) Affidavit verifying execution of above:

Province of Canada: } I, of the of in the Province of , make oath and say,—

To Wit:

1. That I was personally present and did see the within named duly sign and seal the within power of attorney.

2. That I know the said

3. That I am the subscribing witness thereto.

Sworn before me at the of in the Province of this day of A.D. 19 .

(5) Further Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS

that I, of the of in the of , , do hereby appoint of the of in the of , my true and lawful attorney for me and in my name and stead, and in my behalf, and for my sole and exclusive use and benefit, to subscribe for shares of the value of dollars each, in the capital stock of the proposed "The Company," (Limited), and to vote at meetings of the shareholders or directors of the said proposed company in respect of the said stock, and also for me and in my name, and as my act and deed, to execute and do all such assurances, deeds, covenants and things as may be requisite or necessary in obtaining Letters Patent incorporating the said company, and in managing the affairs of the said proposed company when incorporated. And generally to act in relation to the said proposed company as fully and effectually in all respects as I myself could do, if personally present.

And I do hereby grant full power to my said attorney to substitute and appoint one or more attorney or attorneys under him, with the same or more limited powers, and such substitute and substitutes at pleasure to remove and others to appoint.

I, the said hereby agreeing and covenanting for myself, my heirs, executors and administrators to allow, ratify and confirm, whatsoever my said attorney, or his substitute, or substitutes shall do or cause to be done in the premises, by virtue of these presents, including in such confirmation whatsoever shall be done between the time of my decease or of the revocation of these presents, and the time of such decease or revocation becoming known to my said attorney, or such substitute or substitutes.

As witness my hand and seal this day of A.D. 19 .

Signed, sealed and delivered
in presence of:

(Seal.)

(6) Affidavit Verifying Execution of Above.

Canada: } I, of the of in the
Province of } of
make oath and say,—

To Wit:

1. That I was personally present and did see the within named duly sign and seal the within power of attorney.
2. That I know the said
3. That I am the subscribing witness thereto.

Sworn before me at the city of .
in the Province of
this day of A.D. 19 .

Meetings for Organization.

Minutes of meeting of the provisional directors of

Held at on the

Present:

being all the provisional directors of the company.

On motion Mr. was elected Provisional President and took the chair, and Mr. was elected Provisional Secretary.

The charter of the company dated was then read.

On motion the charter was accepted.

The Secretary then read the list of shareholders and subscribers as follows:

Charter members.

A.B. .. shares.
C.D. .. shares.

Subscribers who are not applicants for charter.

E.F. .. shares.

G.H. .. shares.

Moved by seconded by and

RESOLVED,—

That the following shares be allotted to the subscribers who are not charter members, namely, to

E.F .. shares.

G.H. .. shares.

(*It is unnecessary to allot the shares taken by the Charter Members. The issue of the Charter makes them holders of the number of shares they have respectively taken.*)

Moved by seconded by and resolved: "That the following by-laws be adopted :—

(*The following suggestions as to By-laws should be varied to meet the requirements of different companies.*)

BY-LAWS.

1. Officers.—The affairs of the company shall be managed by a board of directors, to be elected annually at the annual general meeting of the shareholders. The board shall from their number elect a President and Vice-President; they shall also appoint a Secretary-Treasurer, who need not be a member of the board.

2. Replacing of Directors.—Any vacancy occurring in the board of directors may be filled by any qualified shareholder elected by the board of directors, provided always that the notice of the meeting at which such election takes place shall specially refer to the filling of such vacancy.

3. Meetings of Directors.—Meetings of directors shall be held at the head office of the company at such times as the board may from time to time fix by by-law, and of such meetings three clear days' notice shall be given by letter addressed and mailed prepaid to each director. Unless the board shall otherwise provide by by-law as aforesaid, a special meeting of the said board may be held at any time by order of the President, or in his absence by any two directors, and of such special meeting a similar notice of at least one clear day shall be given.

4. Quorum of Directors.—Three directors shall form a quorum of the board.

5. Executive Committee.—The President, Vice-President and Secretary-Treasurer shall constitute an executive committee whose duty shall be to give general supervision to the business, to fix the amounts of salaries, and no purchases or contracts are to be entered into excepting by the unanimous consent of said committee.

6. Annual General Meeting.—The annual general meeting of the shareholders shall be held at the office of the company, in the city of Montreal, on the first Tuesday in February in each year, or if that day be a statutory holiday then on the next following juridical day. Ten clear days' notice of the annual meeting shall be given by the Secretary-Treasurer by circular letter addressed and mailed prepaid to each shareholder. At the annual meeting a full statement of the affairs of the company up to the thirty-first day of December then last past shall be submitted to the shareholders.

7. Special Meetings of Shareholders.—A special general meeting of shareholders may be called for any day not a holiday upon the order of the President, or of any five or more shareholders holding in the aggregate not less than one hundred shares, of which meeting the same notice shall be given as is required for the annual meeting. The notice for any special general meeting shall state the business to be then transacted, and no business shall be transacted at such meeting unless the same has been referred to in said notice.

8. Quorum—At an annual meeting any number of shareholders present shall form a quorum. At a special or adjourned meeting the majority in interest of the shareholders shall form a quorum.

9. Voting.—At all meetings of shareholders, each shareholder shall be entitled to one vote for every share then standing in his name on the books of the company. Shareholders may be represented by proxy whenever reasonable evidence in writing of the appointment of such proxy is furnished, provided always that no one except shareholders shall act as proxy.

10. Chairman.—The President, or in his absence the Vice-President, shall preside at meetings of shareholders and directors. In the absence of the President and Vice-President the meeting shall elect a director as chairman, and the presiding officer shall have a casting as well as an ordinary or deliberative vote.

11. Signing of Negotiable Paper.—All cheques, drafts and promissory notes shall be signed by the President and Secretary-Treasurer. Cheques, drafts and promissory notes in favor of the company shall be endorsed by the President and Secretary-Treasurer, or, if for deposit only, by the Seretary-Treasurer. In the event of the absence of the President or Secretary-Treasurer, his signature in any of the above cases may be replaced by that of a director. All amounts over ten dollars shall be paid by the company's cheque.

12. Duties of President.—The President, who shall also be the General Manager of the company, shall have the control over and management of the officers and servants of the company, with power to engage and discharge them from time to time as he may deem fit, and to make such rules and regulations for their conduct and guidance as he may deem expedient, subject to the approval of the executive committee.

13. Secretary-Treasurer.—The Secretary-Treasurer shall have charge of the books, papers and documents of the company as well as all monies. He shall keep records of all meetings of shareholders, directors and committees and perform such other duties as may be assigned to him by the board.

14. Auditor.—An auditor who need not be a shareholder shall be appointed annually by the shareholders at the annual general meeting, whose duty it shall be to audit the books and accounts of the company and all documents having reference to the business of the company, and prepare from the company's books a balance sheet and abstract of the company's affairs to be submitted by the directors at the annual general meeting, accompanied by any recommendation that they may deem proper.

15. Amending of By-Laws.—The directors may from time to time, as circumstances may require, repeal, amend or re-enact the above by-laws, but such by-laws repealed, amended or re-enacted shall only have force until the next meeting of shareholders, and in default of confirmation thereat shall from that time cease to have force.

These by-laws may also be amended at any meeting of the shareholders, provided that thirty days' notice of the proposed amendment be given by circular letter addressed and mailed prepaid to each shareholder and that at the said meeting two-thirds of the issued stock be represented.

The Secretary was instructed to call a special general meeting of shareholders for the purpose of receiving the report of provisional directors, approving by-laws, election of directors and such other business as may be necessary to the due organization of the company. The foregoing meeting to be held at the office of the company, No. street, in on the day of instant, at o'clock in the noon.

The meeting then adjourned.

At the special general meeting of shareholders the Provisional President will preside. The business to be transacted is indicated in the resolution ordering the meeting. When the permanent directors have been elected by the shareholders they will meet and elect officers and then proceed with the business of the Company which will now be fully organized.

FORM OF TRUST DEED TO SECURE DEBENTURES.

EXTRACT from Minutes of Meeting of Shareholders of the Company held at Company's Office in , on the day of , 19 .

RESOLVED :

THAT WHEREAS The Company, of the City of , Province of , is the owner of works in . And

WHEREAS it is proposed to construct . And

WHEREAS it is necessary and expedient for said Company to provide means for the construction and completion of said Works and to pay the indebtedness incurred for the construction and purchase thereof,

NOW THEREFORE RESOLVED by the said Company that the President and Secretary of this Company be and they are hereby authorized to cause to be prepared First Mortgage per cent. Bonds numbered from 1 to inclusive, for the sum of sterling each (amounting in the aggregate to the sum of sterling) ranking *pari passu* with each other and constituting a first charge upon all the Company's undertakings and property and to become due and payable in years from the day of , 19 .

Each and all of the said bonds shall bear interest from the day of , 19 , at the rate of per cent. per annum, payable semi-annually on the day of and day of in each and every year until the payment thereof.

The payment of said interest to be evidenced by interest coupons to the number of for the sum of sterling each to be attached to each of said mortgage bonds. The interest coupons shall be numbered from one (1) to inclusive. The odd numbers of said interest coupons on each and every of the said bonds shall become due and payable on the day of and the even numbers on the day of in each and every year until the maturity of the said bonds. All of said bonds and interest coupons shall be made due and payable at the Bank of in the City of London, and the said bonds shall be duly signed by the President or one of the Vice-Presidents and Secretary of the Company and shall bear the seal of the Company affixed thereto, and said coupons shall each bear the lithographed signature of the Secretary of the Company. Said bonds and interest coupons shall contain the proper recitals usual in cases of securities of like character.

Resolved further that for the purposes of securing the payment of said bonds and interest coupons and the sums of money therein named at the maturity thereof, the President or one of the Vice-Presidents and Secretary of this Company be, and they are hereby authorized and directed to cause to be prepared a proper deed of trust, and to execute and duly acknowledge the same according to the laws of the Province of , and deliver the same, conveying to and hypothecating in favour of , as trustees, the aforesaid Works, lands, buildings, and water power, franchises, easements, rights and privileges, rents, revenues, incomes, extensions additions, improvements and property of every kind, name and description of the said Company now held or that shall or may hereafter be constructed, acquired or held, together with all and singular the hereditaments and appurtenances thereto belonging or in any wise appertaining as a first mortgage and hypothec free and clear of all other liens and encumbrances, which mortgage deed of trust shall contain the proper provisions and recitals to carry into effect the object of these resolutions giving said trustees, their successors and assigns, full power and authority in case default shall be made in payment of any of the said coupons or the principal of any of the said bonds for a period of three months after the same shall become payable, or if an order shall be made by any competent court or any effective resolution passed by the Company for winding up the Company, or if a distress or execution be levied or sued out against the chattels or property of the Company, or if the Company commit a breach of any covenant or stipulation in such trust deed contained, to enter into full possession of the property so conveyed to said trustees and to use and operate said Works and property for the benefit of all the holders of said bonds and interest coupons. Said deed of trust shall contain a covenant on the part of the said Company to keep its buildings and machinery therein properly insured for the benefit of the said trustees and holders of said bonds in some solvent Fire Insurance Company authorized to transact business in the Province of to an amount equal to their full insurable value, and also to pay all taxes, rates and assessments general and special, which may be assessed or levied upon the property of the said Company. And said deed of trust shall contain such other recitals and provisions relative to the advertisement and sale of said Works, real estate, franchises, easements and property aforesaid conveying the same on such sale being made to the purchaser or purchasers thereof free and clear of all equity of redemption of this Company and such other and further recitals as the President and Secretary shall be advised by their counsel learned in the law, and which in their discretion they shall deem proper to have provided therein.

The said Mortgage or Trust Deed when so executed and duly acknowledged shall be fyled of record in the office of the Registrar for the Registration Division of in the Province of . Attest

(Signed), Secretary.

[Seal]

This is the copy of the preamble and resolution of The Company referred to in the deed of mortgage to secure bonds made by the Company in favor of , executed before the undersigned notary this day of , hundred and , and thereunto annexed after being signed for identification by the parties to the said deed in presence of said notary.

(Signed), The Company,
Prest.
Secy.

The Trust Society, Ld.,
Prest.
Secy.

, N.P.

A true copy.

BEFORE Mtre. , the undersigned Public Notary for the Province residing at the of

APPEARED THE COMPANY, a body politic and corporate, having its chief place of business at Montreal, hereinafter called "The Company," and herein acting by the President, and by , the Secretary of the said Company, both of the of and hereunto duly authorized as hereinafter appears.

....................OF THE FIRST PART.

....................OF THE SECOND PART.

AND

THE TRUST SOCIETY, limited, a corporation duly incorporated, having its chief place of business in , as trustees for and on behalf of the bondholders hereinafter mentioned or referred to, hereinafter called the "Trustees."

....................OF THE THIRD PART.

WHO DECLARED UNTO THE SAID NOTARY AS FOLLOWS

WHEREAS the Company are a Corporation duly organized and incorporated by Letters Patent granted under the provisions of the Joint Stock Companies Incorporation Act of

And

WHEREAS at a meeting of the shareholders of the said Company duly called and held on the day of last ( ) the following preamble and resolutions (of which a copy certified true remains hereunto annexed signed for identification by the parties in the presence of the said notary) were unanimously adopted, namely:

(Here insert preamble and resolution.)

AND WHEREAS the Company has requested the trustees to guarantee the principal and interest on hundred of such mortgage bonds to the holders thereof, which the trustees have agreed to do upon the execution of these presents by the Company, and it is also contemplated that other of the said bonds shall or may be guaranteed by other Guarantee Societies or Companies;

NOW THEREFORE The Company, party of the First Part, in pursuance of the above resolution and for the purpose of securing the payment of said bonds amounting in the aggregate to thousand pounds sterling money of the United Kingdom of Great Britain and Ireland and the interest thereon at the rate of pounds per centum per annum, as evidenced by said interest coupons, hath mortgaged and hypothecated and doth by these presents mortgage and hypothecate in favor of the trustees, parties of the Third Part, and hath for further security and for the further consideration of one dollar to it duly paid by the said trustees, parties of the Third Part (the receipt whereof is hereby confessed and acknowledged) and for the purposes set forth herein, granted, bargained, sold, assigned, released, alienated, confirmed and conveyed and doth by these presents grant, bargain, sell, release, alienate, convey and confirm unto the trustees, their successors and assigns forever:

All and singular the Works now held or hereafter to be constructed, acquired or held by the said Company, party of the First Part, situate in the counties of , Province of , as the said immoveable property now subsists with all the rights, members and appurtenances thereto belonging, without exception or reserve. Together with all and singular the rights of way, lands, machinery, boilers, tools, furniture and fixtures, rents, revenues, extensions, additions, improvements, franchises, and property of every name, kind and description of the Company which they now have or own and which they may hereafter own or acquire.

AND THIS INDENTURE ALSO WITNESSETH that in further consideration of the premises it is hereby covenanted and agreed by and between the parties hereto and declared as follows :—

1. The Company and all other necessary parties will, from time to time, and at any time or times hereafter, so long as any money shall remain owing on any of the said intended bonds at the request of the trustees, but at the cost of the Company, execute such further deeds or instruments as may be necessary or as the trustees or their counsel may require for the purpose of causing to be mortgaged and hypothecated in favour of the trustees for the purpose of securing the said bonds and coupons, all or any lands, messuages, hereditaments, rights, privileges, or property of any kind whatsoever, to which the Company may for the time being be entitled, or of causing the same to be conveyed, assured, assigned or demised unto the trustees, either absolutely for the whole interest of the Company therein or for such interest as the trustees may direct, but nevertheless so as and to the intent that the same may be held upon the trusts and sub-

ject to the powers, provisions and conditions herein declared, expressed and contained, and until such conveyance, assignment or demise shall be executed or made the interest of the Company in all or any of such lands, buildings, hereditaments, property and premises shall be deemed to be subject to such powers, provisos and agreements.

2. None of the said bonds shall be issued, negotiated, sold or placed until the same shall have been certified and countersigned by the trustees.

3. The bonds guaranteed by the trustees or other guarantee societies or companies as aforesaid shall be in the form set out in the first part of the first schedule hereto, and the bonds which are not so guaranteed shall be in the form mentioned in the second part of the said first schedule.

4. All such bonds shall bear a certificate in the form set forth in the first schedule hereto; such certificate shall be signed by some person to be appointed by the trustees for that purpose, such appointment to be evidenced by an instrument executed by the trustees under their common seal and deposited of record in the office of the undersigned or some other Notary Public of the Province of with power to the trustees from time to time to revoke such appointment and to appoint any other person for the like purpose. Notice of every such appointment shall be sent by the post to the Company within five days of the date thereof.

5. The proceeds of the issue of all bonds shall be paid to and received by the trustees who shall, out of the proceeds of each bond, pay over to the Company, subject as hereinafter mentioned, the sum of pounds sterling, and shall, out of the balance of the said proceeds, pay (as directed by the said party of the second part) all the expenses of the issue including the expense of the preparation and execution of these presents, except stamps on the said bonds. And shall also retain for themselves and pay to the other guarantee societies or companies as aforesaid, such remuneration as may be agreed between the said party of the second part and them for or in respect of the guarantees to be given by the trustees or other societies or companies as aforesaid, or for or in respect of the use of the name of the trustees and said other societies or companies as aforesaid or for any other assistance or co-operation of the trustees or said other societies or companies in connection with the issue of the said bonds and shall pay the ultimate balance of the said proceed to the said party of the second part. The trustees not-

withstanding any fiduciary relation existing between them and the Company or the holders of the bonds shall be at liberty to receive and retain such remuneration as aforesaid.

No bonds shall be issued and, if subscribed, no portion of the proceeds shall be parted with by the trustees, unless and until the net yearly revenue of the Company after providing for contingencies shall be certified by some person from time to time to be appointed by the trustees to be equal to the total amount of interest payable per annum upon such bond so intended to be issued and upon any bonds which may have been already issued. Such person so to be appointed by the trustees as aforesaid shall determine what shall be the amount to be set aside to provide for contingencies and what is the net income of the Company within the meaning of this clause.

6. The proceeds of the issue of all bonds shall be paid to and received by the trustees who shall, until payment over of the proceeds as aforesaid, invest the same in some or one of the stocks, funds and securities upon which the trustees are by law authorized to invest trust funds or by placing the same on deposit with some bank or banks.

7. The proceeds of the said bonds paid over to the Company shall be applied solely in and towards the completion and extension of the Company's works and shall be paid by the trustees to the Company against certificates of some surveyor, architect or other person to be appointed from time to time by the trustees, by instalments, so that the amount of the bonds, the proceeds whereof shall be paid over ot the Company, shall at no time exceed two equal third parts of the value of the work done and property purchased at the date of payment. No part of the proceeds of the bonds shall without the consent in writing of the trustees be expended in or applied to the purchase or acquisition of any concession or franchise. The trustees shall forthwith, subject to the provisions of clause five hereof, pay to the Company out of the proceeds of such bonds such a sum or sums as such surveyor, architect or other person shall certify to be equivalent to two equal third parts of the value of the work done and property purchased by the Company prior to the execution hereof, but so that such value shall in no case be deemed to exceed the money actually expended by the Company thereon, and that in estimating such value no sum shall be allowed and no allowance shall be made for or in respect of any franchise or concession obtained or acquired by or granted to the Company.

8. All contracts between the Company and any contracts for the completion or extension of the Company's works must be submitted for approval to the trustees, and the Company shall not enter into any such contract before obtaining the approval in writing of the trustees thereof, nor without such approval shall the Company be entitled in respect of such contract or the monies payable to the contractor thereunder to any portion of the proceeds of the said bonds.

9. The trustees shall be entitled to require from the Company such proof as the trustees may think fit that the financial position of any contractor with the Company is satisfactory and that he is able to carry out and complete his contract or intended contract, and that his sureties, if any, are solvent and able to pay the amount for which they become responsible as sureties.

10. No dam, breakwater, pier or any building, erection or obstruction in any river or upon the bank thereof shall be made or constructed without the consent in writing of the trustees, unless the consent of the Government of the Dominion of Canada to the making or construction of such dam, breakwater, pier, building, erection or obstruction shall first be obtained, and such Government shall have agreed and undertaken to settle and discharge all claims of riparian owners which may arise out of or be caused by such dam, breakwater, pier, building, erection or obstruction.

11. The Company shall not cause any new works to be made or any work incidental thereto to be done by way of extending the Company's Works beyond the districts or municipalities included in the contracts or franchises now possessed by the Company unless and until some person to be appointed by the trustees shall certify that the Company and the contractor employed for that purpose by the Company are able to complete the same.

12. The Company will duly pay all taxes, rates and assessments, general and special, of every kind which may be assessed or levied upon any property comprised in this security and any tax which may hereafter be imposed upon hypothecary debts, within the times fixed by the laws of the Dominion of Canada or the Province of as the case may be for the payment of such taxes, rates and assessments.

13. The Company shall set apart and pay to the trustees out of the net revenue of the Company (after providing for payment of interest on the bonds and before the payment of any dividend to any shareholders of the Company) every half year beginning on the thir-

tieth day of June, eighteen hundred and ninety-three, the sums following, that is to say, during the year ending the thirty-first day of December, eighteen hundred and ninety-three, ten shillings sterling each half year on each bond of one hundred pounds for the time being issued, and during the year ending the thirty-first day of December, eighteen hundred and ninety-four, one pound sterling each half year on each such bond, and during the year ending the thirty-first day of December, eighteen hundred and ninety-five, one pound ten shillings sterling each half year on each such bond, and during the year ending the thirty-first day of December, eighteen hundred and ninety-six, two pounds sterling each half year, and during the year ending thirty-first day of December, eighteen hundred and ninety-seven and each subsequent year two pounds ten shillings sterling each half year on each such bond. The sums so from time to time set apart and paid shall form a sinking fund for the payment of the said bonds until the same with the accumulated interest thereon shall amount to the total par value of the bonds for the time being outstanding. If in any half year subsequent to the thirty-first December, eighteen hundred and ninety-seven, and before such sinking fund with accumulated interest as aforesaid amounts to the par value of the bonds for the time being outstanding a dividend is declared in favor of the ordinary shareholders of the Company at a rate exceeding five pounds sterling per centum per annum on the paid up capital, and for this purpose if a dividend or dividends declared in respect of any one year is or are greater than five pounds sterling per centum on the paid up capital, such dividend or dividends shall be divided into two equal parts and each of such parts shall be treated as if it had been declared in respect of a half year; then the Company shall out of such net income as aforesaid, set apart and pay to the trustees for the purpose of such sinking fund before paying such dividend to the said ordinary shareholders a further sum of five shillings sterling on each bond of one hundred pounds sterling for every one per cent. of such dividend in excess of five pounds sterling per cent. upon the paid up capital and for every fractional part of such dividend in excess of five pounds sterling per cent. the Company shall pay to the trustees a proportionate part of such sum of five shillings on each bond of one hundred pounds sterling, provided always that as soon as such payments by the Company to the trustees with accumulated interest thereon amount to the to tal nominal value of the bonds for the time being outstanding the Company shall not make any further payments to the trustees in respect of such sinking fund, and thereafter the trustees shall pay the interest on the sinking fund to the Company, and shall, at the request of the Company, apply any part of the principal of the sinking fund in or towards paying off or redeeming any of the said bonds which the Company shall be entitled and desires to pay off or redeem, but if such bonds shall be redeemed at a premium the premium shall be provided by the Company out of its own monies and not out of the sinking fund.

(*The dates and amounts in the above section are by way of illustration and will be modified as their circumstances require.*)

14. The said monies when paid by the Company to the trustees as aforesaid for the purpose of providing such sinking fund shall be invested by the trustees in such one or more of the securities and investments in or upon which trustees are in England authorized by law to invest trust funds as the trustees shall think fit, and the trustees shall accumulate the interest or income thereof or therefrom.

15. The Company shall not draw upon or against nor use any part of such sinking fund for any purpose whatsoever until the same with accumulated interest shall amount to the nominal value of the bonds for the time being outstanding, and such sinking fund shall not be used or applied in any case in or to any other purpose than the payment of such bonds as may be outstanding until the whole of the bonds have been duly paid off or redeemed, the balance (if any) of the sinking fund, after providing for trustees remuneration, costs and expenses, shall be paid and handed over to the Company.

16. The Company shall be entitled at any time or times on giving months notice of their intention so as to do by advertisement to that effect in " The Times " and such two other daily newspapers published in the United Kingdom as the trustees shall direct, to pay off all or any part of the bonds for the time being outstanding at the rate or price of pounds sterling per pounds bond with all interest due thereon. The bonds to be paid off shall on each occasion be ballotted for under the direction of the trustees who shall give fourteen days notice of the time and place of such balloting by advertising the same in the "Times" newspaper; all holders of outstanding bonds shall be entitled to be present at such balloting. Notice shall be sent by post by the Company to the registered holders of such bonds as shall be drawn that their bonds have been drawn for payment and of the date when such bonds will become payable.

17. The Company shall for the purpose of paying the principal or interest from time to time becoming due upon the said bonds remit

to the trustees the funds necessary for making such payments and so that the same shall reach and be available by the trustees in ample time for such payments.

18. The Company shall not issue or permit or suffer to be issued any prospectus, circular or other notice inviting subscriptions for the bonds of the Company bearing the names of the trustees without the previous consent in writing of the trustees and the payment to the trustees of a fee (to be agreed upon between the Company and the trustees) for the name of the trustees appearing on such prospectus, circular or notice.

19. The premises hereinbefore conveyed, assigned and assured, and the premises hereinbefore agreed to be conveyed, assigned, demised or assured to the trustees (hereinafter called the mortgaged premises) shall be held by the trustees upon trust to permit the Company and its assigns, but subject to the provisions of these presents, to hold and enjoy all the same premises and to carry on therein and therewith the business of the Company until the security hereby constituted becomes enforceable as hereinafter provided, and then upon trust that the trustees may at their discretion, and shall upon the passing of an extraordinary resolution of the bondholders as defined by the provisions set out in the second schedule hereto, requesting the trustees so to do (but in either case without any further consent on the part of the Company or its assigns) either personally or by their nominee or nominees, agent or agents, attorney or attornies, enter upon and take possession of the mortgaged premises and sell or convert the same or any part thereof into money, either by public auction or private treaty with full power to postpone such sale and conversion at their discretion even in the case of wasting property without being responsible for any loss, or the trustees may foreclose the mortgaged premises.

20. On any such sale or conversion as aforesaid, the trustees may receive, as the consideration therefor or for any part thereof, cash or any shares, stocks, debentures or mortgages.

21 After any sale under the power of trust aforesaid of any leasehold premises which shall have been mortgaged by demise in pursuance of the covenant in that behalf hereinbefore contained, the Company or its assigns will stand possessed of the nominal or other reversion remaining in the Company or its assigns upon trust for the purchaser and to assign and dispose of the same as he shall direct.

22. The security hereby constituted shall become enforceable in each and every of the events following :—

(1). If default be made in the payment of some interest on any of the bonds for the period of months after such interest shall have become payable, or in the payment of any principal money on any of the bonds for a period of three months after the same shall have become payable.

(2). If an order shall be made by any competent court or an effective resolution be passed by the Company for winding up the Company.

(3). If a distress or analagous process or execution, or sequestration or any process of any court or authority be respectively levied or sued out against any of the chattels or property of the Company.

(4). If the Company commit a substantial breach of any covenant or stipulation herein contained.

23. Before making any such entry as aforesaid or any sale or conversion under the aforesaid power or trust in that behalf (hereinafter referred to as the primary trust for conversion) the trustees shall, except in the case of such order or resolution as aforesaid having been made or passed or except where the trustees certify in writing that in the opinion of the trustees further delay would be prejudicial to the interest of the bondholders, give written notice of their intention to the Company, and shall not enter upon the mortgaged premises or execute the primary trust for conversion, if, in the case of such trust arising by reason of any default in payment of the interest, the Company shall prove to the trustees payment of the interest so in arrear within calendar months next after such notice shall have been given, or if, in the case of such trust arising by reason of any such distress or analogous process, execution, sequestration or other process as aforesaid, the Company shall forthwith, upon such notice as aforesaid being given, remove, discharge or pay out such distress, execution or other process, or if, in the case of such trust arising by reason of any breach of covenant as aforesaid, the Company shall within calendar months next after such notice shall have been given fully perform the covenant so broken if capable of then being performed or make good the breach thereof to the satisfaction of the trustees.

24. Provided always that upon any sale or conversion purporting to be made in pursuance of the primary trust for conversion the purchaser or purchasers shall not be bound to see or enquire whether

this security has become enforceable or whether any such notice has been given as aforesaid or whether any money remains owing on the security of these presents or otherwise as to the propriety or regularity or such sale or conversion and the receipt of the trustees for purchase or other monies payable to them shall be a complete and effectual discharge, and the remedy of the Company and its assigns in respect of any impropriety or irregularity whatsoever in the execution of the primary trust for conversion shall be in damages only.

25. The trustees shall hold the moneys or consideration to arise from any sale or conversion under the primary trust for conversion upon trust in the first place to pay or retain the costs and expenses incurred in or about the execution or attempted execution of such trust or otherwise in relation to these presents and to apply the residue of the said moneys and consideration first in or towards payment to the bondholders *pari passu* in proportion to the amounts due to them respectively and without any preference or priority whatsoever of all arrears of interest remaining unpaid on such bonds; secondly, in or towards payment to the bondholders *pari passu* in proportion to the amounts due to them respectively and without any preference or priority whatsoever of all principal moneys due on such bonds, and that whether the same principal monies shall or shall not then be payable according to the tenor of the said bonds; and thirdly to pay the surplus (if any) of such moneys to the Company or its assigns.

26. Provided always that if the amount of the moneys at any time apportionable under the last preceding clause hereof shall be less than ten pounds sterling per bond, the trustees may at their discretion invest such monies upon some or one of the investments herein authorized, with power from time to time at the like discretion to vary such investments; and such investments with the resulting income thereof may be accumulated until the accumulations together with any funds for the time being under the control of the trustees and applicable for the purpose shall amount to a sum sufficient to pay ten pounds sterling per bond upon such of the said bonds as shall be outstanding and then such accumulations and funds shall be applied in manner aforesaid.

27. The trustees shall give not less than   days notice by advertisement in the "Times," and at least one other daily London newspaper of the day fixed for any payment to the bondholders under either of the last two preceding clauses hereof and after the day so fixed and advertised the bondholders shall be entitled to interest on

the balance only (if any) of the principal monies due on the bonds respectively after deducting the respective amounts payable in respect thereof on the day so fixed.

28. The receipts of the bondholders and in the case of joint holdings of any one of the joint holders for the respective principal moneys and interest intended to be secured by the bonds shall be a good discharge to the trustees.

29. Upon any payment by the trustees to the bondholders on account of the principal moneys or interest thereby secured, the respective bonds shall be produced to the trustees who shall cause a memorandum of the respective amounts and dates of payment to be endorsed thereon respectively.

30. At any time before the security hereby constituted becomes enforceable the trustees may, at the request and expense of the Company, concur with the Company in selling any of the mortgaged premises and in exchanging any of the mortgaged premises for other hereditaments suitable for the purposes of the Company or in any other dealing with the mortgaged premises and any such sale, exchange or dealing may be made on such terms and conditions as the trustees may think expedient in the interests of the Company and the bondholders and under the circumstances.

31. The trustees shall hold the net moneys received by them under the last preceding clause after payment of all costs and expenses of the Company and the trustees of or incidental to the dealing in respect of which the same moneys were received upon trust at the request of the Company to lay out the same or any part thereof in the erection or improvement of any buildings, works or erections of a fixed or permanent nature suitable for the purposes of the Company and so as to constitute a permanent improvement of some part of the property comprised in this security or in the purchase of other freehold, copyhold or leasehold hereditaments suitable for the purposes of the Company and so that the site of any such buildings, works or erections if not already comprised in these presents and any hereditaments and premises so purchased shall be conveyed or assured in such manner as the trustees shall require so as to become subject to all the trusts, powers and provisions of these presents. Or upon trust at the request of the Company to invest the net moneys aforesaid either by way of temporary or permanent investment upon some or one of the investments herein authorized, with power from time to time to vary any of such investments for others of a like nature and with power (until the primary trust for conversion shall arise) to

resort to any such investments for any of the purposes for which the net moneys aforesaid are hereinbefore authorized to be expended and subject as aforesaid the trustees shall hold the said investments upon trust until the primary trust for conversion shall arise to pay the income thereof to the Company or its assigns and after the primary trust for conversion shall have arisen then as to both capital and income thereof upon the trusts hereinbefore declared of the proceeds of sale and conversion under the primary trust for conversion, provided also that after payment and satisfaction of all moneys intended to be secured by these presents both capital and income of the said investments or so much thereof as shall then remain unapplied shall be held in trust for the Company.

32. The trustees may from time to time upon the application and at the cost of the Company acquire or concur in acquiring new or renewed leases of all or any leasehold hereditaments for the time being subject to these presents for such extended terms at such rents and subject to such covenants and conditions as they may think fit and for that purpose may surrender or concur in surrendering existing leases and any new or renewed leases may be granted to the trustees or as they shall direct and shall become and be in all respects subject to these presents as though the same had been hereby demised or agreed to be demised by way of mortgage to the trustees.

33. After the trustees shall have entered upon or taken possession of the mortgaged premises under the power or trust hereinbefore contained, the trustees may at their discretion carry on the business of the Company in and with any of the mortgaged premises for the time being remaining unsold, and manage and conduct the same as they may think fit, and in the course of such management may employ and pay managers, receivers, valuers, brokers, servants and agents of every kind, and may purchase, repair or replace any plant, machinery or effects, and enter into such contracts to acquire such privileges and concessions as they may think fit, make arrangements with the tenants and others and compound, release or compromise, claims by or against the Company or trustees and generally act as if they were absolute owners of the mortgaged premises without being responsible for loss. And may also at discretion demise or let the mortgaged premises or any part thereof for any term with or without any special or restrictive covenants, stipulations or conditions, provided always that the trustees shall by and out of the rents, profits and income of the mortgaged premises and the monies to be made by it in carrying on the said business, pay and discharge the expenses

incurred in and about such management or in the exercise of any of the powers or trusts aforesaid or otherwise in respect of anything contained in these presents and also pay and discharge all outgoings which they shall think fit to pay and shall pay and apply the residue of the said rents, profits and monies in manner hereinbefore provided with respect to the proceeds of sale and conversion under the primary trust for conversion.

34. Upon the security hereby constituted becoming enforceable or at any time afterwards, the said trustees shall in addition to all other remedies hereby given be entitled to the appointment of a sequestrator or sequestrators, receiver or receivers of the mortgaged premises and of the earnings, income, rents, issues and profits, and may appoint such sequestrator or receiver.

35. Any monies liable to be invested under the trusts of these presents may be invested in the name or under the legal control of the trustees in or upon any investments in which trustees are by law authorized in England to invest trust funds or may be placed on deposit in the name of the trustees in such bank or banks in England, as the trustees may select.

36. The Company will pay the principal monies and interest secured by the bonds in accordance with the tenor thereof respectively and will observe and perform the several conditions endorsed thereon respectively.

37. The principal monies and interest intended to be secured by the bonds shall be a first charge on the mortgaged premises subject to the power of dealing with the same hereinbefore conferred upon the Company and as between the bondholders the bonds shall rank *pari passu* without any preference or priority by reason of data of issue or otherwise.

38. The Company will at all times keep at its head office an accurate register of the bonds showing the original issue of each bond and which of such bonds are outstanding and which have been paid off and the amounts paid off in respect thereof and all or any of the following persons, namely, the trustee and the bondholders and the persons deriving title under them and the agents authorized in writing of any of the parties aforesaid may at all reasonable times inspect the said register and take copies of or extracts from the same or any part thereof.

39. The Company will during the continuance of this security carry on and conduct the business of the Company to the greatest possible advantage and will duly and punctually observe and per-

form all the covenants, stipulations, conditions and agreements contained in the several contracts, grants or concessions now held or which may hereafter be held or acquired by the Company and also will in like manner duly and punctually observe and perform all the several bye-laws of the towns or municipalities hereinbefore mentioned or referred to and will keep proper books of account and therein make true and perfect entries of all dealings and transactions of or in relation to the said business and the said books of account and all other documents relating to the affairs of the Company shall be kept at the head office of the Company or other place or places where the said books of account and documents of a similar nature have heretofore been kept and the same shall at all reasonable times be open for the inspection of the trustees and such person or persons as they shall from time to time in writing for that purpose appoint. And the Company will at all times during the continuance of this security give to the trustees or to such person or persons as last aforesaid such information as they shall require as to all matters relating to the said business or any after acquired property of the Company or otherwise relating to the affairs thereof but so that the Company shall not be bound to take stock otherwise than at the period of their annual stock-taking unless the trustees certify that in the opinion of the trustees there is reasonable ground for believing that the Company has lost a portion of its capital. And will not pull down or remove any houses, buildings or erections on the hereditaments for the time being subject to this security nor the fixed plant, machinery, fixtures and fittings annexed to the same respectively without the previous consent in writing of the trustees unless the pulling down or removal of any of such last mentioned premises shall be necessary on account of the same being worn out or injured or unless such pulling down or removal shall be expedient for the beneficial conduct of the business and in every such case will replace the buildings or premises pulled down or removed by others of similar nature and equal value. And also will keep the said houses, buildings and erections, fixtures, fixed plant, machinery and every part thereof in a good state of repair and in perfect condition and will permit the trustees and such persons as they shall from time to time in writing for that purpose appoint to enter upon the same hereditaments respectively to view the state and condition thereof and of all fixtures and also will pay all rents, rates, taxes and assessments payable in respect of any part of the mortgaged premises and will insure and keep insured such of the mortgaged premises as are of an insurable nature against loss or damage by fire in their full insurable value in some responsible fire insurance office authorized to transact business in the Province of   to be approved by the trustees and will duly pay the premiums and other sums of money payable for that purpose and immediately after such payment deliver if required to the trustees the receipt for the same and will apply all moneys to be received by virtue of any such policy in making good any loss or damage which may so arise to the premises or any of them. And if default shall be made in keeping the same premises so repaired or insured as aforesaid or in delivering any such receipt as aforesaid the trustees may repair and insure the same at their discretion and such repairing or insurance shall not be deemed to constitute an entry into possession by the trustees of the premises so repaired or insured and the Company will on demand repay them every sum of money expended for the above purposes or any of them by them with interest at the rate of ten per cent. per annum from the time of the same respectively having been expended. And until such payment the same shall be a charge upon the mortgaged premises.

40. In addition to the ordinary rights of indemnity by law given to trustees the Company will at times hereafter keep indemnified the trustees from and against all actions, proceedings, costs, charges and expenses, claims and demands whatsoever in respect of the execution of the trusts hereof or in respect of any matter or thing done or omitted without their own wilful default with respect or relating to the premises.

The Company shall be at liberty to pay to the trustees and the trustees shall be at liberty to accept such remuneration for the services hereunder and for and in respect of their guarantee of all or any of the same bonds as may be arranged between the trustees and the Company. And it is decalred that the trustees may retain and pay to themselves out of any monies in their hands under the trust of these presents the amount of any such monies, costs, charges, expenses, claims or demands, remuneration and premiums as aforesaid and shall have a first lien and hypothec for the amount on the mortgaged premises to the extent of the sum of five thousand pounds.

41. The provisions contained in the second schedule hereto shall have effect in the same manner as if such provisions were herein set forth.

42. The trustees may from time to time and at any time waive on such terms and conditions as to them shall seem expedient any breach by the Company of any of the covenants or stipulations in these presents contained.

43. The trustees may delegate to any person or persons all or any of the trusts, powers and discretions vested in them by these presents and any such delegation may be made upon such terms and conditions and subject to such regulations including power to sub-delegate as the trustees may think fit.

44. The trustees shall not be bound to see to the observance or performance by the Company of any of the obligations hereby imposed upon it until the security hereby constituted has become enforceable and the trustees have determined to enforce the same and the trustees shall not be responsible for any loss occasioned by the omission so to do.

45. Upon proof being given to the reasonable satisfaction of the trustees that all the debentures have been paid off or satisfied and upon payment of all costs, charges and expenses incurred by the trustees in relation to these presents, the trustees shall at the request of the Company reconvey to the Company or as the Company shall direct the mortgaged premises or such part thereof as may remain vested in them freed and discharged from the trusts herein contained.

46. The trustees may at any time after due notice to the Company apply to the High Court of Justice in England for an order that the trusts hereof shall be carried into execution under the direction of the court and for the appointment of a receiver or receivers and manager of the premises or for any other order in relation to the administration of the trusts hereof which the trustees may think expedient, and the trustees may assent to or approve of any application to the court made at the instance of any of the bondholders and the trustees shall be indemnified against all expenses incurred by it in relation to such proceedings.

47. If and whenever the trustees under or by virtue of their guarantee pay the principal money or interest on any bond, such bond or the coupons for such interest as the case may be shall be transferred to and delivered to the trustees who shall stand in the position and be entitled to all the rights of such bondholder in respect of such bond or coupon.

48. The term "The Trustees" in these presents shall, except where the contrary appears, mean the   Trust Society, limited, and their successors and assigns and all others the trustees for the time being of these presents.

FIRST SCHEDULE.

PART I.

Form of Mortgage Bond guaranteed by the Trust Society, limited, or other Guarantee Society or Company as aforesaid.

DOMINION OF CANADA.

PROVINCE OF

No. £100

THE COMPANY.

First Mortgage £ per cent. gold Bonds.

1. The Company promises to pay to of or other the registered holder for the time being hereof on the day of , or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon the sum of £ sterling, at the Bank of , in the City of London, and also to pay interest thereon from the date hereof at the rate of £ per centum per annum payable half yearly on the day of , and the day of in each year to the bearer of and upon presentation of the respective coupons for such interests hereto annexed.

2. The Company hereby charges all its undertaking, property and assets, both present and future, with payment of the said principal sum and interest.

3. This bond is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed part of it.

Given under the common seal of the Company this day of 19 .

The common seal of the Company was affixed hereto in the presence of

[Seal.]

.................., President.

.................., Secretary.

THE COMPANY.

Bond No. Interest Coupon No.

For £ half yearly interest due the day of and payable at the Bank of in the City of London.

.................., Secretary.

THE CONDITIONS WITHIN REFERRED TO.

1. This bond is one of a series of first mortgage £ per cent. bonds each for securing the principal sum of £ sterling issued or about to be issued by the Company. The bonds of the said series are all to rank *pari passu* as a first charge upon the property hereby charged without any preference or priority one over another, and such charge is to be a floating security.

2. Annexed to this bond are coupons, each providing for the payment of a half year's interest, and such interest will be payable only on presentation and delivery of the coupon referring thereto.

3. The principal moneys and interest hereby secured will be paid without regard to any equities between the Company and the original or any intermediate registered holder thereof.

4. If the principal moneys hereby secured shall become payable before the day of , 19 , the person presenting this bond for payment must surrender therewith the coupons representing subsequent interest, the Company nevertheless paying the interest for the fraction of the current half year.

5. The delivery to the Company of this bond and of each of the coupons shall be a good discharge for the principal moneys and interest therein respectively specified.

6. The principal moneys hereby secured shall immediately become payable. (*a*) If the Company make default in payment of any interest hereby secured for a period of months after the same shall have become payable and the holder hereof before such interest is paid by notice in writing to the Company calls in such principal moneys. (*b*) If an order is made or an effective resolution passed for winding up the Company. (*c*) If a distress or analogous process or execution or sequestration or any process of any court or authority be levied or sued out against the chattels or property of the Company or any part thereof. (*d*) When the security constituted by the trust deed hereinafter referred to shall have become enforceable and the trustees thereof shall have determined or become bound to enforce the same. (*e*) Upon the expiration of months' notice given by the Company of their intention to pay off the amount of this bond, but in this case the amount payable will be
pounds sterling.

7. The principal moneys and interest hereby secured will be paid at the Bank of in the City of London.

8. The registered holders of bonds of the above issue are and will be entitled *pari passu* to the benefit of and subject to the provisions contained in an indenture dated the day of 19 , and made between the Company, of the First Part and , of the Second Part, and the , limited, of the Third Part, whereby certain property of the Company was vested in Trustees for securing the payment of the principal moneys and interest payable in respect of said Bonds.

9. Every Transfer of this Bond must be in writing under the hand of the registered Holder or of his legal personal representative. The transfer must be delivered at the Registered Office of the , limited, , with a fee of s. d. and with such evidence of identity or title as the Company or the said Society may reasonably require and thereupon the Transfer will be registered.

The , Limited, (hereinafter called the Guarantors) do hereby guarantee to of or other the registered Holder hereof the payment of the principal money and interest to become due under this Bond in manner following, namely:—

1. The Guarantors will on demand made to them in writing pay any interest which shall not be paid within days after it becomes due and any principal money which shall not be paid within days after the , or in the event of the Company going into liquidation before that date any principal money which may remain owing when the last dividend (if any) has been paid by the Company to its Creditors, or on the , whichever date shall first happen.

2. On payment by the Guarantors of all moneys due under this Bond the same shall be transferred to the Guarantors by the Registered Holder thereof.

3. The Guarantors are not to be liable for any losses arising from any act done or consent given by the registered holder after the date hereof and without the consent of the Guarantors whereby the value of this Bond is diminished or prejudiced or the liability or position of the Guarantors hereunder is altered.

4. If principal moneys secured under this Bond be not demanded from the Guarantors within six Calendar months after the day on which the same shall become payable interest thereon shall cease to be payable by the Guarantors after the expiration of such six Calendar months and the principal money secured under this Bond shall not be recoverable from the Guarantors unless payment thereof be

demanded from the Guarantors within twelve calendar months after the day on which the same shall become payable provided always that this clause shall not apply in the event of the Company going into liquidation on or before the .

IN WITNESS WHEREOF the Guarantors have caused these presents to be sealed with their Common Seal this day of 19 .

The Common Seal of the ,
Limited, was hereto affixed in the presence of

[Seal.]

PART II.

FORM OF MORTGAGE BOND NOT GUARANTEED.

The form of this mortgage bond is the same as the guaranteed bond omitting and with the exception of the guarantee by the Trust Society, limited, or other Guarantee Society or Company.

TRUSTEES' CERTIFICATE TO BE ANNEXED TO THE MORTGAGE BONDS WHETHER GUARANTEED OR NOT.

This is one of the first mortgage £ per cent. gold bonds issued by the Company each for the sum of payable *pari passu* the payment of which is secured by Indenture of Trust dated the .

For and on behalf of the Trust Society, limited.

THE SECOND SCHEDULE.

1. The trustee or the Company may from time to time and at any time convene a meeting of the bondholders in London.

2. days notice at the least specifying the place, day and hour of meeting shall be given previously to any meeting of the bondholders; such meeting shall be advertised twice in the Times newspaper and if the meeting is not convened by the trustee a copy of such notice shall also be left at the office of the trustee days before the date of the meeting. It shall be necessary to specify in such notice the nature of the business to be transacted at the meeting thereby convened.

3. At any such meeting persons holding of the nominal amount of the bonds for the time being outstanding shall form a quorum for the transaction of business, and no business shall be transacted at any meeting unless the requisite quorum be present at the commencement of business.

4. Any person nominated by the trustees shall be entitled to take the chair at every such meeting; and if no person is nominated or if at any meeting the person nominated shall not be present within minutes after the time appointed for holding the meeting, the bondholders present shall choose one of their number to be chairman.

5. If within after the time appointed for any meeting of the bondholders a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same time and place; and if at such adjourned meeting a quorum is not present, the bondholders present shall form a quorum and may transact any business which a meeting of the bondholders is competent to transact.

6. Every question submitted to a meeting of the bondholders shall be decided in the first instance by a show of hands, and in case of an equality of votes the chairman, both on the show of hands and at a poll, shall have a casting vote in addition to the vote or votes (if any) to which he may be entitled as a bondholder.

7. At any general meeting of the bondholders, unless a poll is demanded by at least three bondholders, a declaration by the chairman that a resolution has been carried, or carried by any particular majority, or lost or not carried by a particular majority, shall be conclusive evidence of the fact.

8. If at any such meeting a poll is demanded by three or more bondholders, it shall be taken in such manner, and either at once or after an adjournment, as the chairman directs; and the result of such poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

9. The chairman may, with the consent of any such meeting, adjourn the same from time to time.

10. Any poll demanded at any such meeting on the election of a chairman or on any question of adjournment shall be taken at a meeting without adjournment.

11. At any such meeting as aforesaid the respective holders of the bonds and no other person or persons shall be recognized and treated as the legal holder thereof and accordingly shall be entitled to vote in respect thereof.

12. At any such meeting such bondholder shall be entitled to one vote in respect of every bond of which he shall be the holder.

13. When the trustees shall have made such entry as mentioned in the above written indenture, they, with the authority of an extraordinary resolution, may at any time afterwards give up possession

of the mortgaged premises to the Company, either unconditionally or upon any conditions that may be arranged between the Company and the trustees with the sanction of an extraordinary resolution.

14. A general meeting of the bondholders shall, in addition to the power hereinbefore given, have the following powers exercisable by extraordinary resolution and with the consent of the trustee, namely :

(1). Power to sanction the release of any of the mortgaged premises.

(2). Power to sanction any modification or compromise of the rights of the bondholders against the Company or against its property whether such rights shall arise under the bond or under these presents or otherwise.

(3). Power to assent to any modification of the provisions contained in these presents which shall be proposed by the Company.

15. Any extraordinary resolution passed at a general meeting of the bondholders duly convened and held in accordance with these presents and to which the consent of the trustee has been obtained shall be binding upon all the bondholders whether present or not present at such meeting and each of the bondholders shall be bound to give effect thereto accordingly .

16. The expression " extraordinary resolution " when used in this schedule means a resolution passed at a meeting of the bondholders duly convened and held in accordance with the provisions herein contained by a majority consisting of not less than three-fourths of the persons voting thereat, provided that in computing the majority when a poll is demanded reference shall be had to the number of votes to which every such person is entitled under these presents.

17. Minutes of all resolutions and proceedings at every such meeting as aforesaid shall be made and duly entered in books to be from time to time provided for that purpose by the trustees at the expense of the Company; and any such minutes as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting of the bondholders, shall be conclusive evidence of the matters therein stated and until the contrary is proved every such meeting in respect of the proceedings of which minutes had been made shall be deemed to have been duly held and convened and all resolutions passed thereat or proceedings had to have been duly passed and had.

WHEREOF ACTE Done and passed at the City of this day of , and of record in the office of the said Mtre. , under number . And after due reading hereof the parties signed and the corporate seal of the said Company was affixed in the presence of the said notary.

(Signed), THE Co., by

PRESIDENT (*or Vice-President*).

Secy.

THE TRUST SOCIETY, Limited, by

Atty.

N.P.

A true copy of the original hereof remaining of record in my office.

ANOTHER FORM OF MORTGAGE TO TRUSTEES TO SECURE BONDS.

On this day of

Before the undersigned Notary Public,

APPEARED :—

Company, a body politic and corporate, duly incorporated, and having its head office at the City of Montreal, in the Province of Quebec, Canada, acting and represented by , the President, and the Secretary, hereto duly authorized by resolution of the Board of Directors, hereinafter called the Company,

Party of the first part,

AND

hereinafter called the Trustees,

Party of the second part.

Who declared as follows :—

WHEREAS the Company was incorporated by special Act of the Quebec Legislature, being Chap. Vict.,

WHEREAS shares of the capital stock of the said Company have been issued and fully paid up, WHEREAS at a meeting duly convened on the day of 1900, the Directors of the said Company did enact and pass the following By-law, being By-law No. , to wit :—

BY-LAW NO. —

MOVED BY , SECONDED BY

WHEREAS it is expedient in the interests of the Company to issue bonds to an amount not exceeding in the aggregate thousand dollars,

NOW THEREFORE BE IT RESOLVED :—

That the officers of the Company be and are hereby authorized to cause to be printed and issued a series of hundred mortgage bonds for dollars each, amounting in the aggregate to dollars, the principal of said bonds payable in years from the date of issue, and to bear interest at the rate of per centum per annum, payable semi-annually, the said interest payments to be evidenced by interest coupons attached to each of the said bonds, principal and interest to be made payable at at Montreal.

And for the purpose of securing the payment of the principal and interest of the said bonds, the President and Secretary are hereby authorized to sign and execute on behalf of the Company a deed of hypothec and mortgage (*or trust conveyance*) in favor of Trustees for and on behalf of the holders of the said bonds, and in and by the said deed to hypothecate and mortgage and otherwise secure to the said Trustees, in such manner as may be found necessary, all the property, rights, real estate, plant, machinery, furniture and fixtures, and property of every kind, name and description of the said Company, the same to be held by the said Trustees subject to such conditions as the officers of the Company may in and by the said deed stipulate and said deed to contain covenants respecting redemption, insurance and other clauses satisfactory to the President and Secretary and the Company's solicitors.

WHEREAS on the day of a special general meeting of the shareholders of the said Company was duly held in the City of aforesaid, in accordance with the By-laws and specially called for the purpose of considering the said By-law.

WHEREAS at the said special meeting of the shareholders a quorum of the said shareholders was present, and the said By-law was duly passed and approved by the votes of shareholders representing more than seventy-five percent. of the actual paid up stock of the company (or as required by the law under which the Company is incorporated).

Whereas a draft of the present deed and of the form of debenture and coupons hereinafter referred to was duly submitted to the Directors of the said Company at a meeting held on the day of and duly approved of by said Directors and the Company's solicitors,

Whereas the present deed and debentures and coupons herein set forth conform in all respects to the said draft, and

Whereas the Trustees aforesaid have executed these presents to evidence their acceptance of the trusts herein contained; and

Whereas this mortgage is given for the purpose of securing the payment of the principal and interest of the said debentures, without discrimination or preference, according to their tenor and effect,

Now therefore these presents witness:—

The Company, party of the first part, in pursuance of the above By-law, and for the purpose of securing the payment of the said bonds, amounting in the aggregate to thousand dollars currency, and the interest thereon at the rate of per centum per annum, as evidenced by the said interest coupons, hath mortgaged and hypothecated (or assigned and conveyed, etc.), and doth by these presents mortgage and hypothecate in favor of the Trustees, parties of the second part, their successors and assigns, the following immoveable property, acquired by the said Company under

Together with all and singular the rights, machinery, furniture and fixtures, rents, revenues, franchises and property of every kind, name and description of the said Company, which it now has or owns and which it may hereafter own or acquire.

The Company covenants and agrees with the said Trustees that it is the absolute owner and proprietor of the property hereinabove described and hereby mortgaged and hypothecated, and that it has full authority and lawful power to execute the present hypothec (or conveyance) and that the said real estate is free and clear of all incumbrances except

The present mortgage is thus made to the said Trustees in trust for the equal and proportionate benefit and security of the present and future holders of the debentures to be issued and secured by this deed, and for the payment of the said debentures when payable and the performance of and compliance with the covenants and conditions of this deed, without preference, priority or distinction as to lien or other use of any one debenture by reason of priority in the issue or negotiation thereof, so that each and every debenture issued as aforesaid shall have said parity, right, lien and privilege under and by this indenture, and that the principal and interest of every debenture shall, subject to the terms herein, be equally and proportionately secured hereby, as if all had been made, executed, delivered and negotiated simultaneously with the execution of this deed.

The mortgage bond hereinabove referred to shall be in the form following, to wit:—

DOMINION OF CANADA.

No. $

PROVINCE OF

THE COMPANY,

MORTGAGE % GOLD BONDS.

Total Issue, - - - $

The Company, of , in the Province of , Canada, promises to pay to the bearer, or, if registered, to the registered holder hereof, on the day of one thousand nine hundred and , or on such earlier day as the principal monies hereby secured become payable in accordance with the conditions endorsed hereon, the sum of dollars currency in gold of or equal to the present standard of weight and fineness, and also to pay interest thereon from the date hereof, at the rate of dollars per centum per annum, payable half-yearly on the day of and on the day of in each year, to the bearer of and upon presentation and surrender of the respective interest coupons hereto annexed. Payments of principal and interest to be made at the

2. This Bond is one of a series of hundred bonds of hundred dollars each, secured by a Deed of Hypothec and Mortgage passed before on day of , 19 , hypothecating in favor of as Trustees, the property of the Company therein specified, consisting of real estate, plant, machinery, etc., which deed is duly executed and registered, as appears by the Trustees' certificate endorsed hereon.

3. This Bond is issued subject to and entitled to the benefit of the said deed and the conditions endorsed hereon, which are to be deemed part of it.

Given under the Common Seal of the Company, this day of A.D. 19 .

[Seal]

President. Secretary.

INTEREST COUPON.

Bond No. Interest Coupon No.

THE COMPANY.

For dollars, half year's interest due the day of , 19 , and payable at the in the City of .

Secretary.

TRUSTEES' CERTIFICATE.

This is one of a series of hundred bonds of like tenor and effect, secured by Deed of Mortgage and Hypothec, passed before on the day of A.D. 19 , and duly registered.

Trustees.

(ENDORSEMENT.)

No.——

THE COMPANY,

MORTGAGE PER CENT. GOLD BONDS.

$——

Principal payable 19 .
Interest payable semi-annually, the
day of , and
day of at the
Montreal.

THE CONDITIONS WITHIN REFERRED TO.

1. This Bond is one of a series of hundred Mortgage per cent. Gold Bonds, each for the principal sum of dollars currency. The bonds of the said series are all to rank *pari passu* as a charge upon the property hereby mortgaged without any preference or priority one over another.

2. Annexed to this Bond are coupons, each providing for the payment of a half year's interest, and such interest will be payable on presentation and delivery of the coupons referring thereto.

3. The principal monies and interest hereby secured will be paid without regard to any equities between the Company and the original or any intermediate registered holder thereof.

4. If the principal monies hereby secured shall become payable before the day of , one thousand nine hundred , the person presenting this Bond for payment must surrender therewith the coupons representing the subsequent interest, the Company nevertheless paying the interest for the fraction of the current year.

5. The delivery to the Company of this Bond and of each of the coupons shall be a good discharge for the principal monies and interest therein respectively specified.

6. The principal monies hereby secured shall immediately become payable: (*a*) If default be made in the payment of some interest on any of the bonds for a period of three months after such interest shall become payable; (*b*) If an order be made by any competent Court or an effective resolution be passed by the said Company for winding up the Company; (*c*) If an execution or sequestration or any process of any Court or authority be respectively levied or sued out against the property hereby hypothecated for the purpose of bringing the same to sale and remain unsatisfied for ten days; (*d*) If the Company commit a substantial breach of any covenant or stipulation contained in Trust Deed; (*e*) When the security constituted by the Trust Deed shall have become enforceable, and the Trustees shall have determined or become bound to enforce the same; (*f*) Upon the expiration of three months' notice given by the Company of its intention to pay off the amount of this Bond, but in this case, the amount payable will be hundred and dollars, as provided in the Trust Deed.

7. The principal monies and interest hereby secured will be paid at the in the City of .

8. This bond may be registered in the books of the Company, in the name of the holder, in which case it can only be transferred on the books of the Company by the registered holder in person or by attorney.

9. This Bond shall not be valid or obligatory until certified by the Trustees.

N.B.—Further conditions should be added as in previous form of similar deed.

APPENDIX

B.

CANADA COMPANIES' ACT.

(Being Chapter 119 of the Revised Statutes.)

An Act respecting the incorporation of Joint Stock Companies by Letters Patent.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

SHORT TITLE.

1. Short title.—This Act may be cited as "*The Companies Act.*" 40 V., c. 43, s. 1.

INTERPRETATION.

2. Interpretation.—In this Act, and in all letters patent and supplementary letters patent issued under it, unless the context otherwise requires,—

(*a*) The expression "the company" means the company incorporated by letters patent under this Act ;

(*b*) The expression "the undertaking" means the business of every kind which the company is authorized to carry on ;

(*c*) The expression "loan company" means a company incorporated for any of the purposes to which the powers of loan companies extend, as hereinafter provided ;

(*d*) The expression "real estate" or "land," includes messuages, lands, tenements and hereditaments of any tenure, and all immovable property of any kind ;

(*e*) The expression "shareholder" means every subscriber to or holder of stock in the company, and includes the personal representatives of the shareholder ;

(*f*) The expression "manager" includes the cashier and secretary. 40 V., c. 43, s. 2.

LETTERS PATENT.

3. Companies formed for certain purposes may be incorporated by letters patent.—The Governor in Council may, by letters patent under the Great Seal, grant a charter to any number of persons, not less than five, who petition therefor, constituting such persons, and others who thereafter become shareholders in the company thereby created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways, or the business of banking and the issue of paper money, or the business of insurance. 40 V., c. 43, s. 3.

4. Notice to be given and what it shall contain.—The applicants for such letters patent shall give at least one month's previous notice, in the *Canada Gazette*, of their intention to apply for the same, stating therein,—

(*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—which, in the case of a loan company, shall not be less than one hundred thousand dollars ;

(*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, and the majority of whom shall be residents of Canada. 40 V., c. 43, s. 4.

5. Petition for letters patent.—At any time, not more than one month after the last publication of such notice, the applicants may petition the Governor in Council, through the Secretary of State, for the issue of such letters patent:

2. Such petition shall state the facts set forth in the notice, the amount of stock taken by each applicant, the amount paid in upon the stock of each applicant, and the manner in which the same has been paid in, and is held for the company.

3. The aggregate of the stock so taken shall be at least the one half of the total amount of the proposed capital stock of the company:

4. The aggregate so paid in thereon shall, if the company is not a loan company, be at least ten per cent. of the stock so taken; if the company is a loan company the aggregate so paid in of the stock so taken shall be at least ten per cent. thereof, and shall not be less than one hundred thousand dollars;

5. (*a*) Such aggregate shall be deposited to the credit of the Receiver General of Canada, and shall be standing at such credit in some chartered bank in Canada, and the applicants shall, with their petition, produce the deposit receipt for such amount so deposited.

(*b*) At any time after the signing of letters patent incorporating the applicants as a company, the said aggregate, so paid in to the credit of the Receiver General, may be returned to and for the sole use of the company, or in case of failure to incorporate, to the applicants who have paid in or contributed to the same, under regulations from time to time made by the Governor in Council.

(*c*) In case the object of the company is one requiring that it should own real estate, any portion not exceeding one-half of such aggregate may be taken as paid in, if it is *bonâ fide* invested in real estate suitable to such object, and such real estate is, by a valid and sufficient registered deed, duly held by two or more trustees for the company, and the applicants shall establish the fact, by oath, affirmation or declaration, that such real estate is of the required value over and above all encumbrances thereon. 40 V., c. 43, s. 5. (As amended by 61 Vict. (1898), c. 50.)

6. Preliminary matters to be established.—Before the letters patent are issued, the applicants shall establish, to the satisfaction of the Secretary of State, or of such other officer as is charged by the Governor in Council to report thereon, the sufficiency of their notice and petition, and the truth and sufficiency of the facts therein set forth, and that the proposed name is not the name of any other known incorporated or unincorporated company; and for that purpose, the Secretary of State, or such other officer, shall take and keep of record any requisite evidence in writing, by oath or affirmation or by solemn declaration. 40 V., c. 43, s. 6.

7. Facts to be recited in letters patent.—The letters patent shall recite such of the established averments of the notice and petition as to the Governor in Council seems expedient. 40 V., c. 43, s. 7.

8. Governor may give another corporate name.—The Governor in Council may give to the company a corporate name, different from that proposed by the applicants in their published notice, if the proposed name is objectionable. 40 V., c. 43, s. 8.

9. Notice of issuing letters patent.—Notice of the granting of the letters patent shall be forthwith given by the Secretary of State, in the *Canada Gazette*, in the form A in the schedule to this Act; and thereupon, from the date of the letters patent, the persons therein named, and their successors, shall be a body corporate and politic, by the name mentioned therein; and a copy of every such notice shall forthwith be, by the company to which such notice relates, inserted on four separate occasions in at least one newspaper in the county, city or place where the head office or chief agency is established. 40 V., c. 43, ss. 9 *and* 106.

SUPPLEMENTARY LETTERS PATENT.

Change of name.

10. Governor may change name by supplementary patent.—If it is made to appear, to the satisfaction of the Governor in Council, that the name of any company (whether given by the original or by supplementary letters patent, or on amalgamation) incorporated under this Act, is the same as the name of an existing incorporated or unincorporated company, or so similar thereto as to be liable to be confounded therewith, the Governor in Council may direct the issue of supplementary letters patent, reciting the former letters and changing the name of the company to some other name which shall be set forth in the supplementary letters patent. 40 V., c. 43, s. 11.

11. Company may obtain change of name.—When a company incorporated under this Act is desirous of adopting another name, the Governor in Council, upon being satisfied that the change desired is not for any improper purpose, may direct the issue of supplementary letters patent, reciting the former letters patent and changing the name of the company to some other name, which shall be set forth in the supplementary letters patent. 40 V., c. 43, s. 12.

12. Change not to affect rights or obligations.—No alteration of its name under the two sections next preceding shall affect the rights or obligations of the company; and all proceedings may be continued or commenced by or against the company under its new name that might have been continued or commenced by or against the company under its former name. 40 V., c. 43, s. 13.

Obtaining of further powers.

13. Company may authorize directors to apply for extension of powers.—The company may, from time to time, by a resolution passed by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company, at a special general meeting called for the purpose, authorize the directors to apply for supplementary letters patent extending the powers of the company to such other purposes or objects, for which a company may be incorporated under this Act, as are defined in the resolution. 40 V., c. 43, s. 14.

14. Application by directors.—The directors may, at any time within six months after the passing of any such resolution, petition the Governor in Council, through the Secretary of State, for the issue of such supplementary letters patent:

2. The applicants for such supplementary letters patent shall give at least one month's notice in the *Canada Gazette* of their intention to apply for the same, stating therein the purposes or objects to which it is desired to extend the powers of the company. 40 V., c. 43, s. 15.

15. Proof to be furnished to Secretary of State.—Before such supplementary letters patent are issued, the applicants shall establish to the satisfaction of the Secretary of State or of such other officer as is charged by the Governor in Council to report thereon, the due passing of the resolution authorizing the application and the sufficiency of their notice and petition; and for that purpose the Secretary of State, or such other officer, shall take and keep of record any requisite evidence in writing, by oath or affirmation, or by solemn declaration. 40 V., c. 43, s. 16.

16. Grant of supplementary letters patent.—Upon due proof so made, the Governor in Council may grant supplementary letters patent under the Great Seal, extending the powers of the company to all or any of the objects defined in the resolution; and notice thereof shall be forthwith given by the Secretary of State, in the *Canada Gazette*, in the form B in the schedule to this Act; and thereupon, from the date of the supplementary letters patent, the undertaking of the company shall extend to and include the other purposes or objects set out in the supplementary letters patent as fully as if such other purposes or objects were mentioned in the original letters patent; and a copy of every such notice shall forthwith be, by the company to which the notice relates, inserted on four separate occasions in at least one newspaper in the county, city or place where the head office or chief agency is established. 40 V., c. 43, ss. 17 *and* 106.

Increase or reduction of capital, &c.

17. Subdivision of shares.—The directors of the company, other than a loan company, may, at any time, make a by-law subdividing the existing shares into shares of a smaller amount. 40 V., c. 43, s. 19.

18. Increase of capital.—The directors of the company may, at any time after the whole capital stock of the company has been taken up and fifty per cent. thereon paid in, make a by-law for increasing the capital stock of the company to any amount which they consider requisite for the due carrying out of the objects of the company:

2. Such by-law shall declare the number of the shares of the new stock, and may prescribe the manner in which the same shall be allotted; and in default of its so doing, the control of such allotment shall vest absolutely in the directors. 40 V., c. 43, s. 20.

19. Reduction of capital.—The directors of the company may, at any time, make a by-law for reducing the capital stock of the company to any amount which they consider advisable and sufficient for the due carrying out of the undertaking of the company; but the capital stock of a loan company shall never be reduced to less than one hundred thousand dollars:

2. Such by-law shall declare the number and value of the shares of the stock as so reduced, and the allotment thereof, or the manner in which the same shall be made:

3. The liability of shareholders to persons who were, at the time of the reduction of the capital, creditors of the company, shall remain the same as if the capital had not been reduced. 40 V., c. 43, ss. 21 *and* 22, *part.*

20. Such by-law to be approved by shareholders and confirmed by supplementary letters patent.—No by-law for increasing or reducing the capital stock of the company, or for subdividing the shares, shall have any force or effect whatsoever, until it is approved by the votes of shareholders representing at least two-thirds in value of all 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. 40 V., c. 43, s. 22, *part.*

21. Petition for supplementary letters patent to confirm by-law.—At any time, not more than six months after such sanction of such by-law, the directors may petition the Governor in Council, through the Secretary of State, for the issue of supplementary letters patent to confirm the same:

2. The directors shall, with such petition, produce a copy of such by-law, under the seal of the company, and signed by the president, vice-president or secretary, and establish to the satisfaction of the Secretary of State, or of such other officer as is charged by the Governor in Council to report thereon, the due passage and approval of such by-law, and the expediency and *bonâ*

fide character of the increase or reduction of capital or subdivision of shares, as the case may be, thereby provided for:

3. The Secretary of State or such officer shall, for that purpose, take and keep of record any requisite evidence in writing, by oath or affirmation or by solemn declaration, as above mentioned. 40 V., c. 43, s. 23.

22. Granting of supplementary letters patent;—notice;—effect of such letters patent.—Upon due proof so made, the Governor in Council may grant such supplementary letters patent under the Great Seal; and notice thereof shall be forthwith given by the Secretary of State in the *Canada Gazette*, in the form C, in the schedule to this Act: and thereupon, from the date of the supplementary letters patent, the capital stock of the company shall be and remain increased or reduced, or the shares shall be subdivided, as the case may be, to the amount, in the manner and subject to the conditions set forth by such by-law; and the whole of the stock, as so increased or reduced, shall become subject to the provisions of this Act, in like manner, as far as possible, as if every part thereof had been or formed part of the stock of the company originally subscribed. 40 V., c. 43, s. 24.

POWERS OF THE COMPANY.

23. Powers given to be subject to this Act.—All powers given to the company by the letters patent or supplementary letters patent shall be exercised, subject to the provisions and restrictions contained in this Act. 40 V., c. 43, s. 25.

24. General corporate powers.—Every company incorporated under this Act may acquire, hold, sell and convey any real estate requisite for the carrying on of the undertaking of such company, and shall forthwith become and be invested with all property and rights, real and personal, theretofore held by or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament, embodying the provisions of this Act and of the letters patent: Provided always, that the exercise by loan companies of the powers conferred by this section shall be subject to the special provisions respecting such companies hereinafter contained. 40 V., c. 43, s. 10.

CAPITAL STOCK.

25. Stock to be personal estate.—The stock of the company shall be personal estate, and shall be transferable, in such manner, and subject to all such conditions and restrictions as are prescribed by this Act or by the letters patent or by by-laws of the company. 40 V., c. 43, s. 34.

26. Allotment of stock.—If the letters patent, or the supplementary letters patent, make no other definite provision, the stock of the company, or any increased amount thereof, so far as it is not allotted thereby, shall be allotted at such times and in such manner as the directors prescribe by by-law. 40 V., c. 43, s. 35.

27. Shares to be paid in cash, subject to certain exceptions.—Every share in the company shall, subject to the provisions of sub-section five of section five of this Act, be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise agreed upon or determined by a contract duly made in writing and filed with the Secretary of State at or before the issue of such shares. 40 V., c. 43, s. 83.

(*As to Preference Stock, see 62-63 V., c. 40, at p. 556, infra.*)

DIRECTORS.

28. Board of directors.—The affairs of the company shall be managed by a board of not more than fifteen nad not less than three directors. 40 V., c. 43, s. 26.

29. Provisional directors.—The persons named as such, in the letters patent, shall be the directors of the company, until replaced by others duly appointed in their stead. 40 V., c. 43, s. 27.

30. Qualifications of subsequent directors.—No person shall be elected or appointed as a director thereafter unless he is a shareholder, owning stock absolutely in his own right, and to the amount required by the by-laws of the company, and not in arrear in respect of any call thereon; and at all times the majority of the directors of the company shall be persons resident in Canada. 40 V., c. 43, s. 28.

31. By-law for increase or decrease of number of directors.—The company may, by by-law, increase to not more than fifteen, or decrease to not less than three, the number of its directors, or may change the company's chief place of business in Canada; but no by-law for either of the said purposes shall be valid or acted upon unless it is approved by a vote of at least two-thirds in value of the stock represented by the shareholders present at a special general meeting duly called for considering the by-law; nor until a copy of such by-law, certified under the seal of the company, has been deposited with the Secretary of State, and has also been published in the *Canada Gazette*. 40 V., c. 43, s. 18.

32. Election of directors.—Directors of the company shall be elected by the shareholders, in general meeting of the company assembled at some place within Canada,—at such times, in such manner and for such term, not exceeding two years, as the letters patent, or, in default thereof, as the by-laws of the company prescribe. 40 V., c. 43, s. 29.

33. Mode and times of election.—In the absence of other provisions in such behalf, in the letters patent or by-laws of the company,—

(*a*) The election of directors shall take place yearly, and all the directors then in office shall retire, but, if otherwise qualified, they shall be eligible for re-election:

(*b*) Notice of the time and place for holding general meetings of the company shall be given at least twenty-one days previously thereto, in some newspaper published in the place where the head office or chief place of business of the company is situate, or if there is no such newspaper, then in the place nearest thereto in which a newspaper is published;

(*c*) At all general meetings of the company, every shareholder shall be entitled to give one vote for each share then held by him: such votes may be given in person or by proxy—the holder of any such proxy being himself a shareholder; but no shareholder shall be entitled, either in person or by proxy, to vote at any meeting unless he has paid all the calls then payable upon all the shares held by him; all questions proposed for the consideration of the shareholders shall be determined by the majority of votes—the chairman presiding at such meeting having the casting vote in case of an equality of votes;

(*d*) Every election of directors shall be by ballot;

(*e*) Vacancies occurring in the board of directors may be filled, for the remainder of the term, by the directors from among the qualified shareholders of the company;

(*f*) The directors shall, from time to time, elect from among themselves a president and, if they see fit, a vice-president of the company; and may also appoint all other officers thereof. 40 V., c. 43, s. 30.

34. Failure to elect directors, how remedied.—If, at any time, an election of directors is not made, or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any subsequent general meeting of the company duly called for that purpose; and the retiring directors shall continue in office until their successors are elected. 40 V., c. 43, s. 31.

POWERS OF DIRECTORS.

35. Powers and duties of directors.—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 Act, for the following purposes:—

(*a*) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the isuue 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 number of the directors, their term of service, the amount of their stock qualification, and their remuneration, 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;

(*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 requirements as to proxies, and the procedure in all things at such meetings;

(*f*) The imposition and recovery of all penalties and forfeitures which admit of regulation by by-law;

(*g*) The conduct, in all other particulars, of the affairs of the company:

And the directors may, from time to time, repeal, amend or re-enact the same; but every such by-law, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company, duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, at and from that time only, cease to have force:

2. No by-law for the issue, allotment or sale of any portion of the unissued stock at any greater discount or at any less premium than that which has been previously authorized at a general meeting, and no by-law for the remuneration of the president or any director, shall be valid or acted upon until the same has been confirmed at a general meeting. 40 V., c. 43, s.32, *part*.

36. Debts to company may be deducted from dividends.—The directors may deduct from the dividends payable to any shareholder all such sums of money as are due from him to the company, on account of calls or otherwise. 40 V., c. 43, s. 59.

37. Issue of bonds, &c., by company.—The directors may, when authorized by a by-law for that purpose, passed and approved of by the votes of shareholders, representing at least two-thirds in value of the subscribed stock of the company represented at a special general meeting duly called for considering the by-law,—

(*a*) Borrow money upon the credit of the company and issue bonds, debentures or other securities for any sums borrowed, at such prices as are deemed necessary or expedient; but no such debentures shall be for a less sum than one hundred dollars;

(*b*) Hypothecate or pledge the real or personal property of the company to secure any sums borrowed by the company:

But the amount borrowed shall not, at any time, be greater than seventy-five per cent. of the actual paid-up stock of the company:—Provided always that the limitations and restrictions on the borrowing powers of the company contained in this section shall not apply to or include moneys borrowed by the company on bills of exchange or promissory notes drawn, made, accepted, or endorsed by the company. 40 V., c. 43, s. 85 (as amended by 60-61 V. (1897), c. 27, s. 1).

CALLS.

38. Calling in of moneys unpaid on shares.—The directors may, from time to time, make such calls upon the shareholders in respect of all moneys unpaid upon their respective shares, as they think fit, at such times and places and in such payments or instalments as the letters patent, or this Act, or the by-laws of the company require or allow. 40 V., c. 43, s. 52.

39. Interest on calls overdue.—A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed; and if a shareholder fails to pay any call due by him, on or before the day appointed for the payment thereof, he shall be liable to pay interest for the same, at the rate of six per cent. per annum, from the day appointed for payment to the time of actual payment thereof. 40 V., c. 43, s. 53.

40. Payment in advance on shares.—The directors may, if they think fit, receive from any shareholder willing to advance the same, all or any part of the amounts due on the shares held by such shareholder, beyond the sums then actually called for; and upon the moneys so paid in advance, or so much thereof as, from time to time, exceeds the amount of the calls then made upon the shares in respect of which such advance is made, the company may pay interest at such rate, not exceeding eight per cent. per annum, as the shareholder who pays such sum in advance and the directors agree upon. 40 V., c. 43, s. 54.

41. Forfeiture of shares for non-payment of calls.—If, after such demand or notice as is prescribed by the letters patent or by the by-laws of the company, any call made upon any share is not paid within such time as, by such letters patent or by the by-laws, is limited in that behalf, the directors, in their discretion, by vote to that effect duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment is not made; and the same shall thereupon become the property of the company and may be disposed of as, by the by-laws of the company or otherwise, they prescribe; but, notwithstanding such forfeiture, the holder of such shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof. 40 V., c. 43, s. 55.:

42. Enforcement of payment of calls by action.—The directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls, and interest thereon, by action in any court of competent jurisdiction; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number of calls and the amount of each call, whereby an action has accrued to the company under this Act; and a certificate under their seal, and purporting to be signed by any officer of the company, to the effect that the defendant is a shareholder, that such call or calls has or have been made, and that so much is due by him and unpaid thereon, shall be received in all courts as *primâ facie* evidence thereof. 40 V., c. 43, s. 56.

BOOKS OF THE COMPANY.

43. Book to be kept and what to contain.—The company shall cause a book or books to be kept by the secretary, or by some other officer specially charged with that duty, wherein shall be kept recorded,—

(*a*) A copy of the letters patent incorporating the company, and of any supplementary letters patent, and of all by-laws thereof;

(*b*) The names, alphabetically arranged, of all persons who are or have been shareholders;

(*c*) The address and calling of every such person, while such shareholder;

(*d*) The number of shares of stock held by each shareholder ;

(*e*) The amounts paid in and remaining unpaid, respectively, on the stock of each shareholder;

(*f*) The names, addresses and calling of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director:

2. A book called the register of transfers shall be provided, and in such book shall be entered the particulars of every transfer of shares in the capital of the company. 40 V., c. 43, s. 36.

44. Books to be open for inspection and taking extracts therefrom.—Such books shall, during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company, and their personal representatives, at the head office or chief place of business of the company; and every such shareholder, creditor or personal representative may make extracts therefrom. 40 V., c. 43, s. 37.

45. Penalty for false entries.—Every director, officer or servant of the company, who knowingly makes or assists in making any untrue entry in any such book, or who refuses or wilfully neglects to make any proper entry therein, or to exhibit the same, or to allow the same to be inspected and extracts to be taken therefrom, is guilty of a misdemeanor. 40 V., c. 43, s. 40.

46. Forfeiture for neglect.—Every company which neglects to keep such book or books as aforesaid, shall forfeit its corporate rights. 40 V., c. 43, s. 38.

47. Books to be prima facie evidence.—Such books shall be *primâ facie* evidence of all facts purporting to be thereby stated, in any action, suit or proceeding against the company or against any shareholder. 40 V., c. 43, s. 39.

TRANSFER OF SHARES.

48. Transfer of shares valid only after entry.—No transfer of shares, unless made by sale under execution, or under the decree, order or judgment of a court of competent jurisdiction, shall be valid for any purpose whatever, until entry thereof is duly made in the register of transfers, except for the purpose of exhibiting the rights of the parties thereto towards each other, and of rendering the transferee liable, in the meantime, jointly and severally, with the transferrer, to the company and its creditors. 40 V., c. 43, s. 41.

49. Liabilities of directors as regards transfers of shares in certain cases.—No transfer of shares, whereof the whole amount has not been paid in, shall be made without the consent of the directors; and whenever any transfer of shares not fully paid in has been made with such consent, to a person who is not apparently of sufficient means to fully pay up such shares, the directors shall be jointly and severally liable to the creditors of the company, in the same manner and to the same extent as the transferring shareholder, but for such transfer, would have been; but if any director present when any such transfer is allowed does forthwith, or if any director then absent does, within twenty-four hous after he becomes aware thereof and is able so to do, enter on the minute book of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no newspaper there published, then in the newspaper published nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability. 40 V., c. 43, s. 42.

50. Provision when shares are transmitted otherwise than by transfer.—Whenever the interest in any shares of the capital stock of the company is transmitted by the death of any shareholder or otherwise, or whenever the ownership of or legal right of possession in any shares changes by any lawful means, other than by transfer according to the provisions of this Act, and the directors of the company entertain reasonable doubts as to the legality of any claim to such shares, the company may make and file, in one of the superior courts in the Province in which the head office of the company is situated, a declaration and petition in writing, addressed to the justices of the court, setting forth the facts and the number of shares previously belonging to the person in whose name such shares stand in the books of the company, and praying for an order or judgment adjudicating and awarding the said shares to the person or persons legally entitled to the same,—by which order or judgment the company shall be guided and held fully harmless and indemnified and released from every other claim to the said shares or arising in respect thereof:

2. Notice of the intention to present such petition shall be given to the person claiming such shares, or to the attorney of such person duly authorized for the purpose, who shall, upon the filing of such petition, establish his right to the shares referred to in such petition; and the time to plead and all other proceedings in such cases shall be the same as those observed in analogous cases before the said superior courts: Provided always, that the costs and expenses of procuring such order or judgment shall be paid by the person or persons to whom such shares are declared lawfully to belong; and that such shares shall not be transferred in the books of the company until such costs and expenses are paid,—saving the recourse of such person against any person contesting his right to such shares. 40 V., c. 43, s. 43.

51. Restriction as to transfer.—No share shall be transferable until all previous calls thereon are fully paid in. 40 V., c. 43, s. 44.

52. As to transfer by debtor to the company.—The directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company. 40 V., c. 43, s. 45.

53. Transfer by personal representative.—Any transfer of the shares or other interest of a deceased shareholder, made by his personal representative, shall, notwithstanding such personal representative is not himself a shareholder, be of the same validity as if he had been a shareholder at the time of his execution of the instrument of transfer. 40 V., c. 43, s. 46.

LIABILITY OF SHAREHOLDERS.

54. Liability limited to amount unpaid on stock.—The shareholders of the company shall not, as such, be responsible for any act, default or liability of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing relating to or connected with the company, beyond the amount unpaid on their respective shares in the capital stock thereof. 40 V., c. 43, s. 48.

55. Liability of shareholders.—Every shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon; but he shall not be liable to an action therefor by any creditor until an execution at the suit of such creditor against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, not exceeding the amount unpaid on his shares, as aforesaid, shall be the amount recoverable, with costs, from such shareholder; and any amount so recoverable, if paid by the shareholder, shall be considered as paid on his shares. 40 V., c. 43, s. 47.

56. Trustees, &c., not personally liable.—No person, holding stock in the company as an executor, administrator, tutor, curator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estate 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 interdicted person, or the person interested in such trust fund would be, if living and competent to act and holding such stock in his own name; and no person holding such stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same and shall be liable as a shareholder accordingly. 40 V., c. 43, s. 49.

57. But entitled to vote.—Every such executor, administrator, curator, guardian or trustee shall represent the stock held by him, at all meetings of the company, and may vote as a shareholder; and every person who pledges his stock may represent the same at all such meetings and, notwithstanding such pledge, vote as a shareholder. 40 V., c. 43, s. 50.

LIABILITY OF DIRECTORS AND OFFICERS.

58. Liability of directors declaring a dividend when company is insolvent, &c.—If the directors of the company declare and pay any dividend when the company is insolvent, or any dividend, the payment of which renders the company insolvent, or impairs the capital stock thereof, they shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the debts of the company then existing, and for all thereafter contracted during their continuance in office, respectively; but if any director present when such dividend is declared does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware thereof and able so to do, enter on the minutes of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no newspaper there published, then in the newspaper published nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability. 40 V., c. 43, s. 67.

59. No loan by company to shareholders, except by loan companies: liability of directors.—No loan shall be made by the company to any shareholder; if such loan is made, all directors and other officers of the company making the same, or in anywise assenting thereto, shall be jointly and severally liable for the amount of such loan, with interest, to the company,—and also to the creditors of the company for all debts of the company then existing, or contracted between the time of the making of such loan and that of the repayment thereof; but the provisions of this section shall not apply to loan companies. 40 V., c. 43, s. 68.

60. Liability of directors for wages.—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; and the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors. 40 V., c. 43, s. 69.

DOMICILE—SERVICE OF PROCESS, ETC.

61. Offices and agencies of the company in Canada.—The company shall, at all times, have an office in the city or town in which its chief place of business is situate, which shall be the legal domicile of the company in Canada; and notice of the situation of such office and of any change therein shall be published in the *Canada Gazette*; and the company may establish such other offices and agencies elsewhere in Canada, as it deems expedient. 40 V., c .43, s. 60.

62. Service of process on the company.—Any summons, notice, order or other process or document required to be served upon the company, may be served by leaving the same at the said office in the city or town in which its chief place of business is situate, with any adult person in the employ of the company, or on the president or secretary of the company, or by leaving the same at the domicile of either of them, or with any adult person of his family or in his employ; or if the company has no known office or chief place of business, and has no known president or secretary, 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. 40 V., c. 43, s. 61.

63. Use of common seal dispensed with in certain cases.—Any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, manager or other authorized officer of the company, and need not be under the seal of the company. 40 V., c. 43, s. 62.

64. Service of notices upon members.—Notices to be served by the company upon the shareholders may be served either personally or by sending them through the post, in registered letters, addressed to the shareholders at their places of abode as they appear on the books of the company. 40 V., c. 43, s. 63.

65. Service of notice by post.—A notice or other document served by post by the company on a shareholder, shall be held to be served at the time when the registered letter containing it would be delivered in the ordinary course of post; and to prove the fact and time of service it shall be sufficient to prove that such letter was properly addressed and registered, and was put into the post office, and the time when it was put in, and the time requisite for its delivery in the ordinary course of post. 40 V., c. 43, s. 64.

66. Evidence of by-laws.—A copy of any by-law of the company, under its seal, and purporting to be signed by any officer of the company, shall be received as against any shareholder of the company as *primâ facie* evidence of such by-law in all courts in Canada. 40 V., c. 43, s. 33.

67. Actions between company and shareholders.—Any description of action may be prosecuted and maintained between the company and any shareholder thereof; and no shareholder shall, by reason of being a shareholder, be incompetent as a witness therein. 40 V., c. 43, s. 70.

68. Mode of incorporation, &c., how to be set forth in legal proceedings.—In any action or other legal proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name, as incorporated by virtue of letters patent—or of letters patent and supplementary letters patent, as the case may be—under this Act; and the notice in the *Canada Gazette*, of the issue of such letters patent or supplementary letters patent, shall be *primâ facie* proof of all things therein contained; and on production of the letters patent or supplementary letters patent, or of any exemplification or copy thereof under the Great Seal, the fact of such notice shall be presumed; and, except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling the same, the letters patent or supplementary letters patent, or any exemplification or copy thereof under the Great Seal, shall be conclusive proof of every matter and thing therein set forth. 40 V., c. 43, s. 71.

PROVISIONS AS TO EXISTING COMPANIES.

69. Existing companies may apply for charters under this Act.—Any company heretofore incorporated for any purpose or object for which letters patent may be issued under this Act, whether under a special or a general Act, and now being a subsisting and valid corporation, may apply for letters patent under this Act, and the Governor in Council, upon proof that notice of the application has been inserted for four weeks in the *Canada Gazette*, may direct the issue of letters patent incorporating the shareholders of the said company as a company under this Act; and thereupon all the rights or obligations of the former company shall be 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 any such letters patent to set out the names of the shareholders; and after the issue of the letters patent the company shall be governed in all respects by the provisions of this Act, except that the liability of the shareholders to creditors of the old company shall remain as at the time of the issue of the letters patent. 40 V., c. 43, s. 80.

70. Subsisting companies may apply for charters with extended powers.—If a subsisting company applies for the issue of letters patent under this Act, the Governor in Council may, by the letters patent, extend the powers of the company to such other objects for which letters patent may be issued under this Act as the applicant desires and as the Governor in Council thinks fit to include in the letters patent, and which have been mentioned in the notice of the application for the same, in the *Canada Gazette*; and the Governor in Council may, in the said letters patent, name the first directors of the new company; and the letters patent may be issued to the new company by the name of the old company or by another name. 40 V., c. 43, s. 81.

71. Provisions touching supplementary letters patent to apply.—All the provisions of this Act in relation to the obtaining of supplementary letters patent by companies incorporated hereunder shall, so far as applicable, apply and extend to applications for letters patent under the two sections next preceding. 40 V., c. 43, s. 82.

GENERAL PROVISIONS.

72. Agencies in United Kingdom.—The company may have an agency or agencies in any city or town in the United Kingdom. 40 V., c. 43, s. 86.

73. Dividend not to impair capital.—No dividend shall be declared which will impair the capital of the company. 40 V., c. 43, s. 58.

74. Special general meetings.—Shareholders who hold one-fourth part in value of the subscribed stock of the company may, at any time, call a special meeting thereof for the transaction of any business specified in such written requisition and notice as they make and issue to that effect. 40 V., c .43, s. 32, *part*.

75. Acts of company's attorney valid.—Every deed which any person, lawfully empowered in that behalf by the company as its attorney, signs on behalf of the company, and seals with his seal, shall be binding on the company and shall have the same effect as if it was under the seal of the company. 40 V., c. 43, s. 65.

76. Contracts, &c., when to be binding on company.—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 by-laws 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 by-law or special vote or order; and the person so acting as agent, officer or servant of the company shall not be thereby subjected individually to any liability whatsoever to any third person therefor: Provided always, that nothing in this Act shall be construed to authorize the 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 or insurance. 40 V., c. 43, s. 66.

77. Proof may be by declaration or affidavit,—Proof of any matter which is necessary to be made under this Act may be made by oath or affirmation, or by solemn declaration, before any justice of the peace, or any commissioner for taking affidavits, to be used in any of the courts in any of the Provinces of Canada, or any notary public, each of whom is hereby authorized and empowered to administer oaths and receive affidavits and declarations for that purpose. 40 V., c. 43, s. 76.

78. Certain informalities not to invalidate letters patent.—The provisions of this Act relating to matters preliminary to the issue of the letters patent or supplementary letters patent shall be deemed directory only, and no letters patent or supplementary letters patent issued under this Act shall be held void or voidable on account of any irregularity in any notice prescribed by this Act, or on account of the insufficiency or absence of any such notice, or on account of any irregularity in respect of any other matter preliminary to the issue of the letters patent or supplementary letters patent. 40 V., c. 43, s. 77.

79. Word " limited " to be inserted after name of company on all notices, &c.—The company shall keep painted or affixed, its name, with the word " limited " after the name, on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name, with the said word after it, engraven in legible characters on its seal, and shall have its name, with the said word after it, 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 such company, and in all bills of parcels, invoices and receipts of the company :

2. Every company which does not keep painted or affixed, its name, with the word " limited " after it, in manner directed by this Act, shall incur a penalty of twenty dollars for every day during which such name is not so kept painted or affixed:

3. Every director and manager of the company, who knowingly and wilfully authorizes or permits such default, shall be liable to the like penalty:

4. Every director, manager or officer of the company, and every person on its behalf, who uses or authorizes the use of any seal purporting to be a seal of the company, whereon its name, with the said word " limited " after it, is not so engraven as aforesaid, or who issues or authorizes the issue of any notice, advertisement or other official publication of such company, or who signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or who issues or authorizes to be issued any bill of parcels, invoice or receipt of the company, wherein its name, with the said word after it, is not mentioned in manner aforesaid, shall incur a penalty of two hundred dollars, and shall also 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. 40 V., c. 43, ss. 78 *and* 79.

80. Prospectus, &c., to specify certain contracts entered into by company, or be deemed fraudulent.—Every prospectus of the company, and every notice inviting persons to subscribe for shares in the company, shall specify the dates and the names of the persons 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 otherfise; and every prospectus or notice which does not specify the same shall, with respect to any person who takes shares in the company on the faith of such prospectus or notice, and who has not had notice of such contract, be deemed fraudulent on the part of the promoters, directors and officers of the company who knowingly issue such prospectus or notice. 40 V., c. 43, s. 84.

81. Company not to be liable.—The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share; and the receipt of the shareholder in whose name the same stands in the books of the company, shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, and whether or not notice of such trust has been given to the company; and the company shall not be bound to see to the application of the money paid upon such receipt. 40 V., c. 43, s. 51.

82. Directors indemnified in suits., &c., against the company.—Every director of the company, and his heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any general meeting thereof, from time to time, and at all times, be indemnified and saved harmless out of the funds of the company, from and against all costs, charges and expenses whatsoever which he sustains or incurs in or about any action, suit or proceeding which is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him, in or about the execution of the duties of his office; and also from and against all other costs, charges and expenses which he sustains or incurs, in or about, or in relation to the affairs thereof,—except such costs, charges or expenses as are occasioned by his own wilful neglect or default. 40 V., c. 43, s. 57.

83. Forfeiture of charter for non-user.—The charter of the company shall be forfeited by non-user during three consecutive years, or if the company does not go into actual operation within three years after it is granted. 40 V., c. 43, s. 72.

84. Fees on letters patent, &c., to be fixed by Governor in Council.—The Governor in Council may, from time to time, establish, alter and regulate the tariff of the fees to be paid on application for letters patent and supplementary letters patent under this Act, may designate the department or departments through which the issue thereof shall take place, and may prescribe the forms of proceeding and registration in respect thereof, and all other matters requisite for carrying out the objects of this Act:

2. The amount of the fees may be varied according to the nature of the company, the amount of the capital stock and other particulars as the Governor in Council thinks fit:

3. No steps shall be taken in any department towards the issue of any letters patent or supplementary letters patent under this Act, until after all fees therefor are duly paid. 40 V., c. 43, s. 74.

85. Full statement of affairs at each meeting for elections.—The directors of every company shall lay before its shareholders a full printed statement of the affairs and financial position of the company at or before each general meeting of the company for the election of directors. 40 V., c. 43, s. 87.

LOAN COMPANIES.

(See also 50-51 V., c. 20, at p. 553, infra.)

86. Sections relating to loan companies.—The following sections of this Act apply to loan companies only, created, formed or amalgamated prior to August 11th, 1899 (see 62-63 V., ch. 41). 40 V., c. 43, *Sub-title relating to loan companies.*

87. Shares.—The capital stock of every loan company shall be divided into shares of one hundred dollars each. 40 V., c. 43, s. 88.

88. Powers.—Every loan company may, from time to time,—

(*a*) Lend and advance money, by way of loan or otherwise, for such periods as it deems expedient, on the security of real estate, or on the public securities of Canada, or of any of the Provinces thereof, or on the security of debentures of any municipal or other corporation, issued under or in pursuance of any statutory authority, and upon such terms and conditions as to the company seem satisfactory or expedient;

(*b*) Acquire, by purchase or otherwise, any security upon which it is authorized to lend or advance money, and re-sell the same as it dems advisable ;

(*c*) Do all acts that are necessary for advancing such sums of money, and for receiving and obtaining repayment thereof, and for compelling the payment of all interest accruing from such sums so advanced, and the observance and fulfilment of any conditions annexed to such advance, and for enforcing the forfeiture of any term or property consequent on the non-fulfilment of such conditions, or of conditions entered into for delay of payment ;

(*d*) Give receipts, acquittances and discharges, either, absolutely and wholly or partially, and execute such deeds, assignments or other instruments as are necessary for carrying any such purchase or re-sale into effect:

And for every and any of the foregoing purposes, and for every and any other purpose in this Act mentioned or referred to, the company may lay out and apply the capital and property, for the time being, of the company, or any part thereof, or any of the moneys authorized to be hereafter raised or received by the company in addition to its capital for the time being, and may authorize and exercise all acts and powers whatsoever, in the opinion of the directors of the company requisite or expedient to be done or exercised in relation thereto. 40 V., c. 43, s. 89.

89. Company may act as agents and lend money, either on their own behalf or as agents for others.—The company may act as an agency association for the interest and on behalf of others who intrust it with money for that purpose, and may, either in the name of the company or of such others, lend and advance money to any person upon such securities as are mentioned in the next preceding section, or to any body corporate, or to any municipal or other authority, or to any board or body of trustees or commissioners, upon such terms and upon such security as to the company appear satisfactory, and may purchase and acquire any securities on which they are authorized to advance money, and again re-sell the same:

2. The conditions and terms of such loans and advances, and of such purchases and re-sales, may be enforced by the company for its benefit, and for the benefit of the person or persons or corporation for whom such money has been lent and advanced, or such purchase and re-sale made; and the company shall have the same power in respect of such loans, advances, purchases and sales as are conferred upon it in respect of loans, advances, purchases and sales made from its own capital:

3. The company may also guarantee the repayment of the principal or the payment of the interest, or both, of any moneys intrusted to the company for investment:

4. The company may, for every or any of the foregoing purposes, lay out and employ the capital and property, for the time being, of the company, or any part of the moneys authorized to be raised by the company in addition to its capital for the time being, or any moneys so intrusted to it as aforesaid, and may do, assent to, and exercise all acts whatsoever, in the opinion of the directors of the company for the time being requisite or expedient to be done in regard thereto:

5. All moneys of which the repayment of the principal or payment of interest is guaranteed by the company, shall, for the purposes of this Act, be deemed to be money borrowed by the company. 40 V., c. 43, s. 90.

90. Borrowing powers of company and security to be given by it.—The directors may, from time to time, with the consent of the shareholders, obtained at any general meeting, borrow money on behalf of the company, at such rates of interest as are lawful under this Act, and upon such terms as they, from time to time, think proper; and the directors may, for that purpose, execute any debentures, mortgages, bonds or other instruments, under the seal of the company, for sums of not less than one hundred dollars or twenty pounds sterling each, or may assign, transfer or deposit, by way of equitable mortgage or otherwise, for the sums so borrowed, any of the documents of title, deeds, muniments, securities or property of the company, and either with or without power of sale or other special provisions, as the directors deem expedient. 40 V., c. 43, s. 91.

91. Company may receive moneys on deposit.—The directors may, from time to time, with the consent of the shareholders obtained at any general meeting, receive money on behalf of the company on deposit for such periods and at such rates of interest as are agreed upon; and money so received on deposit shall, for the purposes of this Act, be deemed to be money borrowed by the company. 40 V., c. 43, s. 92.

92. $100,000 to be paid up before borrowing.—The company shall not borrow money unless at least one hnudred thousand dollars of its subscribed capital stock has been paid up:

2. The company shall not borrow money unless at least twenty per cent. of its subscribed capital stock has been paid up:

3. If the company borrows money by way of deposit under the next preceding section, the aggregate amount of the sums so borrowed, by way of deposit, shall not at any time, whether the company borrows solely by way of deposit or also in other ways, exceed the aggregate amount of its paid up capital, and of its other cash actually in hand, or deposited by it in any chartered bank or banks in Canada:

4. If the company borrows money solely on debentures or other securities, and by guarantee as hereinbefore authorized and not by way of deposit, under the next preceding section, the aggregate amount of the sums so borrowed shall not, at any time, exceed four times the amount of its paid up and unimpaired capital, or the amount of its subscribed capital, at the option of the company:

5. If the company borrows money both by way of debentures or other securities, or by guarantee, as aforesaid, and also by way of deposit, the aggregate amount of money so borrowed shall not, at any time, exceed the amount of the principal moneys remaining unpaid on securities then held by the company, nor shall it exceed double the amount of the then actually paid up and unimpaired capital of the company; but the amount of cash then actually in the hands of the company, or deposited by it in any chartered bank, or both, shall be deducted from the aggregate amount of the liabilities which the company has then incurred, as above mentioned, in calculating such aggregate amount for the purposes of this sub-section:

6. In the event of any company now incorporated, availing itself of the provisions of this Act for the purpose of enlarging its powers to borrow money by debentures, nothing herein contained shall be construed as affecting or in any wise impairing the right of the holders of debentures issued by such company. 40 V., c. 43, s. 93.

93. Not to purchase stock in other companies.—The company shall not use any of its funds in the purchase of stock in any other incorporated company. 40 V., c. 43, s. 94.

94. Power to hold real estate necessary for business.—The company may hold such real estate as is necessary for the transaction of its business, not exceeding in yearly value the sum of ten thousand dollars, or such real estate as, being mortgaged or hypothecated to it, is acquired by it for the protection of its investments,—and may, from time to time, sell, mortgage, lease or otherwise dispose of the same;

2. The company shall sell any real estate acquired in satisfaction of any debt within seven years after it has been so acquired, unless there is in force in the province or territory in which such real estate is situate an Act of such province or territory respecting the sale or disposition of lands so acquired and the provisions of such Act are inconsistent with those of this subsection, in which case the provisions of such Act shall apply;

3. If real estate to which subsection two of this section applies is not sold within the time therein limited, it shall revert to the previous owner or to his heirs or assigns, (as re-enacted by 58-59 V. (1895), c. 21, s. 1.)

95. Company may charge commission.—The company, when acting as an agency association, may charge such commission to the lender or borrower, or both, upon the moneys invested, as is agreed upon, or as is reasonable in that behalf. 40 V., c. 43, s. 96.

96. What interest company may recover.—The company may stipulate for, take, reserve and exact any rate of interest or discount that may be lawfully taken by individuals, or, in the Province of Quebec, by incorporated companies under like circumstances, and may also receive an annual payment on any loan by way of a sinking fund for the gradual extinction of such loan, upon such terms and in such manner as are regulated by the by-laws of the company: Provided always, that no fine or penalty shall be stipulated for, taken, reserved or exacted in respect of arrears of principal or interest which has the effect of increasing the charge in respct of arrears beyond the rate of interest or discount on the loan. 40 V., c. 43, s. 97.

97. Register of securities.—A register of all securities held by the company shall be kept; and within fourteen days after the taking of any security, an entry or memorandum specifying the nature and amount of such security, and the names of the parties thereto, with their proper additions, shall be made in such register. 40 V., c. 43, s. 98.

98. Company may unite with another company or purchase or sell assets.—The Company may unite, amalgamate and consolidate its stock, property, business, and franchises with those of any other company or society incorporated or chartered to transact a like business and any other business in connection with such business, or with those of any building, savings or loan company or society heretofore or hereafter incorporated or chartered, or may sell its assets to any such other company or society, which is hereby authorized to purchase the same, or may purchase the assets of any other such company or society, which is hereby authorized to sell the same, and for the purpose of carrying out such purchase or sale, the company so purchasing may assume the liabilities of the company so selling and may enter into such bond or agreement of indemnity with the company or the individual shareholders thereof or both as may be necessary, and may enter into all contracts and agreements necessary to such union, amalgamation, consolidation, sale, purchase or acquisition (*as re-enacted by 50-51 V., c. 20, s. 10*).

99. Agreement for union, how made and what to provide.—The directors of the Company and of any other such company or society may enter into a joint agreement under the corporate seals of each of the said corporations for the union, amalgamation or consolidation of the said corporations, or for the sale by the Company of its assets to any other such company or society, or for the purchase and acquisition by the Company of the assets of any such company or society, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors and other officers thereof, and who shall be the first directors and officers thereof, the manner of converting the capital stock of each of the said corporations into that of the new corporation, with such other details as they deem necessary to perfect such new organization, and the union, amalgamation and consolidation of the said corporations and the after management and working thereof, or the terms and mode of payment for the assets of the Company by any other such company or society purchasing the same, or for the assets of any other such company or society purchased or acquired by the company (*as re-enacted by 50-51 V., c. 20, s. 10*).

100. Approval of shareholders.—Such agreement, or if no agreement has been entered into but an offer has been made by another company or society under its corporate seal for the purchase of the assets of the Company, or if the Company has made any offer under its corporate seal for the purchase of the assets of another Company or society, then such offer shall be submitted to the shareholders of each of the said corporations at a meeting thereof to be held separately for the purpose of taking the same into consideration:

2. Notice of the time and place of such meetings and the objects thereof shall be given by written or printed notices addressed to each shareholder of the said corporations respectively, at his last known post office address or place of residence, and also by a general notice inserted in a newspaper published at the chief place of business of such corporations once a week for six successive weeks;

3. At such meetings of shareholders such agreement or offer shall be considered and a vote by ballot taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, unless otherwise provided by the by-laws of the said respective corporations, and the said ballots being cast in person or by proxy; and if two-thirds of the votes of all the shareholders of such corporations representing not less than two-thirds in value of the paid up capital stock of each shall be for the adoption of such agreement, or the adoption and acceptance of such offer, then that fact shall be certified upon the said agreement or offer by the secretary or manager of each of such corporations under the corporate seals thereof:

4. If the said agreement is so adopted or the said offer so adopted and accepted at the respective meetings of the shareholders of each of the said corporations, the agreement so adopted or the offer so adopted and accepted and the said certificates thereon shall be filed in the office of the Secretary of State of Canada, and the said agreement or offer shall thenceforth be taken and deemed to be the agreement and act of union, amalgamation and consolidation of the said corporations, or the agreement and deed of purchase and acquisition of the assets of the Company by such other company or society so purchasing or by the Company of the assets of the company or society so selling, as the case may be; and the assets of the company selling shall thereupon, without any further conveyance, become absolutely vested in the Company purchasing, and the Company purchasing shall thereupon become and be responsible for the liabilities of the Company or Society so selling, the whole as fully and effectually to all intents and purposes as if a special Act were passed with that object; and in dealing with the assets of the Company selling it shall be sufficient for the Company purchasing to recite the said agreement and the filing thereof in the office of the Secretary of State of Canada.

5. A copy of such agreement or offer so filed and of the certificates thereon properly certified shall be evidence of the existence of such new corporation or of such purchase and acquisition:

6. Due proof of the foregoing facts shall be laid before the Governor in Council, and the Governor in Council may issue letters patent to the new

corporation and notice thereof shall be duly published by the Secretary of State in the *Canada Gazette*, after which the new corporation may transact business:

7. The shareholders who may vote at such meetings shall be those only whose names are duly entered in the books of the respective corporations at the date of the first publication of the notices calling such meetings, and they shall vote upon the shares only then standing in their respective names (*as re-enacted by 50-51 V., c. 20, s. 10*).

101. Effect of the agreement when perfected.—Upon the completion and perfection of the said agreement and act of consolidation, as provided in the next preceding section, the several corporations or societies, parties thereto, shall be deemed and taken to be consolidated, and to form one corporation, by the name in the said agreement provided, with a common seal, and shall possess all the rights, privileges and franchises of each of such corporations. 40 V., c. 43, s. 102.

102. Business and rights of both companies vested in new company.—Upon the consummation of such consolidation as aforesaid, all and singular the business, property, real and personal, and all rights and incidents appurtenant thereto, all stock, mortgages or other securities, subscriptions and other debts due on whatever account, and other things in action belonging to such corporations or either of them, shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed: Provided however, that all rights of creditors and liens upon the property of either of such corporations shall be unimpaired by such consolidation, and that all debts, liabilities and duties of either of the said corporations shall thenceforth attach to the new corporation, and may be enforced against it to the same extent as if the said debts, liabilities and duties had been incurred or contracted by it; and that no action or proceeding, legal or equitable, by or against the said corporations so consolidated, or either of them, shall abate or be affected by such consolidation, but for all the purposes of such action or proceeding such corporation may be deemed still to exist, or the new corporation may be substituted in such action or proceeding in the place thereof. 40 V., c. 43, s. 103.

103. Annual statement to Minister of Finance, and what it must show.—The company shall transmit, on or before the first day of March in each year, to the Minister of Finance and Receiver General a statement in duplicate, to the thirty-first day of December inclusive of the previous year, verified by the oath of the president or vice-president and the manager, setting out the capital stock of the company, and the proportion thereof paid up, the assets and liabilities of the company, the amount and nature of the investments made by the company, both on its own behalf and on behalf of others, and the average rate of interest derived therefrom—distinguishing the classes of securities, and also the extent and value of the lands held by it, and such other details as to the nature and extent of the business of the company as the Minister of Finance and Receiver General requires, and in such form and with such details as he, from time to time, requires and prescribes; but the company shall, in no case, be bound to disclose the name or private affairs of any person who has dealings with it. 40 V., c. 43, s. 104.

SCHEDULE.

FORM A.

Public notice is hereby given that under "*The Companies Act*" letters patent have been issued under the Great Seal of Canada, bearing date the day of incorporating [*here state names, address and calling of each corporator named in the letters patent*], for the purpose of [*here state the undertaking of the Company, as set forth in the letters patent*], by the name of [*here state the name of the Company as in the letters patent*] with a total capital stock of dollars divided into shares of dollars.

Dated at the office of the Secretary of State of Canada, this day of 18 .

A.B.,
Secretary.

40 V., c. 43, sch. A.

FORM B.

Public notice is hereby given that under "*The Companies Act*" supplementary letters patent have been issued under the Great Seal of Canada, bearing date the day of whereby the undertaking of the Company has been extended to include [*here set out the other purposes or objects mentioned in the supplementary letters patent*].

Dated at the office of the Secretary of State of Canada, this day of 18 .

A.B.,
Secretary.

40 V., c. 43, sch. C.

FORM C.

Public notice is hereby given that under "*The Companies Act*" supplementary letters patent have been issued under the Great Seal of Canada, bearing date the day of whereby the total capital stock of [*here state the name of the Company*] is increased [*or* reduced, *as the case may be*] from dollars to dollars.

Dated at the office of the Secretary of State of Canada, this day of 18 .

A.B.,
Secretary.

40 V., c. 43, sch. A.

AN ACT TO AMEND "THE COMPANIES ACT."

(*Being 50-51 V. c. 20.*)

[*Assented to 23rd June*, 1887.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Application of Act. R.S.C., c. 119.—The following provisions shall apply only to loan companies, as defined by "*The Companies Act*" and shall be read and interpreted in conjunction with the said Act.

2. Debenture stock may be issued.—The directors may, from time to time, with the consent of a majority of the shareholders present in person or represented by proxy at a meeting called for such purpose, issue debenture stock, which shall be treated and considered as a part of the regular debenture debt authorized by section ninety of the said Act, in such amounts and manner, on such terms and bearing such rate of interest as the directors from time to time think proper, but subject to the limitations in the said Act provided, so that the amount received as money deposits and borrowed on the security of debentures, mortgages, bonds or other instruments, or debenture stock, shall not in the whole exceed the aggregate amount fixed by the said Act as the authorized limit of the borrowing powers of the Company.

3. Ranking of debenture stock.—The debenture stock to be issued under the authority of this Act shall rank equally with the debentures issued, or to be issued, by the Company, and the holders thereof shall not be liable or answerable for any debts or liabilities of the Company.

4. Registration of such stock.—The Company shall cause entries of the debenture stock from time to time created, to be made in a register to be kept for that purpose at their head office, wherein they shall enter the names and addresses of the several persons and co-partners from time to time entitled to the debenture stock, with the respective amounts of the stock to which they are respectively entitled; and the register shall be accessible for inspection and perusal at all reasonable times to every debenture holder, mortgagee, bondholder, debenture stockholder and shareholder of the Company, without the payment of any fee or charge.

5. Registration of transfers.—All transfers of the debenture stock of the Company shall be registered at the head office of the Company; but the Company may have transfer books of such debenture stock in Great Britain and Ireland, in which transfers of the said stock may be made, but all such transfers shall be entered in the book to be kept at the head office.

6. Certificates to be delivered.—The Company shall deliver to every holder of debenture stock a certificate stating the amount of the debenture stock held by him, the rate of interest payable thereon; and all regulations and provisions for the time being applicable to certificates of shares in the capital stock of the Company shall apply, *mutatis mutandis*, to certificates of debenture stock.

7. What rights only holders shall possess.—Debenture stock shall not entitle the holders thereof to be present or to vote at any meeting of the Company, or confer any qualification, but shall, in all respects not otherwise by or under this Act or "*The Companies Act*" provided for, be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, except the right to require re-payment of the principal money paid up in respect of the debenture stock.

8. Redemption of debenture stock.—The Company may, from time to time, purchase in the open market and redeem any portion or portions of the debenture stock representing moneys, which the directors, by a resolution duly made, determine not to be required for the business of the Company; but such purchase, paying off or redemption shall not in any way, extend, limit or prejudice the exercise of the borrowing powers of the Company under this Act or "*The Companies Act.*"

9. Existing companies may avail themselves of this Act.—All loan companies already operating under "*The Companies Act*" shall be entitled to the benefit of the provisions of this Act, and may exercise the powers conferred by it, in the same manner and to the same extent as if such provisions had originally formed part of "*The Companies Act.*"

(*The remaining provisions of this Act, amending sections 98, 99 and 100 of The Companies Act, have been inserted in their proper places in the latter Act.*)

AN ACT TO AMEND "THE COMPANIES ACT."

(*Being 61 V., c. 49.*)

[*Assented to 13th June*, 1898.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows :—

1. Foreign corporations may obtain license to mine in Yukon District and North-West Territories.—Any joint stock company or corporation duly incorporated under the laws of the Parliament of the United Kingdom, or under the laws of any foreign country for the purpose of carrying on mining operations may, on receiving a license from the Secretary of State of Canada, carry on mining operations in the Yukon District and North-West Territories, and shall be entitled to the privileges of a free miner, subject to the regulations governing and affecting free miners.

2. Copy of charter to be filed.—Every company desirous of obtaining such license as aforesaid shall first file in the office of the Secretary of State of Canada a certified copy of the charter or Act incorporating the company, and shall also designate the agent or manager within the Yukon District authorized to represent the company and to accept process in all suits and proceedings against the company for any liabilities incurred by the company therein.

3. Returns.—Every company to which such license has been granted, when so required, shall make a return to the Secretary of State of all business done by it under such license, and in default of making the said return, the license may be cancelled.

4. Notice of license.—Notice of the issue of such license shall be published in the *Canada Gazette.*

5. Fees.—The fees payable for the license shall, from time to time, be fixed by the Governor in Council.

AN ACT TO AMEND THE COMPANIES CLAUSES ACT AND THE COMPANIES ACT.

(*Being 62-63 V., c. 40.*)

[*Assented to 11th August*, 1899.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Preference stock may be created by by-law.—Except as hereinafter provided, the directors of any company heretofore or hereafter incorporated, and to which *The Companies Clauses Act*, chapter 118, or *The Companies Act*, chapter 119 of the Revised Statutes, is applicable, may make a by-law for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is declared by the by-law.

2. Holders may be given control of affairs.—The by-law may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.

3. Sanction by shareholders.—No such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders, present in person or by proxy at a general meeting of the company duly called for considering tne same and representing two-thirds of the stock of the company, or unanimously sanctioned in writing by the shareholders of the company; provided, however, that if the by-law be sanctioned by not less than three-fourths in value of the shareholders of the company, the company may, through the Secretary of State, petition the Governor in Council for an order approving the said by-law, and the Governor in Council may, if he sees fit, approve thereof, and from the date of such approval the by-law shall be valid and may be acted upon.

4. Rights of holders of preference stock.—Holders of shares of such preference stock shall be shareholders within the meaning of the said Acts, or either of them, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of the said Acts, or either of them; provided, however, that in respect of dividends and in any other respect declared by by-law as authorized by section 1 of this Act they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

5. Saving clause.—Nothing contained in this Act or done in pursuance thereof shall affect or impair the rights of creditors of the company.

6. Application of Act.—This Act does not apply to any insurance company or trust company.

DOMINION COMPANIES CLAUSES ACT.

(Being Chapter 118 of the Revised Statutes.)

1886.—An Act respecting Joint Stock Companies.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. Short title.—This Act may be cited as "*The Companies Clauses Act.* 32-33 V., c. 12, s. 1.

INTERPRETATION.

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

(*a.*) The expression "the special Act" means any Act incorporating a company to which this Act applies, and with which this Act is incorporated, as hereinafter provided,—and also all Acts amending such Act;

(*b.*) The expression "the company" means the company incorporated under the special Act;

(*c.*) The expression "the undertaking" means the whole of the works and business of whatsoever kind, which the company is authorized to undertake and carry on;

(*d.*) The expression "real property" or "land" includes messuages, lands, tenements and hereditaments of any tenure, and all immovable property of any kind;

(*e.*) The expression "shareholder" means every subscriber to or holder of stock in the company, and includes the personal representatives of the shareholder. 32-33 V., c. 12, s. 2.

APPLICATION OF ACT.

3. Application of Act, and to what companies.—This Act applies to every joint stock company incorporated subsequent to the twenty-second day of June, one thousand eight hundred and sixty-nine, by any special Act of the Parliament of Canada, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except companies for the construction and working of railways, or the business of banking and the issue of paper money, or insurance,—and, so far as it is applicable to the undertaking, and is not expressly varied or excepted by the special Act, is incorporated with it, and forms part thereof, and shall be construed therewith as forming one Act. 32-33 V., c. 12, s. 3.

4. How provisions of this Act may be excepted from incorporation with the special Act.—Any of the provisions of this Act may be excepted from incorporation with the special Act; and for that purpose it shall be sufficient to provide in the special Act that the sections or sub-sections of this Act which it is proposed so to except, referring to them by the numbers they bear, shall not be incorporated with the special Act, and the special Act shall be construed accordingly. 32-33 V., c. 12, s. 4.

GENERAL POWERS.

5. General corporate powers of companies.—Every company incorporated under any special Act, shall be a body corporate under the name declared in the special Act, and may acquire, hold, alienate and convey any real property necessary or requisite for the carrying on of the undertaking of such company, and shall be invested with all the powers, privileges and immunities necessary to carry into effect the intention and objects of this Act and of the special Act, and which are incident to such corporation, or are expressed or included in "*The Interpretation Act.*" 32-33 V., c. 12, s. 5.

6. Powers to be subject to this Act, unless excepted.—All powers given by the special Act to the company shall be exercised, subject to the provisions and restrictions contained in this Act, except such as are by the special Act expressly excepted from incorporation with it. 32-33 V., c. 12, s. 6.

6A. Change of head office by by-law.—The company may from time to time, by by-law, change the locality of its head office or principal place of business in Canada to any other place in Canada.

2. No such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders, present in person or by proxy at a general meeting of the company duly called for considering the same, and representing two-thirds of the stock of the company, or unanimously sanctioned in writing by the shareholders of the company; provided, however, that if the by-law is sanctioned by not less than three-fourths in value of the shareholders of the company, the company may, through the Secretary of State, petition the Governor in Council for an order approving the said by-law, and the Governor in Council may, on compliance with such terms and conditions (if any) as he directs, approve thereof, and upon such approval the by-law shall be valid; provided also, that no such by-law shall be acted upon until two months after a copy of the by-law has been published by the company, once in *The Canada Gazette* and once in a newspaper published in the city, town or village in or nearest to which the head office of principal place of business of the company is then already situate, and in which a newspaper is published (*as enacted by 63-64 V., c. 40*).

DIRECTORS—THEIR DUTIES AND POWERS.

7. Directors.—The affairs of the company shall be managed by a board of not more than nine and not less than three directors. 32-33 V., c. 12, s. 7.

8. Provisional directors.—The persons named as such, in the special Act, shall be the first or provisional directors of the company, and shall remain in office until replaced by directors duly elected in their stead. 32-33 V., c. 12, s. 8.

9. Qualification of directors subsequently appointed.—No person shall be elected as a director unless he is a shareholder, owning stock absolutely in his own right, and not in arrear in respect of any call thereon; and the majority of the directors of the company so chosen shall, at all times, be persons resident in Canada, and subjects of Her Majesty, by birth or naturalization. 32-33 V., c. 12, s. 9.

10. Election of directors; term of office.—The directors of the company shall be elected by the shareholders, in general meeting of the company assembled, at such times, in such manner, and for such term, not exceeding two years, as the special Act, or in default thereof, as the by-laws of the company prescribe. 32-33 V., c. 12, s. 10.

11. General provisions.—In the absence of other provisions in that behalf, in the special Act or the by-laws of the company,—

(*a.*) The election of directors shall take place yearly, and all the directors then in office shall retire, but if otherwise qualified they shall be eligible for re-election.

(*b.*) Notice of the time and place for holding general meetings of the company shall be given at least ten days previously thereto, in some newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no news paper there published, then in the newspaper published nearest thereto;

(*c.*) At all general meetings of the company, every shareholder shall be entitled to as many votes as he owns shares in the company, and may vote by proxy;

(*d.*) Election of directors shall be by ballot;

(*e.*) Vacancies occurring in the board of directors may be filled for the remainder of the term, by the directors from among the qualified shareholders of the company;

(*f.*) The directors shall, from time to time, elect from among themselves a president of the company; and shall also appoint, and may remove at pleasure, all other officers thereof. 32-33 V., c. 12, s. 11.

12. Failure to complete election, how remedied.—If, at any time, an election of directors is not made or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any general meeting of the company, duly called for that purpose; and the retiring directors shall continue in office until their successors are elected. 32-33 V., c. 12, s. 12.

13. Powers of directors.—The directors of the company may, in all things, administer the affairs of the company, and may 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 special Act or to this Act, for the following purposes:—

(*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 number of the directors, their term of service, the amount of their stock qualification and their remuneration, 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;

(*e*.) The time and place for the holding of the annual meeting of the company, the calling of meetings, regular and special, of the board of directors and of the company, the quorum at meetings of the directors and of the company, the requirements as to proxies, and the procedure in all things at such meetings;

(*f*.) The imposition and recovery of all penalties and forfeitures admitting of regulation by by-law;

(*g*.) The conduct, in all other particulars, of the affairs of the company;

2. The directors may, from time to time, repeal, amend or re-enact the same; but every such by-law and every repeal, amendment or re-enactment thereof, unless it is in the meantime confirmed at a general meeting of the company, duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat shall, at and from that time only, cease to have force. 32-33 V., c. 12, s. 13, *part*.

14. Evidence of by-laws.—A copy of any by-law of the company, under its seal, and purporting to be signed by any officer of the company, shall be received as *primâ facie* evidence of such by-law in all courts in Canada. 32-33 V., c. 12, s. 14.

CAPITAL STOCK AND CALLS THEREON.

(As to Preference Stock, see 62-63, V., ch. 40, p. 565, infra.)

15. Stock to be personal estate.—The stock of the company shall be personal estate, and shall be transferable in such manner only, and subject to such conditions and restrictions as are prescribed by this Act, or by the special Act or the by-laws of the company. 32-33 V., c. 12, s. 15.

16. Allotment of stock.—If the special Act makes no other definite provision, the stock of the company shall be allotted at such times and in such manner as the directors, by by-law or otherwise, prescribe. 32-33 V., c. 12, s. 16.

17. Instalments thereon; how called in, &c,—The directors of the company may call in and demand from the shareholders thereof respectively, all sums of money by them subscribed, at such times and places and in such payments or instalments as the special Act or this Act requires or allows; and interest shall accrue and fall due, at the rate of six per centum per annum, upon the amount of any unpaid call, from the day appointed for payment of such call. 32-33 V., c. 12, s. 17.

18. Calls on stock.—At least ten per centum upon the allotted stock of the company shall, by means of one or more calls, be called in and made payable within one year from the incorporation of the company; and for every year thereafter, at least a further ten per centum thereof shall, in like manner, be called in and made payable, until the whole has been so called in. 32-33 V., c. 12, s. 18.

19. Payment of calls; enforcement of, by action.—The company may enforce payment of all calls and interest thereon, by action in any court of competent jurisdiction; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted to the company in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number of calls and the amount of each call, whereby an action has accrued to the company under this Act; and a certificate under the seal of the company, and purporting to be signed by any officer of the company, to the effect that the defendant is a shareholder, that such call or calls has or have been made, and that so much is due by him and unpaid thereon, shall be received in all courts as *primâ facie* evidence thereof. 32-33 V., c. 12, s. 19.

20. Or by forfeiture of shares.—If, after such demand or notice as by the special Act or the by-laws of the company is prescribed, any call made upon any share or shares is not paid within such time as by such special Act or by-laws is limited in that behalf, the directors, in their discretion, by resolution to that effect, reciting the facts and duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment is not made; and such shares shall thereupon become the property of the company, and may be disposed of as the directors by by-law or otherwise prescribe. 32-33 V., c. 12, s. 20.

21. Restriction as to transfer.—No share shall be transferable, until all previous calls thereon have been fully paid, or until it is declared forfeited for non-payment of a call or calls thereon. 32-33 V., c. 12, s. 21.

22. Shareholders in arrears not to vote.—No shareholder who is in arrear in respect of any call shall vote at any meeting of the company. 32-33 V., c. 12, s. 22.

BOOKS OF THE COMPANY.

23. Stock book to be kept: its contents.—The company shall cause a book or books to be kept by the secretary, or by some other officer especially charged with that duty, wherein shall be kept recorded,—

(*a.*) The names, alphabetically arranged, of all persons who are or have been shareholders;

(*b.*) The address and calling of every such person, while such shareholder;

(*c.*) The number of shares of stock held by each shareholder;

(*d.*) The amounts paid in, and remaining unpaid, respectively, on the stotck of each shareholder;

(*e.*) All transfers of stock, in their order as presented to the company for entry, with the date and other particulars of each transfer, and the date of the entry thereof; and,—

(*f.*) The names, addresses and calling of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director. 32-33 V., c. 12, s. 23.

24. Powers and liability of directors as regards transfers in certain cases.—The directors may allow or refuse to allow the entry in any such book, of any transfer or stock whereof the whole amount has not been paid; and whenever entry is made in such book, of any transfer of stock not fully paid up, to a person who is not apparently of sufficient means, the directors shall be jointly and severally liable to the creditors of the company, in the same manner and to the same extent as the transferring shareholder, except for such entry, would have been liable; but if any director present when such entry is allowed does forthwith, or if any director, then absent, does, within twenty-four hours after he becomes aware thereof and is able so to do, enter on the minute book of the board of directors, his protest against such transfer, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no newspaper there published, then in the newspaper published nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability. 32-33 V., c. 12, s. 24.

25. Transfers valid only after entry.—No transfer of stock, unless made by sale under execution or under the decree, order or judgment of a court of competent jurisdiction, shall be valid for any purpose whatsoever until entry thereof has been duly made in such book or books, except for the purpose of exhibiting the rights of the parties thereto towards each other, and of rendering the transferee liable, in the meantime, jointly and severally with the transferrer, to the company and its creditors. 32-33 V., c. 12, s. 25.

26. Stock books to be open for inspection.—Such books shall, during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company, and their personal representatives, at the head office or chief place of business of the company; and every shareholder, creditor or personal representative may make extracts therefrom. 32-33 V., c. 12, s. 26.

27. Books to be prima facie evidence.—Such books shall be *primâ facie* evidence of all facts purporting to be therein stated, in any suit or proceeding against the company or against any shareholder. 32-33 V., c. 12, s. 27.

28. Penalty for false entries.—Every director, officer or servant of the company who knowingly makes or assists in making any untrue entry in any such book, or who refuses or wilfully neglects to make any proper entry therein, or to exhibit the same, or to allow the same to be inspected and extracts to be taken therefrom, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding two years. 32-33 V., c. 12, s. 28.

29. Penalty for neglect to keep books open.—Every company which neglects to keep such book or books open for inspection as aforesaid, shall forfeit its corporate rights. 32-33 V., c. 12, s. 29.

SHAREHOLDERS.

30. Liability of shareholders.—Every shareholder shall, until the whole amount of his stock has been paid up, be individually liable to the creditors of the company, to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor, until an execution against the company at the suit of such creditor has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable, with costs, from such shareholder. 32-33 V., c. 12, s. 33.

31. Limited to amount of stock.—The shareholders of the company shall not, as such, be held responsible for any act, default or liability whatsoever, of the company or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the company, beyond the amount of their respective shares in the capital stock thereof. 32-33 V., c. 12, s. 34.

32. Trustees, &c., not personally liable,—No person holding stock in the company as an executor, administrator, tutor, curator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estate 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 interdicted person or the person interested in such trust fund would be, if living and competent to act and holding such stock as collateral security, shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same, and shall be liable as a shareholder accordingly. 32-33 V., c. 12, s. 35.

33. Trustees, &c., may vote as shareholders.—Every such executor, administrator, tutor, curator, guardian or trustee shall represent the stock in his possession at all meetings of the company, and may vote as a shareholder; and every person who pledges his stock may, notwithstanding such pledge, represent the said stock at all such meetings, and vote as a shareholder. 32-33 V., c. 12, s. 36.

34. Special meetings may be called.—Shareholders who hold one-fourth part in value of the subscribed stock of the company may, at any time, call a special meeting thereof, for the transaction of any business specified in the written requisition and notice made and given for the purpose. 32-33 V., c .12, s. 13, *part*.

LIABILITY OF THE COMPANY.

35. Contracts, &c., when binding on company.—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 by-laws 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 by-law, or special vote or order; and the person, so acting as agent, officer or servant of the company, shall not be thereby subjected individually to any liability whatsoever to any third person therefor: Provided always, that nothing in this Act shall be construed to authorize the 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 or insurance. 32-33 V., c. 12, s. 31.

36. Company not liable in respect of trusts, &c.—The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share; and the receipt of the shareholder in whose name the same stands in the books of the company, shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, and whether or not notice of such trust has been given to the company; and the company shall not be bound to see to the application of the money paid upon such receipt. 32-33 V., c. 12, s. 30.

LIABILITY OF DIRECTORS.

37. Liability of directors declaring any dividend when the company is insolvent.—If the directors of the company declare and pay any dividend when the company is insolvent, or any dividend, the payment of which renders the company insolvent, or diminishes the capital stock thereof, they shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the debts of the company then existing, and for all thereafter contracted during their continuance in office respectively; but if any director present when such dividend is declared does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware thereof and is able so to do, enter on the minutes of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no newspaper there published, then in the newspaper published nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability. 32-33 V., c. 12, s. 37.

38. No loans by company to shareholders.—No loan shall be made by the company to any shareholder; if such loan is made, all directors and other officers of the company who make the same, or assent thereto, shall be jointly and severally liable to the company for the amount of such loan,—and also to third persons to the extent of such loan, with lawful interest, for all debts of the company contracted from the time of the making of such loan to that of the repayment thereof. 32-33 V., c. 12, s. 38.

39. Contracts must be so made as to show limited liability.—The directors of the company shall be jointly and severally liable upon every written contract or undertaking of the company, on the face whereof the word "limited" or the words "limited liability" are not distinctly written or printed after the name of the company, where it first occurs in such contract or undertaking. 32-33 V., c. 12, s. 39.

40. Liability of directors for wages, &c.—The directors of the company shall be jointly and severally liable to the laborers, servants and apprentices thereof, for all debts, not exceeding one year's 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 became 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 at the suit of such laborer, servant or apprentice is returned unsatisfied in whole or in part; and the amount unsatisfied on such execution shall be the amount recoverable with costs from the directors. 32-33 V., c. 12, s. 40.

GENERAL PROVISIONS.

41. Company not to purchase stock in other corporations.—No company shall use any of its funds in the purchase of stock in any other corporation, unless in so far as such purchase is specially authorized by the special Act, and also by the Act creating such other corporation. 32-33 V., c. 12, s. 32.

42. Service of process on company.—Service of any process or notice upon the company may be made by leaving a copy thereof at the head office or chief place of business of the company, with any adult person in charge thereof, or elsewhere with the president or secretary thereof; or if the company has no known office or chief place of business, and has no known president or secretary, the court may order such publication as it deems requisite to be made in the premises, for at least one month, in at least one newspaper; and such publication shall be held to be due service upon the company. 32-33 V., c. 12, s. 41.

43. Actions between company and shareholders.—Any description of action may be prosecuted and maintained between the company and any shareholder thereof; and no shareholder, who is not himself a party to such suit, shall be incompetent as a witness therein. 32-33 V., c. 12, s. 42.

44. Winding up Acts to apply.—The company shall be subject to the provisions of any general Act for the winding up of joint stock companies. 32-33 V., c. 12, s. 44.

AN ACT TO AMEND THE COMPANIES CLAUSES ACT AND THE COMPANIES ACT.

(*Being 62-63 V., c. 40.*)

[*Assented to 11th August*, 1899.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Preference stock may be created by by-law.—Except as hereinafter provided, the directors of any company heretofore or hereafter incorporated, and to which *The Companies Clauses Act*, chapter 118, or *The Companies Act*, chapter 119 of the Revised Statutes, is applicable, may make a by-law for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is declared by the by-law.

2. Holders may be given control of affairs.—The by-law may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.

3. Sanction by shareholders.—No such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders, present in person or by proxy at a general meeting of the company duly called for considering the same and representing two-thirds of the stock of the company, or unanimously sanctioned in writing by the shareholders of the company; provided, however, that if the by-law be sanctioned by not less than three-fourths in value of the shareholders of the company, the company may, through the Secretary of State, petition the Governor in Council for an order approving the said by-law, and the Governor in Council may, if he sees fit, approve thereof, and from the date of such approval the by-law shall be valid and may be acted upon.

4. Rights of holders of preference stock.—Holders of shares of such preference stock shall be shareholders within the meaning of the said Acts, or either of them, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of the said Acts, or either of them; provided, however, that in respect of dividends and in any other respect declared by by-law as authorized by section 1 of this Act they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

5. Saving clause.—Nothing contained in this Act or done in pursuance thereof shall affect or impair the rights of creditors of the company.

6. Application of Act.—This Act does not apply to any insurance company or trust company.

ONTARIO COMPANIES' ACT.

(*Being Chapter 191, R.S.O. 1897, as amended by 61 Vict., Cap. 19; 62 Vict., Cap. 11 and 63 Vict., Cap. 23.*)

AN ACT RESPECTING THE INCORPORATION AND REGULATION OF JOINT STOCK COMPANIES.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2.

APPLICATION OF THE ACT.

1. To companies hereafter incorporated by letters patent, s. 4.
2. To companies heretofore incorporated by letters patent, s. 5.
3. To companies heretofore incorporated by special Act, s. 6.
4. To companies hereafter incorporated by special Act, s. 7.
5. Cap. 156, R. S. O. 1887, not to apply to future companies, s. 8.

FORMATION OF COMPANIES BY LETTERS PATENT.

1. Objects for which incorporation may be granted, s. 9.
2. Applicants must be twenty-one years of age, s. 10.
3. Name of company must be free from objection, s. 10, ss. (*a*).
4. Word "Limited" must be the last word in each name, s. 10, ss. (*a*).
5. Memorandum of Agreement must be executed in duplicate, s. 10, ss. (2).
6. The Governor-in-Council may make regulations as to notice, etc., s. 11.
7. The Governor may give a Company any name and vary its powers, s. 14.

AMALGAMATION OF COMPANIES.

1. Two or more companies may amalgamate, s. 103, *et seq.*

ANNUAL, GENERAL, SPECIAL AND FIRST MEETINGS.

1. Meeting for organization to be held within two months, s. 26.
2. Notice to be given of annual and general meetings, s, 50.
3. Annual meeting to be held on fourth Wednesday in January, s. 51.
4. Special meetings called by directors or by shareholders, s. 52-57.

ANNUAL STATEMENT AND SUMMARY.

1. Annual statement of income and expenditure, s. 78.
2. Annual summary, s. 79.
3. Copy of summary must be posted in the company's office, s. 79, ss. (7).
4. A second copy must be sent to the Provincial Secretary, s. 79, ss. (7).
5. Penalty for default, s. 79, ss. (8).
6. Proviso as to inactive companies, s. 79, ss. (9).

AUDIT.

1. Accounts may be audited, s. 87.
2. Appointment of auditors, s. 88-94.

BOOKS TO BE KEPT AND WHAT TO CONTAIN.

1. Books of record to be kept, s. 71.
2. Penalty for false entries, s. 72.
3. Rectification of books, s. 73.
4. When and to whom books are to be open, s. 74.
5. Penalty for refusing to allow inspection, s. 75.
6. Books to be prima facie evidence, s. 76.
7. Books of account, etc., to be kept, s. 77.
8. Minutes of proceedings to be kept, s. 77 (*d*).
9. Books and records to be kept at head office, s. 10, ss. (*c*).

CAPITAL, SHARES, ETC.

1. A company may alter its capital or re-divide its shares, s. 17-21.
2. A company may create or cancel preference stock, s. 22.

DIRECTORS AND THEIR POWERS.

1. Provisional directors to act until successors elected, s. 41.
2. Directors must be stockholders and not in arrears, s. 42.
3. Election of directors and filling of vacancies, s. 43, ss. (1), (2), and (3).
4. Number of directors may be increased or decreased, s. 45.
5. Powers and duties of directors, s. 46.
6. Liability for transfer of shares to insufficient person, s. 28.
7. Directors of insolvent company not to declare dividend, s. 83.
8. Directors not to make loans to shareholders, s. 84.
9. Directors liable for wages, s. 85.

FEES, ETC.

1. Regulation and payment of fees, s. 95.
2. Prepayment of fees compulsory, s. 95, ss. (3).

FORFEITURE OR SURRENDER OF A CHARTER.

1. Forfeiture within two years by non-user, s. 98.
2. Revocation for cause, s. 99, ss. (a).
3. Penalty for carrying on business with less than five shareholders, s. 100.
4. Voluntary surrender of a charter, s. 101.
5. A company may be wound up, s. 86.

INSPECTORS.

1. May be appointed by a Judge, s. 80.
2. May be appointed by the company, s. 80, ss. (2).

LIABILITY FOR FALSE STATEMENTS.

1. False returns, etc.,
2. False statements in prospectus,
3. Penalties,
4. False statements as to capital,

(See R. S. O. 216, herewith).

"LIMITED": HOW THE WORD MUST BE USED.

1. Must be the last word in the name of every company, s. 10, ss. (*a*).
2. Word must not be abbreviated in certain cases, s. 23.
3. Word must be used in all notices, invoices, etc., s. 23.
4. Liability of directors for default; Penalty, s. 23, ss. (2), (3), (4), and (5).
5. Provisions as to companies not carried on for gain, s. 23, ss. (6).

LIMITED LIABILITY ON SHARES.

1. Liability of shareholders to creditors, s. 37.
2. Trustees not personally liable, s. 38.
3. Mortgagees not personally liable, s. 39.

NAME: HOW CHANGED.

1. Objectionable name may be changed by the Governor-in-Council, s. 24.
2. Name of any company may be changed under R. S. O. 200, (copy herewith).

NOTICES, SUMMONS, ACTIONS, ETC.

1. Copy of by-law, under seal, to be prima facie evidence, s. 66.
2. Writs, etc., may be signed by director, etc., s. 67.
3. How notice may be served, s. 68; and Proof of service, s. 69.
4. Action may be maintained between company and shareholder, s. 70.

POWERS OF COMPANIES.

1. Powers of incorporation, s. 15.
2. Incidental powers flowing from incorporation, s. 25.
3. Proviso as to land, s. 25, ss. (*g*).
4. Borrowing powers, s. 49.
5. Power to issue bonds and debentures, s. 49, ss. (*c*).
6. Power to mortgage property and rights of company, s. 49, ss. (*d*).
7. Power to take stock in other companies, s. 82.
8. Power to make contracts, etc., s. 81.
9. Extension of powers of companies incorporated by letters patent, s. 102.
10. Extension of powers of companies incorporated by special Act, s. 106.
11. Power to vary by-laws passed by directors, s. 47, ss. (*g*).
12. to reject by-laws for the payment of the president or any director, s. 48.

STOCK, CALLS, ETC.

1. Allotment of stock, s. 26.
2. Stock deemed to be personal estate, s. 27.
3. Transfer of shares in arrears may be refused, s. 28.
4. Transfer of shares valid only after entry, s. 29.
5. Restriction as to transfer, s. 30.
6. Trusts in respect to shares not binding on company, s. 31.
7. Calling in instalments, s. 32.
8. Ten per centum must be called the first year, s. 33.
9. Enforcement of payment of calls, s. 34.
10. Forfeiture of shares, s. 35.
11. Trustees and mortgagors may vote on shares, s. 36.
12. How joint holders of stock may vote, s. 36, ss. (2).
13. Payments on shares on incorporation of company, s. 10, ss. (3).

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Short title.—This Act may be cited as "*The Ontario Companies Act.*"

2. Interpretation.—Where the words following occur in this Act, or in any letters patent and supplementary letters patent issued under this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

(*a*) "Judge" shall mean one of the Judges of the High Court of Justice.

(*b*) "Letters patent" shall mean the letters patent, under the Great Seal of Ontario, incorporating or re-incorporating a company, as the case may be; for any purpose within the scope of this Act.

(*c*) "Proxy" shall mean any person representing an absent shareholder and duly autuhorized in writing, to act for him at a meeting of the company.

(*d*) "Real estate" or "land" shall include all messuages, lands, tenements, leaseholds and hereditaments of any tenure and all immovable real property of every kind;

(*e*) "Shareholder" shall mean every subscriber to, or holder of stock in the company, and shall extend to and include the personal representatives of the shareholder.

(*f*) "Supplementary letters patent" shall mean any letters patent, under the Great Seal of Ontario, granted to a company subsequent to the letters patent incorporating or re-incorporating the company;

(*g*) "*The Gazette*" shall mean *The Ontario Gazette*. 60 V., c. 28, s. 2.

APPLICATION OF ACT.

3. Incorporation of companies by letters patent.—No company shall hereafter be incorporated under *The Ontario Joint Stock Companies' Letters Patent Act*, and the amendments thereto, being chapter 157 of the Revised Statutes of Ontario, 1887, and chapter 190 of these Revised Statutes. 60 V., c. 28, s. 3, *part*.

4. Act to apply to companies hereafter incorporated by letters patent.—The incorporation of every company hereafter by letters patent shall be governed by this Act, and all the provisions of this Act shall apply to every such company, subject to the provisions of any general Act applying to the company. 60 V., c. 28, s. 3, *part*.

5. Sections which apply to companies incorporated by letters patent before 13th April, 1897.—The provisions of sections 17 to 105 inclusive, shall apply to every company incorporated before the 13th day of April, 1897, by letters patent issued under the authority of an Act of the Legislature of Ontario, subject to the provisions of any special Act or general Act applying to the company, other than said chapter 157 of the Revised Statutes of Ontario, 1887, and the amendments thereto. 50 V., c. 28, s. 4.

6. Sections which apply to companies incorporated on or before 13th April, 1897, by special Act.—The provisions of sections 17 to 97, inclusive, and sections 103 to 106, inclusive, shall apply to every company incorporated on or before the 13th day of April, 1897, by special Act of the Legislature of Ontario for the purposes or objects within the scope of this Act, except such provisions as are inconsistent with the provisions of the special Act or amending Acts, or other special Acts relating to the company. 60 V., c. 28, s. 5.

7. Sections which apply to companies incorporated after 13th April, 1897, by special Act.—The provisions of sections 17 to 97, inclusive, and sections 103 to 106 inclusive, shall, subject to any variations and exceptions by the special Act, apply to every company incorporated after the 13th day of April, 1897, by special Act of the Legislature of Ontario for purposes or objects within the scope of this Act, and the said provisions, subject as aforesaid, shall form part of the special Act and shall be construed together therewith as one Act. 60 V., c. 28, s. 6.

8. Rev. Stat., 1887, c. 156, not to apply to companies incorporated after 13th April, 1897, by special Act.—The provisions of *The Ontario Joint Stock Companies General Clauses Act*, being chapter 156 of the Revised Statutes of Ontario, 1887, and chapter 189 of these Revised Statutes, shall not apply to any company incorporated after the 13th day of April, 1897, by special Act of the Legislature of Ontario for any of the purposes or objects within the scope of this Act. 60 V., c. 28, s. 7.

INCORPORATION BY LETTERS PATENT.

9. Companies formed for certain purposes may be incorporated by letters patent.—The Lieutenant-Governor in Council may, by letters patent, grant a charter to any number of persons, not less than five, who petition therefor, creating and constituting such persons and any others who have become subscribers to the memorandum of agreement, a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construcion and working of railways *within the Province of Ontario*, the business of insurance and the business of a loan corporation within the meaning of *The Loan Corporations Act*. 60 V., c. 28, s. 8. Amended by 62 V., c. 11, s. 21.

10. Petition.—(1) The applicants for incorporation, who must be of the full age of twenty-one years, may petition the Lieutenant-Governor, through the Provincial Secretary, for the issue of letters patent. The petition of the applicants shall show :

(*a*) The proposed corporate name of the company with the word "Limited" as the last word thereof, and such name shall not on any public ground be objectionable and shall not be that of any known company, incorporated or unincorporated, or of any partnership, or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive ; provided, however, that a subsisting company, or partnership, or individual, or the person carrying on such business may consent that such name, in whole or in part, be granted to the new company; *and further provided that the name of a company which has not made for three consecutive years the annual summary and statement of its affairs prescribed by this Act, may be given in whole or in part to a new company, unless the defaulting company, after notice by the Provincial Secretary, shows to the satisfaction of the Lieutenant-Governor in Council that it is still a valid and subsisting corporation and entitled to the sole use of its corporate name.* Amended by 63 Vict., cap. 23, s. 1.

(*b*) The objects, simply stated, for which the company is to be incorporated;

(*c*) The place within the Province of Ontario where the head office of the company is to be situated, and where its principal book of account and its corporation records are to be kept and to which all communications and notices may be addressed;

(*d*) The amount of the capital stock of the company;

(*e*) The number of shares and the amount of each share;

(*f*) The name in full, the place of residence and the calling of each of the applicants;

(*g*) The number and the names of the applicants, not less than three, who are to be the provisional directors of the company. *Re-printed as amended by 61 V. c. 19, s. 1.*

(2) The petition may be similar to, but in its essential features shall comply with, Schedule B to this Act, and shall be accompanied by a memorandum of agreement, executed in duplicate, which may be similar to, but which shall in its essential features comply with, Schedule A to this Act.

(3 In case any amount has been paid in on shares taken, by transfer of property to a trustee, the Provincial Secretary may require such evidence as shall be satisfactory to him of such transfer and of the kind, nature and value of the property and the manner in which, and the person or persons or corporate body by whom the property transferred, or any other payment, is held in trust for the company with a view to its incorporation.

(4) Each petitioner shall be the *bonâ fide* holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement.

(5) The petition may ask for the embodying in the letters patent of any provision which, otherwise under this Act, might be embodied in any by-law of the company when incorporated. 60 V., c. 28, s. 9.

11. Power to make general regulations as to notice, etc.— The Lieutenant-Governor in Council may, from time to time, make regulations with respect to the following matters, namely :

(*a*) The cases in which notice of application for letters patent or supplementary letters patent under this Act must be given;

(*b*) The granting to one company power to carry on more than one kind of undertaking;

(*c*) The forms of letters patent, supplementary letters patent, licenses, notices and other instruments and documents relating to applications and other proceedings under this Act;

(*d*) The form and manner of the giving of any notice required by this Act ;

and such regulations shall be published in *The Gazette*. 60 V. c. 28, s. 10.

12. Preliminary conditions to be established.—Before the letters patent are issued, the applicants shall establish to the satisfaction of the Provincial Secretary, or such other officer as may be charged by him to report thereon, the sufficiency of their memorandum of agreement and petition, and show that the proposed name is not open to objection under section 10 of this Act. 60 V. c. 28, s. 11.

13. Proof of matters under this Act.—(1) The Provincial Secretary, the Assistant Provincial Secretary, or such other officer may for the purposes aforesaid, or for any other purpose under this Act, take any requisite evidence in writing under oath, or affirmation.

(*a*) Proof of any matter which may be necessary to be made under this Act, may be made by statutory declaration, or by affidavit, or by deposition before the Provincial Secretary, or Assistant Provincial Secretary, or other officer as aforesaid, or before any Justice of the Peace, or Commissioner for taking Affidavits, or Notary Public, who, for this purpose, are hereby authorized and empowered to administer oaths or to take affirmations. 60 V. c. 28, s. 12.

14. Name and incidental powers of company may be varied.—The Lieutenant-Governor may give to the company a corporate name wholly or partially different from the name proposed by the applicants in their petition, and may in the letters patent vary the powers of the company from the powers stated in the petition. 60 V. c. 28, s. 13.

15. Notice of issuing letters patent.—Notice of the granting of the letters patent shall be given forthwith by the Provincial Secretary in *The Gazette*, and from the date of the letters patent the petitioners and the persons who signed the memorandum of agreement and their successors, respectively, shall be a corporation by the name mentioned in the letters patent and shall be invested with all the powers, privileges and immunities which are incident to such corporation, or are expressed, or included in the letters patent and *The Interpretation Act*, and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company. 60 V. c. 28, s. 14.

FIRST MEETING.

16. Meeting of company for organization.—(1) The provisional directors of the company shall, by a registered letter addressed to each shareholder, call a general meeting of the company to be held within two months of the date of the letters patent, for the purpose of organizing the company for the commencement of business. Such first general meeting shall be held at such convenient place as the directors may determine.

(2) If the said meeting is not called by the provisional directors within the time required by this section, any three or more shareholders in the company shall have power to call the meeting and to proceed to the organization of the company. 60 V. c. 28, s. 21.

CAPITAL, SHARES, ETC.

17. Increase of capital.—(1) The company at any time after nine-tenths of the capital stock of the company has been subscribed and ten per centum thereon paid in, but not sooner, may, by by-law, provide for the increase of the capital stock of the company to any amount which it considers requisite for the due carrying out of the undertaking of the company.

(2) The by-law shall declare the number and value of the shares of the new stock, and may prescribe the manner in which the same are to be allotted; otherwise, the control of such allotment shall vest absolutely in the directors. 60 V. c. 28, s. 15.

18. Reduction of capital.—(1) The company if it sees fit at any time, may, by by-law, provide for decrease of the capital stock of the company to any amount which it may consider sufficient for the due carrying out of the undertaking of the company and advisable.

(2) The by-law shall declare the number and value of the shares of the stock as so decreased; and the allotment thereof or the rule or rules by which the same is to be made.

(3) The liability of shareholders to persons who are, at the time the stock is decreased, creditors of the company, shall remain as though the stock had not been decreased. 60 V. c. 28, s. 16.

19. Re-division of shares.—The company may at any time, by by-law, provide for the re-division of the existing shares into shares of smaller or larger amount. 60 V. c. 28, s. 17.

20. By-law to be confirmed by supplementary letters.—No by-law for increasing or decreasing the capital stock of the company, or re-dividing the shares, shall have any force or effect whatever unless and until it has been sanctioned by a vote of not less than two-thirds in value of the shareholders at a general meeting of the company duly called for considering the by-law, and has afterwards been confirmed by supplementary letters patent. 60 V. c. 28, s. 18.

21. Petition for supplementary letters patent.—(1) At any time not more than six months after the sanction of such by-law, the company may petition the Lieutenant-Governor, through the Provincial Secretary, for the issue of supplementary letters patent to confirm the same.

(2) With the petition the company shall produce the by-law and establish to the satisfaction of the Provincial Secretary, or of such other officer as may be charged by him to report thereon, the due passage and sanction of the by-law, and if the petition is in respect of the increase or decrease of capital, the *boná fide* character of the increase or decrease of capital thereby provided for.

(3) Upon due proof so made, the Lieutenant-Governor in Council may by supplementary letters patent confirm the by-law, and, with respect to an increase or decrease in capital, may, with the consent of the company, by the supplementary letters patent, fix the amount of such increase or decrease at such sum as to him may seem proper; and notice thereof shall be given forthwith by the Provincial Secretary in *The Gazette*; and thereupon, from the date of the supplementary letters patent, the shares shall be re-divided, or the capital stock of the company shall be and remain increased or decreased as the case may be, to the amount, in the manner, and subject to the conditions set forth by such by-law and supplementary letters patent; and the whole of the stock as so increased or decreased shall become subject to the provisions of this Act in like manner (so far as may be) as though every part thereof had originally formed part of the stock of the company. 60 V. c. 28, s. 19.

22. Preferential stock.—(1) The directors may make a by-law for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority as respects dividends and otherwise over ordinary stock as may be declared by the by-law.

(2) The by-law may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as may be considered expedient.

(3) No such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders, present in person or by proxy at a general meeting of the company duly called for considering the same, or unanimously sanctioned in writing by the shareholders of the company; provided, however, that if the by-laws be sanctioned by three-fourths in value of the shareholders of the company, the campany may, through the Provincial Secretary, petition the Lieutenant-Governor in Council for an order approving the said by-law, and the Lieutenant-Governor may, if he sees fit, approve thereof, and from the date of such approval the by-law shall be valid and may be acted upon.

(4) Holders of shares of such preference stock shall be shareholders within the meaning of this Act, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Act, provided, however, that in respect of dividends and otherwise, they shall as against the ordinary shareholders, eb entitled to the preferences and rights given by such by-law.

(5) Nothing in this section contained or done in pursuance thereof, shall affect or impair the rights of creditors of the company. 60 V. c. 28, s. 20.

(6) *The directors of a company which has heretofore issued or may hereafter issue preference stock may, for the purposes of cancelling such preference-stock or parts thereof, from time to time, pass by-laws providing for the purchase or acquisition by the company of such stock or parts thereof with the consent of the holders, and for the cancellation of the stock so purchased or acquired, and for the reduction pro rata according to the amount of stock so cancelled of any reserve set apart, or required to be set apart, in respect of such preference-stock, but no such by-law shall be valid or acted upon unless and until the same has been sanctioned by a vote of at least two-thirds in value of the shareholders of the company present in person, or represented by proxy, at a special general meeting duly called for considering the same, and unless and until such by-law has been confirmed by supplementary letters patent.*

(7) *At any time not more than three months after the sanction of such by-law by the shareholders as aforesaid, the company may petition the Lieutenant-Governor in Council, through the Provincial Secretary for the issue of supplementary letters patent to confirm the same. With the petition, the company shall produce the by-law and establish to the satisfaction of the Provincial Secretary, or of such other officer as may be charged by him to report thereon, the due passage and sanction of the by-law and the bona fide character of the same, and thereupon the Lieutenant-Governor in Council may by supplementary letters patent confirm the by-law, and may, with the consent of the Board of Directors of the Company, by the supplementary letters patent add such terms and conditions thereto as to him may seem proper, and thereupon from the date of the supplementary letters patent the by-law with such added terms and conditions, if any shall be valid and may be acted upon. Notice of the issue of supplementary letters patent shall be given by the Provincial Secretary in the Gazette.* 63 V. c. 23, s. 2.

USE OF THE WORD "LIMITED."

23. Use of word "Limited" in signs on offices.—(1) *Wherever any office or place in which business of the company is carried on is indicated by any sign, name or other means on the outside thereof as being a place of business of the com-*

pany, the company shall keep in a conspicuous place on such outside, in letters easily legible, the name of the company, with the word "Limited" as the last word of, or as the first word after, such name and the name of the company, with the word "Limited" as the last word of, or the first word after, such name, shall appear in a conspicuous position, and in letters easily legible,—

(a) On its corporate seal;

(b) In all advertisements and other official publications of the company;

(c) In all bills of parcels or invoices of the company;

(d) In all written contracts and undertakings of the company;

(e) In the company's signature to any bill of exchange, promissory note, endorsement, cheque, order for money or goods.

(2) It shall be the duty of the director manager, officer or other employee of the company who—

(a) Publishes or causes to be published any such advertisement or other official publication;

(b) Makes out or causes to be made out any such bill of parcels or invoice;

(c) Makes on behalf of the company any such written contract or undertaking; or

(d) Signs in the name of the company any such bill of exchange, promissory note, endorsement, cheque, order for money or goods—

to comply with the foregoing provisions of this section. Provided that where the word "Company," "Club," "Association" or other equivalent word forms part of the company's corporate name the word "Limited" need not appear in full, but an abbreviation thereof, of which the letters "l" and "d" shall be the first and last letters shall be sufficient. Provided also that where the word "Company," "Club," "Association" or other equivalent word does not form part of the corporate name, the word "Limited" shall appear in full and in letters of substantially the same size as the letters in the rest of such name. Provided further, that stamping, writing, printing or otherwise marking upon goods, wares and merchandise of the company, or upon packages containing the same, shall not be deemed an advertisement within the meaning of this section.

(3) Every company and every director, manager, officer or other employee making default in complying with the foregoing provisions of this section shall incur a penalty not exceeding ten dollars for each and every offence. Provided that after having been convicted of an offence under this section the offender upon a subsequent conviction for an offence under this section shall incur a penalty not exceeding one hundred dollars.

(4) This section shall not apply to any company not having gain for its purpose or object where such company by its charter of incorporation is declared to be exempt from the provisions thereof or to any company not having gain for its purpose or object which, on proof thereof being shown to the Lieutenant-Governor in Council is of from and after the date to be set forth in the order of the Lieutenant-Governor in Council in that behalf declared to be exempt.

(5) The prosecution or proceeding to recover a penalty for an offence against the foregoing provisions of this section shall be commenced within six months after the offence has been committed and not afterwards.

(6) All liabilities and penalties heretofore incurred by any company or director, manager, officer or other employee of any company for breach or non-observance of any provision of any statute relating to the use of the word "Limited" or any abbreviation thereof are hereby released and discharged.

Provided, however, that this sub-section shall not apply to any action or other proceeding in which judgment has hitherto been rendered. Provided also that in any pending action or other proceeding the Court in or before which the same is pending may make such order as to costs as to such Court may seem just. 63 V. c. 23, s. 3.

CHANGE OF NAME.

24. Change of name if objectionable.—In case it is made to appear to the satisfaction of the Lieutenant-Governor in Council that any company is incorporated under a name the same as, or so similar to that of an existing company, partnership, individual, or to any name under which any existing business is being carried on, as to deceive, it shall be lawful for the Lieutenant-Governor by an Order in Council to change the name of the company to some other name to be set forth in the order; and no such alteration of name shall affect the rights or obligations of the company; and all proceedings may be continued and commenced by or against the company by its new name, that might have been continued or commenced by or against the company by its former name. 60 V. c. 28, s. 23.

INCIDENTAL POWERS OF COMPANIES.

25. Powers incident to incorporation.—The company shall, in addition to its others powers, possess power :

(*a*) To alter, or change its common seal at pleasure;

(*b*) To take over, acquire, hold, use, sell and convey such personal property and movables, machinery, trade-marks, patents, licenses, and franchises or rights thereunder as may be deemed necessary, or expedient for the purposes for which the company is incorporated;

(*c*) To erect on its property such works, shops, mills, buildings, houses and structures, and to make such improvements of what kind soever as may be convenient or necessary for the due carrying out of its undertaking;

(*d*) To construct and maintain, or aid in the construction and maintenance of such works and improvements as may de deemed necessary, or advantageous to the due carrying out of its undertaking;

(*e*) To exercise and enjoy all the privileges and immunities and to do all -acts requisite, or incidental to the due carrying on of its under taking;

(*f*) To carry on any branch or branches of business incidental to the due carrying out of the objects for which the company was incorporated, and subsidiary thereto, and necessary to enable the company profitably to carry on its undertaking.

(*g*) To acquire by purchase, lease, or other title, and to hold, use, sell, alienate and convey any real estate necessary for the carrying on of its undertaking, and the company shall upon its incorporation become and be invested with all the property and rights, real and personal, theretofore held by or for it under any trust created with a view to its incorporation.

Provided, however, that unless other special statutory enactments apply, no parcel of land, or interest therein at any time acquired by the company and not required for its actual use and occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits of any city or town in this Province, shall be held by the company, or by any trustee on its behalf, for a longer period than seven years after the acquisition thereof, but shall be absolutely sold and disposed of, so that the company shall no longer retain any interest therein unless by way of security; and further provided, that any such parcel of land, or any interest therein not within the exceptions hereinbefore mentioned, held by the company for a longr period than seven years, without being disposed of, shall be forfeited to Her Majesty for the use of this Province; provided also that the Lieutenant-Governor in Council may extend the said period from time to time not exceeding in the whole twelve years; and further provided, that no such forfeiture shall take effect, or be enforced until the expiration of at least six calendar months after notice in writing to the company of the intention of Her Majesty to claim such forfeiture; and it shall be the duty of the company to give the Lieutenant-Governor in Council, when required, a full and correct statement of all lands at the date of such statement held by the company, or in trust for the company, and subject to these provisoes. 60 V., c. 28, s. 24.

STOCK CALLS, ETC.

26. Allotment of stock.—If the letters patent or special Act make no other definite provision, the shares of stock of the company, so far as they are not allotted thereby, shall be allotted when and as the directors by by-law or otherwise ordain. 60 V. c. 28, s. 25.

27. Stock, personal estate.—The shares of stock of the company shall be deemed personal estate, and shall be transferable on the books of the company, in such manner only, and subject to all such conditions and restrictions as by this Act, or by the special Act, or by the letters patent or by laws of the company may be prescribed. 60 V. c. 28, s. 26.

28. Directors may refuse transfer of stock in certain cases.—The directors may refuse to allow the entry, in any such book, of any transfer of shares of stock whereof the whole amount has not been paid in; and whenever entry is made in such book of any transfer of stock, not fully paid in, to a person not being of apparently sufficient means, the directors present when such entry is authorized shall be jointly and severally liable to the creditors of the company in the same manner and to the same extent as the transferring shareholder, but for such entry, would have been; but if any director present when such entry is allowed, forthwith, enters a written protest against the same, and within eight days thereafter causes such protest to be notified, by registered letter, to the Provincial Secretary, such director may thereby, and not otherwise, exonerate himself from such liability. 60 V. c. 28, s. 27.

29. Transfer valid only after entry.—No transfer of shares of stock, less made by sale under execuion, or under the order or judgment of some competent Court in that behalf, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, and as rendering the transferee liable, *ad interim*, jointly and severally with the transferor, to the company and its creditors, until entry thereof has been duly made in the books of the company. 60 V. c. 28, s. 28.

30. Restriction as to transfers.—No share shall be transferable until all previous calls thereon have been fully paid in, or until declared forfeited for non-payment of calls thereon. 60 V. c. 28, s. 29.

31. Company not to be liable in respect of trusts, etc.—The company shall not be bound to see to the execution of any trust ,whether express, implied or constructive, in respect of any share; and the receipt of the shareholder in whose name the same stands on the books of the company shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, whether or not notice of the trust has been given to the company; and the company shall not be bound to see to the application of the money paid upon such receipt. 60 V. c. 28, s. 30.

32. Calling in instalments.—The directors of the company may call in and demand from the shareholders thereof, respectively, the amount unpaid on shares of stock by them subscribed or held, at such times and places and in such payments or instalments as the letters patent, or this Act, or the by-laws of the company require or allow; and interest shall accrue at the legal rate for the time being, upon the amount of any unpaid call, from the day appointed for payment of such call. 60 V. c. 28, s. 31.

33. Calls—Ten per cent. within first year.—Not less than ten per centum upon the allotted shares of stock of the company shall, by means of one or more calls formally made, be called in and made payable within one year from the incorporation of the company; the residue when and as the by-laws of the company direct. 60 V. c. 28, s. 32.

34. Enforcement of payment of calls by action.—The company may enforce payment of all calls and interest thereon by action in any court of competent jurisdiction; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to state that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more upon one share or more, stating the number of calls and the amount of each, whereby an action has accrued to the company under this Act; and a certificate under the seal and purporting to be signed by any officer of the company, to the effect that the defendant is a shareholder, that such call or calls has or have been made and that so much is due by him and unpaid thereon, shall be received in all Courts as *primâ facie* evidence to that effect. 60 V. c. 28, s. 33.

35. Forfeiture of shares.—If after such demand or notice as by the special Act, or by the letters patent or by-laws of the company is prescribed, any call made upon any share or shares is not paid within such time as by such Act, or by such letters patent or by-laws may be limited in that behalf, the directors in their discretion, by resolution to that effect reciting the facts and duly recorded in their minutes, may summarily forfeit any shares whereon such payment is not made; and the same shall thereupon become the property of the company and may be disposed of as, by by-law or otherwise, the company may ordain. 60 V. c. 28, s. 34.

36. Trustees, etc., may vote.—(1) Every executor, administrator, guardian, or trustee, shall represent the 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.

(2) If stock be held jointly by two or more persons, any one of them present at a meeting may in the absence of the other, or others, vote thereon, but if more than one joint stockholder be present or be represented by proxy, they shall vote together on the stock jointly held. 60 V. c. 28, s. 35.

LIABILITY, ETC., OF SHAREHOLDERS.

37. Liability of shareholders.—(1) Each shareholder, until the whole amount of his shares of stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, but not beyond the amount so unpaid of his said shares of stock, shall be the amount recoverable with costs, against such shareholder. 60 V. c. 28, s. 36, *first clause*.

(2) Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or a director of the company. 60 V. c. 28, s. 36 (*a*).

(3) The shareholders of the company shall not as such be held responsible for any act, default or liability whatsoever, of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the company, beyond the unpaid amount of their respective shares in the capital stock thereof. 60 V. c. 28, s. 36 (*b*).

38. Trustees, etc., not personally liable.—No person holding shares of stock of 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 comptent to act and holding such stock in his own name. 60 V. c. 28, s. 37.

39. Mortgagees.—No person holding shares of stock as collateral security, shall be personally subject to liability as a shareholder; but the person transferring such shares as such collateral security shall be considered as holding the same, and shall be liable as a shareholder in respect thereof. 60 V. c. 28, s. 38.

DIRECTORS AND THEIR POWERS, ETC.

40. Board of directors.—The affairs of the company shall be managed by a board of not less than three directors who shall be elected by the shareholders in general meeting of the company assembled at some place within this Province. 60 V. c. 28, s. 39.

41. Provisional directors.—The persons named as provisional directors in the special Act or in the letters patent shall be the directors of the company, until replaced by others duly elected in their stead. 60 V. c. 28, s. 40.

42. Qualification of directors.—No person shall hold office as a director unless he is a shareholder owning stock absolutely in his own right, and not in arrear in respect of any call thereon, and where any person who is a director ceases to be a *bonâ fide* holder of stock in the company, he shall thereupon cease to be a director. 60 v. c. 28, s. 41, *first clause*.

43. Yearly elections.—(1) The election of directors shall take place at the annual meeting, all the members of the board retiring, and (if otherwise qualified) being eligible for re-election;

(2) Elections of directors shall be by ballot;

(3) Vacancies occurring in the board of directors may, unless the by-laws otherwise direct, be filled for the unetxpired remainde rof the term, by the board, from among the qualified shareholders of the company;

(4) The directors shall, from time to time, elect from among themselves a president of the company; and shall also name, and may remove at pleasure, all other officers thereof. 60 V. c. 28, s. 41 (1-4).

44. Failure to elect directors, how remedied.—If at any time an election of directors is not made, or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any general meeting of the company duly called for that purpose; and directors shall continue in office until their successors are duly elected. 60 V. c. 28, s. 42.

45. Change by by-law of number of directors or of head office in Ontario.—(1) A company may by by-law increase or decrease the number of its directors, or may change the company's head-office in Ontario.

(2) No by-law, for either of the said purposes shall be valid or acted upon unless it has been sanctioned by a vote of not less than two-thirds in value of the shareholders at a meeting of the company duly called for considering the subject of the by-law, nor until a copy of the by-law, certified under the seal of the company, has been transmitted to the Provincial Secretary, and also has been published by the Company once in *The Gazette*.

(3) In case the head-office of the Company is being changed as aforesaid, then the company shall forthwith give notice of the fact in such newspapers and for such time as the regulations made under section 11 of this act may prescribe. 60 V. c. 28, sec. 43.

46. Powers and duties of directors.—The directors of the company shall have full power in all things to administer the affairs of the company; and may make, or cause to be made for the company, any description of contract which the company may by law enter into. 60 V. c. 28, s. 44.

47. By-laws.—The directors may, from time to time, make by-laws not contrary to law, or to the letters patent of the company, or to this Act, to regulate—

(*a*) 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; the transfer of stock;

(*b*) The declaration and payment of dividends;

(*c* The term of service not exceeding two years, and the amount of the stock qualification of the directors.

(*d*) The appointment, functions, duties and removal of all officers, agents and servants of the company; the security to be given by them to the company; and their remuneration;

(*e*) The time at which, and place where the general meetings of the company shall be held; the calling of meetings, regular and special, of the board of directors, and of the company; the quorum; the requirements as to proxies; and the procedure in all things at such meetings;

(*f*) The imposition and recovery of all penalties and forfeitures admitting of regulation by by-law; and

(*g*) The conduct in all other particulars of the affairs of the company; and may from time to time repeal, amend, or re-enact the same; but every such by-law, and every repeal, amendment, or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company; and in default of confirmation thereat, shall, at and from that time only, cease to have force; and in that case no new by-law to the same or the like effect shall have any force until confirmed at a general meeting of the company; provided, however, that the company shall have power either at the general meeting, called as aforesaid, or at the annual meeting of the company, to repeal, amend, vary or otherwise deal with any by-laws which have been passed by the directors, but no act done or right acquired under any by-law shall be prejudically affected by any such repeal, amendment, variation or other dealing. 60 V. c. 28, s. 45.

48. Payment to president or directors.—No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting. 60 V. c. 28, s. 46.

49. Borrowing powers.—If authorized by by-law, passed by the directors and sanctioned by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company duly called for considering the subject of such by-law, the directors of the company may:

(*a*) Borrow money upon the credit of the company;

(*b*) Limit or increase the amount to be borrowed;

(*c*) Issue the bonds, debentures or other securities of the company for the lawful purposes of the company, and no other and may pledge or sell the same for such sums and at such prices as may be deemed expedient or be necessary; but no such bonds, debentures or other securities shall be for a less sum than one hundred dollars each, and

(*d*) Hypothecate, mortgage or pledge all or any of the real or personal property, rights and powers of the company to secure any such bonds, debentures or other securities and any indebtedness or sum or sums so borrowed for the purposes of the company. 60 V. c. 28, s. 47.

ANNUAL, GENERAL AND SPECIAL MEETINGS.

50. Mode of election.—In default only of other express provisions in such behalf by the special Act, or by the letters patent or by-laws of the company, notice of the time and place for holding general, including the annual, meetings of the company shall be given at least ten days previously thereto, in some newspaper published at or as near as may be to the head-office, and to the chief place of business of the company, if these differ; and also in the case of companies having a capital exceeding $3,000, either by publishing the same in *The Gazette*, or by mailing the same as a registered letter duly addressed to each shareholder at his last known post office address at least ten days previous to such meeting. 60 V. c. 28, s. 48.

51. Annual meeting.—A general meeting, to be known as the annual meeting of the company, shall be held at such time and place in each year as the letters patent or by-laws of the company may provide, and in default of such provisions in that behalf the annual meeting shall be held on the fourth Wednesday in January in every year, at such place as may be determined by the directors. 60 V. c. 28, s. 49.

52. Special meetings.—The directors may, whenever they think fit and they shall upon a requisition made in writing by the holders of not less than one-tenth of the subscribed capital stock of the company convene a special general meeting of the company. 60 V. c. 28, s. 50.

53. Object.—Any requisition made by the shareholders shall express the object of the special general meeting proposed to be called, and shall be left at the head-office of the company. 60 V. c. 28, s. 51.

54. Duty of directors.—Upon the receipt of such requisition the directors shall forthwith proceed to convene a special general meeting. If they do not proceed to cause the same to be held within twenty-one days from the date upon which the requisition was left at the head-office of the company, the requisitionists, or any other shareholders amounting to the required one-tenth of the subscribed capital stock of the company may themselves convene such special general meeting. 60 V. c. 28, s. 52.

55. Notice for special meetings.—Ten days' notice at the least, specifying the place, the day and the hour of meeting, and the general nature of the business to be considered, shall be given to the shareholders by the directors or by the requisionists, as the case may be, in manner mentioned in section 50 of this Act, or in such other manner, if any, as the by-laws of the company may prescribe. 60 V. c. 28, s. 53.

56. Quorum.—No business shall be transacted at any such special general meeting called upon, or pursuant to requisition as aforesaid, unless a quorum of shareholders is present in person or by proxy, at the time when the meeting proceeds to business; and such quorum shall be ascertained as follows, that is to say, if the shareholders at the time of the meeting do not exceed ten in number, the quorum shall be three, if they exceed ten there shall be added to the above quorum one for every four additional shareholders up to fifty, and one for every two additional shareholders after fifty, with this limitation, that no quorum in any case shall exceed twenty. 60 V. c. 28, s. 54.

57. Dissolution of meeting.—If within one hour from the time appointed for such special general meeting, called upon or pursuant to requisition aforesaid, a quorum is not present, the meeting, shall be dissolved. 60 V. c. 28, s. 55.

58. Presiding officer.—The president of the company shall preside as chairman at every general meeting of the company. 60 V. c. 28, s. 56.

59. Chairman to be elected when necessary.—If there is no president, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the shareholders present shall choose some one of their number to be chairman. 60 V. c. 28, s. 57.

60. Adjournment by consent.—The chairman may, with the consent of the meeting, and subject to such conditions and restrictions as the meeting may decide, adjourn any meeting from time to time, and from place to place. 60 V. c. 28, s. 58.

61. Procedure as to resolutions.—At any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried and an entry to that effect in the proceedings of the company, shall be *primâ facie* evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution. 60 V. c. 28, s. 59.

62. When poll is demanded.—If a poll is demanded it shall be taken in such manner as the by-laws prescribe, and in default thereof, then as the chairman may direct. In the case of an equality of votes, at any general meeting, the chairman shall be entitled to a second or casting vote. 60 V. c. 28, s. 60.

63. Votes.—At all general meetings of the company, every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy. 60 V. c. 28, s. 61, *first part.*

64. Shareholders in arrear not to vote.—No shareholder being in arrear in respect of any call shall be entitled to vote at any meeting of the company. 60 V. c. 28, s. 61 (*a*).

NOTICES, ACTIONS, ETC.

65. Mode of incorporation, etc., how to be set forth in legal proceedings.—In an action or other proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name, as incorporated by virtue of a special Act, or of letters patent, or of letters patent and supplementary letters patent, as he case may be; and the letters patent, or supplementary letters patent themselves, or any exemplification, or copy thereof under the Great Seal, shall be conclusive proof of every matter and thing therein set forth. 60 V. c. 28, s. 62.

66. Evidence of by-laws.—A copy of any by-law of the company, under its seal, and purporting to be signed by any officer of the company shall be received as *primâ facie* evidence of the by-law in all Courts in Ontario. 60 V. c. 28, s. 63.

67. Authentication of summons and notices.—Any writ, notice, order or proceeding requiring authentication by the company may be signed by any director, manager or other authorized officer of the company, and need not be under the seal of the company. 60 V. c. 28, s. 64.

68. Service of notices.—A notice to be served by the company upon a shareholder may be served either personally or by sending it through the post, in a registered letter, addressed to the shareholder at his place of abode as it last appeared on the books of the company. 60 V. c. 28, s. 65.

69. Time of service.—A notice or other document served by post by the company on a shareholder shall be held to be served at the time when the registered letter containing it would be delivered in the ordinary course of post; and to prove the fact and time of service it shall be sufficient to prove that such letter was properly addressed and registered, and was put into the post-office, and the time when it was put in, and the time requisite for its delivery in the ordinary course of post. 60 V. c. 28, s. 66.

70. Actions between company and shareholders.—Any description of action may be prosecuted and maintained between the company and any shareholder thereof, and no shareholder shall, by reason of being a shareholoder, be incompetent as a witness therein. 60 V. c. 28, s. 67.

BOOKS TO BE KEPT AND WHAT TO CONTAIN.

71. Record books to be kept and what to contain.—The company shall cause the secretary, or some other officer especially charged with that duty, to keep a book or books wherein shall be kept recorded:—

(*a*) A copy of the letters patent incorporating the company and of any supplementary letters patent issued to the company; and if incorporated by special Act, the chapter and year of such Act;

(*b*) The names, alphabetically arranged, of all persons who are or have been shareholders in the company;

(*c*) The post-office address and calling of every such person while such shareholder;

(*d*) The number of shares of stock held by each shareholder;

(*e*) The amounts paid in, and remaining unpaid, respectively, on the stock of each shareholder;

(*f*) The date and other particulars of all transfers of stock in their order; and

(*g*) The names, post-office addresses and callings of all persons who are or have been directors of the company; with the several dates at which each person became or ceased to be such director. 60 V. c. 28, s. 68.

72. Penalty for false entries.—No director, officer or servant of the company shall konwingly make or assist to make any untrue entry in any such book, or shall refuse or neglect to make any proper entry therein; and any person violating wilfully the provisions of this section shall, besides any criminal liability which he may thereby incur, be liable in damages for all loss or injury which any person interested may have sustained thereby. 60 V. c. 28, s. 69.

73. Powers of judge as to entries in, omissions from, and rectification of books.—(1) If the name of any person is, without sufficient cause, entered in or omitted from such book or books of the company, or if default is made or unnecessary delay takes place in entering in said books the fact of any person having ceased to be a shareholder of the company, th eperson or shareholder aggrieved, or any shareholder of the company, or the company itself may by application to a Judge apply for an order that the book or books b erectified, and the Judge may either refuse such application with or without costs to be paid by the applicant, or he may, if satisfied of the justice of the case, make an order for the rectification of the said book or books, and may direct the company to pay the costs of such motion or application and any damages the party aggrieved may have sustained. The Judge may in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the said books of the company, whether such question arises between two or more shareholders, or alleged shareholders, or between any shareholders or alleged shareholders, and the company, and, generally, the Judge may in any such proceeding decide any question which it may be necessary or expedient to decide for the rectification of the said books.

(2) The Judge may direct an issue to be tried in which any question of law may be raised.

(3) An appeal shall lie, as in ordinary cases, before such Judge.

(4) This section shall not deprive any Court of any jurisdiction it may have. 60 V. c. 28, s. 70.

74. Books to be open for inspection.—Such books shall during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company, and their personal representatives or agents at the head-office, and every such shareholder, creditor, agent or representative, may make extracts therefrom. 60 V. c. 28, s. 71.

75. Liability for refusal to allow inspection of books.—Any director or officer who refuses to permit any person entitled thereto to inspect such book or books, or make extracts therefrom, shall forfeit and pay to the party aggrieved the sum of one hundred dollars; and in case the amount is not paid within seven days after the recovery of judgment, the Court in which the judgment is recovered, or a Judge thereof, may direct the imprisonment of the offender for any period not exceeding three months unless the amount with costs is sooner paid. 60 V. c. 28, s. 72.

76. Books to be prima facie evidence.—Such books shall be *prima facie* evidence of all facts purporting to be thereby stated, in any action or proceeding against the company or against any shareholder. 60 V. c. 28, s. 73.

77. Books of account to be kept.—The directors shall cause proper books of account to be kept containing full and true statements
books of account to be kept containing full and true statements

(*a*) Of the company's financial and trading transactions;

(*b*) Of the stock-in-trade of the company;

(*c*) Of the sums of money received and expended by the company, and the matters in respect of which such receipt or expenditure takes place, and,

(*d*) Of the credits and liabilities of the company;

and also a book or books containing minutes of all the proceedings and votes of the company, or of the board of directors, respectively, and the by-laws of the company, duly authenticated, and such minutes shall be verified by the signature of the president, or other presiding officer of the company. 60 V. c. 28, s. 74.

ANNUAL STATEMENT AND SUMMARY, ETC.

78. Annual statement of income and expenditures.—At each annual meeting, or, at least, once in every year, and at intervals of not more than fifteen months, the directors shall, at a general meeting duly called, lay before the company a statement of the income and expenditure of the company for the past year, made up to a date not more than three months before such annual or general meeting, and shall also lay before the company such further information respecting the company's financial position and profit and loss account as the by-laws or the charter of the company may require. 60 V. c. 28, s. 75.

79. Annual summary of the affairs of the company.—(1) The company shall, on or before the first day of February in every year, make out a summary in duplicate, verified as hereinafter required, containing as of the thirty-first day of December preceding, correctly stated, the following particulars :—

(*a*) The corporate name of the company;

(*b*) The manner in which the company is incorporated whether by special Act, or by letters patent;

(*c*) The place where head-office of the company is situated;

(*d*) The place, or places where, or from which the undertaking of the company is carried on;

(*e*) The name, residence and post-office address of the president and of the secretary, and of the treasurer of the company;

(*f*) The name, residence and post-office address of each of the directors of the company;

(*g*) The date upon which the last annual meeting of the company was held;

(*h*) The amount of the capital of the company and the number of shares into which it is divided;

(*i*) The number of shares subscribed for and allotted;

(*j*) The amount of stock (if any) issued free from call; if none is so issued, this fact to be stated;

(*k*) The amount issued subject to call;

(*l*) The amount of calls made on each share;

(*m*) The total amount of calls received;

(*n*) The total amount of calls unpaid;

(*o*) The total amount of shares forfeited;

(*p*) The total amount of shares which have never been allotted or subscribed for;

(*q*) The total amount for which shareholders of the company are liable in respect of unpaid stock held by them:

(2) The said summary may also, after giving the information hereinbefore required, give in a concise form, such further information respecting the affairs of the company as the directors may consider expedient.

(3) The summary shall also contain a list of persons who, on the 31st day of December previously, were shareholders of the company and such list shall state the names alphabetically arranged, and the address and occupation of each such person; the amount of stock held by each; and the amount if any unpaid and still due by each such person;

(4) Every company so long as it carries on the business of warehousing crude petroleum shall state the following additional particulars in the summary:—

(i.) The total quantity of crude petroleum actually held by the company for the purpose of answering transportation and warehouse receipts, accepted orders, and certificates of crude petroleum.

(ii.) The total quantity of crude petroleum in respect of which the company as warehousemen or carriers are liable to make delivery to other persons.

[*As to returns by companies carrying on the business of warehousing crude petroleum see also Cap. 219, sec. 4.*]

(5) The summary, and every duplicate thereof required by this Act, shall be written, or printed on only one side of the sheet or sheets of paper containing the same.

(6) The summary shall be verified by the affidavit of the president and secretary, and if there are no such officers, or they, br either of them, are or is, unable to make the same, by the affidavit of the president or secretary and one of the directors, or two of the directors, as the case may require; and if the president or secretary does not make or join in the affidavit, the reason thereof shall be stated in the substituted affidavit. (*As amended by 63 V. c. 23, s. 4.*)

(7) One of the duplicate summaries with the affidavit of verification, shall be posted up in a conspicuous position in the head-office of the company in Ontario on or before the 2nd day of February; and the company shall keep the same so posted, until another summary is posted under the provisions of this Act; and the other duplicate summary, verified as aforesaid, shall on or before the 8th day of February next after the time hereinbefore fixed for making the summary be transmitted, by registered letter, to the Provincial Secretary and be addressed to him at the Parliament Buildings, Toronto.

(8) If a company makes default in complying with the provisions of this section, the company shall incur a penalty of $20 for every day during

which the default continues, and every director, manager or secretary of the company, who knowingly and wilfully authorizes or permits such default, shall incur the like penalty.

(9) This section shall not apply to any company until the 1st day of February next after the first 31st day of December, after the company has been organized, or has gone into actual operation, whichever shall first happen, and shall not be held to apply to any company which has ceased to carry on business; and upon its being proved that any company to which this Act applies did not transact any business (other than the payment of taxes or the making of a return, or the furnishing of any list, statement, or other information to the Government of Ontario, or to any officer or department thereof) during the year for which it is alleged a return in accordance with the requirements of law has not been made, such company shall be deemed to have ceased to carry on business within the meaning of this sub-section.

(10) This section shall not apply to any company not having gain for its purpose or object where such company by its charter of incorporation is declared to be exempt from the provisions thereof, or to any company not having gain for its purposes or object, which, on proof thereof being shown to the Lieutenant Governor in Council, is, on, from and after a date to be set forth in the order of the Lieutenant-Governor in Council in that behalf, declared to be exempt. 60 V. c. 28, s. 76. (*As amended by 61 V. c. 19, s. 5.*)

INSPECTION.

80. The Court may appoint an inspector.—(1) Upon an application by not less than one-fifth in value of the shareholders of the company, a Judge may, if he deems it necessary, appoint an inspector to investigate the affairs and management of the company, who shall report thereon to the Judge, and the expense of such investigation shall, in the discretion of the Judge, be defrayed by the company, or by the applicants, or partly by the company and partly by the applicants as he may order, and if he thinks fit, he may require the applicants to give security to cover the probable cost of the investigation, and he may make necessary rules and prescribe the manner in which and the extent to which the investigation shall be conducted; or the Judge may, if he deems it necessary, examine the officers or directors of the company under oath as to matters that come in question.

(2) The company may by resolution passed at the annual meeting, or at a special general meeting called for the purpose, appoint an inspector to examine into the affairs of the company. The inspector so appointed shall have the same powers and perform the same duties as an inspector appointed by a Judge, with this exception, that instead of making his report to the Judge he shall make the same in such manner and to such persons as the company by said resolution directs.

(3) It shall be the duty of all officers and agents of the company to produce for the examination of any such inspector all books and documents in their custody or power. Any such inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding $20, in respect of each offence. 60 V. c. 28, s. 77.

CONTRACTS, DIVIDENDS, ETC.

81. Contracts, etc., when to be binding on company.—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 by-laws or resolutions 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 by-law, resolution or special vote or order; nor shall the person so acting as agent, officer or servant of the company, be thereby subjected individually to any liability therefor. 60 V. c. 28, s. 78.

82. Not to purchase stock in other corporations.—The company shall not under any circumstances use any of its funds in the purchase of stock in any other corporation, unless and until the directors have been expressly authorized by a by-law passed by them for the purpose and sanctioned by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company duly called for considering the subject of the by-law. 60 V. c. 28, s. 79.

83. Liability of directors declaring a dividend when company is insolvent, etc.—The directors of the company shall not declare or pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent, or diminishes the capital thereof; but if any director present when such dividend is declared, forthwith, or if any director then absent, within twenty-four hours after he has become aware thereof and able so to do, enters his written protest against the same, and wihin eight days thereafter causes such protest to be notified, by registered letter, to the Provincial Secretary, such director may thereby, and not otherwise, exonerate himself from liability. 60 V. c. 28, s. 80.

84. No loan by company to shareholder.—No loan shall be made by the company to any shareholder, and if such loan is made, all directors and other officers of the company making the same, and in anywise assenting thereto shall be jointly and severally liable to the company for the amount thereof and also to third parties to the extent of such loan with legal interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof. 60 V. c. 28, s. 81.

85. Liability of directors for wages.—The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor yet unless such director is sued therefor within one year from the time when he ceased to be such director, nor yet before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs againt the directors. 60 V. c. 28, s. 82.

86. Winding up Acts to apply.—The company shall be subject to the provisions of any Act of the Legislature for the winding up of joint stock companies. 60 V. c. 28, s. 83.

AUDITORS AND THEIR DUTIES.

87. Accounts may be audited.—If the special Act, letters patent or the by laws of the company so direct the accounts of the company shall be examined once at least in every year, and the correctness of the balance-sheet shall be ascertained, by an auditor. 60 V. c. 28, s. 84.

88. Appointment of first auditor.—Such auditor may be appointed by resolution at a general meeting of the company; if so appointed, he shall hold office until the next annual general meeting thereafter unless previously removed by a resolution of the shareholders in general meeting; subsequent auditors may be appointed by a resolution of the company in general meeting. 60 V. c. 28, s. 85.

89. Auditors may be shareholders.—The said auditor may be a shareholder of the company, but no person shall be eligible as an auditor who is interested, otherwise than as a shareholder, in any transaction of the company; and no director or other officer of the company shall be eligible during his continuance in office. 60 V. c. 28, s. 86.

90. Remuneration of auditors.—The remuneration of the auditor shall be fixed by the company in general meeting. 60 V., c. 28, s. 87.

91. Auditors re-eligible.—Any auditor shall be eligible for re-appointment. 60 V., c. 28, s. 88.

92. Auditors to examine accounts, etc.—Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto. 60 V. c. 28, s. 89.

93. Access of auditors to books, etc.—Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. 60 V. c. 28, s. 90.

94. Auditors to make reports to shareholders.—The auditor shall make a report to the shareholders upon the balance sheet and accounts, and in every such report he shall state whether, in his opinion, the balance-sheet is a full and fair balance-sheet, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and, in case he has called for explanations, or information from the directors, or officers of the company, whether such explanation, or information has been given by the directors, and whether it has been satisfactory. 60 V. c. 28, s. 91.

FEES, ETC.

95. Fees on letters patent, etc., to be fixed by Order-in-Council.—(1) The Lieutenant-Governor in Council may, from time to time, establish, alter and regulate the tariff of the fees to be paid on applications under this Act; may designate the department or departments through which the issue of letters patent, or supplementary letters, or of licenses should be made; and may prescribe the forms of proceeding and record in respect thereof,a nd all other matters requisite for carrying out the objects of the Act.

(2) Such fees may be made to vary in amount, under any rule or rules —as to nature of company, amount of capital and otherwise—that may be deemed expedient.

(3) No step shall be taken in any Department towards the issue of any letters patent or supplementary letters patent, or license under this Act, until after all fees therefor have been duly paid. 60 V. c. 28, s. 92.

(4) *The company shall for the following services pay to the Provincial Secretary the following fees upon tendering or transmitting to him any return, by-law or other document required by this Act or by any Act incorporated herewith to be filed with the Provincial Secretary and in the Schedule mentioned, and no tender or transmission of such return, by-law or other document shall be deemed to be a due compliance with these provisions unless and until the prescribed fee for receiving and filing the same has been paid to and has been accepted by the Provincial Secretary.*

1. Filing the annual statement required of a company having a capital stock of $50,000 or under	*$2 00*
2. Filing the annual statement of a company having a capital stock exceeding $50,000 but not exceeding $100,000	*3 00*
3. Filing the annual statement of a company having a capital stock exceeding $100,000	*5 00*
4. Filing by-law for sale of mining company's stock at a discount	*5 00*
5. Filing by-law increasing or decreasing number of directors, or changing company's chief place of business	*2 00*
6. Filing any other by-law or document	*2 00*

63 V. c. 23, s. 5.

96. Certain informalities not to invalidate letters patent, etc.—The provisions of this and any other Act relating to matters preliminary to the issue of the letters patent shall be deemed to be directory only; and no letters patent, or supplementary letters patent, or license, notice, order or other proceeding by or on behalf of the Lieutenant-Governor in Council, Provincial Secretary, or other Government or departmental officer under this or any other Act shall be held to be void or voidable on account of any irregularity, or otherwise, in respect of any matter preliminary to the issue of the letters patent, or supplementary letters patent, license, notice, order or other proceeding or of any alteration in any petition or papers submitted in order to make them comply with this or any other Act, or with the departmental practice thereunder. 60 V. c. 28, s. 93 .

LIABILITY FOR FALSE STATEMENTS.

97. False returns, etc.—(1) If any person in any return, report, certificate, balance-sheet, or other document required by or for the purposes of this Act, wilfully makes a statement false in any material particular, he shall be liable on conviction on indictment to imprisonment for a term not exceeding six months, with or without hard labour, and on summary conviction to imprisonment not exceeding three months, with or without hard labour, and in either case to a fine of $100 in lieu of or in addition to such imprisonment as aforesaid.

(2) A person charged with an offence under this section, may, if he thinks fit, tender himself to be examined on his own behalf, and thereupon may give evidence in the same manner and with the like effect and consequences as any other witness. 60 V. c. 28, s. 94.

[*As to the liability of directors and others for untrue statements in a prospectus, advertisement or notice, see Cap. 216.*]

FORFEITURE OR SURRENDER OR REVOCATION OF A CHARTER, ETC.

98. Forfeiture of charter for non-user.—If a company incorporated by letters patent does not go into actual operation within two years after incorporation, or, for two consecutive years does not use its corporate powers such powers, except so far as is necessary for winding up the company, shall be forfeited, and its name, in whole or in part, may be granted to another company, notwithstanding anything contained in section 10 of this Act; and in any action of proceeding where such non-user is alleged, proof of user shall lie upon the company, provided, however, that no such forfeiture shall affect prejudicially the rights of creditors as they exist at the date of such forfeiture. 60 V. c. 28, s. 97 *first part.*

99. Revocation of charter.—The charter of a company incorporated by letters patent, may, at any time, be declared to be forfeited, and may be on sufficient cause being shown to the Lieutenant-Governor in Council, in that behalf, and such forfeiture, revocation and making void may be upon such conditions and subject to such provisions as to the Lieutenant-Governor may seem proper. 60 V. c. 29, s. 97 (*a*).

100. Individual liability for whole of the company's debts if business is carried on with less than five members.—If a company carries on business when the number of its shareholders is less than five for a period of six months after the number has been so reduced, every person who is a shareholder in the company during the time that it so carries on business after that period of six months and is cognizant of the fact that it is so carrying on business with less than five shareholders shall be severally liable for the payment of the whole of the debts of the company contracted during such time, and may be sued for the same without the joinder in the action or suit of the company or of any other shareholder; but any shareholder who has become aware that the company is carrying on business when the number of its shareholders is less than five, may serve a protest in writing on the company, and may, by registered letter, notify the Provincial Secretary of such protest having been served, and of the facts upon which it is based, and such shareholder may thereby, and not otherwise, from the date of his said protest and notification, exonerate himself from liability; and if after notice from the Provincial Secretary the company refuses or neglects to bring the number of its shareholders up to five, such refusal or neglect may, upon the report of the Provincial Secretary, be regarded by the Lieutenant-Governor in Council as sufficient cause for the revocation of the company's charter. 60 V. c. 28, s. 98.

101. A charter may be surrendered.—The charter of a company incorporated by letters patent may be surrendered if the company proves to the satisfaction of the Lieutenant-Governor in Council:

(*a*) That it has no debts existing, or other rights in question, or

(*b*) That it has parted with its property, divided its assets rateably amongst its shareholders, and has no debts, or liabilities, or

(*c*) That the debts and obligations of the company have been duly provided for or protected, or that the creditors of the company or other persons holding them consent,

and that the company has given notice of the application for acceptance of surrender as may be required by regulations made under section 11 of this Act; and the Lieutenant-Governor in Council, upon a due compliance with the provisions of this section, may accept and direct the cancellation of the charter and may, by his order, fix a date upon and from which the company shall be deemed to be dissolved, and the company shall thereby and thereupon become dissolved accordingly. 60 V. c. 28, s. 99.

EXTENSION OF POWERS.

102. Additional powers which may be granted by supplementary letters patent.—In case of resolution, authorizing an application by petition to the Lieutenant-Governor therefor, is passed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company, duly called for considering the subject of such resolution, the Lieutenant-Governor in Council may, from time to time, direct the issue of supplementary letters patent to the company embracing any or all of the following matters:

(*a*) Extending the powers of the company to any objects within the scope of this Act, which the company may desire;

(*b*) Providing for the formation of a reserve fund;

(*c*) Varying any provision contained in the letters patent, so long as the alteration desired is not contrary to the provisions of this Act.

(*d*) Making provision for any other matter or thing in respect of which provision might be made by original letters patent under this Act. 60 V. c. 28, s. 101; c. 3, s. 3.

AMALGAMATION OF COMPANIES.

103. Amalgamation of companies.—(1) Any two or more companies incorporated under the laws of this Province and having objects within the scope of this Act may, in the manner herein provided, unite, amalgamate and consolidate their stock, property, businesses and franchises, and may enter into all contracts and agreements therewith necessary to such union and amalgamation.

(2) The directors of the companies proposing to so amalgamate or consolidate as aforesaid, may enter into a joint agreement, to be executed under the corporate seal of each of the said companies, for the amalgamation and consolidation of the said companies, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new company, of which the last word shall be the word "Limited," the number of the directors thereof, and who shall be the first directors thereof and their places of residence, the number of shares of the capital stock, the amount of par value of each share, and the manner of converting the capital stock of each of the said corporations into that of the new corporation, and how and when directors of the new corporation shall be elected, with such other details as they deem necessary to perfect the new organization and the consolidation and amalgamation of the said companies, and the after management and working thereof.

(3) The agreement shall be submitted to the shareholders of each of the said companies at a meeting thereof called in accordance with the bylaws and held separately for the purpose of taking the same into consideration.

(4) At such meetings of shareholders, the agreement shall be considered, and a vote by ballot taken for the adoption or rejection of the same, and each share shall entitle the holder thereof to one vote, and the ballots shall be cast in person or by proxy; and if two-thirds of the votes of all the shareholders of each of such companies are for the adoption of the agreement, then that fact shall be certified upon the agreement by the secretary of each of such companies under the corporate seal thereof; and if the agreement is so adopted at the respective meetings of the shareholders of each of the said companies, the companies by their joint petition may, through the Provincial Secretary, apply to the Lieutenant-Governor in Council for letters patent confirming the said agreement.

(5) With their joint petition, the companies shall deposit with the Provincial Secretary, an original of the agreement, and shall furnish such further and other documents and evidence in this behalf as the Provincial Secretary may require, and the Lieutenant-Governor in Council may by letters patent confirm such agreement, and on and from the date of the letters patent confirming the said agreement, and from such date only, the said companies shall be deemed and taken to be amalgamated and consolidated and to form one company by the name in the said agreement and letters patent provided, and the consolidated company shall possess all the properties, real, personal and mixed, rights, privileges, and franchises and be subject to all the liabilities, contracts, disabilities and duties of each of the companies so consolidated.

(6) All rights of creditors to obtain payment of their claims out of the property, rights and assets of the company liable for such claims and all liens upon the property, rights, and assets of either of such companies shall be unimpaired by such consolidation, and all debts, contracts, liabilities and duties of either of the said companies shall thenceforth attach to the

consolidated company, and be enforced against it to the same extent as if the said debts, contracts, liabilities and duties had been incurred or contracted by it.

(7) No action or proceeding, by or against the said corporations so consolidated, or either of them, shall abate or be affected by such consolidation, but for all the purposes of such action or proceeding, such corporation may be deemed still to exist, or the new corporation may be substituted in such action or proceeding in the place thereof.

(8) The Provincial Secretary shall give such a notice respecting the amalgamation of the said companies as the regulations made under section 11 of this Act may prescribe. 60 V. c. 28, s. 102.

RE-INCORPORATION BY INCORPORATED COMPANIES.

104. Subsisting companies may apply under this Act.—(1) Any company incorporated, for purposes or objects within the scope of this Act, or within the scope of this Act as it may be hereafter amended, whether under a special or a general Act, and being at the time of its application a subsisting and valid corporation, may apply for letters patent under this Act, and the Lieutenant-Governor in Council, upon proof that notice of the application has been inserted for four weeks in the *Ontario Gazette*, may direct the issue of letters patent incorporating the shareholders of the said company as a company under this Act, and thereupon all the rights or obligations of the former company shall be transferred to the new company, and all proceedings may be continued and 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 any such letters patent to set out the names of the shareholders; and after the issue of the letters patent, the company shall be governed in all respects by the provisions of this Act, except that the liability of the shareholders to creditors of the old company shall remain as at the time of the issue of the letters patent.

(2) Where a company is re-incorporated under the preceding subsection the Lieutenant-Governor may, by letters patent, increase the capital stock of the company to any amount which the shareholders of the company applying for re-incorporation may, by a resolution passed by a vote of not less than two-thirds in value of those present in person or by proxy at a general meeting of the company duly called for considering the same, have declared to be requisite for the due carrying out of the objects of the company.

(3) The resolution may prescribe the manner in which the new stock is to be allotted; and in default of its so doing, the control of the allotment shall vest absolutely in the directors of the new company. R. S. O. 1887, c. 157, s. 72.

105. Existing companies may apply for letters patent with extended powers.—Where an existing company applies for the issue of letters patent under the provisions of the preceding section, the Lieutenant-Governor may by the letters patent extend the powers of the company to such other objects within the scope of this Act as the applicants desire, and as the Lieutenant-Governor thinks fit to include in the letters patent, and may by the said letters patent name the first directors of the new company, and the letters patent may be to the new company by the name of the old company or by any other name. R. S. O. 1887, c. 157, s. 73.

LETTERS PATENT TO COMPANIES INCORPORATED BY SPECIAL ACT.

106. Letters patent for certain purposes may be granted to companies incorporated under special Acts.—Where any company has been incorporated by a special Act for purposes or objects within the scope of this Act, then, in case a resolution authorizing an application by petition to the Lieutenant-Governor therefor is passed by a vote of not less than two-thirds in value of the shareholders present in person, or by proxy, at a general meeting of the company, duly called for considering the subject of such resolution, the Lieutenant-Governor in Council may, from time to time, direct the issue of letters patent to the company, embracing any or all of the following matters:

(*a*) Extending the powers of the company to any objects within the scope of this Act, which the company may desire;

(*b*) Limiting or increasing the amount which the company may borrow upon debentures, or otherwise;

(*c*) Providing for the formation of a reserve fund;

(*d*) Varying any provision contained in the special Act, so long as the alteration is not contrary to the provisions of this Act;

(*e*) Making provision for any other matter or thing in respect of which provision might have been made had the company been incorporated under this Act. 60 V. c. 28, s. 103.

107. *(This section is not reprinted here, in view of the fact that it is repealed from the first of July,* 1900. *See* 63, *Vic., cap.* 24, *sec.* 22.*)*

108. Recoverv of penalties.—*The penalties provided by this Act shall be recoverable only by action at the suit of, or brought with the written consent of the Attorney-General of the Province of Ontario.* (New section from 61 V. c. 19, s. 8.)

109. Remitting costs of actions for penalties.—*In addition to the power given by chapter 108 of these Revised Statutes for the remission of penalties, the Lieutenant-Governor in Council may remit the costs of any action heretofore commenced for the recovery of penalties under this Act, and in case of such remission no costs shall be recoverable by the person bringing such action.* (New section from 61 V. c. 19., s. 9)

SCHEDULE A. (*Section* 10.)

(To be executed in duplicate; one duplicate to be deposited in the Office of the Provincial Secretary.)

THE.................................. COMPANY OF..............................(LIMITED).

MEMORANDUM OF AGREEMENT AND STOCK-BOOK.

WE the undersigned do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of *The Ontario Companies Act* under the name of THE.. ....COMPANY OF....................(LIMITED), or such other name as the Lieutenant-Governor in Council may give to the Company, with a capital of................dollars, divided into..................shares of..................dollars each.

AND WE DO hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capita stock of the said Company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

In witness whereof we have signed.

Name of subscriber.	Seal.	Amount of subscription.	Date and place of subscription.		Residence of subscriber.	Name of Witness
			Date.	Place.		

60 V. c. 28, Sched. A.

SCHEDULE B.

(Section 10.)

PETITION.

TO HIS HONOUR ....
.... ETC., ETC., ETC.

Lieutenant-Governor of the Province of Ontario in Council:

THE PETITION of ....
....
....
....
....
............................*Humbly sheweth as follows:*—

1. Your Petitioners are desirous of obtaining by letters patent, under the Great Seal, a charter, under the Provisions of *The Ontario Companies Act* constituting Your Petitioners and such others as may become shareholders in the Company thereby created, a body corporate and politic under the name of THE................................COMPANY (LIMITED), or such other name as shall appear to Your Honour to be proper in the premises.

2. Your Petitioners have satisfied themselves and are assured that the corporate name under which incorporation is sought is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership, or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive.*

3. Your Petitioners have satisfied themselves and are assured that no public or private interest will be prejudicially affected by the incorporation of Your Petitioners as aforesaid.†

4. Your Petitioners are of the full age of twenty-one years.

5. The object for which incorporation as aforesaid is sought by Your Petitioners is to ....
....
....
....

6. The undertaking of the company will be carried on at (*or* from)......
............................which is (*or* are) within the Province of Ontario.

---

* Add here when Proper "except the name '.. ' and your Petitioners elsewhere shew that they have received the necessary consent in writing under section 10 of the said Act to the use of the name applied for "

† If otherwise, then the interests liable to be so affected shall be set out at length by affidavit to be briefly referred to here.

7. The head-office of the Company will be at..............................

8. The amount of the capital stock of the Company is to be.............. dollars.

9. The said stock is to be divided into.................................... share of..................................dollars each.

10. The said ....
....
are to be the provisional directors of the Company.

11. By subscribing therefor in a Memorandum of Agreement, duly executed, in duplicate, with a view to the incorporation of the Company, your petitioners have taken the amounts of stock set opposite their respective names, as follows :—

Petitioners.	Amount of stock subscribed for.
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....
....	$ ....

NOTE.—If any payment, in cash or otherwise, has actually been made by any petitioner on his stock, particulars thereof may be set out here.

YOUR PETITIONERS therefore pray that Your Honour may be pleased, by Letters Patent under the Great Seal, to grant a Charter to Your Petitioners constituting Your Petitioners and such others as have or may become subscribers in the Memorandum of Agreement and stock-book of the Company thereby created, a body corporate and politic for the due carrying out of the undertaking aforesaid.

And Your Petitioners, as in duty bound, will ever pray.

Signature of witnesses.	Signatures of petitioners.
....	....
....	....
....	....
....	....
....	....
....	....
....	....
....	....
....	....
....	....
....	....
....	....

Dated at......................this.........day of 18

60 V. c. 28, *Sched. B.*

AN ACT TO AMEND THE ONTARIO COMPANIES' ACT.

(Being 61 N., c. 19.)

Assented to 17th January, 1898.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

(Note.—The Amendments made in the Companies Act by sections 1, 5, 6 and 7 of this Amending Act have been inserted in their respective places in the Conpanies' Act. As sections 2, 3 and 4 of this Amending Act have been repealed by 63 V. c. 23, they are not inserted here).

8. Recovery of penalties.—The penalties provided by the said Act shall be recoverable only by action at the suit of, or brought with the written consent of, the Attorney-General of the Province of Ontario.

9. Remitting costs of actions for penalties.—In addition to the power given by chapter 108 of these Revised Statutes for the remission of penalties, the Lieutenant-Governor in Council may remit the costs of any action heretofore commenced for the recovery of penalties under the said *The Ontario Companies' Act*, and in case of such remission no costs shall be recoverable by the person bringing such action.

QUEBEC COMPANIES' ACT.

(Being Section II. of Chapter Third of the Revised Statutes of Quebec.)

INCORPORATION OF JOINT STOCK COMPANIES.

§ 1. *Declaratory and Interpretative.*

4694. This section may be cited as "The Joint Stock Companies' Incorporation Act."

4695. The following expressions, in this section and in all letters-patent and supplementary letters-patent issued under the same, have the meanings hereby assigned to them, unless there is something in the subject or context repugnant to such construction:

1. The expression "letters-patent" means the letters-patent incorporating a company for any purpose contemplated by this section;

2. The expression "supplementary letters-patent" means any letters-patent granted for the increasing or reducing of the capital stock of such company, or for changing its name;

3. The expression "company" means the company so incorporated by letters-patent;

4. The expression "the undertaking" means the whole of the works and business of every kind, which the company is authorized to carry on;

5. The expression "real estate" or "land" includes all immovable property of every kind;

6. The expression "shareholder" or "stockholder" means every subscriber to or holder of stock in the company, and extends to and comprises the personal representatives of the shareholder.

§ 2. *Granting of the Charter.*

4696. The Lieutenant-Governor may, by letters-patent under the Great Seal, grant a charter to any number of persons, not less than five, who petition therefor.

Such charter constitutes the petitioners and all others who may become shareholders in the company thereby created a body politic and corporate for any of the purposes within the jurisdiction of this Legislature, except for the construction and working of railways and the business of insurance.

2. It is not necessary that an order in council be passed for granting any such charter, but the Lieutenant-Governor may grant any charter upon a favorable report from the Attorney-General.

4697. The applicants for such letters-patent shall previously give notice of their intention to make such application.

Such notice shall be published during four consecutive weeks in the *Quebec Official Gazette* and contain:

1. The corporate name of the proposed company, which shall not be that of any other company, or any name liable to be confounded therewith or otherwise on public grounds objectionable;

2. The object for which the incorporation is sought;

3. The place, within the limits of the Province, selected as its chief place of business;

4. The proposed amount of its capital stock;

5. The number of shares and amount of each share;

6. The name in full and the address and calling of each of the applicants, with special mention of the names of not less than three or more than nine of their number who are to be the first directors of the company.

The major part of such directors shall be resident in Canada and be subjects of Her Majesty.

4698. At any time not more than one month after the last publication of such notice, the applicants may petition the Lieutenant-Governor through the Provincial Secretary for the issue of such letters-patent.

2. Such petition must recite the facts set forth in the notice, and must further state the amount of stock taken by each applicant, and by all other persons therein named, and also the amount paid in upon the stock of each applicant, and the manner in which the same has been paid in, and is held for the company.

3. The aggregate of the stock so taken must be at least one-half of the total amount of the stock of the company.

4. The aggregate so paid in thereon must be at least ten per cent. thereof, or five per cent. of the total capital; unless such total exceed five hundred thousand dollars, in which case the aggregate paid in upon such excess must be at least two per cent. thereof.

5. Such aggregate must have been paid in to the credit of the company or of trustees therefor and must be standing at such credit, in some chartered bank within the Province, unless the object of the company is one requiring that it should own real estate, in which case not more than one-half thereof may be taken as invested in real estate suitable to such object, duly held by trustees therefor, and being fully of the required value over and above all incumbrances thereon.

6. The petition may ask the embodying in the letters-patent of any provision which otherwise under this section might be embodied in any by-law of the company when incorporated.

4699. Before the letters-patent are issued, the applicants must establish to the satisfaction of the Provincial Secretary or of such other officer as may be charged by order of the Lieutenant-Governor in Council to report thereon, the sufficiency of their notice and petition, the truth and sufficiency of the facts therein set forth, and further that the applicants, and more especially the provisional directors named, are persons of sufficiently reputed means to warrant the application.

2. To that end, the secretary or such other officer may take and keep of record any requisite evidence in writing under oath or affirmation, and may administer every requisite oath or affirmation.

4700. The letters-patent shall recite all the material averments of the nctice and petition, as so established.

4701. The Lieutenant-Governor may, if he deem it expedient, give to the company a name different to that chosen for it by the applicants, if such name be objectionable, and may prescribe that the objects for which the company is constituted be changed, provided that they be of the same nature as that given in the notice.

4702. If it happens that the name of a company, constituted as aforesaid, is the same as that of any other existing company, or so nearly resembles it as to be liable to create confusion, the Lieutenant-Governor may order the issue of supplementary letters-patent to change the name to another to be chosen.

Such supplementary letters-patent shall refer to the former letters-patent.

Such change of name shall not affect the rights or obligations of the company.

4703. Whenever a company, incorporated under this section, desires to have its name changed for another, the Lieutenant-Governor may, on petition to that effect, grant supplementary letters-patent, if he deem that such change of name is not made for some unavowed or illegitimate purpose; which letters-patent shall be made in the manner provided in the preceding article, and shall have the same effect to all intents and purposes.

4704. Notice of the granting of the letters-patent shall be forthwith given by the Provincial Secretary, in the *Quebec Official Gazette*, in the form of the Schedule A. of this section; and thereupon, from the date of the letters-patent, the persons therein named and their successors shall be a body corporate and politic by the name mentioned therein.

§ 3. *General Powers.*

4705. Every company so incorporated may acquire, hold, alienate and convey, any real estate requisite for the carrying on of its undertaking, and shall forthwith become and be invested with all rights, real and personal, theretofore held by or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities requisite to the carrying on of its undertaking, as though incorporated by a charter from the Legislature, making it by that name a body politic and corporate, and embodying all the provisions of this section and of the letters-patent.

The company may, by a simple resolution, issue notes, payable to order or to bearer, for the settlement of acounts or other current matters; it may further, on a resolution of the two-thirds of the actual shareholders present at a meeting specially convened for the purpose, issue bonds or debentures to the amount of the two-thirds of the total value of the immovable property.

Such bonds or debentures, after their registration in the office or offices of the registration division or divisions in which the immovables of the said company are situated (which must be described in a notice to that effect given to the registrar), constitute a privileged claim in favor of the holders thereof against the company, and give a right of preference over all other debts and claims against the company, posterior to the issuing of such debentures. *(This and preceding paragraph enacted by 54 V., c. 35, s. 1.)*

4706. The directors of the company may, if they see fit, at any time after the whole capital stock of the company has been allotted and paid in, but not sooner, make a by-law for increasing the capital stock of the company to any amount which they may consider requisite in order to the due carrying out of the objects of the company.

2. Such by-law shall declare the number and value of the shares of the new stock, and prescribe the manner in which the same shall be allotted; in default of its so doing, the control of such allotment shall be held to vest absolutely in the directors.

4707. The directors of the company, if they see fit at any time, may make a by-law for decreasing the capital stock of the company to any amount which they may consider sufficient in order to the due carrying out of the undertaking of the company, and advisable.

2. Such by-law shall declare the number and value of the shares of the stock as so decreased, and the allotment thereof, or the rules by which the same shall be made.

4708. But no by-law for increasing or decreasing the capital stock of the company shall have any force or effect whatever, until after it has been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company duly called for considering the same, and has afterwards been confirmed by supplementary letters-patent.

4709. At any time, not more than six months after such sanction of such by-law, the directors may petition the Lieutenant-Governor through the Provincial Secretary, for the issue of supplementary letters-patent to confirm the same.

2. With such petition they must produce such by-law, and establish, to the satisfaction of the Secretary or of such other officer as may be charged by order of the Lieutenant-Governor in Council to report thereon, the due passage and sanction of such by-law, and the *bona fide* character of the increase or decrease of capital thereby provided for.

3. To that end the Secretary or such officer may take and keep of record any requisite evidence in writing under oath or affirmation, and may administer every requisite oath or affirmation.

4710. Upon due proof so made, the Lieutenant-Governor may grant such supplementary letters-patent under the Great Seal; and notice therof shall be forthwith given by the Provincial Secretary in the *Quebec Official Gazette*, in the form of the schedule B. of this section.

2. From the date of the supplementary letters-patent, the capital stock of the company shall be and remain increased, or decreased, as the case may be, to the amount, in the manner, and subject to the conditions set forth by such by-law; and the whole of the stock as so increased or decreased, shall become subject to the provisions of this section, in like manner (so far as may be) as though every part thereof had formed part of the stock of the company originally subscribed.

4711. All powers given to the company by the letters-patent and supplementary letters-patent granted in its behalf shall be exercised subject to the provisions and restrictions contained in this section.

§ 4. *Directors*

4712. The affairs of the company shall be managed by a board of not less than three, or more than nine directors.

The persons named as such in the letters-patent shall be the directors of the company, until replaced by others duly named in their stead.

4713. No person shall be elected or named as a director thereafter, unless he be a shareholder, owning stock absolutely in his own right, and not in arrear in respect of any call thereon.

The major part of the after-directors of the company shall further, at all times, be persons resident in Canada and subjects of Her Majesty by birth or naturalization

4713.(*a*) The company may, by by-law, increase to not more than nine or decrease to not less than three the number of its directors, or may change the company's chief place of business in the Province; but no by-law for either of the said purposes shall be valid or acted upon, unless it is approved by a vote of at least two-thirds in value of the stock represented by the shareholders present at a special general meeting duly called for considering the by-law, nor until a copy of such by-law, certified under the seal of the company, has been deposited with the Provincial Secretary, and published in the *Quebec Official Gazette*. (*This section enacted by 58 V., c. 37, s. 2.*)

4714. The after-directors shall be elected by the shareholders, in general meeting of the company assembled, at such times, in such wise, and for such term, not exceeding two years, as the letters-patent, or, in default thereof, the by-laws of the company may prescribe.

4715. In default only of other express provisions in such behalf by the letters-patent or by-laws of the company:

1. Such election shall take place yearly, all the members of the board retiring, and, if otherwise qualified, being eligible for re-election;

2. Notice of the time and place for holding general meetings shall be given at least ten days previously thereto, in some newspaper published at or as near as may be to the office or chief place of business of the company;

3. At all general meetings, every shareholder shall be entitled to as many votes as he owns shares in the company, and may vote by proxy;

4. Elections of directors shall be by ballot;

5. Vacancies occurring in the board of directors may be filled for the unexpired remainder of the term, by the board, from among the qualified shareholders;

6. The directors shall from time to time elect from among themselves a president; and shall also name, and may remove at pleasure, all other officers of the company.

4716. If at any time an election of directors be not made or do not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any general meeting duly called for that purpose; and the retiring directors shall continue in office until their successors are elected.

4717. The directors have full power in all things to administer the affairs of the company, and may make or cause to be made for it any description of contract which the company may lawfully enter into; and may from time to time make by-laws not contrary to law, or to the letters-patent of the company, to regulate:

1. The allotment of stock;
2. The making of calls thereon;
3. The payment of calls;
4. The issue and registration of certificates of stock;
5. The forfeiture of stock for non-payment;
6. The disposal of forfeited stock and of the proceeds thereof;
7. The transfer of stock;
8. The declaration and payment of dividends;
9. The number of directors and their term of office;
10. The amount of their stock qualification;
11. The appointment, functions, duties and removal of all agents, officers and servants of the company;
12. The security to be given by them to the company;
13. Their remuneration and that of the directors if they have a right thereto;
14. The time at which and the place within this Province where the annual meetings of the company shall be held, and the places where its business shall be conducted;
15. The calling of meetings, regular and special, of the board of directors and of the company;
16. The quorum;
17. The requirement as to proxies, and the procedure in all things at such meetings, the imposition and recovery of all penalties and forfeitures admitting of regulation by by-law, and the conduct in all other particulars of the affairs of the company.

They may also, from time to time, amend or re-enact such by-laws.

Every such by-law, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, from that time only, cease to have force.

4717*a*. The directors may also make by-laws for issuing any part of the capital stock as preferred stock, giving the same such preference as to dividends and otherwise over ordinary stock as may be declared by the by-law.

Such by-laws may provide that the holders of such shares shall have the right to elect a certain number of the board of directors and may give them any other control over the affairs of the company.

No such by-law shall have any effect, however, until it has been unanimously sanctioned in writing by the shareholders or has been sanctioned by the unanimous vote of all the shareholders, which shareholders shall be present in person or by proxy at a special general meeting of the company called for considering the same.

If, however, the by-law be sanctioned by three-fourths in value of the shareholders, the company may apply to the Lieutenant-Governor in Council for an order approving the same, and it comes into force after such approval. Such approval shall not be given until after a notice of one month has been sent by registered letter to all the shareholders.

Holders of such preferred shares shall be shareholders within the meaning of this Act, and shall in all respects possess the rights and be subject to the liabilities of shareholders, saving the preference and rights given by any such by-law.

Nothing in this article contained, or done in pursuance thereof, shall affect the rights of creditors of any company. *(As enacted by 61 V., c. 36.)*

4718. A copy of any by-law of the company, under its seal and purporting to be signed by any officer of the company, shall be received as *primâ facie* evidence of such by-law in all courts of justice in this Province.

4719. No loan shall be made by the company to any shareholder, and if such be made, all directors and other officers of the company making the same, or in any wise assenting thereto, shall be jointly and severally liable for all debts of the company contracted from the time of the making of such loan to that of the repayment thereof, towards the company for the amount of such loan, and also towards third parties, to the extent of such loan with legal interest.

4720. The directors shall be jointly and severally liable to the laborers, servants and apprentices of the company for all debts, not exceeding one year's wages, due for services performed for the company whilst they are such directors, respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor yet unless such director is sued therefor within one year from the time when he ceased to be such director, nor yet before an execution against the company has been returned unsatisfied in whole or part.

The amount due on such execution shall be the amount recoverable with costs against the directors.

§ 5. *Shareholders, Shares and Calls.*

4721. One-fourth part in value of the shareholders of the company has, at all times, the right to call a special meeting thereof, for the transaction of any business specified in such written requisition and notice as they may issue to that effect.

4722. The capital stock of all joint stock companies shall consist of that portion of the amount authorized by the charter, which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash.

The amount of paid-up capital, from year to year, shall be published annually in a report of the shareholders of the Company.

2. The property accounts of a company shall represent only the amount of the actual *bonâ fide* outlay necessary for the undertaking.

No stock shall be issued to represent the increased value of any property. Any such issue shall be null and void.

3. The practice, commonly known as watering of stock, is prohibited, and all stock so issued shall be null and void.

4. The capitalization of surplus earnings, and the issue of stock to represent such capitalized surplus are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the reimbursement of the amount paid for such stock.

5. Every form and manner of fictitious capitalization of stock in any joint stock company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented by an amount in cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void.

4723. The stock of the company is deemed to be personal estate, and shall be transferable, in such manner only, and subject to all such conditions and restrictions, as by this section or by the letters-patent, or the by-laws of the company, shall be prescribed.

4724. If the letters-patent make no other definite provisions, the stock of the company, so far as the same is not allotted thereby, shall be allotted when and as the directors, by by-law or otherwise, may ordain.

4725. The directors may call in and demand from the shareholders all sums of money by them subscribed, at such times and places, and in such payments or instalments, as the letters-patent, or this section, or the by-laws of the company, may require or allow.

Interest shall accrue and fall due, at the rate of six per cent. per annum, upon the amount of any unpaid call, from the day appointed for the payment of such call.

4726. Not less than ten per cent. upon the allotted stock of the company shall, by means of one or more calls, be called in and made payable within one year from the incorporation of the company.

For every year thereafter, at least a further five per cent. shall in like manner be called in and made payable, until one-half has been so called in.

4727. The company may enforce payment of all calls and interest thereon, by action in any competent court; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more upon one share or more, stating the number of calls and the amount of each, whereby an action has accrued to the company.

A certificate under the seal of the company, and purporting to be signed by any of its officers to the effect that the defendant is a shareholder, that such calls have been made, and that so much is due by him thereon, shall be received in all courts as *primâ facie* evidence to that effect.

4728. If, after such demand or notice as by the letters-patent or by-laws of the company may be prescribed, any call made upon any share or shares be not paid within the time prescribed by the letters-patent or by-laws, the directors, in their discretion, by vote to that effect, reciting the facts and duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment is not made; and the same shall thereupon become the property of the company, and may be disposed of as by by-law or otherwise they shall ordain.

4729. No share shall be transferable until the previous calls thereon have been fully paid in or until declared forfeited for non-payment of calls thereon, or sold under execution.

4730. No shareholder in arrear in respect of any call shall be entitled to vote at any meeting of the company.

4731. Each shareholder, until the whole amount of his stock has been paid up, shall be personally liable to the creditors of the company, to an amount equal to that not paid up thereon; but he shall not be liable to an action therefor by any creditors, before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the whole amount recoverable, with costs against such shareholder.

4732. The shareholders shall not as such be held responsible for any act, default or liability whatever, of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatever, relating to or connected with the company, beyond the amount of their respective shares in the capital stock thereof.

4733. No person holding stock in the company in the name of another shall be personally subject to liability as a shareholder, but the estates and funds in the hands of such person, belonging to the person he represents, shall be liable in like manner, and to the same extent, as the person represented would be, if holding such stock in his own name.

4734. No person holding stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same and shall be liable as a shareholder accordingly.

4735. Every person holding and possessing shares in the name of another shall represent the stock in his hands at all meetings of the company and may vote accordingly as a shareholder; and so with every person who pledges his stock.

§ 6. *Dividends.*

4736. No company shall declare a dividend, the payment of which infringes upon or lessens the capital of the company.

No dividend shall be declared or paid, which has not been actually earned by the company

2. The annual dividend may, however, be supplemented or paid entirely out of the reserve fund; but payment of the dividend in this way must be publicly announced to the shareholders at the annual meeting, and duly authorized by a resolution of the company.

In default of such resolution, the directors of the company, voting for or consenting to such increase, shall be jointly and severally liable to the creditors of the company for the amount of dividend paid in excess of that actually earned.

3. Should any dividend be so declared or paid, the directors voting for or consenting to the payment of such dividend shall be jointly and severally liable to the creditors of such company for the amounts so paid.

4737. The directors, who declare and pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent, or diminishes the capital stock thereof, shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the then existing debts of the company, and for all thereafter contracted during their continuance in office.

But if any director present when such dividend is declared do forthwith, or if any director then absent do within twenty-four hours after he shall have become aware thereof and able so to do, enter on the minutes of the board of directors his protest against the same, and do within eight days thereafter publish such protest in at least one newspaper published at, or as near as may be possible to, the office or chief place of business of the company, such director may thereby, and not otherwise, exonerate himself from such liability.

§ 7 *Books to be Kept.*

4738. The company shall cause a book or books to be kept by its secretary, or by some other officer specially charged with that duty, wherein shall be kept correctly recorded:

1. A copy of the letters-patent incorporating the company, of any supplementary letters-patent, and of all the by-laws thereof;
2. The names, alphabetically arranged, of all persons who are or have been shareholders;
3. The address and calling of every such person while such shareholder;
4. The number of shares of stock held by each shareholder;
5. The amounts paid in and remaining unpaid on the stock of each shareholder;
6. All transfers of stock in their order, as presented to the company for entry, with the date and other particulars of each transfer, and the date of the entry thereof; and
7. The names, addresses and calling of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director.

4739. The directors may refuse to allow the entry, into any such book, of any transfer, not made by sale under execution, of stock whereof the whole amount has not been paid in; and whenever an entry is made in such book of any such transfer of stock not fully paid in, to a person not being of apparently sufficient means, the directors jointly and severally shall be liable to the creditors of the company, in the same manner and to the same extent as the transferring shareholder would have been, but for such entry.

But if any director, present when such entry is allowed, do forthwith, or if any director then absent do, within twenty-four hours after he shall have become aware thereof, and able so to do, enter on the minute book of the board of directors his protest against the same, and do within eight days thereafter publish such protest in at least one newspaper published at or as near as may be possible to the office or chief place of business of the company, such director may thereby, and not otherwise, exonerate himself from such liability.

4740. No transfer of stock, unless made by sale under execution, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, and as rendering the transferee liable *ad interim* jointly and severally with the transferor, to the company and their creditors until entry thereof has been duly made in such books.

4741. Such books shall, during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders and creditors of the company, and their representatives at the office or chief place of business of the company.

Every such shareholder and creditor or their representatives may make extracts therefrom.

4742. In any suit or proceeding against the company or against any shareholder, such books shall be *primâ facie* evidence of all facts purporting to be thereby stated.

4743. Every director, officer or servant of the company who knowingly makes or assists in making any untrue entry in any such book, or who refuses or neglects to make any proper entry therein, or to exhibit the same, or to allow the same to be inspected and extracts to be taken therefrom, shall be liable to a penalty of one hundred dollars for every such untrue entry and for every such refusal or neglect, and also in damages for all loss or injury which any party interested may have sustained thereby.

4744. Every company neglecting to keep such books open for inspection shall forfeit its corporate rights.

§ 8. Trusts, Contracts, etc.

4745. The company is not bound to see to the execution of any trust, whether express, implied or constructive, in respect of any shares.

The receipt of the shareholder in whose name the same may stand in the books of the company is a valid and binding discharge to the company for any dividend or money payable in respect of such shares, and whether or not notice of such trust has been given to the company.

The company is not bound to see to the application of the money paid upon such receipt.

4746. Every contract, agreement or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the company, by any agent, officer or servant of the company, in general accordance with his powers as such under the by-laws, shall be binding upon the company.

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 endorsed, as the case may be, in pursuance of any by-law or special vote or order.

The party so acting as agent, officer or servant of the company, shall not thereby be subjected personally to any liability whatever to any third party therefor.

Provided always, that nothing in this article shall be construed to authorize the 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.

4747. No company shall use any of its funds in the purchase of stock in any other corporation, unless in so far as such purchase may be specially authorized by its charter and also by the charter of such other corporation.

§ 9. *Suits.*

4748. Any description of action may be prosecuted and maintained between the company and any shareholder thereof.

2. No shareholder, not being himself a party to such suit, shall be incompetent as a witness therein.

3. Service of all manner of summons or proceedings whatever upon the company may be made by leaving a copy thereof at the office or chief place of business of the company, with any grown person in charge thereof, or elsewhere with the president and secretary thereof; or if the company have no known office or chief place of business, or have no known president or secretary, then, upon return to that effect duly made, the court or judge orders such publication as it may deem requisite to be made in the premises, for at least one month, in at least one newspaper.

Such publication shall be held to be due service upon the company.

4749. In any action or any other legal proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name, as incorporated by virtue of letters-patent or of letters-patent, and supplementary letters-patent, as the case may be, under this section; and the notice in the *Quebec Official Gazette* of the issue thereof shall be *primâ facie* proof of all things thereby declared.

On production of the letters-patent or supplementary letters-patent themselves, or of any exemplification or copy thereof under the Great Seal, the fact of such notice shall be presumed; and, save only in any proceeding, by *scire facias* or otherwise, for direct impeachment thereof, the letters-patent, or supplementary letters-patent, themselves, or any exemplification or copy thereof under the Great Seal, shall be conclusive proof of every matter and thing therein set forth

§ 10. *Miscellaneous.*

4750. The charter of the company shall be forfeited by non-user during three consecutive years at any one time, or if the company do not go into actual operation within three years after it is granted; and no declaration of such forfeiture by any act of the Legislature shall be deemed an infringement of such charter.

4751. The company shall be subject to such further and other provisions as the Legislature may hereafter deem expedient to enact.

4752. The Lieutenant-Governor in Council may from time to time establish, alter, and regulate the tariff of fees to be paid on applications for letters-patent and supplementary letters-patent under this section, may designate the department or departments through which the issue thereof shall take place, and may prescribe the forms of proceeding and record in respect thereof, and all other matters requisite for carrying out the objects of this section.

2. Such fees may be made to vary in amount, under any rule or rules as to the nature of the company, amount of capital, and otherwise, that may be deemed expedient.

3. No step shall be taken in any department towards the issue of any letters-patent or supplementary letters-patent under this section, until the amount of all fees therefor shall have been duly paid.

The following Order in Council regulates the fees payable under this section:

Quebec, 5th December, 1892.

His Honor the Lieutenant-Governor has been pleased, by Order in Council, dated the 3rd of December instant to amend Order in Council No. 205, of the 27th of April last, concerning the tariff of fees of the Provincial Secretary and Registrar, by striking out Article 26, and replacing the whole of Articles 17, 18, 19, 20 and 21, by the following:

17. On letters-patent incorporating joint stock companies when the capital stock is $500,000 or over the fee will be........$200 00

18. When the proposed capital stock is $200,000 or over, but under $500,000 .... 150 00

19. When the proposed capital stock is $100,000 or over, but under $200,000 .... 100 00

20. When the proposed capital stock is under $100,000........ 50 00

21. On applications for supplementary letters-patent, other than those for increasing capital stock, the fee will be one-half of the amount payable on the original letters-patent.

When application is made for an increase of capital stock, the fee will be calculated on the actual amount of the increase of such capital stock, and will be the same as that payable on original letters-patent for an amount equal to such increase.

LOUIS P. PELLETIER,
Provincial Secretary

4753. No bill for incorporating a company for any of the purposes set forth in article 4696, or for increasing or decreasing the capital stock of any company, or for changing its name, shall be introduced or proceeded with either in the Legislative Council or in the Legislative Assembly, until there has been paid in, to the credit of the Treasurer, for the public uses of the Province, over and above whatever may be required to be paid by way of fee or for printing or otherwise, under the rules of the Legislative Council or Legislative Assembly, a sum equal to what would have to be paid under the order or orders in council in force upon letters-patent or supplementary letters-patent, as the case may be, if the privileges sought by means of such bill were sought by means of letters-patent or supplementary letters-patent under this section.

2. Should such bill fail to become law, so much only of such amount, not exceeding one-third thereof, as may be remitted by joint resolution of the Legislative Council and Legislative Assembly, may be repaid to the depositor.

3. Should such bill be so amended as to make the amount payable therefor as amended, other than what was so payable therefor as introduced, any excess of payment shall be repaid or any required further payment made good, as the case may be.

4. No such bill shall be presented for sanction to the Lieutenant-Governor, unless there is endorsed thereon a certificate by the clerks of the Legislative Council and Legislative Assembly respectively, that they are officially assured of the fact that all payments hereby exigible have been duly made upon the bill.

FORM A.

Public notice is hereby given that, under the Joint Stock Companies' Incorporation Act, letters-patent have been issued under the Great Seal of the Province of Quebec, bearing date the day of , incorporating *(here state names, address and calling of each corporator named in the letters-patent)*, for the purpose of *(here state the undertaking of the company, as set forth in the letters-patent)*, by the name of *(here state name of the company, as in the letters-patent)*, with a total capital stock of dollars divided *the letters-patent*], with a total capital stock of dollars divided into shares of dollars each.

Dated at the office of the Secretary of the Province of Quebec this day of

A. B.,
Provincial Secretary.

FORM B.

Public notice is hereby given that, under the Joint Stock Companies' Incorporation Act, Supplementary letters-patent have been this day issued under the Great Seal of the Province of Quebec, bearing date the day of , whereby the total capital stock of *(here state the name of the company)*, is increased (*or* decreased, *as the case may be*) from dollars to dollars (*or* whereby the name of the said company has been changed to that of).

Dated at the office of the Secretary of the Province of Quebec, this day of

A. B.
Provincial Secretary.

DECLARATION TO BE MADE BY INCORPORATED COMPANIES.

(Being Section III. of Chapter Third of the Revised Statutes of Quebec.)

4754. Every incorporated company, carrying on any labor, trade or business in this Province (except banks) shal cause to be delivered to the prothonotary of the Superior Court in each district, or to the registrar of each registration division in which it carries on, or intends to carry on, its operations or business a declaration in writing to the effect hereinafter provided, made and signed by the president, when its chief office or principal place of business is in this Province, or by the principal manager or chief agent in the Province when it has only branches or agencies therein.

2. Such declaration shall state the name of the company, where and how it was incorporated, the date of its incorporation, and where its principal place of business within the Province is situated.

3. Such declaration shall be in the form or to the effect of form A of this section, and shall be produced by the president or the principal manager or chief agent, as the case may be, of every such incorporated company, and filed within sixty days after commencing operations and business.

4. When and so often as any change takes place in the name of the company, or in its principal place of business in the Province, a declaration thereof shall in like manner be made, within sixty days from such change.

4755. The prothonotary and the registrar shall enter such declaration in the books kept by them respectively for the registration of declarations of partnerships.

4756. The prothonotary and the registrar shall be entitled to a fee of one dollar for the entry of every declaration made under the authority of this section.

4757. A failure to make and file the declarations required by article 4754 renders each of the incorporated companies above mentioned liable to a fine of four hundred dollars, and the president, principal manager, or chief agent, as the case may be, to a fine of two hundred dollars.

4758. Should the declaration be made and filed after the expiration of the sixty days above mentioned and before any suit for a contravention of this section has been instituted, then the company making and filing such declaration, its president, principal manager or chief agent, as the case may be, shall no longer be deemed to have been in default.

4759. The fines imposed by this section are recoverable, before any court having jurisdiction in civil cases to the amount of such fine, by any person suing as well in his own name as in the name of Her Majesty, or by the Attorney-General in the name of Her Majesty.

4760. One-half of all fines recovered belongs to the party suing for the same, and the other half to the Crown, and forms part of the consolidated revenue fund of the Province, unless the suit be brought on behalf of the Crown only, in which case the whole of the fine shall belong to the Crown for the uses aforesaid.

FORM A.

Province of Quebec, }
District of }

The—(*name*)—Company.

The (*name*) Company was incorporated in (*name of the country, province, etc.,*) by (*Letters-Patent or Statute, giving title, etc.,*) granted (*or* sanctioned *or* registered, *as the case may be*), on the (*date*)

Its principal place of business in the Province of Quebec is at (*name of town, etc.*)

In testimony whereof, this declaration in duplicate is made and signed by me (*name, address and calling*), the (*president, principal manager, chief agent, as the case may be*), of the said company, at (*name of place*) on the (*date*)

SPECIAL PROVISIONS RESPECTING CERTAIN COMPANIES AND CORPORATIONS.

(Being Section IV. of Chapter Third of the Revised Statutes of Quebec.)

§ 1. *Powers of certain companies to divide their capital stock and to acquire and hold real estate.*

4761. It is lawful for the directors of any company of which the capital stock is divided into shares being a multiple of one hundred, to pass a by-law declaring that the capital stock of such company shall be divided into shares of one hundred dollars each, and, from and after the passing of such by-law such capital stock shall be divided into shares of one hundred dollars each.

4762. Every company incorporated and existing in Great Britain in the United States of America, or in Canada, has the right to acquire and hold any lands and real estate in this province, for its occupation or the prosecution of its business only, any law to the contrary notwithstanding.

4763. No such corporation formed for the purpose of promoting art, scence, religion, charity, or any other like object, not involving the acquisition of gain by the corporation or by the individual members thereof, shall, without the sanction of the Lieutenant-Governor in Council, hold more than ten acres of land; but the Lieutenant-Governor in Council may, by license under the hand of the Provincial Secretary, empower any such corporation to hold lands in such quantity and subject to such conditions as he shall think fit.

BRITISH COLUMBIA COMPANIES' ACT.

(Being Chapter 44, 61 Vic., 1897.)

AN ACT FOR THE INCORPORATION AND REGULATION OF JOINT STOCK COMPANIES AND TRADING CORPORATIONS.

Preamble.—Whereas there are now several systems whereunder Joint Stock Companies and Trading Corporations can 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 and incorporation of Joint Stock Companies and Trading Corporations:

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Interpretation.

1. Interpretation.—In the construction and for the purposes of this Act (if not inconsistent with the context or subject matter) the following terms shall have the resepective meanings hereinafter assigned to them:—

"Charter" of a company shall mean 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 of Canada, 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 and regulations" of a company shall mean 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:

"Company" shall mean any company which has been or is about to be incorporated under this Act, for any purpose or object to which the legislative authority of the Legislature of British Columbia extends, except the construction and working of railways and the business of insurance:

"Extra-Provincial Company" shall mean any duly incorporated company other than a company incorporated under the laws of the Province of British Columbia:

"Real estate" or "land" shall include all messuages, lands, tenements, leaseholds and hereditaments of any tenure, and all immovable real property of every kind:

"Registrar" shall mean the Registrar of Joint Stock Companies:

"Supreme Court" and "the Court" shall mean and refer to Her Majesty's Supreme Court of British Columbia:

"Shareholder" shall mean every subscriber to or holder of shares in the company, and extend to and include the personal representatives of the shareholder:

"Subscriber" shall mean any person who subscribes for shares in the Memorandum of Association of the company. 1897, c. 2, s 1; 62 Vict. (1899), c. 15, s. 2.

Preliminary.

2. Registrar of Joint Stock Companies.—The Lieutenant-Governor in Council may from time to time appoint such person as he shall think proper to act as Registrar of Joint Stock Companies.

(2.) It shall be the duty of the Registrar to enforce compliance with the several provisions, regulations and stipulations in this Act contained, 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. [C. A. 1888, c. 21, s. 8.] 1897, c. 2, s. 2.

3. General rules and orders.—The Lieutenant-Governor in Council may from time to time, by Order or Orders in Council, make and establish such General Rules and Orders, not inconsistent with this Act, as may from time to time to him appear necessary or expedient for the purpose of giving full effect to the provisions of this Act, or any or either of them, and for prescribing the course to be adopted in the course of official business under this Act, and the forms to be used therein. All such General Rules and Orders shall, after the making thereof, be published in the British Columbia Gazette, and shall thereupon have the force of law, until amended, altered, or revoked. 1897, c. 2, s. 3.

Incorporation.

4. Formation and incorporation.—Associations of persons for the acquisition of gain by any lawful means within the scope of this Act may be formed according to the provisions of this Act, and any such company, the members, shareholders, and stockholders thereof shall be subject to the conditions and liabilities, and be entitled to the rights and privileges imposed and conferred by this Act. 1897, c. 2, s. 4.

5. Companies heretofore incorporated may come under this act.—In case a resolution, authorizing registration under the provisions of this section, and 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 by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company duly called for considering the subject of such resolution, any company heretofore incorporated, or purported or expressed to have been incorporated, under any Act of this Province, or either of the former Colonies of Vancouver Island or British Columbia, for purposes or objects and possessing powers and rights within the scope of this Act, or within the scope of this Act as it may be hereafter amended, and being at the time of registration a subsisting and valid corporation, may deliver to the Registrar an official copy of the Charter and regulations of the company, certified under the hand and seal of a person duly authorized for the purpose by the resolution aforesaid, and the certificate (if any) of the incorporation of such company, or an official copy thereof, certified as aforesaid, and upon payment to the Registrar of a fee ot ten dollars shall be entitled to receive from the Registrar a certificate of the reincorporation and registration of the company as a company under this Act, for the objects and purposes 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 rigats and obligations of the former company shall be transferred to the new company, and all proceedings may be continued and 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 and 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 liability of the shareholders to creditors of the old company shall remain as at the time of the reincorporation, and of such reincorporation the certificate aforesaid shall be conclusive evidence, as well as conclusive evidence of due registration and observance of all statutory requirements with respect to registration or incorporation in force prior to the passage 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 provisions of the resolution of the company authorizing the execution thereof, extend, vary or limit the powers and objects of the company, and the certificate of registration under this section may be to the new company by the name of the old company, or by any other name of which the last word shall be the word "limited":

(*b*.) Where an 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 authorizing such registration:

(*c*.) The said resolution may prescribe the manner in which the shares or stock in the new company are to be allotted, and in default of its so doing the control of the allotment shall vest absolutely in the directors of the new company:

(*d*.) Whenever the Registrar considers that public notice of an intended application, under this section, should be given, he may require such notice to be published in the Gazette or otherwise as he thinks proper:

(*e*.) Every certificate of registration issued under this section shall be published for four weeks in the British Columbia Gazette and in one newspaper circulating in the city or district in which the registered office of the company is situate. 1897, c. 2, s. 5.

6. Definition of Insurance Company.—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, shall be deemed to be an Insurance Company. [25 & 26 Vict., c. 89, s. 3.] 1897, c. 2, s. 6.

7. Prohibition of partnerships exceeding a certain number.—No company, association, or partnership, consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any business, within the scope of this Act, 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.] 1897, c. 2, s. 7.

8. Division of Act.—This Act is divided into ten parts, relating to the following subject-matters:—

The First Part,—to the Constitution and Incorporation of Companies and Associations under this Act:

The Second Part,—to the Distribution of the Capital, and the Liability of Members of Companies and Associations under this Act:

The Third Part,—to the Extraordinary Powers of Companies under this Act:

The Fourth Part,—to the Management and Administration of Companies and Associations under this Act:

The Fifth Part,—to the Borrowing Powers of Companies under this Act:

The Sixth Part,—to the Licensing and Registration of Extra-Provincial Companies:

The Seventh Part,—to the Procedure in Actions against Unregistered Extra-Provincial Companies:

The Eighth Part,—to the Voluntary Winding up of Companies under this Act:

The Ninth Part,—to the Protection of the Purchasers of Stock from Losses by Forged Transfers, and the Prevention of Fraudulent and Negligent Practices:

The Tenth Part,—to the Repeal of former Enactments. 1897, c. 2, s. 8.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of Association.

9. Mode of forming a company.—Any five or more persons associated for any lawful purpose within the scope of this Act may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability. [25 & 26 Vict., c. 89, s. 6.] 1897, c. 2, s. 9.

10. Limitation of liability of members.—The liability of the members of a company formed under this Act may, according to the Memorandum of Association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the Memorandum of Association to contribute to the assets of the company, in the event of its being wound up. [25 & 26 Vict., c. 89, s. 7.] 1897, c. 2, s. 10.

11. Memorandum of Association of a company limited by shares.—Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the Memorandum of Association shall contain the following things, that is to say:—

(1.) The name of the proposed company, with the addition of the word "Limited" as the last word in such name:

(2.) Struck out by 64 Vict. (1900), c. 5, s. 2.

(3) The objects for which the proposed company is to be established:

(4.) The time of existence of the proposed company, if it is intended to secure incorporation for a fixed period:

(5.) A declaration that the liability of the members is limited:

(6.) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount:

Subject to the following regulations:—

(1.) That no subscriber shall take less than one share:

(2.) That each subscriber of the Memorandum of Association shall write opposite to his name the number of shares he takes:

(3.) That each subscriber to the Memorandum of Association shall be the bonâ fide holder in his own right of the share or shares for which he has subscribed in the Memorandum of Association. [25 & 26 Vict., c. 89, s. 8.] 1897, c. 2, s. 11.

12. Memorandum of Association of a company limited by guarantee.—Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the Memorandum of Association shall contain the following things, that is to say:—

(1.) The name of the proposed company, with the addition of the words "Limited by guarantee" as the last words in such name:

(2.) Struck out by 64 Vict. (1900), c. 5, s. 2.

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount. [25 & 26 Vict., c. 89, s. 9.] 1897, c. 2, s. 12.

13. Memorandum of Association of an unlimited company.—Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the Memorandum of Association shall contain the following things, that is to say:—

(1.) The name of the proposed company:

(2.) Struck out by 64 Vict. (1900), c. 5, s. 2.

(3.) The objects for which the proposed company is to be established. [25 & 26 Vict., c. 89, s. 10.] 1897, c. 2, s. 13.

14. Signature and effect of Memorandum of Association.—The Memorandum of Association shall be signed by each subscriber in the presence of, and be attested by, one witness at the least; it shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the Memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such Memorandum, subject to the provisions of this Act. [25 & 26 Vict., c. 89, s. 11.] 1897, c. 2, s. 14.

15. Power of certain companies to alter Memorandum of Association.—Any company limited by shares may so far modify the canditions contained in its Memorandum of Association, if authorized to do so by its regulations as originally framed, or as altered by special resolution, in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and, as is hereinafter provided, no alteration shall be made by any company in the conditions contained in its Memorandum of Association. [25 & 26 Vict., c. 89, s. 12.] 1897, c. 2, s. 15, (as amended by 64 Vict., c. 5, s. 3, and every company heretofore incorporated under this Act may change the location of its registered office at will and as if its Memorandum of Association contained no statement as to the intended location of such office, *Ibid.*)

Articles of Association.

16. Regulations to be prescribed by Articles of Association.—The Memorandum of Association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by Articles of Association, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the company as the subscribers to the Memorandum of Association deem expedient. The Articles shall be expressed in separate paragraphs numbered arithmetically; they may adopt all or any of the provisions contained in the table marked A in the First Schedule hereto; they shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, 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. In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the Memorandum of Association the number of shares he takes. [25 & 26 Vict., c. 89, s. 14.] 1897, c. 2, s. 16.

17. Application of table A.—In the case of a company limited by shares, if the Memorandum of Association is not accompaniecd by Articles of Association, or in so far as the articles do not exclude or modify the regulations contained in the table marked A in the First Schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in Articles of Association, and the Articles had been duly registered. [25 & 26 Vict., c. 89, s. 15.] 1897, c. 2, s. 17.

18. Signature and effect of Articles of Association.—The Articles of Association shall be printed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least. When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such Articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company in the nature of a specialty debt. [25 & 26 Vict., c. 89, s. 16.] 1897, c. 2, s. 18.

General Provisions.

19. Registration of Memorandum of Association and Articles of Association.—The Memorandum of Association and the Articles of Association, if any, shall be delivered to the Registrar of Joint Stock Companies, who shall retain and register the same. There shall be paid to the Registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B in the First Schedule hereto, the several fees therein specified, or such smaller fees as the Lieutenant-Governor in Council may from time to time by Order or Orders in Council direct; and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C in the First Schedule hereto, the several fees therein specified, or such smaller fees as the Lieutenant-Governor in Council may from time to time, by Order or Orders in Council direct. All fees paid to the said Registrar in pursuance of this Act shall be paid and carried to the account of the Consolidated Revenue Fund of the Province. [25 & 26 Vict., c. 89, s. 17.] 1897, c. 2, s. 19

20. Registrar's certificate.—Upon the registration of the Memorandum of Association, and of the Articles of Association in cases where Articles of Association are required by this Act or by the desire of the parties to be registered, the Registrar shall issue a certificate of incorporation, showing the corporate name of the company, the amount of the capital of the company, the number of shares into which the same is divided, and the amount of each share, the time of existence of the company if incorporated for a fixed period, and in the case of a limited company that the company is limited, and in the case of a mining company the liability of the members whereof is specially limited under section 56 hereof, that the company is so specially limited under said section 56. The subscribers of the Memorandum of Association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the Memorandum of Association, 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 hereinafter mentioned. A certificate of the incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect to registration have been complied with. [25 & 26 Vict., c. 89, s. 18. 1897, c. 2, s. 20.

(2.) The Registrar shall, at the cost of the parties applying for registration of a Memorandum of Association, publish the certificate of incorporation for four weeks in the British Columbia Gazette.

(3.) At the like cost as aforesaid, the Registrar shall also cause to be published concurrently with the publication of the certificate of incorporation and immediately below the same, a statement showing the objects for which the company named in the certificate has been so incorporated. 64 Vict., c. 5, s. 4.

21. Alteration of Memorandum of Association or constitution.—Subject to the provisions of this Act, any company registered under this Act may, by special resolution, alter the provisions of its Memorandum of Association, so far as may be required for any of the purposes hereinafter specified, but in no case shall any such alteration take effect until confirmed, on petition, by the Supreme Court:

(2.) Before confirming any such alteration, the Supreme Court must be satisfied—

(*a.*) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any person 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 of persons, for special reasons, dispense with the notice required by this section:

(3.) An order conurming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit, and the Court may make such orders as to costs as it deems proper:

(4.) The Court shall, in exercising its discretion under the provisions of this section, have regard to the rights and interests of the members of the company, or of any class of those members, 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 the Court may give such directions and make such orders as it may think expedient for the purpose of facilitating any such arrangement or carrying the same into effect: Provided always, that it shall not be lawful to expend any part of the capital of the company in any such purchase:

(5.) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company—

(*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 of Association. [53 & 54 Vict., c. 62, s. 1.] 1897, c. 2, s. 21.

22. Registration of altered Memorandum of Association.—Where a company has altered the provisions of its Memorandum of Association with respect to the objects of the company, and such alteration has been confirmed by the Court, an office copy of the order confirming such alteration, together with a printed copy of the Memorandum of Association so altered, shall be delivered by the company to the Registrar within fifteen days from the date of the order, and the Registrar shall register the same, and shall certify under his hand the registration thereof, and shall cause the certificate, together with a statement of the objects of the company as altered, shall be delivered by the company to the Registrar within fifteen British Columbia Gazette, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to such alteration and the confirmation thereof have been complied with, and thenceforth (but subject to the provisions of this Act) the Memorandum so altered shall be the Memorandum of Association of the Company:

(2.) If a company makes default in delivering to the Registrar any document required by this section to be delivered to him, the company shall, upon summary conviction, be liable to a penalty not exceeding fifty dollars for every day during which it is in default, and every director, manager, secretary and officer of the company, who shall knowingly and wilfully authorize or permit such default, shall, upon summary conviction, be liable to the like penalty. [53 & 54 Vict., c. 62, s. 2.] 1897, c. 2, s. 22, (as amended by 64 Vict. (1900), c. 5, s. 5.)

23. Copies of Memorandum, etc., to be given to members.—A copy of the Memorandum of Association, having annexed thereto the Articles of Association, if any, shall be forwarded to every member at his request, on payment of the sum of one dollar, or such less sum as may be prescribed by the company, for each copy; and if any company makes default in forwarding a copy of the Memorandum of Association and Articles of Association, if any, to a member in pursuance of this section, the company so making default shall upon summary conviction, for each offence, be liable to a penalty not exceeding five dollars, and every director, manager, secretary and officer of the company who shall knowingly and wilfully authorize or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 19.] 1897, c. 2, s. 23.

24. Prohibition against identity of names.—No company shall be registered under a name identical with that by which a subsisting company is already registered, or a society is incorporated, under the provisions of the 'Investment and Loan Societies Act,' or a society is registered under the provisions of the "Industrial and Provident Societies Act," or so nearly resembling the same as to be calculated to deceive (except in the case where such subsisting society or company is in the course of being dissolved and testifies its consent in such a manner as the Registrar requires); and if any company has heretofore been or shall hereafter be, without such consent as aforesaid, incorporated by a name identical with that by which a subsisting society or company has been incorporated, registered or licensed under any of the aforesaid Acts, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company shall, upon the direction of the Registrar, change its name; and upon such change being made the Registrar shall enter the new name on the Registrar in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

(As re-enacted by 61 Vict., c. 13, s. 2.)

25. Contracts—how made.—Contracts on behalf of any company incorporated under this Act may be made as follows, that is to say:—

(1.) 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 this Province or of the Dominion of Canada to be under seal, may be made on behalf of the company, in writing, under the common seal of the company, and such contract may be in the same manner varied or discharged:

(2.) Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

(3.) 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 the express or implied authority of the company, and such contract may in the same way be varied or discharged:

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be. [30 & 31 Vict., c. 131, s. 37.] 1897, c. 2, s. 25.

26. Promissory notes and bills of exchange.—A promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under this Act if made, accepted or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or indorsed by or on behalf or on account of the company by any person acting under the authority of the company. [25 & 26 Vict., c. 89, s. 47.] 1897, c. 2, s. 26.

27. Contracts generally when made by company, etc.—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:

(*a*.) Nothing in this Act shall be construed to authorize the 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. 1897, c. 2, s. 27.

28. Dividends not to be issued in insolvency of company.—The directors of the company shall not declare or pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent, or diminishes the capital thereof, but if any director present when such dividend is declared, forthwith, or if any director then absent, within twenty-four hours after he has become aware thereof and able so to do, enters on the minutes of the Board of Directors his protest against the same, and within eight days thereafter causes such protest to be published in at least one newspaper published at, or as near as may be possible to, the head office or chief place of business of the company, such director may thereby, but not otherwise, exonerate himself from liability. 1897, c. 2, s. 28.

29. Prohibits loan to shareholders.—No loan shall be made by the company to any shareholder, and if such loan is made all directors and other officers of the company making the same, and in anywise assenting thereto, shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with legal interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof; but this section shall not apply to a building society, or to a company incorporated for the lending of money. 1897, c. 2, s. 29.

PART II.

DISTRIBUTION OF CAPITAL OF COMPANIES AND LIABILITY OF MEMBERS AND OFFICERS OF COMPANIES UNDER THIS ACT.

Distribution of Capital.

30. Definition of member.—The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the Register of Members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the Register of Members, shall be deemed to be a member of the company [25 & 26 Vict., c. 89, s. 23.] 1897, c. 2, s. 30.

31. Nature of interest, etc. in company.—The shares or other interest of any member in a company under this Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company, and shall not be of the nature of real estate, and each share shall, in the case of a company having a capital divided into shares, be distinguished by its appropriate number. [25 & 26 Vict., c. 89, s. 22.] 1897, c. 2, s. 31.

32. Transfer by personal representative.—Any transfer of the share or other interest of a deceased member of a company under this Act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer. [25 & 26 Vict., c. 89, s. 24.] 1897, c. 2, s. 32.

33. Executors and pledgors voting.—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. 1897, c. 2, s. 33.

34. Entry of transfer by transferror.—A company shall, on the application of the transferror of any share or interest in the company, enter in its Register of Members the name of the transferee of such share or interest, in the same manner and subject to the same conditions as if the application for such entry were made by the transferee. [30 & 31 Vict., c. 131, s. 26.] 1897, c. 2, s. 34.

35. Transfers to escape liability.—Any transfer of shares in a company under this Act, made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person in the menial or domestic service of the transferror, shall be deemed to be a fraudulent transfer, and need not be recognized by the company or by the Court on the winding up of the company. [32 & 33 Vict., c. 19, s. 35.] 1897, c. 2, s. 35.

36. Register of members.—Every company under this Act shall cause to be kept in one or more books a Register of its members, and there shall be entered therein the following particulars:—

(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of 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 the name of any person was entered in the Register as a member:

(3.) The date at which any person ceased to be a member.

And any company acting in contravention of this section shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for every day during which its default in complying with the provisions of this section continues, and every director, manager, secretary and officer of the company who shall knowingly and wilfully authorize or permit such contravention shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 25.] 1897, c. 2, s. 36.

37. Annual list of shares.—Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list in the form E in the Second Schedule, of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, and so far as may be posible addresses and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:—

(1.) The amount of the capital of the company, and the number of shares into which it is divided:

(2.) The number of shares taken from the commencement of the company up to the date of the summary:

(3.) The amount of calls made on each share:

(4.) The total amount of calls received:

(5.) The total amount of calls unpaid:

(6.) The total amount of shares forfeited:

(7.) The names, addresses and occupations of the persons who have ceased to be members since the last list was made and the number of shares formerly held by each of them:

The above list and summary shall be contained in a separate part of the Register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar. [25 & 26 Vict., c. 89, s. 26.] 1897, c. 2, s. 37.

38. Penalty.—If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the Registrar, such company shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for every day during which such default continues, and every director, manager, secretary and officer of the company who shall knowingly and wilfully authorize or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 27.] 1897, c. 2, s. 38.

39. Company to give notice of consolidation, etc., of shares.—Every company under this Act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, shall forthwith give notice to the Registrar of such consolidation, division, or conversion, specifying the share so consolidated, divided or converted, and in default shall be subject to the penalty in the last section mentioned. [25 & 26 Vict., c. 89, s. 28.] 1897, c. 2, s. 39.

40. Effect of conversion into stock.—Where any company under this Act, and having a capital divided into shares, has converted any portion of its capital into stock, and given notice of such conversion to the Registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the Register of Members hereby required to be kept by the company, and the list of members to be forwarded to the Registrar, shall show the amount of stock held by each member in the list, instead of the amount of shares and the particulars relating to shares hereinbefore required. [25 & 26 Vict., c. 89, s. 29.] 1897, c. 2, s. 40.

41. No trust to be entered on Register.—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 under this Act. [25 & 26 Vict., c. 89, s. 30.] 1897, s. 2, s. 41.

42. Company not bound to see to trusts, etc,—The company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, in respect of any share; and the receipt of the shareholder in whose name the same stands on the books of the company shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, whether or not notice of the trust has been given to the company; and the company shall not be bound to see to the application of the money paid upon such receipt. 1897, c. 2, s. 42.

43. Evidence of title to shares, etc.—A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be primâ facie evidence of the title of the member to the share or shares or stock therein specified. [25 & 26 Vict., c. 89, s. 31.] 1897, c. 2, s. 43.

44. Inspection of Register.—The Register of Members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned. Except when closed, as hereinafter mentioned, it shall, during business hours, subject to such reasonable restrictions as the company in general meeting may impose (but so that no less than two hours in each day be appointed for inspection), be opened to the inspection of any member gratis, and to the inspection of any other person on the payment of twenty-five cents, or such less sum as the company may prescribe for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of twenty-five cents for every hundred words required to be copied. If such inspection or copy is refused, the company shall, for each refusal, upon summary conviction, be liable to a penalty not exceeding ten dollars, and a further penalty not exceeding ten dollars for every day during which such refusal continues; and every director, manager, secretary and officer of the company who shall knowingly authorize or permit such refusal shall, upon summary conviction, be liable to the like penalty; and in addition to the above penalty any Judge of the Supreme Court, sitting in Chambers may, by summary order, compel an immediate inspection of the Register. [25 & 26 Vict., c. 89, s. 32.] 1897, c. 2, s. 44.

45. Closing of Register.—Any company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, 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.] 1897, c. 2, s. 45.

46. Notice to Registrar of increase of capital or members.—Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the Registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorized, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the Registrar shall forthwith record the amount of such increase of capital or members. If such notice is not given within the period aforesaid, the company in default shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for every day during which such neglect to give notice continues; and every director, manager, secretary and officer of the company who shall knowingly and wilfully authorize or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 34.] 1897, c. 2, s. 46.

47. Remedy for improper entry or omission in Register.—If the name of any person is, without sufficient cause, entered in or omitted from the Register of Members of any company under this Act, 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 company, the person or member aggrieved, or any member of the company, or the company itself, may, by motion in the Supreme Court, or by application to a Judge thereof sitting in Chambers, apply for an order of the Court that the Register may be rectified, and the Court or Judge may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the Register, and may direct the company to pay all the costs of such motion or application, and any damages the party aggrieved may have sustained. The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the Register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the Register: Provided that the Court or Judge may direct an issue to be tried, in which any question of law may be raised, and an appeal shall lie. [25 & 26 Vict., c. 89, s. 35.] 1897, c. 2, s. 47.

48. Notice to Registrar of rectification of Register.—Whenever any order has been made rectifying the Register, in the case of a company hereby required to send a list of its members to the Registrar, the Court shall, by its order, direct that due notice of such rectification be given to the Registrar. [25 & 26 Vict., c. 89, s. 36.] 1897, c. 2, s. 48.

49. Register to be evidence.—The register of members shall be primâ facie evidence of any matters by this Act directed or authorized to be inserted therein. [25 & 26, Vict., c. 89, s. 37.] 1897, c. 2, s. 49.

Liability of Members.

50. What liability share deemed to carry.—Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar at or before the issue of such share. [30 & 31 Vict., c. 131, s. 25.] 1897, c. 2, s. 50.

51. Shareholder's liability on unpaid portion.—Each shareholder, until the whole amount of his shares, stock, or other interest has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, but not beyond the amount so unpaid of his said shares, stock, or other interest, shall be the amount so recoverable with costs, against such shareholder:

(*a.*) Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or a director of the company:

(*b.*) The shareholders of the company shall not as such be held responsible for any act, default, or liability whatsoever of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the company, beyond the unpaid amount of their respective shares in the capital stock thereof. 1897, c. 2, s. 51.

52. Trustees, etc.—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. 1897, c. 2, s. 52.

53. Non-personal liability of mortgagee or pledgee of shares.—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, 1897, c. 2, s. 53.

54. Liability, etc., of shareholders in case of winding up.—In the event of a company formed under this Act or under any other Act of the Legislature being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say):—

(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up:

(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:

(3.) No past member shall be liable to contribute to the assets of the company 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:

(4.) 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:

(5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the Memorandum of Association:

(.) Nothing in this Act contained shall invalidate any provision contained in any contract whereby the liability of individual members upon any such contract is restricted, or whereby the funds of the company are alone made liable in respect of such contract:

(7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories among themselves. [25 & 26 Vict., c. 89, s. 38.] 1897, c. 2, s. 54.

PART III.

EXTRAORDINARY POWERS OF COMPANIES.

Preference Shares.

55. Preference shares.—The directors of any company incorporated or re-incorporated under this Act may, with the sanction of a special resolution of the company previously given in general meeting, create and issue any part of the capital as preference shares giving the same such preference and priority as respects dividends and otherwise over ordinary shares as may be declared by the special resolution:

(*a*.) The special resolution may provide that the holders of such preference shares shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as may be considered expedient:

(*b*.) Holders of such preference shares shall be shareholders within the meaning of this Act, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Act; provided, however, that in respect of dividends and otherwise, they shall, as against the original or ordinary shareholders, be entitled to the preference given by any special resolution as aforesaid:

(*c*.) Nothing in this section shall affect or impair the rights of creditors of any company. 1897, c. 2, s. 55.

Issue of shares without personal liability by Mining Companies.

56. Mining companies with specially limited liability on shares—The Memorandum of Association of a company incorporated or re-incorporated under this Act, the objects whereof are restricted to acquiring, managing, developing, working and seling mines, mineral claims and mining properties, and the winning, getting, treating, refining and marketing of mineral therefrom, may contain a provision that no liability beyond the amount actually paid upon shares or stock in such company by the subscribers thereto or holders thereof shall attach to such subscriber or holder, and the Certificate of Incorporation issued under section 20 of this Act shall state that the company is specially limited under this section:

(*a*.) The licence or certificate of registration to any extra-provincial company (the objects whereof are restricted as aforesaid) issued under the provisions of Part VI. of this Act, may, if applied for in the application for such licence, or the petition for such registration, contain the provision aforesaid. 1897, c. 2, s. 56.

(*b*.) 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:—

(1.) To obtain by purchase, lease, hire, discovery, location or otherwise, and hold within the Province of British Columbia 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:

(2.) To dig for, crush, wash, smelt, assay, analyze, reduce amalgamate and otherwise treat gold, silver, 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:

(3.) To carry on the business of a mining, smelting, milling and refining company in all or any of its branches:

(4.) 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:

(5.) 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, saw-mills, crushing works, smelting works, concentrating works, hydraulic works, 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, subsidise or otherwise aid or take part in any such operations, 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:

(6.) To build, acquire, own, charter, navigate and use steam and other vessels for the purposes of the company:

(7.) 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:

(8.) 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 specially limited under this section is authorized to carry on:

(9) 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:

(10.) To borrow or raise money for the purposes of the company, but so that 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 sub-section 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 of Association, or the articles of Association, or by-laws of the Company:

(11.) To distribute any of the property of the company among the members in specie:

(12.) To do all such other things as are incidental or conductive to the pose 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 the objects of which are restricted as aforesaid:

(13.) To do all such other things as are incidental or conductive to the attainment of the foregoing objects. 64 Vict. (1900), c. 5, s. 6.

57. Shares to be specially marked.—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 provision mentioned in section 56 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 the company, the words "Issued under section 56 respecting Mining Companies of the 'Companies Act, 1897,'" and where such shares or stock are issued subject to further assessments the word "Assessable," or if not subject to further assessments the word "Non-assessable," as the case may be. 1897, c. 2, s. 57.

58. Charter, prospectuses and other documents of such company to be specially marked.—Every mining company, the Memorandum of Association of which contains the said provision, 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 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 authorizes or permits such default shall be liable to the like penalty. 1897, c. 2, s. 58.

59. Enforcement of payment of assessments on such shares.—In the event of any call or calls on assessable shares in a company so incorporated, remaining unpaid by the subscriber thereto, or holder thereof, for a period of 60 days after notice and demand of payment, such shares may be declared 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 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 interest and cost of advertising; provided that if the price of the shares so sold exceed the amount due with interest and cost thereon, the excess thereof shall be paid to the defaulting subscriber or holder. 1897, c. 2, s. 59.

60.—Liability of shareholder on such shares—No shareholder or subscriber for shares in any company so incorporated shall be personally liable for non-payment of any calls made upon his shares, beyond the forfeiture and sale, in the event of non-payment of such calls, of the amount, if any, already paid on the shares held or subscribed for, nor shall such shareholder or subscriber be personally liable for any debt contracted by the company, or for any sum payable by the company beyond the amount, if any, paid by him upon such shares. 1897, c. 2, s. 60.

61.—Existing Companies—Wherever any shares have been heretofore issued by any company duly incorporated under any Act as fully paid-up shares, either at a discount or in payment fir 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 passing of this Act (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. 1897, c. 2, s. 61.

Adjustment of Calls and Dividends.

62. Adjustment of calls and dividends.—Nothing contained in this Act shall be deemed to prevent any company incorporated under this Act, if authorised by its regulations as originally framed, or as altered by special resolution, from doing any one or more of the following things, namely:—

(1.) Making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls:

(2.) Accepting from any member of the company who assents thereto the whole or part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him, or without any call having been made:

(3.) Paying dividends in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others. [30 & 31 Vict., c. 131, s. 24.] 1897, c. 2, s. 62.

The following is enacted by 64 Vict. (1900), c. 5, s. 14:—

(1.) Notwithstanding any law to the contrary, it shall be lawful for companies incorporated under any Statute of this 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, 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 also exhibits a full, true, and correct account of the liabilities and assets of the company, such statutory declaration to be filed with the Registrar of Joint Stock Companies,—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.

63. Subdivision of shares.—Any company limited by shares may, by special resolution, so far modify the conditions contained in its Memorandum of Association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as by subdivision of its existing shares, or any of them, to divide its capital, or any part thereof, into shares of smaller amount than is fixed by its Memorandum of Association:

(2.) Provided that, in the subdivision of its existing shares, the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived. [30 & 31 Vict., c. 131, s. 21.] 1897, c. 2, s. 63.

64. Memorandum, etc., of the subdivision to comply with resolution.—The statement of the number and amount of the shares into which the capital of the company is divided, contained in every copy of the Memorandum of Association or other official document issued after the passing of any such special resolution, shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this section shall, upon summary conviction, be liable to a penalty not exceeding five dollars for each copy in respect of which such default is made; and every director, manager, secretary and officer of the company who knowingly or wilfully authorizes or permits any such default shall, upon summary conviction, be liable to the like penalty. [30 & 31 Vict., c. 131, s. 22.] 1897, c. 2, s. 64.

Share Warrants to Bearer.

65. Warrant of limited shares fully paid up, or of stock, may be issued to bearer,—In the case of a company limited by shares, the company if authorized to do so by its regulations as originally framed, or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up or, with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the share or shares or stock included in such warrant, hereinafter referred to as a share warrant. [30 & 31 Vict., c. 131, s. 27.] 1897, c. 2, s. 65.

66. Effect of and mode of transfer of share warrant.—A share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant. [30 & 31 Vict., c. 131, s. 28.] 1897, c. 2, s. 66.

67. Re-registration of bearer of share warrant.—The bearer of a share warrant shall, subject to the regulations of the company, be entitled, on surrendering such warrant 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 of Members the name of any bearer of a share warrant in respect of the shares or stock specified therein, without the share warrant being surrendered and cancelled. [30 & 31 Vict., c. 131, s. 29.] 1897, c. 2, s. 67.

68. Rights of bearer of share warrant as member of company.—The bearer of a share warrant may, if the regulations 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 such purposes as may be prescribed by the regulations:

(2.) Provided that the bearer of a share warrant shall not be qualified in respect of the shares or stock specified in such warrant for being a director or manager of the company in cases where such a qualification is prescribed by the regulations of the company. [30 & 31 Vict., c. 131, s. 30.] 1897, c. 2, s. 68.

69. Entries in register in case of share warrant.—On the issue of a share warrant in respect of any share or stock the company shall strike out of its Register of Members the name of the member then entered therein as holding such share or stock, as if he had ceased to be a member, and shall enter in the Register the following particulars:—

(1.) The fact of the issue of the warrant:

(2.) A statement of the shares or stock included in the warrant, distinguishing each share by its number:

(3.) The date of the issue of the warrant:

and until the warrant is surrendered, the above particulars shall be deemed to be the particulars which are required by the thirty-sixth section of this Act to be entered in the Register of Members of a company; and on the surrender of a warrant the date of such surrender shall be entered as if it were the date at which a person ceased to be a member. [30 & 31 Vict., c. 131, s. 31.] 1897, c. 2, s. 69.

70. Particulars of share warrant in annual summary.—After the issue by the company of a share warrant the annual summary required by the thirty-seventh section of this Act shall contain the following particulars: The total amount of shares or stock for which share warrants are outstanding at the date of the summary, and the total amount of share warrants which have been issued and surrendered respectively since the last summary was made, and the number of shares or amount of stock comprised in each warrant. [30 & 31 Vict., c. 131, s. 32.] 1897, c. 2, s. 70.

Reduction of Capital and Shares.

71. Power to reduce capital.—Any company limited by shares may, by special resolution, so far modify the conditions contained in its Memorandum of Association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar as is hereinafter mentioned:

(2.) The power to reduce capital conferred by this section shall include paid-up capital, and a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved. [30 & 31 Vict., c. 26, s. 9; 41 & 42 Vict., c. 26, s. 3.] 1897, c. 2, s. 71.

72. After such reduction "and reduced" added to name.—Every company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Supreme Court may fix, the words "and reduced," as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the company. [30 & 31 Vict., c. 131, s. 10.] 1897, c. 2, s. 72.

73. Company to apply for order confirming reduction.—A company which has passed a special resolution for reducing its capital may apply to the Supreme Court, by petition, for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who, under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit:

(2.) Provided that where the reduction of the capital of a company, does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital:

(*a*.) The creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction; and

(*b*.) It shall not be necessary before the presentation of the petition for confirming the reduction to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words "and reduced:"

(3.) In any case that the Court thinks fit so to do, it may require the company to publish, in such manner as the Court may direct, the reasons for the reduction of its capital, or such other information in regard to the reduction of its capital as the Court may think expedient, with a view to give proper information to the public in relation to the reduction of its capital by a company, and if the Court thinks fit, the causes which led to such reduction. [30 & 31 Vict., c. 131, s. 11; 40 & 41 Vict., c. 26, s. 4.] 1897, c. 2, s. 73.

74. Right of creditors to object to reduction.—Where a company proposes to reduce its capital 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 proposed reduction, and to be entered in the list of creditors who are so entitled to object:

(2.) The Court shall settle a list of such creditors, and for that purpose shall ascertain, as far as possible, without requiring an application from any creditor, the names of such creditors, and the nature and amounts of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction. [30 & 31 Vict., c. 131, s. 13.] 1897, c. 2, s. 74.

75. Court may dispense with consent of creditors on security given.—Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating, in such manner as the Court may direct, a sum of such amount as is hereinafter mentioned (that is to say):

(1.) If the full amount of the debt or claim of the creditor is admitted by the Company, or though not admitted is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated:

(2.) If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the Court may, if it think fit, inquire ino and adjudicate upon the validity of such debt or claim, and the amount for which the company may be liable in respect thereof, in the same manner as if the company were being wound up by the Court, and the amount fixed by the Court on such inquiry and adjudication shall be set apart and appropriated. [30 & 31 Vict., c. 131, s. 14.] 1897, c. 2, s. 75.

76. Order and minute to be registered.—The Registrar, upon the production to him of an order of the Supreme Court confirming the reduction of the 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 capital of the company, as altered by the order, the amount of sucn capital, the number of shares in which it is to be divided, the amount of each share, and the amount (if any) at the date of the registration of the minute, proposed to be deemed to have been paid up on each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect:

(2.) Notice of such registration shall be published in such manner as the Court may direct:

(3.) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute. [30 & 31 Vict., c. 131, s. 15; 40 & 41 Vict., c. 26, s. 4.] 1897, c. 2, s. 76.

77. Minute to form part of Memorandum of Association.—The minute when registered shall be deemed to be substituted for the corresponding part of the Memorandum of Association of the company and shall be of the same validity and subject to the same alterations as if it had been originally contained in the Memorandum of Association; and, subject as in this Act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute. [30 & 31 Vict., c. 131, s. 17.] 1897, c. 2, s. 77.

78. Saving right of creditors ignorant of proceedings.—If any creditor who is entitled, in respect of any debt or claim, to object to the reduction of the capital of a company under this Act is, in consequence of his ignorance of the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the company is unable, within the space of three weeks after demand made, to pay to the creditor the amount of such debt or claim, every person who was a member of the company at the date of the registration of the order and minute relating to the reduction of the capital of the company shall be liable to contribute for the payment of such 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 prior to such registration; and, on the company being wound up, the Court, on the application of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it think fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in a winding-up; but the provisions of this section shall not affect the rights of the contributories of the company among themselves. [30 & 31 Vict., c. 131, s. 17.] 1897, c. 2, s. 78.

79. Registered minute to be embodied in Memorandum of Association.—A minute, when registered, shall be embodied in every copy of the Memorandum of Association issued after its registration; and if any company makes default in complying with the provisions of this section, it shall, upon summary conviction, be liable to a penalty not exceeding five dollars for each copy in respect of which such default is made, and every director, manager, secretary and officer of the company who shall knowingly and wilfully authorise or permit such default shall, upon summary conviction, be liable to the like penalty. [30 & 31 Vict., c. 131, s. 18.] 1897, c. 2, s. 79.

80. Concealing name of creditor entitled to object.—If any director, manager or officer of a company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the company, 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 offence, upon summary conviction, be liable to a penalty not exceeding five hundred dollars. [30 & 31 Vict., c. 131, s. 19.] 1897, c. 2, s. 80.

81. Reduction by cancelling of unused shares.—Any company limited by shares may so far modify the conditions contained in its Memorandum of Association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital by cancelling any shares which, at the date of the passing of such resolution, have not been taken, or agreed to be taken by any person; and the provisions of the ten next preceding sections of this Act shall not apply to any reduction of capital made in pursuance of this section. [40 & 41 Vict., c. 26, s. 5.] 1897, c. 2, s. 81.

Change of Name.

82. Proceedings for change of name.—When a company is desirous of changing its name, the Lieutenant-Governor, upon being satisfied that the company is in a solvent condition, that the change is not desired for any improper purpose, and is not otherwise objectionable, that the change has been sanctioned by a special resolution of the company, and that the notice hereinafter provided has been duly given, may by Order in Council change the name of the company to some other name set forth in the said Order:

(2.) The company shall give at least three months' previous notice in the British Columbia Gazette, and in some newspaper published or circulated 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:

(3.) Such name shall be conclusively established by the insertion in the British Columbia Gazette of a notice thereof by the Provincial Secretary. 1897, c. 2, s. 82.

83. Effect of such change of name.—No contract or engagement entered into by or with the company, and no liability incurred by it, shall be affected by the change of name; and all suits commenced by or against the company prior to the change of name may be proceeded with against or by the company under its former name. 1897, c. 2, s. 83.

PART IV.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Provisions for Protection of Creditors.

84. Registered office of company.—Every company under this Act shall have a registered office within the Province, to which all communications and notices may be addressed. If any company under this Act carries on business without having such an office, it shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for every day during which business is so carried on. [25 and 26 Vict., c. 89, s. 39.] 1897, c. 2, s. 84.

85. Notice of situation of.—Notice of the situation of such registered office, and of any change therein, shall be given to the Registrar, and recorded by him. Until such notice is given, the company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office. [25 & 26 Vict., c. 89, s. 40.] 1897, c. 2, s. 85.

86. Publication of name by a limited company.—Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements and other official publications of such 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 such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company. [25 & 26 Vict., c. 89, s. 41.] 1897, c. 2, s. 86.

87. Penalties for non-publication of name, etc.—If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed; and every director or manager of the company who shall knowingly and wilfully authorize or permit such default shall, upon summary conviction, be liable to the like penalty; and if any director, manager, or officer of such 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 such company, or signs, or authorises to be signed on behalf of such 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, upon summary conviction, be liable to a penalty of 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, s. 42.] 1897, c. 2, s. 87.

88. Register of mortgages.—Every company under this Act shall keep a Register of all mortgages and charges specifically affecting property of the company, and shall enter in such Register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, Manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall, upon summary conviction, be liable to a penalty not exceeding two hundred and fifty dollars. The Register of Mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal, shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars, and a further penalty of ten dollars for every day during which such refusal continues; and in addition to the above penalty, any Judge of the Supreme Court sitting in Chambers may, by summary order, compel an immediate inspection of the Register. [25 & 26 Vict., c. 89, s. 43.] 1897, c. 2, s. 88.

89. Register of Directors, etc.—Every company under this Act shall keep at its registered office a Register containing the names and addresses and the occupations of its directors or managers, and shall send to the Registrar a copy of such Register, and shall, from time to time, notify the Registrar of any change that takes place in such directors or managers. [25 & 26 Vict., c. 89, s. 45.] 1897, c. 2, s. 89.

90. Penalty on company not keeping Register.—If any company under this Act makes default in keeping a Register of its directors or managers, or in sending a copy of such Register to the Registrar in compliance with the foregoing rules, or in notifying to the Registrar any change that takes place in such directors or managers, such delinquent company shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars for every day during which such default continues; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 46.] 1897, c. 2, s. 90.

91. Prohibits carrying on business with less than five members.—If any company under this Act carries on business when the number of its members is less than five for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than five members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member. [25 & 26 Vict., c. 89, s 48.] 1897, c. 2, s. 91.

Notices, Summons, Actions, Etc.

92. Corporate name and proof of Memorandum, etc., in actions and proceedings.—In an action or other proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name, as incorporated or re-incorporated under this Act; and the Memorandum and Articles of Association of the company, or any exemplification, or copy thereof certified under the hand and seal of the Registrar, or any copy of the Gazette containing such Memorandum and Articles of Association shall be conclusive proof of every matter and thing therein set forth. 1897, c. 2, s. 92.

93. Proof cf resolutions, etc.—A copy of any resolution or special resolution of the company under its seal, and purporting to be signed by any officer of the company, or as to any special resolution filed with the Registrar, a copy certified under his hand and seal shall be received as primâ facie evidence of such resolution or special resolution in all Courts in British Columbia. 1897, c. 2, s. 93.

94. Service on company.—Any summons, notice, order or other process or documents requiring to be served upon the company may, in addition to any other method of service from time to time provided by any Act, Ordinance or Rule of Court in that behalf, be served by leaving the same at the registered office of the company with any adult person in the employ of the company, or on the President or Secretary of the company, or by leaving the same at the domicile 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 or secretary, 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. (*As repealed by 64 Vict. (1900), c. 5, s. 7.*)

95. Authentication of summons, etc., by company.—Any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, manager or other authorized officer of the company and need not be under the seal of the company. 1897, c. 2, s. 95.

96. Actions with shareholders.—Any description of action may be prosecuted and maintained between the company and any shareholder thereof, and no shareholder shall, by reason of being a shareholder, be incompetent as a witness therein. 1897, c. 2, s. 96.

Provisions for Protection of Members.

97. First general meeting.—Every company formed under this Act shall hold a general meeting within four months after its Memorandum of Association is registered; and if such meeting is not held the company shall, upon summary conviction, be liable to a penalty not exceeding twenty-five dollars a day for every day after the expiration of such four months until the meeting is held; and every director or manager of the company, and every subscriber of the Memorandum of Association, who knowingly authorises or permits such default shall, upon summary conviction, be liable to the like penalty. [30 & 31 Vict., c. 131, s. 39.] 1897, c. 2, s. 97.

98. Annual general meeting.—A general meeting of every company under this Act shall be held once at the least in every year. [25 & 26 Vict., c. 89, s. 49.] 1897, c. 2, s. 98.

99. Alteration of regulations by special resolution.—Subject to the provisions of this Act, and to the conditions contained in the Memorandum of Association, any company formed under this Act may, in general meeting, from time to time, by passing special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the Articles of Association or in the table marked A in the First Schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the Articles of Association, and shall be subject in like manner to be altered or modified by any subsequent special resolution. [25 & 26 Vict., c. 89, s. 50.] 1897, c. 2, s. 99.

100. Special resolutions.—A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where, by the regulations of the company, proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of tne meeting at which such resolution was first passed. At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against the same. Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company. [25 & 26 Vict., c. 89, s. 51.] 1897, c. 2, s. 100.

101. Provision where no regulations as to voting.—In default of any regulations as to voting, every member shall have one vote; and in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the table marked A in the First Schedule hereto; and in default of any regulations as to the persons to summon meetings, five members shall be competent to summon the same; and in default of any regulations as to whom is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside. [25 & 26 Vict., c. 89, s. 52.] 1897, c. 2, s. 101.

102. Registration of special resolutions.—A copy of any special resolution that is passed by any company under this Act shall be printed and forwarded to the Registrar, and be recorded by him. If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall, upon summary conviction, be liable to a penalty not exceeding ten dollars for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded; and every director, manager and officer of the company who shall knowingly and wilfully authorise or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 53.] 1897, c. 2, s. 102.

103. Special resolutions to be embodied in Articles of Association, or supplied to members.—Where Articles of Association have been registered a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the Articles of Association that may be issued after the passing of such resolution. Where no Articles of Association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same, on payment of twenty-five cents, or such less sum as the company may direct; and if any company makes default in complying with the provisions of this section, it shall, upon summary conviction, be liable to a penalty not exceeding five dollars for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall, upon summary conviction, be liable to the like penalty. [25 & 26 Vict., c. 89, s. 54.] 1897, c. 2, s. 103.

104. Power of attorney by company.—Any company under this Act may, by instrument in 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 this Province; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on 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; C. A. 1888, c. 21, s. 4.] 1897, c. 2, s. 104.

Inspectors.

105. Inspectors appointed by Lieutenant-Governor on application.—The Lieutenant-Governor in Council may appoint one or more competent Inspectors to examine into the affairs of any company under this Act, and to report thereon in such manner as the Lieutenant-Governor in Council may direct, upon the applications following, that is to say:—

(1.) In the case of any company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued:

(2.) In the case of any company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members. [25 & 26 Vict., c. 89, s. 56.] 1897, c. 2, s. 105.

106. On what application to be based.—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 requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the Lieutenant-Governor in Council may also require the applicants to give security for payment of the costs of the inquiry before appointing any Inspector or Inspectors. [25 & 26 Vict., c. 89, s. 57.] 1897, c. 2, s. 106.

107. Officers, etc., to produce books, etc., for inspection.—It shall be the duty of all officers and agents of the company to produce for the examination of the Inspectors all books and documents in their custody or power. Any Inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall upon summary conviction, be liable to a penalty not exceeding twenty-five dollars in respect of each offence. [25 & 26 Vict., c. 89, s. 58.] 1897, c. 2, s. 107.

108. Report.—Upon the conclusion of the examination the Inspectors shall report their opinion to the Lieutenant-Governor in Council. A copy shall be forwarded by the Provincial Secretary to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them, or to any one or more of them. All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the Inspectors were appointed, unless the Lieutenant-Governor in Council shall direct the same to be paid out of the assets of the company, which he is hereby authorized to do. [25 & 26 Vict., c. 89, s. 59.] 1897, c. 2, s. 108.

109. Inspectors appointed by special resolution.—Any company under this Act may by special resolution appoint Inspectors for the purpose of examining into the affairs of the company. The Inspectors so appointed shall have the same powers and perform the same duties as Inspectors appointed by the Lieutenant-Governor in Council, with this exception, that instead of making their report to the Lieutenant-Governor in Council they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document hereby required to be produced to such Inspectors, or to answer any question, as they would have incurred if such Inspector had been appointed by the Lieutenant-Governor in Council. [25 & 26 Vict., c. 89, s. 60.] 1897, c. 2, s. 109.

110. Proof or admissibility of report in legal proceedings.—A copy of the report of any Inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceedings, as evidence of the opinion of the Inspectors in relation to any matter contained in such report. [25 & 26 Vict., c. 89, s. 61.] 1897, c. 2, s. 110.

Prospectus.

111. Publication of prospectus.—Every prospectus issued by or on behalf of any company or intended company shall state the date on which it was issued, and that date shall be taken for all purposes as the date of publication:

(2.) A copy of every such prospectus shall be signed by every person who is named therein as a director or proposed director of the company, or by his duly authorized agent, and shall be filed with the Registrar on or before the date of its publication:

(3.) If default is made in complying with the requirements of this section, every officer and agent of the company who is a party to the issue of the prospectus shall, upon summary conviction, be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. 1897, c. 2, s. 111.

112. [*This section has been repealed by 61 Vict. (1898), c. 13, s. 3.*]

Legal Proceedings.

113. Evidence of proceedings at meetings.—Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications. [25 & 26 Vict., c. 89, s. 67.] 1897, c. 2, s. 113.

114. Plaintiff company to give security for costs in certain cases.—Where a company under this Act is plaintiff in any action, suit, or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given. [25 & 26 Vict., c. 89, s. 69.] 1897, c. 2, s. 114.

115. Declaration in action against members.—In any action or suit brought by a company under this Act against any member to recover any call or other moneys due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due whereby an action or suit hath accrued to the company. [25 & 26 Vict., c. 89, s. 70.] 1897, c. 2, s. 115.

Notices.

116. Services of notices, etc,, on company.—Any summons, notice, order or other document required to be served upon the company, may be served by leaving the same or sending it through the post in a prepaid letter addressed to the company, at their registered office, or in such other manner as may from time to time, by any Statute or Rules of Court for the time being in force, be permitted or prescribed. [25 & 26 Vict., c. 89, s. 62.] 1897, c. 2, s. 116.

117. Rules as to notices by letter.—Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office. [25 & 26 Vict., c. 89, s. 63.] 1897, c. 2, s. 117.

118. Authentication of notices by company.—Any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, secretary or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print. [25 & 26 Vict., c. 89, s. 64.] 1897, c. 2, s. 118.

Arbitration.

119. Power to companies to refer matters to arbitration.—Any company under this Act may from time to time, 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, question or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies. [25 & 26 Vict., c. 89, s. 72.] 1897, c. 2, s. 119.

120. Application of "Arbitration Act."—All the provisions of the "Arbitration Act" shall be deemed to apply to arbitrations between companies and persons in pursuance of this Act. [25 & 26 Vict., c. 89, s. 73.] 1897, c. 2, s. 120.

Alteration of Forms.

121. Lieutenant-Governor in Council may alter forms in Schedule.—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. The Lieutenant-Governor in Council may from time to time 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 British Columbia 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 marked A, contained 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 such table. [25 & 26 Vict., c. 89, s. 71.] 1897, c. 2, s. 121.

PART V.

BORROWING POWERS OF COMPANIES UNDER THIS ACT.

122. Borrowing powers.—(1.) All companies under this Act shall have power, subject to the conditions of and in addition to all other powers conferred by this Act, to borrow money for the purpose of carrying out the objects of their respective incorporations, and to execute mortgages and pledges of their real and personal property, rights and powers; to issue debentures secured by mortgage or pledge or otherwise; to sign bills, notes, contracts, and other evidences of or securities for money borrowed or to be borrowed by them for the purposes aforesaid, and to pledge debentures as security for temporary loans. 64 Vict. (1900), c. 5, s. 8.

(2.) These powers shall not be exercised except with the sanction of a special resolution of the company previously given in general meeting. 1897, c. 2, s. 122.

(3.) This section shall not be taken to limit, alter or affect, or to have limited, altered or affected the powers of a company acquired under its certificate of incorporation or the powers acquired under the provisions of this Act, whether such powers be expressed or necessarily implied: Provided further, that where any moneys have been borrowed by the directors of any company, and have been used for the purposes of such company, they shall be chargeable against the assets of such company if such act of borrowing shall be ratified at a special meeting of the shareholders of such company to be held for this purpose within twelve months from the date upon which such money was borrowed, such ratification to be approved by the holders of two-thirds of the total stock issued of such company. 61 Vict. (1898), c. 13, s. 4.

PART VI.

LICENSING AND REGISTRATION OF EXTRA-PROVINCIAL COMPANIES.

123. Extra-provincial companies to become licensed or registered under this Act.—Unless otherwise provided by any Act, no extra-provincial company having gain for its purpose and object, shall carry on any business within the scope of this Act in this Province unless and until it shall have been licensed or registered under this Act, and thereby become expressly authorised to carry on such of its business as is specified in the license or certificate of registration, and no company, 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 its business within this Province until such company shall have obtained such licence or certificate or registration; and any such company which fails or neglects to obtain such licence or certificate of registration shall incur a penalty of fifty dollars, recoverable upon summary conviction for every day during which it carries on business in contravention of this section; provided that this section shall not apply until the first day of January, 1898, to any extra-provincial company carrying on business within this Province on the date of the passage of this Act, and further provided that proof as to compliance with this section shall at all times be upon the company. 1897, c. 2, s. 123.

(1.) 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. 61 Vict. (1898), c. 13, s. 5.

124. Mode of obtaining license.—Any extra-provincial company, duly incorporated under the laws of Great Britain or Ireland, or of the Dominion of Canada, or of the late Province of Canada, or of any of the Provinces of Canada, duly authorized 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, my obtain a licence from the Registrar authorising it to carry on business within this 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 marked 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 this Province as if incorporated under the provisions of this Act. 1897, c. 2, s. 124.

125. Special licence to insurance companies, authorising investments upon realty.—Any extra-provincial insurance company, incorporated under the laws of Great Britain or Ireland, or of the Dominion of Canada, or of the late Province of Canada, or of any of the Provinces of Canada, may, upon complying with the requirements of this Act, apply for and obtain from the Registrar a licence under the provisions of this Act, empowering it to purchase real estate, and to loan and invest its moneys in manner and to the extent permitted by the charter and regulations of the company. 1897, c. 2, s. 125.

126. Special licence to protect existing investments.—Any such licence obained by any such insurance company before the first day of January, 1898, shall be deemed to have ratified and confirmed all previous acts of the company, and shall be construed as if such licence had been granted before such company invested any money in this Province. 1897, c. 2, s. 126.

127. Proceedings to obtain such licence.—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 of British Columbia:

(*b.*) An affidavit or statutory declaration that the company is still in existence and legally authorised to transact business under its charter:

(*c.*) [*Repealed 61 Vict. (1898), c. 13, s. 7.*]

(*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 this 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 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. 1897, c. 2, s. 127.

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 section 127 or 133 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. 61 Vict. (1898), c. 13, s. 6.

128. What licence contains.—The licence shall set forth the corporate name of the company, the place where the head office of the company is situate, the amount of the capital of the company, and the number of shares into which the same is divided, and the amount of each share, the place where the head office of the company in this Province is situate, and the name, address and occupation of the attorney of the company; 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 for four weeks in the Gazette, and in one newspaper published or circulating in the place at which the head office of the company in this Province is situate, and in the district wherein the company proposes to carry on business, at the expense of the company; and such licence shall be conclusive evidence that all the requirements of this Act have been complied with:

(*a*.) Notice in like manner shall be published in the Gazette and in a newspaper as aforesaid of the appointment (if any) of a new attorney, or of the ceasing of the company to carry on business within the Province under its licence. 1897, c. 2, s. 128, (as amended by 64 Vict. (1900), c. 5, s. 9.)

129. Evidence of licence.—The licence, or any 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 this Province of the due licensing of the company as aforesaid. 1897, c. 2, s. 129.

130. Substituted service.—If the power of attorney hereinbefore prescribed becomes invalid or ineffectual from any reason, or if other service cannot 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. 1897, c. 2, s. 130.

131. Lieutenant-Governor's power to suspend or revoke licence.—The Lieutenant-Governor in Council may, by an Order in Council, to be published in three consecutive issues of the Gazette, suspend or revoke and make null and void any licence granted, under this Part, 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, and notwithstanding such suspension or revocation, the rights of creditors of the company shall remain as at the time of such suspension or revocation. 1897, c. 2, s. 131.

Registration of Extra-Provincial Companies.

132. Power for extra-provincial company to register.—Any extra-provincial company, duly authorized by its charter and regulations to carry out or affect any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends, may register the company as a company under this Act on compliance with the provisions thereof, and on payment to the Registrar in respect of the several matters mentioned in the table marked 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 this Province as if incorporated under the provisions of this Act. 1897, c. 2, s. 132.

133. Proceedings by such company to obtain registration.—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 of British Columbia:

(*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 61 Vic., (1898), c. 13, s.* 7.]

(*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 this 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 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. 1897, c. 2, s. 133.

133*a*. Registrar's power to dispense with filing of documents.—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 section 127 or 133 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. 61 Vict. (1898), c. 13, s. 6.

133*b*. Powers of attorney by extra-provincial companies seeking registration.—The Registrar may accept from any extra-provincial company, proceeding to obtain registration under the provisions of section 133 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 stock upon its being shown to his satisfaction either that the company is not a public company, the stock whereof is upon the market, or that although the company is a public company, and the stock thereof is upon the market, yet that, either owing to the small quantity of the stock of the company held in the Province, and to the fact that the company does not propose to place any of the stock upon the market in the Province, or to the fact that the consent of the holders of 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 134 shall state, after the name, address and occupation of the attorney, that such attorney is not empowered to issue or transfer stock:

(*b*.) The company shall thereupon be relieved from compliance with section 140 of the said Act.

2. Any company which has heretofore filed a power of attorney empowering its attorney to issue and transfer 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. 61 Vict. (1898), c. 13, s. 8.

134. Certificate of registration.—The Registrar shall issue to any extra-provincial company registered under the foregoing provisions of this Act, a certificate of registration, which shall set forth the corporate name of the company, the place where the head office of the company is situated, the amount of the capital of the company, and the number of shares into which the same is divided, and the amount of each share; the time of existence of the company, if incorporated for a fixed period, and in the case of a limited company that the company is limited, and in the case of a mining company the liability of the members whereof is specially limited under section 56 hereof that the company is so specially limited under said section 56; the place where the head office of the company in this Province is situate, and the name, address and occupation of the attorney of the company; 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 for four weeks in the Gazette, and in one newspaper published or circulating in the place at which the head office of the company in this Province is situate, and in the district wherein the company propose to carry on business, at the expense of the company; and such certificate of registration shall be conclusive evidence that all the requirements of this Act have been complied with.

(*a*.) Notice in like manner shall be published in the Gazette and in a newspaper as aforesaid of the appointment (if any) of a new attorney, or of the ceasing of the company to carry on business within the Province under its said certificate. 1897, c. 2, s. 134; 61 Vict (1898), c. 13 s. 9; 64 Vict. (1900), c. 5, s. 10.

(*b*.) The licence issued in pursuance of section 141 of this Act, or the certificate issued in pursuance of section 134, 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. 61 Vict. (1898), c. 13, s. 11.

135. Evidence of such registration.—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 this Province of the due registration of the company as aforesaid. 1897, c. 2, s. 135.

136. Substituted service on such company.—If the power of attorney hereinbefore prescribed becomes invalid or ineffectual from any reason, or if other service cannot 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. 1897, c. 2, s. 136.

137. Lieutenant-Governor's power to suspend or revoke licence.—The Lieutenant-Governor in Council may, by an Order in Council, to be published in three consecutive issues of the Gazette, suspend or cancel and make null and void any registration effected under this Part, 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, and, notwithstanding such suspension or revocation, the rights of creditors of the company shall remain as at the time of such suspension or cancellation. 1897, c. 2, s. 137.

General Provisions Applying to Extra-Provincial Companies Licensed or Registered under this Act.

138. Rights of such company to sue, hold lands, etc.—Any extra-provincial company licensed or registered under this Part 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 inBritish Columbia 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. 1897, c. 2, s. 138.

139. Rights and duties of such companies.—Every extra-provincial company registered as a company under this 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 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. 1897, c. 2, s. 139.

140. Power to issue and transfer shares.—Every extra-provincial company registered under this Part shall, in and by the power of attorney hereinbefore prescribed, empower its attorney to issue and transfer shares of the company:

(1.) Every such extra-provincial company, at its head office or chief place of business in this Province, provide and keep in form and manner provided by section 36 of this Act, a register of all stock issued at such head office or chief place of business, and of all transfers of shares in the company made within this 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 on that behalf. 1897, c. 2, s. 140.

141. Surrender of certificate of registration for licence.—Every extra-provincial company duly incorporated under the laws of Great Britain or Ireland, or of the Dominion of Canada, or of the late Province of Canada, or of any of the Provinces of Canada, heretofore registered in this 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; 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 27 of this Act shall be deemed to be sufficient compliance with the requirements of this Part. 1897, c. 2, s. 141. 61 Vict. (1898), c. 13, s. 10.

141A. What certificate of registration or licence to extra-provincial companies to contain.—The licence issued in pursuance of section 141 of this Act, or the certificate issued in pursuance of section 134, to an extra-provincial company heretofore registered as a foreign country 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. 61 Vict. (1898), c. 13, s. 11.

142. What extra-provincial companies subject to the Act.—Every extra-provincial company registered in this 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, or may obtain a licence under this Part), 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. 61 Vict. (1898), c. 13, s. 12.

143. Provision requiring all transactions of an extra-provincial company to conform to the laws of this Province.—No act, matter, disposition or thing affecting the corporate rights and property of the company within this Province, made, done or executed by any extra-provincial company not entitled to obtain a licence under this Part, 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 action in any Court in this Province, unless such act, matter disposition or thing be within the rights, powers and privileges, granted by, and done and exercised according to the provisions of this Act in that behalf. 1897, c. 2, s. 143.

144. Security for costs by extra-provincial company.—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 this Province, such extra-provincial company shall furnish security for costs, if demanded. 1897, c. 2, s. 144.

145. Chinese company.—Nothing contained in this Part of this Act shall authorise the registration of any Chinese company or association. 1897, c. 2, s. 145.

PART VII.

PROCESS AGAINST UNREGISTERED FOREIGN COMPANIES.

146. Definition of "company" in this Part.—In this Part 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 this Province. 1897, c. 2, s. 146.

147. Service of process on unregistered company.—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 Registrar of the Supreme Court. [C. A. 1888, c. 21, s. 88.] 1897, c. 2, s. 147.

148. Publication of such process.—It shall be the duty of such Registrar to cause to be inserted, in the four regular issues of the British Columbia 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. [C. A. 1888, c. 21, s. 89.] 1897, c. 2, s. 148.

149. When such service valid.—After such advertisement shall have appeared in such four issues, the delivery of such process to the Registrar as aforesaid, shall be deemed, as against the defendant company, to be good and valid service of such process. [C. A. 1888, c. 21, s. 90.] 1897, c. 2, s. 149.

150. Procedure on entering up judgment against company.—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 British Columbia Gazette in which the advertisement 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. [C. A. 1888,, c. 21, s. 91.] 1897, c. 2, s. 150.

151. Averment in action against company.—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. [C. A. 1888, c. 21, s. 95.] 1897, c. 2, s. 151.

152. Act not to affect remedies against companies.—Nothing in this Part contained shall be deemed to limit, abridge, or take away any legal right, recourse, or remedy against a company not therein enacted or recognised, nor to absolve or lessen any obligation, rule, or duty imposed by law on a company. [C. A. 1888, c. 21, s. 96.] 1897, c. 2, s. 152.

PART VIII.

VOLUNTARY WINDING UP.

153. [*This section repealed by 61 Vict. (1898), c. 13, s. 13.*]

154. [*This section repealed by 61 Vict. (1898), c. 13, s. 13.*]

PART IX.

PROTECTING PURCHASERS OF STOCK FROM LOSSES BY FORGED TRANSFERS, AND THE PREVENTION OF FRAUDULENT AND NEGLIGENT PRACTICES.

Forged Transfers.

155. Power to make compensation for losses from forged transfers.—Where a company issue or have issued shares, stocks or securities transferable by an instrument in writing or by an entry in any books or register kept by or on behalf of the company, they shall have power to make compensation by a cash payment out of their funds for any loss arising from a transfer of any such shares, stock or securities, in pursuance of a forged transfer, or of a transfer under a forged power of attorney, whether such loss arises, and whether the transfer or power of attorney was forged before or after the passing of this Act, and whether the person receiving such compensation, or any person through whom he claims, has or has not paid any fee or otherwise contributed to any fund out of which the compensation is paid:

(2.) Any company may, if they think fit, provide either by fees not exceeding the rate of one dollar on every five hundred dollars transferred, with a minimum charge equal to that for one hundred dollars, to be paid by the transferee upon the entry of the transfer in the books of the company, or by insurance, reservation of capital, accumulation of income, or in any other manner which they may resolve upon, a fund to meet claims for such compensation:

(3.) For the purpose of providing such compensation any company may borrow on the security of their property:

(4.) Any such company may impose such reasonable restrictions on the transfer of their shares, stock or securities, or with respect to powers of attorney for the transfer thereof, as they may consider requisite for guarding against losses arising from forgery:

(5.) Where a company compensate a person under this Part for any loss arising from forgery, the company shall, without prejudice to any other rights or remedies, have the same rights and remedies against the person liable for the loss as the person compensated would have had:

(6.) Where the shares, stock or securities of a company have by amalgamation or otherwise become the shares, stock or securities of another company, the last-mentioned company shall have the same power under this Part as the original company would have had if it had continued. [54 & 55 Vict., c. 43, s. 2; 55 & 56 Vict., c. 36, ss. 2, 3 and 4.] 1897, c. 2, s. 155.

Fraudulent and Negligent Practices.

156. Liability for statements in prospectus or notice.—Where, after the passing of this Act, a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorised such naming of him, is named in the prospectus or notice as a director of the company, or as having agreed to become a director of the company, 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 or notice shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, 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 such 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, debentures or debenture stock, as the case may be, believe that the statement was true; and

(*b*.) With respect to every such 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 engineer, valuer, accountant or other expert, that it fairly represented the statement made by such engineer, valuer, accountant or other expert, or was a correct and fair copy of or extract from the report of valuation: Provided, always, that notwithstanding that such untrue statement fairly represented the statement made by such engineer, valuer, accountant or other expert, or was a correct and fair copy of an extract from the report or valuation, such director, person named, promoter or other person who authorised the issue of the prospectus or notice as aforesaid, shall be liable to pay compensation as aforesaid, if it be 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 such 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 such statement or a copy of or extract from such document:

Or unless it is proved that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority 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 that after the issue of such prospectus or notice and before allotment thereunder, on becoming aware of any untrue statement therein, withdrew his consent thereto and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given:

(2.) A promoter, in this section, means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

(3.) Where any company existing at the passing of this Act, which has issued shares or debentures, shall be desirous of obtaining further capital by subscriptions for shares or debentures, and for that purpose shall issue a prospectus or notice, no director of such company shall be liable in respect of any statement therein, unless he shall have authorised the issue of such prospectus or notice, or have adopted or ratified the same. [53 & 54 Vict., c. 64, s. 3.] 1897, c. 2, s. 156.

157. Indemnity where name of person has been improperly inserted as a director.—Where any such prospectus or notice as aforesaid contains the name of a person as a director of the company, or as having agreed to become a director thereof, and such person has not consented to become a director, or has withdrawn his consent before the issue of such prospectus or notice, or has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus or notice was issued, and any other person who authorised the issue of such prospectus or notice, shall be liable to indemnify the person named as a director of the company, or as having agreed to become a director thereof as aforesaid, against all damages, costs, charges and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or notice, or in defending himself against any action or legal proceedings brought against him in respect thereof. [53 & 54 Vict., c. 64, s. 4.] 1897, c. 2, s. 157.

158. Contribution from co-directors.—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 or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases o. contract, from any other person who, if sued separately, would have been liable to make the same payment. [53 & 54 Vict., c. 64, s. 5.] 1897, c. 2, s. 158.

159. Circulating misleading documents.—Where any advertisement, letter-head, postal-card, account or document issued, published or circulated by any corporation, association or company, or any oincer, agent, or employee of any such corporation, association or company, purports to state the subscribed capital of the company, then the capital actually and in good faih subscribed, and no more, shall be so stated; and any such corporation, association, company, officer, agent or employee who causes to be inserted an advertisement in any newspaper, or who publishes, issues or circulates, or causes to be published, issued or circulated, any advertisement, letter-head, postal-card, account, or document, which states, as the subscribed capital of such company, any larger sum than the amount of such subscribed capital so actually and in good faith subscribed as aforesaid, or which contains any untrue or false statement, as to the incorporation, control, supervision, management, or financial standing of such corporation, association or company, and which statement is intended or calculated or likely to mislead or deceive any person dealing or having any business or transaction with said corporation, association or company or with any officer, agent or employee of the association, corporation or company, shall, upon summary conviction, be liable to a penalty not exceeding two hundred dollars and costs, and not less than fifty dollars and costs, and in default of payment the offender, being any officer, agent or employee as aforesaid, shall be imprisoned, with or without hard labor, for a term not exceeding three months, and not less than one month; and on a second or any subsequent conviction he may be imprisoned with hard labor for a term not exceeding twelve months and not less than three months. [1894, ce. 17, s. 1.] 1897, c. 2, s. 159.

(2.) Any officer, agent, or employee of an association, corporation or company who shall, with fraudulent intent, withold from the shareholders, or shall alter any written report furnished by the manager, engineer, or expert duly authorised to make such report, shall, on summary conviction, be liable to imprisonment not exceeding three months nor less than one month. 62 Vict. (1899), c. 15, s. 4.

PART X.

REPEAL OF FORMER ENACTMEMTS.

160. Repeal of C. A. 1888, c. 21; 1899, c. 4; 1890, c. 6; 1891, c. 3; 1892, c. 7; 1893, c. 9; 1894, c. 6; 1894, c. 17; 1895, c. 8.—"The Companies Act," being chapter twenty-one of the Consolidated Acts, 1888; the Companies Act Amendment Act, 1889"; the "Companies Act, 1890"; the

"Companies Act Amendment Act, 1891"; the "Companies Act (1890) Amendment Act, 1892"; the "Companies Acts Amendment Act, 1893"; the "Companies Acts Amendment Act, 1894"; the "Fraudulent Statements Act, 1894"; and the "Companies Act Amendment Act, 1895," are hereby repealed: Provided:—

(*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 any company incorporated under the said repeal Acts, or any or either of them, and the companies thereby incorporated shall, except as in this Act, is specially provided, continue to be governed by the provisions of the said repealed Acts to them respectively applicable:

(*b*.) That the provisions of the Eighth Part of this Act, and of sections 37, 38, 89, and 90 of this Act, shall apply to every company incorporated under the said repealed Acts, or any or either of them; and

(*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 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 nor 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. Provided also that the power hereby conferred shall be deemed to be enabling and not imperative, and shall in no wise limit, control or affect any power of sale vested in any company incorporated under the repealed Acts by its Memoranduf of Association, or any provisions or conditions as to the exercise of such power contained in its Articles of Association or by-laws. 1897, c. 2, s. 160; 61 Vict. (1898), c. 13, s. 14; 64 Vict. (1900), c. 5, s. 11.

161. Free miner's licence to companies.—No free miner's certificate shall be issued to a joint stock company for a longer period than one year, and such certificate shall date from the 30th day of June in each year; and every free miner's certificate held by a joint stock company at the passing of this Act shall be valid and existing until and shall expire on the 30th day of June, 1897. Upon applying to renew any such certificate on or before said 30th day of June, the joint stock company shall be entitled to a rebate of a proportionate amount of the fee paid for a certificate heretofore issued according to the further time which it would be for this section have been valid. 1897, c. 2, s. 161.

161A. Effect of non-observance of provisions of Act by extra-provincial company prior to passage of "Companies Act, 1897."—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. 61 Vict. (1898), c. 13, s. 18.

161B. Lieutenant-Governor's power to remit penalty.—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 the said Act. 61 Vict. (1898), c. 13, s. 19.

161C. Companies Act not to apply to H. B. Co.—This Act shall be held not to apply to the Governor and Company of Adeventurers of England trading into Hudson's Bay. 62 Vict. (1899), c. 15, s. 3.

161D. As enacted by 62 Vict. (1899), c. 15, s. 5, has been repealed by 64 Vict. (1900), c. 5, s. 13.

Short Title.

162. Short title.—This Act may be cited as the "Companies Act, 1897." 1897, c. 2, s 162.

FIRST SCHEDULE.

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Shares.

(1.) If several persons are registered as joint holders of any shares, any one of such persons may give effectual receipts for any dividend payable in respect of such share:

(2.) Every member shall, on payment of twenty-five cents, or such less sum as the company in general meeting may prescribe, 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;

(3.) If such certificate is worn out or lost, it may be renewed on payment of twenty-five cents, or such less sum as the company in general meeting may prescribe:

Calls on Shares.

(4.) The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call, and each member shall be liable to pay the amount of calls so made to the persons and at the time and places appointed by the directors:

(5.) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed:

(6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment:

(7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon:

(8.) The instrument of transfer of any shares in the company shall be executed both by the transferror and the transferee, and the transferror shall be deemed to remain a holder of such share until the name of the transferee is entered in the Register Book in respect thereof:

(9.) Shares in the company shall be transferred in the following form:—

I, *A. B.*, of in consideration of the sum of dollars paid to me by *C. D.*, of , do hereby transfer to the said *C. D.* the share (*or* shares) numbered standing in my name in the books of the Company, to hold unto the said *C. D.*, 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 *C. D.*, do hereby agree to take the said share (*or* shares) subject to the same conditions. As witness our hands, the day of

(10.) The company may decline to register any transfer of shares made by a member who is indebted to them:

(11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year:

Transmission of Shares.

(12.) The executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his share:

(13.) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company:

(14.) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such shares:

(15.) The person so becoming entitled shall testify such election by eecuting to his nominee an instrument of transfer of such share:

(16.) The instrument of transfer shall be presented to the company accompanied with such evidence as the directors may require to prove the title of the transferror, and thereupon the company shall register the transferee as a member:

Forfeiture of Shares.

(17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such non-payment:

(18.) The notice shall name a further day on or before which such call, and all interest and expenses that have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable.) The notice shall also state that in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited:

(19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect:

(20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit:

(21.) Any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing upon such shares at the time of the forfeiture:

(22.) A statutory declaration, in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share; and such declaration, and the receipt of the company for the price of such share, shall constitute a good title to such share, and the certificate of proprietorship shall be delivered to the purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale:

Conversion of Shares into Stock.

(23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock:

(24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit:

(25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interest in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages:

Increase in Capital.

(26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the direcetors think expedient:

(27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting the time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whim such notice is given 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:

(28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of the calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital:

General Meetings.

(29.) The first general meeting shall be held at such time, not being more than four months after the registration of the company, and at such place as the directors may determine:

(30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors:

(31.) The above-mentioned general meetings shall be called ordinary meetings: and other general meetings shall be called extraordinary:

(32.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting:

(33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company:

(34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting:

Proceedings at General Meetings.

(35.) 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 such business, shall be given to the members in manner hereafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting:

(36.) 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 and the consideration of the accounts, balance sheets, and the ordinary report of the directors:

(37.) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business; and such quorum shall be ascertained as follows, that is to say:—If the persons who have taken shares in 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 twenty:

(38.) If within one hour from the time appointed for a 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 such adjourned meeting a quorum is not present, it shall be adjourned sine die:

(39.) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company:

(40.) 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, the members present shall choose some one of their number to be chairman:

(41.) The chairman may, with the consent of the meeting, adjourn any 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 for which the adjournment took place:

(42.) At any general meeting, unless a poll is demanded by at least five 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 sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against such resolution:

(43.) If a poll is demanded by five or more members it 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. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote:

Votes of Members.

(44.) Every member shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares:

(45.) If any member is a lunatic or idiot, he may vote by his committee, curator bonis or other legal curator:

(46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same:

(47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote:

(48.) Votes may be given either personally or by proxy:

(49.) The instrument appointing a proxy shall be in writing, under the hand of the appointer, or if such appointer is a corporation under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the company:

(50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution:

(51.) Any instrument appointing a proxy shall be in the following form:—

Company, Limited.

I, , of , in the County of being a member of the Company, Limited, and entitled to vote (*or* votes), 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 (*or* at any meeting of the Company that may be held in the year).

As witness my hand, this day of

Signed by the said in the presence of

Directors.

Directors.

(52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the Memorandum of Association:

(53.) Until directors are appointed the subscribers of the Memorandum of Association shall be deemed to be directors:

(54.) The future remuneration of the directors and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting:

Powers of Directors.

(55.) 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 foregoing Act, or by these Articles required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles, to the provisions of the foregoing 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 direcetors which would have been valid if such regulation had not been made:

(56.) The continuing directors may act notwithstanding any vacancy in their body:

Disqualification of Directors.

(57.) The office of director shall be vacated—

If he holds any office or place of profit under the company;

If he becomes bankrupt or insolvent:

If he is concerned in or participates in the profits of any contract with the company:

But the above rules shall be subject to the following exceptions: 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; nevertheless he shall not vote in respect of such contract or work; and if he does so vote shall not be counted:

Rotation of Directors.

(58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office:

(59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot; in every subsequent year the one-third or other nearest number who have been longest in office shall retire:

(60.) A retiring director shall be re-eligible:

(61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons:

(62.) 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 such 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 continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up:

(63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office:

(64.) Any casual vacancy occurring in the Board of Directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred:

(65.) The company, in general meeting may, by a special 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 hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed:

Proceedings of Directors.

(66.) The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. 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 at any time summon a meeting of the directors:

(67.) 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 at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting:

(68.) 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:

(69.) A committee may elect a chairman of their meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members shall choose one of their number to be chairman of such meeting:

(70.) 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:

(71.) 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.

(72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares:

(73.) No dividend shall be payable except out of the profits arising from the business of the company:

(74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserve fund, upon such securities as they may select:

(75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise:

(76.) Notice of any dividend that may have been declared shall be given to such member in manner hereinafter mentioned; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the company:

(77.) No dividend shall bear interest as against the company:

Accounts.

(78.) The directors shall cause true accounts to be kept,—

of the stock-in-trade of the company;

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 credits and liabilities of the company;

The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business:

(79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting:

(80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year:

(81.) A balance sheet shall be made out in every year, and laid before the company in general meeting, and such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit:

(82.) A printed copy of such balance sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served:

Audit.

(83.) Once at least in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained, by one or more auditor or auditors:

(84.) The first auditors shall be appointed by the directors; subsequent auditors shall be appointed by the company in general meeting:

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him:

(86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is elibible during his continuance in office:

(87.) The election of auditors shall be made by the company at their ordinary meeting in each year:

(88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting:

(89.) Any auditor shall be re-eligible on his quitting office:

(90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same:

(91.) If no election of auditors is made in manner aforesaid, the Lieutenant-Governor in Council may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services:

(92.) Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto:

(93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company:

(94.) The auditors shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting:

Notices.

(95.) A notice may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode:

(96.) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the Register of Members; and notice so given shall be sufficient notice to all the holders of such share:

(97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post office. 1897, c. 2, Sch. 1.

DR. **BALANCE SHEET** OF THE Co. MADE UP TO , 19 . CR.

CAPITAL AND LIABILITIES.

I. CAPITAL.		*Showing:*	$	$
	1.	*The number of shares - - -*		
	2.	*The amount paid per share - -*		
	3.	*If any arrears of calls, the nature of the arrear, and the names of the defaulters.*		
	4.	*The particulars of any forfeited shares.*		
II. DEBTS AND LIABILITIES of the Company.		*Showing:*		
	5.	*The amount of loans on mortgages or debenture bonds.*		
	6.	*The amount of debts owing by the company, distinguishing—*		
		(a.) Debts for which acceptances have been given		
		(b.) Debts to tradesmen for supplies of stock in trade or other articles:		
		(c.) Debts for law expenses:		
		(d.) Debts for interest on debentures or other loans:		
		(e.) Unclaimed dividends:		
		(f.) Debts not enumerated above.		
VI. RESERVE FUND.		*Showing:* *The amount set aside from profits to meet contingencies:*		
VII. PROFIT AND LOSS.		*Showing:* *The disposable balance for payment of dividends, etc.*		
CONTINGENT LIABILITIES.		*Claims against the company not acknowledged as debts.*		
		Money for which the company is contingently liable.		

PROPERTY AND ASSETS.

III. PROPERTY held by the company.		*Showing:*	$	$
	7.	*Immovable property, distinguishing—*		
		(a.) Freehold land - - -		
		(b.) " buildings - -		
		(c.) Leasehold " - -		
	8.	*Movable property, distinguishing—*		
		(d.) Stock in trade - - -		
		(e.) Plant - - - - -		
		The cost to be stated, with deductions for deterioration in value, as charged to the reserve fund or profit and loss.		
IV. DEBTS owing to the company.		*Showing:*		
	9.	*Debts considered good for which the company hold bills or other securities.*		
	10.	*Debts considered good for which the company hold no security.*		
	11.	*Debts considered doubtful and bad.*		
		Any debt due from a director or other officer of the company to be separately stated.		
V. CASH AND INVESTMENTS.		*Showing:*		
	12.	*The nature of investment and rate of interest.*		
	13.	*The amount of cash, where lodged, and if bearing interest.*		

TABLE B.

TABLE OF FEES to be paid to the REGISTRAR OF JOINT STOCK COMPANIES by a company having a capital divided into shares.

For registration of a company whose nominal capital does not exceed $10,000, a fee of	$25 00
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

For registration of any increase of capital made after the first registration of the company, the same fees per $5,000, or part of a $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.

For a licence to or registration of any extra-provincial company, the same fees as are payable for registering a new company. In the case of an extra-Provincial trading or business company, 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 in the preceding item a fee of two hundred and fifty dollars.

For registration under this Act of any existing company, the certificate of registration whereof is issued pursuant to section 56 hereof, or the capital whereof is increased pursuant to section 5 (*b*) hereof, in lieu of the fee of ten dollars prescribed by section 5 of this Act, the same fees as are payable for registering a new company hereunder, allowing credit 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.

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 56 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.

For a licence to an extra-provincial insurance company under section 125 of this Act $25 00

For registering any document hereby required or authorised to be registered, other than the Memorandum of Association.. .... $1 00

For making a record of any fact hereby authorised or required to be recorded by the Registrar, a fee of $1 00

Publication in the Gazette, according to the scale of charges as defined in Schedule A of the "Statutes and Journals Act." 1897, c. 2; 61 Vict. (1898), c. 13, s. 15; 64 Vict. (1900), c. 5, s. 12.

The scale of fees provided by 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 said "Companies Act, 1897," dealt with in the office of the Registrar after the 20th day of May, A.D., 1898. 61 Vict. (1898), c. 13, s. 17.

TABLE C.

Table of Fees to be paid to the Registrar of Joint Stock Companies by a company not having a capital divided into shares.

For registration of a company whose number of members, as stated in the articles of association, does not exceed 20................ $10 00

For registration of a company whose number of members as stated in the Articles of Association, exceed 20, but does not exceed 100. $25 00

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 and additional $1 for every 50 members or less number than 50 members after the first 100.

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

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

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 pany.
into account the fee paid on the first registration of the com-

For registering any document hereby required or authorised to be registered, other than the Memorandum of Association $1 00

For making a record of any fact hereby authorised or required to be recorded by the Registrar of Companies, a fee of................ $1 00
1897, c. 2.

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 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. The 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 November, 189 .

Witness to the above signatures,

A. B., No. Street, , British Columbia.

1897, c. 2.

FORM B.

Memorandum and Articles of Association of a Company limited by guarantee and not having a capital divided into shares.

Memorandum of Association.

1st. The name of the Company is the "Mutual London Marine Association, Limited."

2nd. The registered office of the Company will be situate in

3rd. The objects for which the Company is established are "the mutual "insurance of ships belonging to members of the Company, and the doing all "such other things as are incidental or conducive to the attainment of the "above objects."

4th. Every member of the Company undertakes to contribute to the assets of the Company in the event of the same being wound up during the time that he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which 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   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   , 189   .

Witness to the above signatures,

A. B., No.   Street.   British Columbia.

1897, c. 2.

ARTICLES OF ASSOCIATION to accompany preceding MEMORANDUM OF ASSOCIATION.

(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:

(3.) Every person shall be deemed to have agreed to become a member of the Company who insures any ship, or share in a ship, in pursuance of the regulations hereinafter contained:

General Meetings.

(4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the Company, and at such place as the directors may determine:

(5.) Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors:

(6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary:

(7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary meeting:

(8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company:

(9.) Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists or any other five members, may themselves convene a meeting:

Proceedings at General Meetings.

(10.) 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 such 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 notice by any member shall not invalidate the proceedings at any general meeting:

(11.) 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:

(12.) 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 such business; and such 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:

(13.) If, within one hour from the time appointed for the meeting, a quorum of members is not present, the meeting, if convened upon 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:

(14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the Company:

(15.) 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 at such meeting:

(16.) The chairman may, with the consent of the meeting, adjourn any 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:

(17. At any general meeting, unless a poll is demanded by at least five 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 sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against such resolution:

(18.) If a poll is demanded in manner aforesaid, the same 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:

Votes of Members.

(19.) Every member shall have one vote and no more:

(20.) If any member is a lunatic or idiot, he may vote by his committee, curator bonis, or other legeal curator:

(21.) No member shall be entitled to vote at any meeting unless all moneys due from him to the Company have been paid:

(22.) Votes may be given either personally or by proxies. A proxy shall be appointed in writing under the hand of the appointor, or if such appointor is a corporation, under its common seal:

(23.) No person shall be appointed a proxy who is not a member, and 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.

(24.) Any instrument appointing a proxy shall be in the following form:—

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 to be held on the day of next (*or* at any meeting of the Company that may be held in the year).

As witness my hand this day of

Signed by the said in the presence of

Directors.

(25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the Memorandum of Association:

(26.) Until directors are appointed, the subscribers of the Memorandum of Association shall for all the purposes of this Act be deemed to be directors:

Powers of Directors.

(27.) The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not hereby 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 such regulation had not been made:

Election of Directors.

(28.) The directors shall be elected annually by the Company in general meeting:

Busines of Company.

[*Here insert Rules as to mode in which business of Insurance is to be conducted.*]

Accounts.

(29.) The accounts of the Company shall be audited by a committee of five members, to be called the Audit Committee:

(30.) The first Audit Committee shall be nominated by the directors out of the body of members:

(31.) Subsequent Audit Committees shall be nominated by the members at the ordinary general meeting in each year:

(32.) The Audit Committee shall be supplied with a copy of the Balance sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto:

(33.) The Audit Committee shall have a list delivered to them of all books kept by the Company, and they shall at all reasonable times have access to the books and accounts of the Company; they may, at the expense of the Company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the Company:

(34.) The Audit Committee shall make a report to the members upon the balance Sheet and Accounts, and in every such report they shall state whether in their opinion the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations of the Company, and properly drawn up, so as to exhibit a true and correct view of the state of the Company's affairs, and in case they have called for explanation or information from the directors, whether such explanations or information have been given by the directors and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting:

Notices.

(35.) A notice may be served by the Company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode:

(36.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office:

Winding up.

(37.) The Company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the "Companies Act," is passed, requiring the Company to be wound up voluntarily.

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 , -89 .

Witness to the above signatures,

A. B., No. Street.

British Columbia. 1897, c. 2.

FORM C.

MEMORANDUM and ARTICLES OF ASSOCIATION of a Company limited by Gurantee and having a capital divided into shares

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 sea "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 "object."

4th. Every member of the Company undertakes to contribute to the assets of the Company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which 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 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 , -89 .

WE, the several persons whose names and addresses are subscribed are

Witness to the above signatures,

A. B., No. Street. British Columbia.

Articles of Association to accompany preceding Memorandum of Association.

1. The capital of the Company shall consist of dollars, divided into shares of dollars each.

2. The directors may, with the sanction of the Company in general meeting, reduce the amount of shares.

3. The directors may, with the sanction of the Company in general meeting, cancel any shares belonging to the Company.

4. All the articles of Table A shall be deemed to be incorporated with these articles, and to apply to the Company.

WE, the several persons whose names and addresses are subscribed, 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 , 189 .

Witness to the above signatures,

A. B., No. Street, , British Columbia.

1897, c. 2.

FORM D.

MEMORANDUM and ARTICLES OF ASSOCIATION of an unlimited Company having a Capital divided into Shares.

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 , 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.

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 , -89 .

Witness to the above signatures,

A. B., No. Street. British Columbia.

Articles of Association to accompany preceding Memorandum of Association.

Capital of the Company.

The capital of the Company is dollars divided into shares of dollars each.

Application of Table A.

All the articles in Table A shall be deemed to be incorporated with these articles, and to apply to the Company.

WE, the several persons whose names and addresses are subscribed, 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.	1
"2. John Smith of	in the County of	—	5
"3. Thomas Green of	in the County of	—	2
"4. John Thompson of	in the County of	—	2
"5. Caleb White of	in the County of	—	3
	Total shares taken — —	—	13

Dated the day of , 189 .

Witness to the above signatures,

A. B., No. Street, , British Columbia.

1897, c. 2.

FORM E, as required by the Second Part of the Act.

SUMMARY of CAPITAL and SHARES of the Company, made up to the day of

Nominal capital, \$, divided into shares of \$ each.
Number of shares taken up to the day of
There has been called up on each share, \$
Total amount of calls received, \$
Total amount of calls unpaid, \$

List of persons holding shares in the Company on the day of , and of persons who have held shares thereon at any time during the year immediately preceding the said day of , showing their names and addresses, and an account of the shares so held.

Folio in Register Ledger containing particulars	NAMES, ADDRESSES, AND OCCUPATIONS.				ACCOUNT OF SHARES.					Remarks.
	Surname.	Christian Name.	Address.	Occupation.	Shares held by existing members on the day of	Additional shares held by existing members during preceding year.		Shares held by persons no longer members.		
						Number.	Date of Transfer.	Number.	Date of Transfer.	

ORDERS IN COUNCIL.

The following Orders in Council relate to Companies and have the force of aw :—

AT THE GOVERNMENT HOUSE AT OTTAWA,

Tuesday, the 19th day of June, 1894.

Present :

HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL.

On a memorandum, dated 7th June, 1894, from the Minister of Justice, stating that for the reasons hereinafter mentioned, it appears to him to be advisable and in the public interest, in cases where a charter of incorporation is to be granted under the provisions of "The Companies Act" (Revised Statutes of Canada, chapter 119), that the prefix "The" should form part of the corporate name to be given to the company.

The Minister further states that it may be assumed that one of the chief purposes of obtaining Letters Patent under the Act above referred to, would be the obtaining of that freedom from liability attaching to persons ordinarily engaged in business or trade, and he therefore is of opinion that it is essential that the name of the company to be incorporated should be such as would be a constant notice to any one dealing with the company that it is incorporated, and as such, subject to statutory limitation as to liability.

The Minister therefore recommends that, in all cases where Letters Patent of incorporation are granted under the provisions of the Act in question, the prefix "The" shall form a part of the corporate name to be given to such company.

The Committee submit the above recommendation for Your Excellency's approval, and recommend that this minute, if approved, be published in the *Canada Gazette.*

JOHN J. McGEE,
Clerk of the Privy Council.

Vide Canada Gazette, vol. XXVII., p. 2373.

AT THE GOVERNMENT HOUSE AT OTTAWA,

Tuesday, the 9th day of February, 1897.

Present :

HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL.

On a memorandum, dated 6th February, 1897, from the Secretary of State representing that it appears to him advisable and in the public interest, in cases where a charter of incorporation is to be granted under the provisions of "The Companies Act" (Revised Statutes of Canada, chapter 119), that the word "company" or some equivalent collective noun or special designation such as "association," "factory," or "club" should form part of the corporate name to be given to the company.

The Minister observes that by an Order in Council dated 19th June, 1894, it is provided that the prefix "The" shall be included in the name of companies incorporated under the statute above cited, and it would seem to him that to give full and proper effect to the terms of that Order in Council some provision should be made which would necessitate the addition to such name of a term indicating that the body to which incorporation is granted is one composed of several persons within the meaning of the Act in question. Moreover he is of opinion that with the addition of such a term all possibility of misconception as to the corporate existence of the company would be thereby removed.

The Minister, therefore, recommends that in all cases where Letters Patent are granted under "The Companies Act," the word "company" or some such collective noun shall form part of the corporate name to be granted to such company.

The Committee submit the above recommendation for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

Vide Canada Gazette, Vol. XXX., p. 1626.

TARIFF OF FEES.

Relating to Mining Companies operating in the Yukon District and North-West Territories.

By Order in Council of the 3rd August, 1898, in virtue of the provisions of Section 5 of Chapter 49 of 61 Victoria, "An Act to amend the Companies' Act," the following tariff of fees were fixed as the tariff of fees to be paid on application for licenses by companies or corporations incorporated under the laws of the Parliament of the United Kingdom, or of any foreign country intending to carry on mining operations in the Yukon district and North West Territories, viz.:—

When the capital stock of the company applying for a license is $1,000,000...	$ 500 00
For every additional million, $100 extra to be charged.	
When the capital stock of the company applying for a license is $500,000 or upwards and less than $1,000,000	300 00
When the capital stock of the company applying for a license is $200,000 or upwards and less than $500,000	250 00
When the capital stock of the company applying for a license is $100,000 or upwards and less than $200,000	200 00
When the capital stock of the company applying for a license is more than $40,000 and less than $100,000	150 00
When the capital stock of the company applying for a license is $40,000 or less than $40,000	100 00

Vide Canada Gazette, vol. XXXII., p. 280.

ANALYTICAL AND ALPHABETICAL TABLE.

A

B