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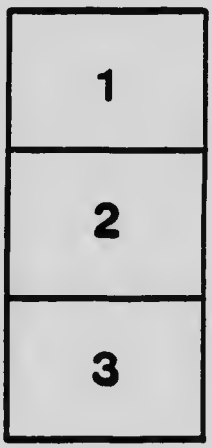

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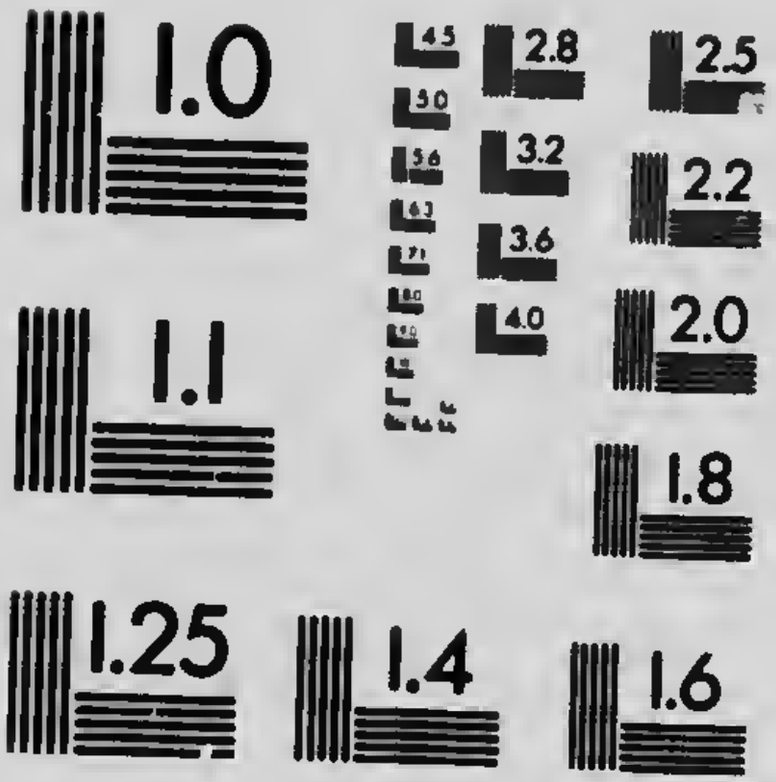

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COMPANY LAW.

TENTH EDITION.

COMPANY LAW:

A

PRACTICAL HANDBOOK

FOR

LAWYERS AND BUSINESS MEN.

With an Appendix

CONTAINING THE

COMPANIES (CONSOLIDATION) ACT, 1908; COMPANIES ACT, 1913, AND OTHER ACTS AND RULES.

BY

SIR FRANCIS BEAUFORT PALMER,

BENCHER OF THE INNER TEMPLE,

Author of "Company Precedents," &c.

TENTH EDITION.

BY

ALFRED F. TOPHAM, LL.M.,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

FORMERLY WHEWELL SCHOLAR AND CHANCELLOR'S MEDALLIST IN THE UNIVERSITY OF CAMBRIDGE.

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1916.

PREFACE
TO THE TENTH EDITION.

THE editing of this Work has now passed for the first time in its history into hands other than the Author's.

All the Author's arguments, expressions of opinion and criticisms of decided cases have been retained unaltered. The Editor's views on some of the subjects dealt with have been stated elsewhere, but have not been put before the reader in this edition. The additional matter consists mostly of short statements of the effect of recent decisions, and, in the few cases where the Editor has expressed an opinion or attempted to lay down a general principle, the passage in question is printed between square brackets.

Some re-arrangement and some substantial additions have been made as to subjects which have developed in importance during recent years, such as Re-organization of Capital (p. 100), Apportionment between Capital and Income (p. 220), Receivers (p. 324), and Set-off (p. 405).

Emergency legislation, so far as it relates especially to companies, has been dealt with shortly in the Appendix (p. 633).

All references to the Act and to decided cases as well as the Index, Table of Cases and cross references have been revised and corrected throughout, and the Editor hopes that errors and misprints have been reduced to a minimum.

In this respect the Editor has received most valuable assistance from his clerk, Mr. H. C. Mills.

A. F. TOPHAM.

NEW SQUARE, LINCOLN'S INN,
February, 1916.

AUTHOR'S PREFACE

TO THE NINTH EDITION.

THE fact that eight large editions of this Work have been sold since its publication in 1898, that the Work is now in common use in the United Kingdom and has followed the Author's larger work to Canada, Australia, New Zealand, India and the United States, affords convincing evidence that it has been found serviceable.

The object of the Work is to set forth the leading provisions of the Companies (Consolidation) Act, 1908, which has now taken the place of the Companies Acts, 1862 to 1907, and at the same time to show, by reference to the principal decisions, how the Acts have been interpreted by the Courts, and how the provisions thereof have been supplemented by the application of the general rules of law and equity.

The Acts alone, as pointed out in the Preface to the first edition, afford a very inadequate view of the law regulating companies incorporated thereunder; but the Acts *plus the decisions* constitute a great and, for the most part, admirable system of Company Law built up with the assistance (at the Bar and on the Bench), and illuminated by the genius, of a host of great lawyers—a system which prevails not only in the United Kingdom, where the paid-up capital of such companies exceeds £2,000,000,000, but, with more or less variation, in most of our colonies and dependencies.

The Author has laboured to make the Work practically useful not only to lawyers and to students of law, but generally

to business men ; for nowadays, looking to the vast number of persons interested as directors, shareholders, officials, customers, creditors and otherwise in companies, there are but few business men who can safely avoid the task of acquiring some knowledge of Company Law.

The Work in its inception was the outcome of the Author's series of lectures on Company Law delivered in 1897, at the Inner Temple Hall, upon the request of the Council of Legal Education.

The Author tenders his cordial thanks to his friend Mr. Edward Manson, of the Chancery Bar, for his kind assistance in preparing the Work for, and passing it through, the press.

And he offers his sincere acknowledgments to the profession and the public for the encouraging reception accorded to the prior editions.

F. B. P.

May, 1911.

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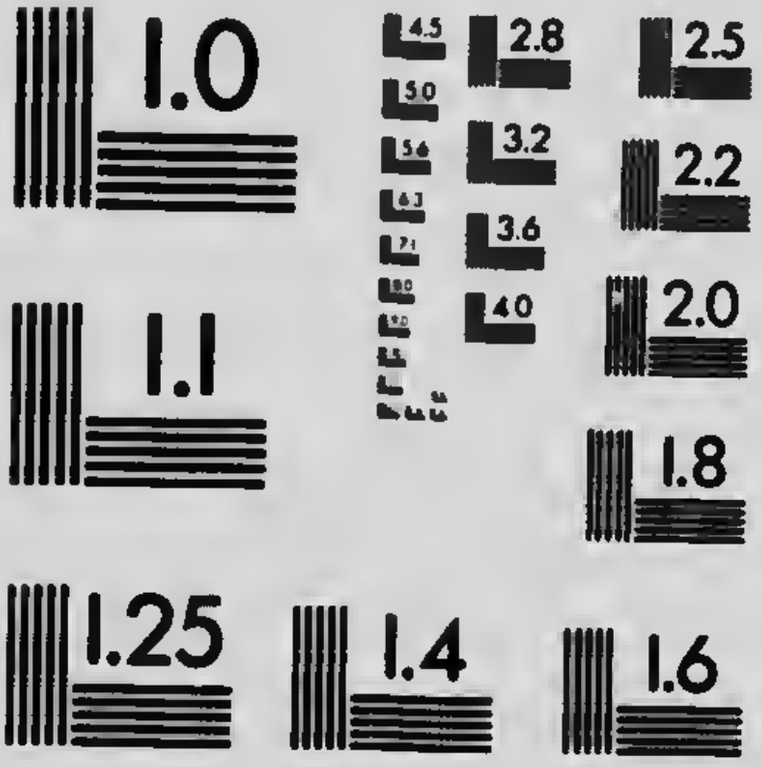

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COMPANY LAW.

CHAPTER I.

PRELIMINARY.

The principal kinds of associations known to the law.

THE following pages treat almost exclusively of companies incorporated under the Companies Act, 1862—the Magna Charta of co-operative enterprise—or under the Companies (Consolidation) Act, 1908* (*infra*, p. 13), which has taken the place of the Act of 1862; but it is necessary to bear in mind that such companies, though incomparably the most numerous and important, form only one of several classes of associations known to the law. Of these associations outside the Companies (Consolidation) Act, 1908, the principal are—(1) ordinary partnerships; (2) companies incorporated by roy[illegible] charter; (3) companies incorporated by special Act of Parliamen[illegible]; (4) unincorporated companies; (5) companies under the Act of [illegible]; (6) building societies; (7) industrial and provident societies; (8) friendly societies; (9) trade unions; and (10) limited partnerships. It is desirable, therefore, before dealing at large with companies under the Act of 1908, to say a few words as to each of the other kinds of companies or associations above referred to; for it is by comparing and contrasting the principal features of these other forms of co-operative effort with those of companies under the Act of 1908, that the special characteristics of the latter can be best brought into clear relief. To begin with—

(1.) Ordinary Partnerships.

Partnerships.

In these associations the firm is not a person in law, distinct from the partners who compose the firm. The partners are themselves the firm. They are the joint owners of the partnership property;

* This Act is referred to in these pages as "the Act," or "the Act of 1908," or "the Consolidation Act of 1908."

P.

their shares in the partnership are not transferable, and each of the partners is an agent of the partnership to make contracts, undertake obligations and dispose of partnership property in the ordinary course of the partnership business. Upon all contracts and obligations so incurred the liability of the partners is unlimited. As between themselves, the partners may make what private arrangements they please; but "as between the partners and the outside world, whatever may be the partners' private arrangements between themselves, each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of the partnership to the value of millions, may bind the partnership by contracts to any amount, may give the partnership acceptances for any amount, and may even, as has been shown in many painful instances in this Court, involve his innocent partners in unlimited amounts for fraud which he has craftily concealed from them": per Lord Justice James, *Baird's case*, 5 Ch. 725. This very serious liability as regards an ordinary partnership strikingly differentiates such an association from a statutory partnership, like a limited company. Partnership law is now to a large extent codified in the Partnership Act, 1890. As to "limited partnerships," see *infra*, p. 10.

(2.) Companies incorporated by Royal Charter.

Chartered companies.

A charter of incorporation can only be granted by the Crown, for the constitution of corporations is one of the prerogatives vested in the Crown by the common law. This power is now supplemented by 7 Will. 4, c. 73. Instances in which the Crown has exercised the power are: The Russia Company, incorporated by Queen Elizabeth, 1555; The Senegal Adventurers, incorporated by the same Queen, 1588; The Levant Company, incorporated by the same Queen, 1592; The East India Company, incorporated by the same Queen, 31st December, 1600; The Hudson's Bay Company, 1670; The Bank of England, incorporated in 1674; The South Sea Company, incorporated 1711; The London Assurance Corporation, 1720; Peninsular and Oriental Steam Navigation Company, 1840; The British North Borneo Company, 1881; The British South Africa Company, 1889.

A charter of incorporation usually runs as follows:—

"GEORGE THE FIFTH, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British

> Dominions beyond the Seas King, Defender of the Faith, to all to whom these presents shall come, greeting [*then follow recitals of the circumstances*]: Now THEREFORE know ye that we of our special grace, &c., by these presents, for us, our heirs and successors, grant and ordain that A., B. and C., and all such other persons and bodies politic and corporate as have become, or from time to time hereafter may become, members of the said undertaking or company, and shall hold one or more shares therein, shall be a body politic and corporate in deed and in law by the name of the A. B. C. Company for carrying into effect the purposes hereinafter mentioned," &c.

It is, or was, a peculiarity of a chartered corporation that its members were originally under no liability for the debts of the corporation, the Crown having no power in incorporating to attach liability to the individual members of the corporation. This anomaly was, however, removed by the statute above mentioned, 7 Will. 4, c. 73, under which a considerable number of banks and other concerns have from time to time been incorporated with a liability attached to the shares in the capital, and sometimes with an additional liability of the like or double the amount in the event of a winding-up. There still, however, subsists a difference of a fundamental character between a chartered company and a company formed under a special Act or registered under the Companies Acts, and it is this: at common law a corporation created by the king's charter has power, as was determined in the *Sutton's Hospital case* (10 Rep. 13), to deal with its property, to bind itself by contracts, and to do all such acts as *an ordinary person* can do, and so complete is this corporate autonomy that it is unaffected even by a direction contained in the creating charter in limitation of the corporate powers. For the common law has always held that such a direction of the Crown—though it may give the Crown a right to annul the charter if the direction is disregarded—cannot derogate from that plenary capacity with which the common law endows the company, even though the limitation is an essential part of the so-called bargain between the Crown and the corporation. See judgment of Bowen, L. J., in *Baroness Wenlock* v. *River Dee Co.*, 36 C. D. 685, and of Blackburn, J., in *Riche* v. *Ashbury Rail. Co.*, L. R. 9 Ex. p. 224. This feature—the unrestricted corporate capacity of the chartered company—is in marked contrast to the strict delimitation by the legislature and the Courts of the statutory or registered company to its defined objects.

Fundamental difference between chartered companies and others.

The power to incorporate by charter has always been sparingly exercised by the Crown, and the delay and expense in the proceedings

for obtaining a charter—concurring with the reluctance of the Crown to grant—has, for many years past, made a charter a very exceptional mode of incorporation.

(3.) Companies incorporated by special Act of Parliament.

Special Act companies.

The formation of companies by private or special Act of Parliament grew out of the canal-construction movement, a movement which followed closely on Brindley's success in the construction of the Bridgewater Canal under the Acts obtained in 1759 and 1760 by the Duke of Bridgewater.

It was very soon discovered that the best organization for the construction of these large undertakings was a company incorporated by special Act of Parliament. One of the earliest of these Acts was the Trent Navigation Act, 1766 (6 Geo. 3, c. 196). A considerable number of canal companies were so constituted, but it was not until the great movement set in for the construction of railways—inaugurated by the Stockton and Darlington Act of 1821—that companies constituted under special Acts began to multiply. Since then, great numbers of companies have been so constituted, and in particular in relation to railway, dock, water-works, gasworks, and tramway undertakings. In the case of most of these companies, the scheme of constitution and management is the same or similar, and, therefore, to avoid repetition and save expense, the legislature has embodied in certain Acts a code of general regulations or statutory provisions applicable to such companies and incorporated by reference into the special Act creating the company. Among such general Acts embodying typical provisions are The Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16); The Railways Clauses Act, 1845 (8 Vict. c. 20); The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18); The Gas Works Clauses Act (10 & 11 Vict. c. 15); The Waterworks Clauses Act (10 & 11 Vict. c. 17); The Harbours and Docks and Piers Act (10 & 11 Vict. c. 27); The Electric Lighting (Clauses) Act, 1899, and various other Acts amending and extending the above.

Special peculiarity of them—compulsory powers.

A special peculiarity of these statutory undertakings, and one which distinguishes them from ordinary trading companies registered under the Companies (Consolidation) Act, 1908, is that they are, in many cases, invested with compulsory powers: for instance, to take land or to commit what, but for these parliamentary powers, would amount to nuisances; otherwise their constitution is closely analogous; the liability of the members, for example, is limited to the amount of their shares, and the company in each case incor-

porated is restricted, as regards its powers, to the purposes of its creation and the terms of its parliamentary mandate. See *Colman* v. *Eastern Counties Rail. Co.*, 10 Beav. 1; *Salomans* v. *Laing*, 12 Beav. 339; *East Higham Rail. Co.* v. *Eastern Counties Rail. Co.*, 11 C. B. 775; *Hawkes* v. *Eastern Counties Rail. Co.*, 5 H. L. C. 331. In the case last mentioned, Lord Cranworth, after reviewing the authorities, said: "It must, therefore, be now evident, as a well-settled doctrine, that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such application may be." See also *Mann* v. *Edinburgh Northern Tramways Co.*, (1893) A. C. 69.

(4.) Unincorporated Companies constituted by Contract.

Common law companies.

These companies made their appearance first in the seventeenth century. It was a time when men of business were beginning to recognize the advantages derivable from co-operation in commercial enterprise, the advantages which it offered, that is to say, on the one hand, for raising funds for the purposes of large and more or less speculative undertakings by means of contributions from a number of small capitalists ready and willing to co-operate, and, on the other hand, of minimising the risk by spreading the liability. The difficulty was how to secure these advantages. A charter was too costly, and a special Act of Parliament was impracticable. Business men had to devise for themselves a new form of partnership which should possess the advantages as nearly as might be of a chartered corporation, and in particular should have shares of fixed amount freely transferable by the holders. The outcome of these commercial needs was the unincorporated company, the lineal ancestor of the ordinary company under Companies Act, 1862, and its amending Acts, now reproduced and consolidated in the Act of 1908.

The law at first frowned on these new associations. It questioned their validity. It insisted on treating them as ordinary partnerships, and by this and other rules which it applied to them seriously checked and crippled their development. They continued, however, to be formed, and gradually the number increased until the fraudulent promoter appeared on the scene.

To such an extent did this person take advantage of the opportunity by floating all sorts of fraudulent and objectionable concerns that the legislature had, in 1719, to intervene and pass the Bubble Act with a view to putting down fraudulent companies. Unfortunately the Act

was expressed in such ambiguous terms as to raise doubts whether it was not intended to stop generally the formation of companies with transferable shares, good and bad alike. The leading case—a very instructive one—on this Act is *R.* v. *Webb*, 14 East, 406. The difficulty was solved, however, in 1825 by the repeal of the Bubble Act, and thenceforth, for a time, the formation of companies was left to the common law, subject to the doubts which existed as to whether, under the common law, they were legal or not, doubts which were subsequently settled in favour of their legality. See *Walburn* v. *Ingilby*, 1 M. & K. 61, decided by Lord Brougham; *Garrard* v. *Hardey*, 5 Man. & Gr. 471; *Harrison* v. *Heathorn*, 6 Man. & Gr. 81; and *Sheppard* v. *Oxenford*, 1 K. & J. 491.

Left to the freedom of the common law, the tide of company enterprise rose, and, as it did so, the policy of the legislature changed. In lieu of the policy of repression the legislature, in 1844, recognizing the advantages of the joint stock company principle, and the desirability of facilitating the association of persons in commercial undertakings, provided means for regulating them by passing, in 1844, the Act 7 & 8 Vict. c. 110. This Act, with certain exceptions, required all companies subsequently formed to be registered under it. The formation of unregistered companies was thus, to a great extent, stopped, and though the Act was repealed in 1862, except as to then existing companies, the Act of 1862, as appears below, continued to prohibit the formation of unregistered companies for gain where the members exceeded twenty, or in the case of banking companies, ten. The Act of 1908 does the same.

Unincorporated company to be differentiated from ordinary partnership.

An unincorporated company has always been regarded by the law as a partnership with special features; one of these special features was the transferability of its shares. To secure the continuity of the concern, notwithstanding the death or bankruptcy of members, was another; and the vesting of the management in a select body of directors, to the exclusion of the members generally, was a third.

Deed of settlement.

Such companies were usually established by deed of settlement expressed to be made between the various shareholders and a trustee or trustees with whom the shareholders covenanted to observe the provisions of the deed. The deed commonly declared that the several persons for the time being holding shares in the capital of the company should constitute and be a company with a specified name, and with a specified capital, and subject to specified regulations (set out in the deed) until dissolved in a specified manner. And the deed usually also made the shares transferable.

What the founders of these associations aimed at was, in fact, to make them as nearly as possible a corporation with continuous existence, and

with transmissible and transferable stock, but without any individual right in any associate to bind the other associated members or to deal with the assets of the association. In many cases they obtained a private Act of Parliament enabling them to sue and be sued in the name of some specified officer. See further as to unincorporated companies, *Baird's case*, 5 Ch. 725; *Grain's case*, 1 C. D. 307, 315; *Burnes* v. *Pennell*, 2 H. L. C. 897; Lindley on Companies.

Such associations being in contemplation of law nothing but great partnerships with some special features, the members have always been held liable for the debts and liabilities to the full extent of their means.

(5.) Companies incorporated under 7 & 8 Vict. c. 110 [1844].

Companies under the Act of 1844.

The above Act was the first general registration Act in regard to companies. Lord Cranworth has, in *Oakes* v. *Turquand*, L. R. 2 H. L. at p. 358, pointed out some of the circumstances which made the intervention of the legislature necessary.

"When it became the habit and interest," said that learned Judge, of persons engaged in commerce to unite in great numbers for carrying on any particular trade, it soon became evident that the ordinary provisions of the laws of this country were ill adapted to the business of such bodies. It is a general principle of mercantile law, that when two or more persons are associated in partnership for carrying on a trade, every partner can bind his co-partners in all contracts made in the ordinary course of the business. But where a hundred persons or upwards are engaged in any particular trade to be managed by directors acting for the whole body, that principle plainly became very inconvenient in its application. So, again, it was a principle of our Courts that in any proceeding by or against a partnership, all the partners must, either as plaintiffs or defendants, be made parties to the proceeding. But when numerous members of a partnership, to the extent of many hundreds of persons, were concerned as partners, this rule would, if adhered to, have made litigation practically impossible, and would often have amounted to a denial of justice."

The Act was of a somewhat anomalous character. It incorporated the companies registered under it, and thus endowed them with faculties, privileges and powers denied to an unincorporated company. In particular it facilitated legal proceedings and the holding of property, but it still withheld from them one of the most important incidents of an incorporated company—the immunity of the members

from direct liability. Indeed, it expressly imposed on the members liability for the debts of the company just as if they were partners.

Notwithstanding this provision, an effort was in some cases made to obtain limited liability for a company registered under the Act. The Act provided that the deed of settlement should be filed with the Registrar of Joint Stock Companies and be open for public inspection, and it was thought that the insertion in the deed of settlement so filed of a clause limiting the liability of the members to the amount of their shares would or might be effective. Clauses to that effect were inserted in some cases, but it was ultimately held by the Court that this attempt to limit was, as regards outsiders, ineffectual. See *Greenwood's case*, 3 De G. M. & G. 459; and see further as to such companies, Lindley on Companies.

(6.) Building Societies

Building societies.

under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and the Building Societies Act, 1894 (57 & 58 Vict. c. 47).

The liability of the members of these societies is limited. The societies are by the Act of 1874 incorporated. They are not companies, but they bear a great resemblance to companies. See further Wurtzburg on Building Societies.

(7.) Industrial and Provident Societies

Industrial societies.

under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39); amended 1895 (58 & 59 Vict. c. 30).

The Act incorporates such societies (sect. 21), and limits the liability of the members. It also confers special rights and privileges. These societies are not companies, though, like building societies, they bear a considerable resemblance to them. They are intended for small capitalists, and accordingly the interest of a member is not to exceed 200*l*. (Sect. 4.) See Fowke, Industrial and Provident Societies.

(8.) Friendly Societies

Friendly societies.

under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25); amended Societies' Borrowing Powers Act, 1898 (61 & 62 Vict. c. 15); re-amended Friendly Societies Act, 1908 (8 Edw. 7, c. 32).

These societies are not incorporated, but they are, by the Act, invested with various privileges, and the liability of the members is limited. A friendly society can convert itself into a company, and a

company can convert itself into a friendly society. (Sect. 71 of the Act of 1896.) See Fuller, Friendly Societies.

(9.) Trade Unions.

Trade unions.

These associations, which at common law were illegal as in supposed restraint of trade, were legalised to some extent by the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31, and 39 & 40 Vict. c. 22). "Parliament has legalised trade unions whether registered or not. If registered, they enjoy certain advantages." Per Lord Macnaghten in *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, (1901) A. C. 426: in which case it was decided that trade unions could be sued for wrongs committed by their agents. The Act of 1871, however, in legalising trade unions, contains an important qualification, for it expressly provides that it is not to enable the Court to entertain any legal proceedings for directly or indirectly enforcing or recovering damages for the breach of a large class of agreements, including almost all the material rules of these societies. For example, if it be desired to compel a member of the union to abstain from work during a strike or to insist on standard wages or hours, or to pay his subscriptions or fines, or if a member desires to compel the union to give him the benefits in the way of sick pay and otherwise stipulated for, the Court will not assist.

The Companies Acts, 1862 and 1867, are not to apply to any trade union, and registration of a trade union under them is void. See Trade Union Act, 1871, s. 5. By sect. 293 of the Act of 1908, the reference in that section to the Acts of 1862 and 1867 is to be read as a reference to the Companies Act, 1908. See, further, Company Precedents, Part I., p. 113; *Chamberlain Wharf*, (1900) 2 Ch. 605; *Edinburgh and District Aerated-Water Manufacturers' Defence Association* v. *Jenkinson*, 5 Ct. of Sess. Cas. 1159; and *Howden* v. *Yorkshire Miners' Association*, (1903) 1 K. B. 308; *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, (1901) A. C. 426; *Osborne* v. *Amalgamated Society of Railway Servants*, (1910) A. C. 87; 27 T. L. R. 115; *Russell* v. *Amalgamated Society of Carpenters*, (1910) 1 K. B. 506.

By the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1), "No Court" is now "to entertain any action against a trade union . . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union."

(10.) Limited Partnerships.

Limited partnerships.

Limited partnerships are associations established under the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24). The name is somewhat of a misnomer, for in such an association there must be one or more partners with unlimited liability. Those partners are called "general partners"; the other partners are called "limited partners," the latter contributing to the partnership assets a specified amount in money or money's worth, and enjoying immunity from liability beyond the amount so contributed. But it is an essential condition of this immunity (sect. 6) that a limited partner shall not take part in the management of the business, and he is to have no power to bind the firm. He may inspect the books and may advise, that is, consult with the other partners as to the state and prospects of the business, but he must not go beyond this. If he does, though it be in ignorance of the law, or inadvertently, or at the urgent request of the general partners, he forfeits his immunity from liability, and is plunged into the unknown depths of unlimited liability.

These limited partnerships are an importation from abroad. On the Continent something of the kind has been for upwards of half a century permitted in several countries, but the scheme offers little attraction to those who have, as in England, the alternative of forming or joining a private company, with all the advantages and immunities conferred by the law on such companies. The Act in effect merely limits the liability of a sleeping partner provided he strictly complies with the statutory requirements. If A. wants to join a partnership, and while limiting his liability wants to look after his money by taking part in the conduct of the business, the Act of 1907 affords him no facilities and no protection. If he wants to join a limited partnership he must make up his mind to leave the whole of the management of the business in the hands of the general partners; to intervene means for him to risk incurring liability for all the debts and obligations of the firm. The Act is full of pitfalls for the unwary. The Act has been in force for more than seven years, and instead of a rush to take advantage of its provisions, there has been great reluctance and hesitation; the rush has been to form private companies.

The provisions of the Bankruptcy Act, 1914, now apply to limited partnerships. (Sect. 127.)

The Companies Acts, 1862 to 1913.

Companies under the Act of 1862.

The main object of the Act of 1862 (a masterpiece of legislation) was to throw open to all the coveted privilege of carrying on business with limited liability. The principle of the Act was to allow the

greatest freedom both in the formation and working of a limited liability company, and at the same time to ensure that those who dealt with such concerns should be informed that the liability of the members was limited. Abandoning the old cumbersome system introduced by the Act of 1844 of provisional and complete registration, the Act made the formation of a company a perfectly simple and inexpensive process—all that it required for the formation of a company was seven signatures to a written or printed document called a memorandum of association. This, on payment of a small fee, was to be registered and a certificate of incorporation to be given, and thereupon the company was at liberty at once to commence business. It was not bound before starting business to have any capital paid up or subscribed beyond the seven shares to be taken by the signatories of the memorandum: it might start on its commercial career without any further subscription, might at once enter into contracts, borrow money if it could, and carry on business. And the great boon of limited liability was secured by the insertion in the memorandum, as part of the name of the company, of the magic word "Limited," together with a clause stating that the liability of the members was to be limited.

The Act of 1862 was amended and extended by the following Acts:—

The subsequent Acts.

1. The Companies Seals Act, 1864 (27 Vict. c. 19).

   This Act empowered companies in certain cases to have official seals for use abroad.

2. The Companies Act, 1867 (30 & 31 Vict. c. 131).

   This Act provided for reduction of capital, issue of share-warrants to bearer, sub-division of shares and other matters.

3. The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).

   This Act extended the powers of the Court in winding-up as to compromises and arrangements with creditors.

4. The Companies Act, 1877 (40 & 41 Vict. c. 26).

   This Act provided further for reduction of capital.

5. The Companies Act, 1879 (42 & 43 Vict. c. 76).

   This Act provided for re-registration with limited liability of unlimited companies, and also for the creation of reserve capital.

6. The Companies Act, 1880 (43 Vict. c. 19).

   This Act provided for payment off of profits in reduction of capital, and empowered the Registrar to strike names of defunct companies off the register.

7. The Companies Colonial Registers Act, 1883 (46 & 47 Vict. c. 30).

   This Act provided for colonial registers in certain cases.

8. The Companies Act, 1886 (49 Vict. c. 23).

   This Act amended the Act of 1862, as to winding-up in Scotland in certain respects.

9. The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), though not one of the Companies Acts, nevertheless affects the winding-up thereof. See also the Act of 1897, *infra*.

10. The Companies Memorandum of Association Act, 1890 (53 & 54 Vict. c. 62).

    This Act provided for the extension of objects, &c.

11. The Companies Winding-up Act, 1890 (53 & 54 Vict. c. 63), largely modified provisions of the principal Act in regard to winding-up.

12. The Directors' Liability Act, 1890 (53 & 54 Vict. c. 64).

    This Act modified the liabilities of directors in regard to prospectuses, &c.

13. The Companies Winding-up Act, 1893 (56 & 57 Vict. c. 58), modifying the Bankruptcy Act, 1883, in relation to winding-up.

14. The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 Vict. c. 19).

15. The Companies Act, 1898 (61 & 62 Vict. c. 26), modifying s. 25 of the Companies Act, 1867.

16. The Companies Act, 1900 (63 & 64 Vict. c. 48), extensively amending the Companies Acts, 1862 and 1867.

17. The Companies Act, 1907 (7 Edw. 7, c. 50), amending the above Acts in a number of important particulars.

18. The Companies Act, 1908, enabling certain foreign and colonial companies to hold land and other property.

The existence of these eighteen Acts with their many provisions, original, supplementary, amending, re-amending, substitutionary and repealing, rendered it a difficult task even for the trained lawyer familiar with the Acts and decisions to know how the law stood, much more for the business man, and long before 1908 there was a growing consensus of opinion that the law needed simplifying, and that the living provisions of the law ought to be brought together in an orderly form under one comprehensive enactment, so that he who ran might read one Act in place of the mosaic of many separate Acts. This has now been accomplished by the Companies (Consolidation) Act, 1908 (7 Edw. 7, c. 69), and it marks a new and important starting

point in the history of our company law. This Act has been amended by the Companies Act, 1913, with reference to private companies.

The Act of 1908 is a little more than a consolidation of the existing law as already expressed in the Acts of 1862 to 1908. The alterations are few and trifling, but some of them change the law considerably. See *Thomas* v. *United Butter Co.*, (1909) 2 Ch. 484. The drafting is in the main clear, but (alas!) practically no attempt has been made to embody in the Act the relevant decisions of the Courts—decisions which throw so great a flood of light on the operation and meaning of the repealed Acts, and of the new Act. See p. 17, *infra*.

The Companies (Consolidation) Act, 1908, is divided into ten parts:—

Part I. Constitution and Incorporation.

Part II. Distribution and Reduction of Capital.

Part III. Management and Administration.

Part IV. Winding-up and Dissolution.

Part V. Registration Office and Fees.

Part VI. Application of Act to Companies formed and registered under former Acts.

Part VII. Companies authorized to register under the Act.

Part VIII. Winding-up of unregistered Companies.

Part IX. Companies established outside the United Kingdom.

Part X. Supplemental.

And there are six Schedules:—

Schedule I. Tables A., B. and C.

Schedule II. Statement in lieu of Prospectus.

Schedule III. Forms of Memorandum and Articles and Annual Summary.

Schedule IV. Provisions as to Scotch Orders.

Schedule V. Applicability of sect. 281.

Schedule VI. Repeals.

The Act was to come into operation on the 1st April, 1909. See sect. 296. It may be cited as "The Companies (Consolidation) Act, 1908" (see sect. 295), or, with the Act of 1913, as "The Companies Acts, 1908 and 1913."

The interpretation of the Act.

One key to the understanding of the Act is to be found in the interpretation section (sect. 285), attaching to certain words used in the Act special significations, "unless the context otherwise requires." A brief comment on some of the definitions may not be out of place. The section commences thus:—

285.—(1) In this Act, *unless the context otherwise requires*, the

following expressions have the meanings hereby assigned to them, that is to say:—

"Existing company" means a company formed and registered under the Joint Stock Companies Acts [*i.e.*, of 1856, 1857, &c.], or under the Companies Act, 1862;

"Company" means a company formed and registered under this Act or an existing company;

It follows, then that the various sections of the Act dealing with a "company" apply *primâ facie* not only to companies formed under the Companies (Consolidation) Act, 1908—*i.e.*, on or after April 1st, 1909—but also to companies formed under the Act of 1862, at any time before April 1st, 1909.

This at a stroke brings within the operation of the Act the 50,000 or more companies registered under the Companies Acts, 1862 to 1908, and now carrying on business in the United Kingdom and all parts of the world. Henceforth they are to be governed by the provisions of the Act of 1908. But as regards existing companies, the application is subject to the words "unless the context otherwise requires," and further to the provisions of Part VI. and sect. 286 of the Act (see Appendix, *infra*, pp. 512, 522). Moreover, by sect. 247 of the Act its provisions are made applicable in like manner to companies registered, but not formed, under the Joint Stock Companies Acts (as defined in sect. 285) or under the Act of 1862.

Another important expression defined in s. 285 is the following:—

"Articles."

"Articles" means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A. in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A. in the First Schedule to this Act;

This expression—"articles"—now takes the place of the expression "regulations," so frequently used in the Companies Acts, 1862 to 1907. See, for example, sects. 12 and 50 of the Act of 1862; sects. 9 and 21 of the Act of 1867; sects. 3 and 13 of the Act of 1900.

We thus get rid of what has been for many years past a troublesome ambiguity—the use sometimes of "articles," sometimes of "regulations." In the present edition the author has uniformly adopted the expression "articles" as being in conformity with the language of the new Act, and also in harmony with legal and commercial usage.

By defining "articles" as above the Consolidation Act also gets rid of the clumsy circumlocution so often appearing in the text of the Acts, *e.g.*, in sect. 12 of the Act of 1862, "if authorized so to do by its regulations as originally framed or as altered by special resolution," and substitutes the simple expression "if authorized by its articles." See, *e.g.*, sect. 41 (1908).

The following are some further defined expressions:—

"Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of the provisions of this Act;

"Document" includes summons, notice, order, and other legal process, and registers;

"Share" means share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied;

"Debenture" includes debenture stock;

"Books and papers" and "books or papers" include accounts, deeds, writings, and documents;

"Director" includes any person occupying the position of director by whatever name called;

"Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, inviting the public to subscribe for or purchase any shares or debentures of a company.

Besides the above, "Private company" is defined in sect. 121.

The repeals are dealt with in sect. 286, which runs thus:—

Repeals.

286.—(1) The Acts mentioned in the first part of the Sixth Schedule to this Act are hereby repealed to the extent specified in the third column of that part:

Provided that the repeal shall not affect—

(a) The incorporation of any company registered under any enactment hereby repealed; nor

(b) Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

(c) Table A. in the First Schedule annexed to the Companies Act, 1862, or any part thereof (either as originally contained in that Schedule or as altered in pursuance of section seventy-one of that Act) so far as the same applies to any company existing at the commencement of this Act; nor

(d) The continuance in force of the enactments set out in the second part of the Sixth Schedule to this Act, being the enactments continued in force by section two hundred and five of the Companies Act, 1862.

(2) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section thirty-eight of the Interpretation Act, 1889, with regard to the effect of repeals.

This must be read with sect. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), which runs as follows:—

38.—(1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or,

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

Windings-up commenced before the Consolidation Act of 1908 are excepted by sect. 287:—

Pending liquidation.

287. The provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had

not passed, and for the purposes of the winding up the Act or Acts under which the winding up commenced shall be deemed to remain in full force.

The operation of deeds, &c. prior to the Act is not to be affected.

288. Every conveyance, mortgage, or other deed, made before the commencement of this Act in pursuance of any enactment hereby repealed shall be of the same force as if the Act had not passed, and for the purpose of that deed the repealed enactment shall be deemed to remain in full force.

References in documents to the repealed Acts are transferred to the Consolidation Act.

291. Where any enactment repealed by this Act is mentioned or referred to in any document, that document shall be read as if the corresponding provision (if any) of this Act were therein mentioned or referred to and substituted for the repealed enactment.

How far the decisions on the Companies Acts, 1862 to 1907, may be resorted to for the purpose of interpreting the Companies (Consolidation) Act, 1908.

Decisions on the repealed Acts.

The Act of 1908 being a consolidation Act, it is apprehended that the rule laid down by Lord Herschell in *Bank of England* v. *Vagliano*, (1891) A. C. 144, is in point. His Lordship in that case, speaking with reference to the Bills of Exchange Act, 1882 (which consolidated the law relating to bills of exchange), said:—"I think the proper course is, in the first instance, to examine the language of the statute, and to ask, what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with this view.

"If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any points specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was—extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous

state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import such resort would be perfectly legitimate. Or again, if in a code of the law of negotiable instruments words be found which had previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I take these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

Nor is the principle thus laid down confined to a codifying Act, it extends also to a consolidating and amending Act. "The same principle applies to such an Act as that which is now before us, but in a less stringent degree. In this Act, clauses of the repealed Acts are found repeated, but often in altered form, and with amendments whereby the sense may be to a great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand, and that a minute critical examination of the repealed clauses ought not to be entered upon for the purpose of interpretation except upon special grounds." Per Chitty, L. J., in *Thames Conservators* v. *Smeed, Dean & Co.*, (1897) 2 Q. B. 346 (C. A.).

Applying this principle to the Consolidation Act of 1908, which has to a very great extent adopted the wording of the Acts of 1862 to 1907, it is obvious that there is and must be ample scope for reference to the decisions on those Acts, and the right thus to refer is well settled.

Thus in a *Mersey Dock case*, 11 H. L. C. 443, Blackburn, J., in delivering the opinion of the majority of the judges, said: "Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent Act *in pari materiâ* uses the same words, there is a presumption that the legislature uses these words intending to express the meaning which it knew has been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise."

The reports are full of cases in which this rule has been recognised and acted on: *Re Cathcart*, 5 Ch. 703; see *Avery* v. *Wood*, (1891) 3 Ch. 115; *Greaves* v. *Tofield*, 14 C. D. 571; *Dale's case*, 6 Q. B. D. 453; *Rosenberg* v. *Northumberland Building Society*, 22 Q. B. D. 373; *Hodgson* v. *Bell*, 24 Q. B. D. 528; *Rex* v. *Abrahams*, (1904) 2 K. B. 859.

Hence it may be taken that in re-enacting the provisions of the Companies Acts, 1862 to 1907, the legislature has not disturbed the

decided cases, and that these decided cases are still to be treated as relevant and available for the interpretation of the new Act, in so far as any questions as to its meaning may arise in the future. It by no means follows, however, that the new Act is to be taken to adopt and affirm a construction erroneously placed on the former Acts. *Colonial Bank* v. *Whinney* (1885), 30 C. D. 261, furnishes a good illustration. There the question arose whether shares in a company were or were not choses in action within sect. 44 of the Bankruptcy Act, 1883 (dealing with reputed ownership). It appeared that in 1871 Vice-Chancellor Bacon, in *Union Bank of Manchester*, 12 Eq. 354, had decided that under a similar provision in a corresponding portion of the Bankruptcy Act, 1869, shares were not included as choses in action; and this decision was relied on by Cotton and Lindley, L. JJ., the latter saying that "the decision of the Vice-Chancellor has never been appealed from or judicially disturbed. After it had thus stood for years the present Act of 1883 was passed. I do not think we ought to suppose the draughtsmen of that Act to have been unaware of the construction which had been put by the Court upon the Act of 1869, and it appears to me that it would be a very strange thing for us to say that the language used, in the Act of 1883, ought to be construed differently from the judicial construction which had been put on the same language in the Act of 1869." But on appeal to the House of Lords (1886), 11 A. C. 426, this decision was overruled, and it was held that, notwithstanding the erroneous decision of the Vice-Chancellor, shares *were* choses in action within the meaning of sect. 44 of the Bankruptcy Act of 1883. Moreover the application of a decision may be excluded by a change in the language of the new Act: *Thomas* v. *United Butter Co.*, (1909) 2 Ch. 484.

Here, then, in the Companies (Consolidation) Act, 1908, we find gathered together and set in order the results of more than fifty years of company legislation, and we may venture to assert that the provisions of the Act, interpreted and supplemented by the many important decisions of the Courts on the Companies Acts, 1862 to 1907, and supplemented also by the Acts relating to insurance companies referred to in Chap. XLI. of this work, form together a comprehensive, and in most respects, admirable system of law for regulating the constitution, management, and winding-up of companies throughout the United Kingdom—a system which contrasts very favourably with the complicated formalities and the hard-and-fast regulations and restrictions imposed by not a few foreign systems of law in regard to companies and co-operative enterprises. Unlike these systems, the policy of our law has been to accord the utmost liberty in regard to the formation, the carrying on, and the dissolution of companies; and although this freedom has at times been abused by unscrupulous persons for their

own ends, necessitating the intervention of the legislature, such abuses are but an insignificant item in comparison with the vast volume of honestly formed and honestly managed companies; * while there can be no doubt that the facilities afforded by these Acts have largely stimulated and developed British trade and co-operative enterprise in all parts of the world.

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* The share capital of companies now on the register under the Companies Acts amounts, according to the latest official return, to more than two thousand five hundred millions, while the total share capital of companies registered since 1862 exceeds seven thousand eight hundred millions.

CHAPTER II.

FORMATION OF A COMPANY LIMITED BY SHARES—ALLOTMENT AND COMMENCEMENT OF BUSINESS—GENERAL SKETCH OF PROCEEDINGS.

THE mode of forming a company limited by shares is extremely simple:—

Preliminaries.

First steps.

The first step is to prepare the Memorandum of Association (see sect. 3 of the Act of 1908) and the Articles of Association (if there are to be any). See sect. 10.

The Memorandum of Association.

The memorandum.

This is a document of extreme importance in relation to the proposed company, and it will be fully dealt with later on (Chapter III., p. 26). It is required to state (among other things) (1) the name of the company; (2) what part of the United Kingdom the registered office is to be situate in; (3) the objects of the company; (4) that the liability of the members is limited; and (5) the capital of the company. See the specimen form set out in the Third Schedule to the Act, *infra*, Appendix.

This document has to be subscribed by seven persons at least, or, in the case of a private company, by two persons at least. Each subscriber must write opposite to his or her name the number of shares—it must not be less than one—he or she takes, and each signature must be attested by a witness. (Sects. 3, 6.)

The memorandum may be wholly in writing, or it may be printed (save as regards the signatures), or it may be partly printed and partly in writing.

The signature of a subscriber cannot be attested by himself or by another subscriber. "The word implies the presence of some person who stands by, but is not a party to the transaction." Per Lord Selborne, *Seal* v. *Claridge*, 7 Q. B. D. 516.

The Articles of Association.

The articles.

These contain the regulations for the management of the affairs of the company and the conduct of its business. (Sect. 10.) In the case

of a company limited by shares there is no obligation to register articles of association, but if it is registered without articles the regulations in Table A. in the First Schedule to the Act are to be deemed to be the articles of the company.

There is a third alternative, and that is to have a short set of articles of association, supplementing or modifying Table A., but otherwise leaving Table A. to operate. In such a case Table A., plus the supplementary or modifying provisions, will constitute the regulations of the company.

As a general rule, it is desirable for a company to have special articles of association, but there are a considerable number of cases in which Table A., in its new form, with any necessary modifications and additions as above, may work well enough.

The articles of association (if there are to be any) must be printed (sect. 12), and must be signed by the subscribers of the memorandum, and the subscribers' signatures must be attested as required by sect. 12(d) of the Act. See Articles of Association, Chap. IV., p. 37.

Memorandum and articles must each bear a 10*s.* deed stamp, and a 5*s.* registration stamp.

Registration.

Registration.

In order to effect registration of the company, the documents, prepared as above described, must be taken to the Registrar of Joint Stock Companies (sect. 15), with a statutory declaration by a solicitor of the High Court engaged in the formation of the company, or by a person named in the articles of association as a director or secretary of the company, of compliance with the requirements of the Act as to registration (sect. 17), and also (except in the case of a private company) with certain other documents below mentioned.

The above documents each require a 5*s.* registration stamp, and the Registrar, on payment of the requisite registration fee and stamp duties, registers and retains the documents, and issues a certificate of incorporation. Sect. 16; see Chap. V., p. 51.

As to the further declaration or licence required during the war, see Appendix, p. 632.

Fees on Registration.

Fees.

The fees on registration are proportioned to the amount of the capital. See Table B. in the First Schedule to the Act, and the note appended thereto in regard to the capital duty of 5*s.* per cent. imposed by the Stamp Act, 1891, and the Finance Act, 1899.

Form of Certificate of Incorporation.

The certificate of incorporation is in the terms following:— Certificate.

I HEREBY CERTIFY that the —— Company, Limited, is this day incorporated under the Companies (Consolidation) Act, 1908, and that the company is limited.

Given under my hand this —— day of ——.

[*Signature*] Registrar of Joint Stock Companies.

With the issue of the certificate of incorporation (see Chap. V., *infra*, p. 51), the company comes into existence as a body corporate. See Chap. VI., *infra*, p. 55.

Allotment of Shares and Commencement of Business and exercise of Borrowing Powers.

The following is a summary of the position:—

Class 1 (*Private Companies*).

In the case of private companies as defined in sect. 121 of the Act (Chap. XXXVII., *infra*), the company can go to allotment immediately after the certificate of incorporation is obtained, and can commence business and exercise its borrowing powers forthwith, a private company being exempt from all restrictions as to allotment and commencement of business. Private companies.

Class 2 (*Companies issuing Prospectus inviting Public to subscribe for Shares*).

In the case of companies in relation to whose formation a prospectus inviting the public to subscribe for shares is issued— Share prospectus companies.

(a) The prospectus must contain the disclosure required by sect. 81, and must provide for payment of at least five per cent. application money on the shares offered (sect. 85), and must be dated and signed by every director or proposed director named in it, or by his agent duly authorized in writing, and must be filed with the registrar before its issue. (Sect. 80.)

(b) If anyone is to be named in the articles or prospectus as a director or proposed director, he must by himself or his agent duly authorized in writing sign and file with the registrar a consent in writing to act as such director, and if the articles provide for a share qualification, must either subscribe the memorandum of association for his qualification or sign

and file a contract to take and pay for such qualification. (Sect. 72.)

(c) It must be seen that the articles fix the minimum subscription upon which the directors may proceed to allotment, unless the parties are content that the whole amount of the share capital for which the public are invited to subscribe shall be treated as the minimum subscription. (Sect. 85.)

(d) On the application to register there must be delivered to the registrar a list of the persons who have consented to be directors. (Sect. 72 (2).)

(e) Before going to allotment, care must be taken that, as required by sect. 85, the minimum subscription has been subscribed, and the sum payable on application has been paid to and received by the company.

(f) It must be seen also that every director of the company has paid to the company on each of the shares taken, or contracted to be taken, by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription. (Sect. 87 (1) (b).)

(g) There must be filed with the registrar a statutory (sect. 87 (1) (c)) declaration by the secretary, or one of the directors, in the prescribed form. (Company Precedents, Part I., Form 227, 11th ed., p. 605.)

And thereupon the registrar will certify that the company is entitled to commence business. (Sect. 87 (2).)

Class 3 (*Companies not issuing Prospectus inviting Public to subscribe for Shares*).

Other companies.

In the case of companies which do not fall within Classes 1 and 2:—

(a) A statement in lieu of prospectus (sect. 82) must be filed with the registrar, and the statement must be in the prescribed form: see *infra*, Appendix, Act of 1908, Second Schedule.

(b) If anyone is named in the articles or in the statement in lieu of prospectus as a director, or proposed director, he must by himself, or by his agent duly authorized in writing, sign and file with the registrar a consent in writing to act as such director, and if the articles provide for a share qualification, must either subscribe the memorandum of association for his qualification, or sign and file a consent to take and pay for such qualification. (Sect. 72.)

(c) It must be seen that the memorandum or articles fix, and that the statement in lieu of prospectus states, the minimum sub-

scription (if any) upon which the directors may proceed to allotment, unless the parties are content that the whole amount of the share capital, other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, shall be treated as the minimum, and it must be seen that the minimum has been subscribed. (Sects. 82 and 85 (7).)

(d) On the application to register there must be delivered to the registrar a list of persons who have consented to be directors. (Sect. 72 (2).)

(e) It must be seen that every director of the company has paid to the company on each of the shares taken, or contracted to be taken, by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash. (Sect. 87 (1) (b).)

(f) There must be filed with the registrar a statutory declaration (sect. 87 (1) (c)) by the secretary or one of the directors in the prescribed form. (See Company Precedents, Part I., Form 227, 11th ed., p. 605.)

And thereupon the registrar will certify that the company is entitled to commence business. (Sect. 87 (2).)

As regards companies in Class 3, the statement in lieu of prospectus must be filed, and all the above requirements must be complied with, even though the company on its formation issues, or proposes forthwith to issue, a prospectus inviting the public to subscribe for debentures or debenture stock.

CHAPTER III.

MEMORANDUM OF ASSOCIATION.

Form of memorandum.

THE specimen form of memorandum of association for a company limited by shares is set forth (*infra*, Appendix) in the Third Schedule to the Act of 1908 (Form A.). This form follows, it will be observed, the requirements of sect. 3 of the Act, and states:—

(1) The name of the company. See Name of Company, *infra*, Chapter XXV.

(2) In what part of the United Kingdom the registered office is to be situate. See *infra*, Chapter XXIII.

(3) The objects of the company. See *infra*, pp. 29 and 60.

(4) That the liability of the members is limited. See *infra*, p. 32.

(5) The capital of the company and the shares into which such capital is divided. See *infra*, p. 32.

It is for the subscribers to the memorandum of association to frame and fill up the memorandum as they choose; for the Act in sect. 2 expressly provides that any seven or more persons (or in the case of a private company two persons) associated together for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of the Act in respect of registration, form an incorporated company with or without limited liability.

1. Name.

Name of company.

In the selection of a name for a company the greatest freedom of choice is allowed, but the following points must be borne in mind:—

1. The last word of the name must be the word "Limited." As to dispensing with this word in the case of certain companies, see *infra*, p. 455. As to the penalty for improper use of the word "Limited," see sect. 282.
2. The word "Royal" or "Imperial" must not be used as part of the name without the consent of the Home Office.
3. A name must not be selected too closely resembling the name used by any other concern, whether registered or not, carrying on a business similar to that proposed to be carried on by the company. For the protection of registered companies, the Registrar,

in such cases, is, by sect. 8, empowered to refuse registration, and the Court will not, in case of refusal, interfere with his discretion. *Rex* v. *Registrar of Companies*, (1912) 3 K. B. 23.

This section provides that "a company may not be registered under a name identical with that by which a company in existence is already registered, or so nearly resembling the same as to be calculated to deceive, except" as therein named; and, in the case of an unregistered company, or firm, it is wise in the promoters to observe the same rule. In neither case is registration any efficient protection against an action for an injunction at the suit of anyone prejudiced by the adoption of the name. The principle on which the Court interferes in such cases is, that one person is not to be permitted to represent the business which is carried on by another as carried on by him. *Croft* v. *Day*, 7 Beav. 84; *Hendricks* v. *Montague*, 17 C. D. 638; *Tussaud* v. *Tussaud*, 44 C. D. 678; *North Cheshire and Manchester Brewery* v. *Manchester Brewery*, (1899) A. C. 83; *F. Pinet & Co.* v. *Maison Louis Pinet, Limited*, (1898) 1 Ch. 179; and *Montreal Lithographing Co.* v. *Sabiston*, (1899) A. C. 610; *Société Panhard* v. *Panhard Levassor Co.*, (1901) 2 Ch. 513; *Aerators, Limited* v. *Tollit*, (1902) 2 Ch. 319; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, (1907) 2 Ch. 312; *Electromobile Co.* v. *British Electromobile Co.*, 97 L. T. 196; *Cash, Limited* v. *Cash*, (1902) W. N. 32; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 83 L. T. 259; *Scottish Union and National Insurance Co.* v. *Scottish National Insurance Co.*, (1909) S. C. 318, Ct. of Sess.; *Standard Bank of South Africa* v. *Standard Bank*, 25 T. L. R. 420.

The inadvertent omission by a limited company to publish its corporate name will not disentitle it to have the use of its trade name protected by injunction. *Randall, Limited* v. *British and American Shoe Co.*, (1902) 2 Ch. 354.

The prohibition against similarity of name does not apply where an existing company is in course of being dissolved and testifies its consent to the satisfaction of the Registrar. See sect. 8 (1) of Act of 1908.

The following are some examples of the various kinds of names that may be adopted:—

The Wenlock Ironworks, Limited.
The York Supply Association, Limited.
The Patent Pencil Company, Limited.
The Birmingham Advance Corporation, Limited.
The Malaga Syndicate, Limited.
The London and South Coast Bank, Limited.
The Gordon Trust, Limited.
The Tenby Club, Limited.
The Incorporated Institute of Barge Owners, Limited.

The Suburban News, Limited.
La Trinidad, Limited.
The J. K. Syndicate, Limited.
Bass, Ratcliff, and Gretton, Limited.
Sir Joseph Causton, Limited.
Sir W. G. Armstrong & Co., Limited.
George Newnes, Limited.
Peter Robinson, Limited.

The last few names are specimens of names adopted on conversion of going business concerns into companies, it being very common in such cases to adopt the old name with merely the addition of the word "limited."

There is great inconvenience in having too long a name, and it is highly desirable, therefore, where practicable, to confine the name to three or four words. As to change of name, see *infra*, p. 250.

2. Registered Office.

Registered office.

Every memorandum of association is required to state whether the registered office will be situate in England, or in Scotland, or in Ireland. If the registered office is to be in Wales, the proper statement in the memorandum is, that it is to be situate in England; England, for this purpose, including Wales. 2 Geo. 2, c. 42, s. 3. The statement as to the situation of the registered office is material, for various reasons, and, in particular, because on the situation of the registered office depends the place where the company is to be registered. Thus, if the registered office is to be in England, the company must be registered in London, unless the memorandum states that the object is to work mines in the counties of Devon or Cornwall. In that case it must be registered at Truro. If the registered office is to be in Scotland, or in Ireland, the company must be registered in Edinburgh or Dublin, as the case may be. The London office for registration is at Somerset House.

Writs and notices are to be served at the registered office of the company. See Chap. XXIII., "Registered Office."

The principal object of requiring a company to have a registered office is to provide some definite place at which notices and other documents may be served on it. Accordingly by sect. 62 of the Act, it is enacted that "Every company shall have a registered office to which all communications and notices may be addressed." By sect. 116, a document may be served on a company by leaving it or sending it by post to the registered office of the company. "Document" here includes summons, notice, order, or other legal process, and registers; and under sect. 26 of the Interpretation Act,

1889, the service [by post] shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Sect. 62 (2) of the Act provides for notices to the registrar of the situation of the registered office, and of any change therein. The situation of the registered office also fixes the domicile (*Jones* v. *Scottish Accident Co.*, 17 Q. B. D. 421) and nationality (*Continental Tyre Co.* v. *Daimler Co.*, (1915) 1 K. B. 893) of the company. See further as to the registered office, Chap. XXIII., *infra*, and sects. 61 and 117.

3. The Objects Clause.

Object-clause.

Every memorandum of association—this is the third requirement—must state the objects of the proposed company.

The statement of the objects is not a mere record of, what is contemplated by the subscribers, without operative effect. On the contrary, the statement has a twofold operation—

(1) It affirmatively determines what shall be the powers of the company; for the stated objects confer on the company all powers reasonably requisite to the attainment thereof;

(2) It limits and restricts the powers of the company to those thus conferred, save so far as other powers are given by statute.

Hence, as it rests with the subscribers to declare the objects, it follows that the subscribers are by the Act furnished with the means, not merely to bring into existence a statutory corporation, but to endow that body with such powers (not illegal) as they, in their absolute discretion, think fit. This is their statutory right, and its importance cannot be exaggerated.

As regards legality, the subscribers may be associated together for any lawful purpose (sect. 2), and accordingly the following rules are applicable:—

(a) The objects must not include anything in contravention of the Act. For example, a limited company cannot legally issue shares at a discount, and accordingly, to make the issuing of its shares at a discount one of the objects of such a company is not allowable. *Ooregum Co.* v. *Roper*, (1892) A. C. 125. Again, it is not a lawful object to provide for a limited company dealing in its own shares, for that is in contravention of the Act.

(b) The objects stated must not include anything in contravention of the general law. For example, it is not a legal object "to keep a gambling house in the United Kingdom," or "to establish and work lotteries in England," or "to work

and develop inventions for importing tobacco into the United Kingdom free of duty," or "to work a scheme for debasing the coinage," or to promote the commission of burglaries—for all these objects are contrary to the general law.

(c) The objects must not include any which would render the company a trade union, for to register a trade union under the Companies Act, 1908, is illegal. See Trade Union Acts, 1871 and 1876, and sect. 294 of the Act of 1908.

The subscribers' discretion.

Subject to these restrictions the subscribers of a company's memorandum of association have complete freedom to frame the objects as they choose. It is for them to say whether the objects shall be wide or narrow, cautious or speculative, wise or ridiculous, reasonable or unreasonable, congruous or incongruous, diffuse and rambling, or concise and elliptical—whether they shall be concurrent, or independent, or substitutional, or contingent, or in the alternative.

No doubt some persons have argued that what the legislature really intended was that the principal objects should be specified —not the powers by which those objects are proposed to be attained— and proceeding from this premiss maintain that once a main or primary "object" is specified it is improper to set out in the memorandum further objects which merely confer "powers." But there is nothing in the Act to give colour to this contention or to show an intention to discriminate between main objects and objects merely conferring powers. Every object stated, whether main or auxiliary, in effect endows the company with a power or powers. To exclude objects conferring powers is to nullify the Act.

Besides these critics there is another class who complain of what may be called the multifariousness of the contents of a memorandum of association. The objects clause, according to their view, ought to specify the leading objects, be they one or many; and that is enough! To go on and specify as an object anything which is implied or may possibly be implied as incidental, on a reasonable construction of the leading object or objects, is irregular and improper. There ought to be no overloading, overlapping, repetition or surplusage. But here again the answer is that it is a matter for the subscribers' discretion. They have a statutory right to state the objects as they choose. If they deem it desirable to set out the objects in greater detail than some experts or pedants consider necessary, there is nothing in the Act to prevent them, and there is much to be said from the commonsense point of view in favour of the practice. Take, for instance, borrowing powers of a company. It is unnecessary, any critic might say, to include a borrowing power in the objects of a trading company, for such a power is, according to the decisions, implied; and so it is to the trained lawyer familiar with the authorities; but the persons to whom

a memorandum of association is addressed are in the main men of business, not lawyers, and for these it is expedient that the powers of the company should be made manifest by adequate objects, and should not be left as far as possible to inference or implication. This principle has been extensively and almost universally acted on during the last thirty years, and has been sanctioned by the practice and example of the greatest masters of company law, including Lord Macnaghten, Lord Davey, and the Lords Justices Chitty, Rigby, and Farwell, when at the Bar. In the result cases of *ultra vires* with reference to a company's objects have been almost banished from the Courts.

It is a curious fact that the advocates of this retrograde policy of extreme conciseness and reliance on implication are quite ready to elaborate the position by inserting express and detailed supplementary powers in the articles, and to assume that the general words in the memorandum will be interpreted so as to include by implication the additional powers set out in the articles. And, no doubt, there are some *dicta* to the effect that this is allowable; but these *dicta* must be acted on with great caution. Thus, Jessel, M. R., in *Anderson's case*, 7 C. D. 75, said: "Where there are two contemporaneous documents executed and assented to by the same persons at the same time . . . . it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other." But these words must be read as qualified by the words which had just gone before: "I am not now speaking," said the learned judge, "of those portions of the memorandum of association which the Act of Parliament requires to be stated in the memorandum." And this distinction was further emphasised by Bowen, L. J., in *Guinness* v. *Land Corporation of Ireland*, 22 C. D. 377, where he pointed out that "the memorandum contains the fundamental condition upon which alone the company is allowed to be incorporated; they are conditions introduced for the benefit of the creditors and the outside public, as well as shareholders. The articles are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation and the internal regulations of the company are to be construed together? . . . . In any case it is, as it seems to me, certain that for anything which the Act of Parliament says shall be in the memorandum, you must look to the memorandum alone. If the legislature has said one instrument is to be dominant you cannot turn to another instrument and read it, nor modify the provision of the dominant instrument."

To sum up, experience shows that it is better in stating the objects to be explicit, and thus to preclude as far as practicable the doubts and difficulties which inevitably arise on the construction of a very concise statement of objects. Hence the somewhat elaborate statements of

objects now so commonly found. These clauses may, and undoubtedly do in some cases, err by excess of detail; but over-elaboration is better than over-conciseness. Nothing is more annoying to those who have to manage a company than to find that the powers of the company are fettered or questioned, and its business impeded or prejudiced simply because the draftsman of the memorandum of association has framed it without sufficient foresight or judgment, and has, contrary to the fact, assumed that the ordinary business man is familiar with the legal and somewhat conflicting decisions as to the powers which may be implied by a concise specification of objects.

The objects clause, then, must be drawn in clear and well-considered terms, and must on no account omit any of the clauses which experience has shown are or may be required for the working of the business.

As to the powers conferred by the stated objects, see *infra*, p. 60.

As to the construction of objects, see *infra*, p. 69.

As to the effect of general words, see *infra*, p. 72.

As to the importance of making the objects wide enough, see *infra*, p. 64.

As to the doctrine of *ultra vires*, see *infra*, p. 62.

Limitation of Liability.

Limitation of liability.

The fourth clause of the memorandum states that the liability of the members is limited. This clause is to be read in conjunction with sect. 123 of the Act of 1908, which provides that in winding up, 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. See Appendix.

Capital Clause.

"Capital" clause.

This clause must state the amount of the nominal capital, the number of shares into which it is divided, and the amount of each share.

What is to be the amount of the capital is a matter left to the discretion of the promoters. It can be as small or as large as they choose. The capital of the average company is 5,000*l.*,* or 10,000*l.*, or 50,000*l.*, or 100,000*l.* Sometimes it is larger, sometimes less. Companies have been registered with a capital of 7*l.* or less, and others—numerous now—with a capital of 5,000,000*l.* and upwards.

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* By far the larger number of companies now registered are companies with a capital of between 1,000*l.* and 5,000*l.* See Board of Trade Report.

The material consideration in fixing the amount of capital is, What funds will the company want, and how much in the shape of paid-up shares are the vendors, if any, to get? Suppose the company is to be formed to acquire a going concern, and that the price to be paid therefor is 50,000*l.* in paid-up shares, and 50,000*l.* in cash, and that the company besides will want a working capital of 20,000*l.* This makes a total of 120,000*l.* Then, in addition to this, it may be desirable to have some shares in reserve, which can be issued as and when the company wants further capital, so that, in such case, the capital may properly be fixed at, say, 130,000*l.*, or 150,000*l.* Or to take another case: the purchase consideration may be 300,000*l.*, to be paid, as to 200,000*l.*, in cash, and as to 100,000*l.* in paid-up ordinary shares, and the company may determine to raise the cash part of the consideration by the issue of 100,000*l.* of debentures and 100,000*l.* of preference shares. In such a case the capital will be, say, 200,000*l.*, or, with an addition for working capital, 250,000*l.* In a case where the company is not proposing to buy any existing concern or property, but to start a fresh business, the question will simply be, What sum will it cost to start the new concern and to provide sufficient working capital? and the nominal capital will be fixed accordingly.

Amount of shares.

As regards the amount of the shares, this is again for the promoters to determine. 1*l.* shares are very common. So are 5*l.* shares and 10*l.* shares. Occasionally the shares are fixed as low as 1*s.* each, or 5*s.* each. Everyone is familiar with the 2*s.* shares of the Incandescent Gas Light Company, Limited, which went up in the market to 70*l.* or 80*l.* each. Shares have been fixed as high as 1,000*l.*, or even 5,000*l.* each. When the original capital is divided into several classes of shares, the amount of the different classes often varies. Some may be 10*l.* each, some 5*l.* each; some 1*l.* each and others 1*s.* each. All these are matters which have to be thought out, with reference to the special requirements of the company, by those who are interested in its formation and fortunes.

Classes of shares.

It is not unusual to divide the shares in the original capital into two or more classes, *e.g.*, preference shares and ordinary shares, or preference shares and *A.* ordinary shares and *B.* ordinary shares, or ordinary shares and deferred shares, or preference shares, ordinary shares, and founders' shares; and various special rights, privileges, and conditions are attached to such shares. As regards preference shares and founders' shares, it is very common to declare these rights, privileges, and conditions by express provision in the memorandum of association, for by so doing, extra protection is secured to the holders of such shares against any alteration of their status. See further as to classes of share capital, p. 87. It is not, however, essential in a memorandum of association to specify the rights attached to each class, or, indeed, to

disclose the fact that it is intended to divide the capital into different classes of shares, for all this can be done—and more properly done—by the articles of association of the company. Thus the memorandum may state that the capital is 100,000*l.* in 1*l.* shares, and the articles may state that of the shares in the capital 50,000 shall be preference, with specified rights attached, and 50,000 shall be ordinary shares.

Other Provisions.

Conditions and provisions generally in memorandum of association.

These are the five leading provisions or conditions in the memorandum of association of a company limited by shares, and they are the only provisions which the Act of Parliament requires to be stated therein, but occasionally additional provisions are inserted, clauses, for example, defining the rights attached, as above mentioned, to different classes of shares, rights as regards dividend, voting, and participation in assets on a winding-up, and various other matters. There is nothing illegal in the insertion in the memorandum of such additional provisions, but it must be borne in mind that, if inserted without qualification, they become conditions of the company's constitution within the meaning of sect. 7 of the Act of 1908, substituted for sect. 12 of the Act of 1862, and the rule is that such a condition cannot be altered, and that nothing can be done in contravention thereof—a conclusion of law which may prove embarrassing to the company. See *Ashbury* v. *Watson*, 30 C. D. 376.

If, however, the memorandum qualifies the provisions, *e.g.*, by giving power to alter them, that power may be exercised. *Welsbach Incandescent Gas Co.*, (1904) 1 Ch. 87. But it is open to argument that sect. 45 impliedly nullifies, as to companies formed after 1st April, 1909, a power to alter the memorandum as to reorganisation of capital by consolidation or subdivision of classes of shares. (See further, p. 100, *infra*.)

Association Clause.

Association clause.

The memorandum of association of a company limited by shares concludes with what is commonly referred to as the association clause (see Third Schedule to the Act, Appendix, *infra*), whereby the subscribers declare that they desire to be formed into a company, and agree to take shares, and the clause is followed by a tabular form in which the names, addresses, and descriptions of the subscribers, and the number of shares taken by each, appear.

Subscription of Memorandum.

Subscription of memorandum.

This is provided for by sect. 6. Anyone may be a subscriber. A married woman may be a subscriber: so may a bankrupt, an alien

(*Princess of Reuss* v. *Bos* (1871), L. R. 5 H. L. 176), or an infant (*Re Laron & Co.* (No. 2) (1893), (1892) 3 Ch. 555), but there is some doubt as to this last point. An incorporated company with the requisite power may be a subscriber, and several persons may jointly be subscribers; but a firm is not a person, and the individual partners must subscribe.

A subscriber usually subscribes the memorandum with his own hand; but he can subscribe by the hand of an agent duly authorized by him (*Re Whitley Partners*, 32 Ch. D. 337), and the Registrar does not call for evidence of authority if seven subscribe with their own hands. The number of subscribers must be at least seven, except in the case of a "private" company, but there may be as many more as the promoters think fit.

In the case of a "private company"—as defined by sect. 121—two subscribers are enough. (Sect. 2.)

Each subscriber must write opposite to his or her name the number of shares he or she takes, and must take one share at least.

Usually the subscribers each subscribe for one share; but sometimes they subscribe for a larger number. As to the liability to pay up the shares subscribed for, see pp. 116—118.

If the articles require a qualification, the directors (except in the case of a private company, sect. 72 (3)) must sign the memorandum for their qualification, unless they sign and file with the Registrar a contract in writing to take the shares from the company and pay for them. (Sect. 72.)

In subscribing the memorandum of association care must be taken to write clearly. The signature should set out the full name of the subscriber, and should be followed by the subscriber's address, clearly written, and sufficiently explicit, and also by words denoting his occupation, or, if he has none, stating the fact. Thus the term "broker" should be qualified by stating what sort of broker. "Clerk" also should be qualified; but it is not necessary to state to whom the subscriber is clerk. It is sufficient to say, for example, "clerk to a public company."

Attention to such details as these is necessary, otherwise when the document comes before the Registrar of Companies he may refer it back, on the ground that he cannot read the signatures, or that some of the requisite particulars are not clearly expressed. It is his duty to see that the requirements of the Act of Parliament are complied with, and that the documents are in order. *Peel's case*, 2 Ch. 682.

Witnesses.

As regards the witnesses to the signatures of the subscribers, one witness for all the signatures will suffice, and, in that case, the words "Witness to the above signatures" will be used; but sometimes the

same witness cannot attest all the signatures, and in that case the attestation clause must be altered. It may run thus:—

Witness to the above signatures other than that of A. B.,
, or,

Witness to the signatures of the above A., B. and C.,
Witness to the signatures of the above D., E., F. and G.,

The witness or witnesses must in each case give his or their address. This also should be clearly written and sufficiently explicit for identification. One of the subscribers cannot witness and attest the signature of another of the subscribers.

A subscriber to the memorandum cannot, after the registration of the company, repudiate his subscription on the ground that he was induced to sign by misrepresentation. *Metal Constituents, Limited, Lord Lurgan's case*, (1902) 1 Ch. 707.

CHAPTER IV.

ARTICLES OF ASSOCIATION OR REGULATIONS.

As already mentioned, the memorandum of association, when taken in for registration, may (and in some cases must (see Appendix)) be accompanied by articles of association (sect. 10 of the Act) containing regulations for the management of the affairs of the company

When articles required.

Form and Subscription.

The articles are to be expressed in separate paragraphs numbered arithmetically, and they may adopt any of the provisions contained in Table A. See Appendix. If no articles are so registered, the articles contained in Table A., so far as the same are applicable, are to apply to the company. (Sect. 11.)

Form and subscription. Table A.

In most cases a full set of articles is taken in for registration. In a good many cases a short set of articles only is registered making a few alterations in Table A., and supplementing it to some extent, and in a considerable number of cases Table A. is left to operate without alteration.

The articles, if any, must be printed, must bear the same stamp as a deed (10*s.*), and must be signed by the subscribers to the memorandum of association. Each subscriber must sign in the presence of a witness, who must attest the signature. (Sect. 12.) See Appendix (First Schedule to Act of 1908). As in the case of the memorandum, the signature may be under the signatory's own hand or that of his duly authorized agent: p. 35. One of the subscribers cannot attest the signature of another.

Printing.

Copies.

Each member of the company is entitled to a copy of the memorandum and articles (sect. 18) on payment of a shilling.

Where articles have been registered a copy of every special resolution for the time being in force is to be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such special resolution; and where no articles have been registered a copy of any such special resolution is to be forwarded in

print to any member requesting the same on payment of 1s or such less sum as the company may direct. (Sect. 70.) There is a penalty for default.

Meaning in the Act of 1908 of the term "Articles."

Articles.

The expression "Articles" is frequently used in the Act of 1908, and in sect. 285 thereof it is specially defined. See *supra*, p. 14.

The expression "Articles" thus takes the place of the expression "the regulations" heretofore commonly used in a similar sense in the Companies Acts, 1862 to 1907. See, for example, sects. 12 and 50 of the Act of 1862; sects. 9 and 21 of the Act of 1867; sects. 3 and 13 of the Act of 1900.

Relation of the Articles to the Memorandum.

The memorandum the dominant instrument.

The articles of a company are subordinate to and controlled by the memorandum of association, which is the dominant instrument. The memorandum contains the conditions upon which alone the company is granted incorporation—conditions which are fundamental, and with a few exceptions unalterable. The articles are the internal regulations of the company, and over these the members have full control, and may alter them from time to time as they think fit by pursuing the course pointed out in sects. 13 and 69 of the Act; subject only to this, that they keep within the limits marked out by the memorandum of association and the Acts.

"The memorandum is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit." Per Lord Cairns, L. C., *Ashbury Rail. Co.* v. *Riche*, L. R. 7 H. L. 670.

Hence, any articles that go beyond the company's sphere of action will be inoperative, and anything done under the authority of such articles void and incapable of ratification.

Ultra vires provisions.

If, for instance, the articles purport to confer on the company a power to buy its own shares (*Trevor* v. *Whitworth*, 12 App. Cas. 409), or to pay dividends out of capital (*Guinness* v. *Land Corporation of Ireland*, 22 C. D. 349), or to extend the objects by special resolution (*Ashbury* v. *Riche*, *supra*), or to issue shares at a discount (*Welton* v. *Saffery*, (1897) A. C. 299), or prohibit the members from exercising the statutory right of applying for a winding-up order (*Re Peveril Mines*, (1898) 1 Ch. 122), or provide for the application of the profits in a manner which is inconsistent with some provision in the memorandum of association (*Ashbury* v. *Watson*, 30 C. D. 376), or purport to deprive shareholders who dissent from a scheme of reconstruction

under sect. 192 of the Act of 1908 (substituted for sect. 161 of the Act of 1862) of their statutory right to be paid out in cash (*Baring Gould* v. *Sharpington Co.*, (1899) 2 Ch. 80; *Payne* v. *Cork Co.*, (1900) 1 Ch. 308), they are to that extent invalid and ineffectual.

But though the articles cannot alter or control the memorandum, yet, if there be an ambiguity in the memorandum, the articles registered at the same time may, it has been said, be used to explain it, provided it is not in the objects. See *supra*, p. 31.

Binding Force of Articles.

Binding clauses.

Sect. 14 of the Act (substituted for sect. 16 of the Act of 1862) enacts that "the memorandum and articles of association shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained a covenant on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act." And, under sect. 11, Table A., so far as applicable, and, under sect. 13, any new regulations adopted by the company are made binding in like manner as if they had been inserted in the original articles.

Thus, whatever the articles may be, they are binding in the manner, and to the extent, mentioned in sect. 14 of the Act. With regard to that section, it is to be noted that it does not make them absolutely binding on the company and the members thereof, but binding *as if* each member had covenanted to conform to such regulations.

The Members bound to the Company by implied Covenant.

Members' implied covenant with company.

The above section (14) does not say with whom the implied covenant by the members is to be taken to be made, but it is sufficiently obvious that it is with the company, and, therefore, that the members are all bound to the company. See *Bradford Bank* v. *Briggs*, 12 App. Cas. 29. In that case the articles gave the company a lien on the shares of a member, and it was held that Briggs, the plaintiff in the action, being a member, was to be treated as having covenanted with the company to give it such lien. Lord Blackburn said (p. 33): "His property in the shares was, by virtue of sect. 16 of the Act (the corresponding section of the old Act), bound to the company as much as if he had executed a covenant *to the company* in the same terms as Article 103." So, again, in *Welton* v. *Saffery*, (1897) A. C. 315, Lord Herschell said: "It is quite true that the articles constitute a contract between each member *and the company*." And in *Imperial Hydropathic, &c. Co.* v. *Hampson*, 23

C. D. 1, Bowen, L. J., said: "We are discussing the rights of directors of a statutory corporation created by the Act of 1862, and in such a case we must consider what are the rights of the directors and shareholders, for the articles of association by sect. 16 are to bind all the company and all the shareholders as much as if they had put their seals to them." That this is the true construction follows from the many decisions in which it has been held that the company is entitled to sue its members for the enforcement, and to restrain the breach by them of its articles, and to treat as irregular anything which is done in contravention thereof. *Macdougall* v. *Gardiner*, 1 C. D. 13; *Pender* v. *Lushington*, 6 C. D. 70; *Imperial Hydropathic Co.* v. *Hampson*, 23 C. D. 1; *Harben* v. *Phillips*, *ibid.* 15.

How far binding between Members.

Whether implied covenant *inter se*.

In *Eley* v. *Positive, &c. Co.*, 1 Ex. Div. 88, where the articles provided that the plaintiff should be solicitor to the company, Lord Cairns said: "They (the articles) are an agreement *inter socios*, and in that view, when the introductory words are applied to Article 118, it [illegible] a covenant between the parties that they will employ the plaintiff." See also *Browne* v. *La Trinidad*, 37 C. D. 1. So in *Imperial Hydropathic Co.* v. *Hampson*, 23 C. D. 1, Cotton, L. J., said that the articles "under the Act are a contract between the shareholders to comply with the regulations in them." And Stirling, J., in *Wood* v. *Odessa Waterworks Co.*, 42 C. D. 636, said: "The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other." See also *Pulbrook* v. *Richmond, &c. Co.*, 9 C. D. 610; and *Bainbridge* v. *Smith*, 41 C. D. 475, in which it was held that a director being a member was entitled to an injunction against his co-directors restraining them from improperly excluding him from board meetings. Nevertheless there is some reason to doubt whether this is really the effect of the articles, and Lord Herschell in *Welton* v. *Saffery*, (1897) A. C. at p. 315, stated the position in language somewhat different, but substantially to the same effect. "It is quite true," he said, "that the articles constitute a contract between each member and the company, and that there is *no contract* in terms *between the individual members* of the company; but the articles do none the less, in my opinion, regulate their rights *inter se*." And this accords with the well-established principle that it is for the company, save in exceptional cases, to sue for a breach of the articles. *Macdougall* v. *Gardiner*, 1 C. D. 13; *Foss* v. *Harbottle*, 2 Hare, 461; *Burland* v. *Earle*, (1902) A. C. 83. And as to enforcing provisions in the articles for referring disputes to arbitration, see *Hickman* v. *Kent or Romney Marsh Association*, (1915) 1 Ch. 881.

How far binding on the Company.

Whether company bound, and in whose favour.

First, in relation to an outsider, do the articles bind the company? The answer clearly is no. A provision in the articles in favour of an outsider, *e.g.*, with a promoter, that the preliminary expenses shall be paid by the company, gives to the promoter no right of action against the company. *Re Rotherham Chemical Co.*, 25 C. D. 103; *Melhado* v. *Porto Alegre Co.*, L. R. 9 C. P. 503. In this respect the articles of a company differ from an Act of Parliament. Such a provision in an Act of Parliament imposes on the company a statutory duty towards the promoter, and confers on the promoter a corresponding right of action. *Tilson* v. *Warwick Gas Co.*, 4 B. & C. 962.

Secondly, in relation to members. Here the answer is yes. The articles do bind the company. The section (14) says so: "The . . . . articles shall bind *the company* and the members thereof to the same extent as if, &c.," and these words must have effect given to them. It may possibly be urged that they are qualified, and that the company is only bound "as if the members had covenanted," not as if the members *and the company* had covenanted, and, therefore, that the company is not bound. But such a construction stultifies the section, and, in effect, strikes out of it the words, that "the articles sl " bind *the company*," and in corroboration of this view, there a. numerous decisions showing that the company is bound. Thus, in *Johnson* v. *Lyttle's Iron Agency* (1877), 5 C. D. 687, an irregular forfeiture of shares was impeached by a member, and set aside by the Court of Appeal on the ground, as James, L. J., said, that the notice prior to forfeiture "did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations." So in *Crum* v. *Oakbank Co.*, 8 A. C. 65, it was held that the plaintiff, a member, was entitled, as against the company, to insist on the observance of the articles as to dividends so long as they stood unaltered. So also in *Wood* v. *Odessa Waterworks Co.*, 42 C. D. 636, Stirling, J., granted an injunction, at the instance of a member, to restrain the defendant company from contravening the articles. Furthermore, in *Burdett* v. *Standard Exploration Co.* (1900), 16 T. L. R. 112, Cozens-Hardy, J., held that a member was entitled to enforce compliance by the company with a clause in the articles giving him a right to a share certificate. And see *Hickman* v. *Kent or Romney Marsh Association*, (1915) 1 Ch. at p. 897.

These decisions, however, all deal with cases in which members claimed and sought to enforce or protect rights given them as members of the company. Where rights are by the articles given to members : ot as such, but in some other capacity (*e.g.*, as directors, policy-holders, or otherwise), a member claiming to enforce the

same cannot, it seems, sue on the articles—treating them as a contract by the company with him—he must make out a contract outside the articles.

Cases where company not bound by articles.

Thus, in *Eley* v. *Positive, &c. Co.*, 1 Ex. D. 88, the articles contained a clause providing that A. should be employed for life as solicitor for the company, and should not be removed except for misconduct; he took office and was so employed for some time, and, whilst so employed, he became a shareholder; later on the company discontinued his employment; he, still being a shareholder, sued for breach of contract, and it was held that no action lay. The matter was disposed of rather summarily in the Court of Appeal; Lord Cairns, L. C., delivered the judgment of the Court, and refused the plaintiff relief principally upon the ground that the articles "are an agreement *inter socios*, and, in that view, if the introductory words are applied to Article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as the plaintiff is concerned, this is *res inter alios acta*; the plaintiff is no party to it [*although he was a member*]. This article is either a stipulation which is binding on the members, or else a mandate to the directors; in either case it is a matter between the directors and shareholders, and not between them and the plaintiff."

This case was followed in *Browne* v. *La Trinidad*, 37 C. D. 1, where the articles contained a provision that a contract with the plaintiff, made before incorporation, should be adopted by the company, and that it was thereby confirmed, and that the provisions thereof, so far as applicable to the company, should be construed as part of the regulations. Yet it was held that the plaintiff, though a member of the company, had no cause of action against the company on this clause. Lindley, L. J., said: "That, having regard to the construction put upon sect. 16 [of 1862] in *Eley* v. *Positive, &c. Co.*, and subsequent cases [*none to be found*], it must be taken as settled that the contract upon which he (the plaintiff) relies, is not a contract upon which he can maintain any action, either on the common law side or the equity side"; adding, "there might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him and is therefore a member."

It is not easy to reconcile the rule laid down in these decisions with sect. 16 of the Act of 1862 (now supplanted by sect. 14 of the Act of 1908), which expressly provides that the regulations "shall bind *the company* and the members thereof," but they must be taken to have settled the law in this respect.

It has been suggested that the meaning of the enactment (*supra*, p. 41) is that the implied covenant is only to bind the members to observe such of the provisions of the articles as concern their rights,

privileges, powers and obligations as members. But the section does not contain any such qualification: the implied covenant is to observe "all the provisions . . . of the articles."

Finding a difficulty in applying the above rule consistently with justice the Courts have in some cases acted on the footing that a clause in the articles, not dealing with the rights of a member as such, but apparently intended to operate as a contract with him, is to be regarded as the basis of a contract, *i.e.*, as indicating the terms on which the company proposes to contract with him, and that if the parties enter into the relations contemplated by the clause, they are to be treated as having made a contract in the terms of the clause and are bound accordingly. This is illustrated by *Swabey* v. *Port Darwin Gold Co.* (1889), 1 Meg. 385. In that case the articles provided for the payment to each director by way of remuneration of a specified sum per annum. By a special resolution, in July, the company reduced this as from the end of the preceding year. The plaintiff thereupon resigned, and sued the company for three months' remuneration for services prior to the date of his resignation; and the Court held that he was entitled to recover on the footing of an implied contract in the terms of the clause. "The articles," said Lord Esher, "do not themselves form the contract, but from them you get the terms upon which the director is serving." And this proposition was adopted by Stirling, J., in *Re International Cable Co.*, 66 L. T. 2 1; and by Wright, J., in *Ex parte Beckwith*, (1898) 1 Ch. 324. Moreover, the principle involved is not confined to members, it extends also to outsiders, *e.g.*, to persons who take office as directors. *Isaacs' case*, (1892) 2 Ch. 158; *Salisbury Jones' case*, (1894) 3 Ch. 356. And see *Pritchard's case*, 8 Ch. 956. The question whether an implied contract so entered into is capable of being varied by the company against the will of the other party has not been finally decided. According to *Swabey* v. *Port Darwin Gold Co.*, *supra*, it would seem that the contract, at any rate where it relates to service, can be varied by the company as to the future, and this accords with the views expressed in *Doman's case*, 3 C. D. 21, and in *Argus Life Assurance Co.*, 39 C. D. 571. But the contrary was decided in case of an express contract for service in *Nelson* v. *James Nelson & Sons, Ltd.*, (1914) 2 K. B. 770; and see *Punt* v. *Symons*, (1903) 2 Ch. 506; *Baily* v. *British Equitable Assurance Co.*, (1904) 1 Ch. 374 (reversed by the House of Lords, (1906) A. C. 35, on the ground that there was in fact no contract); and *British Murac Syndicate, Ltd.* v. *The Alberton Rubber Co.*, (1915) W. N. 176.

Constructive Notice of Memorandum and Articles.

Notice of regulations.

Under the Companies Acts the memorandum and articles of association or regulations of a company are registered in a public office and are open for public inspection on payment of a small fee. (Sect. 243, which takes the place of sect. 174 of the Act of 1862.) They are public documents; and accordingly it is well settled that anyone, whether a shareholder or an outsider, who has dealings with a registered company, must be taken to have notice of the memorandum and articles or other regulations which form the constitution of the company. This principle was fully recognized in regard to registered companies prior to the Act of 1862 (*Ernest* v. *Nicholls*, 6 H. L. C. 401), and was adopted in regard to the companies under the Act of 1862. See *Sewell's case*, L. R. 3 Ch. 131; *Campbell's case*, L. R. 9 Ch. 1. "Every joint stock company," said Lord Hatherley in *Mahoney* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, "has its memorandum and articles of association . . . open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents." And what is more, they must be taken not only to have read those documents, but to have understood them according to their proper meaning. Per Jessel, M. R., *Griffith* v. *Paget*, 6 C. D. 517; *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 71. See also *Marshall* v. *Glamorgan Iron and Coal Co.*, 7 Eq. 137; *Barrow Hematite Co.*, 39 C. D. 582; *Argus Life Co.*, 39 C. D. 571; *County of Gloster Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629; *Owen and Ashworth's Claim*, (1901) 1 Ch. 115.

Consequences.

This rule of constructive notice entails important consequences, for inasmuch as every one dealing with a company is to be deemed to have notice of its memorandum and articles, it follows that he is fixed with notice of the extent not only of the company's powers, but of the directors' powers and of any limitations and restrictions thereon imposed by the articles or other regulations.

Thus if the articles provide that a bill of exchange to be effective must be signed by two directors, an outsider or anyone dealing with the company must see that it is so signed, otherwise he cannot claim under it. So, too, if the articles provide that the seal of the company is to be affixed in the presence of two directors, who are to sign their names, a person dealing with the company must see that this is done. This is a sufficiently onerous obligation to impose on those who deal with a registered company, but the incidence of the obligation is to some extent lightened by what is known as the

Rule in Royal British Bank *v.* Turquand (6 E. & B. 327).

Presumption of regularity.

This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherley called "the indoor management." They are entitled to assume that all is being done regularly. See also *Mahoney* v. *East Holyford Rail. Co.*, L. R. 7 H. L. 869; *Bargate* v. *Shortridge*, 5 H. L. C. 318; *In re Land Credit Co. of Ireland*, L. R. 4 Ch. 469; *In re County Assurance Co.*, L. R. 5 Ch. 288; *Duck* v. *Tower Galvanizing Co.*, (1901) 2 K. B. 314. *Premier Industrial Bank* v. *Carlton Co.*, (1909) 1 K. B. 106, is not easily reconcileable with the rule.

This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus where the articles give power to borrow with the sanction of a general meeting, a lender need not inquire whether such sanction has in fact been obtained. *Royal British Bank* v. *Turquand*, *ubi supra*. He may assume that it has, and if he is acting *bonâ fide* he will, even though the sanction has not been obtained, stand in as good a position as if it had been obtained.

So if there is a managing director, and authority in the articles for the directors to delegate their powers to him, a person dealing with him may assume that he has power to do what he purports to do, provided that it is within the company's objects. All he has to do is to see that the managing director *might* have power to do what he purports to do. That is enough for a person dealing with him *bonâ fide*. *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93.

So, too, in the case of a mortgagee taking a mortgage from a company which, as far as he can tell, has been duly executed. *County of Gloster Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 633. In that case a person dealing with a company in due course obtained from the company a mortgage under seal signed by two directors and the secretary. The articles contained no special provision as to the execution of such a document, but they provided that the directors should have power to fix a quorum, and that power they had exercised by fixing three as the quorum. In fact, the mortgage had been sealed at an irregular meeting, and no quorum was present. It was held, notwithstanding, that the mortgage was good, for the mortgagee had no means of knowing of this internal irregularity in the management.

So, too, in a similar case, debentures issued under the seal of the company were held to be valid though there had been no meetings or resolutions of the company or the board. *Duck* v. *Tower Galvanizing Co.*, (1901) 2 K. B. 314.

On the same principle, a person dealing with a company is entitled to assume that the directors who carry on its business are directors *de jure*. It matters not to him that they have not been duly appointed—that is part of the indoor management. *Mahoney* v. *East Holyford Co.*, L. R. 7 H. L. 869; *Re County Life*, 5 Ch. 288.

Notice of irregularity.

But a person dealing with a company who has notice of the irregularity cannot claim the benefit of this rule. Thus where directors had only power to borrow in excess of 1,000*l.* with the assent of a general meeting, and without obtaining such assent had issued debentures for 2,500*l.* to themselves in respect of money lent, it was held, that as they must be taken to have known that the internal regulations had not been complied with, the debentures could only stand good for 1,000*l.* *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156. And see *Tyne Mutual* v. *Brown*, 74 L. T. 283. Nor does the rule apply, it seems, where requisite signatures are forged. *Ruben* v. *Fingall Consolidated*, (1906) A. C. 439. A person dealing with a company must take the articles to be such as appear at the office of the Registrar of Joint Stock Companies to be in force. If the directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution (*infra*). *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

Subject-Matter of Articles.

Clauses in articles.

The matters with which a company's articles usually deal are—(1) the exclusion, or partial exclusion, of Table A.; (2) the adoption of a preliminary agreement, if any; (3) the allotment of shares by the directors; (4) calls and forfeiture for non-payment of calls; (5) transfer and transmission of shares; (6) increase of capital; (7) reduction of capital; (8) borrowing; (9) general meetings; (10) directors; (11) dividends and reserve fund; (12) accounts and audit; (13) notices; (14) special provisions for winding-up. These various matters will be found dealt with under their respective headings.

Alteration of Articles.

Alteration.

Sect. 13 of the Act gives to a company under the Act power by special resolution, but "subject to the provisions of the Act and to the conditions contained in the memorandum of association," to alter

or add to its articles, and it expressly provides that "any alteration or addition so made shall be *as valid as if originally contained in the articles*, and be subject in like manner to alteration by special resolution." Nothing could be wider than the terms of this section. It does not say that the articles for the management or administration of the business may be altered, or that the articles, other than those which form part of the constitution of the company, may be altered; there is no limitation, except that the power is to be subject to the Act and the memorandum. All or any of the articles (*supra*, p. 14) may therefore be altered, and a company cannot by a clause in its articles exempt any article from liability to alteration under the section. *Walker* v. *London Tramways Co.* (1879), 12 Ch. D. 705; *Malleson* v. *National Insurance Co.*, (1894) 1 Ch. 200. And this applies not only as between the company itself and its shareholders (*Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656), but as between the company and an outsider. *Punt* v. *Symons & Co.*, (1903) 2 Ch. 506.

Sect. 13 of the Act of 1908 is substituted for sect. 50 of the Act of 1862, which was to the same effect.

At an early period, however, in the history of the Act of 1862, a construction was placed by Kindersley, V.-C., on the corresponding section in the Companies Act, 1856, which for many years had the effect of fettering to a large extent the freedom of companies under the Act of 1862. The case was *Hutton* v. *Scarborough Cliff, &c. Co.*, 2 Dr. & Sm. 521 (No. 2). The company there was desirous of issuing some of the shares in the original capital as preference shares, but there being no power in its memorandum or articles to do so, the Court held (4 De G. J. & S. 672) that it could not be done, and the Vice-Chancellor had expressed a doubt whether it could be done by altering the articles. It was then proposed to alter the articles of association so as to enable *new* shares to be created and issued with a preference attached to them; but Kindersley, V.-C., held that this again could not be done, as it amounted to an alteration of the constitution of the company, and was, therefore, *ultra vires* and invalid.

Hutton v. *Scarborough Cliff Hotel.*

The learned judge in effect decided that the different articles were to be discriminated, and that there must be excepted from alterability such portions of them as in the opinion of the Court were part of the company's constitution, and that it was only the articles as to the management and administration of the company which could be altered. Obviously this was unduly narrowing down the words of the section; nevertheless there was no appeal, and the decision, though it did not escape criticism (see *Harrison* v. *Mexican Rail. Co.*, 19 Eq. 358), was for years recognized as authoritative.

Principle of decision.

Dissent from the decision.

At last, however, in *British, &c. Corporation* v. *Couper*, (1894) A. C. 399, Lord Macnaghten had occasion in the House of Lords to refer to this case, and said: "It seems to me that the decision was not founded upon a sound view of the Companies Act, 1862, and I respectfully dissent from it."

Andrews v. *Gas Meter Co.*

The way was thus prepared for the final demolition of the doctrine by the Court of Appeal in *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361 (C. A.). In that case the original articles contained no power to issue preference shares, but the company, by special resolution, had altered its articles so as to take power, and had issued preference shares accordingly. The Court overruled *Hutton* v. *Scarborough Cliff Hotel Co.* (No. 2), *ubi supra*, and held the alteration effective. The principle on which the case was decided was that although by sect. 8 of the Act [of 1862] a company's memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet that this does not extend to the rights of the shareholders in respect of their shares, and the terms on which additional capital may be raised. These are matters which may be regulated by the articles of association—indeed are more properly so regulated than by the memorandum, and are therefore matters which, unless dealt with in the memorandum, as in *Ashbury* v. *Watson* (30 C. D. 376), may be determined by the company from time to time by special resolution pursuant to sect. 50 of the same Act. "We are of opinion," said Lindley, L. J., delivering the judgment of the Court, "that the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* [*supra*] was wrong and ought not to be followed, and that the decision appealed from must be reversed, and the resolutions thereby declared to be *ultra vires* must be declared *intra vires* and valid. If, by declining to follow the second decision in the case referred to, we were disturbing titles or embarrassing trade or commerce, we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case, and it is desirable from all points of view to remove from companies a fetter which ought never to have been imposed upon them."

Hutton v. *Scarborough Co.* (No. 2) overruled.

Results.

This decision has been very welcome, not merely because it removes a fetter on the issue of preference shares, but also because it disposes of the notion that the power to alter the articles given by the Act is not to have the full effect which the legislature contemplated.

Retrospective alterations allowable.

In a subsequent case it was argued that the power to alter the articles conferred by sect. 50 of the Act of 1862 (now replaced by sect. 13 of the Act of 1908) did not justify a retrospective alteration, *e.g.*, the insertion of a lien clause (*infra*, p. 154) intended to give the company a lien on the shares of members for debts incurred before as well as after the insertion of the clause. The

argument if successful would have created the utmost confusion, and would to a great extent have deprived the members of that full control over the articles with which the section was intended to invest them. But it did not prevail, the Court of Appeal holding that the power of altering the articles was not thus to be limited, and that the introduction of a lien clause was valid and effective, though in some senses it operated retrospectively.

"The power," said Lindley, M. R., in that case, "thus conferred on corporations to alter the regulations is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. It must be exercised for the benefit of the company as a whole [*sed qu.*], and it must not be exceeded. These conditions are always implied and are seldom if ever expressed. But if they are complied with, I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it." *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

The foregoing decisions are in accordance with the principles of construction applied by the late Lord Justice Chitty in *Pepe* v. *City and Suburban Permanent Building Society*, (1893) 2 Ch. 311. In that case the plaintiff, a holder of fully paid-up shares, had under the rules given notice of withdrawal; afterwards, and before repayment, the society altered the rules by giving the directors power to pay off in priority members holding less than 50*l.* in the society. It was held that the alteration was valid though in some sense it took away the vested right of the plaintiff.

"It was," said Chitty, J., in that case, "part of the plaintiff's contract with the society that the rules might be altered, and the power of altering them was wisely framed so as to require not a bare majority but three-fourths of the members to bring about the alteration. . . . The plaintiff's counsel says rightly that when the plaintiff gave notice of withdrawal he had a vested right to be paid according to the then existing rule, but this does not settle the question, because there existed also against him the power of altering the rule, so that the question assumes this form, that he had a vested right liable to be divested by any later rule they passed. It may be wondered that the society should have such a power, but it may be greatly to the benefit of all concerned to make alterations. And I say also that members place reliance on the sense of justice of the three-fourths majority required to effect the alteration."

See also *British Equitable Assurance Co.* v. *Baily*, (1906) A. C. 35; *Rosenberg* v. *Northumberland Building Socy.*, 22 Q. B. 373; *Re Barrow Hematite Co.*, 39 C. D. 582; *Doman's case*, 3 C. D. 21; *Re Aryus Co.*, 39 C. D. 571. In the case last mentioned it was considered that a power in the deed of settlement of a company (not under the

Act of 1862) to alter such deed of settlement was to have full effect, and included even power to insert, by alteration, a clause providing for the sale of the whole undertaking. *Re James Colmer, Ltd.*, (1897) 1 Ch. 524, shows the far-reaching operation of the decision in *Andrews* v. *Gas Meter Co.*, *supra*. In *Continental Union Gas Co.* (1893), 7 T. L. R. 496, it had been held in effect that voting rights were matter of the company's constitution and unalterable; but in *Re James Colmer, Ltd.*, Romer, J., held that *Hutton* v. *Scarborough Cliff Co.*, *ubi supra*, having been overruled, there was no objection to an alteration of voting rights.

Limits to alteration.

Nevertheless, a limit must be placed on the general words contained in sect. 13; and the limit is this, that the section cannot be used to oppress or defraud a minority of shareholders, or so as to violate any statutory provision or principle of law. *Peveril Gold Mines*, (1898) 1 Ch. 122; *Payne* v. *Cork Co.*, (1900) 1 Ch. 308. The power, in other words, like other powers, must be exercised fairly and according to law. And it is clear from the authorities that any abuse of the statutory power will be restrained. A majority, for instance, will not be permitted by the Court, under colour of the section, to commit a fraud on the minority. *Menier* v. *Hooper's Telegraph Co.*, L. R. 9 Ch. 350. And see *Gray* v. *Lewis*, L. R. 8 Ch. 1051; *Atwool* v. *Merryweather*, 5 Eq. 464, n.; *Mason* v. *Harris*, 11 Ch. D. 97; and *Macdougall* v. *Gardiner*, 1 Ch. D. 13; *Burland* v. *Earle*, (1902) A. C. 83; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84. And a company will not be allowed to alter its articles in breach of contract with an outsider. *Allen* v. *Gold Reefs*, (1900) 1 Ch. at p. 673; *Baily* v. *British Equitable*, (1904) 1 Ch. 374; *British Murac Syndicate* v. *Alberton Rubber Co.*, (1915) 2 Ch. 186. But short of fraud or oppression, breach of contract, or want of good faith, or contravention of the statutes on the part of the majority, the statutory power of alteration is subject to no restriction. As Lord Cairns, L. C., said in *Ashbury* v. *Riche*, L. R. 7 H. L. 653, 671, "The memorandum is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit."

Rectification by Court.

Rectification.

The Court has no jurisdiction to rectify the articles of association on the ground of mistake, for they have statutory operation. *Evans* v. *Chapman*, 86 L. T. 381.

CHAPTER V.

THE CERTIFICATE OF INCORPORATION.

"WHEN once," said Lord Cairns, in *Peel's case* (1867), 2 Ch. 674, "the memorandum is registered and the company is held out to the world as a company undertaking business, willing to receive shareholders and ready to contract engagements, then it would be of the most disastrous consequences, if, after all that has been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration and the regularity of the execution of the document." Were such a thing permissible, a company's foundation would be built not on a rock but on sand. The legislature was fully alive to the importance of this, of making the certificate of incorporation—the company's statutory charter—unimpeachable, and in sect. 18 of the Companies Act, 1862, it provided that "the certificate of incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." In relation to this enactment it was long since held that the words "the requisitions of this Act in respect of registration" meant "the requisitions and conditions precedent and incidental to registration," and, accordingly, that once the certificate of incorporation was given, the company named therein as incorporated was to be taken to be duly and effectually incorporated, and all reference to prior matters was precluded.

Thus, in *Peel's case* (1867), 2 Ch. 674, the memorandum of association had, after signature and before registration, been altered without the privity of the signatories so materially that, in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and registration of the document." The company was, however, registered, and the registrar gave his certificate of incorporation; subsequently the question arose whether this certificate was conclusive, seeing that according to sect. 6 of the Act the memorandum before registration has to be subscribed "by seven or more persons associated for any lawful purpose," whereas here the signature had been entirely annihilated. Nevertheless, it was held that the

registrar's certificate of incorporation *was* conclusive. "The certificate of incorporation," said Lord Cairns, "is not merely a *primâ facie* answer, but a conclusive answer to such objections, ... when once the certificate of incorporation is given nothing is to be inquired into as to the regularity of the prior proceedings."

And shortly afterwards, Lord Chelmsford, L. C., dealing with the same point in *Oakes* v. *Turquand*, L. R. 2 H. L. 325, said: "I think that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive that all previous requisitions have been complied with."

See also *Salomon* v. *Salomon & Co.*, (1897) A. C. 22. The Court of Appeal there, whilst holding that the defendant company had been formed "for an illegitimate purpose," and "for objects not authorized by the Act," nevertheless held the certificate of incorporation conclusive, although, as we have seen, sect. 6 of the Act of 1862 required that the subscribers should be persons associated together for some "lawful purpose," following the view taken by the House of Lords in *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 193. But no legislation, were it framed, as Lord Herschell said, by a "committee of archangels," can escape misinterpretation; and in *Re National Debenture Corporation*, (1891) 2 Ch. 505, a learned judge refused to treat a certificate of incorporation as conclusive where he found as a fact that the memorandum of association had been subscribed by six persons only instead of seven, thus in effect treating the words "conclusive evidence" as meaning "*primâ facie* evidence," although the legislature had significantly used the words "conclusive evidence" in contradistinction to the words "*primâ facie* evidence" used by it in sects. 31 and 37 of the same Act. This decision was reversed on appeal on the ground that the evidence did not establish the fact so found. Unfortunately, however, the judges of the Court of Appeal let fall some *dicta* to the effect that if the judge below had been right as to the facts, his decision would have been correct in point of law. The Court, however, had no power to overrule *Peel's case*, and of course these mere *dicta* could in no way derogate from the authority of the decision in that case. Referring to these *dicta*, Vaughan Williams, J., in *Laxon & Co.* (2), (1892) 3 Ch. 555, said that he did not understand how they could be reconciled with the decision and words of the judgment of Lord Cairns in *Peel's case*, *ubi supra*; and it is to be noted that the Court of Appeal in *Salomon* v. *Salomon & Co.*, as appears above, followed *Peel's case*. Further, in *Ladies' Dress Association* v. *Pulbrook*, (1900) 2 Q. B. 376, 381, where these *dicta* were relied on, Romer, L. J., whilst holding them not applicable, significantly added that "if it were not so, it might be necessary for us to consider whether these *dicta* could be

justified." The existence of these *dicta*, however, ill-founded as they were, cast a shadow of uncertainty on the conclusiveness of the certificate. It was also doubtful, from the remarks of Turner, L. J., in *Re Northumberland Banking Co.*, 2 De G. & J. 357, whether the certificate was conclusive, if the company was one not authorized to be registered under the Act. To get rid of these doubts sect. 1 (1) of the Companies Act, 1900, was passed, and it dealt with both points, expressly providing that "a certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Acts." This section made it clear beyond all cavil that the certificate of incorporation is conclusive, even as Lord Cairns decided in 1867.

It is now repealed, but is re-enacted in sect. 17 of the Act of 1908.

Looking to the above decisions and to the words of sect. 17, it is clear that there is no longer any possible ground for questioning the conclusiveness of certificates of incorporation. Thus, even if the seven signatories to a memorandum were all written by one person, or were all forged, the certificate would be conclusive that the company was duly incorporated. So, too, if the signatories were all infants, the certificate would still be conclusive, whether the remarkable decision in *Laxon & Co.* (2), (1892) 3 Ch. 555, that an infant is a "person" within sect. 6, can or cannot be supported.

As a safeguard, however, and to secure care in the preparation of documents and in the matters preliminary to registration, the legislature has taken the precaution to provide in sect. 17 (2) of the Act of 1908, that a statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles of association as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept this declaration as sufficient evidence of compliance.

The practice now is to require the production of such a statutory declaration upon all applications to register under Part I. of the Act.

As to impeaching incorporation by *sci. fa.*

The further question whether a company, once incorporated by registration under the Act of 1862, could by *scire facias* or otherwise be removed from the register and disincorporated, was touched on but not dealt with by the Lord Chancellor in *Salomon* v. *Salomon & Co.*, (1897) A. C. 22; the point had, however, been previously adjudicated on by the House of Lords in *Princess of Reuss* v. *Bos* (1871), L. R. 5 H. L. 176. In that case the question arose as to the

regularity of the constitution of a company—"The General Company for the Promotion of Land Credit, Limd." All the subscribers to the memorandum of this company 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, and Lord Hatherley, L. C., said: "All we have to ask ourselves is this, my lords. Has this company come into existence? Has it been born? . . . The question is therefore simply whether it has been created. If created, there is no power given in this Act of Parliament, nor in any other Act of Parliament that I am aware of, by which, through any result of a formal application, like an application for *scire facias* to repeal a charter, the company can be got rid of, unless by winding up"; and Lord Cairns said: "My lords, it might have been a very wise provision of the legislature to say that in a case of this kind—a case where there was an abuse of the Act of Parliament going on; a case where, if it had been a matter of a royal grant, there would have been what is termed a forfeiture of the franchise by reason of non-user or mis-user: it might have been a very wise thing for the legislature to say that in a case of that kind there should be some peremptory mode of reducing or getting rid of the incorporation and putting an end to a state of things which was an abuse of, or a fraud upon, the Act of Parliament, and which ought not to be allowed to continue. However, the legislature has not thought fit to provide any means in the nature of a process of reduction, in the ordinary sense of the term, for getting rid of an incorporation in any such circumstances."

See, also, what was said by Fry, J., in *Global* v. *Giles* (1881), 18 Ch. D. 180.

It is clear from these judicial observations that there was not, under the Companies Acts as the law then stood, any jurisdiction to annul a certificate of incorporation, and the Act of 1908 has introduced no change in this respect.

The Registrar of Companies has, however, jurisdiction under sect. 242 of the Act of 1908 to strike the names of companies believed to be defunct off the register, subject to the observance of certain formalities. If companies so struck off are still carrying on business the Court has power to reinstate them on the register. See *In re Gunlay Assurance Society*, 34 Ch. D. 479; *Re Langlaagte Proprietary Co.* (1912), 28 T. L. R. 529; and Company Precedents, Part I., p. 1337. Sect. 242 of the Act takes the place of sect. 7 of the Companies Act, 1880, and sect. 26 of the Companies Act, 1900.

CHAPTER VI.

CORPORATE EXISTENCE AND POWERS.

Company a Legal Persona.

Company a person.

Upon the issue of the certificate of incorporation, a company registered under the Act of 1908 becomes a body corporate, or in other words, a corporation. (Sect. 16.) A corporation, it must be remembered, is not, like a partnership or a family, a mere collection or aggregation of individual units. It is, in contemplation of law, a *person* distinct from the members or shareholders who are interested in it—a metaphysical entity—a convenient fiction of law, but with no physical existence. As Lord Selborne said (*G. E. Rail. Co.* v. *Turner*, 8 Ch. 152): "The company is a mere abstraction of law." "A corporation," said Cotton, L. J., "is not a mere aggregate of the shareholders." *Flitcroft's case*, 21 C. D. 535. "A corporation is a legal *persona* just as much as an individual." Per Cave, J., in *Re Sheffield, &c. Society*, 22 Q. B. D. 476; *Att.-Gen.* v. *Smith*, (1909) 2 Ch. 524, in which it was held that a company was a person within the Dentists Act, 1878. "The company is at law a different person altogether from the subscribers to the memorandum of association." Per Lord Macnaghten, *Salomon* v. *Salomon & Co.*, (1897) A. C. 22.

These several statements of the law are cited here because they emphasize the all-important distinction between the company as a body corporate, and the members or shareholders of that body.

Importance of the principle.

This distinction lies at the root of many of the most perplexing questions that beset company law. It is a fundamental or cardinal distinction—a distinction which must be firmly grasped. *Broderip* v. *Salomon*, (1895) 2 Ch. 323 (C. A.) (reversed by the House of Lords on appeal), is a melancholy instance of the legal quagmire into which the neglect of this principle may conduct even the most learned judges.

The principle is thrown into very clear relief by contrasting a partnership with an incorporated company.

Company and Ordinary Partnership distinguished.

Companies and partnerships distinguished and contrasted.

1. In the case of a partnership the property of the firm belongs to the individual members. They are collectively entitled to it, whereas, in the case of a company, it belongs to the company, and not to the

members. *Re George Newman & Co.*, (1895) 1 Ch. 685; *Reg.* v. *Arnaud*, 9 Q. B. 806.

2. Creditors of a firm are creditors of the members of the firm, and on obtaining judgment against the firm can levy execution on the property of the partners in the firm; whereas, in the case of a company the creditor has no debtor but that abstraction the corporation. Per Cotton, L. J., *Flitcroft's case*, 21 C. D. 533. The direct remedy of the creditor is solely against the incorporated company (per Lord Cranworth, *Oakes* v. *Turquand*, L. R. 2 H. L. 357), and judgment against the company gives no right to levy execution against the members.

3. A member of a firm can dispose of property and incur liabilities, within the scope of the business, to any extent; whereas a member of a company, as such, has no such power.

4. In the case of a partnership, restrictions on a member's authority contained in the partnership contract are of no avail as against outsiders; whereas, in the case of a company such restrictions are effective, because the public are bound to acquaint themselves with them. *Ernest* v. *Nicholls*, 6 H. L. C. 419.

5. A partner cannot contract with the firm, whereas a member of the company can contract with the company; for the company is in law a distinct person.

Re-affirmation of the principle.

Elementary as this principle—of the independent corporate existence of a company—may seem to be, it has still—after all the many years' working of the Companies Acts—been so much misunderstood, and has had to be so elaborately explained and emphasized by the House of Lords in the case of *Salomon* v. *Salomon*, (1897) A. C. 22—above referred to—that it may be well to pause in order to examine briefly that decision. The case was this: One Salomon, a leather merchant, was the owner of a profitable business, and in order to obtain the advantages of limited liability, he being perfectly solvent at the time, determined to convert the business into a private company, see Chapter XXXVI., *infra*. Of the shares in the capital he himself took 20,000, and his wife and sons and daughter took each, one. No other shares were issued. Salomon received also mortgage debentures to the amount of 10,000*l.* in part payment by the company for the business.

Salomon v. _Salomon_ in the House of Lords.

It was the validity of these debentures which was questioned in the action on the ground that the company was a "one man company" and a sham, and so Vaughan Williams, J., held, being of opinion that 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 notwithstanding that his shares had all been fully paid up.

This decision the Court of Appeal affirmed but on a somewhat different ground, viz. that the whole scheme was a fraud on the policy of the Act, and that it was never intended by the legislature that a company should consist of one substantial person and six mere dummies devoid of any real interest. There must, the Court was of opinion, be seven *bonâ fide* traders associated. This decision caused great anxiety in the commercial world, as well it might, but it was unanimously reversed by the House of Lords, *Salomon* v. *Salomon & Co.*, (1897) A. C. p. 22, on the ground that the only mode of ascertaining the intent and meaning of the Act was to examine its provisions and find what regulations it had imposed as a condition of trading with limited liability, and that the Act said not a syllable as to the seven members being beneficially or substantially interested.

Judgments of the Law Lords on the case.

"The statute," said Lord Chancellor Halsbury, "enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest, or influence, possessed by one or the majority of the shareholders over the others." And Lord Herschell added, "It was said that in the present case, the six shareholders, other than the appellant, were mere dummies, his nominees, and held shares in trust for him. I will assume this was so. In my opinion it makes no difference." Lord Macnaghten also said: "There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned judges seemed to think, or that there should be anything like a balance of power in the constitution of the company." A serious danger was thus averted and the cardinal principle of corporation law—the independence of the company as a legal *persona*—was fully vindicated.

Further cases.

Farrar v. *Farrars, Limited*, 40 C. D. 395—409, affords another illustration of the rule of independent corporate existence. In that case Lindley, L. J., said: "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a body corporate, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation is in every sense a sale, valid in equity as well as at law."

So again in *North West Transportation, &c. Co.* v. *Beatty*, 12 A. C. 589, it was held that a sale of property of the company to one of its members which had been sanctioned by a general meeting, could not be invalidated on the ground that it was carried by the votes of the purchaser. And see *Burland* v. *Earle*, (1902) A. C. 83.

Number of Members necessary to preserve Limited Liability.

Seven members required.

It may be convenient here to refer to sect. 115 of the Act of 1908, which provides, "If at any time the number of members of a company is reduced in the case of a private company below two, or in the case of any other company below seven, and it carries on business for more than six months whilst the number is so reduced, every person who is a member of such company during the time that it so carries on business after those six months, and is cognisant of the fact that it is so carrying on business with fewer than two or seven members as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time and may be sued for the same without the joinder in the action of any other member."

Penalty, unlimited liability.

This section is a reproduction, with some necessary variations as to private companies, of sect. 48 of the Companies Act, 1862.

Having regard to this section, the members of a limited company other than a private company must be careful to keep the number of members up to seven. This is not a difficult thing, even where the number of members is small, for (as appears above, p. 57) a few shares can be transferred to clerks or nominees of the principal shareholders. All that is required is, that there should be seven, or in the case of a private company two, members on the register.

Commencement of Business.

What business may be commenced.

Under the Companies Act, 1862, a company was entitled to commence business immediately upon its incorporation: it was, in the words of sect. 18 of that Act, "capable forthwith of exercising all the functions of an incorporated company." And this plenary capacity of starting business at once is still permitted to private companies. See sect. 16 of the Act of 1908. But as regards other companies, sect. 87 of the Act of 1908 restricts their power to commence business unless and until certain conditions have been complied with.

Restrictions on commencement of business.

The section embodying the restrictions is in the terms following:—

87.—(1.) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum [see *infra*, p. 105] subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares

offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares on the shares payable in cash; and

(c) there has been filed with the registrar of companies a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2.) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of a prospectus has been filed with him.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a private company or to a company registered before the 1st day of January, 1901, or to a company registered before the 1st day of July, 1908, which does not issue a prospectus inviting the public to subscribe for its shares.

The duty of the registrar in granting the certificate is purely ministerial. As to the meaning of "conclusive," see p. 52; and *Hadleigh Castle Gold Mines*, (1900) 2 Ch. 419, *infra*, p. 239.

Contracts before certificate.

The word "provisional" means that the contracts made by a company before the date at which it is entitled to commence business are to be treated as if they contained a provision that they shall not be binding on the company unless and until the company becomes entitled to commence business. Hence, if the company never becomes entitled to commence business a contract entered into by it never becomes

binding on it, and no one can sue in respect of such contract. *In re Otto Electrical Manufacturing Co., Jenkins' Claim*, (1906) 2 Ch. 390; *Clinton's case*, (1908) 2 Ch. 515.

"Every person responsible for the contravention" would include directors, managers, and other executive officers, possibly the secretary, having regard to sub-sect. 1 (c). Conf. *Burton* v. *Bevan*, (1908) 2 Ch. 240.

What is the minimum subscription depends on the provisions of sect. 85 of the Companies Act, 1908. See *infra*, p. 105.

As to pre-incorporation contracts and contracts generally by a company, see Contracts, Chap. XXVI., *infra*.

Powers of Registered Company.

A company under the Act of 1908 has the following powers:—

(1) Power to do whatever it is necessary to do with a view to the attainment of the objects (see *supra*, p. 29) stated in its memorandum, and also whatever may fairly be regarded as incidental to and consequential on the stated objects.

(2) Power to do whatever else is legally authorized by the other clauses of its memorandum.

(3) Power to do such other things as it is allowed to do by the Act of 1908 or by any other statute.

That the powers of a registered company were dependent on and governed by its stated objects was recognized in an early case decided on the Joint Stock Companies Act, 1856, the immediate forerunner of the Companies Act, 1862. The Act of 1856 contained provisions as to formation almost identical with those subsequently adopted in the Act of 1862. In particular the Act required that the memorandum should state the objects of the proposed company, and it prohibited any alteration of the conditions contained in the memorandum of association. It was in relation to a company formed under this Act that *Simpson* v. *Westminster Palace Hotel*, 8 H. L. C. 712, was decided in 1860. In that case the memorandum stated that "the objects for which the company is established are the purchase of leasehold lands in the City of Westminster, the erection, furnishing and maintenance of an hotel thereon, and the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of these objects." The directors, whilst the hotel was in course of being built, agreed to let off for a stipulated period—a few years—a large portion of the building to the head of a Government Department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business. The case went to the House of Lords, and it was decided that the letting

was not *ultra vires*, on the ground that it was temporary and preliminary, and conducive to the ultimate object of the whole being devoted to the proper purpose of the hotel. The Lord Chancellor (Lord Campbell), in his opinion, said: "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made the act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a Court of Equity will interpose on his behalf by injunction. A railway company cannot apply its funds to make a line of railway different from that described in the Act by which the company was constituted. A company established for granting fire and life insurances cannot engage in marine insurance. A company established to make a railway and exercise the trade of carriers upon the line from one town in England to another cannot add to it the trade of a steam-packet company; and no company can ever abandon the business for which it was established and undertake another. . . . . I agree that the case depends upon the fair construction of the third clause of the Memorandum of Association. There is a difficulty in saying that the letting of so large a portion of the hotel to the India Board for so long a time is carrying on the usual business of an hotel or tavern therein; but I conceive that it is in the words of the third clause, 'doing a thing otherwise conducive to the attainment of' the described objects of the undertaking. An hotel to be used as such still remains in the hands of the company. This hotel is larger than any other hotel in England, and in this portion of the building the usual business of an hotel and tavern is to be carried on. . . . . I rely much upon the consideration that the arrangement is temporary and preliminary, and conducive to the ultimate object of the whole building being devoted to the proper business of the hotel," and the other learned lords concurred.

After the Act of 1862 came into operation this decision was treated as applicable to companies registered under that Act, and as importing that a company so registered was, as regards its powers, substantially in the same position as a railway, water, gas or other company incorporated for specified purposes or objects, and was not endowed with the general powers of a common law corporation (*supra*, p. 3). Whether this was the true position of such a company was not, however, finally settled until 1875, when the celebrated case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653, was decided by the House of Lords. In that case the objects of the company were "to make and sell, or lend on hire, railway carriages and waggons and all kinds of railway plant, and to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, lands and buildings; to purchase and sell, as

merchants, timber, coal, metals and other materials; to buy and sell any such materials on commission or as agents; to acquire, purchase, hire, construct or erect works or buildings for the purposes of the company; and to do all such other things as are necessary, contingent, incidental or conducive to all or any of such objects."

The company with this memorandum defining its objects had entered into a contract with the plaintiff in relation to the construction of a railway in Belgium, and the question raised in the action was, whether that contract was valid. The Exchequer Chamber, affirming the decision of the Court of Exchequer, held that the contract was *ultra vires*, but in the Exchequer Chamber, L. R. 9 Ex. 249, the judges were evenly divided in opinion.

Blackburn, J., in his judgment, in which Brett and Grove, JJ., also concurred, was of opinion that the company, being incorporated, was like a chartered or common law corporation endowed with full powers, that, although the Act might have expressly or impliedly cut down these powers it had not in fact done so, and that in the circumstances the contract was only *ultra vires* the directors, not *ultra vires* the company, and capable, therefore, of being ratified by the shareholders.

On appeal, the House of Lords held that the contract was *ultra vires* the company and therefore altogether void, and that the views put forward by Blackburn, J., and those who concurred with him, were erroneous.

House of Lords' decision.

The view of their Lordships was that a company under the Act of 1862 was not to be regarded as a common law corporation endowed with full powers, but as a statutory corporation endowed with limited powers only. Lord Chancellor Cairns, after premising (p. 669) that the subscribers "are to state the objects for which the proposed company is to be established, and that the existence, the coming into existence of the company, is to be an existence and to be a coming into existence for those objects, and for those objects only," and after referring to the words at the end of sect. 12, to the effect that "no alteration shall be made by any company in the conditions contained in its memorandum of association," proceeded as follows :—

Grounds for decision.

"Now, my Lords, if that is so—if that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

"A statutory corporation," said Lord Selborne in the same case, "created by Act of Parliament for a particular purpose, is limited as

to all its powers by the purposes of its incorporation, as defined in that Act. The present and all other companies, incorporated by virtue of the Companies Act, 1862, appear to me to be statutory corporations within this principle. The memorandum of association is, under the Act, their fundamental and, except in certain specified particulars, their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. . . . . I am unable to see any distinction for this purpose between statutory corporations under the Railway Acts and statutory corporations under the Companies Act, 1862. . . . . I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some express or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do." And all the learned lords were of opinion that, if it were necessary to find words of prohibition, the words at the conclusion of sect. 12, to the effect that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association," were sufficient, and that in thus prohibiting any alteration of the conditions in the memorandum the Act, in effect, prohibited the doing of anything beyond the objects expressed. They further held, as a corollary from the above, that the contract, being *ultra vires*, and therefore void in its inception, was incapable of ratification even by the unanimous consent of all the shareholders.

In a subsequent case (*Att.-Gen.* v. *Great Eastern Rail. Co.*, 5 App. Cas. 473), the principle laid down in *Ashbury* v. *Riche* was again recognized in the House of Lords, but it was in some degree qualified by the rule laid down by Lord Selborne, L. C., and the other Law Lords, to the effect that the principle was one to be reasonably, and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental or consequential upon those things which the legislature had authorized (that is, those things specified in the memorandum as objects) ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.

Lastly, in *London County Council* v. *Att.-Gen.*, (1902) A. C. 165, Lord Halsbury, L. C., referring to *Ashbury Railway Carriage Co.* v. *Riche* and *Att.-Gen.* v. *G. E. Rail. Co.*, said, "I think now it cannot be doubted that those two cases do constitute the law upon the subject. It is impossible to go behind those two cases. They are now part of the law of this country and we must acquiesce in them whether we like them or not."

To apply and illustrate these principles:—

What powers implied.

If a company is formed, for example, "to buy, sell and deal in coal," it may, *for the purpose of carrying out its objects*, not only buy, sell and deal in coal, but may—(1) purchase or take on lease stores; (2) open shops and agencies; (3) buy and hire trucks, carts, horses; (4) employ labour; (5) draw and accept bills of exchange; (6) borrow and give security; (7) incur debts; (8) make contracts for purchase or supply; (9) have a banking account; (10) bring actions and take proceedings; (11) compromise actions and disputes (*Bath's case*, 8 Ch. D. 334); (12) employ agents; (13) pay bonuses and pensions to employés: for these things are fairly incidental to and consequential on the object to "buy, sell, and deal in coal." As to pensions and gratuities, see Chap. XLIV., *post*.

Such a company may also pay all "expenses incurred in getting up and registering the company," and it may pay dividends out of profits, and may provide for payment, even out of capital, of interest on capital paid up in advance of calls, for clauses 17 and 72 of Table A. (substituted for clauses 7 and 55 of the original Table A.) treat such outgoings and expenses as properly dealt with by the articles, and what Table A. authorizes is not to be treated as *ultra vires*. *Lock* v. *Queensland Mortgage Co.*, (1896) A. C. 461.

Munition work.

By sect. 16 of the Munitions of War Act, 1915, any company has power, notwithstanding anything contained in its memorandum of association, to carry on munition work during the present war.

Necessity of amplifying objects clause.

Wide as the powers thus vested are, experience has shown that they are not wide enough to cover many of the transactions which are found necessary or convenient in the course of a company's business, irrespective of the fact already alluded to, that an over-concise statement of objects leaves, in the opinion of business men, too much to implication of law, thereby necessitating constant resort to legal advice, and also hampering business by the doubts it induces amongst outsiders as to the company's capacity to engage in a given transaction. See further, *supra*, p. 30.

Hence the objects clause of by far the greater number of existing companies is expressed in considerable detail (see p. 31), and specifies, in most cases at any rate, some objects which might be—to a lawyer—implied.

Specimen clauses: why inserted.

The following are the clauses most commonly found in memoranda of association:—

1. A clause authorizing the company to carry on the particular business which it is proposed to carry on, and also to carry on various other businesses which it may probably or possibly be desirable to carry on in conjunction therewith or in lieu thereof.

The object of this is to avoid the necessity for going to the Court

(under sect. 9 of the Act of 1908 (embodying the Companies Memorandum of Association Act, 1890)) to extend the objects, and also to give the company full freedom for developing its business.

2. A clause empowering the company to acquire any other business similar to its own, for it is extremely difficult to imply such a power from the memorandum. *Ernest* v. *Nicholls*, 6 H. L. C. 401.

3. A clause empowering the company to enter into any agreement for sharing profits, joint adventure, reciprocal concession, or other arrangement of a like nature with other persons or companies carrying on any similar business; for very clear powers are necessary to justify such transactions. *Ex parte British Nation, &c. Association*, 8 Ch. D. 704.

4. A clause empowering the company to take shares in other companies having similar objects, &c. Such a power is commonly wanted, and not easily implied (*Barned's Banking Co.*, 3 Ch. 105; *Lands Allotment Co.*, (1894) 1 Ch. 630), but may be implied, *e.g.*, from a clause allowing amalgamation. *Re William Thomas & Co.*, (1915) 1 Ch. 325.

5. A clause empowering the company to promote other companies for any purpose calculated to benefit the company. This power, though often required, cannot be implied. *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381.

6. A power generally to acquire property and rights which the company may think necessary or convenient for the purpose of its business. In dealing with outsiders, it is found useful to have an express power like this, and so preclude any question of capacity.

7. A power to lend money and guarantee the performance of contracts by customers and others. These loan and guarantee transactions are constantly called for in business, and yet the power is one not easily implied.

8. A power to borrow or raise money by the issue of debentures, debenture stock, or otherwise; for, although a *trading* company has an implied power to borrow and to give security to a reasonable amount (*infra*, Chapter XXXI.), it is found in practice highly desirable to have an explicit power in the memorandum. Some doubt, too, exists whether debenture stock of a permanent character can be raised without express power. See now, however, sect. 103 of the Act (1908).

9. A power to draw, make, accept, indorse, discount, and issue promissory notes, bills of exchange, debentures, and other negotiable or transferable instruments. This is very desirable; for, although a trading company has implied power to make and accept promissory notes and bills of exchange for the purpose of its business (see *In re Peruvian Rails. Co.*, L. R. 2 Ch. 623), the fact that various kinds of companies have been held not to possess any such implied power

clouds the implication with a most inconvenient uncertainty. See Company Precedents, Part I., p. 474.

10. A power to sell and dispose of the undertaking of the company for shares, debentures, or securities of any other company having objects altogether, or in part, similar to those of this company. This is effective. See *Cotton* v. *Imperial, &c. Co.*, (1892) 3 Ch. 454; *Grant* v. *United Switchback Co.*, 40 C. D. 135, in which a sale of the undertaking or any part was one of the objects. *New Zealand, &c. Co.* v. *Peacock*, (1894) 1 Q. B. 622, in which it was distinctly held by the Court of Appeal that a sale under the power in the memorandum was valid. So too in *Foster* v. *Borax Co.*, (1901) 1 Ch. 326; and *Virian & Co.*, (1900) 2 Ch. 654. Lindley on Companies, 6th ed., 256. In the absence of an express power like this, a company cannot sell or dispose of its whole business (*Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712). According, however, to *Bisgood* v. *Henderson's Transvaal Estates*, (1908) 1 Ch. 743, the power to sell for shares cannot be exercised if winding-up and distribution among the shareholders of the proceeds of sale is in contemplation; but this view is commonly considered erroneous. See further *infra*, p. 427.

11. A power to apply for an Act of Parliament for any purpose which may seem expedient. Without such an express power a company cannot apply its funds in promoting a Bill to effect any modification in its constitution. *Munt* v. *Shrewsbury, &c. Rail. Co.*, 13 Beav. 1; *Simpson* v. *Dennison*, 10 Hare, 51; *Vance* v. *East Lancashire Rail. Co.*, 3 K. & J. 50.

12. A power to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with, all or any part of the property and rights of the company. Although a trading company has an implied power to deal with its property for the purpose of its business (see *In re Patent File Co.*, L. R. 6 Ch. 83), it is in practice found highly desirable to have express and explicit powers on such matters, and so preclude all question and doubt. See *Kingsbury Collieries*, (1907) 2 Ch. 259.

Intra Vires and Ultra Vires Proceedings.

Powers of company as to expenditure.

It is a corollary from the rule in *Ashbury* v. *Riche*, *ubi supra*—that a company's objects circumscribe its powers—that the funds of a company under the Act can only be applied in carrying out its authorized objects. "It cannot be questioned," said Lord Herschell in *Trevor* v. *Whitworth*, 12 App. Cas. 414, "since the case of *Ashbury* v. *Riche*, that a company cannot employ its funds for the purposes of any transactions which do not come within the objects specified in the memorandum. The capital may, no doubt, be diminished by expenditure upon, and reasonably incidental to, the

objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware and take the risk. But I think that they have a right to rely on the capital remaining undiminished by any expenditure outside those limits."

Examples of *intra vires* acts.

The following are some of the cases in which the expenditure of the company's funds, or the employment of its property, has been held a legitimate expenditure or employment on the objects of the company and therefore *intra vires*, though not expressly provided for: a company, formed to work a patent, expending its funds in purchasing such patent (*Leifchild's case*, 1 Eq. 231); a company, formed to work mines of which it had acquired a lease, spending money in buying the freehold, including surface (*Johns* v. *Balfour*, 5 T. L. R. 389); a company, being second mortgagee of land in England, paying off the first mortgages in order to prevent foreclosure (*Re Sheffield, &c. Society* v. *Aislewood*, 44 C. D. 412); a company, bound to supply boats for a ferry, employing the boats, when not wanted for the ferry, in excursions (*Forrest* v. *Manchester Rail. Co.*, 30 Beav. 40); a hotel company letting off temporarily part of its premises not wanted for the purposes of its business (*Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712); a colliery company selling land from time to time when the sale is reasonably necessary (*Kingsbury Collieries*, (1907) 2 Ch. 259); a company incurring debts for the purpose of its business (*Russell* v. *East Anglian Rail. Co.*, 3 M. & G. 125); a company formed to acquire and work a mine, paying fees to a mining expert for a report of the mine to its solicitors and brokers, and for advertisements and printing (*Lydney, &c. Co.* v. *Bird*, 33 Ch. D. 85); a company paying its workmen a gratuity (*Hampson* v. *Price's Patent Candle Co.*, 24 W. R. 754), or granting a pension to an ex-officer or his widow (*Henderson* v. *Bank of Australasia*, 40 C. D. 170; *Hutton* v. *West Cork Ry. Co.*, 23 C. D. 672; *Cyclists Touring Club* v. *Hopkinson*, (1910) 1 Ch. 179, but the pensioner cannot prove for the pension if the company is wound up, *Re Birkbeck Building Society*, (1913) 1 Ch. 400), or compromising a *bonâ fide* dispute (*Bath's case*, 8 C. D. 334), or selling its undertaking for shares, where authorized by its memorandum to do so (see *supra*, p. 66), or paying to a broker a reasonable brokerage for issue of its capital (*Metropolitan Coal, &c. Co.* v. *Scrimgeour*, (1895) 2 Q. B. 604), or incurring expenses on printing, stamping and sending out proxy papers and circulars to secure the defeat of a resolution which the directors consider adverse to the company's interest (*Peel* v. *L. & N. W. Rail. Co.*, (1907) 1 Ch. 5; *Campbell* v. *Australian Mutual*, 99 L. T. 3), or, with wide powers of lending, lending money to a servant of the company (*Rainford* v. *James Keith and Blackman Co.*, (1905) 2 Ch. 147).

All these have been held *intra vires*. So it is *intra vires* for a

trading company to borrow, raise money and give security on its property. *General Auction Co.*, (1891) 3 Ch. 436.

Examples of *ultra vires* acts.

The following, on the other hand, are a few cases in which transactions not expressly authorized have been held *ultra vires*.

The application by a company of its funds towards promoting a Bill in Parliament to obtain powers for improving the navigation of a river was held *ultra vires*, though the prosperity of the company depended materially on the navigation of the river being improved. *Munt* v. *Shrewsbury Rail. Co.*, 13 Beav. 1. See also *Att.-Gen.* v. *Manchester Corporation*, (1906) 1 Ch. 643, as to acting as carriers in relation to tramways, and *Att.-Gen.* v. *North Eastern Rail. Co.*, (1906) 2 Ch. 675.

So a railway company (in the absence of a power for the purpose in its constitution) was held incompetent to secure the capital and guarantee the profits of another company about to run steamboats in connection with the line, however beneficial it might be to the railway company. *Colman* v. *E. C. Rail. Co.*, 10 Beav. 1. So, again, where a railway company proposed to subscribe to the Imperial Institute, this was held *ultra vires*. *Tomkinson* v. *S. E. R.*, 35 C. D. 675. It is *primâ facie ultra vires* for a railway company to take to working coal mines and dealing in coal for profit. *Att.-Gen.* v. *Great Northern Rail. Co.*, 1 Dr. & Sm. 283. It is *ultra vires* for a corporation like the London County Council to run omnibuses. *L. C. C.* v. *Att.-Gen.*, (1902) A. C. 165.

It is likewise *ultra vires* for a company, without special power in its constitution, to take over the undertaking of another company (*Ernest* v. *Nicholls*, 6 H. L. C. 401), or to enter into a partnership or amalgamation arrangement (*British Nation Life*, 8 C. D. 704), or to promote another company. Thus, where a company was formed to carry on business as a bill broker and scrivener and to make advances and procure loans and invest in securities, it was held that subscribing for shares in a new company, in order to assist in floating it, was not a *bonâ fide* investment, and therefore *ultra vires*. *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381. It is also *ultra vires* for a company to pay dividends out of capital. It is now well settled that a company cannot apply its funds in purchasing its own shares (*Trevor* v. *Whitworth*, 12 App. Cas. 409); and the same case shows that even an express authority in the memorandum is unavailing to authorize it, the reason being that such a purchase operates as a reduction of capital and can only be effected with the sanction of the Court. *British, &c. Co.* v. *Couper*, (1894) A. C. 339. For the same reason it is *ultra vires* for a company under the Companies Acts to make a present of bonus shares (*Re Eddystone Co.*, (1893) 3 Ch. 9), or to issue its shares at a discount, that is to say, on the footing that the holders shall have paid-up shares on payment of less than the nominal

value of such shares. *Ooregum Co.* v. *Roper*, (1892) A. C. 125; *Welton* v. *Saffery*, (1897) A. C. 299.

And where a company issues debentures with bonus certificates for payment of an additional sum out of profits it cannot afterwards, by arrangement, issue paid-up shares in satisfaction of the certificates. See *Bury* v. *Famatina Development Co.*, (1910) A. C. 439; *Railway Time Tables Co.*, 68 L. T. 649; and *Moseley* v. *Koffyfontein Mines, Limited*, (1904) 2 Ch. 108.

Construction or Interpretation of Objects.

Whether any given transaction is or is not within the powers of a company is a question of law depending on the construction to be placed on the objects clause of the memorandum of association. "I agree," said Lord Chancellor Campbell in *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712, one of the earliest cases in the House of Lords on the powers of a registered company, "that the case depends upon the fair construction of the third clause of the memorandum of association." And so in *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 7 H. L. 653, the whole case turned, as appears from the opinions of the Lords, on the construction to be placed on the objects clause of the memorandum of association. The transaction in question was held *ultra vires* because it was not covered by the objects clause. Accordingly, if a question arises as to whether a transaction is or is not within the powers of a company to be inferred from its objects, one must scrutinize the objects clause and ascertain its meaning, and in doing this the rules which are to be applied to its interpretation or construction must be borne in mind. To construe a document is, as Lord Chelmsford said in *Scott* v. *Corporation of Liverpool*, 3 De G. & J. 360, nothing more than this: to arrive at the meaning of the parties to the instrument. For this purpose there are certain well-recognized rules which apply to a memorandum and articles of association, just as much as to any other document. Thus (i) the whole document must be read and considered. (ii) The expressed intention is to have effect; we are not to speculate as to what the parties intended, but to ascertain it from the words used, for the expressed meaning is to be taken to indicate the intention. (iii) The "golden rule" must be observed, namely, that the grammatical and ordinary sense of the words is to be adhered to; unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnance or inconsistency, but no further. *Gray* v. *Pearson*, 6 H. L. C. 106. Where the language is clear and unambiguous it must have effect, even though in the result it may operate in a capricious and unreasonable manner; if it is ambiguous the mere

Construction.

reasonable construction should be adopted. (iv) Popular words are to be taken *primâ facie* to be used in their popular sense, and technical words in their technical sense; but in each case the *primâ facie* sense may be displaced or qualified by the context. (v) The words used must be read with reference to the subject-matter, *secundum subjectam materiam*; the memorandum must be liberally interpreted, *ut res magis valeat quam pereat*. (vi) The *ejusdem generis* rule, the rule *noscitur a sociis*, and the maxim *expressio unius est exclusio alterius* are also, at times, applicable. The case of *Riche* v. *Ashbury Railway Carriage Co.*, L. R. 7 H. L. 653 (further referred to *supra*, p. 61), affords a good instance of the application of the *noscitur a sociis* construction. In that case it was held, that the words "general contractors" inserted in one of the clauses were to be taken to refer to the preceding words of the same clause exclusively, and to be restricted accordingly.

"The purposes," said Lord Cairns, L. C., in that case, "for which a company, established under the Act of 1862, is formed, are always to be looked for in the memorandum of association of the company. According to that memorandum the Ashbury Railway Carriage and Iron Company, Limited, is formed for these objects: 'to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals or other materials, and to buy and sell such materials on commission, or as agents.' Part of the argument at your Lordships' Bar was as to the meaning of two of the words used in this part of the memorandum—the words 'general contractors.' My Lords, as it appears to me, upon all ordinary principles of construction those words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works. First, 'to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock.' That is an object *sui generis*, and complete in the specification which I have read. The second is, 'to carry on the business of mechanical engineers and general contractors.' That, again, is the specification of an object complete in itself; and according to the principles of construction, the term 'general contractors' would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers—such contracts as mechanical engineers are in the habit of making, and are in their business required, or find it convenient to make for the purpose of carrying on their business. The third is, 'to purchase, lease, work and sell mines, minerals, land and buildings.' That is an object pointing to the working and the acquiring of mineral property,

and the generality of the last two words, 'land and buildings,' is limited by the purpose for which land and buildings are to be acquired, namely, the leasing, working and selling, mines and minerals. The fourth head is, 'to purchase and sell, as merchants, timber, coal, metals or other materials, and to buy and sell any such materials on commission or as agents.' That requires no commentary. My Lords, if the term 'general contractors' were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description; and the memorandum, in place of specifying a particular kind of business, would virtually permit to be carried on any business of any kind whatever, and would therefore be altogether unmeaning." Such words as "in or out of the colony" (*Campbell* v. *Australian Mutual, &c. Society*, 99 L. T. 3), or "in Mysore and elsewhere" (*Pedlar* v. *Road Block Gold Mines*, (1905) 2 Ch. at p. 435) have been held not to be restricted by the context, but to be world-wide.

These well-settled rules of construction have since been supplemented and to some extent modified by a new rule of construction first suggested in *Haven Gold Mining Co.*, 20 C. D. 151, and in *German Date Co.*, 20 C. D. 169, and subsequently recognized in *Crown Bank*, 44 C. D. 634; *Amalgamated Syndicate*, (1897) 2 Ch. 600; *Coolgardie Gold Mines*, 76 L. T. 269.

According to these authorities, where the objects of a company are expressed in a series of paragraphs, the true rule of construction is to seek for the paragraph (commonly the first) which appears to embody the main or dominant object of the company, and all the other paragraphs, however generally expressed, are to be treated as merely ancillary to this main object, and as limited and controlled thereby.

Assuming that this rule of construction is to be treated as established, it is, of course, to be borne in mind that, like every other rule of construction, it may be excluded or modified by the contents of the document to be construed, for every rule of construction contains by implication the saving clause "unless a contrary intention appear by the document."* Accordingly this "primary object" rule must be applied with caution; it has only a *primâ facie* application, and it must be seen that there is nothing in the document to exclude or modify it. *Pedlar* v. *Road Block*, (1905) 2 Ch. 427; 22 T. L. R. (1906) 179; and *Butler* v. *Northern Territories Mines of Australia*, 96 L. T. 41. Sometimes for this purpose the memorandum declares the intention to be that the objects specified in each paragraph of the clause, or in each of three or four specified paragraphs, shall, except

* See per Bowen, L. J., in *Earl of Jersey* v. *Guardians of Poor of Neath*, 22 Q. B. D. 548.

where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company. These words are obviously intended to exclude or modify the rule, and the Court is bound to give effect to the intention thus indicated.*

There are other modes of excluding the rule occasionally adopted. For example, the paragraphs stating the several leading objects of the company sometimes commence with the words "as an independent object." In other cases, the first few paragraphs are expressed in very wide general terms, and any special object is made subordinate thereto and is sometimes expressed to be "without prejudice to the generality of the preceding objects." See further, as to interpretation, Company Precedents, Part I., Chap. VII.

General Concluding Words.

General words: effect thereof.

The objects clause commonly concludes with the words: "To do all such other things as are incidental or conducive to the attainment of the above objects or any of them": sometimes the words are even wider, *e.g.*, "all such other things as the company may think expedient." The latter words were used in *Peruvian Rail. Co.* v. *Thames Co.*, L. R. 2 Ch. 617, and were relied on by Lord Cairns as enlarging the company's powers, but it seems very doubtful whether they can really add anything to what the law already implies as incidental to the specifically enumerated objects. See *Baglan Hall Co.*, 5 Ch. 356; *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 712; *Taunton* v. *Royal Insur. Co.*, 2 H. & M. 135.

The operation of such general words should, it seems, be considered to be limited to such things as are naturally conducive to the objects specified, *i.e.*, doing something *bonâ fide* connected with the objects to be attained and in the ordinary course of business adapted to their attainment. *Joint Stock Discount Co.* v. *Brown*, 3 Eq. at p. 150; 8 Eq. 381; *Ashbury* v. *Riche*, L. R. 7 H. L. 653 (where the words were "necessary, contingent, incidental, or conducive"); 20 L. T. 361.

Indefinite Objects.

Sometimes it is contended that when the objects are widely stated there is no sufficient "statement" of the objects within the require-

* Yet, strange to say, in *Stephens* v. *Mysore Reefs Kanguudy Mining Co.*, (1902) 1 Ch. 745, a learned judge disregarded the operation of such words, on the ground that inasmuch as when applied to one particular paragraph they would be nonsense, they could not be held to apply to the other twenty-three paragraphs. Such a reading offends against the settled principles of construction, and cannot, it is apprehended, be maintained. [Possibly the only true limitation of the contention in the text is to be found in the *dictum* of Warrington, J., in *Pedlar* v. *Road Block Mines*, (1905) 2 Ch. 439: "It is not right to accept a construction which would virtually enable a company to carry on any business or undertaking of any kind whatever."—*Ed.*]

ments of the Act, but any objection of the kind is precluded by the certificate of incorporation, which the Act makes conclusive evidence of compliance with the preliminary conditions, one of which is a statement of the objects. However, where the objects are ambiguous, that construction should be preferred which brings them within reasonable limits; but if there is no ambiguity there is no room for restrictive construction.

Alteration of other Conditions in the Memorandum.

Rule of *ultra vires* does not apply to objects only.

In *Ashbury* v. *Riche*, L. R. 7 H. L. 653, the House of Lords was dealing primarily with the objects of a company, but the rule there established applies equally to the other conditions contained in the memorandum of association. Thus the name of the company (clause 1 of the memorandum) cannot be changed except as provided by sect. 8 of the Act (1908): the situation of the registered office (clause 2 of the memorandum) can only be altered by special Act of Parliament (but see *infra*, p. 243); and the capital of the company (clause 5 of the memorandum) can only be altered in the manner specified in the Act of 1908, sects. 41 and 46, and, where sect. 45 applies, can only be reorganised in the manner required by that section.

Protection of Outsiders dealing bonâ fide.

How rule affects outsiders.

These powers and disabilities of a company, as matters of public record, everyone is presumed to know, but an outsider dealing with a registered company in regard to a matter apparently within the powers of the company (*e.g.*, selling to it property or lending it money) is only bound to look to the memorandum and articles of the company, and if the transaction appears to be within the powers of the company, he may safely proceed; he is not bound to ascertain that the property or advance is really required for the purposes of the company. If he does not know of any intention to misapply the funds of the company or the money advanced, but acts *bonâ fide* in the matter, he is not prejudiced by any such misapplication (*Hackes* v *Eastern Counties Rail. Co.*, 5 H. L. C. 331; *Re Marseilles, &c. Rail. Co.*, 7 Ch. 161; *Young* v. *David Payne & Co.*, (1904) 2 Ch 609); nor is he concerned as to any irregularities of internal management. See *supra*, pp. 44, 45.

Company's Responsibility for Acts of its Agents.

Acts of agents of company: fraud, torts, &c.

An ingenious perversion of the doctrine of *ultra vires* has sometimes led to its being contended that, inasmuch as the funds of a company can be applied only to the promotion of its objects, they cannot be applied in making good damage caused by the fraud, or negligence, or misconduct of its agents and servants.

Company, when liable

This is a fallacy. There is nothing in the rule of *ultra vires* which in any way protects a company acting within its legitimate sphere from liability, to the extent of its assets, for the consequences of the acts of its agents, done by them on behalf of the company and in the course of the company's business. This liability is derived from the ordinary law of principal and agent, and it makes no difference whether the agent's wrongful act or default takes the form of malice, negligence, nuisance, or fraud. "The objects of the company," as Lord Cranworth said, in *Ranger* v. *G. W. Rail. Co.*, 5 H. L. C. 86, "can only be accomplished by the agency of individuals, and there can be no doubt that, if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail when the principal under whom the agent acts is a corporation." See also *Barwick* v. *English Joint Stock Banking Co.*, L. R. 2 Ex. 259; and *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 326, where Lord Selborne, referring to the observations of Willes, J., in delivering the judgment of the Exchequer Chamber, in *Barwick* v. *English Joint Stock Banking Co.*, *supra*, said: "The principle on which the company is held liable in such cases has already received full recognition from the House of Lords. It is a principle not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation in a matter within the scope of the corporate powers, or for an individual, and the decisions in all these cases proceed not on the ground of any imputation of vicarious fraud to the principal, but because—as was well put by Mr. Justice Willes in *Barwick's case*, L. R. 2 Ex. 259—'With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

Other cases of liability.

Hence, a corporation may be held liable for negligence (*Mersey Dock Trustees* v. *Gibb*, L. R. 1 H. L. 93; *Parnaby* v. *Lancaster Canal*, 11 Ad. & El. 223; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392, 423); for trespass (*Maund* v. *Monmouthshire Canal*, 4 M. & G. 452); for malicious prosecution (*Abrath* v. *G. E. Rail. Co.*, 11 App. Cas. 247; *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287; *Cornford* v. *Carlton Bank*, (1899) 1 Q. B. 392); for libel (*Whitfield* v. *S. E. Rail. Co.*, E. B. & E. 122); for assault and battery (*Butler* v. *Manchester Rail. Co.*, 21 Q. B. D. 207); for nuisance (*Rapier* v. *London Tramways Co.*, 69 L. T. 361); for fraud (*Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394). It may be indicted or fined for breach of duty imposed by the law. *Reg.* v. *Birmingham Rail. Co.*, 3 Q. B. 223; *Reg.*

v. *Tyler & Co.*, (1891) 2 Q. B. 588. It may be estopped by the acts of its agents. *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; *Bloomenthal* v. *Ford*, (1897) A. C. 156; *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841. See Chap. XXV. And finally, it may be held guilty of laches, and bound by acquiescence. *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218; *Nicol's case*, 29 C. D. 429. For although it may not have eyes and see what is going on, it has agents who can see. *Crook* v. *Corporation of Seaford*, 6 Ch. 551.

The extent of the company's liability is not limited because its constitution limits the amount of its expenditure. *Gallsworthy* v. *Selby Dam Commissioners*, (1892) 1 Q. B. 348; *United Service Co.*, L. R. 6 Ch. 212.

A company can ratify an act which has been done on its behalf without authority, provided the act is not *ultra vires*. *Grant* v. *Switchback Co.*, 40 C. D. 135; *Wilson* v. *West Hartlepool Co.*, 2 De G. J. & S. 475.

Statutory Powers independent of Memorandum.

Besides the powers given to a company by its memorandum of association, it has numerous other supplemental powers expressly given to it by the Companies Act, 1908. Of these the following may be mentioned:— Statutory powers independent of memorandum.

1. Power by sect. 8 to change its name in manner specified.
2. Power by sect. 13 to alter its articles. See p. 46.
3. Power by sect. 16 to have a common seal, and see sect. 79 as to official seals for foreign purposes.
4. Power by sect. 16 to hold lands notwithstanding Mortmain Acts.
5. Power by sect. 25 to keep a register of members which, by sect. 33, is made *primâ facie* evidence.
6. Power by sect. 35 to keep a colonial register. See further, p. 129.
7. Power by sect. 37 to issue share warrants to bearer.
8. Power by sect. 41 to increase its capital, consolidate its shares, convert shares into stock, and to re-convert stock into shares.
9. Power by sect. 41 to sub-divide its shares.
10. Power by sect. 45 to reorganise capital.
11. Power by sect. 46 to reduce its capital in various ways.
12. Power by sect. 59 to make part of its uncalled capital incapable of being called up, except in a winding-up.
13. Power by sect. 76 to contract without seal. See *infra*, p. 254.
14. Power by sect. 78 to appoint an attorney to execute deeds, &c. abroad.
15. Power by sect. 89 to pay, in certain cases, commissions for taking up, underwriting, or placing shares.

Statutory Duties.

Statutory duties.

Together with these powers the Act imposes on a company a number of duties and obligations of which the following may be mentioned. The company must:—

1. Supply to members on demand printed copies of its memorandum and articles, and of any special resolutions. (Sects. 18 and 70 of Act of 1908.)
2. Keep a register of members at its office (sect. 25) to be open for inspection. (Sect. 30.)
3. Make annual returns of its members, assets and liabilities, &c. to the Registrar. (Sect. 26.)
4. Give to the Registrar notices of increase of capital and consolidation of shares, &c. (Sects. 42, 43, and 44.)
5. Have a registered office (sect. 62), and notify to Registrar situation and change of situation. (Sect. 62.)
6. Put up the name of the company outside its office and place of business, and insert it in all its business publications, &c. (Sect. 63.)
7. Hold one general meeting every year within fifteen months of the last. (Sect. 64.)
8. If registered after 31st of December, 1900, hold the statutory meeting not less than one month after and not more than three months after it becomes entitled to commence business. (Sect. 65.)
9. Register special and extraordinary resolutions. (Sect. 70.)
10. Keep at its registered office a register of its directors or managers, and send a copy to Registrar and notify changes. (See sect. 75.)
11. File its prospectus (if any) with the Registrar, or statement in lieu thereof. (Sects. 80, 82.)
12. In issuing a prospectus, comply with sect. 81.
13. Where sects. 85 and 87 apply, refrain from allotting shares or commencing business until the requirements of those sections have been satisfied.
14. Make returns of allotments to the Registrar within one month. (Sect. 88.)
15. File contracts and make returns where shares are allotted for a consideration other than cash. (Sect. 88.)
16. State in every balance sheet the amount paid by way of underwriting commission until written off. (Sect. 90.)
17. Have certificates of shares ready for delivery within two months. (Sect. 92.)
18. Register with the Registrar of Joint Stock Companies all mortgages and charges to which sect. 93 applies.

19. Keep a register of mortgages and charges open for inspection by shareholders, creditors, and the public. (Sects. 100, 101.)
20. Comply with sects. 112 and 113 as to audit.
21. Keep up the number of the members to seven, or in the case of a private company to two. See sect. 115, *supra*, p. 58.

Alteration of Objects.

In keeping a company strictly to the objects defined in its memorandum of association the Legislature intended to protect, not only investors and shareholders, but also the outside public, and more particularly creditors. Per Lord Cairns, *Ashbury* v. *Riche*, L. R. 7 H. L. 667. And in this, it was pursuing a just and beneficial policy. But there was a sensible inconvenience attaching to the unalterability of a company's memorandum in respect of the objects specified in it. Not, indeed, that the memorandum was ever, strictly speaking, unalterable. It was always possible to alter the objects by special Act of Parliament, and in many cases this was done; but obtaining a private Act was an expensive and dilatory process. The only other alternative was to reconstruct—a course, again, involving inconvenience and dislocation. This hindrance to the legitimate expansion of a company's business the Legislature recognized, and in the Companies Memorandum of Association Act, 1890, the provisions of which are now embodied in sect. 9 of the Act of 1908, it administered a qualified relief, subject to certain simple and easy conditions. This Act provided that a company registered under the Companies Act, 1862, might by special resolution alter its memorandum with respect to its objects, and empowered the Court to confirm the alteration where it appeared that the alteration was required to enable the company—

Extension, when allowable.

The Act of 1890.

(a) To carry on its business more economically or more efficiently; or

(b) To attain its main purpose by new and improved means; or

(c) To enlarge or change the local area of its operations; or

(d) To carry on some business or businesses 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 or deed of settlement.

The Act contained various provisions designed for the protection of creditors, including debenture holders, and also of shareholders whose rights may be affected by the proposed alteration. The legislative facilities thus offered to companies for enlarging the scope of their business objects have been largely made use of.

Instances of companies availing themselves of the Act.

Thus a considerable number of companies have obtained power to raise money by debentures and perpetual debenture stock. *Reversionary Interest Society*, (1892) 1 Ch. 615; *Law Reversionary Interest Society*, May, 1893; *P. Phipps & Co.*, July, 1897; *Union Rolling Stock Co.*, January, 1894; *In Re Empire Trust*, 64 L. T. R. 221.

The area of a company's operations has been enlarged in several cases. *Indian Mechanical, &c. Co.*, (1891) 3 Ch. 538; *London Joint Stock Bank*, November, 1892; *R. Bell & Co.; Crompton & Sons.*

Several banks have largely extended their objects. *London and Midland Banking Co.*, 1891; *London Joint Stock Bank*, November, 1892; *York City and County Banking Co.*, 1894; *Liverpool and District Banking Co.*, 1896; *London and Westminster Bank*, 1897.

Other companies have been enabled to acquire other business concerns of a like nature (*London Joint Stock Bank*, November, 1892; *Norwich Union*, 1893; *Leicestershire Banking Co.*, June, 1895), or enter into arrangements for joint working. *Tower Company, Limited.*

Investment companies have been allowed to enlarge the scope of their investments (*Re Foreign and Colonial Government Trust*, (1891) 2 Ch. 395; *Government Stock Co.*, (1892) 1 Ch. 597); insurance companies to extend their objects so as to take in cognate businesses (*Re Alliance Marine*, (1892) 1 Ch 300: *National Boiler*, (1892) 1 Ch. 306); guarantee companies to extend their business to indemnity, burglary, &c. *Law Guarantee*, 1895; *British Empire Co.*, 1897; *Equity and Law Life*, 1897; *North of England Association*, (1900) 1 Ch. 481. In some cases objects have been so extended as to allow the promotion of foreign companies and holding shares in them. *Ocean Accident Co.*, July, 1893; *Crompton & Sons.* An unlimited company having neither shares nor capital has been allowed to alter its memorandum. *North of England Steamship Insurance Co., In re*, (1900) 1 Ch. 481. These are only a few instances out of many alterations sanctioned by the Court under the Act.

The Court rarely refuses to confirm a resolution for alteration of objects. If the alterations of the objects sanctioned are such as render the name of the company misleading, the Court is in the habit of requiring the company's name to be changed so as to express the alteration in its aims or sphere of operations. *Foreign and Colonial Government Trust Co., supra; Government Stock Investment Co.*, (1892) 1 Ch. 597; *Indian Mechanical, &c. Co., supra; Alliance Insurance*, (1892) 1 Ch. 300; *National Boiler Insurance Co.*, (1892) 1 Ch. 306. The Court may also add words to the resolution so as to limit the extended objects. *Spiers & Pond*, W. N. (1895) 135; *Fleetwood Estate Co.*, W. N. (1897) 20. But in *In re Jewish Colonial Trust* (*Juedische Colonialbank*), (1908) 2 Ch. 287, the Court refused to sanction an alteration involving the abandonment of objects of the company of a fundamental character,

and confining them (from a world-wide) to a limited local area. And in *Re Cyclists Touring Co.*, (1907) 1 Ch. 269, the Court refused to sanction an alteration extending the objects of a company formed to cater for, protect and assist cyclists so as to include the catering for and assistance of motorists, the latter being one of the dangers against which cyclists needed protection. In other cases the power which the Act contains (sect. 1 (1), now sect. 264 of 1908), enabling a company regulated by deed of settlement to adopt a memorandum and articles, has been exercised. The following are a few instances within the writer's own experience: *Birmingham and Midland Bank; Law Union and Crown Insurance Co.; Equity and Law Life Assurance Society; Manchester and District Banking Co.; London and Westminster Bank.*

Adoption of memorandum and articles by companies regulated by deed of settlement.

In *Consett Iron Co.*, (1901) 1 Ch. 236, a learned judge expressed doubts whether the Court has jurisdiction under the Act to sanction an alteration which amounts to a re-writing of the objects in modern form, and accordingly in that case the old objects were left, whilst five times as much matter (in the shape of new objects in modern form) was added. Apparently, therefore, the doubt is confined to the question whether the Court has jurisdiction to sanction an alteration which introduces a series of new objects in modern form *instead* of the old objects. This question has been answered again and again in the affirmative by the High Court. Thus, Henn Collins, J., in 1891, in the *Birmingham and Midland Bank, Limited;* Kekewich, J., in 1893, in the *Law Union and Crown Insurance Co., Limited;* North, J., in 1894, in the *York City and County Bank, Limited;* North, J., in 1895, in *Leicestershire Banking Co., Limited;* Chitty, J., in 1896, in *Equity and Law Life Assurance Society;* Vaughan Williams, J., in 1896, in the *Union Steamship Co., Limited;* North, J., in 1897, in the *London and Westminster Bank, Limited*, and in *Wakefield and Barnsley Union Bank, Limited;* Stirling, J., in 1897, in *British Plate Glass Co., Limited;* Byrne, J., in 1899, in *Halifax Joint Stock Bank, Limited;* Farwell, J., in 1901, in *Halifax Commercial Banking Co., Limited;* and Kekewich, J., in 1901, in *Carlisle and Cumberland Banking Co., Limited*, sanctioned an alteration which substituted a complete new set of objects in modern form for the old concise and imperfect objects. See also *New Westminster Brewery*, (1911) W. N. 217, and *Re Anglo-American Telegraph Co.*, (1911) W. N. 248. And it is to be noted that the Act empowers the company by special resolution to "alter" its objects and not merely to "extend" or "add to" them.

Where the company proposed to adopt new powers of unlimited extent the alteration was only permitted subject to modification. *Re John Brown, Ltd.*, (1914) W. N. 431.

The Act applies to a company formed under the Companies Act,

1856. *Copiapo Mining Co., In re*, 6 Manson, 320; and see *Re Euphrates and Tigris Steam Navigation Co.*, (1904) 1 Ch. 360. And see sect. 246 of the Act of 1908.

Where a company formed not for purposes of gain, without the word "limited," desires to alter its objects, it must first submit the proposed alteration to the Board of Trade. *St. Hilda's Incorporated College, Cheltenham*, (1901) 1 Ch. 556.

Petition to obtain Sanction of Court.

How to obtain sanction of Court.

The procedure to obtain the sanction of the Court is quite simple. A petition is presented, and, upon summons in chambers, directions are given as to advertising the petition and as to notice to debenture holders (if any) (*Munster and Leinster Bank, In re*, (1907) 1 Ir. R. 237, M. R.); and in the course of a short time, generally about a fortnight, the petition comes on again, and the order, if the Court approves, is made. A copy of this order is filed with the Registrar, who gives a certificate, and the transaction is then complete.

The jurisdiction under the Act is still vested in the judges of the Chancery Division (*Islington Electric Supply Co.*, 93 L. T. N. 31), but this includes the judge to whom winding-up is assigned *Mining Shares Co.*, (1893) 2 Ch. 660. As to transfer to the County Court, see *Rugeley Gas Co.*, W. N. (1899) 127. In the case of a company which has been allowed to dispense with the word "limited," the approval of the Board of Trade should be obtained to the proposed changes. *St. Hilda's Incorporated College, Cheltenham*, (1901) 1 Ch. 556. Advertisement of the order will not as a rule be required. *Lancaster Banking Co.*, W. N. (1897) 3. For the Act contains no enactment corresponding to sect. 51 (3) as regards reduction.

CHAPTER VII.

CAPITAL.

Capital and division into shares of fixed amounts.

EVERY company limited by shares has a capital. This capital—as one of the essential features in the company's constitution—is to be mentioned in the memorandum of association, and the capital so mentioned is to be "divided into shares of a certain fixed amount." (Sect. 8 (1908).) What the amount shall be, and into what shares it shall be divided is left to the subscribers to the memorandum of association to determine; but, when determined, it constitutes one of the fundamental conditions of the company's constitution (see sect. 7 of the Act of 1862), and, accordingly, can only be altered in the manner provided for in the Act. See sects. 41, 45 and 46.

The capital is usually fixed at some round figure, proportioned to the requirements of the company in the early stages of its existence, *e.g.*, 1,000*l.*, or 20,000*l.*, or 50,000*l.*, or 100,000*l.*, or 500,000*l.*, or 1,000,000*l.* Thus, suppose the company to be formed to acquire a property for 100,000*l.*, to be satisfied as to 50,000*l.* by paid-up shares, and as to the balance by cash, and that it will want 50,000*l.* for working capital: the initial capital will, in such cases, be fixed at—say 150,000*l.*

As to the amount of the shares, it is usually fixed at 1*l.*, or 5*l.*, or 10*l.* Sometimes the amount is less—10*s.*, 5*s.*, 2*s.* 6*d.* or even as low as 1*s.*

Preference and other special Classes of Shares.

Definition of rights in memorandum.

Not unfrequently, the capital is, by the memorandum and articles of association, divided not only into shares of different amounts, but into different classes of shares with different rights attached to them, *e.g.*, into preference and ordinary shares or preference, ordinary, and founders' shares. When this is the case, it is not uncommon to define in the memorandum some of the rights attached to the different classes of shares respectively, or to some one class of them.

The object of so defining the rights of shareholders in the memorandum is to fortify the position of the class, for rights once *unconditionally* attached by the memorandum to a particular class of shares cannot be altered or infringed. *Ashbury* v. *Watson*, 30 C. D. 376. That case decided that the specification in the memorandum of the rights attached to a class of shares, is to be regarded, *primâ facie*, as one of the "conditions" referred to in sect. 12 of the Act of 1862

and in sect. 7 of the Act of 1908, and, therefore, made unalterable. But if the rights are only conditionally attached by the memorandum of association, *e.g.*, if though specified therein they are accompanied by a clause in the memorandum providing for alteration, such a specification does not take effect as an unalterable condition: the power to alter contained in the same document is effective. *Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87; and see *Underwood* v. *London Music Hall, Ltd.*, (1901) 2 Ch. 309.

General clause in memorandum as to division in classes.

In many—perhaps it would be correct to say in most—cases the form of the clause in the memorandum is to the effect that "the shares in the capital for the time being, whether original or increased, may be divided into several classes with any preferential, special, qualified, or deferred rights, privileges, or conditions attached thereto," and, in such case, the power to attach preferential rights is clear.

Memorandum silent, but power in original articles.

In other cases, now less common than formerly, the memorandum is wholly silent as to the issue of special classes of shares; but even in such cases it was long since held that the articles, as originally framed and registered, could effectually divide, or give power to divide, the capital into different classes of shares with preferential and other rights attached. *Harrison* v. *Mexican Rail. Co.*, 19 Eq. 358; *Re South Durham Brewery Co.*, 31 C. D. 61. This conclusion was not arrived at without difficulty, for the decisions in *Hutton* v. *Scarborough Cliff, &c. Co.* ((1865), 4 De G. J. & S. 672; and (No 2) 2 Dr. & Sm. 521, *supra*, p. 47), both appeared to point to the conclusion that, where the memorandum of association was silent as to any distinctions between shareholders, there was an implied condition of equality, and, if so, it was not easy to see how (looking to sect. 12 of the Act of 1862 (sect. 7 of 1908)) the articles could modify this condition. However, Jessel, M. R., in *Harrison* v. *Mexican Rail. Co.* (19 Eq. 358), held that the articles could for this purpose explain, though they could not contradict, the memorandum, and, although Kay, J., subsequently decided the contrary in *Re South Durham Brewery Co.* (*supra*), that decision was reversed on appeal.

Where memorandum and articles are both silent as to classes of shares.

It is, however, not uncommon to find that neither the memorandum nor the articles, as originally framed, give power to issue preference or other special classes of shares. In this case, memorandum and articles being both silent, the following questions sometimes arise:—(1) Can the company issue part of the shares in its original capital with preferential or special rights attached? (2) Can the company issue new shares created upon an increase of capital with preferential or special rights attached?

Views formerly prevailing.

At one time it was generally considered that both these questions must be answered in the negative.

As to the first question, it was decided by Lord Westbury, L. C., that when both the memorandum and articles were silent as to pre-

ference shares, a company could not issue shares in its original capital as preference shares, at any rate, without altering its articles; and, further, his Lordship expressed doubt whether even by altering its articles, the power could be obtained (*Hutton* v. *Scarborough Cliff, &c. Co.*, 4 De G. J. & S. 672); and the decision of Kindersley, V.-C., in *Hutton* v. *Scarborough Cliff, &c. Co.* (No. 2), 2 Dr. & Sm. 520, 521, went far to confirm this doubt. And as to the second question, it was expressly answered in the negative by the decision of Kindersley, V.-C., in the case last mentioned.

But this decision has now, as appears above (p. 48), been overruled by the Court of Appeal in *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361, and, accordingly, the correct answer to the second question is "yes, by altering its articles so as to take the requisite power." The law as now settled

Moreover, the grounds given by the Court of Appeal for this decision go far to show that the same answer should be given to the first question; for it is now abundantly clear that silence in the memorandum does not amount to an implied condition of equality as between the shares in the capital.

Cotton, L. J., in *Guinness* v. *Land Corporation of Ireland*, 22 C. D. 349, 377, said: "In reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividend arises, but by the implication which the law raises as between partners, unless their contract has provided to the contrary." And in a later case (*British Co.* v. *Couper*, (1894) A. C. 399), Lord Macnaghten said: "I agree that the equality of shareholders as regards dividend is not an implied condition of the memorandum; but I doubt whether it is necessary to have recourse to the doctrine of partnership. It seems to me that if the sum of the interests of persons concerned in a joint venture is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, expressed or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares, as regards dividends and everything else, must be equal."

And, lastly, *Andrews* v. *Gas Meter Co.*, *supra*, was decided in the Court of Appeal on grounds which are inconsistent with the proposition that silence gives rise to an implied condition of equality in the memorandum.

There being, then, no implied and therefore unalterable condition of equality in the memorandum, it follows that an alteration of the articles can give the requisite power to issue part of the original shares as preference shares. This conclusion is not at variance with the decision in *Hutton* v. *Scarborough Cliff Co.* (4 De G. J. & S., No. 1, *supra*), for in that case the company was seeking to issue preference

shares, although neither its memorandum nor its articles gave power to issue the same, and although its regulations expressly, in effect, provided that all dividends were to be paid *pari passu*. It is only contrary to the doubt expressed by Lord Westbury—a doubt which was nothing more than a dictum. As to altering the rights attached to classes of shares, see *infra*, p. 90.

Cumulative Dividends.

Cumulative and non-cumulative dividends.

In defining the rights of holders of preference shares in regard to dividends, it is necessary to determine whether a dividend payable to them is to be cumulative (*i.e.*, whether, where the profits of any year are insufficient to pay the preference dividend, the deficiency is to be made good out of the profits of subsequent years), or is to be non-cumulative (*i.e.*, payable as regards each year out of the profits of that year only).

Primâ facie where the clause defining the preferential rights declares that the preference shares are to be entitled to a preferential dividend at a specified rate per cent., the dividend is cumulative. See *Henry* v. *The Great Northern Co.*, 1 De G. & J. 606; *Webb* v. *Earle*, 20 Eq. 557; *Foster* v. *Coles*, 22 T. L. R. 555; but for clearness the word "cumulative" is sometimes inserted in the definition of rights, *e.g.*, a fixed cumulative preferential dividend, &c. This preveuts any mistake.

If the dividend is to be non-cumulative, the clause must be carefully framed accordingly, *e.g.*, it should say that "the preference shares are to confer the right to receive out of the profits of each year a preferential dividend for such year" at the specified rate per cent.; or the definition may declare that the profits of each year available for dividend are to be applied first to the payment of a dividend for such year on the preference shares at the specified rate, and that the surplus shall be applicable to dividend on the other shares. All that is necessary is that it should appear with sufficient clearness that the preferential dividend for each year is to come only out of the profits of that particular year. If this intention is plain, the Court will give effect to it even though imperfectly expressed. *Staples* v. *Eastman Photographic Materials Co.*, (1896) 2 Ch. 303. In addition to a fixed preferential dividend, preference shares are sometimes given the right to participate in surplus profits. But they have no such right unless it is expressly given to them by the articles. *Will* v. *United Lankat Plantations*, (1914) A. C. 11; *National Telephone Co.*, (1914) 1 Ch. 755.

As to payment of arrears of preference dividend in the winding-up, see *Crichton's Oil Co.*, (1901) 2 Ch. 184; *W. J. Hall & Co.*, (1909) 1 Ch. 521; Company Precedents, 10th ed., Part I., p. 817.

These are only some of the special rights and privileges attached to preference shares.

Preference as to Capital.

Preference as to capital.

The right of a preference shareholder is *primâ facie* confined to a preferential dividend. Apart from special provisions in the articles, he is not entitled to have his capital on a winding-up paid off in priority to the other shareholders (*London India Rubber Co.*, 5 Eq. 519); but he is entitled, after repayment of all the paid up capital, to participate in the surplus assets of the shareholders in proportion to the nominal amount of the shares. *Re Bridgwater Navigation Co.*, 14 A. C. 525.

Preferential rights as to capital may be and often are attached. Then the clause runs that the preference shareholders are to be entitled not only to a preferential dividend but to priority as regards capital in the winding-up. If so, the capital paid up on the preference shares in accordance with the clause must, in a winding-up, be paid off out of the surplus assets before the ordinary shareholder can get anything. *Re Bangor, &c. Co.*, 20 Eq. 59. But the holders of preference shares are not then entitled to participate in any surplus capital. *Re National Telephone Co.*, (1914) 1 Ch. 755 (not following *Espuela Land Co.*, (1909) 2 Ch. 187, having regard to the decision of the House of Lords in *Will* v. *United Lankat*, (1914) A. C. 11).

These are the general rules. But the rights of shareholders *inter se* must of course depend on the true construction of the documents. See *infra*, p. 416.

Founders' or Deferred Shares.

Founders' or deferred shares.

Besides preference and ordinary shares it is not at all uncommon, though it is less common than it was, to issue what are called founders' or deferred shares. These shares are usually mentioned in the memorandum of association as part of the capital, *e.g.*, capital 100,000*l.*, in 100,000 shares of 1*l.* each, whereof 100 shall be founders' shares. When this is the case, the memorandum generally defines the rights attaching to such founders' shares, *e.g.*, that they shall confer on the holders the right to 10 per cent. of the surplus profits of the company for each year, which remain after paying a cumulative dividend at the rate of 10 per cent. on the capital paid up on all the other shares for the time being issued. This is one very common clause, but the rights attached to founders' shares vary considerably. Sometimes there are 10,000 or more of 1*s.* each, and sometimes it is provided that each shall confer the same right as regards dividend, voting and in a winding up as if it were a fully paid-up ordinary share of 10*l.* (or 1*l.*). Founders' shares are mostly subscribed for by the vendors and promoters, but they are also sometimes used by way of bonus to attract subscribers for the ordinary or other shares.*

* Founders' shares offered as a bonus must not of course be issued without consideration or at a discount.

A prospectus must, under sect. 81, state the number of founders' or management or deferred shares, if any, and their rights and interests in the property and profits and their voting rights, unless sub-sect. 7 applies.

Increase of Capital.*

Increase of capital.

To increase the capital of a company limited by shares is to alter one of the conditions of its memorandum, but sect. 41 of the Act of 1908 (which takes the place of sect. 12 of the Act of 1862) empowers a company limited by shares, "if so authorized by its articles," to alter the conditions of its memorandum so as "to increase its share capital by the issue of new shares of such amount as it thinks expedient." It is to be noted that the authority to increase may be unlimited and/or limited, and can be exercised from time to time (see sect. 32 of the Interpretation Act, 1889), but the Act does not say how the company may exercise the authority. It is not required that the increase shall be by special resolution, or extraordinary resolution, or by ordinary resolution. It follows that the power can be exercised on the company's behalf in the manner indicated in its articles, and whether "by special resolution," or "by extraordinary resolution," or "by resolution of a general meeting," or "by resolution of the directors," or "by the managing director," or "by the directors with the sanction of a special resolution" (Table A. of 1862), or "with the sanction of an extraordinary resolution" (Table A. of 1908), or otherwise. See *Campbell's case*, 9 Ch. 1.

In this respect the authority to increase is like the authority to convert shares into stock, or to consolidate shares (sect. 41), or the power to issue share warrants to bearer (sect. 37), or the power to adopt an official seal (sect. 79), or the power to pay interest during construction (sect 91). In all these cases the company can, "if so authorized by its articles," do the thing authorized in the manner authorized, and whether by special resolution, resolution of the directors or otherwise, and accordingly where the articles provide merely that "the company may increase its capital," without saying how, and contain the general clause (Table A., 71) enabling the directors to act generally on the company's behalf, the directors can exercise the power of increase. *Campbell's case, supra.*

The authority to increase is to be contrasted with the authority to reduce (sect. 46), and to sub-divide (sect. 41 (d)), which authorities can only be exercised *by special resolution*, and if the articles do not contain the requisite authority they must be amended by special resolution, and then the power has to be exercised by subsequent special resolution.

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* As to control of new issues by the Treasury during the War, see Appendix, p. 632.

But two successive special resolutions can be passed in three meetings. *John Crossley & Sons* (1892), W. N. 55.

Where the articles do not contain the requisite authority to increase they should be amended by special resolution inserting the requisite authority. But a short cut may be taken, for in such case if the company passes a special resolution authorizing the creation and issue of the desired new shares, that will in effect not only give the authority to increase required by sect. 41, but *uno flatu* enable the directors to exercise that authority. It was so held by a full Court of Appeal in *Campbell's case*, L. R. 9 Ch. 1 at p. 21 (Lord Selborne, L. C., and James and Mellish, L. JJ.), differing in opinion from the Exchequer Chamber.

Where the articles of association enabled (clause 53) the company in general meeting to increase its capital, and by special resolution the words "by resolution of the directors" were substituted for the words "in general meeting," but the articles also contained a clause headed "Preference Shares," authorizing the issue of new shares with preferential or special rights, and generally on such terms as the company by resolution of a general meeting should declare, it was held that notwithstanding the alteration of clause 53, and that the new shares were issued as ordinary shares, clause 59 in effect precluded the directors from issuing the same without the sanction of a general meeting. *Mosely* v. *Koffyfontein Co.*, (1911) A. C. 409. One would have thought that the object of clause 59 was to provide that no shares should be issued with any preferential or special rights without the sanction of the company in general meeting, and not to control or limit the directors' power to issue new as ordinary shares, especially looking to the alteration made in clause 53, and to the fact that sect. 41 of the Act authorizes the company "to increase its capital by the issue of new shares," so that really, as pointed out by Lord Selborne in *Campbell's case*, *supra*, there is no increase of capital until the new shares are issued. The decision is commonly thought to have defeated the manifest intention.*

What Classes of New Shares may be created.

Shares should be preference or ordinary, of what class.

Before answering this question it is necessary to make sure that there is nothing in the memorandum to restrict or limit the company's choice, *e.g.*, that the memorandum does not provide that no preference shares shall be issued, or that specified first preferential rights shall be irrevocably (p. 81, *supra*) attached to a particular class of shares in the original capital, or that shares created upon an increase of

* This criticism was directed to the decision of the Court of Appeal ((1911) 1 Ch. 73). The House of Lords has subsequently affirmed the decision.

ca. .1 shall be deferred shares or ordinary shares only. Any such condition or provision, if contained in the company's memorandum and unqualified, must in nowise be contravened (*Ashbury* v. *Watson*, 30 C. D. 376; *Re Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87), but, subject as aforesaid, it is now settled, by the decision in *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361, that it is open to the company, when the memorandum of association contains nothing to the contrary, to create and issue new shares with preferential or other special rights attached.

Thus, where the memorandum of association of a company contained a statement that the original preference shares therein mentioned should confer a right to a fixed cumulative preferential dividend, but also contained a power for the company to issue new shares on such special conditions as to priority or postponement, either for dividends or repayment of principal, as the company might determine, the company was held to have power to issue new preference shares to rank *pari passu* with the original preference shares. *Underwood* v. *London Music Hall, Limited*, (1901) 2 Ch. 309; *Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87.

The principle of the decision in *Andrews* v. *Gas Meter Co.*, *supra*, appears to be that "the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are therefore matters which, unless provided for by the memorandum, as in *Ashbury* v. *Watson*, *supra*, may be determined by the company from time to time by special resolution pursuant to sect. 50 of the Act" (see sect. 13 of Act of 1908); and there is nothing inequitable in this readjustment of rights or interests, for the shareholders must be taken to have assented to it when they joined the company.

Assuming, then, that there is nothing in the memorandum to the contrary, the question as to what class of shares shall, upon a creation of fresh capital, be selected for increase, will turn on the special needs and circumstances of the company and on the condition of the market. According to the circumstances they will be pre-preference shares, preference shares, second preference shares, ordinary shares, or deferred shares.

As to the various rights commonly attached to preference shares, see *supra*, p. 84.

Notice of Increase to Registrar.

Notice of increase to registrar.

Where the capital is increased, notice thereof must be given to the Registrar within fifteen days from the date after the passing, or, in the case of a special resolution, of the confirmation of the resolution authorizing the increase; in default the company and every director and

manager will be liable to a penalty of 5*l.* per day. See sect. 44. Upon an increase of capital, duty has to be paid as provided for in Table B in the First Schedule to the Act of 1908, and also (5*s.* per 100*l.*) as provided for by sect. 7 of the Finance Act, 1899, and by sect. 5 of the Revenue Act, 1903.

Consolidation of Shares.

Consolidation of shares.

Sect. 41 of the Act of 1908 also gives power to consolidate shares. This power can, like the power to increase the capital, be made exercisable by ordinary, extraordinary, special, or other resolution of a general meeting, or by the directors. See *supra*, p. 86. And even where there is no power in the articles, it appears, on the principles of *Campbell's case*, 9 Ch 1, that the power may be exercised by a special resolution without first altering the articles. It is not very common to consolidate shares. It is more common to sub-divide them under the power contained in the same section. The tendency of modern business is to reduce, not increase, the denomination of shares.

Stock.

Conversion of shares into stock.

The conversion of paid-up shares into stock, also authorized by sect. 41 of the Act of 1908, may be effected either by special resolution or otherwise in such manner as the regulations provide. Such a conversion can only be made where the shares are paid-up shares. Notice of conversion must, as in the case of an increase of capital, be given to the registrar. (Sect. 42.) A considerable number of companies have availed themselves of this power, and have converted their shares into stock. One of the conveniences of stock, besides its divisibility, is that it becomes no longer necessary in a transfer to specify all the numbers of the various shares comprised in the transfer. A transfer is merely of so much stock. Under sect. 41 stock can be re-converted into shares in the manner provided by the articles. Stock cannot be issued direct by the company; but, if it is so issued, this irregularity can be waived. Where, however, a company purported to issue bonus stock and partly paid stock, these two issues were held to be entirely void, the holders had no rights, and calls could not be made on them. *Re Home and Foreign Investment Co.*, (1912) 1 Ch. 72.

Sub-division of Shares.

Sub-division of shares.

Sub-division of shares is provided for in sect. 41 of the Act of 1908, which takes the place of sect. 21 of the Act of 1867. Prior to this enactment it was *ultra vires* to sub-divide shares. *Rimington's case*, 2 Ch. 714; see also *Sewell's case*, 3 Ch. 131. A power to sub-divide must be contained in the articles and must be

exercised by a *special* resolution. Hence, unlike increase of capital (see *Campbell's case*, p. 87, *supra*), if there be no power in the regulations, two successive special resolutions must be passed (1) altering the articles by inserting the power, and (2) exercising the power by effecting the sub-division. See *West India, &c. Steamship Co.*, 9 Ch. 11; and *Patent Invert Sugar Co.*, 31 C. D. 166. Notice of a special resolution to sub-divide shares must be given to the registrar. (Sect. 42.) The articles sometimes contain power on sub-division to attach a preference to some of the shares resulting from the sub-division as against the other shares; and, having regard to the decision in *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361, it would seem that such a power can be inserted in the articles, even though not appearing in the articles as originally framed.

Alterations of Preferential and Special Rights.

Alteration of rights of special classes of shareholders.

Where preferential or other special rights are by the memorandum of association unconditionally attached to a class of shares, such rights can only be altered by virtue of some power reserved in that memorandum (*Ashbury* v. *Watson*, 31 C. D. 371; *Underwood* v. *London Music Hall, Limited, supra; Re Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87), or by virtue of a scheme sanctioned by the Court under sect. 120 of the Act, or under sect. 45 of the Act. See p. 100, *post*.

If the rights are attached by the articles only, the position is altogether different, and there is greater scope for alteration. This is a matter of great importance, for after issuing preference shares it is not uncommon to find it desirable to alter the rights attached thereto, *e.g.*, by sanctioning the creation of pre-preference shares, or of further preference shares ranking *pari passu* with the original issue, or by reducing the rate of the preferential dividend.

It was formerly considered that such alterations could only be made where the articles in force when the shares were issued gave the requisite power. Thus in *Harper* v. *Paget*, where preference shares had been issued and it was proposed to issue further preference shares ranking *pari passu* with them, Jessel, M. R., granted an injunction to restrain such issue. This case is mentioned in *Griffith* v. *Paget*, 5 C. D. 895. And see the Order, Company Precedents, Part I. 1408. But having regard to *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361, it seems doubtful whether this view can be supported. There is, of course, no question that a clause in the articles, in force at the time when the shares were being issued, authorizing a modification of the rights attached thereto, *e.g.*, with the sanction of a three-fourths majority in value of the holders of the shares of the class, is effective; but the question is whether such a clause cannot, under sect. 13 of the Act of 1908, which takes the place of sect. 50 of the Act of 1862, be introduced into the articles so as to

have full effect; and, looking to the decision above referred to, it would seem that this question should be answered in the affirmative: the concluding words of sect. 13 of the Act point clearly to the conclusion that such a clause, if inserted, would be as valid as if contained in the articles of association as originally registered. See *National Dwellings Co.*, 78 L. T. 144, North, J.

Whether a company, which has issued preference shares with rights only attached by the articles, can, without inserting any such clause in its articles, alter by special resolution the rights so attached is a still more difficult question; thus, if the company has issued 10,000 preference shares and 100,000 ordinary shares, would a special resolution reducing the dividend on the preference shares and carried by the votes of the holders of the ordinary shares be effective? Probably such interference with the rights of a class by a majority proposing to benefit themselves at the expense of the class so dealt with would be restrained as unfair and oppressive, and an abuse of the power to alter articles. See *Menier* v. *Hooper's Telegraph Co.*, 9 Ch. 350; and see, per Romer, L. J., *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

Reduction of Capital.

Reduction of capital.

The Companies Act, 1862, made no provision for reduction of capital. The theory of that Act was that the limited capital, the creditors' only fund, was not to be capable of reduction otherwise than in the prosecution of the company's objects; but the working of the Act showed that there were many cases where capital could be reduced without any injustice to creditors, and where commercial convenience required that it should be reduced. In these cases the Companies Acts of 1867 and 1877 relaxed the severity of the rule against reduction, but they by no means abolished it. On the contrary the legislature has, throughout these Acts, in granting a qualified right of reduction to companies, studiously safeguarded the rights of creditors by stringent conditions and every precaution in its power. The Act of 1908, sects. 46—56, re-enacts the provision for reduction.

Power to Reduce.

Power to reduce.

In order to effect a reduction of capital, the articles of the company must contain power to reduce. See sect. 46. Power in the memorandum is not effective. *Re Dexine Patent Packing and Rubber Co.*, 88 L. T. 791.

If there is no such empowering clause in the articles, they must be altered by special resolution, and subsequently a further special resolution must be passed to reduce the capital in the manner proposed.

See *Patent Invert Sugar Co.*, 31 C. D. 166; *Oregon Mortgage Co.* (1910), S. C. 964, Court of Session, and p. 90, *supra*. The statutory power cannot be fettered. *Ayre* v. *Skelsey's Adamant Cement Co.*, T. L. R. 587. The resolution for reduction must state with sufficient clearness what is to be done in the way of reduction. It need not purport in terms to alter the memorandum of association (*Campbell's case*, 9 Ch. 1), but it must show what is proposed to be done, *e.g.*, "that the present capital of 10,000*l.*, divided into 1,000 shares of 10*l.* each, be reduced to 5,000*l.*, divided into 1,000 shares of 5*l.* each, and that such reduction be effected by cancelling the present liability of 5*l.* per share, and reducing the nominal amount of each share to 5*l.*," or, "that the capital of the company be reduced from 10,000*l.*, divided into 1,000 shares of 10*l.* each, to 5,000*l.*, divided into 1,000 shares of *l.* each, and that such reduction be effected by cancelling paid-up capital which has been lost or is unrepresented by available assets to the extent of ——*l.*, and by reducing the amount of the shares from 10*l.* to 5*l.*," or, "that capital of the company be paid off to the extent of 5*l.* per share, upon the footing that the same may be called up again as and when required in accordance with the regulations of the company."

Modes of Reduction.

Modes of reduction.

There are several modes of reducing capital. Some of these can be carried out without the sanction of the Court; for others the sanction of the Court is required.

The general rule or principle of the Act is, that the capital of a company is not to be reduced without the sanction of the Court in any case where the rights of creditors are affected, and for this reason: The creditors of a company are invited to deal with the company on the footing of its registered capital being a reality, of the registered shareholders being liable for the unpaid portions of their shares, and of the company having received the paid-up capital which appears in its register and in the returns to the Registrar of Joint Stock Companies, and if this liability to pay up were released or the paid-up capital returned to shareholders, or the creditors' security in any other manner given away or tampered with, it would seriously alter their position. *Trevor* v. *Whitworth*, 12 App. Cas. 409. The company's capital is embarked in its business and it must run the risks of that business. It may be diminished. It may be lost. Of that persons dealing with the company are aware and take the chance, but they have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by any return of any part of it to the shareholders. Per Lord Herschell, *Trevor* v. *Whitworth*, &c., *supra*.

It will be convenient to deal with reduction under two heads, viz.:—

1. Reduction not requiring sanction of Court.
2. Reduction requiring sanction of Court.

1. Reduction of capital without the sanction of the Court is allowable in the following cases:— Where sanction of Court not required.

(a) A company may forfeit shares for non-payment of calls or instalments pursuant to its articles. Such a proceeding amounts, if there be any liability on the shares, to a reduction of capital, but the Act clearly contemplates such a reduction as an allowable proceeding. See Articles 24 to 30 of Table A.

(b) A company may pay off paid-up capital out of accumulated profits. This is expressly sanctioned by sect. 40, *e.g.*, where the company has a reserve of undistributed profits and it desires to pay off, say, the sum of 5*l.* per share, on the footing that it should be capable of being called up again. *Neale* v. *Birmingham Tramways Co.*, (1910) 2 Ch. 464.

(c) A company may, by special resolution under sect. 41 (c) of the Act of 1908, without asking for or obtaining the sanction of the Court, cancel shares which have not been taken or agreed to be taken (this is not reduction, sect. 41 (4)), but where it is desired to cancel shares which have been taken or agreed to be taken the sanction of the Court must be obtained.

(d) A company may in certain cases accept a surrender of shares, *e.g.*, as a short cut to forfeiture, but no company may take back shares which are effectually repudiated on the ground of misrepresentation; and it seems doubtful whether the power to accept surrenders can safely be exercised unless it is sanctioned by the Court, or unless the company is in a position to forfeit the shares and *bonâ fide* arranges a surrender as a short cut to the same end. The validity of each case of surrender of shares must be decided upon its own merits. See what Lord Herschell said in *Trevor* v. *Whitworth*, 12 App. Cas. 418. "A surrender of shares in consideration of a payment in money or money's worth by the company is a purchase by it of its own shares and is *ultra vires*." Per Lord Macnaghten, *Trevor* v. *Whitworth*, *supra*; and see *British, &c. Co.*, (1894) A. C. 399; and *Bellerby* v. *Rowland and Marwood's S.S. Co.*, (1902) 2 Ch. 14.

In the case last mentioned a surrender of partly paid shares, though made in good faith, was held to be invalid. "Every surrender of shares," said Cozens-Hardy, L. J., in that case, "whether fully paid up or not, involves a reduction of capital which is unlawful, except

where sanctioned by the Court under the Companies Acts of 1867 and 1877. Forfeiture is a statutory exception and is the only exception."

It has indeed been held that a surrender of shares in exchange for other shares may in some cases be effected without the sanction of the Court (see *Eichbaum* v. *City of Chicago, &c. Co.*, (1891) 3 Ch. 459), but in coming to this decision, Stirling, J., relied on *Teasdale's case*, 9 Ch. 54, the authority of which had been severely shaken by *Trevor* v. *Whitworth*, 12 App. Cas. 409. Moreover, Lord Justice Rigby, when at the bar, advised (see Company Precedents, Part 1. 751), notwithstanding *Eichbaum* v. *City of Chicago, &c. Co.*, *supra*, that a general scheme for exchange of shares was invalid as involving a trafficking by the company in its own shares (see *Hope* v. *International Co.*, 4 C. D. 327), and that the shares issued by the company in exchange could not, for such a consideration, be regarded as effectually paid up or partly paid up, for the company gets no additional assets by the transaction, seeing that the amount paid up on the share surrendered in exchange already belongs to the company absolutely. And, lastly, on the appeal in *Bellerby* v. *Rowland and Marwood's S.S. Co.*, *supra*, Stirling, L. J., expressed an opinion that in deciding *Eichbaum* v. *City of Chicago, &c. Co.*, he should *not* have followed *Teasdale's case*. Notwithstanding these considerations such an exchange was held by Warrington, J., not to involve a reduction of capital. See *Rowell* v. *John Rowell & Sons, Ltd.*, (1912) 2 Ch. 609.

Where sanction of Court required.

2. Reduction requiring the sanction of the Court. The following are some of the modes of reduction which require the sanction of the Court:—

(a) Reducing the liability of shareholders in respect of uncalled or unpaid capital, *e.g.*, where the shares are 10*l.* each with 5*l.* paid up, reducing them to 5*l.* fully paid-up shares, and thus relieving the shareholders from liability of the uncalled shares. This is the kind of reduction more especially contemplated by the Act of 1867, and is provided for in sect. 46 (1) (a) of the Act of 1908.

(b) Paying off or returning paid-up capital not wanted for the purposes of the company, *e.g.*, where the shares are 10*l.* fully paid up, reducing them to 5*l.*, and paying back 5*l.* per share. Sect. 46 of the Act expressly provides that this kind of reduction is to be allowable. *Lees Brook Spinning Co., In re*, (1906) 2 Ch. 394; *Artizans' Land and Mortgage Corp., In re*, (1904) 1 Ch. 796; *Piercy, In re*, (1907) 1 Ch. 289.

(c) Paying off paid-up capital on the footing that it may be called up again. Thus, if the shares are 10*l.* fully paid up, paying off 2*l.* per share on the footing that when desired the company may call it up again. *Fore Street, &c. Co.*, 59 L. T. 214.

(d) Cancelling shares which have been surrendered, or the holders of which consent to cancellation. *Llynvi Co.*, 26 W. R. 55; *Vivian & Co.*, 54 L. T. 381; *Poole v. National Bank of China*, (1907) A. C. 228.

(e) Paying off and cancelling preference shares, in pursuance of a contract in the memorandum and articles binding on both preference and ordinary shareholders, by applying for the purpose a portion of the profits of the company. See *In re Dicido Pier Co.*, (1891) 2 Ch. 354.

(f) Lost Capital. Cancelling capital which has been lost or is unrepresented by available assets. This is one of the commonest modes of reduction. A company, whose capital amounts to 100,000*l.* in 10*l.* shares, has lost, say, 50,000*l.* by some business disaster. Nothing, as Sir George Jessel said, can be more beneficial to the company than to admit the loss, and to write it off (*In re Ebbw Vale Co.* (1877), 4 C. D. 827), *e.g.*, to reduce its 10*l.* shares to 5*l.*, and thus place itself in a position to resume payment of dividends.

The provisions empowering a company to cancel "any lost capital, or any capital unrepresented by available assets," are alternative provisions, and the latter is not explanatory of the former. *Hoare & Co., Ltd., In re*, (1904) 2 Ch. 208.

(g) Any other kind of reduction (except those mentioned on p. 93, *supra*), sect. 46. *British and American Co. v. Couper*, (1894) A. C. 399; *Poole* v. *National Bank of China*, (1907) A. C. 229; *Louisiana, &c. Co.*, (1909) 2 Ch. 552.

In connection with reductions it sometimes becomes necessary to cancel wholly or in part arrears of preference dividend. This requires an arrangement under sect. 120 (*Australian Estates and Mortgage Co.*, (1910) 1 Ch. 414; *Hoare & Co.*, (1910) W. N. 87), unless the memorandum or articles vest the requisite power in a class meeting. (*Hoare & Co.*, (1904) 2 Ch. 208.)

All round Reduction.

All round reduction.

Primâ facie a reduction of capital should be an all round one; that is to say, where capital is to be paid off or to be cancelled as lost or unrepresented by available assets, or where the liability for uncalled capital is to be reduced, the same percentage should be paid off or cancelled or reduced in respect of each share; and this *pari passu* mode of reduction is the proper mode where there are several classes of shares, *e.g.*, ordinary and preference shares (*Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 C. D. 287; *Direct Spanish Cable Co.*, 34 C. D. 307; *Barrow Hematite Steel Co.*, 39 C. D. 582; *Credit Assurance and Guarantee Corporation*, (1902) 2 Ch. 601), unless such pre-

ference shares have priority as regards capital in winding-up (*Re American Pastoral Co.*, 62 L. T. 625), in which case the loss should be thrown first on the ordinary shares. And see *Floating Dock of St. Thomas*, (1891) 1 Ch. 691; *London and New York Co.*, (1895) 2 Ch. 860. But it is open to a company to pass a special resolution reducing the capital otherwise than in accordance with the legal rights of the shareholders, *e.g.*, by paying off wholly or in part *some* of the shareholders, although all are entitled to rank *pari passu*; or by cancelling part of the capital paid up on one class, although both classes rank evenly as regards capital. And it is now settled that the Court has jurisdiction to confirm any kind of reduction, notwithstanding that it involves a departure from the legal rights of the classes. *British and American Corporation* v. *Couper*, (1894) A. C. 399; *Credit Assurance and Guarantee Corporation*, (1902) 2 Ch. 601; *Allsopp and Sons*, 51 W. R. 644; *Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87; *National Dwellings Society, In re*, 78 L. T. 144; *Louisiana and Southern States Real Estates Co.*, (1909) 2 Ch. 552; *Thomas de la Rue & Co.*, (1911) 2 Ch 361. For the power to confirm a reduction conferred by the Acts of 1862 and 1877 (now represented by sect. 46 of the Act of 1908) is perfectly general.

"It will," said Lord Herschell, L. C., in *British and American Corporation* v. *Couper*, *supra*, "be observed that neither of these statutes [1867 and 1877, for which sects. 46—56 are now substituted] prescribes the mode in which the reduction of capital is to be effected, nor is there any limitation of the power of the Court to confirm the reduction, except that it must first be satisfied that the creditors entitled to object to the reduction have either consented or been paid or secured . . . If, then, the scheme which the Court is asked to confirm be in fact one for the reduction of capital, I am, with all deference, at a loss to understand how the Court in confirming it could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out. Nor has it prohibited any method of effecting that object . . . I think it was the policy of the legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court." And Lord Macnaghten, in the same case, referring to the power given by the Act of 1867, said, "The power is general . . . . the Companies Act, 1877, was passed merely in order to remove certain doubts created by the decision of Sir George Jessel in the *Ebbw Vale case*, 4 C. D. 827, which was, I believe, a surprise to the profession at the time, and which is, I believe, generally thought to have been incorrect . . . . . but there is

not a word in the Act of 1877, from beginning to end, tending to narrow the scope of the Act of 1867. The generality of the power conferred by that Act is left wholly untouched." There can be no mistake here as to the principle on which the House of Lords proceeded.

Yet, strange to say, in *Anglo-French Exploration*, (1902) 2 Ch. 845, Buckley, J., treated this principle as unsound, and held that inasmuch as the Act of 1877 gave specific power to cancel capital lost or unrepresented by available assets, it impliedly denied jurisdiction to sanction the cancellation of capital not lost or unrepresented by available assets, *e.g.*, to sanction a cancellation of paid-up shares which the holder was willing to have cancelled for the company's benefit. This, as pointed out in the fifth edition of this work, was inconsistent alike with the principle laid down in the House of Lords as above stated, and with a series of cases in which the Court has from time to time exercised the very power thus supposed to be denied to it. See *Llynvi Co.*, 26 W. R. 55; *Re Vivian & Co.*, 54 L. T. 384; *Islington Electric Co.*, W. N. (1892) 81; *Re Dicido Pier Co.*, (1891) 2 Ch. 354.

However, in a recent case in the House of Lords, *Poole* v. *National Bank of China*, (1907) A. C. 229, that House dissented from the views so expressed by Buckley, J., and re-affirmed the principle laid down in *British and American Corporation* v. *Couper*, *supra*.

"The decision," said Lord Macnaghten, "of Buckley, J., in *Anglo-French, &c.* goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specifies certain cases and declares that the power conferred by the Act of 1867 includes those specified, it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect. In the present case the creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital."

The Court will not sanction the cancellation of a class of shares on the footing that in lieu thereof the company is to issue to the holders a much larger amount of paid-up shares of another class. *Development Co. of Central Africa*, (1902) 1 Ch. 547.

If the company reducing its capital has a reserve fund, there is no obligation to apply in the first instance the whole of such reserve fund to replace the capital account; and if the reserve fund has been employed in the business and is therefore mixed up with the general

assets, a loss falls on the reserve and on the paid-up capital rateably (*Re Hoare & Co.*, (1904) 2 Ch. 208; *Poole* v. *National Bank of China*, (1907) A. C. 229), unless the company chooses to throw on reserve a larger proportion than its rateable proportion.

In the case last mentioned, Lord Macnaghten said: "The Court of Appeal was not quite satisfied about the propriety of retaining in hand any part of the reserve fund, but the proposal was allowed to pass on the company giving an undertaking which is embodied in the order that no part of the sum retained out of the profit reserve fund should be applied otherwise than for capital purposes. As the company offered this undertaking I do not propose to your lordships that it should be omitted, but I do not quite understand what the undertaking means or how long it is intended to last. But I must say, speaking for myself, that I do not think that this addition to the order ought to be treated as a precedent in any other case."

The Court will not, under guise of a reduction of capital, sanction a resolution which effects a "conversion" and "re-allocation" as distinguished from a reduction of capital. *Walker Steam Trawl Fishing Co.* (1908), S. C. 123, Ct. of Sess.

Proceedings to obtain Sanction of Court.

Proceedings for sanction of Court.

As to the mode of procedure where the sanction of the Court is reqnired, the first step is to pass the requisite special resolution reducing the capital. The next is to apply to the Court to confirm the resolution. This application is made by petition. The petition states the incorporation and nature of the company, its subsequent history, the passing of the special resolution for reduction, and the facts requisite to show that it is a propor case for reduction, and prays for a confirmation order. See Company Precedents, Part I., p. 1268. Where the reduction does not involve either the diminution of liability or the payment off of any paid-up capital (A. cases) the procedure is short and simple. A summons in chambers is taken out, and on it directions are given fixing a day for hearing the petition and ordering meanwhile advertisements to be inserted in tho Gazette and other newspapers. The petition then comes on—usually in about a fortnight—and the order can be at once made without setting in motion any of the complicated machinery provided by the legislature where the rights of creditors aro involved. But the Court requires in these cases very clear proof that the capital alleged to have been lost has in fact been lost. *Re Barrow Hematite Steel Co.*, (1900) 2 Ch. 846; on appeal, (1901) 2 Ch. 746. In cases (B.) which do involvo a diminution of liability or a return of paid-up capital, the procedure is much more elaborate. It is provided for

in detail in the Rules of the Supreme Court as to reduction of capital, 1908. See *infra*, Appendix; Company Precedents, Part I., p. 1287 *et seq.*

An inquiry has to be made as to the debts and liabilities, advertisements have to be issued, the consent of creditors has to be obtained. Such as do not consent must be paid off, or provision be made for paying their debts into Court. As to obtaining consent of bearer debenture holder by extraordinary resolution under a majority clause in the trust deed, see *Re Hydraulic Power Co.*, (1914) 2 Ch. 187; and as to satisfying landlord's claim to future rent, see *Palace Billiard Rooms, Ltd.* v. *City Property, Ltd.*, Court of Sess. (1912), S. C. 5. Ultimately, at the end of six or eight months, the petition comes on and an order may or may not be made. If made, the order must be advertised. *The London Steamboat Co.*, 31 W. R. 781; *Canada N. W. Co.*, W. N. (1885) 61. In either case, (A.) or (B.), the words "and Reduced" have to be added to the company's name and used for a longer or shorter period. In (A.) cases these words need not be used until the presentation of the petition, and the Court has power in such cases to dispense with them altogether; but it rarely, if ever, does so now. In case (B.) the words have to be used as from the passing of the special resolution until such time as the Court shall fix for discontinuing. In both cases the Court generally requires the use of the words to be continued for a month from the order confirming the reduction. For cases as to dispensing with further use of the words "and reduced," see *Sumatra Tobacco Co.* (1898), W. N. 80; *Re Australian Estates*, (1910) 1 Ch. 414; *Re Lindner & Co.*, (1911) W. N. 66; *Andrew Knowles & Sons, Ltd.*, (1912) W. N. 300 (use of words on the company's seal dispensed with). In making the order the Court approves a minute expressing the new condition of the capital, as to the form of which see Company Precedents, Part I. p. 1297; and *Oceana Development Co.*, (1912) W. N. 121, 138; *Thomas Wolfe & Son, Ltd.*, (1912) W. N. 286; *Re Victoria (Malaya) Rubber Estates*, (1914) W. N. 307; and this minute, together with a copy of the order, has to be filed with the Registrar, who gives a certificate, which completes the reduction.

This certificate is conclusive of the reduction, even though it is shown afterwards that the company had not by its articles any power to reduce (*Re Walker and Smith, Limited*, 72 L. J. Ch. 572), or that the special resolution for reduction was invalid. *Ladies' Dress Association* v. *Pulbrook*, (1900) 2 Q. B. 376.

In *Calgary and Edmonton Land Co.*, (1906) 1 Ch. 141, it was held by Buckley, J. (in total disregard of the express provisions of the Companies Act, 1867), that where capital was to be paid off it ought to be paid off *after* the presentation of the petition, but before the order confirming the reduction. This was clearly erroneous. See Com-

pany Precedents, Part I., p. 1305; and Eady. J., in *Lees Brook Spinning Co.*, (1906) 2 Ch. 394; Warrington, J., in *Estate and Finance Co.*; and Parker, J., in *General Industries Development Syndicate, Limited* (1907), W. N. 23, declined to follow the decision.

Occasionally the Court directs publication of the reasons for reduction. *Truman, Hanbury & Co.*, (1910) 2 Ch. 498; Form 624, Company Precedents, Part I., p. 1284.

Re-Organization of Capital.

Re-organization which involves no alteration of the memorandum of association may be effected by the appropriate resolutions without the sanction of the Court. *Re Australian Estates Co.*, (1910) 1 Ch. 414.

Where the re-organization involves an alteration of the memorandum of association and also either consolidation of shares of different classes or division of shares into shares of different classes, the provisions of sect. 45 of the Act must be complied with, which involve a special resolution confirmed by the Court and a resolution passed by a majority in number of the shareholders of each class holding at least three-quarters of the issued share capital of such class, and confirmed as a special resolution.

For a case of sub-division under this section, see *Re Vine and General Rubber Trust*, 108 L. T. 709. Meetings must be called for this purpose, at which proxies will be allowed. *Re Foucar & Co.*, (1913) W. N. 83.

Where an alteration of the memorandum is necessary, not involving consolidation or division of classes of shares, sect. 45 does not apply. *Re Schweppes, Ltd.*, (1914) 1 Ch. 322, following *Re Palace Hotel, Ltd.*, (1912) 2 Ch. 438, and overruling *Re Doecham Gloves, Ltd.*, (1913) 1 Ch. 226. [It is not quite clear how far the memorandum can then be altered by a scheme of arrangement under sect. 120 (see *Palace Hotel, Ltd.*, (1912) 2 Ch. at p. 442), since sect. 7 only authorizes alterations of the memorandum in cases for which express provision is made in the Act. But see *Re J. A. Nordberg, Ltd.*, (1915) 2 Ch. 439; where, however, this point was not raised.]

Rights accorded to preference shareholders do not necessarily interfere with the ordinary shareholders so as to require a meeting of the latter under the section. *Re Stewart Carburettor*, (1912) W. N. 100; 28 T. L. R. 335.

The proceedings are by petition similar in form to a petition for reduction of capital. The petition need not be advertised. *Ashanti Development, Ltd.*, (1911) W. N. 144.

CHAPTER VIII.

MEMBERSHIP.

Every company under the Act of 1908 is composed of members, though in contemplation of law it is an entity distinct from such constituent members. In the case of a company limited by shares, the terms "momber" and "shareholder" are synonymous. A member is a shareholder, and a shareholder is a member. Wo have now to consider what it is which constitutes membership. It is a point of the first importance in the law of companies, and to answer it we must turn to sect. 24, which takes the place of sect. 23 of the Act of 1862; that section provides as follows:— Members. Shareholders.

"24.—(1) The subscribers of the memorandum of a company under this Act shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members; (2) every other person who agrees to become a member of a company, and whose name is entered on its register of members, shall be a member of the company." Who are members.

This section, it will be observed, deals with two classes:—

(1) Those persons who have subscribed the company's memorandum of association. Subscribers.

(2) Those persons who have agreed to be members, and whose names are entered in the register.

These and these only can strictly be called members in the sense of having acquired the full status of membership. *Nicol's case* (1884), 29 C. D. 421.

A person may, therefore, become a member or shareholder in any of the following ways:—

(1) By subscribing the memorandum of association before its registration.

(2) By agreeing with the company to take a share or shares, and being placed on the register of members.

(3) By taking a transfer of a share or shares, and being placed on the register of members.

(4) By registration on succession to a deceased or bankrupt member.
(5) By allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member. See *infra*, p. 126.

Premising thus much, let us proceed to analyse a little more closely the conditions creating the status of membership; and first of persons subscribing the memorandum.

Subscribers to the Memorandum.

Subscribers to memorandum.

Every such subscriber becomes a member *ipso facto* on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. The 23rd section of the Act of 1862 (for which sect. 24 of the Act of 1908 is substituted), as Bowen, L. J., pointed out (*Nicol's case*, 29 C. D. 447), defines the status of a subscriber of the memorandum of association in a different way to the position of other persons who agree to become members. "It is plain," said Lord Cairns in *Evans' case* (1867), L. R. 2 Ch. 420, "that the original subscribers are by the Act of Parliament deemed to have taken the shares set opposite their names—the object being that the public might rest with confidence on the subscribers of the memorandum becoming members of the company." And see *Migotti's case*, 4 Eq. 238. In the case of the subscribers of the memorandum, therefore, no allotment is necessary (*Re London and Provincial Co.*, 5 C. D. 525); no entry on the register of members is necessary. *Nicol's case, supra; Alexander* v. *Automatic Co.*, (1900) 2 Ch. 63. The subscriber is bound to take the shares from the company, and to pay for them on call duly made like any other shareholder. *Alexander* v. *Automatic Co., supra.* He cannot in satisfaction of this obligation take a transfer of fully paid shares from another member; the only way he can possibly escape liability is by shewing that all the shares have been allotted to others. *Mackley's case*, 1 C. D. 247; *Evans' case, supra.* See also *Re Esparto Trading Co.*, 12 C. D. 191, where a subscriber who had not been placed on the register was nevertheless held liable for the shares he had subscribed for after a lapse of nine years. In *In re Argyle, &c. Co.*, 54 L. T. 237, liability was enforced after a lapse of four years.

But where the subscriber showed that his subscription was intended to be on behalf of his firm, and the shares were allotted to the firm, it was held that he had discharged his obligation. *Dunster's case*, (1894) 3 Ch. 473.

As to the subscriber's liability to pay, see *infra*, p. 116.

A subscriber cannot repudiate on the ground of misrepresentation. *Metal Constituents Co.*, (1902) 1 Ch. 707.

Other Members.

Other members.

To come next to the second class of persons dealt with by sect. 24 (2) —every *other* person who agrees to become a member, and whose name is entered in its (the company's) register of members.

Here the section contemplates two things:—(1) an agreement; (2) entry on the register. An agreement alone does not create the status of membership. It is a condition precedent to acquiring such status of membership that the shareholder's name should be entered on the register. Per Fry, L. J., *Nicol's case*, 29 C. D. 421; see further, *infra*, p. 111.

The Agreement to take Shares.

Agreement to take shares.

There is no difference, as Chitty, J., said in *Nicol's case*, 29 C. D. 421, between a contract to take shares and any other contract. A formal agreement is not necessary. If, in substance, an agreement is made, the form is not material. *Ritso's case* (1877), 4 C. D. 782. To constitute a binding contract to take shares in a company, when such contract is constituted, as it usually is, by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made. *In re Scottish Petroleum Co.*, 23 C. D. 439.

Application for Shares.

Application for shares.

An application for shares is usually made in writing signed by the applicant, but an application by word of mouth is effective. *Ex parte Bloxam*, 33 Beav. 529 a; *Levita's case*, L. R. 3 Ch. 36. An application is an offer by the applicant and, like any other offer, it may be withdrawn at any time before acceptance is notified to the applicant, or, if the acceptance is by post, at any time before the letter of acceptance is posted (*Hebb's case*, 4 Eq. 9; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; *Wallace's case*, (1900) 2 Ch. 671), and such withdrawal may be by word of mouth. *Truman's case*, (1894) 3 Ch. 272. Withdrawal by post is not effective unless it reaches the company before notice of allotment is posted. *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344.

Application by agent.

The general rule *qui facit per alium facit per se* applies to a contract to take shares, and, accordingly, A. can authorize B. to apply for shares on A.'s behalf, and, if shares are allotted to A., he becomes a member. *Barrett's case*, 4 De G. J. & S. 416; *Hanman's Empress, &c. Co.*, (1896) 2 Ch. 643; *Hindley's case*, (1896) 2 Ch. 121. Nor is it

essential that the agent should have actual authority: it is sufficient if he is held out as having authority. Thus, where A. gives B. an open letter authorizing him to apply, and gives him private instructions limiting the authority. Here, if B. applies showing his authority but concealing the private instructions, A. is bound, though the application is in contravention of the private instructions. *Henry Bentley & Co.*, 69 L. T. 204.

If A. applies for shares in a fictitious name and is allotted some, he will be held liable as a member in respect thereof, and his real name may be entered on the register. *Pugh and Sharman's case* 13 Eq. 566. Where an application is sent in the name of another not *sui juris* (*e.g.*, an infant son), it has been held that the case is the same as if the application were sent in in a false or fictitious name. The transaction is *fabula acta*, and the applicant himself may be put on the list of contributories (*Pugh and Sharman's case*, 13 Eq. 566; *Richardson's case*, 19 Eq. 588; *G. H. Levita's case*, L. R. 5 Ch. 489); but there must, to constitute liability in such a case, be a contract, and there can be no contract where there is no intention of contracting, as the Court of Appeal pointed out. *Cundy* v. *Lindsay*, 3 App. Cas. 459. This was the case in *Coventry's case, Britannia Fire Association*, (1891) 1 Ch. 202 (C. A.).

Allotment.

Allotment of shares.

Acceptance of an application for shares is ordinarily evidenced by what is termed allotment. Allotment means the appropriation to an applicant by a resolution of the directors of a certain number of shares in response to an application. Shares so allotted are not, in general, specific shares identified by number; the numbering is left till later. To be effective an acceptance of an application for shares must be unconditional. If it introduces a new term (*e.g.*, says that the shares must be paid up at once under penalty of forfeiture), it is not an effective acceptance, and is to be regarded as a new offer made by the company which will not result in a contract unless accepted by the applicant. *Leeds Banking Co.*, 2 Dr. & Sm. 415; *Addinell's case*, 1 Eq. 225; *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

So, too, a resolution for allotment to a person who has not applied, though communicated to the allottee, is in point of law merely an offer by the company.

To constitute a valid allotment there must, as a general rule, be a duly constituted board of directors. *In re Homer District Gold Mines*, 39 C. D. 546. But the rule in *Royal British Bank* v. *Turquand*, *supra*, p. 45, may sometimes render an allotment by an irregular board effective. And see *Owen and Ashworth's Claim*, (1900) 2 Ch. 272. And an allotment by a board irregularly constituted may be subsequently

ratified by a regular board. *Portuguese Consolidated Coffee*, 42 C. D. 160. A director who has joined in an allotment to himself will be estopped from alleging the invalidity of the allotment. *York Tramways Co.* v. *Willows* (1882), 8 Q. B. D. 685.

The duty of the directors as to allotment is clear. They are bound to act in good faith in the best interests of the company. *London and Colonial Finance Co.*, 13 T. L. R. 576 (C. A.); *Shaw* v. *Holland*, (1900) 2 Ch. 305; *Percival* v. *Wright*, (1902) 2 Ch. 421. But it is generally considered that they may properly offer the shares to the existing shareholders at par or over, even though the shares stand at a higher price in the market: there is no duty to the company to hold out for the highest price. *Hilder* v. *Dexter*, (1902) A. C. 474.

When first public Allotment may be made.

Restrictions on where offered to public.

Prior to the Companies Act, 1900, directors had an absolute discretion as to when they should proceed to allotment; but the many mischiefs which arose from companies going to allotment on a wholly inadequate subscription and merely for the purpose of paying preliminary expenses, led the legislature to interfere, and sect. 4 of the Act of 1900 and sect. 1 of the Act of 1907 imposed restrictions which, in substance, are re-enacted in sect. 85 of the Act of 1908. This section runs thus:—

85.—(1) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:—

(a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that

money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say):—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This sub-section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

With regard to the application of the above section—

(1.) As to companies which invite the public to subscribe for shares, sub-sects. (1) to (6) inclusive apply, and the minimum subscription should be stated in the articles and in the prospectus.

(2.) As to companies which on their formation do not invite the public to subscribe, and have, therefore, to file a statement in lieu of prospectus (under sect. 82), sub-sects. (1) to (6) do not apply unless and until these companies invite the public to subscribe, but sub-sect. (7) applies unless the company has allotted any shares or debentures or debenture stock before 1st July, 1908. A minimum subscription clause should therefore be inserted in the articles and in the statement in lieu of prospectus.

(3.) As to private companies sub-sect. (7) does not apply at all, but sub-sects (1) to (6) inclusive will apply if the company in contravention of its articles offers any of its shares to the public for subscription.

The following points ha[illegible]o be borne in mind:—

(1.) As to the minimum subscription. The amount may be stated as so many shares, or so many pounds, or as a specified percentage of what is offered for subscription. *West Yorkshire Darracq Agency*, W. N. (1908) 236. The statement must be express. *Rousell* v. *Burnham*, (1909) 1 Ch. 127.

(2.) The prospectus in (4) means the prospectus on which the applicant subscribed. *Rousell* v. *Burnham*, *ubi sup.*

(3.) The words at close of sub-sect. (1) of sect. 85, "has been paid to and received by the company," mean what they say, and are not satisfied by the giving of a cheque until the cheque is honoured. *Mears* v. *Western of Canada*, (1905) 2 Ch. 353; *National Motor, &c. Co.*, (1908) 2 Ch. 228; *Burton* v. *Bevan*, (1908) 2 Ch. 240.

(4.) As to the meaning of "the public," see p. 341.

Sect. 82, referred to in par. (7) of sect. 85, above mentioned, runs thus:—

82.—(1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the 1st July, 1908.

The above sects. 85 and 82 should be read in conjunction with sect. 86 of the Act, which provides as follows:—

(1.) An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section (*i.e.*, 85), shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting (*infra*, p. 161) of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up. Effect of irregular allotment.

(2.) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the provisions of the last foregoing section with respect to allotment[illegible] be liable to compensate the company and the allottee [illegible]ely for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover such loss, damage, or costs shall not be commenced after the expiration of two years from the date of allotment.

An allotment made by directors before the minimum subscription is obtained is, as sect. 86 provides, voidable, not void, and the allottee is entitled to rescind the contract at any time within one month of the date of the statutory meeting. If the company is one to which the statutory meeting section (65) does not apply (*i.e.*, is a company formed before 1st January, 1901), there is no time limit on the shareholder's right to rescind short of his affirming the contract. *Finance and Issue Co.* v. *Canadian Produce Co.*, (1905) 1 Ch. 37.

It is not necessary that the rescinding shareholder should take actual legal proceedings to avoid the contract within the month. Notice of avoidance followed by prompt legal proceedings, though after the month, is sufficient. *In re National Motor, &c. Co.*, (1908) 2 Ch. 228.

After allotment is once made, though irregularly, it is only voidable at the option of the shareholder. The company cannot insist on paying back the application moneys, for the shareholder may prefer to keep the shares. *Burton* v. *Bevan*, (1908) 2 Ch. 240. But he may still bring his action against the directors who have "knowingly contravened" the section to compel them to make good the loss occasioned to him by the irregular allotment. *Ib.*

"Knowingly contravening" the section means contravening it with knowledge of the facts upon which the contravention depends. It is immaterial whether the directors had knowledge of the law or not. A director merely hearing the minutes of a preceding meeting, at which the resolution for the irregular allotment has been passed, read, and voting for their confirmation, will not fix him with knowledge so as to make him liable under this section. *Burton* v. *Bevan*, (1908) 2 Ch. 240. The Court, it seems, has no jurisdiction to restrain directors by injunction from going to allotment in contravention of sect. 85, and it is said the proper remedy is by action against the directors for breach of their statutory duty. *Finance and Issue* v. *Canadian Produce Corporation*, (1905) 1 Ch. 37. This seems to be a lame conclusion.

It will be observed that sect. 85 of the Act only applies to a company's first allotment of shares offered to the public for subscription: once the company has allotted shares offered for public subscription, it will not, if it makes a further issue, have again to comply with the section: nor does the section touch or affect in any way (except by sub-sect. (7)) an allotment of shares not offered for public subscription, *e.g.*, offered to a limited circle of friends or relations.

The comment which suggests itself on this legislation is that there is nothing to prevent promoters putting the "minimum subscription" at a merely nominal figure, *e.g.*, seven *l.* shares.

Notice of Allotment.

"I think," said Lord Cairns in *Pellatt's case*, L. R. 2 Ch. 527, "that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract"; and this statement of the law has always been accepted. The communication of the acceptance need not necessarily be in writing, but it must be communicated in some way, whether by writing or verbally, or by conduct. *Gunn's case*, L. R. 3 Ch. 40. *Primâ facie* notice of allotment must be given to the applicant or to his agent duly authorized to receive notice of allotment (*Levita's case*, 5 Ch. 489; *De Rosaz's case*, 21 L. T. 10); for an agent to *apply* for shares has no implied authority to receive notice of allotment. *Robinson's case*, 4 Ch. 330; *Wallis' case*, L. R. 4 Ch. 325, n. Notice of allotment

If, however, A., in applying, says, Give notice of allotment to B., and notice is so given, that is sufficient (*De Rosaz's case* (1889), 21 L. T. 10), and so, too, an applicant may waive notice of allotment. *Carlill* v. *Carbolic, &c. Co.*, (1893) 1 Q. B. 256.

There are other cases also in which notice of allotment is not necessary to complete the contract, *e.g.*, where, by virtue of some agreement upon reconstruction or amalgamation, the company is under an obligation to allot the shares, and a person, entitled to an allotment in response to a circular calling on him to come in, claims allotment of his shares. In such case notice of allotment may not be necessary (*Gunn's case*, L. R. 8 Ch. 40), unless, indeed, the circular shows that the offer is intended to invite application, not acceptance (*Wallace's case*, W. N. (1900) 171; (1900) 2 Ch. 671). However, in any case in which the company, by letter or otherwise, in effect offers a specified number of shares to a person and he writes back accepting them, no further notice of allotment is necessary.

Allotment and notice after incorporation, in response to an application before incorporation, is sufficient to constitute a complete contract (*Downes* v. *Ship*, L. R. 3 H. L. 343; *Lawrence's case*, 2 Ch. 412), for in such a case the application operates as a continuing offer and matures, on acceptance by the company after incorporation, into a contract.

As a general rule, notice of allotment may be given by post (*Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *Henthorn* v. *Fraser*, (1892) 2 Ch. 27), and in such case the contract is complete when the letter is posted, even though it is never received. *Harris' case*, 7 Ch. 587. But handing to a town postman in the street who is clearing a pillar-box is not enough. *London and Northern Bank, Ex parte Jones*, (1900) 1 Ch. 220. By post.

If notice of allotment is disputed the onus is on the company to prove Proof of notice.

the notice (*Reidpath's case*, 11 Eq. 86); but this onus it may discharge by proving acts on the part of the alleged member, going to show that he was aware of the allotment and assented to it (*Crawley's case* (1869), 4 Ch. 322), for formal notice is not necessary. *Richards* v. *Home Assurance Association*, L. R. 6 C. P. 591. Notice of allotment, if brought home to the allottee, not from the company but *aliunde*, will bind him (*Wallis' case*, L. R. 4 Ch. 325, n.), *e.g.*, if the allottee is present at a board meeting at which the allotment is resolved on. *Ex parte Smedley and Fletcher*, W. N. (1867) 259.

In *Crawley's case, supra*, C. had applied for shares that were not allotted to him for fourteen months, and accordingly he might have refused the allotment on the ground that it was not made within a reasonable time. No notice of the allotment was given to him, but some months afterwards, he, at the request of B., signed a blank transfer of the shares, and that was held sufficient to show that he must have known of, and assented to, the allotment. "I think after that act," said Selwyn, L. J., p. 328, "he cannot be heard to say that he did not know of the allotment, or that it had not been communicated to him."

A letter of allotment and letter of renunciation or any other document having the effect of a letter of allotment of any company had, by the Stamp Act, 1891, to be stamped with a penny stamp under a penalty on any person executing, granting, issuing or delivering it out, of 20*l.* Sect. 79 and Schedule I. But by sect. 9 of the Finance Act, 1899 (62 & 63 Vict. c. 9), a duty of 6*d.* is substituted for the 1*d.* duty when the nominal amount which is allotted or to which the letter of allotment relates is not less than 5*l.*, and a separate duty is charged in respect of letters of allotment and renunciation although entered in the same document. An unstamped letter of allotment, if posted or delivered, is still an effective acceptance of the application. *Re Whitley Partners*, 32 C. D. 337.

Entry on Register.

Entry on register necessary to complete membership.

Where membership is constituted otherwise than by subscribing the memorandum of association, entry in the register of members is, by sect. 24, made a condition precedent to membership. The complete status of membership in such case is not acquired unless and until it can be predicated of the person that he is, within the words of the section, one "who agrees to become a member of a company, and whose name is entered in its register of members."

In this respect there is an essential difference between the requisites of membership as regards persons who subscribe the memorandum, and those who otherwise agree to become members.

The former, as we have seen (p. 102), become *ipso facto*, on the registration of the company, members irrespective of entry in the register of members; but the latter do not become members until agreement, plus entry in the register. This distinction is recognized in *Nicol's case*, 29 C. D. 421. In that case A. had agreed to take shares, and shares had been allotted to him; but his name had not been entered in the register. After some years, the agreement for membership not having been acted on, a winding-up order was made, and it was sought to place A. on the list of contributories, on the ground that he was a member. The learned judges were all of opinion that he had never become a member, that he had only agreed to be a member.

Agreement without registration not sufficient.

Cotton, L. J., said that the question was, whether, under the circumstances, A. had become an actual member or had only agreed to become a member, and stated that 'there was in this case no actual membership, although it would have been possible, if proper proceedings had been taken, to render the membership complete"; and Bowen, L. J., said: "It appears to me that A. never acquired the status of a member of the company. I think that he remained with contractual obligations to the company, which the company had for a time a right to enforce against him. . . . According to the twenty-third section of the Act (1862) I think he had not become a corporate member"; and Fry, L. J., said that the section "makes the placing of the name of a shareholder on the register a condition precedent to membership."

The result, therefore, in the case of an agreement to take shares not perfected by entry on the register, is that there is an agreement which the Court may or may not think ought to be specifically enforced, but there is no membership.

So, too, if B. takes a transfer of shares from A., and the company rightly or wrongly refuses to register such transfer, B. is not a member, although either A. or B. can enforce registration of the transfer under sect. 32 of the Act (1908).

Nor is the rule, that entry in the register is necessary to establish the status of membership, in any way at variance with the rule as to settling the list of contributories in winding-up, namely, that a person who has agreed to become a member, and whose name is not, but *ought* to be, on the register, is to be included in such list, for in a winding-up the Court has full power to rectify the register of members (sects. 32 and 163 of the Act); but even in contributory cases the Court will not exercise this power unless the agreement relied on is one which, at the commencement of the winding-up, the company was entitled to have specifically enforced. *Arnot's case*, 36 C. D. 707.

The above cases must also be distinguished from those in which a Wrongful

removal from register.

person who has acquired the full status of membership is afterwards wrongfully removed from the register, as, for example, in consequence of a forged transfer having been proved. In such a case the person remains a member; he has acquired the full status, and the wrongful removal of his name does not affect his membership. *Barton* v. *L. & N. W. Rail. Co.*, 24 Q. B. D. 77; *Re Bahia Co.*, L. R. 3 Q. B. 595.

Registration subject to a condition.

Moreover, it has been held that where shares are allotted subject to a condition, and the name of the allottee is entered in the register with words expressly referring to the condition, he has not obtained the complete status of a member. *Spitzel* v. *Chinese Corporation* (1900), 80 L. T. 347

Mere entry of a person's name on the register cannot make him a member if there is no contract.

Delay in Allotment.

Delay in allotment.

It is an implied term in an application for shares that the offer must be accepted within a reasonable time, and, if it is not, the applicant is entitled to repudiate the allotment. See *Crawley's case*, L. R. 4 Ch. 323, *supra*, and *Ramsgate Hotel* v. *Montefiore*, L. R. 1 Ex. 109. What is a reasonable time must depend on circumstances; but an allottee who receives notice of allotment, after a reasonable time has expired, must exercise his right of repudiation promptly. If he does not he will be bound; *à fortiori* if creditors' rights have intervened by a winding-up. *Boyle's case*, 33 W. R. 450; *Crawley's case*, *supra*.

Conditional Applications.

Conditional applications.

Sometimes an application for shares is made subject to a condition precedent, *e.g.*, A. writes to a hotel company saying, If you will give me an order for furniture, I will take up fifty shares in your capital, which please allot. In such case an allotment disregarding the condition may be repudiated by the allottee; for where there is a conditional application for shares and an unconditional allotment there is no contract constituted. The parties are not *ad idem*. *Rogers' case*, *Harrison's case* (1868), L. R. 3 Ch. 633; *Wood's case*, 3 De G. & J. 85; *Shaw's case*, 34 L. T. 715; *Wood's case*, 15 Eq. 236. The condition need not be contained in the letter of application. It is sufficient if the letter containing the condition reach the directors before allotment. *Rogers' case*, *Harrison's case*, *supra*. But in such cases if, after notice of allotment before the condition is complied with, the allottee abstains from repudiating, he will be taken to have waived the condition and be bound. *Wheatcroft's case*, 29 L. T. 324.

A distinction of a very material kind exists between an application with a condition precedent annexed, and an application with a collateral agreement or a condition subsequent. In the latter case the applicant on allotment becomes a shareholder *in presenti* absolutely, with only a right to enforce (if valid) the collateral agreement or condition subsequent against the company. *Elkington's case* (1867), L. R. 2 Ch. 511; *Fisher's case* and *Sherington's case* (1885), 31 C. D. 120; *Bridger's case* (1870), L. R. 5 Ch. 305; and *Thomson's case* (1865), 4 D. J. & S. 749, are good illustrations of the distinction.

Mistake as to Company.

Mistake as to company.

Where a person applies for and takes an allotment of shares in Company A. believing it to be Company B., he may in some cases be entitled to repudiate membership if he acts promptly on discovering his mistake. *International Society of Auctioneers and Valuers, Baillie's case*, (1898) 1 Ch. 110; *Cundy* v. *Lindsay*, 3 App. Cas. 459, 465.

Who may take Shares.

Who may take shares.

As to the subscribers of the memorandum, see *supra*, p. 102.

As to other persons, it is well settled that any person not under disability may become a member; a married woman may take shares (*Re Leeds Banking Co.*, 3 Eq. 781; Married Women's Property Act, 1893, s. 1); a foreigner may take shares (*Princess of Reuss* v. *Bos*, L. R. 5 H. L. 193; but dividends due to enemy shareholders must be paid to the Public Trustee: see Trading with the Enemy Amendment Act, 1914, s. 2, and (as to notice) s. 3 (2)); a company having power to take shares may become a member (*Re Barned's Banking Co.*, 3 Ch. 112); and even an infant may become a member, subject, however, to the right to repudiate the shares when he attains majority. *Capper's case*, 3 Ch. 458; *Pugh and Sharman's case*, 13 Eq. 566. Till disaffirmed the infant's contract is valid. *Viditz* v. *O'Hagan*, (1899) 2 Ch. 569.

Typical Examples of Contracts to take Shares.

Examples of contracts to take shares.

(a) A. applies to the company for an allotment of a specified number of shares, and agrees to accept the same or any less number that may be allotted to him. In response to this application, the directors resolve that a specified number of shares be allotted to him, and notice of such allotment is given to him. This constitutes the agreement, and his name should at once be entered on the register.

(b) The company allots or offers to A. a specified number of shares, and A. notifies to the company his acceptance of the shares so offered. The agreement is complete, and A. should be entered in the register.

(c) A. authorizes some agent to apply for shares on his behalf, and such agent applies accordingly. The shares are allotted to A., and

notice is given to him as above, and he is duly registered. He is a member.

(d) B. without authority applies for shares on behalf of A., and the directors allot shares to A., and register him. Subsequently A. ratifies B.'s act, *e.g.*, either expressly, or by doing something (*e.g.*, signing a transfer, or taking a dividend) which shows that he assents to the allotment. A. is a member.

(e) A. being the holder of shares, transfers them by an instrument complying with the regulations of the company to B.; B. takes the transfer to the company, and the company passes it and places B. on the register. In this case, B. becomes a member in respect of the shares comprised in the transfer, and his name should be entered in the register in the place of A.'s.

(f) A. accepts office as a director of the company. The regulations of the company state that the qualification of a director is so many shares, and that unless he acquires such qualification within (say) a month after the incorporation of the company, he is *to be deemed* to have agreed to take the shares from the company, and is to be registered accordingly. A. does not take up the shares within the month, and shortly afterwards he is, by the officers of the company, placed on the register as the holder of such shares. He thereby becomes a member in respect of such shares. By accepting the office he is regarded as in effect agreeing to comply with the regulations, and by placing him on the register the company accepts his offer; and see pp. 184, 185, *infra*.

(g) A. accepts office as a director. The articles state that the qualification of a director is the holding of so many shares. A. does not acquire his qualification within a reasonable time, and he is, at the expiration of that time, placed on the register of members in respect of his qualification. He is estopped from denying that he is a member in respect of the shares thus registered in his name, and should, therefore, be treated as a member.

(h) A., who has not applied for shares, is informed that he has been registered as a holder of a specified number of shares in a company. He signs a proxy paper in respect of such shares, or otherwise, in effect, acts as the owner of such shares. He is estopped from denying that he is the holder of such shares. *Crawley's case*, 4 Ch. 323.

(i) A. applies for shares on the footing that he is not to be liable thereon for the full amount, and the company allots shares which involve the full liability. A. nevertheless exercises acts of ownership, *e.g.*, by selling some and obtaining proxies. A. is bound. *Re Railway Time Tables, &c. Co*, 42 C. D. 98. "If she assented to have these shares in her name, that is all that is required to make her liable as a member," said Cotton, L. J., and Bowen, L. J., added: "From such

assent to be on the register, and from such dealing with the shares which took place after she was on the register, there can be but one inference which the Court ought to draw, namely, that she agreed to be a member of the company, and her name being on the register, her liability to the company is complete."

The cases under the last two heads come to this: that a person is to be regarded as a member if his name is on the register of members with his consent, or if he is estopped from denying that he is registered without consent. He may not have applied. The shares may have been placed there without his consent and contrary to his wishes, but if he assents to his name being on the register, he is to be considered a member of the company.

Mere entry of a person's name on the company's register, however, without agreement or assent, is not enough. Thus, if a director resigns before the time for taking up his qualification shares has expired, and the company has, notwithstanding, entered his name on the register, without his assent, as the holder of the qualification shares, he may compel the company to take his name off the register. *Salisbury-Jones's case*, (1894) 3 Ch. 356. So, too, if a man's name is put on the register upon the application of some person professing to act as his agent, but without any authority in fact, the company can be compelled to take the name off. *Ormerod's case*, (1894) 2 Ch. 475. Or, again, where a man applies for shares, but withdraws his application before acceptance. If, nevertheless, the company allots and puts his name on the register, he may have it taken off. *Hebb's case*, 4 Eq. 9; *Truman's case*, (1894) 3 Ch. 272.

A person improperly registered as a transferee of a share is not bound, and may have his name taken off the register. *Heritage's case*, 9 Eq. 5; *Cartmell's case*, 9 Ch. 691.

As to rescinding the agreement, see *infra*, p. 128.

The above are all cases of persons *sui juris*. In the case of persons not *sui juris*, such as infants or lunatics, a contract to take shares is voidable (*Lumsden's case*, 4 Ch. 34; *Ebbett's case*, 5 Ch. 302; *Capper's case*, 3 Ch. 458; *Vceland Consols*, 58 L. T. 922; *Symons' case*, 5 Ch. 298), but valid till disaffirmed.

Specific Performance.

Specific performance of contract to take shares.

The Court has jurisdiction to specifically enforce a contract by a person to take, or by a company to allot, shares (*New Brunswick Co.* v. *Muggeridge*, 1 Dr. & Sm. 363; *Oriental Inland Steam Co.* v. *Briggs* (1861), 31 L. J. Ch. 241; *Odessa Tramways Co.* v. *Mendel* (1878), 8 Ch. D. 235); but the matter is one of judicial discretion, and if before action brought all the shares have been allotted to other persons, the only remedy of a plaintiff claiming an allotment is an

action for damages for breach of contract. *Ferguson* v. *Wilson* (1866), 2 Ch. 77. A company may, by delay, disentitle itself to enforce an agreement. *Nicol's case*, 29 C. D. 421.

Cesser of Membership.

Cesser of membership.

A person may cease to be a member of a company—

(1.) By transferring his shares to another person. In such case, the transferor ceases to be a member so soon as the transferee is registered, but not before. After registration the transferor is still liable to be placed on the B. list of contributories as a past member, if the company is wound up within a year. *Stanhope's case*, L. R. 1 Ch. 161; *Heritage's case*, 9 Eq. 5.

(2.) By his shares being forfeited. *Dawes' case*, 6 Eq. 232.

(3.) By his shares being sold by the company under some provision in its articles (*e. g.*, for enforcing a lien), and by the purchaser being registered as holder in his place.

(4.) By death: but in such a case the deceased member's estate remains liable until the registration of some person entitled under a transfer from his executors or administrators. *Heward* v. *Wheatley*, 3 De G. M. & G. 628; *Baird's case*, 5 Ch. 725.

(5.) By a valid surrender. *Trevor* v. *Whitworth*, 12 App. Cas. 409.

(6.) By the trustee in bankruptcy of an insolvent member disclaiming his shares. See Bankruptcy Act, 1914, s. 54.

(7.) By rescission of the contract of membership on the ground of misrepresentation (p. 128) or mistake (p. 113). This, however, does not apply to shares subscribed for in the memorandum of association.

Liability to pay for Shares.

Liability on shares.

The terms of the Act of 1908, and in particular the provisions of sects. 14 and 123, leave no doubt, in the case of a company limited by shares, about the obligation of shareholders to pay to the company the full amount of their shares. The words of the section limiting the liability of members to "the amount unpaid on their shares," can only mean, as Lord Macnaghten pointed out in the *Ooregum case*, (1892) A. C. 145, that the liability of the member continues so long as anything remains unpaid on his shares. Nothing but payment, and payment in full, can put an end to the liability. "All the legislation," said his lordship, "proceeds on the footing of recognizing and maintaining the liability of the individual member to the company until the prescribed limits are reached." The liability under the Act of 1862 was to pay in money or (with the company's consent) money's worth. *Baglan Hall Co.*, 5 Ch. 346. But by sect. 25 of the Companies Act, 1867, the legislature restricted the power to pay otherwise than in cash by providing that any shares should be deemed to have been

issued and to be held subject to the payment of the whole amount thereof in cash unless the same should have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Whilst this section was in force it followed that once a share was issued it had to be paid up in full in cash unless a sufficient contract providing for some other mode of payment was duly filed before such issue. See, further, *infra*, p. 119. The cash payment section was repealed by the Companies Act, 1900, as from 31st December, 1900, and the Act of 1908 leaves that repeal untouched. Hence shares, whether subscribed for in the memorandum or otherwise taken, may now be paid up in money or (with the consent of the company) in money's worth, *e.g.*, by making over to the company property or rendering to it services. *Baglan Hall Co.*, 5 Ch. 346; see also *Wilkinson Sword Co., Ltd.*, (1913) W. N. 27; 29 T. L. R. 242 (where a contract was allowed to be filed twenty-four years after the formation of the company in respect of shares for which the memorandum had been subscribed). And it is well settled that if a valid contract be made for the acceptance by the company of specified property or services of substantial value in payment or part payment of shares the Court will not, whilst the contract stands, inquire into the value of the consideration even at the instance of the liquidator (*Pell's case*, 5 Ch. 11; *Re Baglan Hall Co.*, 5 Ch. 346); the attempt in *Re Wragg, Limited*, (1897) 1 Ch. 796, to upset this well-established rule signally failed. See also *Re Theatrical Trust*, (1895) 1 Ch. 771; *Re Innes & Co.*, (1903) 2 Ch. 254; and, as to future services, *Pellatt's case*, L. R. 2 Ch. 527, and *Gardner* v. *Iredale*, (1912) 1 Ch. 700.

The result of these decisions is that a company may and sometimes does issue paid-up shares at a discount, by taking as the cash equivalent of payment property worth in the market much less than the nominal amount of such shares, and the transaction, though an abuse of the Acts, cannot practically be upset, but except in this way it is not permissible or practicable to issue shares on a cash basis at a discount or by way of bonus. *Ooregum Gold Mining Co.* v. *Roper*, (1892) A. C. 125; *Eddystone Marine Insurance Co.*, (1893) 3 Ch. 9.

Where, however, the contract is fraudulent or shows on the face of it that the consideration given to the company is illusory, or is clearly not equivalent to the nominal value of the shares, the shares cannot to this extent be treated as fully paid. *Re Wragg, Ltd.*, *ubi sup.*, at p. 836; *Hong Kong & China Co.* v. *Glen*, (1914), 1 Ch. 527 (an agreement to allot as fully paid a certain proportion of all future increases of capital).

Under sect. 89 of the Companies Act, 1908, a commission may be paid for subscribing the shares, and thus in effect the rule that shares may not be issued at a discount is still further relaxed: that is,

the financial result to the company is the same as if the shares were issued at a discount; but as a matter of form the transaction is correct: the shares are fully paid up by the subscriber, and the commission is paid him by the company out of its funds as part of its business expenditure.

Who is Liable.

Who is liable.

The registered holder of a share is the person liable in respect of anything unpaid on the share, and it makes no difference whether he is the beneficial owner of the share or a mere trustee, nor, in the latter case, whether the company is or is not cognisant of the trust. *Chapman and Barker's case*, 3 Eq. 361. The *cestui que trust* cannot be made liable either as shareholder or as a contributory (*Bunn's case*, 2 De G. F. & J. 275, 300; *Somervail* v. *Cree*, 4 App. Cas. 618), for there is no privity of contract between him and the company.

The liability of the registered holder to pay arises in most cases from the operation of sect. 14 (2) of the Act (replacing sect. 16 of the Act of 1862), which expressly provides that "all money payable by any member to the company in pursuance of the conditions and regulations of the company under the memorandum or articles, shall be a debt due from him to the company"; and the articles generally provide that calls and instalments made payable by the terms of issue shall be paid when due by the holder to the company. See "Calls," p. 146. Sometimes, however, the articles are defective in this respect, and in such cases it is necessary to resort to the contract under which the shares were issued, and to rely on the promise therein to pay the whole or part by specified instalments. In a winding-up the liability to pay whatever may be called for arises under sect. 123 of the Act (replacing sect. 38 of the Act of 1862). Where the holder dies, his estate remains liable in respect of his share until some other person is registered as the holder thereof. When the holder transfers and the transferee is registered, the transferee becomes liable to pay all moneys subsequently becoming payable in respect of the share. See *infra*, p. 130. But though a person has by transfer, forfeiture, or surrender, ceased to be a member, he still remains secondarily liable in the event of a winding-up commencing within one year after he ceased to be a member. Sect. 123 of the Act.

Returns as to Allotments and Filing Contracts with Registrar.

The cash payment section of the Act of 1867 was repealed because it was found to operate very harshly at times on persons who had given full consideration for their shares and were not aware of the non-compliance with the section; but the policy of the law which dictated

the section remains the same, that is to say, that persons dealing with the company, and shareholders of the company also, are entitled to know the nature of the *quid pro quo* for which shares have been issued as fully paid by the directors of the company. In repealing sect. 25 the legislature has therefore, in pursuance of this policy, made provision by sect. 88 (which takes the place of sect. 7 of the Act of 1900), for the company promptly filing with the registrar particulars of all allotments from time to time made. The substituted section runs as follows:—

Return as to allotments.

88.—(1.) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the Registrar of Companies—

(a) a return of the allotments stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted

The section also provides for filing particulars as to oral contracts and imposes penalties for default, and gives the Court power to extend the time for filing in certain cases, a remedy first given by the Act of 1898. *Re Wilkinson Sword Co.*, (1913) W. N. 27; 29 T. L. R. 242. Neglect to file the required contract or particulars will not, as under sect. 25 of the Act of 1867, below referred to, render the shares liable to payment in cash, but will expose the directors and other officials of the company to heavy penalties.

Annual return under sect. 26, see p. 123.

Decisions on Sect. 25 (now repealed) of the Companies Act, 1867.

Filing of contracts under sect. 25 of Act 1867.

Sect. 25 of the Companies Act, 1867, ran as follows:—"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 of Joint Stock Companies at or before the issue of such shares."

The result was that, to use Bowen, L. J.'s language in *London Celluloid Co.*, 39 C. D. 204, "there is a statutory liability to pay the whole amount in *cash*, which can only be avoided under the statute in

one way, namely, by a registered contract." A registered contract under sect. 25 did not, however, it must be remembered, exempt the shares from being paid up in full; the section only regulated the *mode* of payment. Per Lindley, L. *In re Addlestone Linoleum Co.* (1887), 37 C. D. 205. It did not affect the *quantum* or the adequacy of the consideration. That was regulated by the Act of 1862, read in the light of the decisions cited on p. 117.

Sect. 25 was, as above mentioned, repealed by sect. 33 of the Act of 1900; but it is still desirable to refer to some of the leading decisions on the repealed section, having regard to the peculiar language used by the repealing section. It runs as follows:—

> 33.—(1.) Section 25 of the Companies Act, 1867, and the other enactments mentioned in the schedule to this Act to the extent specified in the third column of that schedule are hereby repealed.
>
> (2.) No proceedings under section 25 of the Companies Act, 1867, shall be commenced after the commencement of this Act.

This provision—"that no proceeding under sect. 25 shall be commenced after the commencement of this Act"—may not, as Rigby, L. J., pointed out in *Brutton* v. *Burney, Limited*, (1901) 1 Ch. 637, cover the entire case. "Suppose," said the Lord Justice, "that a brewery company were to be wound up and there were surplus assets of which the appellants desired to obtain their share: though no proceedings could be taken against them under sect. 25, is it clear that they could obtain their share of the assets in the winding-up? I think it is not an unreasonable contention (whether it be well founded or not it is not necessary now to decide) that in the absence of a contract filed under sect. 25 they would not be able to obtain their shares of the assets in the winding-up. It might be years before such a question arose, and meanwhile the shareholders would be placed in a difficult position and the value of their shares might be seriously imperilled." From this position they would be rescued if they could obtain either before or in the winding-up relief by being allowed to file a proper contract or memorandum *nunc pro tunc*. Hence the Court in the case cited refused to treat the Companies Act of 1898 (which gave power to grant relief) as *functus officio*, and its powers have been invoked in at least one recent case: see *Wilkinson Sword Co.*, (1913) W. N. 27.

Effect and remedy if not filed.

Apart from the Act of 1898, in cases where owing to inadvertence a contract or sufficient contract was not filed at or before the issue of the shares, and the holders of the shares were thus left exposed to the danger of having to pay them over again, the Court had power, at the instance of the allottee, if he came promptly on discovering the mistake, to rectify the register under sect. 35 of the Act of 1862 by striking his

name off to the intent that after the contract has been filed he might obtain a re-allotment. *New Zealand Kapanga Co.*, 18 Eq. 17 (n.); *Denton Colliery Co.*, 18 Eq. 16. But evidence was always required that the allottees were ignorant of the omission to file, and very commonly evidence also of the solvency of the company. There was full evidence of solvency in the cases last mentioned. See also *Broad Street Co.*, W. N. (1887) 149, and *Preservation Syndicate*, (1895) 2 Ch. 768, where relief was given after the commencement of a winding-up, the notice of motion having been served before the winding-up.

This general power was, however, found inadequate to meet the requirements of the situation, and it was supplemented by the Companies Act, 1898.

The commonest cases for relief under the Companies Act, 1898, have been as follows:—

(a) Where no contract in writing at all was filed "at or before the issue" of the shares. See *Jackson & Co.*, (1899) 1 Ch. 348. For the precise meaning to be attached to the words "at or before," see *Tunnel Mining Co., Pool's case*, 35 C. D. 579, and *Anglo-Colonial Syndicate, Limited*, 65 L. T. 847.

(b) Where a contract was filed at or before the issue, but it was insufficient—

(i) Because it was not made between the proper parties. See *Dalton* v. *Dalton Time Lock*, 66 L. T. 704; *Hartley's case*, 10 Ch. 157; *Smith* v. *Brown*, (1896) A. C. 614; *Pritchard's case*, 8 Ch. 960; *Common Petroleum Co.*, (1895) 1 Ch. 759; *Transvaal Exploring Co.* v. *Albion Transvaal Gold Mines*, (1899) 2 Ch. 370.

(ii) Because it was not signed by both parties. *New Eberhardt Co.*, 43 C. D. 118.

(iii) Because it did not specify or correctly specify the consideration or the general nature of the consideration. *Kharaskhoma*, (1897) 2 Ch. 451; *Robert Watson & Co.*, (1899) 2 Ch. 509; *S. Frost & Co.*, (1898) 2 Ch. 556; (1899) 2 Ch. 207; *Markham and Darter's case*, (1899) 2 Ch. 480; *Tom Tit Cycle Co., Fisher's case*, 15 T. L. R. 132; W. N. (1899) 35; *May's Metal Separating Syndicate*, W. N. (1898) 159; *Jackson & Co.*, (1899) 1 Ch. 348.

(iv) Because it did not state the number of shares to be allotted under it or gave merely an option to take shares instead of cash. *Jackson & Co., supra*; *Coolgardie Mines*, 14 T. L. R. 277; *Transvaal Exploring Co.* v. *Albion Transvaal Gold Mines*,

(1899) 2 Ch. 370; *Delta Syndicate*, 30 C. D. 153; *Common Petroleum Engine Co.*, (1895) 2 Ch. 759.

(v) Because the shares were subscribed in the memorandum and the only contract filed was filed some time afterwards. *F. W. Jarvis & Co.*, (1899) 1 Ch. 193; *Dalton Time Lock Co.* v. *Dalton*, 66 L. T. 704 (C. A.); *Archibald D. Dawnay, Limited*, W. N. (1900) 152, and *Ebenezer Timmins & Son, Limited*, 50 W. R. 134; and see *Hartley's case*, 10 Ch. 157, and *Whitehead & Brothers*, (1900) 1 Ch. 804.

(vi) Where the shares though treated in the books as paid up in cash were, in fact, issued and credited for a consideration other than cash.

Meaning of "cash" in sect. 25.

The section used the term "cash." This did not mean exclusively current coin. If the company owed to A. 100*l.*, presently payable, and A. owed the company 100*l.*, also presently payable in respect of his shares, and it was agreed between the parties that the one sum should be set off against the other, that amounted to payment in cash within the section. It was not necessary to go through the idle form of the company handing the 100*l.* over and the allottee handing it back again. *Sparyo's case*, 8 Ch. 407; *White's case*, 12 C. D. 517. Some doubts were thrown on these cases by Lord Halsbury's observations in *Johannesburg Hotel Co.*, (1891) 1 Ch. at p. 129 (C. A.); but the Privy Council has recently expressed a very clear opinion that *Spargo's case* was rightly decided. *Larocque* v. *Beauchemin*, (1897) A. C. 358; *North Sydney Investment Co.* v. *Higgins*, (1899) A. C. 263. See also *Barrow's case*, 14 C. D. 432; *Coolgardie Mines*, 14 T. L. R. 278; *Jackson & Co.*, (1899) 1 Ch. 348; *Transvaal Exploring Co.* v. *Albion Transvaal Gold Mines*, (1899) 2 Ch. 370, and *Eastern and Australian Steamship Co.*, 68 L. T. 321.

As to cases where the company is estopped by certificate from alleging that shares have not been fully paid, see p. 144.

As to the construction of particular words in the Act of 1898, the following cases may be usefully referred to:—

"Credited as fully or partly paid for a consideration other than cash." This means in consideration of property or services or other benefits which the company agrees to take in payment instead of cash. *Tom Tit Cycle Co., Fisher's case*, 15 T. L. R. 132; W. N. (1899) 35.

"The company or any person interested in such shares or any of them may apply." See *Whitefriars Financial Co.*, (1899) 1 Ch. 189.

"The Court" means the Court having jurisdiction under sect. 35 of the Act of 1862. *Lucky Guss, Limited*, 79 L. T. 722; *Reeves & Son*, (1899) 1 Ch. 184. And now under sect. 32 of the Act of 1908.

"Accidental or due to inadvertence." *Lucky Guss, supra; Jackson & Co.*, (1899) 1 Ch. 348; *Tom Tit Cycle Co.*, 15 T. L. R. 142; W. N. (1899) 35; Company Precedents, Part I., p. 1422.

"Or that for any reason it is just and equitable to grant relief." *Roxburghe Press*, (1893) 1 Ch. 210.

"Either before or after an order has been made or an effective resolution has been passed." *Welton* v. *Saffery*, (1897) A. C. 299.

"On such terms and conditions." See *May's Metal Co.*, W. N. 1898) 159; *Tom Tit Cycle Co.*, W. N. (1899) 35; *Farmer's Limited*, 1900) 2 Ch. 442.

"Is satisfied that the filing of the requisite contract would cause delay or inconvenience or is impracticable." See *Jackson & Co.*, (1899 1 Ch. 348; *Reeves & Son*, (1899) 1 Ch. 192.

The application in the Chancery Division is commonly made by motion, but may properly be by summons adjourned into Court (*Duffin* v. *Mexican Gold Co.*, W. N. (1890) 116; *Whitefriars Financial Co.*, (1899) 1 Ch. 184; *Re Dowson*, W. N. (1889) 222); in the winding-up Court it should be in Court. *Concessions Acquisitions Syndicate*, 68 L. J. Ch. 49.

The application must be supported by affidavit. The affidavit must not barely state that the omission to file was accidental or due to inadvertence, but must set out the circumstances. *Victoria Brick Works*, W. N. (1898) 162; see, further, Company Precedents, 10th ed., Part I., pp. 1422—1444.

Annual Summary of Capital and List of Members.

Annual summary.

By sect. 26 of the Act of 1908, every company having a share capital must every year file a list of members and summary of shares issued, &c. See Appendix, p. 456. "Year" in the section no doubt means the year commencing 1st January and ending 31st December. *Gibson* v. *Barton*, L. R. 10 Q. B. 329. A director not taking care that the return is made affords *primâ facie* evidence of default. *Gibson* v. *Barton, supra*; *Edmonds* v. *Foster*, 45 L. J. M. C. 41. And a director cannot excuse himself by showing that by his own default the meeting was not in fact called. Though the meeting is not held, the return should be made. *Park* v. *Lawton*, (1911) 1 K. B. 588. An offence under sect. 26 is a criminal offence. *Reg.* v. *Tyler*, (1891) 2 Q. B. 588. Proceedings to enforce the penalty are taken before a magistrate under the Summary Jurisdiction Acts 11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49; and 47 & 48 Vict. c. 43. The magistrate may inquire into the sufficiency or accuracy of the return. *Briton Medical*, 37 W. R. 52. As to what is a sufficient return, *Galloway* v. *Schill & Co.*, (1912) 2 K. B. 354. The complaint must be brought within six months *Edmonds* v. *Foster, supra*.

CHAPTER IX.

REGISTER OF MEMBERS.

Register of members.

EVERY company under the Act is to keep in one or more books a register of its members. See sect. 25 of the Act.

Contents.

Contents.

This register must contain :—

(i) The names and addresses and occupations (if any) of the members of the company, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number (sect. 22) and the amount paid or agreed to be considered as paid on the shares of each member.

(ii) The date at which each person was entered in the register as a member.

(iii) The date at which any person ceased to be a member.

In default the company and its directors are liable to heavy penalties—5*l.* for every day the default continues.

In *Vaglianc Anthracite Co.*, (1910) W. N. 187, it was held that a firm was not a "persen," and therefore ought not to be registered, but the section uses the term "member," not "person"; and in *Weikersheim's Case*, 8 Ch. 831; 28 L. T. R. 653, the Court of Appeal held that a firm could be registered.

Notice of any change of address is to be entered on the register. No notice of any trust is to be entered on the register. Sect. 27.

As to share warrants, see sect. 37.

In *In re Key & Son*, (1902) 1 Ch. 467, the Court refused to allow a memorandum of lien to be entered on the register by the company.

Inspection.

Inspection.

The register of members commencing from the date of the registration of the company is, by sect. 30, to be kept at the registered office of the company (sect. 62, p. 243), and by sect. 30 such register is to be open for inspection by members gratis, and for inspection by any other person on payment of one shilling or such less sum as the company may prescribe for each inspection.

A right is also given to require a copy of such register or any part thereof, and a penalty is imposed for refusal of inspection, and in

addition to this penalty, a judge sitting in chambers may by order compel an immediate inspection of the register, and disobedience of that order being a contempt of Court may be punished by imprisonment.

The right to inspection does not in this case carry with it the right to take copies, such right being excluded by the section entitling the person inspecting to require a copy on certain terms. *Balaghat Co.*, (1901) A. C. 665, overruling *Boord* v. *African, &c. Co.*, (1898) 1 Ch. 553. Sixpence a folio of 100 words must therefore be paid.

The right terminates on a winding-up. *Re Kent Coalfields Syndicate*, (1898) 1 Q. B. 754.

Refusal in this section means a distinct and definite refusal. *Rex* v. *Wilts and Berks Canal Co.*, 3 Ad. & El. 477. See, too, 8 Ad. & El. 901.

A creditor or member may inspect by his solicitor or agent. *Beran* v. *Webb*, (1901) 2 Ch. 59, 75.

The Court will compel production, irrespective of motive. *Davies* v. *Gas Light & Coke Co.*, (1909) 1 Ch. 248.

Closing of Register.

The company is empowered to close the register by advertisement, but not for more than thirty days in each year. See sect. 31. Closing of register.

Register Prima facie Evidence.

The register of members is to be *prima facie* evidence of any matters by the Act directed or authorized to be inserted therein. Sect. 33 of the Act. Hence it is not conclusive. *Reese River, &c. Co.* v. *Smith*, L. R. 4 H. L. 80.

Publicity of Register.

It is important to note the fact that the register of members is, by the Act, open to the public. In this respect the Act of 1862 differed from the Act of 1844. *Supra*, p. 7. By sect. 50 of the Act of 1844 every *shareholder* was to have liberty to search the register at all reasonable times, but nobody was to be at liberty to search it who was not a shareholder. Publicity of register.

The Companies Act, 1862, retained the obligation as to keeping a register; but the Act introduced an important change in providing (sect. 32 of 1862) that the register should be open to the inspection not only of shareholders, but, on payment of one shilling, of *all other persons*. This would, of course, include creditors and persons dealing or about to deal with the company, and the change indicates unmistakeably an intention on the part of the legislature that the creditors and persons who contemplate dealing in some way with the company ought to have the means by inspecting the register of satisfying themselves

to what extent they may safely trust the company. Sect. 30 of the Act of 1908 is to the same effect.

While the liability of shareholders remained unlimited "such a power of inspection was not necessary, or, certainly, not at all so necessary. . . . But when the legislature enabled shareholders to limit their liability not merely to the amount of their shares, but to so much of that amount as remained unpaid, it is obvious that no creditor could safely trust the company without ascertaining first who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world. . . . The legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they might trust. It intended to put the persons whose names are on it in the same position towards creditors (subject, of course, to the statutable restrictions) as persons engaged in an ordinary partnership, or persons trading formerly under the Act of 1844." Per Lord Cranworth, *Oakes* v. *Turquand*, L. R. 2 H. L. 366. In the same case his Lordship also said: "It is a fallacy to hold that the liability of the partners in these companies must rest entirely on the same principle of contract which was the foundation of the liability of the partners of any unincorporated companies prior to the institution of this class of associations. The question is not whether there was any privity of contract between the appellant and creditors of the company, but it is whether, under the constitution of these newly created societies, there is a statutory liability imposed on persons in the position of the appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations as to the register of shareholders and the publicity to be given to them form a sufficient answer to that argument. Indeed, it is plain from the reason of the thing, that no credit would otherwise be given to the abstraction of a company."

Object of publicity.

On the same principle in *Sewell's case*, L. R. 3 Ch. 138, where a registered shareholder wished to disclaim the ownership of certain shares, Lord Cairns, while assuming in the shareholder's favour that he might have had a right to disclaim, was of opinion that "not having done so, and being aware that he was held out to the public as the holder of the shares, it is too late for him, months or even years afterwards, to enter into that question." "It is impossible," the same learned judge remarked on another occasion, "to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position." *Lawrence's case* (1867). L. R. 2 Ch. 417.

Doctrine of holding out.

The result of this doctrine of holding out is that if a person's name

is on the register with his consent, and he claims a right to have it removed on some ground or other, he must exercise the right promptly, otherwise he forfeits it. See *Scottish Petroleum Co.*, 23 C. D. 434, in which Baggallay, L. J., said: "The delay of a fortnight in repudiating the shares makes it in my mind doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in the *Central Railway Company of Venezuela*, L. R. 2 H. L. 99; but where, as in the present case, the shareholder is at once fully informed of the circumstances, he ought to lose no time in repudiating." Even where a name is, pursuant to a *void* contract, placed on the register, delay after knowledge may be fatal. *Railway Time Tables Co.*, 42 C. D. 107; *supra*, p. 114. Delay.

Nevertheless the reliance to be placed on the register is qualified to this extent that anyone dealing with the company must be taken to know— Register not conclusive.

(1) That shares may be transferred in accordance with the articles, and thus an insolvent shareholder may be substituted for a solvent one.

(2) That a member who has been induced to take shares by misrepresentations or mistake, even though on the register for years, may, while the company is a going concern, repudiate his shares and get off the register. See p. 352.

(3) That there may be persons on the register placed there without their consent who may subsequently enforce the removal of their names. See further, *Reese River Co.* v. *Smith*, L. R. 4 H. L. 80; and *Baillie's case*, (1898) 1 Ch. 110, in which a person [illegible] register escaped on the ground that he had made a [illegible]s to the company.

(4) That person whose name has been improperly entered on the register under an allotment in contravention of sect. 85 of the Act of 1908, may claim under sect. 86 to be removed.

(5) Where the entry on the register is there stated to be subject to some condition membership is not complete. *Spitzel* v. *Chinese Corporation*, 80 L. T. 347.

Rectification of Register.

It is a corollary from the principle that the register of members is to be the creditors' guarantee, showing them to whom and to what they have to trust, that the register should be properly kept and that the names appearing therein should be the names of the persons really for the time being liable to the creditors. That this may be Rectification of register.

the case the legislature in sect. 32 of the Act of 1908 (replacing sect. 35 of the Act of 1862) provides a summary mode of rectifying the register from time to time by application to the Court in two classes of cases:—

(1) Where the name of any person is without sufficient cause entered in or omitted from the register of members.

(2) Where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member.

Instances.

This jurisdiction is exercisable after as well as before winding-up (*Sussex Brick Co., In re*, (1904) 1 Ch. 598), and is frequently exercised. The following are a few illustrative cases in which orders have been made: where the applicant was induced to take shares by misrepresentation (*Stewart's case*, 1 Ch. 574; *Anderson's case*, 17 C. D. 373); where the company improperly neglected to register a transfer (*Stranton Iron Co.*, 16 Eq. 559); where shares had been issued to the applicant as paid up without filing a contract in compliance with sect. 25 of the Companies Act, 1867 (*New Zealand Kapanga Co.*, 18 Eq. 17); where shares were improperly forfeited (*Ystalyfera Gas Co.*, W. N. (1887) 30); where the company, acting on a forged transfer, had removed the name of the applicant, the real owner (*Bahia, &c. Co.*, L. R. 3 Q. B. 584); where there was a dispute between the vendor and purchaser of shares (*Ex parte Shaw*, 2 Q. B. D. 463); where shares had been irregularly allotted to applicant (*Portuguese Consolidated, &c. Mines*, 42 C. D. 160; *Homer District Gold Mines*, 39 C. D. 546); where the signatory of an underwriting letter not constituting a contract had been placed on the register (*Consort, &c. Co.*, (1897) 1 Ch. 575); where a shareholder, who had made an *ultra vires* surrender of his shares to the company, claimed to have his name reinstated. *Bellerby* v. *Rowland and Marwood's Steamship Co.*, (1902) 2 Ch. 14 (C. A.).

The Court has rarely declined, as between a member and the company, to exercise its jurisdiction under the section (*Ex parte Parker*, 2 Ch. 685); but the Court had and has a discretion, although the words "if satisfied of the justice of the case," in sect. 35 of the Act of 1862 are not used in sect. 32 of the new Act. See, per Lord Macnaghten, *Trevor* v. *Whitworth*, 12 App. Cas. at p. 440, as to the materiality of these words. Where justice requires it, the order to rectify will be made *nunc pro tunc*. *Sussex Brick Co.*, (1904) 1 Ch. 598. An application under sect. 32 should be by motion intituled in the Companies (Consolidation) Act, 1908, and in the matter of the particular company. If there is no winding-up pending, the application should be made to one of the ordinary judges of the Chancery Division (if it is made in that Division), and not to the winding-up judge. *British*

Columbian Exploitation Gold Estates, W. N. (1899) 32. For forms of notice of motion, and orders to rectify, see Company Precedents, Part I., 11th ed., pp. 1392 *et seq.* There is jurisdiction to rectify the register not only upon motion under sect. 32, but in an action against the company. *Reese River Co.* v. *Smith*, L. R. 4 H. L. 80.

In a voluntary winding-up the liquidator may alter the register on sanctioning transfers of shares made after the commencement of the winding-up. Companies Act, 1908, ss. 163, 186 (iv); *Taylor, Phillips and Rickard's case*, (1897) 1 Ch. 298.

Under a winding-up by the Court, the liquidator can now only rectify the register with the special leave of the Court. (Sect. 173.)

A secretary, as such, has no power to alter the register. *Wheatcroft's case*, 29 L. T. 326; *Chida Mines, Limited* v. *Anderson*, 22 T. L. R. 27.

Colonial Registers.

Colonial registers.

A company is by sect. 34 given power in the circumstances specified therein, to "cause to be kept in any colony in which it transacts business, a branch register or registers of the members resident in such colony." Such a register may be rectified by any competent Court in the colony. See the section in the Appendix.

CHAPTER X.

TRANSFER AND TRANSMISSION OF SHARES.

Transfer of shares, Act permits, subject to company's articles.

"When joint stock companies were established the great object," said Lord Blackburn, "was that the shares should be capable of being easily transferred." *Re Bahia and San Francisco Rail. Co.*, L. R. 3 Q. B. 595. In pursuance of this object, sect. 22 of the Act provides that shares in a company under the Act shall be capable of being transferred in manner provided by the articles of the company; and it is well settled that, unless the articles otherwise provide, the shareholder has a free right to transfer to whom he will. *Weston's case*, 4 Ch. 20.

It is not (as that case decided) necessary to seek in the articles for a power to transfer, for the Act gives that. It is only necessary to look to the articles to ascertain the mode of transfer and the restrictions upon it. See *Gilbert's case*, 5 Ch. 565.

So absolute, *primâ facie*, is the right, that a transfer by a shareholder, if out and out, is valid, though made to a pauper and with the avowed object of escaping liability. *De Pass's case*, 4 De G. & J. 544; *Discoverers Finance Corporation, Lindlar's case*, (1910) 1 Ch. 312; affirming Neville, J., (1910) 1 Ch. 207, and overruling *Cooper's case*, (1908) 1 Ch. 141. Hence the importance, in the interests of the company, of inserting some qualification of the right in the articles.

Restrictions by articles.

There is nothing to limit the restrictions which a company's articles may place on the right of transfer. *In re Cawley & Co.*, 42 C. D. 209, 231; *Stockton Malleable Iron Co.*, 2 C. D. 101. The articles may give the directors power to refuse to register a transfer in any specified cases; for instance, where calls are in arrear, or where the company has a lien on the shares—and some such provisions are usually inserted. Thus, Table A. in clause 20 provides that the directors may decline to register any transfer of shares to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. But the articles in many cases go far beyond this. They prohibit, for example, the transfer of a share to any person who is not a member of a specified class, or they provide, as they often do in private companies, that before transferring to an

outsider the intending transferor must first offer the shares to the other members, and give them a right of pre-emption. And there is nothing in such provisions, though permanent, to contravene the rule against perpetuities. *Borland's Trustee* v. *Steel Brothers & Co.*, (1901) 1 Ch. 279.

Where discretion of directors as to registration of transfers.

Where a discretion as to registering transfers is by the articles given to the directors, the Court will not control the exercise of such discretion, unless it is proved that the directors are not exercising it *bonâ fide* (*Ex parte Penney*, 8 Ch. 452; *Re Coalport China Co.*, (1895) 2 Ch. 404), or are acting, in other words, oppressively, capriciously, or corruptly, or in some way *malâ fide*. *Bell* v. *Bell*, 65 L. T. 245. Nor will the Court draw unfavourable inferences against directors because they do not give their reasons for refusing to pass a particular transfer, for they are under no obligation to disclose their reasons either in Court or out of Court; it is enough that they have in fact considered the transfer, and that in exercise of the discretion given to them by the articles they have not passed it. See the above cases. But if the directors choose to give their reasons, the Court will then consider whether they are legitimate or not. *Bell* v. *Bell*, *ubi supra*.

In the absence of a wider power to refuse to register or transfer, the directors cannot refuse on the ground that the title will on the registration vest in the trustee in bankruptcy of the transferee. *Sutton* v. *English and Colonial Produce Co.*, (1902) 2 Ch. 502.

Whatever the articles as to transfer may be, a shareholder desiring to transfer must conform to them. If he does not, the company is entitled to refuse to register the transfer, and the Court declines in such a case to interfere.

On the other hand, registration by the secretary without the authority of the directors can be repudiated by them. *Chida Mines* v. *Anderson*, 22 T. L. R. 27.

One of several transferors revoking his signature on mere suspicion of a breach of trust does not justify an absolute refusal to register. *Grundy* v. *Briggs*, (1910) 1 Ch. 444.

Registration necessary to complete transfer.

A transfer is incomplete until registered. *Société Générale* v. *Walker*, 11 App. Cas. 28; *Shropshire Union Co.* v. *The Queen*, L. R. 7 H. L. 496; *Roots* v. *Williamson*, 38 C. D. 485; *Powell* v. *London and Provincial Bank*, (1893) 2 Ch. 555. Pending registration, the transferee has only an equitable right to the shares transferred to him. He does not become the legal owner until his name is entered on the register in respect of the shares transferred to him. Before that he cannot be sued for calls. *Ural Gold Fields* v. *Pappa*, 15 T. L. R. 330. But delay in registration involves danger to him, for some prior equity may come to light, as in *Ireland* v. *Hart*, (1902) 1 Ch. 522, where a husband had mortgaged shares of which he was trustee for his wife; or a second transfer may be passed and registered, and

thus the prior transfer may be defeated. And see *Peat* v. *Clayton*, (1906) 1 Ch. 659. "The rule on this point is that, as between two persons claiming title to shares in a company which are registered in the name of the third party, priority of title [*i.e.*, equitable title] prevails, unless the claimant, second in point of time, can show that, as between himself and the company, before the company received notice of the claim of the first claimant, he (the second claimant) has acquired the full status of a shareholder, or, at any rate, that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which, as between the company and the second claimant, the company could not have refused to do forthwith, so that, as between himself and the company, he may be said to have acquired, in the words of Lord Selborne, 'a present, absolute, unconditional right to have the transfer registered' before the company was informed of the existence of a better title." Per Romer, J., *Moore* v. *N. W. Bank*, (1891) 2 Ch. 599; *Guy* v. *Waterlow Bros.*, 25 T. L. R. 515.

Priorities.

Liability of transferor until registration.

Delay in registration prejudices the transferor also as well as the transferee, for in the case of shares which are only in part paid up, the transferor, whilst the transfer is unregistered, continues liable to the company to pay all calls in respect of the shares comprised therein that may be made by the company. Hence the transferor is given by law a right to enforce registration of the transfer. See sect. 28.

It is not clear that the registration of the transfer divests the liability of the transferor for calls in arrear (*Hoylake Rail. Co.*, 9 Ch. 257); but where the transfer is in the usual form it seems that the company may sue the transferee for the calls in arrear (*Herbert Gold, Limited* v. *Haycraft* (C. A.), 27 March, 1901), and it is clear that the transferee takes the shares on the footing that the call has not been paid, and cannot vote in respect thereof if the articles provide that no member shall be entitled to vote at all if any calls or other sums of money shall be due and payable to the company in respect of the shares of such members. *Randt Gold Mining Co* v. *Wainwright*, (1901) 1 Ch. 184. In a winding-up he can certainly be called on to pay up whatever is then unpaid on his shares (sect. 123 of the Companies Act, 1908), and it would seem that, even while the company is a going concern, it could make a fresh call on him for the amount of the old unpaid call, and that he would be liable to pay such call. *Randt Gold Mining Co.* v. *New Balkis Eersteling*, (1903) 1 K. B. 461 (C. A.); affirmed (1904) A. C. 165.

Where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, and a holder of partly paid-up shares has actively or passively induced the directors to pass

and register a transfer, even though it be an out-and-out transfer which but for his conduct they would have refused to register, the company on discovering the facts may repudiate the registration. *De Pass's case*, 4 De G. & J. 544; *Lindlar's case*, (1910) 1 Ch. 312.

But where the articles contain no clause authorizing the directors to reject a transferee, a shareholder may at the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee even though he be a pauper, and may compel the directors to register that transfer, provided that it be an out-and-out transfer, reserving to the transferor no beneficial right to the shares, direct or indirect. Whether the transfer is of that character is a question of fact. *Hyam's case*, 1 D. F. & J. 75; *Costello's case*, 2 D. F. & J. 302; *Lindlar's case*, (1910) 1 Ch. 312.

Where the directors have a discretion as to registering transfers and the consideration is misstated, the company, on discovering the facts, may repudiate the transfer and restore the transferor's name to the register. *Green's case*, 19 W. R. 1057; *sub nom. Rogers' case*, 25 L. T. 406. Compare *Weston's case*, 4 Ch. 20, 27, where there was no misrepresentation.

Form and Execution of Transfer.

Form and execution of transfer.

The form of transfer provided by a company's regulations is usually in close accord with the form given in clause 19 of Table A. The directors may refuse to register if the prescribed form is not substantially followed, but they may waive any irregularity, *e.g.*, non-signature by the transferee. *Marino's case*, 2 Ch. 596. And they must not be too technical. Thus, where the articles required a transfer to be "in the usual common form," according to which the address of the transferor and the distinctive number of the shares should appear, and the transfer tendered omitted these particulars, but was accompanied by the transferor's share certificate giving the omitted particulars, it was held that the transfer should be registered. *Re Letheby & Christopher, Limited, Jones's case*, (1904) 1 Ch. 815. Where there are joint holders, a transfer, to be effective, must be executed by all. If the signature of anyone be forged, the transfer will be void. *Barton* v. *L. & N. W. Rail. Co.*, 24 Q. B. D. 77. Unless otherwise provided by the regulations, a transfer may be merely *signed* by the parties to it, but sometimes the regulations provide that a transfer is to be by deed; this, however, causes inconvenience without any corresponding advantage, for it interferes with the ordinary practice as to blank transfers.

Blank transfers.

According to that practice, upon a sale or mortgage of shares, the transferor very commonly signs and hands over what is called a blank

transfer (*i.e.*, a transfer signed by the transferor, but with a blank for the name of the transferee), the intention being that the purchaser or mortgagee shall be at liberty later on to fill up the blank and perfect his security by getting himself registered. If, however, the regulations require the transfer to be by deed, the transferee cannot effectively fill up the blank and deliver the deed unless authorized so to do by power of attorney under seal; whereas, if the transfer may be under hand merely, the authority to fill up the blank may be oral and may be implied from the nature of the transaction. See *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Powell* v. *London and Provincial Bank*, (1893) 2 Ch. 555; *France* v. *Clark*, 26 C. D. 257; *Ex parte Sargent*, 17 Eq. 273; *Tees Bottle Co.*, 33 L. T. 834.

A person taking a blank transfer and certificate by way of security is an equitable mortgagee, not a pledgee, and can sell after reasonable notice. *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

Where a shareholder executes blank transfers to enable another to deal with the shares, he is bound not to do anything to prevent registration of the transfer; and if he improperly intervenes, he is liable in damages. *Hooper* v. *Herts*, (1906) 1 Ch. 549.

As to the measure of damages in such a case, see *ib.*

When to be executed under hand or seal.

Where the regulations require a transfer to be under hand, the fact that it is under seal does not make it the less effective. *Ortigosa* v. *Brown*, 38 L. T. 145.

If a deed is requisite, it must be duly signed, sealed, and delivered. *Powell* v. *London and Provincial Bank*, (1893) 2 Ch. 555. A printed circle with the words "place for seal," is not equivalent to a seal. *Balkis Co.*, 36 W. R. 392.

Transfers by infants can only be made in pursuance of an order of some Court of competent jurisdiction, *e.g.*, the Chancery Division, and by the person named in the order.

Shares held by a lunatic member or by joint holders, one of whom is a lunatic, can only be transferred pursuant to an order in lunacy and by the person named in the order. Lunacy Act, 1890, ss. 133, 136—139.

Married women can transfer without the concurrence of their husbands. Married Women's Property Act, 1882, s. 9.

A member can transfer his shares by attorney, but the power of attorney must be left with the transfer, and should either be retained by the company or should be filed pursuant to the Conveyancing Act, 1881, s. 48. It should be duly authenticated, and unless it is irrevocable under sect. 8 or 9 of the Conveyancing Act, 1882, evidence should be adduced that at the time the transfer was signed the appointor was alive.

Practice

The instrument of transfer, when executed by the transferor, is

handed to the transferee or his broker, together with the certificates of title, and is then executed by the transferee and deposited with the company for registration. Precautions observed on transfer.

A seller of shares is bound, if the contract fixes no date, to deliver the certificates within a reasonable time, and the reasonableness of the time cannot depend upon circumstances which are unknown to the buyer and are not disclosed to him by the seller. *De Waal* v. *Adler*, 12 App. Cas. 141. Delivery of certificates.

An 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. *Skinner* v. *City of London, &c. Co.*, 14 Q. B. D. 882; *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576. But until the registration of the transfer the transferor is a trustee of the shares for the transferee. See *Loring* v. *Davis*, 32 C. D. 625; *Hardoon* v. *Belilios*, (1901) A. C. 118; *Stevenson* v. *Wilson*, (1907) S. C., Ct. of Sess. 445. Vendor not bound to procure registration.

If the buyer wishes to protect himself he must buy "with registration guaranteed."

A company is not bound to register a transfer at once. It may inquire, *e.g.*, as to the authenticity of the transfer. *Société Générale* v. *Walker*, 11 App. Cas. 41; *Ireland* v. *Hart*, (1902) 1 Ch. 522; *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618. And where a transfer purports to be executed or signed by the agent of the transferor, the directors are entitled to call for evidence of authority. Investigation by company before registration.

A transfer of shares must be duly stamped. If gratuitous or for a nominal consideration, *e.g.*, 5*s.*, it must bear a 10*s.* stamp; but if on a sale it must bear an *ad valorem* stamp at the rate of 10*s.* per cent. on the price. See Stamp Act, 1891. The directors cannot safely register a transfer not duly stamped, for the transfer in such a case not being available as evidence for any purpose in a Court of justice (Stamp Act, 1891, s. 14 (a)), the directors could not use it to justify altering the register. *Maynard* v. *Consolidated Kent Collieries Corporation, Limited*, (1903) 2 K. B. 121. It makes no difference that the stamp is sufficient on the face consideration, if the directors know that such consideration is less than the real consideration. *Ib.* Stamp.

Forged Transfers.

Sometimes a forged transfer is presented for registration. If the company acts thereon it may incur serious liability, for the registration of the transfer does not defeat the title of the true owner, and he has a right to require the company to restore his name to the register. *Davis* v. *Bank of England*, 2 Bing. 393; Forged transfers.

Sloman v. *Bank of England*, 14 Sim. 475; *Barton* v. *L. & N. W. Rail. Co.*, 38 Ch. D. 149. *Re Bahia, &c. Co.*, L. R. 3 Q. B. 595, is an illustrative case. There the company, acting on a forged transfer, registered the transferee and gave him a certificate of title; he then sold the shares, and the purchaser, when the shares were claimed by the real owner, was held entitled to damages as against the company. In order to minimise the danger incident to the registration of transfers, it is usual for the company, upon the deposit with it of a transfer, to write to the transferor a letter informing him of the deposit of the transfer, and stating that it will be registered unless, by return of post, he objects. This course of procedure practically operates as a safeguard, but, in adopting it, a company does not relieve itself of its obligation to ascertain the authenticity of the deposited transfer. The transferor may not receive the notice, and, even if he does receive it, he is not bound to reply; by not replying, he does not estop himself from asserting his rights at some subsequent period. *Barton* v. *L. & N. W. Rail. Co.* (1889), 24 Q. B. D. 77. Where the company registers a forged transfer it may, *primâ facie*, on discovering the forgery, remove the name of the transferee from the register; it is not estopped by the registration. *Simm* v. *Anglo-American, &c. Co.*, 5 Q. B. D. 214. But, if it has issued to the transferee a certificate of title, and he or a *bonâ fide* buyer from him has acted thereon, the company may be liable in damages. See p. 143, *infra*; *Re Bahia, &c. Co.*, L. R. 3 Q. B. 595; *Tomkinson* v. *Balkis Co.*, (1893) A. C. 396; *Bloomenthal* v. *Ford*, (1897) App. Cas. 156. Where, however, the certificate has been issued and sealed by the secretary fraudulently, without the authority of the directors and for his own purposes, it has been held that the company is not estopped. *Ruben* v. *Great Fingall Consolidated*, (1906) A. C. 439, overruling *Shaw* v. *Port Philip*, 13 Q. B. D. 103.

A person claiming under a forged transfer who sends in and procures registration of such transfer and the issue of a fresh certificate is bound, though acting in good faith, to indemnify the company. *Sheffield, Corporation of* v. *Barclay*, H. L., (1905) A. C. 392, reversing C. A., (1903) 2 K. B. 580. And on the same principle where a stock-broker, acting innocently under a forged power of attorney from one of two trustees of stock, had induced the Bank of England to transfer the stock, he was held liable to indemnify the Bank as having impliedly warranted his authority to the Bank. *Starkey* v. *Bank of England*, (1903) A. C. 114; *Oliver* v. *Bank of England*, (1902) 1 Ch. 610.

Forged Transfer Acts, 1891 and 1892.

Even where there is no such right of action, companies can, in some cases, pay compensation under the Acts known as the Forged Transfer Acts, 1891 and 1892. These Acts, however, do not give any *right* to compensation; they merely give the company power to pay.

Indemnity.

Upon a sale of shares there is an implied contract on the part of the buyer to indemnify the seller from any calls or liability which may arise in respect of the shares subsequently to the transfer. *Kellock v Enthoven*, L. R. 9 Q. B. 241; *Loring* v. *Davis*, 32 C. D. 625. *Lee* v *Ayres*, 3 App. Cas. 852; *Hardoon* v. *Belilios*, (1901) A. C. 118. Indemnity of transferor to transferee

Transfers during Winding-up.

These, where the winding-up is compulsory or under supervision, are avoided by sect. 205 of the Companies Act unless sanctioned by the Court, and the Court will not, if a transfer is incomplete by reason of want of registration at the commencement of the winding-up, put the buyer on the register. *Emmerson's case* (1866), L. R. 1 Ch. 433; and see *In re Onward Building Society*, (1891) 2 Q. B. 463. Transfers during winding-up

A voluntary liquidator has power under sect. 205, to register a transfer after winding-up (*Re National Bank of Wales*, (1897) 1 Ch. (C. A.) 298), and the transfer, if registered, has full effect. The transferee in such a case ought to be placed on the A list of contributories, the transferor on the B list. A transferee under a transfer executed before a confirmatory resolution for winding-up is not entitled to insist on the registration of such transfers merely because an action has been brought to declare the resolution invalid and an interlocutory order made to restrain the company acting on it. *Violet Consolidated Gold Mining Co.*, 68 L. J. Ch. 535.

It is doubtful whether a voluntary liquidator can rectify *nunc pro tunc*, although the Court can. *Sussex Brick Co.*, 1904 1 Ch. 598, *supra*, p. 128.

Transferor a Past Member.

Where there is a liability in respect of uncalled capital on the shares transferred, the transferor, upon registration of the transfer, is freed from this liability, subject to this qualification, that if a winding-up takes place within one year he may be placed on the B list of contributories as a past member if the A list proves inadequate. See sect. 123 of the Act. Liability of transferor as past member.

Certification of Transfers.

When the holder of shares executes a transfer thereof, it is for the transferee, as the party mainly concerned, to get the transfer registered, and in order to do this he must be prepared to hand Certificates, when required

over, or to procure someone else to hand over, to the company the transferor's certificate of title to such shares. If the certificate comprises the shares transferred and no more, it can of course be handed over with the transfer to the transferee, and can then be delivered by him to the company; but very commonly the certificate includes other shares, for example, the certificate may certify that A. is the holder of 100 shares; if he transfers only 50, he retains 50, and, therefore, does not want to hand over his certificate to the purchaser. And again, if, having 100 shares, he sells 50 to B. and 50 to C. he cannot hand over the certificate to both. In such cases the transferor usually lodges his certificate with the company, and then at his request, or at the request of his broker, the secretary "certifies" the transfers (before they are handed over to the transferees), by stamping in the margin the form of certification and signing the same. The following forms are used:—"Certificate lodged: for the —— Company, Limited, —— Secretary," or "Certificate for —— shares [has been lodged] at the company's office. Date. —— Secretary."

Practice as to.

Effect.

The certification is regarded as a representation by the secretary, on behalf of the company, that the transferor has produced such documents as on the face of them show a *primâ facie* title in the transferor to make the transfer, *i.e.*, a certificate of title that the transferor is the registered holder of the shares comprised in the transfer, or else a certificate that some other person is the registered holder, together with proper transfers from that person to the transferor. In giving such "certifications" the secretary is not supposed to do more than look at the documents produced; if they appear to be in order he certifies, if they are not he refuses to certify; but he is not bound to inquire whether the documents produced to him are genuine or not, or whether the various transfers are valid or invalid in point of law. "He does not warrant the title of the transferor, nor the validity, in point of law, of the various documents which together (purport to) establish his title." Per Lindley, L. J., *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 512.

Stock Exchange sanctions.

A transfer certified as above is, by the rules of the London Stock Exchange, accepted as good delivery of the shares to a purchaser without delivery of the certificate. But irrespective of these rules, by the general practice a transferee requires the share certificate or a certified transfer in order to comply with the articles of the company, which usually provide for the production of the certificate before a transfer will be registered.

Certification of outsider.

Sometimes an official of the London Stock Exchange certifies.

Estoppel by certification.

It was held in one case (*Re Concessions Trust*, (1896) 2 Ch. 757), that where an instrument, purporting to transfer fully paid up shares,

is certified by the secretary as above, the company is, by the certification, estopped from saying that they are not paid up. But it has now been decided by the House of Lords that there is no estoppel where the secretary certifies in cases in which he is not authorized to certify. *George Whitechurch & Co.*, (1902) A. C. 117.

Certification of transfers given to the secretary is an ordinary business transaction within the power of a company. *Bishop* v. *Balkis, &c. Co.*, 25 Q. B. D. 520. Power of company.

If the company, after certifying, returns the certificate by mistake to the transferor, and the transferor pledges it in fraud of the transferee, this, it seems, gives the pledgee no ground of action against the company. *Longman* v. *Bath Electric Tramways*, (1905) 1 Ch. 646.

Transmission of Shares.

Where a member of a company dies, his shares, as personal estate, vest in his executors or administrators, and the estate is liable (*Baird's case*, 5 Ch. 725); but the executors or administrators do not *ipso facto* become members of the company, nor is the company entitled, without their consent, to register them as members. Such registration (as members) may involve them in a personal liability, and to justify it there must be some distinct and intelligent request on their part. *Buchan's case*, 4 App. Cas. 588. Where registered as members, there should be a clean registration, without any reference to their representative capacity. They may choose the order in which their names are to stand. *Re Saunders & Co.*, (1908) 1 Ch. 415. Sect. 29 of the Act enables the personal representative of a deceased member, without himself becoming a member, to transfer the shares of the deceased, and the provision is commonly repeated in the regulations. See Clauses 21, 22 and 23 of Table A. This power is frequently exercised when the shares are not fully paid up. The transfer is subject to the regulations. Transmission of shares.

One of two executors registered as shareholders cannot transfer: all must concur. *Barton* v. *North Staffordshire Rail. Co.*, 38 C. D. 458; *Barton* v. *L. & N. W. Rail. Co.*, 24 Q. B. Div. 77.

A transfer by executors to one of themselves should be treated as *primâ facie* regular. *Grundy* v. *Briggs*, (1910) 1 Ch. 444.

If a shareholder is domiciled abroad the company may not recognize his executors or administrator till probate or letters of administration are obtained in England. *Fernandez' Executor*, 5 Ch. 314; *A.-G.* v. *New York Breweries*, (1898) 1 Q. B. 205; affirmed, (1899) A. C. 62. As to colonial probate, see Colonial Probate Act, 1892 (55 Vict. c. 6).

The trustee of a bankrupt member generally has a right under the regulations to be registered as a member in respect of the bankrupt's Trustee in bankruptcy.

shares. See Clause 22 of Table A., and *Re Bentham Mills Spinning Co.*, 11 C. D. 900, and *W. Key & Son, Limited*, (1902) 1 Ch. 467. In the latter case there was a lien clause, and the company claimed to enter the trustee's name with a memorandum stating the lien, and to indorse a similar memorandum, but the Court disallowed the entry and held the trustee entitled to a "clean" certificate. The equitable title vests in the trustee, and he has also, under sect. 48 (3) of the Bankruptcy Act, 1914, a statutory power to transfer the shares subject to the same conditions as the bankrupt is subject to. If the shares are onerous, the trustee may by writing, within three months of his appointment, disclaim the shares, leaving the company to prove for the injury caused by the disclaimer. Bankruptcy Act, 1914, s. 54; *In re West of England Bank, Ex parte Budden and Roberts* (1879), 12 C. D. 288; *Levi* v. *Ayers*, 3 App. Cas. 845.

As to the measure of damages in such a case, see *Re Hallett*, W. N. (1894) 156; *Re Hooley*, (1899) 2 Q. B. 579.

On the bankruptcy of a trustee of shares, the shares, being choses in action, will not pass to his trustee in bankruptcy under the order and disposition clause. *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

A company cannot refuse to register a transfer of shares to a bankrupt director on the ground that if registered the shares will pass to the trustee in bankruptcy. *Sutton* v. *English and Colonial Produce Co.*, (1902) 2 Ch. 502.

A provision in articles for the compulsory transfer of shares of a bankrupt shareholder at a prearranged valuation is no fraud on the bankruptcy law. *Borland's Trustee* v. *Steel Brothers*, (1901) 1 Ch. 279.

As to a Scotch sequestrator's right to prove against the estate of a deceased shareholder, see *Tuticorin Co.*, 43 W. R. 190.

A clause, entitling a company to refuse to register any transfer made by a member who is indebted to it, has no application to a person claiming by transmission, such as a trustee in bankruptcy or an executor (*Re Bentham Mills Spinning Co.*, 11 C. D. 900; see, however, *Ex parte Harrison*, 26 C. D. 522); but this oversight is usually corrected in properly-framed regulations.

Share Warrants to Bearer.

Share warrants to bearer.

The Act of 1862 made no provision for the creation of shares to bearer. Shares of this description were first introduced by the Companies Act, 1867, and the provisions there relating to them are re-enacted in sects. 37 and 38 of the Act of 1908. Under sect. 37, a company is empowered, if authorized by its articles so to do, to issue, with respect to any share which is fully paid up, or with respect to stock, a warrant under the common seal stating that the bearer of the warrant is entitled to

the share or shares or stock therein specified. The section also empowers the company to provide, by coupons or otherwise, for the payment of future dividends. Sect. 37 further enacts that 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 delivery of the share warrant. A considerable number of companies have taken advantage of these provisions as contained in the Act of 1867. Share warrants to bearer are always treated as negotiable instruments. Whether they are so or not under the Act is not quite clear, but there is a valid mercantile custom to treat them as negotiable which is as effective. *Webb, Hale & Co.* v. *Alexandria Water Co.* (1905), 21 T. L. R. 572. See *infra*, p. 306. One circumstance which operates as a check on or discourages the issue of share warrants is the heavy stamp duty payable on the issue of them under the Stamp Act, 1891, viz., three times the amount of duty payable on transfer, that is to say, 30*s.* per cent. When a share warrant is issued, the name of the prior holder of the share is to be struck out of the register of members. See sect. 37 (5). Hence, whilst the share warrant is outstanding there will be no registered holder. The Act provides in sect. 26 as to the particulars to be contained in the annual summary where share warrants have been issued, and sect. 38 provides penalties for forgery and personation.

Holding a share warrant will not qualify a director where a share qualification is required.

The holder of a share warrant may be deprived of the right of voting, but this is seldom done, though the right to vote is usually qualified by providing for the deposit beforehand of the warrant.

CHAPTER XI.

CERTIFICATES OF SHARES.

Nature and Form of.

Certificates of title to shares.

SECTION 23 of the Act provides that a certificate under the common seal of a company specifying any shares or stock held by any member of the company, shall be *primâ facie* evidence of the title of the member to the shares or stock, and the articles of the company usually contain express provision as to the issue of such certificates. Moreover, sect. 92 of the Act makes provision for the prompt issue of certificates. The document issued is commonly in these terms:—

"*The* *Company, Limited.*

"This is to certify that A. B. is the registered holder of —— shares of £—— each, numbered —— to —— inclusive, in the above-named company, and that the sum of £—— has been paid up on each of the said shares. Given under the common seal of the said company this —— day of ——."

The articles of a company usually give the members the right to a certificate (see Table A, Clause (6)), and this right can be enforced by action against the company. *Burdett* v. *Standard Exploration Co.*, 16 T. L. R. 112.

Convenience of.

A share certificate is meant to facilitate dealings by shareholders with their shares in the market by enabling them, on any such dealing, whether it is one of sale, mortgage or pledge, to show on the spot a good *primâ facie* marketable title to the shares. "The certificates in companies of this kind," said Lord Selborne, in *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29, "are the proper, and indeed the only, documentary evidence of title in the possession of a shareholder."

A share certificate is a declaration to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it should be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. Per Cockburn, C. J.,

in *Re Bahia, &c. Rail. Co.*, L. R. 3 Q. B. 595. And see per Lord Cairns, L. C., in *Shropshire Union, &c. Co.* v. *The Queen*, L. R. 7 H. L. at p. 509, and *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, at p. 1017. Being thus addressed to the world, and all persons being invited to rely upon it, the directors of a company are bound to use the utmost care in issuing certificates; for the general rule is that a person making a representation of fact with the intention that it shall be acted on, is estopped from denying its truth as against any person acting on it *bonâ fide*. *Pickard* v. *Sears*, 6 Ad. & El. 469; *Freeman* v. *Cooke*, 2 Ex. 654. Hence if, by inadvertence or negligence, an incorrect certificate is issued, the company may incur serious liabilities in respect thereof. But the case is different where the secretary of a company, for his private ends, has fraudulently affixed the seal of the company to a certificate and forged the names of two of the directors. A certificate so issued raises no estoppel against the company in favour even of a mortgagee without notice. *Ruben* v. *Great Fingall Consolidated Co.*, (1906) A. C. 439. The cases on estoppel by certificate fall into two classes—representations by a company raising an estoppel as to title, and representations raising an estoppel as to payments on shares. The principle in both is the same.

May raise an estoppel.

Estoppel as to Title to Shares.

Thus, in *Re Bahia and San Francisco Co.*, L. R. 3 Q. B. 593, the company, acting upon a forged transfer, purporting to be a transfer by A., a shareholder, to B., issued to B. a certificate representing him to be the owner of the shares. C., in reliance on this certificate and in good faith, purchased and paid for the shares specified in it, and was duly registered as owner thereof. The forgery was subsequently discovered, and the company was compelled to restore the name of A. to the register in respect of the shares in question: his title, of course, no forgery could displace (*Barton* v. *L. & N. W. Rail. Co.*, 38 C. D. 144); but the company was also held liable, in an action by C., to pay him damages for wrongfully removing his name; for though the shares were not really his, the company was estopped, by its conduct, from setting up this defence.

Estoppel of company as to title by certificate issued.

In *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618, A. bought shares on the faith of a certificate representing B. as the holder, and took a transfer from B. accordingly. The company had, in fact, issued the certificate to B. in pursuance of a forged transfer, and refused to register the transfer to A. The Court held that A. was, under the circumstances, entitled to damages, and that the measure of such damages was the value of the shares at the time of the refusal to

register. The aggrieved party must, however, in such cases show that he acted on the certificate, for if he merely relies on a forged transfer and is registered and receives a certificate of title, the company is not estopped as against him (*Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188; *Coates* v. *L. & S. W. Rail. Co.*, 41 L. T. 553; *Vulcan Ironworks Co.*, W. N. (1885) 120); *but if he acts on the certificate* the case is different. Thus where A. was registered as the holder of shares under a forged transfer, and received a certificate of title thereto and *bonâ fide* acted upon it by selling the shares, the company was held estopped from denying his title to the shares, and such title being displaced by that of the true owner, he was held entitled to damages from the company. *Tomkinson* v. *Balkis Co.*, (1893) A. C. 396. So, also, if he is put to rest until it is too late to get redress against the real wrongdoer there is an estoppel. *Dixon* v. *Kennaway & Co.*, (1900) 1 Ch. 833.

Estoppel as to Payment on Shares.

Estoppel of company by certificate as to payment on shares.

The only difference in this case is that the representation made by the company is one as to payment and not title, but the company is equally bound to pay damages if its representation is acted on in good faith. Thus, if a company issues a certificate describing a share as fully paid up, when in fact it is not fully paid up, a purchaser of the share, who acts on the faith of the certificate, is entitled to hold the share as paid. *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004. See also *Rowland's case*, W. N. (1880) 80; and *Markham and Darter's case*, (1899) 1 Ch. 414. *Bloomenthal* v. *Ford*, (1897) A. C. 162, affords a good illustration. There A. lent the company 1,000*l.* on the terms that he was to have fully paid-up shares as security, and the company issued to him a certificate stating that he was the registered holder of 10,000 fully paid-up shares. The shares were, in truth, not paid up, but of this fact the lender had no knowledge, and it was held, in a winding-up, that the company was estopped from saying that the shares were not paid up, and that A., who honestly believed the representation made in the certificate to be true, was not bound to make any inquiry, or to ascertain how it was that the company was in a position thus to register him as the holder of paid-up shares for which he had not in fact paid. The company, in such a case, has no right to say: "I told you so-and-so, but you ought not to have believed me. You were too great a fool. I had the right to mislead you because you were too great a fool." Per Lord Halsbury, L. C. The estoppel will arise in favour of a firm, though one of the directors signing the certificate is a member of the firm. *Coasters, Limited*, 103 L. T. 622; (1911) 1 Ch. 86. See, also.

Parbury's case, (1896) 1 Ch. 100, in which the company was held estopped as against an original allottee who had acted on the company's certificate.

A transferee with knowledge or notice that the representation is not correct cannot, however, invoke the doctrine of estoppel in his favour (*Crickmer's case*, L. R. 10 Ch. 614), but the onus of proving notice rests on the person setting up the case of notice. *In re Hall & Co.*, 37 C. D. 712.

Directors who issue certificates for shares or stock which do not exist may be held personally liable in damages upon an implied warranty of authority. *Firbank* v. *Humphreys*, 18 Q. B. D. 54.

A certificate that a person is the holder of shares or stock does not require any stamp. It is not a deed. *Queen* v. *Morton*, L. R. 2 C. C. R. 22. No stamp required.

But a scrip certificate or other document entitling any person to become the proprietor of any share of any company or proposed company requires a penny stamp. Stamp Act, 1891, s. 79.

As to estoppel by "certification," see *supra*, pp. 138, 139.

Deposit by Way of Equitable Mortgage.

A valid equitable mortgage of shares or stock may be effected by depositing the certificate relating thereto. *Tahiti Cotton Co.*, 17 Eq. 273; *Williams* v. *Colonial Bank*, 38 C. D. 395; *France* v. *Clark*, 26 C. D. 263; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; and *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *De Verges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579. If a purchaser of shares leaves them in the hands of a broker, together with blank transfers, and the broker deposits the certificates by way of charge, the purchaser may be estopped from disputing the validity of the charge. *Fuller* v. *Glyn, Mills, Currie & Co.*, (1914) 2 K. B. 168. Equitable mortgage by deposit of certificates.

Renewing Lost Certificates.

The articles very commonly contain provision for the issue of a fresh certificate in the place of any certificate which has been lost or defaced. See Clause 7 of Table A., *infra*, Appendix. Lost certificates.

Note at Foot.

The certificate very commonly bears at the foot thereof a note to the effect that before any transfer is registered the certificate must be produced. This note, it seems, is only a warning to the shareholder to take care of the certificate. It is not addressed to outsiders, and therefore does not create a contract or estoppel against the company on which they can rely. *Rainford* v. *James Keith and Blackman Co.*, (1905) 1 Ch. 296; *Guy* v. *Waterlow Bros.*, 25 T. L. R. 515. See dicta to the contrary in *Société Générale* v. *Walker*, 11 App. Cas. 20. Note.

CHAPTER XII.

CALLS.

Calls on shares.

A MEMBER is under a liability to pay up in accordance with the articles the amount for the time being unpaid on his shares. If his shares have been issued as paid up or partly paid up, whether for cash or otherwise, or if he or some prior holder has paid them up wholly or in part, he may be wholly or *pro tanto* exempt from calls; but *primâ facie* his liability is to pay the full amount in money or, if so agreed, in money's worth. Under sect. 25 of the Companies Act, 1867, he had to pay in cash unless a contract otherwise providing was filed with the registrar, but this section has been repealed. See *supra*, p. 119.

The nature of this liability is defined by sect. 14 of the Act. See *supra*, p. 116. A shareholder is bound, indeed, to pay the full amount unpaid on his shares, but he is not bound (unless, indeed, the terms of issue so provide) to pay up at once. He is only bound to pay *in accordance with the articles*, *e.g.*, by instalments, according to the terms of issue, or in response to calls. *In re Kershaw, Whittaker* v. *Kershaw*, 45 C. D. 320; *Re Russian Spratts, Limited*, 78 L. T. 480; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56. When the liability to pay has thus matured into a debt, this indebtedness on the shareholder's part to the company is by the section "to be in the nature of a specialty debt." An instalment payable by the terms of issue is not a call. *Croskey* v. *Bank of Wales*, 4 Giff. 314; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56.

Call-making Power a Trust.

The power to make calls is a power in the nature of a trust, and it must be exercised for the general benefit of the company. *Gilbert's case*, 5 Ch. 559; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56. If it is being exercised *malâ fide*, *e.g.*, for the directors' own ends or other indirect purpose, this is an abuse of the power, and an injunction may be obtained restraining the call. See p. 149, *post*. *Norman* v. *Mitchell*, 19 Beav. 278; *Logan* v. *Courtown*, 13 Beav. 22;

Bailey v. *Birkenhead Co.*, 12 Beav. 433. But the Court does not readily accede to such an application. The onus of proving *mala fides* in such a case is on the shareholder. *Odessa Tramways Co.* v. *Mendel*, 8 C. Div. 245. In the absence of proof of *mala fides*, it is a well-established principle that the Court will not interfere with the discretion of the directors in making a call. *Ibid.*

Making of Calls.

A call is made by the directors or other the executive of the company pursuant to the provisions of the company's articles. These generally provide (see Table A., Arts. 12—17) that the directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them and not by the conditions of allotment thereof made payable at fixed times, and that each member shall pay the amount of every call so made on him to the persons and at the times and places fixed by the directors. Usually the notice of a call is 14 or 21 days. The terms thus defined by the articles are the terms on which, and on which only, the shareholder has agreed to pay, and in making a call care must, therefore, be taken that the directors making it are (i) duly appointed (*Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151); and (ii) duly qualified (*Iron Ship Co.* v. *Blunt*, L. R. 3 C. P. 484; *Sharp* v. *Dawes*, 2 Q. B. D. 26); (iii) that the meeting of the directors has been duly convened (*Garden Gully United Quartz Mining Co.* v. *McLister*, 1 App. Cas. 46; *Faure Electric Accumulator Co.* v. *Phillipart*, 58 L. T. R. 525); (iv) that the proper quorum is present (*Austin's case* (187), 24 L. T. 932); and (v) that the resolution making the call is duly passed and specifies the amount of the call, the time and place—for these are of its essence—and to whom the call is to be paid. See *Re Cawley & Co.*, 42 C. D. 209; conf. *Johnson* v. *Lyttle's Iron Agency*, 5 C. D. 687. A proper entry must also be made in the minutes. *Cornwall Mining Co.* v. *Bennett*, 5 H. & N. 423. Unless these matters are attended to the call may be invalid, and when the company comes to sue for the amount or seeks to enforce payment by forfeiture it may be embarrassed by finding that all the proceedings are vitiated by an initial irregularity. See, however, as to such irregularities, p. 192.

Sometimes the articles limit the amount of a call—provide, for example, that the amount shall not exceed one-fourth of the nominal amount of the share, and sometimes that a specified interval must elapse between the times fixed for payment of two successive calls. Any conditions of this kind must be kept in mind in making a call.

Calls should be made *pari passu* unless the articles otherwise

provide, and directors can only justify a call made on certain selected members only (if at all) on very special grounds. *Galloway* v. *Hallé Concerts Society*, (1915) 2 Ch. 233. If the directors omit to make calls on their own shares they may be held guilty of misfeasance. *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56.

It may sometimes be proper for directors to make a call in order to restrain threatened transfers (*Gilbert's case*, 5 Ch. 559); 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. *New Zealand Co.* v. *Peacock*, (1894) 1 Q. B. 622.

A call may be made payable in instalments without any express authority in the articles. *Ambergate Rail. Co.* v. *Norcliffe*, 6 Ex. 629; *Lawrence* v. *Wynn*, 5 M. & W. 355.

Directors may make calls after a voluntary winding-up has commenced with the sanction of a general meeting or of the liquidators. *Fairbairn Engineering Co., Ladd's case*, (1893) 3 Ch. 450.

Interest.

Interest on

The articles usually contain also a provision to the effect that if any call is not paid at the time fixed, the holder for the time being of the share is to be liable to pay interest at a specified rate, sometimes 10 per cent. See Table A., Art. 14. Such clause is binding and will be given effect to. It does not, however, apply in the case of calls made by the liquidators of a company. *Welsh Flannel and Tweed Co.*, 20 Eq. 367. As to liability to pay interest on calls after forfeiture of the shares, see *Stocken's case*, L. R. 3 Ch. 412; *Faure Electric Accumulator Co.* v. *Phillipart*, 58 L. T. R. 525.

Deceased Member.

Calls where member deceased.

Although the articles generally provide that calls are to be made on the "members," a deceased member, whilst his name remains on the register, is to be treated as a continuing member so far as may be necessary to make his estate liable. *New Zealand, &c. Co.* v. *Peacock*, (1894) 1 Q. B. 622.

In the administration of the insolvent estate of a deceased person the amount due for calls which may be made in respect of shares in a company held by him should be estimated and proved for, as well when the company is a going concern as when it is being wound up. *Re McMahon, Fuller* v. *McMahon*, (1900) 1 Ch. 173.

Bankrupt Member.

If a shareholder becomes bankrupt and the company proves in the bankruptcy for the uncalled liability on the shares and receives a dividend, this does not make the bankrupt a holder of fully-paid shares so as to entitle him to participate in surplus assets of the company. Proof is not equivalent to payment. *Re West Coast Goldfields*, (1906) 1 Ch. 1.

Enforcing Payment.

Enforcement of payment

The duty of the directors of a company when a call is made is to compel every shareholder to pay to the company the amount due from him in respect of such call, and they are guilty of a breach of their duty if they do not take all reasonable means for enforcing payment. *Spackman* v. *Evans*, L. R. 3 H. L. 186.

It is a breach of trust for them to favour any director in such a matter. *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56.

It is now common to sue for a call on a writ specially indorsed under Ord. III. r. 6 of Supreme Court Rules. After judgment has been obtained against the defaulting shareholder, the company can, if needs be, proceed against him in bankruptcy. *Re Winterbottom*, 18 Q. B. D. 446. See also as to forfeiture, Chapter XIII. Whilst the company is a going concern the shareholder can plead a set-off. *Re Hiram Maxim Co.*, (1903) 1 Ch. 70. As to the method of enforcing calls due to an English company from contributories in Ireland, see *Re Bank of Egypt, Ltd.*, (1913) 1 I. R. 502.

Injunction to Restrain Enforcement of Call.

If a call is improperly made, the shareholder can obtain an injunction to restrain the directors from enforcing the call by forfeiture pending the trial of the question; but usually only on the terms that the amount of the call should be paid into Court. *Lamb* v. *Sambas Rubber Co.*, (1908) 1 Ch. 845; and see *Jones* v. *Pacaya Rubber Co.*, (1911) 1 K. B. 455.

An injunction to restrain the enforcement of a call by action at law cannot now be granted. Judicature Act, 1873, s. 24 (5); and see *Galloway* v. *Hallé Concerts Society* (1915) 2 Ch. 233.

Payment in Advance of Calls.

Payment in advance of calls.

The articles of a company usually contain a clause similar to Clause 17 of Table A., empowering the directors to receive from any

member money in advance of calls, on the footing that interest is to be paid thereon whilst in advance. This is an extremely important power and one which is frequently exercised. It is in the nature of a trust to be faithfully exercised for the benefit of the company, and accordingly the directors should only receive money in advance when, in their judgment, the same can be advantageously used for the purposes of the company, and the rate of interest should not be excessive. *Poole, Jackson and White's case* (1878), 9 C. D. 322; *In re Pyle Works*, 44 C. D. 534. Hence, where directors under a power of this kind paid up in advance their own shares, and the same day appropriated the amount in payment of their fees, the company being insolvent, it was held, that the transaction, not being *bonâ fide*, was ineffectual, and that the directors remained liable on their shares. *Sykes's case*, 13 Eq. 255. See, however, *Mason's case*, *In re Liverpool Insurance Co.*, 30 W. R. 378; *In re A. M. Woods, Ship* v. *Woodite Protection Co.*, 2 Meg. C. R. 164; also *Washington Diamond Co.*, (1893) 3 Ch. 95. It has now been settled by the House of Lords that where money is paid up in advance under such a clause on the footing that it is to carry interest, such interest is to be paid whether there are or are not profits for the payment thereof. If there are no profits, or the profits are insufficient, then the company must pay out of capital, and there is nothing *ultra vires* in this. *Lock* v. *Queensland Co.*, (1896) A. C. 461, 467. Where capital has been paid up in advance it ranks for repayment in a winding-up *primâ facie* before capital not paid up in advance. *Maude's case*, 6 Ch. 51; *Wakefield, &c. Co.*, (1892) 3 Ch. 165; *In re Exchange Drapery Co.*, 38 C. D. 171. The company is not entitled to repay the amount advanced at any time against the wish of the shareholder. *London and Northern S.S. Co.* v. *Farmer*, (1914) W. N. 200; 111 L. T. 204.

CHAPTER XIII.

FORFEITURE.

Forfeiture of shares for non-payment of calls.

The articles of a company generally contain provisions for the forfeiture of shares for non-payment of calls or instalments. See Table A., Arts. 24—30: sometimes for non-payment of debts also. See *Dunlop* v. *Dunlop*, 21 Ch. D. 583, and the footnote on p. 160, *post*. Such a power to forfeit is not inherent in a company. *Clarke* v. *Hart*, 6 H. L. C. 633. It only exists where it is given by the articles or introduced into them, as it may be, by special resolution. *Dawkins* v. *Antrobus*, 17 C. D. 634; *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656. When given, it is like other powers of directors, fiduciary —to be exercised, that is, for the benefit of the company.

Collusion

A collusive forfeiture made for the purpose of enabling a member favoured by the directors to escape from his liabilities is an abuse of the power and a fraud on the other shareholders. *Re Esparto Trading Co.*, 12 C. D. 191; *Spackman* v. *Evans*, L. R. 3 H. L. 186; *Lord Wallscourt's case*, W. N. (1899) 258. Forfeiture is treated very strictly by the Courts, and directors seeking to enforce it must exactly pursue the course of procedure marked out by the articles. *Clarke* v. *Hart*, *supra*. A slight irregularity is as fatal as the greatest. *Garden Mining, &c. Co.* v. *McLister*, 1 App. Cas. 39; *Johnson* v. *Lyttle's Iron Agency*, 5 C. D. 687. Thus if the call, in respect of which the forfeiture is made, was not validly made (*Garden Gully United Quartz Mining Co.* v. *McLister*, *supra*), or if the notice on which the forfeiture is founded is inaccurate in requiring payment of interest from a wrong date, *e.g.*, the date of the call instead of the date appointed for payment, the forfeiture may be held invalid. *Johnson* v. *Lyttle's Iron Agency Co.*, *supra*; *Watson* v. *Eales*, 23 Beav. 294; *Faure Electric Accumulator Co.* v. *Phillipart*, 58 L. T. 525. Even where a shareholder is seeking to rescind his contract the Court can restrain a forfeiture. *Lamb* v. *Sambas Rubber*, (1908) 1 Ch. 845; *Jones* v. *Pacuya Rubber Co.*, (1911) 1 K. B. 455.

Irregular.

Where a shareholder is bankrupt the notice of forfeiture may still be given to him. *Graham* v. *Van Diemen's Land Co.*, 36 L. J. Ex. 73; but it is well to give notice to the trustee also. So where the shareholder is dead the notice may be sent to his registered address. *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656 at p. 670. [Note that in this case the notice in fact reached the executors; but the statement of the law at p. 670 is probably sufficient to override the doubt expressed in *James* v. *Buena Ventura*, (1896) 1 Ch. at p. 465.]

The exercise of a power of forfeiture is a question of expediency as to which the directors must exercise their discretion. *Bigg's case*, 1 Eq. 309. On forfeiture the shares become the property of the company and may be sold by it. See Table A., Clause 27.

Directors do not lose the power of forfeiture because the company charges all its uncalled capital in favour of trustees for debenture holders. *Re Agency Land and Finance Co. of Australia*, 20 T. L. R. 41.

Forfeiture after winding-up.

In a voluntary winding-up the directors can, with the sanction of the liquidator, exercise the power of forfeiture. See sect. 185 (iii) of the Act of 1908, and *Re Fairbairn, &c. Co.*, (1893) 3 Ch. 450.

Sale of shares.

The articles generally give power to the directors to sell forfeited shares. In such a case the directors can sell at a discount, that is for less than the amount paid up prior to the forfeiture. *Morrison* v. *Trustees' Executors Co.* (1899), 68 L. J. Ch. 11; 79 L. T. 605 (C. A.). [But *semble* the transferee will remain liable to pay any amount remaining unpaid on the shares at the time of sale. S. C. And see *New Balkis* v. *Randt Gold Mining Co.*, (1904) A. C. 165, and p. 153, *post*.] In such a case the transferee will be a holder of shares in respect of which money is due, and may therefore by a clause in the regulations be debarred from voting. *Randt Gold Mining Co.* v. *Wainwright*, (1901) 1 Ch. 184. He should be credited with any subsequent payments made by the ex-owner. *Randt Gold Mining Co.*, (1904) 2 Ch. 468.

Power to annul.

The articles very commonly give power to the directors so long as they have not sold the forfeited shares to annul the forfeiture on such terms as they think proper. This power cannot be exercised without the consent of the late holder. *Exchange Trust, Limited, Larkworthy's case*, (1903) 1 Ch. 711.

Relief against Forfeiture.

Relief against.

Where a forfeiture has been duly and *bonâ fide* effected, equity will not relieve against it. *Sparks* v. *Liverpool Waterworks Co.*, 13 Ves. 428. A shareholder who desires to challenge a forfeiture as invalid may bring an action to set it aside (*Sweny* v. *Smith* (1867), 7 Eq. 324; *Johnson* v. *Lyttle's, &c. Co.*, *supra*; *Re New Chili, &c. Co.*, 45 C. D. 598); and may obtain an injunction to restrain the forfeiture pending the trial, usually on the terms of payment of the amount called up into Court; see *Jones* v. *Pacaya Rubber Co.*, (1911) 1 K. B. 455 (where the forfeiture was restrained pending the trial of an action claiming rescission of the contract to take the shares); and mere laches will not disentitle a legal owner of shares to such relief if the forfeiture is invalid (*Garden Gully, &c. Co.* v. *McLister*, 1 App. Cas. 39); but it is different where years have elapsed and the shareholder claiming relief was himself party as director to the forfeiture. *Jones* v. *North Vancouver Land Co.*, (1910) A. C. 317.

A shareholder whose shares have been irregularly forfeited (*e.g.*, without proper notice) can sue the company or, in a winding-up, prove for damages against the company. *In re New Chili, &c. Co.*, 45 C. D. 598. Damages for irregular forfeiture.

A clause in a company's articles forfeiting the shares of any shareholder who should commence or threaten an action against the company or the directors on payment to the shareholder of the full market value of his shares is invalid, as an infringement of a shareholder's legal rights. *Hope* v. *International Financial Society* (1876), 4 C. D. 327.

Liability after Forfeiture.

Forfeiture of shares prevents *primâ facie* any action by the company for calls (*Stocken's case*, 3 Ch. 415), and when a person has been induced by misrepresentation to become a member, forfeiture places him in a position, if sued by the company, to set up the misrepresentation by way of defence, even in a winding-up. *Aaron's Reef* v. *Twiss*, (1897) A. C. 273. But the articles commonly provide that where a share has been forfeited the member shall be liable for payment of the call with interest, and this creates a new obligation (*Stocken's case, supra*) which can be enforced by action at law, but not by placing the holder on the list of contributories. *Ladies' Dress Association* v. *Pulbrook*, (1900) 2 Q. B. 376. Liability after.

A call may be "owing" within the meaning of such a clause, though it has not become payable when the forfeiture takes place. *Foure* v. *Phillipart*, 58 L. T. 525.

The forfeiture of a share does not relieve the forfeiting member from liability in respect thereof if the company should be wound up within a year after the forfeiture: he will still be liable as a past member to the extent specified in sect. 123 of the Act. *Creyke's case*, L. R. 5 Ch. 63. So a shareholder who has transferred his shares within a year of a winding-up is liable as a past member, though the shares have been forfeited in the hands of a transferee. *Bridger's and Neill's cases* (1869), L. R. 4 Ch. 266.

A liquidator has no power to cancel a forfeiture of shares duly made by the directors before the commencement of the winding-up. *Dawes' case*, 6 Eq. 232.

When shares forfeited for non-payment of calls are sold, the purchaser is liable to a fresh call in respect of the capital comprised in such prior calls (*New Balkis Eersteling* v. *Randt Gold Mining Co.*, (1904) A. C. 163), for the company cannot sell free from that liability. But subsequent payments by the former holder, on account of the prior calls, should be credited to the purchaser in due course. *Randt Gold Mining Co.*, (1904) 2 Ch. 468.

CHAPTER XIV.

LIEN ON SHARES.

How created.

The lien clause: its operation.

A COMPANY has, *primâ facie*, no lien on the share of a member (*Pinkett* v. *Wright*, 2 Ha. 120; 12 Cl. & Fin. 764); but the articles may, and usually do, provide that the company shall have a paramount lien on the shares of each member for his debts and liabilities to the company, whether matured or not. See Company Precedents, 11th ed., Part I. p. 662, and Table A., cl. 9. And such a provision is effective. *New London, &c. Co.* v. *Brocklebank* (1882), 21 C. D. 302; *Bradford Bank* v. *Briggs* (1886), 12 App. Cas. 29. The lien thus created takes effect as an equitable charge (*Ex parte Lewis* (1871), 6 Ch. 818) created in favour of the company by covenant of the shareholder, the covenant being implied by virtue of sect. 14 of the Act. See *Bradford Bank* v. *Briggs*, *supra*; and also p. 39, *supra*. A lien clause may be adopted by special resolution. *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

A right of lien may be discharged by a clear arrangement between the shareholder and the company. *Bank of Africa* v. *Salisbury Gold Mining Co.*, (1892) A. C. 281.

Validity of Lien against Third Persons.

As to subsequent mortgage or purchase.

A lien clause in the articles not infrequently gives rise to questions of priority between the company asserting the lien and persons claiming under the shareholder. For example, the company may receive notice that the shareholder has mortgaged or sold the shares, and the question then arises whether, if the shareholder subsequently becomes indebted to the company, the company's lien will rank in priority to the mortgagee or purchaser.

Exemption clause.

The answer to the question generally turns on the presence or absence in the articles of a clause (below referred to as an exemption clause) relieving the company from the obligation to take notice of equities in relation to its shares. It will be convenient to consider, in the first place, cases

Where there is an Exemption Clause.

See, for examples, p. 158.

New London, &c. Bank v. *Brocklebank.*

In *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 C. D. 302, there was a paramount lien clause and also an exemption clause. The shares were acquired with trust money. One of the holders became indebted to the bank, and upon the bank seeking to enforce its charge the prior equity of the beneficiaries was set up, with the result that the Court of Appeal (Jessel, M. R., and Lindley and Holker, L. JJ.) held that the bank had a lien on the shares which must prevail over the title of the beneficiaries. Jessel, M. R., considered that, as the lien was given by the articles, it took effect from the time the member was admitted, and further, that the beneficiaries were not entitled to repudiate the lien and exemption clauses, and Lindley, L. J., said that he failed to see upon what ground the equitable owner could claim title to the shares and yet "repudiate the terms upon which the trustees have acquired the shares."

In the last edition of Lindley on Company Law, p. 637, this case is referred to as an authority for the proposition that—

"In the case of companies which are exempted from the duty of taking notice of trusts, the lien is available against a shareholder who is merely a trustee for others for debts due from him personally."

And the decision was recognized as a binding authority by Farwell, J., in the recent case of *Borland's Trustees* v. *Steel Brothers & Co.*, (1901) 1 Ch. 289.

Again, in *Miles* v. *New Zealand, Alford, &c. Co.* (1886), 32 C. D. 266, there being a lien clause and an exemption clause, it was held by the Court of Appeal that the company was not bound to take notice of a mortgage, and was entitled to rank before the second mortgagee in respect of a claim arising after notice to the company of such mortgage.

And in *Société Générale* v. *Walker* (1886), 11 App. Cas. 20, where there was an exemption clause, Lord Selborne said that he thought "upon the true and proper construction of the Companies Act, 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."

This passage was thought by Lord Halsbury, L. C., in *Bradford Banking Co.* v. *Briggs* (see *infra*), to go too far; but, apparently, attention was not called to the fact that, in the case last mentioned, there was no exemption clause, whereas, in the case Lord Selborne was dealing with, there was a very full exemption clause.

Principle of decision.

The principle of these decisions appears to be that a shareholder cannot both approbate and reprobate, and that those who claim under him cannot repudiate either the lien clause or the exemption clause, any more than those claiming under a lease or a policy can repudiate the conditions thereof. *Qui sentit commodum, sentire debet et onus.* See *Macdonald* v. *Law Union, &c. Co.* (1873), L. R. 9 Q. B. 328, and *Borland's Trustee* v. *Steel Brothers & Co.*, (1901) 1 Ch. 279 (Farwell, J.). It is the same principle as that a person who takes property with notice of an equity attached thereto is bound thereby. See *Tulk* v. *Moxhay* (1848), 2 Ph. 774. "If," said Lord Chancellor Cottenham in that case, "an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." *Tulk* v. *Moxhay* was a case as to user of land, but there is no difference in principle whether the subject-matter is land or a chattel, *e.g.*, a ship. See *De Mattos* v. *Gibson* (1858), 4 De G. & J. 276, in which Knight-Bruce and Turner, L. JJ., both considered that, when there was a contract between A. and B. as to the employment of a chattel the Court of Chancery had power to restrain C., claiming through B. with notice, from doing anything in contravention of the contract. "A system of law," said Knight-Bruce, L. J., "in which such a power does not exist must surely be very defective. I repeat that in my opinion the power does exist here."

Object of sect. 27 of the Act.

Company looks to registered holder.

The importance of thus relieving the company from an obligation to recognize equities is well pointed out by Lord Coleridge, C. J., sitting in the Court of Appeal in *Re Perkins*, 24 Q. B. D. 613. "It seems to me," he said, "extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do. They can only look to the man whose name is upon the register. It seems to me that if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves." Lord Esher and Fry, L. J., concurred. It is for these *dicta* that the case is cited. The actual point decided was a somewhat different one, viz., that as the company were not bound to recognize trusts, they had no lien upon the shares for a debt due to them by the *cestui que trust* of the shareholder.

Where no Exemption Clause.

Where no exemption clause.

On the other hand, cases sometimes occur where there is a lien clause but no clause exempting the company from taking notice of trusts and equities. In such cases the company has to rely exclusively on sect. 27 of the Act, which provides that "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 and registered in England or Ireland."

This section is very wide in its terms; but it has been held by the House of Lords, on the corresponding section in the Act of 1862, that notice of an equitable mortgage created by the shareholders, is not notice of a "trust" within the meaning of the sections. *Bradford Banking Co.* v. *Briggs* (1887), 12 App. Cas. 29. In that case the articles contained a clause giving the company a first and permanent lien, and there was no exemption clause. The company received notice of a mortgage by the shareholder, and afterwards it advanced money to the shareholder and claimed priority for its advance, contending (1) that on the true construction of the lien clause (103) in its articles (which gave the company a first and permanent lien) the shareholder had agreed that the company should have a lien ranking in priority to all other charges with or without notice, and that the second mortgagee with notice of this bargain could not establish any claim in violation of it; and (2) that the company was, under sect. 30 of the Act of 1862 (now sect. 27), entitled to disregard the notice as notice of a trust, and on that ground, entitled to priority.

It was held that the principle of *Hopkinson* v. *Rolt*, 9 H. L. C. 514, applied, and there being nothing in the articles to the contrary, the company was not entitled to disregard notice of the mortgage and insist upon priority for its subsequent advances.

As to the first of these contentions, the House of Lords was of opinion that it was inconsistent with the real meaning of the clause. "I cannot agree," said Lord Blackburn, "that such is the true construction of Art. 103." And Lord Fitzgerald observed that "the principle of *Hopkinson* v. *Rolt* governs the present case *unless* there is something in Art. 103 which prevents its application. The articles provide for the transfer of shares; . . . but there is no limit to the right of the shareholder to pledge, or raise money on, his shares unless it is to be found in Art. 103," and he considered that "full effect may be given to its terms, and yet the lien conferred by it be limited as to liabilities of the shareholder contracted up to the time at which the company shall have had notice that he has ceased to be the beneficial holder of the shares."

As to the second contention, the House of Lords held that notice of the mortgage was not notice of a trust within the meaning of the section.

It is material to note that this case was decided on the construction of the articles and of sect. 30 of the Act of 1862. It did not decide that there was any inexorable rule of equity making it impossible, by the articles, to exclude the application of the rule in *Hopkinson* v. *Rolt*, *supra*. On the contrary, as appears above, the provisions of the articles were carefully considered, and it was held that they did not import any intention to exclude the rule, for they in no way attempted to relieve the company from noticing equities. And as regards sect. 30 of the Act of 1862 (now sect. 27 of 1908), the case merely decided that notice of a mortgage was not notice of a trust. *Bradford Banking Co.* v. *Briggs* therefore in no way derogates from the authority of *New London and Brazilian Bank* v. *Brocklebank*, 21 C. D. 302, *supra*, p. 155. See also the judgment of Farwell, J., in *Borland's Trustee* v. *Steel Brothers & Co.*, (1901) 1 Ch. 288.

Exemption Clauses.

The terms of exemption clauses vary considerably. In *New London and Brazilian Bank* v. *Brocklebank*, 21 C. D. 302, *supra*, p. 155, the clause ran—

"The company shall not be bound by or recognize any agreement to transfer or charge any share, or any equitable, contingent, future or partial interest, or other right in, to, or in respect of such share, except an absolute right thereto in the person from time to time registered as the holder thereof."

The clause in *Société Générale* v. *Walker*, *supra*, p. 155, ran thus—

"The company shall not be bound by or recognize any equitable, contingent, future, or partial interest in any share or any other right in respect of a share except absolute right thereto in the person from time to time registered as the holder thereof, and except also as regards any parent, guardian, committee, husband, executor, or administrator or trustee in bankruptcy his right under these presents to become a member in respect of or to transfer a share."

In *Miles* v. *New Zealand, &c. Co.*, *supra*, p. 155, the clause was in these terms—

"The company shall not be bound to recognize any contingent, future, partial or equitable interest in the nature of a trust, or otherwise in any share or any other right in respect of any share except an absolute right thereto in the person from time to time registered as the holder thereof."

Another provision very commonly found in articles is that "[Save as herein otherwise provided] the company shall be entitled to treat

the registered holder of any share as the absolute owner thereof, and, accordingly, shall not [except as ordered by a Court of competent jurisdiction or as by statute required] be bound to recognize any equitable or other claim to, or interest in, such shares on the part of any other person." Such a clause is framed with a view to enabling the company, whether in relation to a lien clause or otherwise, to deal with the registered holder of a share as the absolute owner, and to relieve the company altogether from any obligation to take notice of any claims or assertions of equitable interests that may come to it.

How far such a clause operates has not yet been fully determined. It is, however, clear that, even without the words in brackets, it does not prevent a person equitably interested in shares from procuring the intervention of the Court to protect his rights. *Binney* v. *Ince Hall Coal Co.*, 35 L. J. Ch. 363; *Taylor* v. *Midland Rail. Co.*, 8 W. R. 401. In this respect it goes no further than sect. 27 of the Act. See *Bradford Banking Co.* v. *Briggs*, 12 A. C. 29, *supra*, p. 157; and Company Precedents, Part I. p. 650.

Such a clause does not exclude the Court.

How Lien enforced.—Sale.

The articles generally give power to the company to enforce a lien by sale after default (see Table A., Art. 10), and, if needs be, to transfer the shares into the purchasers' names. This is right; for, in the absence of some such provision, it may be necessary to apply to the Court. *New London, &c. Bank* v. *Brocklebank*, 21 Ch. D. 302, *supra*, p. 155. On the other hand, the charge which a lien creates being a mortgage within the meaning of sect. 2, sub-sect. (vi) of the Conveyancing Act, 1881, the shareholder or his transferee is entitled, by sect. 15, sub-sect. (i) of that Act, to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee. *Everett* v. *Automatic, &c. Co.*, (1892) 3 Ch. 506: but see *Re Magneta Time Co.*, (1915) W. N. 318, as to the necessity of concurrence of a subsequent incumbrancer.

Enforcing lien.

This being so, it may be that the power of sale given by sect. 19 of the same Act to mortgagees is applicable. Sect. 19, no doubt, only gives the power to a mortgagee to sell where the mortgage is "by deed," but under sect. 14 of the Act of 1908, the lien clause binds the shareholder as if it were his deed of covenant with the company. *Bradford Bank* v. *Briggs*, *supra*.

The clause conferring a lien extends not only to the shares, but to the dividends thereon (*Re General Exchange Bank* (1871), L. R. 6 Ch. 818; *Hague* v. *Dandeson*, 2 Ex. 741), and also to any assets which, in a winding-up, may come to the shareholders in respect thereof. *Ex parte Lewis*, 6 Ch. 818.

When the holder of shares subject to a lien by the company sells some of them the purchaser is entitled to marshal as against an execution creditor of the vendor, and to throw the lien in the first instance upon the shares remaining unsold. *Gray* v. *Stone & Funnell*, 69 L. T. 282; W. N. (1893) 133.

Forfeiture.

Forfeiture clause.

Occasionally the articles provide that a lien may be enforced by forfeiture, but such a provision is not effective; for the lien is an equitable mortgage, and a clause for forfeiture in a mortgage is, in equity, inoperative. The rule is that, "once a mortgage always a mortgage" (*Salt* v. *Marquis of Northampton*, (1892) A. C. 1), and any attempt to clog the equity of redemption is futile.

Simple forfeiture clause without lien.

Sometimes it is thought better to avoid any question as to the operation of the lien clause by striking it out altogether, and adopting in lieu thereof a forfeiture clause for non-payment of *any* debt. Such a clause is sometimes used (*Dunlop* v. *Dunlop*, 21 C. D. 583), and is effective (*a*). It practically overrides *Bradford Banking Co.* v. *Briggs*, *supra*, p. 157.

Charging Orders.

Charging orders.

As to obtaining charging orders on shares, see 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; R. S. C., Ord. XLVI. r. 1; and Company Precedents, Pt. II. pp. 557, 650. A charging order cannot be made upon the shares of a judgment debtor if he is a trustee of the shares. *Cooper* v. *Griffin*, (1892) 1 Q. B. 740; *Howard* v. *Sadler*, (1893) 1 Q. B. 1, *South Western Loan and Discount Co.* v. *Robertson*, 8 Q. B. D. 17. See also *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157. A charging order must be enforced in a separate action commenced by writ or originating summons. Company Precedents, Part II. p. 650. See *Leggott* v. *Western*, 12 Q. B. D. 287; *Ricketts* v. *Ricketts*, W. N. (1891) 29; R. S. C., Ord. LV. r. 5a.

[(*a*) The validity of the clause was not questioned in *Dunlop* v. *Dunlop*, and the *dicta* of the House of Lords in the subsequent case of *Trevor* v. *Whitworth*, 12 A. C. at p. 417, and of the Court of Appeal in *Bellerby* v. *Rowland & Marwood*, (1902) 2 Ch. at p. 32, may raise a doubt whether forfeiture is permissible for purposes other than those specified in Clause 26 of Table A.—Ed.]

CHAPTER XV.

GENERAL MEETINGS.

The Statutory Meeting.

First statutory meeting of company.

SECT. 65 of the Companies (Consolidation) Act, 1908 (which has taken the place of sect. 12 of the Companies Act, 1900), runs as follows:—

(1.) Every company limited by shares and registered on or after the 1st day of January, 1901, shall, within a period of not less than one month nor more than three months from the date at which the company is entitled [see p. 23] to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2.) The directors shall, at least seven days before the day on which the meeting is held, forward to every member of the company a report (in this Act called "the statutory report") to every member and to every other person entitled under this Act to receive it.

(3.) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of such shares, distinguished as aforesaid;

(c) an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;

(d) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company; and

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

(4.) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5.) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar of companies forthwith after the sending thereof to the members of the company.

(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8.) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9.) If a petition is presented to the Court in manner provided for in Part IV. of this Act for winding up the company on the ground of default in filing the statutory report, or in holding the statutory meeting, the Court may, instead of directing the company to be wound up, give directions for the report to be filed or a meeting to be held, or make such other order as may be just.

(10.) The provisions of this section as to forwarding and filing the statutory report shall not apply in the case of a private company.

The obvious purpose of the statutory meeting with its preliminary report is to put the shareholders of the company as early as possible in possession of all the important facts relating to the new company—what shares have been taken up, what moneys received, what contracts entered into, what sums spent on preliminary expenses, &c. Furnished with these particulars, the shareholders are to have an opportunity of meeting and discussing the whole situation—the

management, methods and prospects of the company. If the shareholders fail to do so, they have only themselves to blame.

As regards the details of the section, it is to be noted that it is only applicable in the case of a company limited by shares. Hence the section does not apply to unlimited companies, or to companies limited by guarantee (even where these companies have a capital divided into shares), and it applies only in part to private companies. And see sub-sect. (10); *Gardner* v. *Iredale*, (1912) 1 Ch. 700. Notes on the section.

The words "entitled to commence business" at the commencement of the section refer, in the case of a company which on its formation invites the public to subscribe for shares, to sect. 87. (*Supra*, p. 57.) In the case of a private company the words refer to the date of incorporation. Such a company is entitled to commence business immediately on its incorporation, for sect. 10 of the Act declares that it shall "be capable forthwith of exercising all the powers of an incorporated company"; and, as Lord Macnaghten said in *Salomon's case*, (1897) A. C. 22, "The company attains maturity on its birth. There is no period of minority, no interval of incapacity."

The notices convening the statutory meeting should state that it is to be the statutory meeting. *Gardner* v. *Iredale*, (1912) 1 Ch. 700.

For a case where the company was wound up for default in compliance with this section, see *Re Kent Outcrop Coal Co.*, (1912) W. N. 26.

Ordinary and Extraordinary General Meetings.

A general meeting of the shareholders of a company is, by sect. 64, to be held once at least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and there are penalties for default; moreover, the Court, in case of default, can order the meeting to be convened. The calendar year commences 1st January (*Gibson* v. *Barton*, L. R. 10 Q. B. 329; *Cork* v. *Lawton*, (1911) 1 K. B. 588). Sect. 26 implies that an ordinary meeting is to be held every year. The statutory meeting is not an ordinary meeting. Hence both should be held, though the holding of an extraordinary meeting would no doubt be a sufficient compliance with sect. 64. *Lord Claude Hamilton's case*, L. R. 8 Ch. 548. Annual meeting.

The articles usually distinguish between ordinary meetings and extraordinary meetings. See Clause 47 of Table A. The term "ordinary meeting" is generally confined to the annual meeting which, by the articles, is usually to be held at some specified period of the year. The article for this purpose commonly provides that the directors are to hold one meeting every year at a specified date, and that they *may* call other meetings whenever they choose; and further, that they *shall* call an extraordinary meeting whenever they are required so to Ordinary and extraordinary meetings.

do by a requisition signed by a specified proportion of the members. *Macdougall* v. *Gardiner* (1875), L. R. 10 Ch. 606; see Clause 48 of Table A. Sect. 66 of the Act of 1908 (re-enacting provisions first introduced by sect. 13 of 1900) provides that the directors must call an extraordinary meeting on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls and other sums then due have been paid, and that if the directors do not, pursuant to any such requisition, convene a general meeting within twenty-one days the requisitionists, or a majority of them in value, may themselves convene such a meeting. See sect. 66 below.

Who may Convene.

The articles, as above stated, generally provide that the directors may, and that they shall, upon a specified requisition by members, convene a general meeting. This means *prima facie* that the directors may by resolution passed at a duly convened and constituted meeting of the board order the meeting to be convened. *Haycraft Gold Reduction Co.*, (1900) 2 Ch. 230; *Harben* v. *Phillips*, 23 C. D. 14. But if the articles so provide, a resolution in writing signed by the directors without meeting is as effective as a resolution passed at a board meeting. Notice of a general meeting given by the secretary without the sanction of the directors or other proper authority is invalid. *Ibid.*; and *Re State of Wyoming Syndicate*, (1901) 2 Ch. 431. But such a notice may be ratified by the directors before the meeting. *Hooper* v. *Kerr Stuart & Co.*, 83 L. T. 729, *infra*, p. 195.

Moreover, a resolution passed by a meeting which has the appearance of being regularly convened, will not be invalidated because some of the acting directors who joined in convening the meeting were not duly appointed. *Browne* v. *La Trinidad*, 37 C. D. 1; *British Asbestos Co.* v. *Boyd*, (1903) 2 Ch. 439. See also *Boschoek Proprietary Co.* v. *Fuke*, (1906) 1 Ch. 148, where the object was to confirm past proceedings.

Directors in calling meetings, as in other matters, must consider the general interests of the company.

Extraordinary general meeting.

As regards a meeting on requisition the articles commonly contain independent provisions on the subject. Where this is so the shareholders can proceed either under the articles or under sect. 66, as may seem the more convenient, but subject to this qualification, that the articles cannot abridge the statutory right. Usually it is found better to proceed under the section.

The section above referred to (which takes the place of sect. 13 of the Act of 1900) runs thus:—

66.—(1.) Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of

not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

(2.) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

(3.) If the directors of the company do not proceed to cause a meeting to be held within twenty one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of such deposit.

(4.) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

(5.) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors."

(Clause 1.) The holder of fully paid shares can take part in a requisition in respect of those shares, notwithstanding that calls remain unpaid on other shares held by him. *Fruit and Vegetable Association* v. *Kekewich*, (1912) 2 Ch. 52.

(Clause 2.) Documents may be "in like form," notwithstanding slight differences of language. *Fruit and Vegetable Association* v. *Kekewich*, *ubi sup.*

The mere fact that some of the resolutions referred to in the requisition could not be put to the meeting does not relieve the directors from an obligation to call the meeting. *Isle of Wight Rail. Co.* v. *Tahourdin*, 25 C. D. 320.

The Court would not under the old law compel directors to convene a general meeting pursuant to a requisition where the articles enabled the requisitionists themselves to call the meeting (*Macdougall* v. *Gardiner*, 10 Ch. 606), and the same rule will probably be adopted under the Act. The shareholders have the remedy in their own hands. But there might be special circumstances where the Court would interfere, *e.g.*, where there was a deadlock (*Brick and Stone Co.*, W. N. (1878) 140; *Sailing Ship "Kentmere" Co.*, W. N. (1897) 58), or where there was no board, or such disputes between the governing body as to prevent the affairs of the company being properly carried on.

Trade Auxiliary Co. v. *Vickers*, 16 Eq. 298. In such a case the Court would meet the situation by an injunction or appointment of a receiver.

In an urgent case a mandatory injunction has been granted directing the directors to call a meeting "forthwith" under sect. 66 (1). *Rutherford* v. *Farmery* (1915, R. No. 1524), Astbury, J., 12 Nov. 1915.

Notice.

Omission to give notice to any particular members.

Unless the articles otherwise provide, every member is entitled to notice of a general meeting—usually a seven days' notice—and the omission to give due notice, therefore, invalidates the meeting (*Smyth* v. *Darley*, 2 H. L. C. 789); but a clause in the articles commonly relaxes this rule as regards an accidental omission or non-receipt. See Clause 49 of Table A.; and as to members who are abroad, see *infra*, p. 232. Unless the articles otherwise provide, the executors or administrators of a deceased member, until registered as members, are not entitled to notice. *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656. To convene a meeting of the subscribers of the memorandum a reasonable notice is sufficient. Two days was held sufficient in *John Morley Building Co.* v. *Barras*, (1891) 2 Ch. 386. Sunday is not a *dies non*, apart from express provision. *Child* v. *Edwards*, (1909) 2 K. B. 753. The notice of meeting must be given in accordance with the articles; these usually require the notice to specify the date, place, and hour of meeting, and in case of special business, the general nature thereof. Where the articles are thus framed, it is necessary to define what is special business, and this is usually done by saying that at an ordinary meeting, the consideration of the accounts and reports, the election of directors and other officers in the place of those retiring by rotation, and the declaration of a dividend shall be considered ordinary business; but that any *other* business transacted at an ordinary meeting, and *all* business transacted at an extra-ordinary meeting shall be considered *special* business. See Clause 50 of Table A. An ordinary meeting may deal with special business if the notice specifies it. *Graham* v. *Van Diemen's Land Co.*, 26 L. J. Ex. 73. The notice convening a meeting at which any special business is to be transacted must state the nature thereof, otherwise the meeting will have been irregularly convened and cannot deal with the matter. *Lawe's case*, 1 De G. M. & G. 421; *Hampshire Co.*, (1896) 2 Ch. 743; *Kaye* v. *Croydon Tramways Co.*, (1898) 1 Ch. 358 (C. A.).

Notices as per regulations.

Contents of notice.

Special or ordinary business.

But a resolution need not be in the identical terms of the resolution specified in the notice of meeting, if, as passed, it is in substance covered by the notice. *Torbock* v. *Lord Westbury*, (1902) 2 Ch. 871.

If a member is known to be dead, it is enough to send a notice to his registered address. *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

Notices are not construed with excessive strictness. *Wright's case*, 12 Eq. 545; *Grant* v. *United Switchback*, 40 C. D. 137; *Henderson* v. *Bank of Australia*, 45 C. D. 330. Substantial compliance with the articles is sufficient. *In re British Sugar Refining Co.*, 3 K. & J. 408; *Young* v. *South African Syndicate*, (1896) 2 Ch. 268. Notices are to be construed as a business man would construe them, and to be understood in the ordinary sense (*Alexander* v. *Simpson*, 43 C. D. 139); but it is not enough, in a notice of an extraordinary meeting, merely to say "special business." *Wills* v. *Murray*, 4 Ex. 869. Nor is it enough to state that remuneration is to be allowed to the directors, without stating the amount, if the amount is large. *Baillie* v. *Oriental Telephone Co.*, (1915) 1 Ch. 503. Terms of notices not strictly construed.

Nor will a notice pointing to a particular course of action justify the adoption of only a part thereof, for how is it possible for the Court to know how many shareholders abstained from attending the meeting, being satisfied that the arrangement as it was proposed was advantageous to them, and being quite content to exercise no voice about it? Per Page-Wood, V.-C., *Clinch* v. *Financial Corporation*, 5 Eq. 461. Thus, where a meeting was convened to consider resolutions for reconstruction and for winding-up as incidental thereto, and at the meeting a naked resolution for winding-up was passed, it was held to be invalid as not in accordance with the notice. *Re Teede & Bishop*, 70 L. J. Ch. 409; W. N. (1901) 52; 84 L. T. 561. The authority of the case is, however, shaken by the recent decisions in *Thomson* v. *Henderson's Transvaal Estates Co.*, (1908) 1 Ch. 765, in which it was held that where the notice specified several resolutions, some *ultra vires* and some *intra vires*, and all were passed, the latter were effective, although the other resolutions were void. And see per Lord Selborne, *Ashbury* v. *Riche*, L. R. 7 H. L. 693.

But if the articles or the Act give a general power to deal with certain business at a general meeting without notice of such business, the fact that the notice convening the meeting specifies a particular resolution for dealing with such business does not limit the powers of the meeting. *Bethell* v. *Trench Tubeless Co.*, (1900) 1 Ch. 408. In that case it was held that at a meeting to confirm a special resolution for winding-up voluntarily the company, having without notice a general power under the Act to appoint a liquidator, might appoint B. though the notice stated that A. would be proposed. So, if the notice convening an ordinary meeting states that A. and B. will be proposed as directors, this does not prevent the appointment of C. and D. if by the regulations the appointment of directors is part of the business of the meeting and requires no special notice; and see *Betts & Co.* v. *Macnaghten*, (1910) 1 Ch. 430, and *post*, p. 175.

Where a contract is to be submitted to a meeting for confirmation,

and directors of the company are interested therein, it has been held that the notice convening the meeting should give particulars as to that interest. *Kaye* v. *Croydon Tramways Co.*, (1898) 1 Ch. 358 (C. A.); *Tiessen* v. *Henderson*, (1899) 1 Ch. 861; *Normandy* v. *Ind, Coope & Co.*, 1908) 1 Ch. 84. See *contra*, *Southall* v. *British Mutual*, 6 Ch. 614 C. A.), and *Grant* v. *United Switchback Co.*, 40 C. D. 135 (C. A.).

On the other hand, where a meeting is convened to pass a special resolution adopting a new set of articles in lieu of the existing articles, it has been generally assumed that if the notice stated the terms of the proposed resolution that was a sufficient compliance with sect. 51 of the Act of 1862 (for which sect. 69 of the Act of 1908 is substituted), without the notice specifying the details of alteration involved. The Court has repeatedly acted on this assumption, and the most eminent counsel have advised that it was correct.

Nor is it easy to see why the words of the section should, in such case, be supplemented by the Court. However, a learned judge (now dead), in *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84, considered that such a notice was insufficient, and that the notice ought to specify the material alterations proposed. It was not, however, really necessary to decide the point. See, too, *Grant* v. *United Switchback Rail. Co.*, 40 C. D. 135; *Southall* v. *British Mutual*, 6 Ch. 614.

Notice of meeting to be held on contingency only.

A notice that a meeting will be held in a certain contingency is not a good notice (*Alexander* v. *Simpson*, 43 C. D. 139), unless the articles sanction such a form of notice. *Re North of England Steamship Co.*, 1905) 2 Ch. 15. (Company Precedents, Pt. I. p. 696.) But even without special authority in the articles, it is possible to convene the two meetings for passing and confirming a special resolution if care is taken that the notice convenes both meetings unconditionally. *Espuela Land and Cattle Co.*, 48 W. R. 684 (Byrne, J.). In construing a notice, the rule is that the shareholders, to whom it is addressed, are to be presumed to know the Acts of Parliament, and also the terms of the memorandum and articles; and they must therefore read the notice in the light of these documents. *Campbell's case*, 9 Ch. 22; *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 70. A notice convening a meeting to pass a special resolution need not state that the resolution will be proposed "as an extraordinary resolution," notwithstanding the wording of sect. 69 of the Act. *Re Penarth Pontoon Co.*, (1911) W. N. 240.

Form of notice in case of special resolution.

Quorum.

Quorum of general meeting.

In order to constitute a general meeting a quorum of members must be present. If there be no provision as to a quorum in the articles, two members are requisite for a quorum. This is the common law rule. One member cannot for the purposes of an Act constitute a meeting, though for the purposes of a contract it may be possible.

East v. *Bennett Brothers*, (1911) 1 Ch. 163; *Sharp* v. *Dawes*, 2 Q. B. D. 26; *In re Sanitary Carbon Co.*, W. N. (1877) 223. But n single person may constitute a "meeting" where that word has a special signification givon it by the articles. *East* v. *Bennett Brothers*, (1911) 1 Ch. 163.

The regulations very commonly make three a quorum, as in Clause 51 of Table A., but sometimes a scale is established for determining a quorum.

Where articles provide for a quorum "present in person or by proxy," proxies can be counted. Sometimes there is a different quorum fixed for general meetings of shareholders and for meetings of particular classes of shareholders. See *Hemans* v. *Hotchkiss Co.*, (1899) 1 Ch. 115; Company Precedents, Part I. p. 685.

If no quorum be present, then there is no meeting and the proceedings are invalid. *Cambrian, &c. Co.*, 31 L. T. 773; *Romford Canal Co.*, 24 C. D. 85. Sometimes the nrticles provide that for some particular elass of busiuess a smaller quorum shall be sufficient. Occasionaiiy it is provided that if a quorum is not present the meeting is to stand adjourned, say, for a week, and that at the adjourned meeting those who are present shali be a quorum. This also is effective. See Table A., Art. 52.

Chairman.

Chairman of general meeting.

The articles generally provide for the directors electing a chairman of their meetings (conf. Table A., Art. 90); and the ehairmnn so chosen is, as a rule, by tho urticles, to be entitled to preside nt a general meeting (see Table A., Art. 53); or in his absence some other director. If no director is willing to act ns ehairman, then some person selected by the meeting is to aet. In the nbsence of any such provisions the meetiug will itself choose its own ehairman from amongst the membors present. The duty of the chairman is to keep order and see that the business is properly conducted. *Indian Zoedone Co.*, 26 C. D. 70. His decisions on points of order nnd upon any incidental questions that arise are to be tnken *primâ facie* to be correct. *S.C.*; nnd seo *Wandsworth Gaslight Co.* v. *Wright*, 22 L. T. 404. If tho articles so provide, the chairman's decision as to the validity of a vote is conclusive. *Wall* v. *London and Northern Assets Corporation* (No. 1), (1898) 2 Ch. 469. He may also, by the vote of a majority, stop a discussion on a resolution after it has been reasonably debated. *Ib.*

Where tho articles say that he "may" adjourn, ns in Clause 55 of Table A., he has a discretion, and may decline to ndjourn. *Salisbury Gold Mining Co.* v. *Hathorn*, (1897) A. C. 268. But if he departs from his duty, *e.g.*, by prematurely closing the meeting and purporting to ndjourn it, his acts become irregular, and it is open to the meeting

to select another chairman and proceed with the business. *National Dwellings Co.* v. *Sykes*, (1894) 3 Ch. 159. See further, p. 175.

In the case of a special or extraordinary resolution, where no poll is duly demanded, the declaration by a chairman that a resolution has been carried, is, by sect. 69 of the Companies Act, 1908, made "*conclusive* evidence of the fact, without proof of the number or proportion of votes." It is now settled that "conclusive" in this section means what it says, conclusive and not *primâ facie* evidence. See *Re Gold Co.*, 11 C. D. 719; *Hadleigh Castle Gold Co.*, (1900) 2 Ch. 419; *Arnot* v. *United African Lands*, W. N. (1901) 28, C. A., overruling *Young* v. *South African Syndicate*, (1896) 2 Ch. 268.

But a chairman's declaration is not, it seems, conclusive where the declaration that the resolution is passed shows on the face of it that it was not passed by the requisite majority. *Re Caratal (New) Mines, Limited*, (1902) 2 Ch. 498, and see pp. 51, 239.

The articles (see Table A., Art. 56) commonly contain similar provisions making the chairman's declaration conclusive as to the passing or not passing of a resolution by a specified majority, and should be construed accordingly.

Votes.

Votes at general meeting.

The articles generally determine how many votes a member is to have. Very commonly they provide that a member shall have one vote for every share held by him. See Clause 60 of Table A. Sometimes they provide that the voting shall be in accordance with a scale. Sometimes one class of shares is given no votes or only a qualified right of voting. In the absence of any regulations as to votes, each member has one vote only, whether on a show of hands or at a poll. (Sect. 67.) The register is the only evidence of a member's right to vote at a general meeting. *Pender* v. *Lushington*, 6 C. D. 70. If the articles so provide, the chairman's decision as to the validity of a vote is, in the absence of fraud, conclusive. *Wall* v. *London and Northern Assets Corporation*, (1898) 2 Ch. 469. A shareholder's vote is a right of property which he may use as he pleases. The propriety or impropriety of his motive is immaterial (*Pender* v. *Lushington*, 6 C. D. 70); he is entirely free to exercise his own judgment as to how he shall vote (*North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589; *Burland* v. *Earle*, (1902) A. C. 83), and may, at any rate in some cases, bind himself by contract to vote, or not to vote, in a particular way (*Greenwell* v. *Porter*, (1902) 1 Ch. 530), and the Court has no power to go behind the vote and to invalidate it on the ground that the shareholder had a personal interest in the subject-matter different from, or opposed to, that of the company, and did not exercise his voting power for the best interests of the company.

See *East Pant Mining Co.* v. *Merryweather*, 2 H. & M. 254. *Burland* v. *Earle* (*supra*). But a majority of the members will not be allowed by vote to commit a fraud on the minority, *e.g.*, by sanctioning a sale to themselves of the property of the company at an undervalue. *Menier* v. *Hooper's Telegraph Co.*, 9 Ch. 350; *Burland* v. *Earle* (*supra*); and see *Atwool* v. *Merryweather*, 5 Eq. 464, n.; *Mason* v. *Harris*, 11 C. Div. 97; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56; *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

There is nothing to prevent a shareholder transferring some of his shares to nominees to increase, where there is a scale, his voting power. *In re Stranton Iron Co.*, 16 Eq. 559; *Pender* v. *Lushington*, 6 C. D. 70. An alien enemy cannot vote. *Robson* v. *Premier Oil Co.*, (1915) 2 Ch. 124.

A provision in a company's articles that no objection shall be taken to any vote except at the meeting at which it is tendered, or any adjournment thereof, is binding, and votes not then disallowed cannot afterwards be challenged (*Wall* v. *London and Northern Assets Corporation* (No. 2), (1899) 1 Ch. 550), but such a provision is unusual.

By the Collecting Societies and Industrial Assurance Companies Act, 1896, restrictions are placed on the voting by "collectors" who are members of an industrial assurance company.

Where the shareholder is a company, that company is by sect. 68 authorized to vote by its representative.

Resolutions.

Resolutions.

Questions for submission to a general meeting are generally expressed in the form of resolutions. A resolution, according to the ordinary practice of companies, may be proposed by the chairman or by some other member, and, in either case, is put by the chairman to the meeting, whereupon it is open to discussion: when the discussion has closed, the chairman puts the resolution formally to the vote by stating what the resolution is, and that it has been proposed by A. and seconded by B., and he then calls for a show of hands: "those who are in favour of the resolution, hold up one hand; those who are against the resolution, hold up one hand"—and having counted the number pro and con., he then states the result, *e.g.*, "the resolution is carried," or "the resolution is lost." Thereupon a poll can be demanded unless the regulations otherwise provide.

The articles usually give the chairman, where the votes are equal, a casting vote, both on a show of hands and at a poll (see Table A., Art. 58); but in the absence of such provision he has no casting vote.

A resolution inconsistent with the articles is invalid, unless confirmed as a special resolution. *Quin and Axtens* v. *Salmon*, (1909) A. C. 442.

Show of Hands.

Show of hands.

Unless the articles otherwise provide, questions arising at a general meeting are to be decided, in the first instance, by a show of hands. This is the common law rule which, unless excluded, applies automatically. *Horbury, &c. Co.*, 11 C. D. 109. In taking a vote by show of hands, the duty of the chairman, unless the articles otherwise provide, is to count the hands held up and to declare the result accordingly, without regard to the number of votes that a member holding up the hand possesses; and without regard to the fact that some members hold proxies for some other members. *Ernest* v. *Loma Co.*, (1897) 1 Ch. 1; overruling *In re Bidwell Brothers*, (1893) 1 Ch. 603.

Where the number of votes on a show of hands is equal, the chairman has no casting vote by common right.

Poll.

Poll.

A vote by show of hands is a rough and ready way of taking the sense of a meeting; but it is often a very inadequate means for arriving at the wishes of the whole constituency of the company. To ascertain these, the articles usually provide for the taking of a poll. The right to demand a poll is a common law right, and, according to the common law, any one member may demand a poll. This rule can only be excluded by express provision. *Reg.* v. *Wimbledon*, 8 Q. B. D. 459. It may be qualified by the articles, and is to some extent qualified as to special and extraordinary resolutions by sect. 69 of the Act. See p. 237, *infra*. Usually the articles contain a provision as to how many members may demand a poll. When a poll is duly demanded, it is the chairman's duty to grant it, and to fix the time and place for taking it; for if a poll is duly demanded, the show of hands is nullified. *Anthony* v. *Seger*, 1 Hagg. Cas. Con. 9, at p. 13. If, by the regulations, the poll is to be taken "in such manner as the chairman may direct," a poll may be taken then and there. *Chillington Iron Co.*, 29 C. D. 159. As to the manner of taking a poll, it is usual to require every person who desires to vote to sign a paper headed, as the case may be, "For" or "Against" the motion. The votes of each member are then inserted, and, these having been added up, the chairman declares the result. A meeting or the chairman has power to appoint scrutineers to examine and count the votes at a poll and to report the result to the chairman (*Wandsworth Co.* v. *Wright*, 22 L. T. 404), and this is often done. A member may vote at a poll, though not present when the poll was demanded. *Campbell* v. *Maund*, 5 Ad. & El. 865. If a poll is duly demanded, it must be taken, and in such case the

meeting subsists in contemplation of law until the poll has been taken; and this is so, even though the chairman refuses to grant the poll and there is no express adjournment of the meeting. *Regina* v. *Wimbledon*, 8 Q. B. D. 459. If a poll is not completed on the day on which it is commenced, it must be continued subsequently, for the chairman is not entitled to close the poll whilst voters are coming in. *Reg.* v. *St. Pancras*, 11 Ad. & E. 15; *Reg.* v. *Graham*, 9 W. R. 738. To shut out and exclude a voter may invalidate a poll. *Reg.* v. *Lambeth*, 8 Ad. & El. 356. Upon taking a poll, the right to vote and the number of shares is to be determined, if any question arises, by a reference to the register of members. *Pender* v. *Lushington*, 6 C. D. 70. To appoint a subsequent day for the taking of the poll is not an adjournment, although the meeting subsists till the poll is taken (*Reg.* v. *Chester*, 1 Ad. & El. 342); but it is not uncommon to adjourn to hear the result.

At a poll there is no power, in the absence of express provision in the articles, to take it by voting papers. *McMillan* v. *Le Roi Mining Co.*, (1906) 1 Ch. 331.

Proxies.

Proxies.

Prima facie, there is no right to vote by proxy, for the common law does not recognize any such mode of voting; but the articles generally confer such a right, for it is extremely inconvenient that a member, especially when residing at a distance, should be obliged personally to attend every meeting.

The directors, acting in good faith in the interests of the company, may do what they consider requisite to get the members to vote against or in favour of a particular resolution, *e.g.*, they may at the expense of the company send out stamped proxy forms. *Peel* v. *L. & N. W. Rail. Co.*, (1907) 1 Ch. 5, overruling *Studdert* v. *Grosvenor*, 33 C. D. 528.

The articles generally fix the required form of proxy. It commonly runs:—"I, A. B., appoint C. D. to be my proxy to vote on my behalf at the general meeting of the company to be held on the —— day of ——." See Table A., Clause 67.

The articles also as a rule require the instrument of proxy to be signed by the appointor, or, in the case of a corporation, to be under its seal. In such a case a foreign or colonial corporation which has no seal, can nevertheless appoint proxies. *Colonial Gold Reefs, Ltd.*, (1914) 1 Ch. 382. Sometimes it is provided that the instrument must be signed in the presence of a witness. In such case, signature in the presence of a witness is necessary. *Harben* v. *Phillips*, 23 C. D. 32. A proxy cannot attest his own appointment. *Ex parte Cullen*, (1891) 2 Q. B. 151. A proxy paper for a single meeting only requires a

penny stamp. If for several meetings, it requires a 10*s.* stamp. Sect. 80, Stamp Act, 1891. To cancel an adhesive stamp the signatory should place his initials and the date on it or otherwise mark it so as to be incapable of subsequent use. *McMullen* (*Sir Alfred Hickman*) *Steamship, Ltd.*, 71 L. J. Ch. 755.

A proxy paper signed in blank and handed over to some one with authority to fill up the blank, is effective if the blank has been properly filled up when the proxy paper is deposited or used. *Sadgrove* v. *Bryden*, (1907) 1 Ch. 318; *Ernest* v. *Loma Co.*, (1897) 1 Ch. 1. The articles very commonly require instruments of proxy to be deposited with the company a certain number of hours before the meeting. See Clause 66 of Table A. If so, further proxies cannot be deposited after the date of the meeting for the purpose of a poll taken subsequently. *Shaw* v. *Tati Concessions*, (1913) 1 Ch. 292.

If the shareholder himself after appointing a proxy attends the meeting, his being there does not, it seems, avoid the instrument of proxy; but if he votes before his proxy has voted for him, he impliedly revokes the proxy. *Knight* v. *Bulkeley*, 5 Jur. (N. S.) 817; 33 L. T. 7; Story on Agency, s. 475.

As to a corporation representative, see s. 68, *infra*, p. 467.

Speeches—Defamation.

Defamatory speeches at general meetings.

A speech by a shareholder at a meeting defamatory of the directors, but on a matter affecting the interests of the shareholders, is privileged (*Parsons* v. *Surgey*, 4 Fost. & Fin. N. P. Cas. 247); but the privilege is gone if the public or the press are present at the meeting at the express invitation of the shareholder publishing the defamatory matter. *Ibid.* As to where reporters are present uninvited, see *Pittard* v. *Oliver*, (1891) 1 Q. B. 474; and *Marks* v. *Samuel*, (1904) 2 K. B. 287, C. A. If the directors of a company invite a newspaper to a private meeting, query, whether the company can sue the newspaper for publishing, in a report of that meeting, a true statement of what was said by a shareholder, because that statement is defamatory. *Liverpool Household Stores* v. *Smith* (1887), 37 C. D. 170. A report to the public press of the proceedings of a general meeting, if containing libellous matter, is not privileged. *Popham* v. *Pickburn*, 7 H. & N. 891; *Davison* v. *Duncan*, 7 E. & B. 229. But a report sent to the members is *primâ facie* privileged. *Laughton* v. *Bishop of Sodor & Man*, 4 P. C. 495; *Waller* v. *Loch*, 7 Q. B. D. 619. And see *Quartz Hill Gold Mining Co.* v. *Beall*, 20 C. D. 508.

Amendments.

Amendments to proposed resolutions.

Where a resolution is proposed there is a *prima facie* right to propose any relevant amendment coming within the scope of the notice. Thus, if the notice is "to increase the capital of the company," and a resolution is proposed accordingly to increase it to 10,000*l.*, an amendment can be proposed to increase to 20,000*l.* or to 50,000*l.*, but an amendment to alter the articles or remove the directors would be irregular, and the chairman should not allow such an amendment to be put to the meeting, for it does not come within the scope of the notice. So, too, if the notice is "to increase the capital by 20,000*l.*," or "to increase the directors' remuneration by 100*l.*," an amendment to increase the capital to 50,000*l.*, or the remuneration by 500*l.*, would be irregular: for it is not fair to call the members together for an apparently limited and small object, and then to spring on them a much larger proposal. Those who are absent may have stayed away because they are content with what is proposed in the notice, and those who are present by proxy, are presumed to have given the proxy on the basis of the notice. See *Teede & Bishop, Limited*, W. N. (1901) 52, and *Clinch* v. *Financial Corporation*, 5 Eq. 461; *Wall* v. *London and Northern Assets Corporation* (No. 1), (1898) 2 Ch. 469, 484; *Stroud* v. *Royal Aquarium Society*, 89 L. T. 243. Similarly, if the notice of meeting is to ratify a particular agreement, it would seem permissible to ratify the agreement subject to modifications or conditions, provided they do not make the agreement more onerous as regards the company. *Wright's case*, 12 Eq. 335, n., 341, n. Where the notice is in general terms, *e.g.*, "to increase the capital" or "to increase the directors' remuneration" cf. *Baillie* v. *Oriental Telephone Co.*, (1915) 1 Ch. 503), there is a wide scope for amendment. Where the notice stated that the business was to pass with such amendments as should be determined, a resolution re-electing three directors, it was held that an amendment to elect two extra directors was competent. *Betts* v. *Macnaghten*, 25 T. L. R. 552. See also *Henderson* v. *Bank of Australasia*, 45 Ch. D. 330.

So, too, a notice of meeting to confirm a resolution to wind up and to appoint a particular person liquidator is effective to confirm the resolution, though a person other than the person named is appointed liquidator; for as soon as a resolution for the voluntary winding-up of a company has been passed, a liquidator can be appointed without any previous notice. *Re Trench Tubeless Tyre Co.*, (1900) 1 Ch. 408.

If a chairman refuses to allow a proper amendment to a proposed resolution to be put, even under a mistaken idea that the amendment is *ultra vires*, the resolution may be irregular. The mover of the amendment not challenging the chairman's ruling is not a waiver of

his right to impeach the resolution. *Henderson* v. *Bank of Australasia* (1890), 45 C. D. 330. Unless the regulations otherwise provide, an amendment at a meeting need not be seconded if it is put and voted on. *In re Horbury Bridge Co.*, 11 Ch. D. 118.

Adjournment.

Adjournment of general meeting.

The articles commonly confer on the chairman power, with the consent of the meeting, to adjourn. This gives the chairman a discretion. The meeting may resolve to adjourn, but it is for the chairman to determine whether he will exercise the power vested in him. *Salisbury Gold Mining Co.* v. *Hathorn*, (1897) A. C. 268. The articles often provide for a poll being taken—on the spot—on the question of adjournment. If the chairman improperly adjourns or stops the meeting, the meeting can choose another chairman and go on with the business. *National Dwellings Society* v. *Sykes*, (1894) 3 Ch. 159. On the other hand, if the meeting is duly adjourned or dissolved, members who remain behind cannot continue the business. *Rex* v. *Gaborian*, 11 East, 77. As regards notice, an adjourned meeting is regarded in law as a continuance of the ordinary meeting (*Scadding* v. *Lorant*, 3 H. L. C. 418); and accordingly a fresh notice thereof need not be given. *Wills* v. *Murray*, 4 Ex. 843. Directors, in the absence of express provisions in the articles, have no power to postpone a meeting which has been duly convened. *Smith* v. *Paringa Mines*, (1906) 2 Ch. 193.

Irregularities, &c.

Rule in *Foss* v. *Harbottle*.

The rule in *Foss* v. *Harbottle*, 2 Ha. 461 (*infra*, p. 242), is applicable to general meetings, and accordingly the Court declines to interfere, at the instance of a minority, in respect of domestic irregularities (*Macdougall* v. *Gardiner*, 1 C. D. 13); the principle being that it is within the power of the persons who have committed the irregularity at once to set the matter right by calling a fresh meeting and dealing with the matter with all due formalities. *Browne* v. *La Trinidad*, 37 C. D. 1.

CHAPTER XVI.

DIRECTORS.

Company only acts by agents.

A COMPANY cannot act in its own person, for it has no person. Per Lord Cairns, *Ferguson* v. *Wilson*, L. R. 2 Ch. 89. Accordingly it must act by agents, and usually these persons, by whom it acts, by whom the business of the company is carried on or superintended, are termed directors. The Act, however, as we have seen, leaves the members entirely free to determine how and by whom the business shall be managed, and accordingly, in some cases, the regulations provide that instead of directors there shall be a "council" or a "managing committee," or that the business shall be carried on by "managers." In other cases, especially in private companies, it is not uncommon to provide that the business shall be managed by "governing directors" or by "permanent directors," or by a sole "governing director." In all these matters the articles can be framed as may seem expedient, but whatever the title chosen for the governing body, and whatever the scope of their duties, the rules which apply to directors apply also to members of a council or committee, who, in substance, stand in the position of directors. The definition of "director" in sect. 285 of the Companies Act, 1908, "includes any person occupying the position of director by whatever name called." A limited company may be a director or the sole director of another company if it has the requisite power. *Bulawayo Market Co.*, (1907) 2 Ch. 458. See Company Precedents, Part I., p. 734.

Directors, Agents of Company.

Their acts generally bind company only, and not themselves, except in certain cases.

Law of principal and agent obtains

Directors, whether they are called "directors" or a "council" or a "managing committee," are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence (1) where directors make a contract in the name of or purporting to bind the company, it is the company—the principal—which is liable on it, not the directors; they are not personally liable unless it appears that they undertook personal liability (*Lindus* v. *Melrose*, 3 H. & N. 177; *McCollin* v. *Gilpin*, 5 Q. B. D. 390), *e.g.*, by contracting in their own names or by contracting for the company without using the word "limited" as part of the name. See sect. 63 (3) of the Act. *Dermatine Co.* v. *Ashworth*, 21 T. L. R. 510. As to their liability for damages where they contract for the company without authority, see p. 190, *infra*.

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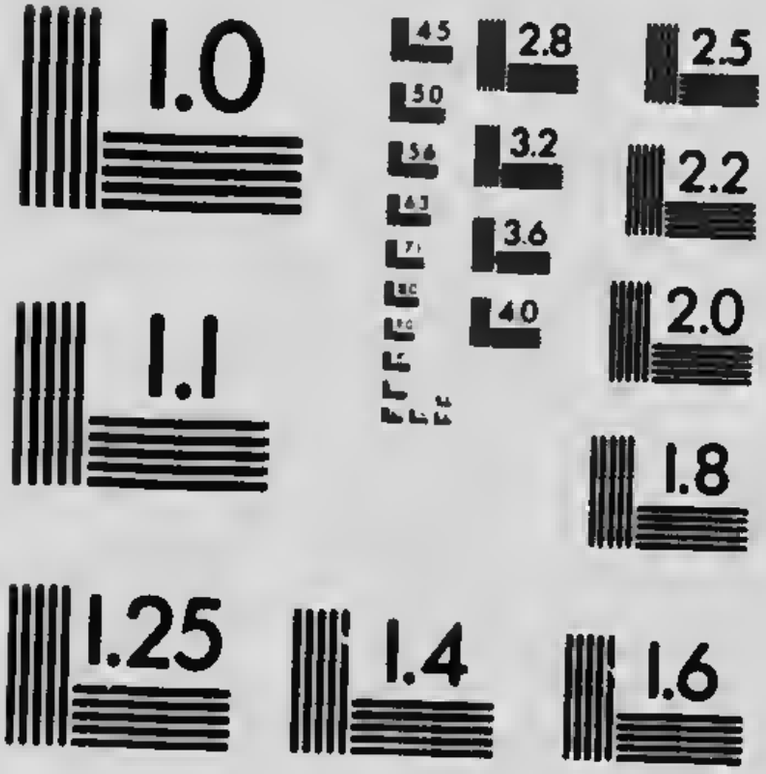

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(2) Where directors contract in their own names but really on behalf of the company, the other party to the contract can, generally, on discovering that the company is the real principal, sue the company on the contract. See Pollock on Contracts, 7th ed., p. 102. (3) Where directors enter into a contract which is within the power of the company but is beyond the powers of the directors, the company, like any other principal, can ratify the contract. *Grant* v. *United Switchback Rail. Co.*, 40 C. D. 135.

Cases establishing position of directors as agents.

That directors are agents is established by a long series of decisions. It will be sufficient to refer to one of these, *Ferguson* v. *Wilson*, 2 Ch. 77, in which it was held by Turner and Cairns, L. JJ., that directors were not liable in respect of a contract of the company on the ground that they were agents. "What," said Cairns, L. J., in that case, "is the position of the directors of a public company? They are merely agents of the company. The company itself cannot act in its own person, for it has no person, it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent, for wherever an agent is liable those directors would be liable. Where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought before this Court, or into any other Court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent but the principal would be the person liable." See further, *infra*, p. 199, as to contracts by directors.

Directors Trustees, in what sense.

Directors how far trustees:

Directors are not only agents but they are in some sense and to some extent trustees or in the position of trustees. No doubt their position differs considerably from that of the trustees of a marriage settlement or will, and it is well settled that the strict rules applicable to such trustees do not apply in all respects to directors. Their conduct is to be measured with reference to the character of the undertaking which they are appointed to manage and conduct.

Nevertheless it is impossible now to dispute the proposition that they are in some sense trustees, that proposition having been established by a long series of cases.

Thus in *Charitable Corporation* v. *Sutton* (1742), 2 Atk. 400, Lord Hardwicke, L. C., held that committeemen or directors of a chartered corporation who had misapplied its funds and committed breaches of its bye-laws, were liable as trustees for "*breach of trust*." So, in *York, &c. Rail. Co.* v. *Hudson* (1853), 16 Beav. 485, directors who had

improperly dealt with funds of the company were held liable as *trustees*. Romilly, M. R., there said, "the directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely."

So, in *Ferguson* v. *Wilson* (1866), 2 Ch. 90, Lord Cairns, whilst holding directors to be mere agents and, therefore, not liable on a contract made on behalf of the company, said that "the case was to be distinguished from proceedings by shareholders against directors treating the directors as trustees—which in point of law they are—and seeking redress against them for a breach of trust. That kind of case is exactly the converse of the present. Here the shareholders who file the bill, in point of fact allege that the company has done no wrong whatever, that it is the executive which has committed the wrong and they—the shareholders—file the bill to protect, as it were, the company from the unlawful acts of the directors. There, the directors, being *in the position of trustees*, are, of course, liable in this Court."

This two-fold character of directors is, perhaps, best expressed in Lord Selborne's words in *G. E. Rail. Co.* v. *Turner* (1872), 8 Ch. 149, where he said (p. 152): "The directors are the mere trustees or agents of the company—trustees of the company's money and property: agents in the transactions which they enter into on behalf of the company." And this is the way in which it is put by Sir George Jessel in the case of *Forest of Dean, &c. Co.* (1879), 10 C. D. 450: "Directors," said that learned judge, "are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control."

So in *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381, where directors had misapplied funds of the company, it was declared that they had "committed a breach of trust and were jointly and separately liable" accordingly. See also *Flitcroft's case*, 21 C. D. 519; *Pelly's case, ibid.* 492; *Faure Electric Co.*, 40 C. D. 150; *Oxford Benefit, &c. Society*, 35 C. D. 502; *Leeds Estate, &c. Co.* v. *Shepherd*, 36 C. D. 787; and *Masonic and General Life, &c. Co.* v. *Sharpe*, (1892) 1 Ch. 154: in all which cases directors were held liable as trustees. It was as being trustees that directors were held, before the Trustee Act, 1888, disentitled to claim the benefit of the Statutes of Limitation (see *Flitcroft's case*, *supra*); and it is as trustees that they have since that Act been held entitled to the benefit of the qualified provisions for limitation of actions contained in sect. 8 of the Act of 1888. This was decided in *Re Lands Allotment Co.*, (1894) 1 Ch. 616, where Lindley, L. J., said: "Although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which

comes to their hands, or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees"; and the learned judge proceeded to point out that, in accordance with the established rules, directors are considered *express* trustees of money which they have control of; and Kay, L. J., in the same case, added: "When they"—directors, that is—"get assets of the company under their control or into their hands and deal with them in a way which is beyond the powers of the company, they are liable for a breach of trust"; and he held, therefore, that they were trustees within sect. 8 of the Trustee Act, 1888.

James, L. J., it is true, in *Smith* v. *Anderson*, 15 C. D. 275, defined the status of a director in language differentiating it from that of trustee, but this dictum cannot outweigh the authorities above referred to.

Perhaps the best—or the least controversial—way of putting it is to say that they occupy a fiduciary position.

But this fiduciary position does not extend to directors as shareholders in their individual capacity; there is nothing, for instance, to prevent directors purchasing on their own account shares in the company from the executors of a deceased shareholder. *Percival* v. *Wright*, (1902) 2 Ch. 421; conf. *Burland* v. *Earle*, (1902) A. C. 83; but if they take an unfair advantage of their position, they may be made to account for the resulting profit. *Allen* v. *Hyatt* (1914), 30 T. L. R. 444.

As throwing some light on the process of reasoning by which directors are regarded as trustees, it is to be borne in mind that the funds of a company are by statute made applicable only to specific purposes, and are in that way impressed with the qualities of a trust fund. See *Ernest* v. *Croystill* (1860), 2 D. F. & J. 175, per Knight-Bruce and Turner, L. JJ.; and *Great Eastern Rail. Co.* v. *Turner*, 8 Ch. 149, per Lord Selborne; and *Ashbury* v. *Riche*, L. R. 7 H. L. 689, per Lord Hatherley; and *Russell* v. *Wakefield Waterworks*, 20 Eq. 474, per Jessel, M. R. *Moxham* v. *Grant*, (1900) 1 Q. B. 88. Thus they may be followed into the hands of any alienee who takes with notice of their *ultra vires* application.

As to the relief of directors for breach of trust where they have acted honestly and reasonably, see sect. 279 of the Act of 1908, *infra*, p. 520.

Appointment of Directors.

First directors.

First directors are usually named in the articles of association, if there are any, but not uncommonly the articles, instead of naming them, contain a power for the subscribers, or the majority of them, by writing, to appoint them, as in Table A., clause 68. Where directors are to be named in the articles, sect. 72 of the Companies

Act, 1908, as to filing consents and contracts for share qualifications (see *infra*), must be borne in mind. If there are no articles, or there is no such provision, then clause 68 of Table A. prescribes that it shall rest with the majority of the subscribers of the memorandum to appoint in writing. In such case the signatures of a majority to the appointment will be sufficient. Where the power is given to the subscribers and nothing is said about the majority, the subscribers should all sign the appointment (*Great Northern Salt Co.*, 44 C. D. 472), or a meeting of the subscribers may be called, and a resolution passed thereat, which is another way of effecting the appointment; and in that case, if a majority be present, they are competent to appoint. *London and Southern, &c. Co.*, 31 C. D. 223. If there are no directors and no provision in the regulations for the appointment of the first directors, and Table A. is excluded, they can be appointed under sect. 67 of the Act, by which five members may convene a meeting to appoint directors. The articles may give power to a vendor or other outsider to appoint one or more directors. If so, the company cannot alter its articles so as to destroy this power, but the Court will not grant an injunction to enforce the appointment of any particular director who is objectionable to the company on personal grounds. *British Murac Syndicate, Ltd.* v. *The Alberton Rubber Co.*, (1915) 2 Ch. 186.

Where the articles delegate the power of appointing additional directors to the board, a general meeting has no power to do so. *Blair Open Hearth Furnace*, 108 L. T. 665.

But if the directors cannot agree, the company retains power to appoint new directors. *Barron* v. *Potter*, (1914) 1 Ch. 895.

Provisions of Act as to naming Directors in Articles.

Sect. 72 of the Companies (Consolidation) Act, 1908, provides as follows:—

Restrictions on appointment of director.

72.—(1.) A person shall not be capable of being appointed director of a company by the articles, . . . unless, before the registration of the articles, . . . he has by himself or by his agent authorized in writing—

(i) signed and filed with the registrar a consent in writing to act as such director; and

(ii) either signed the memorandum of association for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2.) On the application for registration of the memorandum and articles of association of a company, the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and if this list contains the name of any person who has

not so consented the applicant shall be liable to a fine not exceeding fifty pounds.

(3.) This section shall not apply to a private company. . . . .

The word "articles" in this section refers to the articles in force, whether in their original form or as altered by special resolution. See sect. 285. Where an agent signs the consent he must produce his authority.

An intended director who subscribes the memorandum for his qualification becomes bound on incorporation to take the shares even though the company never commences business.

As to what is a private company, see sect. 121.

Maximum and Minimum Number.

Maximum and minimum number of directors.

The regulations usually fix what is to be the maximum and minimum number of the directors. As a general rule, a large board is not desirable, for it weakens the sense of individual responsibility. Where a minimum number is fixed, and the number of the directors falls below the minimum number, the remaining directors *primâ facie* cannot act (*Alma Spinning Co.*, 16 C. D. 681), unless the articles contain the ordinary provision enabling the directors to act notwithstanding vacancies. This provision does not make their acts valid if the minimum number never was appointed. *Sly, Spink & Co.*, (1911) 2 Ch. 430; *Scottish Petroleum Co.*, 23 C. D. 431; *Re Bank of Syria, Owen and Ashworth's claim, Whitworth's claim*, (1901) 1 Ch. 115. Nevertheless, their acts may be valid in favour of a person who has no notice of the irregularity. *British Asbestos Co.*, (1903) 2 Ch. 439.

Qualification.

Qualification.

The general law requires no share qualification for a director, and Table A., Art. 70, only requires a nominal qualification—the holding of at least one share in the company. But the articles of a company very commonly contain a provision that "the qualification of a director shall be the holding of [a specified number of] shares in the company"; it being thought desirable in most companies to require a qualification, as giving a director a personal interest in the undertaking. *Archer's case*, (1892) 1 Ch. 322. The amount is commonly fixed at 100*l.* or 200*l.*, but sometimes at 1,000*l.* or 5,000*l.*, and occasionally—in the case of important private companies—at 10,000*l.* or 50,000*l.* There is, however, in the case of an ordinary company, no particular advantage in requiring a large qualification; on the contrary, it is detrimental as restricting the class of persons eligible for office, and possibly depriving the company of the services of an eminently suitable director, simply because he has not got sufficient funds to take up his qualification. Many questions have arisen in regard to qualification clauses, and more particularly as to the liability of a director to take up his qualification shares. Where

the clause is framed in the terms above mentioned, it has long since been settled that it does not compel the director to take shares from the company. The meaning of such a clause is, that the director is under an obligation to acquire the requisite qualification in some way or other, whether from the company, or by transfer from a friend, or by purchase in the market; but that he is to have a reasonable time—now two months (sect. 73, below)—within which to do so. *Brown's case*, 9 Ch. 102. After the two months have expired he is disqualified from acting as a director, but the mere acting as a director does not import any agreement to take the shares *from the company*. *Brown's case, supra*. Nevertheless, if in such circumstances he is put on the register by the officers of the company after the time limited for qualifying has expired, he cannot repudiate the shares; he is estopped by his conduct. *Brown's case, supra; Lord Inchiquin's case*, (1891) 3 Ch. 28. The law has now, however, been supplemented by sect. 73 of the Act of 1908, which takes the place of sect. 3 of the Act of 1900. The section runs as follows:—

Sect. 73

73.—(1.) Without prejudice to the restrictions imposed by the last foregoing section (see p. 181), it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

(2.) The office of director of a company shall be vacated, if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification: and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3.) If after the expiration of the said period or shorter time any unqualified person acts as director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

This section, it will be observed, leaves it still optional with a company to have a qualification clause or not. It is comprehensive in so far as it applies to companies formed before the Companies Act, 1908, as well as after, but it creates a duty only, not a contract.

Sub-sect. 3 will, however, go far to discourage unqualified persons from acting as directors, for it imposes a definite liability to pay a fine of five pounds per diem by way of punishment. Prior to the enactment a company could only recover compensation if it could prove damage. *Coventry's case*, 14 C. D. 660.

A joint holding may qualify a director. *Glory Paper Mills*, (1894) 3 Ch. 473; *Grundy* v. *Briggs*, (1910) 1 Ch. 444.

A well known and commonly adopted form of qualification clause now is, that if the director does not qualify within, say, one month "he is to be deemed to have agreed to take the shares from the company." This clause was an effective one; and if, after the month was up, the director was still in office, and did not hold the requisite qualification, the contract was complete, and the company or its liquidator might place his name on the register for the qualification shares. *Isaacs' case*, (1892) 2 Ch. 158. If, however, the director resigned within the month, he escaped even under such a clause. *Salisbury Jones' case*, (1894) 3 Ch. 356. And as under sect. 73 (2) of the Act, a director vacates office at the expiration of the time limited, it is doubtful whether *Isaacs' case*, *supra*, now operates. See Company Precedents, Part I., p. 722.

A special resolution raising the share qualification, *e.g.*, from 50 to 250 shares, does not make the directors "cease" to hold their qualification, or necessarily vacate their offices under such a clause as sect. 73 (2). *Molineaux* v. *London, Birmingham and Manchester Insurance Co.*, (1902) 2 K. B. 589.

Occasionally a clause says that 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*. *Jenner's case*, 7 C. D. 132. At times the form runs that a director's qualification shall be the holding of so many shares "in his own right." To the unsophisticated layman these words might seem to mean, holding beneficially and not as a mere trustee for some third party; but it has been decided that this is not so, and that if the director holds the shares as trustee, he is none the less duly qualified (*Pulbrook* v. *Richmond Mining Co.*, 9 C. D. 610; *Cooper* v. *Griffin*, (1892) 1 Q. B. 740; *Howard* v. *Sadler*, (1893) 1 Q. B. 1)—a construction which goes far to defeat the object of the clause, that the director shall have a substantial stake in the company. See *Archer's case*, (1892) 1 Ch. 322. However, though the first of these cases was decided thirty years ago, the Court has in several recent cases sought to restrict its application. Thus it has been held that if a person is entered on the register as holding shares as liquidator of some other company, he does not hold "in his own right." *Boschoek Proprietary Co.* v. *Fuke*, (1906) 1 Ch. 148, see, too, *Sutton* v. *English and Colonial Produce Co.*, (1902) 2 Ch. 502. According to that case, if the beneficiary, where a share is held in trust, gives notice to the company claiming the shares, the qualification of the registered holder is gone—*i.e.*, the company must take notice of the trust.

Present of qualification

It has too often happened in the history of companies that a director has accepted a present of his qualification from a promoter or vendor,

being assured that it is quite the usual thing. Such a transaction constitutes a gross breach of trust on the part of the director. It amounts to accepting a retaining fee from the promoter or vendor: the director is liable to account to the company for any damages sustained by such breach of trust (*Hay's case*, 10 Ch. 604; *Pearson's case*, 5 C. D. 336; *London & S. W. Canal Co.*, (1911) 1 Ch. 346, and there is no right of set-off. *In re Carriage Supply Association* (1884), 27 C. D. 322. The same principle applies if he takes up and pays for his qualification, receiving at the same time an indemnity from the promoter (in such case the indemnity is a thing of value, and the director must account to the company for it: *Archer's case*, (1892) 1 Ch. 322); or if he holds his shares as a bare trustee for the promoters. The damages in that case may be the highest value of the shares. *Re London and South Western Canal*, (1911) 1 Ch. 346. [*Sed quære* whether this decision is sound in principle.] Shares from promoter, vendor, &c.

The mere fact that the director of a company holds his qualification shares as trustee for another company does not render him liable to account to that company for the director's fees which he earns. *Re Dover Coalfields Extension, Limited*, (1908) 1 Ch. 65.

Remuneration.

Primâ facie, directors of a company are not entitled to remuneration. *Dunstan* v. *Imperial, &c. Co.*, 3 Bar. & Ad. 125; *Hutton* v. *West Cork Rail. Co.*, 23 Ch. D. 672; *Stroud* v. *Royal Aquarium Society*, 89 L. T. 243. But the articles usually provide expressly for payment of remuneration. Table A. (cl. 69) so provides. And where this is the case the provision operates as an authority to the directors to pay such remuneration out of the funds of the company; and there is no rule to the effect that the remuneration can only be paid out of profits. *Harvey Lewis's case*, 26 L. T. 673. Where a decision of the Board as to mode of division is required, there is no right of action till resolution passed. *Morrell* v. *Oxford Portland Cement Co.*, 26 T. L. R. 682. Remuneration.

The amount of remuneration to be paid to directors is a matter of internal management. *Barland* v. *Earle*, (1902) A. C. 83; *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84.

A director can sue for remuneration agreed to be paid him by the company (*Orton* v. *Cleveland Co.*, 3 H. & C. 868; *Nutt* v. *Atlanta Co.*, 11 T. L. R. 407, C. A.), and prove in the winding-up like an ordinary creditor. *Beckwith's case*, (1898) 1 Ch. 324; *A 1 Biscuit Co.*, W. N. (1899) 115; *Dale & Plant*, 43 Ch. D. 255. *Leicester Club Co., Cannon's case*, 30 C. D. 629—which was a decision to the contrary—cannot be relied on. Whether the articles do or do not constitute a contract for this purpose between the company and the directors (see *supra*, p. 39), they operate, it has

been held, as an offer accepted by the director, and ... give the terms on which the director is serving the company. *Swe... v. Port Darwin Gold Mining Co.*, 1 Meg. 385; *Isaacs' case*, (1892) 2 Ch. 158; *Peruvian Co.*, (1894) 3 Ch. 690. But it is open to directors by a resolution to renounce the right to future remuneration under such implied contracts. *McConnell's case, Re London and Northern Bank*, (1901) 1 Ch. 728. An agreement by all the directors with the company to renounce the right to remuneration is binding on each director. *West Yorkshire Darracq* v. *Coleridge*, (1911) 2 K. B. 326. To take remuneration in excess of what is payable under the regulations is a misfeasance; and directors who are parties to such payments are jointly and severally liable to make good the amount. *George Newman*, (1895) 1 Ch. 674; *Oxford, &c. Society*, 35 C. D. 502; *Leeds Estate Co.* v. *Shepherd* (1887), 36 C. D. 809; *Re Whitehall Court* (1887), 56 L. T. R. 280. But it seems competent to the company in general meeting to ratify excess remuneration in accordance with the principle recognized in *Grant* v. *United Switchback*, 40 C. D. 135, C. A. Directors must not pay the income tax on their remuneration out of the company's funds. *Boschoek Proprietary Co.* v. *Fuke*, (1906) 1 Ch. 148.

Where, under the articles, a director is to be paid so much per annum, and he vacates office before the end of a current year, the question whether he can maintain a claim for an apportioned part of the remuneration for that year, has given rise to considerable difference of opinion. In *Swabey* v. *Port Darwin Gold Mining Co., Limited* (1889), 1 Meg. 385, the question was considered by the Court of Appeal—Lord Halsbury, L. C., Lord Esher, M. R. and Lindley, L. J. There the clause in the articles provided that "the directors shall each receive by way of remuneration out of the funds of the company in each year the sum of 200*l.*, and the chairman in addition 100*l.* per annum." A director resigned in the course of a current year, and he was held entitled to an apportioned part of the remuneration for that year. In that case Lord Halsbury, L. C., said: "As to the point of the service being determined in the middle and not at the end of the year disentitling the plaintiff to anything because the service was for a year, the judgment of Stephen, J., was right. But upon the articles there were two cases in which the service could be brought to an earlier termination than the year, namely, if the directors give a month's notice of resignation the resignation must be accepted by the company; but if this were done, then both the parties contemplated an earlier determination of the service than a full year. On the other hand, the company could, if it thought fit, by special resolution determine the service between it and its servants. There was therefore a reciprocal right to put an end to the service at an earlier period than the end of the year. It follows from that, as a necessary consequence, that both parties must have contemplated that, as this was a service for

hire and reward, a proportionate part of the remuneration agreed upon should be paid if the service was determined at an earlier period than the full year." On the other hand, in *Salton* v. *New Beeston Cycle Co.*, (1899) 1 Ch. 775, Cozens-Hardy, J., held that where the article provided that "the directors shall be entitled to receive by way of remuneration in each year 5,000*l.*," a director who vacated office in a current year was *not* entitled to any apportionment: and this was followed by Wright, J., in *McConnell's case*, (1901) 1 Ch. 728, where the words were "each director shall be paid . . . . . the sum of 300*l.* per annum"; and by Bruce, J., in *Inman* v. *Ackroyd and Best*, 82 L. T. 621; affirmed, (1901) K. B. 613, where the words were "the sum of 300*l.* per annum per director." See also *Central de Kapp Gold Mines*, 69 L. J. Ch. 18. But in nearly all these cases the Court proceeded on the erroneous assumption that in *Swabey* v. *Port Darwin Gold Mining Co., Limited*, the Court of Appeal was dealing with a case in which the articles provided that the remuneration to be paid to the directors should be AT THE RATE of 200*l.* per annum as stated in the head-note to that case. Thus, in *Inman* v. *Ackroyd and Best*, *supra*, Bruce, J., distinguished *Swabey* v. *Port Darwin Gold Mining Co.*, on the ground that "in that case the remuneration stipulated to be paid to the directors was to be *at the rate* of 200*l.* per annum, and I think there that the observations of the Lord Chancellor with respect to the reciprocal rights of the parties must be read in connection with and in regard to the particular form of the stipulation in that case." But on this point the head-note in *Swabey* v. *Port Darwin Gold Mining Co.* is incorrect. The remuneration clause did NOT contain the words "at the rate." The terms of the clause taken from the articles registered at Somerset House are set forth above (p. 187), and the above decisions, grounded on this inaccuracy, require therefore reconsideration, as noted in the appeal in *Inman* v. *Ackroyd*, (1901) 1 K. B. 618.

Furthermore, it is not easy to see why the Apportionment Act, 1870 (33 & 34 Vict. c. 35), does not apply. That Act expressly provides that all rents, annuities (including salaries and pensions), and other periodical payments in the nature of income shall be apportionable, and provides for the recovery in due course of an apportioned part of an annuity determined by *death* or otherwise. In *Salton* v. *New Beeston Cycle Co.*, *supra*, it was argued that the Act applied, and on the other hand the case of *Lowndes* v. *Earl Stamford* (1852), 18 Q. B. 425 (decided on the Apportionment Act, 1834, which was very differently expressed), was apparently relied on; but in his judgment, Cozens-Hardy, J., made no reference to the Apportionment Act. However, in *Inman* v. *Ackroyd and Best*, *supra*, Bruce, J., considered that the Apportionment Act, 1870, must have been taken into consideration by Cozens-Hardy, J., and Wright, J., and held to be inapplicable.

Where the company went into liquidation a few days before the expiration of a year, and the director's work for the year was completed, he was held entitled to remuneration for the year. *Shaws, Bryant & Co.*, W. N. (1901) 124. If the remuneration is to be paid "at such time as the directors determine," a director has no right until such determination. *Caridad Copper Co.* v. *Swallow*, (1902) 2 K. B. 44 (C. A.); *Inman* v. *Ackroyd, supra*. A director may in some cases be entitled to remuneration although not qualified. *Salton* v. *New Beeston Cycle Co., supra*; *International Cable Co.*, 66 L. T. 253. A salaried director is not, in the absence of a clear provision to the contrary, entitled to his travelling expenses in attending board meetings. They are covered, *primâ facie*, by his remuneration. *Young* v. *Naval and Military Co-operative Society*, (1905) 1 K. B. 687.

Where the articles fix the remuneration of directors, and provide that the company may, by resolution in general meeting, grant to the directors any additional remuneration, it has been held to be *ultra vires* for the directors to grant a retiring pension to a managing director. *Normandy* v. *Ind, Coope & Co.*, (1908) 1 Ch. 84. *Sed quære*: and see *Cyclists' Touring Club* v. *Hopkinson*, (1910) 1 Ch. 179. Remuneration ceases as from the time when any director ought to have vacated office under the provisions of the articles. *Consolidated Nickel Mines*, (1914) 1 Ch. 883.

Resignation.

Resignation.

Primâ facie, a director, like any other agent, can at any time resign his office, and usually the regulations make express provision accordingly. It seems enough if he gives notice to the company in the manner provided by s. 116 of the Act of 1908. See, however, *Municipal Freehold Land Co.* v. *Pollington*, 63 L. T. 238. That he must give notice to the company in general meeting appears to be unsound. And there is nothing to prevent a director from parting with his qualification shares, and so vacating office by disqualification. *Gilbert's case*, 5 Ch. 565. A resignation once made is irrevocable. *Reg.* v. *Mayor of Wigan*, 14 Q. B. D. 908; *Glossop* v. *Glossop*, (1907) 2 Ch. 370.

Where a director who was both a permanent and an ordinary one resigned, it was held that the resignation applied to both offices. *Moseley* v. *Koffyfontein*, (1910) 2 Ch. 382.

Disqualification.

Disqualification.

The regulations commonly provide for special cases in which a director is to vacate office by reason of disqualification, *e.g.*, if he accepts any other office under the company, becomes bankrupt, or lunatic, or ceases to hold his qualification shares, or absents himself or is absent from meetings of the directors for a lengthened period. See Company Precedents, Part I., p. 730, and Table A., cl. 77.

In such a case the director, upon the event happening, vacates his office automatically. *Bodega Co., Limited*, (1904) 1 Ch. 276.

Even apart from such provision, it is well settled that the acceptance by a director of an incompatible office vacates his directorship. See *Milward* v. *Thatcher*, 2 T. [illegible] 81; *Eales* v. *Cumberland Lead Co.*, 6 H. & N. 481; *Iron Ship Co.* v. *Blunt*, L. R. 3 C. P. 484. The trusteeship of a debenture holders' trust deed, if paid, is a "place of profit" disqualifying within the meaning of such a regulation. *Astley* v. *New Tivoli C[illegible]* 1899) 1 Ch. 151. An "office under the company" may, but will not usually, include the appointment of one of the directors to be solicitor of the company. *Harper's Tick Issuing Machine, Ltd.*, (1912) W. N. 263; 29 T. L. R. 63.

"Becomes bankrupt" means becomes such after election. It does not preclude the election as a director of a person who at the time is an undischarged bankrupt. *Dawson* v. *African Co.*, (1898) 1 Ch. 6.

"Becomes insolvent." *Reg.* v. *Saddlers Co.*, 10 H. L. C. 404; *Sissons* v. *S.*, 54 S. J. 802; Mans. 48; *James* v. *Rockwood Colliery Co.*, 106 L. T. 128; *London & Counties Assets Co.* v. *Brighton Grand Concert Hall, Ltd.*, (1915) 2 K. B. 493.

"Cease to hold": a director does not "cease to hold" shares where he has never acquired them. *Forbes' case*, 8 Ch. 775. Nor does he "cease to hold" by the qualification being raised from, *e.g.*, 50 to 250 shares. *Molineaux* v. *London, Birmingham and Manchester Insurance Co.*, (1902) 2 K. B. 589.

"Absenting himself" means being absent vo[illegible]'arily (*Mack's case*, W. N. (1906) 114), but a director may be treate[illegible] absenting himself if ill-health obliges him to go abroad. *McCon[illegible]'s case, Re London and Northern Bank*, (1901) 1 Ch. 728. As to the meaning of "concerned in any contract with the company," *Star Steam Laundry*, (1913) W. N. 39; 108 L. T. 367.

Unless otherwise provided, a director is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote. *Re Greymouth Point Elizabeth Rail. and Coal Co.*, (1904) 1 Ch. 32.

As to acts done by disqualified directors, see *infra*, p. 191.

Powers of Directors.

Powers of directors under the articles

The articles generally give to the directors a number of specific powers scattered up and down the various clauses, but, in addition to these specific powers, there is almost always inserted a general clause on the lines of Clause 71 of Table A., providing that the directors may exercise all the powers of the company not by the articles or by statute required to be exercised by the company in general meeting. Such a general vesting of powers in the directors is valid and effective, and all that has to be done, in

considering whether any particular transaction is within the powers conferred by such a clause on the directors, is to search the articles and the Acts to see whether there is any express provision requiring, for that transaction, the authority of the company in general meeting, and, if there is no such provision, the directors must be treated as competent to carry out the transaction. "The articles" said Mellish, L. J., in *In re Patent File Co.*, L. R. 6 Ch. 83, at p. 88, "give to the directors the whole powers of the company, subject to the provisions [of the articles and] of the Companies Act. 1862, and I cannot find anything either in the Act or in the articles to prohibit their making a mortgage by deposit." So, in *In re Anglo-Danubian Co.*, 20 Eq. 339, where it was a question of directors' power to issue debentures at a discount, Jessel, M. R., said: "Looking to the 66th clause, I cannot have any possible doubt. The directors can do anything the company can do." See, also, *Australian Co.* v. *Mounsey*, 4 K. & J. 733; *Pyle Works*, No. 2, (1891) 1 Ch. 173; *Hampson* v. *Price's Patent Candle Co.*, 45 L. J. Ch. 437.

In exercising these powers, whether general or special, directors must always bear in mind that they are trustees for the company, and must exercise the powers for the benefit of the company, and for that alone. *Richmond's case*, 4 K. & J. 325; *Gilbert's case*, 5 Ch. 559; *Re Gresham Life Assurance Society, Ex parte Penney*, L. R. 8 Ch. 449; *Punt* v. *Symons & Co.*, (1903) 2 Ch. 506; *Percival* v. *Wright*, (1902) 2 Ch. 421.

Where directors have a discretion and are *bonâ fide* acting in the exercise of it, it is not the habit of the Court to interfere with them. *Gresham Life*, L. R. 8 Ch. 449.

Where the articles vest the general powers of the company in the directors, "subject to such regulations not being inconsistent with the aforesaid regulations," as may be prescribed by the company in general meeting, the company in general meeting cannot override the directors' powers by prescribing a regulation or passing a resolution inconsistent with the articles. *Automatic Self-Cleaning Co.* v. *Cunninghame*, (1906) 2 Ch. 34; *Gramophone and Typewriter*, (1908) 2 K. B. 89; *Salmon* v. *Quin & Axtens*, (1909) A. C. 442. See, however, *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.*, (1909) 1 Ch. 267.

Acts in Excess of Authority.

Acts of directors in excess of authority.

Directors who act in excess of their authority—*e.g.*, borrow beyond the limit of their borrowing powers—are, in some cases, held liable to those with whom they deal, on the footing that they are to be taken to warrant their authority. *Collen* v. *Wright* (1857), 8 El. & Bl. 647; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Chapleo* v. *Brunswick Estate*, 6 Q. B. D. 715; *Firbank's Executors* v. *Humphrys*, 18 Q. B. D. 54; *Oliver* v. *Bank of England*, (1902) 1 Ch. 610, furnish examples of this doctrine.

Defective Appointments and Acting after Disqualification.

Acts where not duly appointed a director.

A person who has not been duly appointed is not a director (*Jenner's case*, 7 Ch. D. 132); and his purporting to act as such does not give the company any right of action against him unless it can show damage. *Coventry's case*, 14 Ch. D. 660. But the company may bring an action to restrain a *de facto* director from acting as director or representing himself as such. This right, however, is confined to the company; an individual member has no right to bring such an action where a director is improperly disqualified or appointed. For the matter is one for the company to determine, that is, for the majority, and if the majority choose not to interfere, the individual member must conform to the will of the majority. See rule in *Foss* v. *Harbottle*, p. 242.

As regards persons dealing with the company—outsiders, that is—the concluding paragraph of sect. 71 of the Act to some extent prevents the inconvenience which may arise from directors being irregularly appointed, for it provides that "until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened and all proceedings had thereat to have been duly held, and all appointments of directors, managers or liquidators shall be deemed to be valid." And sect. 74 provides that the acts of a director or manager shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification; but these provisions are obviously inadequate, and it is therefore usual to insert in the articles a clause supplementing them. See, for example, Clause 94 of Table A. It is to be observed that there is a distinction between the words of sect. 71 and the words of the clause, for the words of the section are qualified by the introduction of the words "until the contrary is proved." The provisions above referred to are effective not only as regards members, but as regards outsiders, for, as we have seen (*supra*, p. 44), outsiders, even more than members, are entitled to presume that the proceedings of the company have been conducted with due regularity. *Mahoney* v. *East Holyford Co.*, L. R. 7 H. L. 887, is an instance. There *de facto* directors had not been duly appointed, but the company was held bound by their acts as against an outsider, and Lord Cairns relied, amongst other things, on a clause in the regulations similar to Clause 94 of Table A. The protection enures for the benefit of a director who has taken over the rights of the outsider. See *Re Bank of Syria*, (1900) 2 Ch. 272. See, also, *Newhaven* v. *Newhaven*, 30 C. D. 363; *Briton Medical Co.* v. *Jones*, 61 L. T. 384; *Dawson* v. *African, &c. Co.*, (1898) 1 Ch. 6; *Howbeach*

Coal Co. v. *Teague*, 5 H. & N. 151; and *British Asbestos Co.* v. *Boyd*, (1903) 2 Ch. 439. In *Dawson* v. *African, &c. Co.* it was held that a call made by directors, who had not been duly appointed or were disqualified, was valid; and in the *British Asbestos Co.* the combined effect of an article analogous to Clause 94 of Table A. and of sect. 67 of the Act of 1862 (for which sect. 74 is now substituted), was held to validate the acts of a person who had vacated his directorship by becoming secretary, but had gone on innocently acting as director. And see *Transport* v. *Schonberg*, 21 Times L. R. 305.

A director who takes part in irregular proceedings may be estopped from setting up the irregularity. *Faure* v. *Phillipart*, 58 L. T. 527; *York Tramways* v. *Willows*, 8 Q. B. D. 685.

The clause will not, however, protect a person who knows of the invalidity of the appointment (*Staffordshire Gas Co.*, 66 L. T. 414; *Tyne Steamship Co.* v. *Brown*, 75 L. T. 483); a director, for instance, making a *malâ fide* transfer of his shares, accepted collusively by the other directors. *Murray* v. *Bush*, L. R. 6 H. L. 77; see further, as to the protection afforded to outsiders by the rule in *Royal British Bank* v. *Turquand*, *supra*, p. 44.

A *de facto* director is as much in a fiduciary position as a *de jure* director, and liable accordingly. *Coventry's case*, 14 C. D. 670.

Contracts by Directors with Company: Bribes.

Contracts by company with directors or in which they are interested.

Unless the articles confer on a director express powers of contracting with the company, a director's powers of so contracting are extremely limited. He may take up shares in the company, he may subscribe for debentures in the ordinary course of business (*Campbell's case*, 4 C. D. 470; and see *London and Colonial Fin. Corp.*, 77 L. T. 146, C. A.); but otherwise he is, like a trustee, disqualified from contracting with the company (*Albion Co.* v. *Martin*, 1 C. D. 580), and for a good reason. The company is entitled to the collective wisdom of its directors, and if all or any of such directors are interested in a contract, the company loses the benefit of its directors' unbiassed judgment (*Imperial Association* v. *Coleman*, 6 Ch. 558; and see *Costa Rica Rail. Co.* v. *Forwood*, (1900) 1 Ch. 756; affirmed, (1901) 1 Ch. 746); for on any such contract being entered into, a conflict of interest and duty must or may arise, and in this conflict the interests of those whom the director is bound to protect run a great risk of being sacrificed. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract in question. *Aberdeen, &c. Co.* v. *Blackie*, 1 Macq. 401; *Parker* v. *McKenna*, 10 Ch. 118; *Bray* v. *Ford*, (1896) A. C. 50. If, for example, the directors (there being no relaxation of the rule in the articles) agree to sell to one of themselves part of the property of the company.

the company is entitled to have the sale set aside, or, at its option, to sue the directors for breach of duty. So, too, if a director, concealing his interest, sells, through a third party, his property to the company, the company is entitled to reject the property and claim repayment of the purchase-money (*In re Cape Breton Co.*, 29 Ch. D. 795; *Chesterfield and Boythorpe Colliery* v. *Black*, 26 W. R. 207), or to retain the property and claim damages for any loss sustained by the non-disclosure. *Leeds and Hanley Co.*, (1902) 2 Ch. 809. And the same rule applies to contracts with any company in which a director holds shares. And if that company has notice of the facts, the contract may be set aside. *Transvaal Land Co.* v. *New Belgium Co.*, (1914) 2 Ch. 488. But this right the shareholders may waive to any extent by provisions in the articles as below mentioned, and even in the absence of such a provision they can, by resolution of a general meeting, duly convened, confirm a contract in which the directors or some of them are interested. *Grant* v. *United Switchback Co.*, 40 C. D. 135; *Kaye* v. *Croydon Tramways Co.*, (1898) 1 Ch. 358; *Imperial Association* v. *Coleman*, L. R. 6 H. L. 190; *Costa Rica Rail. Co.* v. *Forwood*, (1901) 1 Ch. 746 (C. A.).

Secret benefits of directors.

Directors, as we have seen, are agents of the company, and it is a well-settled rule that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration. "No man," said Lord Cairns, L. C., "can in this Court, acting as agent, be allowed to put himself in a position in which his interest and duty will conflict." *Parker* v. *McKenna*, 10 Ch. 118; see also *Bray* v. *Ford*, (1896) A. C. 50. And this rule applies with peculiar stringency to the directors of a joint stock company. Hence any *secret* benefit obtained by a director by reason of his position, or in the course of the company's business, whether it takes the form of a commission, or of qualification shares, or a sum of cash, is regarded as a bribe, and the director is accountable to the company for the amount (see *Eden* v. *Ridsdale, &c. Co.*, 23 Q. B. D. 368; *Boston Co.* v. *Ansell*, 39 C. D. 339; *Parker* v. *Lewis*, 8 Ch. 1035); and if the bribe has not been paid, the company can sue the briber for the excess of price caused by the bribe. *Mayor of Salford* v. *Lever*, (1891) 1 Q. B. 168; *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109; *Grant* v. *Gold Exploration Syndicate*, (1900) 1 Q. B. 233. Where a director has been promised a present of this kind, he cannot enforce payment. The consideration is corrupt, and the law will render no assistance to him. *Harrington* v. *Victoria Dock Co.*, 3 Q. B. D. 549; *Shipway* v. *Broadwood*, (1899) 1 Q. B. 369.

In the alternative the company may, if it chooses, rescind the contract; for where one party to a contract bribes or has any underhand dealing with the agent of the other party, the latter on discovery

may repudiate the contract. *Panama and Pacific Co.* v. *Indiarubber Co.*, L. R. 10 Ch. 515; *Shipway* v. *Broadwood*, (1899) 1 Q. B. 369. And see the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34).

So, too, a company acting as manager must rest satisfied with the agreed remuneration, and cannot charge extra for services rendered by its employees. *Bath* v. *Standard Land Co*, (1910) 2 Ch. 408.

Relaxation of the above rules.

These are the rules *primâ facie* applicable to such transactions, but a company is at liberty to waive the benefit of such rules, and to allow a director to make a contract, or to be interested in a contract, with the company, and the articles very commonly make provision accordingly. The usual form which such a provision takes, is that a director may make contracts, or be interested in contracts, with the company: but he is to disclose the nature of his interest to the board, and is not to vote in regard to the matter. Experience has shown that, as a general rule, such provisions are desirable; for it often happens that a company may be largely benefited by being able to deal with one of its own directors: All that is required is that the other directors should have such knowledge as will enable them to scrutinize the terms of the contract with more than usual care. *Imperial Association* v. *Coleman*, 6 H. L. 190; *Southall* v. *British Mutual*, &c., 6 Ch. 619; *Adamson's case*, 18 Eq. 670; *Costa Rica Co.* v. *Forwood*, (1900) 1 Ch. 756.

Proceedings of Directors.

Proceedings of directors.

The directors of a company must, as a general rule, act at board meetings unless the regulations otherwise provide. *Hayeraft Gold Co.*, (1900) 2 Ch. 230. Nevertheless, it does not follow that a transaction can be invalidated as against an outsider who has dealt with the company *bonâ fide* merely because the directors acted without meeting. *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629; *Re Bank of Syria, Owen & Ashworth's claim*, (1901) 1 Ch. 115. And the articles not uncommonly negative the rule, and expressly declare that a resolution in writing signed by all the directors shall be as effective as if passed at a board meeting, and there are cases in which this is found extremely convenient. *Primâ facie* one director alone has no power to act on behalf of the company. *R. N. Cunningham*, 58 L. T. 16; Lindley, 156. He is only one of a body of directors in whom collectively the management is vested.

The articles usually provide that the directors may conduct their proceedings as they think fit. Sometimes proxies are allowed.

Notice of Board Meeting.

Notices of directors' meetings.

Primâ facie due notice must be given convening a meeting of directors, and in default the meeting is irregular (*Harben* v. *Phillips*, 23 C. D. 34); but this is not always necessary, for by the articles.

or by the determination of the directors, meetings may be held at fixed times, and it may be arranged that in such cases no notice need be given. Where notice has to be given, it must be given a reasonable time before the meeting. *Browne* v. *La Trinidad*, 37 C. D. 1. Otherwise it will be invalid, unless, indeed, all the directors are present at the meeting. The notice need not specify, unless the articles otherwise provide, the nature of the business to be transacted. *La Compagnie de Mayrüe* v. *Whitley*, (1896) 1 Ch. 788. As regards directors abroad, the regulations commonly provide that no notice need be given, and even in the absence of such a provision it appears that notice need not be given to a director abroad, unless, indeed, he is within easy reach. *Halifax Sugar Co.* v. *Francklyn*, 59 L. J. Ch. 593. Sometimes by an accidental omission to give due notice to some one director, or by reason of there no being a quorum present, a meeting of directors is rendered irregular, but the directors nevertheless transact business on behalf of the company, *e.g.*, allot shares, make contracts, &c. In such a case, the rule in *Royal British Bank* v. *Turquand* (see p. 44, *supra*) applies, and outsiders will not, as a general rule, be prejudiced by such irregularities. They are not concerned to see to the internal regularity of the company's proceedings—its "indoor management" as Lord Hatherley termed it—and are entitled to assume that everything has been properly done. Where there has been any such irregularity, a subsequent regularly constituted board meeting can always ratify and confirm what was done by the irregular board, and it will then be valid *ab initio*. *Portuguese Copper Co.*, 45 C. D. 26; *Land Credit Co.*, 4 Ch. 473; *Hooper* v. *Kerr Stuart & Co.*, 83 L. T. 729; 45 S. J. 139 (22 Dec., 1900). And see *State of Wyoming Syndicate*, (1901) 2 Ch. 431, 437.

Omission of notice or want of quorum.

Outsiders unprejudiced by irregularity of proceedings.

Ratification.

Quorum of Directors.

The articles generally fix, or enable the directors to fix, the quorum for a board meeting, that is to say, what number of directors must be present to enable them to act as a board, and exercise the powers vested in the directors collectively. *Primâ facie*, a power to fix a quorum cannot be exercised by less than a majority of the directors at a board meeting. A director must not be counted in a quorum for the consideration of matters on which he is not entitled to vote. *Re Greymouth Point Elizabeth Rail. Co.*; *Yuill* v. *Same*, (1904) 1 Ch. 32.

Quorum of directors.

If the requisite quorum is not present the meeting is irregular and cannot transact business: so too if the number of directors of the company is less in the whole than the required minimum board, no effective board meeting can be held (*Faure Electric, &c. Co.* v. *Phillipart* (1888), 58 L. T. R. 525), unless the articles give power to act notwithstanding vacancies. *Scottish Petroleum*, 23 C. D. 411; *Bank*

of Syria, (1900) 2 Ch. 272. If no quorum has been fixed the number who usually act will do. *Lyster's case* (1867), 4 Eq. 233. 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.

The quorum clause in Table A. is 88.

Minutes.

It is the duty of directors to keep proper minutes of their proceedings. See *infra*, p. 244.

Resolutions of Directors.

Resolutions of directors.

The directors exercise their powers by resolutions passed at board meetings. Thus a call is made by passing a resolution—

Examples.

"That a call of ——*l.* per share be, and the same is hereby, made on the members of the company, such call to be payable to, &c., on, &c., at, &c."

The following are other examples:—

"That the shares numbered, &c., of A. B. be, and the same are hereby forfeited."

"That Messrs. —— and —— be and they are hereby appointed a committee with power to arrange with Mr. —— the terms on which he shall supply, &c., and make a contract with him accordingly for a period not exceeding twelve calendar months."

"That the sum of ——*l.* be raised for the purposes of the company by the issue of mortgage debentures to that amount, and that the solicitor be requested to furnish a draft debenture for the approval of the board."

"That the seal of the company be affixed to a contract, &c."

"That Mr. ——'s offer to supply the company with —— be and the same is hereby accepted, and that the secretary do give Mr. —— notice of this resolution."

"That an offer be made to Mr. —— on behalf of the company to, &c."

It is not, however, essential to the validity of a directors' resolution that the determination should be embodied in a formal resolution, and the minutes in recording it often, in fact, enter only the substance, *e.g.*, "a contract with A. B. for the supply of, was submitted and approved."

In order to carry a resolution in regard to external matters into effect, it is sometimes necessary to do some further act in the name of the company, *e.g.*, where a resolution has been passed to borrow

money it will be necessary to apply to some person or persons to lend the same, or to issue a prospectus, and when a lender has been found and the security agreed on, the directors will pass a resolution approving thereof and directing the seal to be affixed and the contract to be signed by two directors on behalf of the company. Hence, a matter may come before the board several times before it is completed. So, too, a mechanical act may be necessary, *e.g.*, to sign or seal a document, &c.

Delegation.

Delegation by directors.

The maxim "*delegatus non potest delegare*" applies to directors, and they cannot, therefore, *primâ facie* delegate their powers (*Cobb* v. *Becke*, 6 Q. B. 936); but this rule may be controlled by an express or implied authority to delegate, and usually the articles expressly provide that the directors may appoint servants and agents and determine their duties and powers, and further that the directors may delegate to any one or more of themselves any of their powers. Conf. Table A. cl. 91. A delegation thus authorized is good. *In re Taurine Co.*, 25 Ch. D. 118; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

Delegation may also be presumed. See *Totterdell* v. *Fareham Brick Co.*, L. R. 1 C. P. 674; *Regent's Canal*, W. N. (1867) 79; *Lyster's case*, 4 Eq. 238; *Mahoney* v. *East Holyford Co.*, L. R. 7 H. L. 869. See, however, *Premier Industrial Bank* v. *Carlton Manufacturing Co.*, (1909) 1 K. B. 106, and note, *supra*, p. 45.

Delegation does not prevent the directors from still acting in regard to the matter delegated. *Huth* v. *Clarke*, 25 Q. B. D. 391.

If directors delegate their powers to a committee without fixing a quorum, whatever the committee does must, unless the articles otherwise provide, be done in the presence of all its members. *In re Liverpool Household Stores Association* (1890), 59 L. J. Ch. 624.

Committees.

Committees of directors.

The delegation to a committee is usually effected by resolution passed at a meeting of the board, *e.g.*—

"That Messrs. —— and —— be, and they are hereby appointed, a committee, with power on behalf of the company to, &c."

"That Mr. —— be and he is hereby appointed a committee for the purpose of, &c.; and that the following powers and authorities be delegated to him, (1) power to, &c.; (2) power to, &c."

"That Messrs. —— and —— be, and they are hereby appointed, a committee for the purpose of settling with Mr. — — the terms of an agreement for, &c., and that they be authorized to execute on behalf of the company an agreement in writing embodying such terms."

Rotation.

Rotation of retirement of directors.

The articles of a company usually provide that a proportion of the directors, usually one-third, shall retire by rotation year by year, but in the case of private companies these provisions are often omitted or considerably qualified. See clauses 78—86 of Table A.

Removal.

Removal of directors.

The articles generally contain power to remove a director, but unless they do so a director cannot, it has been held, be removed without first altering the articles by special resolution so as to take the requisite power. *Imperial Hydropathic Co.* v. *Hampson*, 23 C. D. 1; *Browne* v. *La Trinidad*, 37 Ch. D. 1. But removal is one thing and specific performance another, and the Court, it is now well settled, will not enforce specifically a contract of service either at the instance of employer or employed. Hence, if a director refuses to act the Court will not force him to act, and if, on the other hand, a company, by resolution of a general meeting, refuses to employ a director, the Court will not force it to do so. *Harben* v. *Phillips*, 23 C. D. 14; *Bainbridge* v. *Smith*, 41 C. D. 462. It is a different thing, however, when a board of directors excludes one of their body from acting. The Court does not regard such exclusion as the act of the company (even though the directors have, under the articles, the general powers of the company), and it will accordingly, on the application of the aggrieved director, grant an injunction restraining the other directors from excluding him from office. *Pulbrook* v. *Richmond, &c. Co.*, 9 C. D. 610. It will not, however, restrain the company, and if, after the grant of the injunction, the shareholders, by a resolution in general meeting, declare that they do not wish the particular director to act any longer, the Court will discharge the injunction and decline to assist him any further, at least, by injunction. *Bainbridge* v. *Smith*, 41 C. D. 475. For any other redress he may claim he must proceed by action for damages.

Where the power to remove is only for reasonable cause, it is for the meeting to decide what is reasonable cause, and the Court will not interfere with their decision. *Inderwick* v. *Snell*, 2 M. & G. 216; and see *Gresham Life*, 8 Ch. 449; *Osgood* v. *Nelson*, L. R. 5 H. L. 636. If, owing to the irremovability of a director, there is a deadlock, a winding-up order may be obtained. *Sailing Ship Kentmere*, W. N. (1897) 58.

Table A. gives a power to remove—Art. 86.

Liabilities of Directors.

As to Contracts.

Contracts by directors for company.

Directors being agents (see above, p. 177), are not liable on contracts purporting to bind their company. If, having authority, they make a contract professedly for the company, then the company, their principal, and the company only, is liable on it, if they have not authority to make the contract, still they are not personally liable on the contract (*Ferguson* v. *Wilson*, L. R. 2 Ch. 77), although they may be liable to an action for damages for breach of implied warranty of authority. *Collen* v. *Wright*, 7 E. & B. 301; 8 E. & B. 647; *Coventry's case*, (1891) 1 Ch. 202. The general rule is thus stated by Lord Cairns in *Ferguson* v. *Wilson*, *supra*: "Whenever an agent is liable, those directors would be liable. Where the liability would attach to the principal and the principal only, the liability is the liability of the company."

Thus, if the directors order goods for, or on behalf of, their company, or if they enter into an agreement for, or on behalf or on account of, the company, the company is liable and not the directors, whether the contract be in writing or verbal.

Directors may bind themselves personally.

But the directors of a company may, of course, if they choose, contract, so as to bind themselves personally: whether they have done so depends on the terms of the contract. If, for example, they contract in their own names, without disclosing that they are acting for the company, they are, without doubt, personally liable; or, if they contract, disclosing the fact that they are directors, but without using words sufficient to bind the company, *e.g.*, the word "Limited," they are personally liable on the contract. The test of liability is, does it appear from the terms of the contract that the directors were contracting on behalf of the company? If it does, they are protected. "Ltd." may be used as an abbreviation for "limited." *F. Stacey & Co.* v. *Wallis*, 106 L. T. 541. See also sect. 63 (3) of the Act, and *Civil Service Society* v. *Chapman*, (1914) W. N. 369.

Thus, if the directors contract in their own name, but expressly on behalf of the company or for the company, that is sufficient, and it matters not whether the words appear in the description of the parties, or in the body of the contract, or are added by way of qualification to the signature. *Gadd* v. *Houghton*, 1 Ex. D. 357. On the other hand, if the directors contract without purporting to bind the company, *e.g.*, where they say: "We, the directors of the —— Company, Limited, hereby agree," &c., the contract does not purport to bind the company, and the directors are therefore liable. *Aggs* v. *Nicholson*, 1 H. & N. 165; *McCollin* v. *Gilpin*, 5 Q. B. D. 390; and see *Dermatine Co.* v. *Ashworth*, 21 T. L. R. 510.

As to Frauds and other Torts.

Frauds and torts of directors.

Any director who is a party to a fraud, such as the issuing of a fraudulent prospectus, or to the commission of any tort, is personally liable. This is on the principle that whoever commits a wrong is liable for it himself, and none the less so that he was acting as an agent or servant on behalf, and for the benefit, of another; for the contract of agency or service cannot impose any obligation on the agent or servant to commit, or assist in the committing of, fraud or any other wrong. *Collin* v. *Thompson's Trustees*, 4 Macq. 424, 432. The company may also be liable (*supra*, pp. 73—75), but that does not exonerate the director, nor ought it in reason to do so, for though the company is an artificial person in law, it is in fact the directors who set the company in motion. So, too, if, by the order of the directors, a trespass is committed, a patent infringed, or other wrongful act committed, the directors who are parties to it are personally liable. If more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all, or any one or more of them, at his choice; for every wrongdoer is liable for the whole damage, and it does not matter whether they acted as between themselves as equals, or one of them as agent or servant of another. Pollock on Torts, 7th ed., p. 190.

But a director is not to be held responsible for the fraud of his co-directors, unless he has expressly or impliedly authorized it. *Cargill* v. *Bower* (1878), 10 Ch. D. 502. "A director," as Lord Hatherley said, "cannot be held liable for being defrauded. To do so would make his position intolerable." *Land Credit Company of Ireland* v. *Lord Fermoy* (1870), L. R. 5 Ch. 772; *In re Charles Denham & Co.*, 25 Ch. D. 752; *Dovey* v. *Cory*, (1901) A. C. 477; *Prefontaine* v. *Grenier*, (1907) A. C. 101.

As to the measure of damages where a director had by fraudulent misrepresentations induced his co-directors to advance him moneys of the company on an insufficient security, see *Exploring Land and Minerals Co.* v. *Kolchmann*, 94 L. T. 234.

Again, if a director neglects to comply with the requirements of the Act of 1908, he is, or may be, liable in damages personally. See, further, *infra*, p. 357.

Negligence.

Negligence of directors.

"By accepting a trust of this sort (*i.e.*, the management of a company's affairs), a person," says Lord Hardwicke, "is bound to exercise it with fidelity and reasonable diligence" (*Charitable Corporation* v. *Sutton*, 2 Atk. 405); and Jessel, M. R., in another case, said: "Directors are bound to use fair and reasonable diligence in

the discharge of their duties, and to act honestly; but they are not bound to do more." *Forest of Dean, &c. Co.*, 10 C. D. 452.

"If the directors act within their powers and with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company which the present, they discharge both their legal and equitable duty to the company, and will not be liable for mistakes or errors of judgment." *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392. And see *Brazilian Rubber Plantations*, 27 T. L. R. 109.

Thus, in *Turquand* v. *Marshall* (1869), 4 Ch. 376, it was sought to make directors liable on the ground, amongst other things, that they had made an improvident loan to one of themselves; but relief was refused, and Lord Hatherley, L. C., said: "They were intrusted with full powers of lending money, and it was part of the business of the concern to trust people with money, and their trust to an undue extent was not a matter with which they could be fixed unless there was something more alleged, as, for instance, that it was done fraudulently and improperly, and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors; but so long as they kept within the powers of their deed, the Court could not interfere with the discretion exercised by them." To do so would seriously cripple directors in the exercise of that free judgment on which the company's welfare so much depends; but there is nothing in those words to import that directors may not be liable for negligence, as distinguished from want of judgment, as Lord Hatherley subsequently explained in *Overend, Gurney & Co.* v. *Gibb*, L. R. 5 H. L. 480.

"I should like," said his Lordship there, "to say one word as regards the case of *Turquand* v. *Marshall*. . . . . I certainly never intended to lay down the strong position 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, viz., the same amount of prudence which in the same circumstances he would exercise on his own behalf."

Referring to this topic, Lord Lindley, in his work on Companies, remarks that although, speaking generally, directors have a wide discretion, and, in the absence of proof of *mala fides*, it may be difficult to establish a case of culpable or wilful default, yet, if such a case be proved, and loss by the company attributable thereto be also proved, the directors would be liable to make good such loss. The negligence for which a director will be held liable must, however, be such as would make him liable [illegible] action. *Marzetti's case*, 28 W. R. 541.

What has helped not a little to perplex the law on this point is the notion which has long been floating about in the minds of even eminent lawyers—that directors are not liable for *mere* negligence, but only for *gross* negligence, and the case of *Overend, Gurney* v. *Gibb*, L. R. 5 H. L. 480, is sometimes referred to as an authority for the proposition—though not very happily, inasmuch as in that case *negligence was not alleged*. It was in that very case, too, that Lord Hatherley used the words above cited without any dissent on the part of the other learned lords.

Directors' imprudence may, it is true, be so gross, so palpable, as to justify the inference that they were not acting *bonâ fide* in the exercise of the discretion committed to them; but *mala fides* or fraud of this kind is quite distinct from negligence, with reference to which the word "gross" does not seem to mean anything at all. "Gross negligence," remarked Rolfe, B., in *Wilson* v. *Brett*, 11 M. & W. 115, "is the same thing as 'negligence' with the addition of a vituperative epithet," and this epigram was cited with approval by Willes, J., in *Grill* v. *General, &c. Co.*, L. R. 1 C. P. 603, affirmed L. R. 3 C. P. 476. Erle, C. J., referring to this expression, 35 L. J. C. P. 324, said: "I advisedly abstained from using a word to which I can attach no definite meaning; and no one, as far as I know, ever was able to do so."

On the other hand, Romer, J., in giving evidence before the House of Lords Select Committee in 1897 on the then pending Companies Bill, said:—"As I understand the law, a director is only liable for what is called 'gross negligence' . . . . he is not held liable for ordinary mere negligence if it is of a simple character." But when asked by the Lord Chancellor, "Do you, as a lawyer, say there is any difference between gross negligence and negligence?" the answer of the learned judge was, "It is very difficult to say as a lawyer." At all events, in *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392, and in *National Bank of Wales*, (1899) 2 Ch. 672, Romer, J., and Lindley, L. J., maintained the utility of the phrase "gross negligence." "Their negligence," said Lindley, M. R., in the last-mentioned case, speaking of directors, "must be not the omission to take all possible care, it must be much more blameable than that; it must be in a business sense culpable or gross. I do not know how better to describe it." Unfortunately these expressions do not remove the obscurity of the word "gross."

The truth is that negligence is a purely relative term: it is the absence of due care or diligence, and what is due care or diligence must in every community be judged by the actual state of the society, the habits of business, the general usages of life and the changes as well as the institutions peculiar to the age. Story on Bailments, § 14.

In a recent case (*Dovey* v. *Cory*, (1901) A. C. 477) a bank had

sustained heavy losses by the issue of fraudulent balance sheets and the improper advance of money to customers of the bank. The frauds were the work of the manager and the chairman, and the question arose whether a co-director, though, in fact, innocent of any complicity, was liable to the company for negligence in not having discovered the frauds. The House of Lords in the result entirely exonerated him from liability. "It is obvious," said Halsbury, L. C., in giving judgment, "that if there is such a duty (of detecting frauds) it must render anything like an intelligent devolution of labour impossible. Was Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts and that he believed such assurances is involved in the admission that he was guilty of no moral fraud: so that it comes to this—that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director . . were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditor himself. The business of life could not go on if people could not trust those who are put in a position of trust for the express purpose of attending to details of management": and Lord Davey added, "I think the respondent Cory was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *In re Wincham Shipbuilding and Boiler Co., Hallmark's case*, 9 C. D. 329, and by Mr. Justice Chitty, in *In re Denham & Co.*, that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) the chairman to go carefully through the returns from the branches and to bring before the board any matter requiring consideration, but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

A director is not necessarily affected with constructive notice, in the absence of actual knowledge of the facts which appear in the books of the company. *Coasters Limited*, 103 L. T. 622.

In determining whether a director has been guilty of negligence, the Court will, as *Dovey* v. *Cory*, *supra*, and other cases show, take into account the character of the business, the number of the directors, the provisions of the articles, the ordinary course of management and practice of directors, the extent of their knowledge and experience, and, in a word, all the special circumstances of the particular case.

Given a case of duty not performed, the burden of proving that the non-performance is equivalent to negligence rests on those who allege such negligence (*In re Liverpool Household Stores* (1890), 59 L. J. Ch. 618), for directors have a large discretion, and while acting honestly within it cannot be charged with misfeasance. Thus directors will not be held liable for misfeasance because, in the exercise of their discretion, they allow calls to remain unpaid (*In re Liverpool Household Stores*, *supra*), or because they rely on subordinates doing their duty (*Dovey* v. *Cory*, *supra*), or do not sue for a debt of the company. *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450. It may in some cases be the best policy for the company not to press for payment. Even if it is not, mere errors of judgment and imprudence on the part of directors do not constitute either negligence or misfeasance. *Marzetti's case*, 28 W. R. 541. As Lord Justice Cotton said: "Trustees are liable, whatever trouble they take, if the fund in their care goes not according to the trust. Opinions of counsel, *bona fides*, or care, do not protect them. Directors are confidential agents with the liabilities of trustees; but they have a large discretion, and if they act *bonâ fide* they are relieved, and are not liable for want of judgment or error if they make a payment which is not, in fact, for the purposes of the company." See, also, *Re Faure Accumulator Co.*, 40 C. D. 150; *Sheffield and South Yorkshire, &c. Society* v. *Aizlewood*, 44 C. D. 412; and as to imprudence, *Turquand* v. *Marshall*, 4 Ch. 376; *Overend, Gurney* v. *Gibb*, L. R. 5 H. L. 480; *London Financial Association* v. *Kelk*, 26 C. D. 107; *Grimwade* v. *Mutual Society*, 52 L. T. 409. See *Brazilian Rubber Plantations and Estates*, (1911) 1 Ch. 425, as to indemnity provisions in the articles.

But it is one thing to make a payment injudiciously, and another to make it without inquiry. Thus, if a director signs cheques for the company he is bound to inform himself of the purposes for which the cheques are being given. He cannot be allowed to say that the signing was a ministerial act—a mere matter of form. If he neglects inquiry, trusting to his co-directors, he does so at his own risk. *Joint Stock Discount Co.* v. *Brown* (1869), 8 Eq. 381. And see *Coats* v. *Crossland*, 20 T. L. R. 800.

And if directors do not really exercise their judgment they may be liable. *New Mashonaland Co.*, (1892) 3 Ch. 577; *Re Leeds Co.*, 36 C. D. 787.

Negligence by Non-Attendance at Board Meetings.

Negligence of directors by non-attendance to affairs.

If directors are guilty of gross non-attendance and leave the management to others, they may be guilty, by this means, of the breaches of trust which are committed by others. Per Lord Hardwicke, *Charitable Corporation* v. *Sutton*, 2 Atk. 406. But it is not necessary for a director to attend every board meeting unless the articles otherwise provide. This was laid down long since in *Perry's case*, 34 L. T. 716, in which Bacon, V.-C., said, that a director "is not bound to attend every meeting of the directors. It is not part of the duty of a director to take part in every transaction which is considered at a board meeting." And Jessel, M. R., recognized this qualification in *In re Forest of Dean Co.*, 10 Ch. D. 452. "They [directors] are bound, no doubt," said the learned judge, "to use all reasonable diligence, having regard to their position, though probably an ordinary director, who only attends at 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."

In the case of *Re Denham & Co.*, 25 C. D. 752, a director who for four years had attended no board meetings was held not to be personally answerable for fraudulent reports and balance-sheets issued and passed by his co-directors, or for dividends paid by them. But there the articles were in special terms. In *Marquis of Bute's case*, (1892) 2 Ch. 100, non-attendance by a trustee of a savings bank for a long period was excused, but here there were fifty trustees. In that case Stirling, J., said: "Neglect or omission to attend meetings is not, in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings." See also *Exploring Land and Minerals Co.*, 94 L. T. 234.

Misfeasance and Breach of Trust.

Misfeasance and breach of trust.

Besides negligence, directors, as agents and trustees, may be held liable for various other kinds of misconduct and delinquency. These are generally grouped together under the head of what is known as "misfeasance," or breach of trust, the term "breach of trust" being generally confined to some misapplication of the funds of the company (see *supra*, pp. 179, 180), and the term "misfeasance" to other breaches of duty which do not involve such misapplication. For instance, to apply the funds of the company to *ultra vires* purposes (*Cullerne* v. *London Society*, 25 Q. B. D. 485), or to pay dividends out of capital (21 Ch. D. 519), is a breach of trust; see *supra*, pp. 179, 180; to allot shares knowingly to an infant (*Re Wilson*, 8 Ch

45), or to take a bribe (*Pearson's case*, 5 Ch. D. 336); to give a creditor a fraudulent preference, or to commit a breach of the articles resulting in loss to the company—these are acts of misfeasance.

Examples of misfeasance and breach of trust.

The following are some cases in which directors have been charged with or made liable for misfeasance or breach of trust:—*Stringer's case*, L. R. 4 Ch. 475 (claim against directors to repay dividend declared and paid under delusive balance-sheet); *Rance's case*, L. R. 6 Ch. 104 (director ordered to repay bonus improperly paid to him); *National Funds Assurance Co.*, 10 C. D. 118; *Alexandra Palace Co.*, 21 Ch. D. 149; *Flitcroft's case*, 21 Ch. D. 519; *Denham & Co.*, 25 C. D. 752; *Re Sharpe*, (1892) 1 Ch. 154; *London & General Bank* (2), (1895) 2 Ch. 673 (directors ordered to repay dividends improperly paid to shareholders out of capital); *De Ruvigne's case*, 5 Ch. D. 306; *Pearson's case*, 5 Ch. D. 336; *Metcalf's case*, 13 C. D. 169; *Carriage Co-operative Association*, 27 C. D. 322 (orders against directors who had improperly obtained their qualification shares from promoters or vendors); *Archer's case*, (1892) 1 Ch. 332 (order to compel director who had obtained from promoter a secret advantage—an indemnity against loss on his qualification—to account to company); *London and S. W. Canal*, (1911) 1 Ch. 346 (order against director who held his qualification shares as trustee for and at will of promoter); *Postage Stamp, &c. Co.*, (1892) 3 Ch. 566 (directors ordered to account for gift of shares by vendor); *Englefield Co.*, 8 C. D. 388 (directors ordered to make good sum paid to promoter for preliminary expenses, out of which directors' qualification provided); *Marzetti's case*, 28 W. R. 541 (director ordered to repay sums nominally paid for preliminary expenses, but really for rigging the market); *Geo. Newman & Co.*, (1895) 1 Ch. 674 (director held liable for present made to himself without the sanction of the company's articles); *Parker* v. *McKenna*, 10 Ch. 118 (directors held liable for illegitimate profits made by dealings with the company's shares); *Boston Deep Sea Co.* v. *Ansell*, 39 Ch. D. 339 (managing director held liable for secret commission); *In re Cape Breton Co.*, 29 Ch. D. 795, and 12 App. Cas. 652 (director selling his own property to the company without disclosure): "The misfeasance in such a case is not selling, but in not disclosing," per Lord Herschell; *Alexander* v. *Automatic Telephone Co.*, (1900) 2 Ch. 56 (directors held liable for not making calls on themselves).

Directors who purposely abstain from making inquiries, in pursuance of an understanding between them to that effect, into the price paid to each other for properties sold to the company, are guilty of a gross dereliction of duty. *Coats* v. *Crossland*, 20 T. L. R. 800.

In cases of misfeasance or breach of trust the delinquent director has no right of set-off. *In re Anglo-French Co-operative Society*, 21 C. D. 492; *In re Carriage Supply Association*, 27 C. D. 322; *Flitcroft's case*,

21 C. D. 519. And he cannot rely on a release in general terms. *Re Joint Stock Trust* (1912), 56 S. J. 272.

Statutory Relief of Directors.

Statutory relief of directors.

By sect. 279 of the Companies Act, 1908 (which takes the place of sect. 32 of the Act of 1907), special provision is now made for the relief of directors. Thus—

"279. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper."

National Trustee Co. of Australasia v. *General Finance Co.*, (1905) A. C. 373, points to the conclusion that it is not enough to prove that the trustee (remunerated) acted reasonably and honestly. It must, in addition, be proved that he ought fairly to be excused. See also *In re Smith, Smith* v. *Thompson*, 71 L. J. Ch. 411; *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536; *Re Second East Dulwich 745th Starr-Bowkett Building Society*, 68 L. J. Ch. 196; *Re Grindey, Clews* v. *Grindey*, (1898) 2 Ch. 593; *Perrins* v. *Bellamy*, (1899) 1 Ch. 797; and *Re Lord de Clifford*, (1900) 2 Ch. 707.

Dispositions pending Winding-up.

Disposition of property by directors pending winding-up petition.

Directors who dispose of the company's property pending a winding-up petition are *primâ facie* liable, on a winding-up, for all such moneys not expended by them in the ordinary course of business (Companies Act, 1908, s. 207: *Re Neath Harbour Works*, 35 W. R. 827); but where such payments are honestly made and in the ordinary course of business, it is usual for the Court to allow them, as where a charge on calls is given to prevent the ruin of an insurance company (*International Life Assurance Society*, L. R. 10 Eq. 312), or a contract for sale of goods is completed by sale and delivery. *Wiltshire Iron Co.*, L. R. 3 Ch. 443. In sanctioning dispositions the Court is guided by the same principles as those applied by the Court in bankruptcy to "protected transactions." *Re Repertoire Opera Co.*, 2 Manson, 314. Directors should, however, be on their guard what they do after petition presented. *Ibid.*

The acceptance of a bill of exchange in the ordinary course of business by a director after commencement of a voluntary winding-up is not capable of being sanctioned under the section, the directors being *functi officio*. (Sect. 186 (iii).)

Penalties.

Statutory penalties.

The Act imposes a number of penalties for breach of its provisions. The most important of these are the following :—

Alteration of Memorandum.—Sect. 9. Default in relation to alteration of objects.

Copies of Memorandum and Articles.—Sect. 18. Default in supplying copies of memorandum or articles.

Register of Members.—Sect. 25. Default in keeping register of members.

Annual Returns.—Sect. 26. Default in making annual returns.

Inspection of Register.—Sect. 30. Default as to allowing inspection of register.

Sub-division of Shares.—Sect. 41. Default as to sub-division of shares.

Increase of Capital.—Sect. 44. Default as to giving notice of increase of capital.

Name of Company.—Sect. 63. Default as to publishing name.

General Meeting.—Sect. 64. Default in convening annual general meeting.

Special Resolutions.—Sect. 70. Default in registration of copies of special and extraordinary resolutions.

Register of Directors.—Sect. 75. Default as to register of directors.

Commencing Business.—Sect. 87. For commencing business prematurely.

Allotments of Shares.—Sect. 88. Default in returning allotments.

Share Certificates.—Sect. 92. Default as to issuing certificates.

Appointment of Receiver.—Sect. 94. Default as to registering appointment of receiver.

Accounts, filing.—Sect. 95. Default in filing accounts of receiver.

Return of Mortgages.—Sect. 99. Default in return as to mortgages.

Registration of Mortgages and Charges.—Sect. 100. Default in registering mortgages or charges.

Inspection of Mortgage Register.—Sect. 101. Default in allowing inspection.

Balance Sheet.—Sect. 113 (4). For issuing unsigned or without report attached.

False Returns.—Sect. 281. For false returns and statements.

As to the prosecution in respect of offences made punishable by fine, see sects. 276 and 277.

Application of Funds ultra vires the Company.

Ultra vires application of funds.

If directors apply funds of the company to purposes which are *ultra vires* the company, they are liable to replace them, however honestly they may have acted. *Cullerne* v. *London, &c. Society*, 25 Q. B. D. 485. "If," said Lord Justice Liudley in that case, "a director, acting *ultra vires*, that is, not only beyond his own power, but also beyond any power the company can confer on him, parts with money of the

company, I fail to see on what principle the fact that he acted *bonâ fide* and with the approval of the majority of the shareholders can avail him as a defence to an action by the company to compel him to replace the money." This is a hard saying in cases where directors have honestly misinterpreted their powers under an ambiguous memorandum (*London Financial Association* v. *Kelk*, 26 Ch. D. 107); but it is the inexorable logic of the law. Such a case would be an eminently proper one for relief under sect. 279 of the Act of 1908.

Remedies against Directors.

The civil remedy of a company against a delinquent director, whether for negligence, fraud, misfeasance, or breach of trust, is, whilst the company is a going concern, by action. *Joint Stock Bank* v. *Brown*, 8 Eq. 381; *Nant-y-glo, &c. Co.* v. *Grave*, 12 C. D. 738. If the company is being wound up the remedy is, except where the parties are not amenable to the winding-up jurisdiction, under sect. 215 of the Act, commonly known as "misfeasance section," which gives power to the Court, in a summary way, to order any director or officer of the company who has been guilty of misfeasance to replace the moneys misapplied or to pay compensation.

An application under the section may be made by either the official receiver or the liquidator or a creditor or contributory.

Criminal Liability for Fraud.

By the Larceny Act, 1861, s. 84:

"Whosoever being a manager, director or public officer of any body corporate or public company shall make, circulate or publish or concur in making, circulating or publishing any written statement or account which he shall know to be false in any material particular with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to any of the punishments which the Court may award as hereinbefore last mentioned."

The punishments "hereinbefore last mentioned" were "To be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceed-

ing two years with or without hard labour and with or without solitary confinement."

Criminal liability of directors for fraud.

A prospectus is a "written statement" within this section. It was under this Act that the directors of Overend, Gurney & Co. were prosecuted. See the admirable summing-up of Cockburn, C. J., in this case (*Queen* v. *Gurney*, reported Finlayson, p. 254, extract of which is given in Company Precedents, Part I., p. 233); and there have been various other cases from time to time in which directors have been prosecuted and convicted. By sect. 217 of the Act of 1908 the Court may direct the liquidator of a company in winding-up by the Court to institute a prosecution against the directors, managers or officers, or members, for criminal offences committed by them, and a similar power of prosecuting is given to the liquidator in a voluntary winding-up, with the sanction of the Court. (Sect. 217 (2).) The difficulty of working these sections lies in the fact that the costs of the proceedings come out of the assets, in other words, out of the pockets of creditors or shareholders, who are naturally indisposed to have public justice vindicated at their expense. The question was very carefully considered by Buckley, J., in *Re London and Globe Finance Corp.*, (1903) 1 Ch. 728, and the test he there adopted was what would a good citizen feel to be his duty in the matter—if to prosecute, then a prosecution ought to be directed by the Court, even against the wishes of the persons entitled to the assets. Other cases are *Re Charles Denham & Co.*, 32 W. R. 921; *Re Eupion Fuel and Gas Co.*, W. N. (1875) 10; and *Re Northern Counties Bank*, 31 W. R. 546.

Directors who pay dividends out of capital are not only civilly liable but may be liable in some cases for conspiracy. *Burnes* v. *Pennell*, 2 H. L. C. 487; *R.* v. *Esdaile*, 1 F. & F. 213.

The Act of 1908 also contains a penal section (sect. 281), where "any person in any return, report, certificate, balance sheet or other document required by or for the purposes of any of the provisions of this Act specified in the Fifth Schedule hereto, wilfully makes a statement false in any material particular knowing it to be false"—a provision designed to fortify the working of the Act; and offences against several of the sections are criminal. *Reg.* v. *Tyler*, (1891) 2 Q. B. 588.

Further, by sect. 216 of the Act (1908), "If any director, officer, or contributory of any company being wound up destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company, with intent to defraud or deceive any person," he is to be guilty of a misdemeanour, and liable to two years' imprisonment with or without hard labour.

Indemnity.

Directors, as agents, are by law entitled to indemnity in respect of all liabilities properly incurred by them in the management of the company's business. *Re German Mining Co.*, 4 De G. M. & G. 19; *Re Norwich Yarn Co.*, 22 Beav. 143; *James* v. *May*, L. R. 6 H. L. 328; *Walters* v. *Woodbridge*, 7 C. D. 504; *Re Financial Corporation*, 28 W. R. 760; *Hunt's Claim*, W. N. (1872) 53; *Hardoon* v. *Belilios*, (1901) A. C. 118; Seton, 7th ed. 1131. This extends to costs incurred by a director in defending a libel action in connection with a report made by him for the company (*Re Famatina Development Corporation*, (1914) 2 Ch. 271); and no express provision for that purpose is necessary; but the articles commonly contain express provision on the subject, and where this is the case a right of indemnity may be and often is given more extensive than that implied by law. See *Re Pyle Works* (2), (1891) 1 Ch. 184. The right does not, of course, extend to indemnity for wrongful or *ultra vires* acts of the agent. *Smith* v. *Duke of Manchester*, 24 Ch. D. 611; and other cases. Indemnity to directors.

As to the right of indemnity where a person's name has been inserted in a prospectus without his consent, see sect. 84 (3) of the Act of 1908.

Directors who pay a dividend representing that it is paid out of profits cannot claim indemnity, but where directors pay a dividend to members who know that it is paid out of capital, they may have a right of indemnity as against such members. *Moxham* v. *Grant*, (1900) 1 Q. B. 88; yet the directors will primarily be ordered to make good the amount to the company. *Re Alexandra Palace Co.*, 21 C. D. 149; *National Funds*, 10 C. D. 118.

Directors are not entitled, unless the articles so provide, to be paid by the company their travelling expenses in attending board meetings. *Young* v. *Naval and Military, &c. Society*, (1905) 1 K. B. 687. Such expenses are not expenses incurred in the execution of their office within an indemnity clause. *Marmor, Limited* v. *Alexander* (1908), S. C. 78, Ct. of Sess.; *Brazilian Rubber*, 27 T. L. R. 109.

Contribution.

Where directors incur liability, *e.g.*, by engaging in some *ultra vires* transaction, they are all liable to contribute to meet the consequent liability; that is to say, if one is sued for and has to pay the damages, he is entitled to call on the others, who are equally blameable, to Contribution of directors *inter se* as to moneys paid for liability.

contribute rateably to discharge the amount, for all directors who join in a misapplication of the company's property are jointly and severally liable. *Ashurst* v. *Mason*, 20 Eq. 225; *Ramskill* v. *Edwards*, 31 C. D. 100; *In re Englefield Colliery Co.*, 8 Ch. D. 388; *In re Anglo-French Society*, 21 Ch. D. 501; and see Rules of Supreme Court, Ord. XVI. r. 55; and Ann. P. 1916, pp. 285, 299. See also the right of contribution under sect. 84 (4) of the Act of 1908, in relation to prospectus liabilities.

CHAPTER XVII.

DIVIDENDS AND PROFITS.

Dividend paying incident to Trading.

No statutory provisions except in Table A. as to paying dividends.

The Act of 1908, except in Table A., where applicable, does not contain any express provisions as to the payment of dividends, and although the powers of a company are limited by its objects, the Act evidently treats the power to pay dividends as an object of every company so obvious, so inherent, as not to need mention in the memorandum, but properly left to be dealt with and defined by the articles (Table A. Clause 95, and Companies Act, 1908, s. 39 (3)); and this is consonant with common sense, for the main object of the Act was, and is, to enable people to trade with limited liability, and the chief incentive to all such trading would be gone if the members of the company could not appropriate to themselves the profits derived from such trading.

But there is no principle which compels a company while a going concern to divide the whole of its profits among the shareholders. How the company shall deal with such profits is a matter of management and internal economy. The company may form a reserve fund, and the reserve fund may, subject to the control of a general meeting, be invested in such securities as the directors may select, the matter being one of internal management. *Burland* v. *Earle*, (1902) A. C. 83; *Bond* v. *Barrow Hæmatite Co.*, (1902) 1 Ch. 353.

Table A.—which is to apply to all companies limited by shares, unless excluded—provides, by Art. 95, for the payment of dividends out of profits. Where Table A. does not apply, the articles generally contain specific provisions as to the payment of dividends.

Power to declare Dividends.

Powers in regulations.

In framing these provisions the usual plan is to provide that "the company in general meeting," or "the directors with the sanction of a general meeting," may declare a dividend. Occasionally, however, the power to declare dividends is vested in the directors alone, and in many cases they are given the power to pay interim dividends.

Proportion in which Dividends payable.

In what proportions dividends payable.

One of the most important points which the articles have to determine in reference to dividends is in what proportion the dividends are to be made payable as between the members. The provision as to this, contained in Table A. (of 1862), was that the dividend is to be paid "to the members in proportion to their shares." This means in proportion to the nominal amount of the capital held by them respectively. And the result of such a provision is to give the same

dividend per share to shares of the same amount, even where more is paid up on so than on others. *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 65.

Some persons consider this principle of distribution inequitable, and not without reason, and it is consequently very common, in the articles, to provide that the dividend shall be distributed among the members "according to the capital paid on the shares." Table A. (of 1908) so provides in Clause 98. This gives a rateable dividend on the paid up capital; but this again fails to satisfy ideal justice, because it does not take account of the outstanding liability on the shares. Thus, if there are 10,000 fully paid up shares of 1*l.* each, and 10,000 1*l.* shares on which only 5*s.* per share has been called and paid up, here the holders of the part-paid shares undoubtedly confer a substantial benefit on the company by enabling it to trade on the credit of the uncalled capital represented by their names. And yet for this they get no corresponding advantage. They take only the same dividend as if their shares were 5*s.* shares.

To meet this unfairness it is sometimes provided that the profits shall be applied, first in paying a dividend at the rate of—say—5 per cent. per annum on the paid up capital, and that the surplus shall be divided among the members in proportion to their shares. This seems, in a great measure, to do justice all round.

If the articles do not specify in what proportion dividends are to be paid, they must be paid in proportion to the nominal amount of the shares, for members are *primâ facie* entitled to participate in the profits of a company in proportion to their respective interests therein, and the nominal amount of capital held by each is the measure of such interest. *Bridgwater Co.*, 14 App. Cas. 525; *Oakbank Oil Co.* v. *Crum*, *supra*.

When the articles expressly or impliedly provide for payment of dividends in proportion to the shares, the question sometimes arises whether, by altering the articles, provision can be effectively made for paying dividend in proportion to the capital paid up. Sect. 39 of the Act authorizes such payment, and the decision in *Andrews* v. *Gas Meter Co.*, (1897) 1 Ch. 361, makes it clear that such an alteration can be made.

Dividends on Preference or other Special Shares.

Dividends on preference or other special shares.

The dividend on preference shares depends on the terms of issue. Such terms may be found in the memorandum (*Ashbury* v. *Watson*, 30 Ch. D. 376), or in the articles of association, or in the resolution creating the shares, or in some prospectus or other document offering them for subscription. *Webb* v. *Earle*, 20 Eq. 557.

The dividend on preference shares is usually at a fixed rate, *e.g.*, 5 per cent. per annum on the capital paid up thereon. In some cases, as

appears above (p. 84), it is cumulative; in other cases it is non-cumulative.

Preference shares sometimes confer a right to participate also in surplus profits.

Besides preference shares there may be other classes of shares with special dividend rights attached thereto.

In declaring a dividend, the rights of all these different classes must be observed. Any infringement, or attempted infringement of their respective rights will give, to the members who are prejudiced, the right to apply for an injunction or other relief.

Payment out of Profits.

In declaring dividends certain important points have to be borne in mind, viz.:—

Points to be observed in declaring dividends.

1. Dividends are only to be paid out of profits, not out of capital. *In re Oxford Benefit Building Society*, 35 Ch. D. 502; *In re National Funds Assurance Co.*, 10 Ch. D. 126; *Fliteroft's case*, 21 Ch. D. 519; *Alexandra Palace Co.*, 21 Ch. D. 149; *Leeds Estate* v. *Shepherd*, 36 Ch. D. 787; *Re Sharpe*, (1892) 1 Ch. 154. Except as permitted under sects. 89 or 91 of the Act. *Foster* v. *New Trinidad Lake Asphalt Co.*, (1901) 1 Ch. 208; *Fisher* v. *Black and White Publishing Co.*, (1901) 1 Ch. 174.

Profits, not capital, available

2. Payment out of capital is *ultra vires*, for it amounts to a reduction of the paid-up capital, and no such reduction is allowable.

Ultra vires if payment out of capital.

3. Even if such payment is expressly authorized by the memorandum of association, or by the articles of association, or by special resolution, it is, except as aforesaid, equally *ultra vires*, for these documents cannot repeal the Act. *Trevor* v. *Whitworth*, 12 App. Cas. 409.

Even if authorized by memorandum or articles.

4. Much less can the sanction of a general meeting justify it. *Fliteroft's case*, 21 C. D. 519.

Or by general meeting.

5. Directors who are parties to the payment of a dividend out of capital, except as aforesaid, are *primâ facie* jointly and severally liable to repay the amount. *Fliteroft's case*, *supra*.

Civil liability of directors.

6. Directors who are parties to the payment of a fictitious dividend in order to raise the price of the company's shares, may be criminally liable for a conspiracy. See per Lord Campbell, L. C., *Burns* v. *Pennell* (1849), 2 H. L. C. 525, and *Regina* v. *Esdaile* (1858), 1 F. & F. 213.

Criminal liability of directors as to payment out of capital.

The fundamental rule prohibiting payment of dividend out of capital as not only contrary to the Act, but commercially unsound, seemed at one time in no small danger of being relaxed or altogether explained away by certain startling decisions of the Court of Appeal, as formerly constituted, of which the following are the most important:—*Lee* v. *Neuchatel Co.*, 41 C. D. 1; *Verner* v. *General*

Modern decided cases militating against above rule.

Commercial Trust, (1894) 2 Ch. 268; *Wilmer* v. *Macnamara*, (1895) 2 Ch. 245; below referred to as the *Lee* v. *Neuchatel* series of decisions.

Some conclusions from such cases.

Some of the remarkable conclusions to which these decisions, or the principles on which they were decided, pointed may be stated as follows:—

The regulations are to be followed (subject to next paragraph).

1. Dividend pre-supposes profit of some kind; but it is for the company to determine, by its articles or by resolution, what sort of profits are available for dividends, and if they do so the Court will not, subject to what follows, interfere, however illusory or unsound the principle adopted for arriving at profits may be.

Capital only means amount paid on shares and assets acquired therefrom.

2. In determining what sort of profit is to be divisible, the company must conform to the rule that dividends must not be paid out of capital or out of borrowed money; but "capital" in this proposition means the capital paid up on the shares, and the capital assets acquired therewith.

Net income of wasting property is divisible as profits.

3. To divide the net income arising from a company's property is not to be regarded as in any sense a return of capital, even when the income arises from a wasting property acquired by an expenditure of capital, for instance, from a lease of ten acres of coal, one acre of which is worked out each year.

Express power in articles to apply such net income is equivalent to sanction of Court to reduce capital.

4. Therefore, though an express power in the memorandum to return capital to shareholders can only be exercised with the sanction of the Court, a power in the articles to apply the proceeds arising from a wasting property in paying dividends, is free from objection, although the result is the same. *Lee* v. *Neuchatel Co.*, 41 C. D. 1.

Loss, &c. of "fixed capital" need not be made good out of income.

5. Loss or depreciation of "fixed" capital does not affect the profits available for dividend, or render it necessary to make good the same out of income. "Fixed capital" here is used in the sense in which the economists use the expression, and is not confined to property physically fixed. Thus, the ships of a shipping company and the rolling stock of a railway company are fixed capital. See Company Precedents, Pt. I. p. 884 *et seq.*; *Verner* v. *General Commercial Co.*, (1894) 2 Ch. 268.

Otherwise as to "circulating capital."

6. But in ascertaining profit for a particular period, loss or depreciation of "circulating" capital must be taken into account. Circulating capital means here capital which performs its whole office in the production in which it is engaged by a single use, *e.g.*, the goods which the merchant has for sale, he sells out and out and gets the money in exchange; the goods which the tradesman uses up in doing repairs for a customer; the horses of a horse-dealer. Company Precedents, Pt. I. p. 884 *et seq.*

Realised

7. Accretions to capital, *when realised*, may be brought into the

profit and loss account and dealt with accordingly. *Lubbock* v. *British Bank of S. A.*, (1892) 2 Ch. 198; *Foster* v. *New Trinidad Co.*, (1901) 1 Ch. 208. And see *Spanish Prospecting Co.*, (1911) 1 Ch. 92, where the meaning of the term "profits" is discussed. Accretions of capital are divisible as profits.

8. A legal mode of ascertaining the profits of a particular period, if the articles so provide, is to take an account of the ordinary outgoings, and in so far as the receipts exceed the outgoings, and the loss of circulating capital during such period, the same may be treated as profit without making good previous losses even of circulating capital. *Bosanquet* v. *St John del Rey* (1897), 77 L. T. 207; *National Bank of Wales*, (1899) 2 Ch. 629. Legal mode of ascertaining profits if articles admit.

9. A balance sheet need not disclose the true position of the company. It deals, as regards the assets, not with existing facts but with past history. It shows what the particular assets cost, not what they are worth. Thus, if a company buys a property for 10,000*l.* and the value has fallen to 1,000*l.*, it will still be properly entered in the balance sheet as property that cost 10,000*l.*, and it may remain at that figure even though each year, by consumption, user, wear and tear, or otherwise, it depreciates more and more.

Observations on the above decided cases.

The extraordinary laxity in regard to the ascertainment of profits which some of these decisions countenanced, and apparently legalised, went far to render the salutary rule, that dividends must not be paid out of capital, illusory. The earlier cases pointed to the conclusion, that a dividend can only be paid out of profits ascertained by a proper profit and loss account and balance-sheet, as commercial men generally ascertain profits, throughout the world. *Helby's case*, 2 Eq. 175; *Stringer's case*, 4 Ch. 475; *Rance's case*, L. R. 6 Ch. 104; *Ebbw Vale Co.*, 4 C. D. 827; *Davison* v. *Gillies*, 16 C. D. 347; *Oxford Building Society*, 35 C. D. 502. This was the view of Jessel, M. R., as appears from the decision in *Ebbw Vale Co., supra*. And see per Stirling, J., *Verner* v. *General Commercial, &c. Co.*, (1894) 2 Ch. 268, and per Kay, L. J., in the same case, at p. 268, and per Chitty, J., in *Lubbock* v. *British Bank of S. A.*, (1892) 2 Ch. 198. And the Act of 1877 was undoubtedly passed with a view to enabling a company which had lost capital to write it off, and thereby place it in a position to resume payment of dividend. But these views were in effect disregarded, if not treated as unsound, in the *Lee* v. *Neuchatel* series of decisions.

Doubts as to the *Lee* v. *Neuchatel* series.

The criticisms of the Law Lords in *Dovey* v. *Cory*, (1901) A. C. 477, upon the *Lee* v. *Neuchatel* series of decisions, and the judicial dicta therein, have, however, severely shaken their authority as expositions of the law, and gone far to restore the authority of the earlier line of decisions.

In *Dovey* v. *Cory*, *supra*, it was sought to make a director responsible in respect of dividends paid out of capital. The Court of Appeal had decided in his favour on two grounds: (1) that he had been deceived by those whom he was entitled to trust, and (2) that the dividends were not in fact paid out of capital; and in regard to the second ground of decision the Court reiterated the propositions laid down in the *Lee* v. *Neuchatel* series of decisions and acted thereon. But the House of Lords, during the argument before it, showed a marked disinclination to agree to those propositions, and ultimately, whilst affirming the decision on the first ground, declined in the most significant manner to express any opinion on the propositions thus laid down in the Court of Appeal; and more than one of the learned Lords dissented from or stated that he was not to be taken to assent to all those propositions. Had the propositions thus referred to been free from objection, the House would in the usual way have adopted them and treated them as a further ground for the decision; but a reservation of opinion so pointed and unusual in regard thereto is pregnant with meaning and necessarily casts a shadow of doubt on the propositions laid down in the *Lee* v. *Neuchatel* series of decisions.

At all events, a salutary caution has been administered to those who desire to act on that series of decisions, and further developments may be anticipated.

Bond v. *Barrow Hæmatite Co.*

Following on the decision of the House of Lords above referred to came the case of *Bond* v. *Barrow Hæmatite Co.*, (1902) 1 Ch. 353. Farwell, L.J. (then J.). That was a case of a steel manufacturing company which for the purpose of making steel had bought collieries and mines and erected blast furnaces and cottages. By the surrender of the leases and otherwise a loss had been incurred, and it was contended for the plaintiff that, notwithstanding this loss, the company could apply its current income in paying dividends. But the learned judge held that the mines, blast furnaces and cottages were in the circumstances to be regarded as "circulating capital," and that, as this at any rate must be made good before dividends could be paid, the company was not in a position to pay dividends. In referring to *Verner* v. *General and Commercial Investment Trust*, (1894) 2 Ch. 239, and to the propositions laid down therein by Lindley, L.J., that fixed capital may be sunk and lost and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, he said: "I do not understand his Lordship to be laying down a general and universal rule that in every company fixed capital may be sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be kept up." And referring to the decision in *Lee* v. *Neuchatel Co.*, *supra*, which was cited as an authority for the proposition that no company owning wasting property need ever

create a depreciation fund, his Lordship said: "In my opinion that is not the true result of the decision: the company's assets were larger than at its formation, and the Court decided nothing more than the particular proposition that some companies with wasting assets need have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the leases for three years of a valuable patent and distribute the whole of the receipts in respect thereof as profits without replacing capital expended in the purchase."

In practice profits are usually ascertained on strict business principles, and above cases not taken advantage of.

Meanwhile, in practice [notwithstanding the *Lee* v. *Neuchatel* series of decisions], companies, as a general rule, ascertain their profit on sound business principles, and, acting under the advice of competent auditors, decline to avail themselves of the power, which the principles laid down in the discredited decisions would allow, to inflate profits at the expense of capital.

Generally, where capital has been lost or is unrepresented by available assets, companies take steps to reduce their capital, and the Court never insists that reduction is needless, having regard to the *Lee* v. *Neuchatel* series of decisions. See *Welsbach Incandescent Co.*, 1904) 1 Ch. 87; *Hoare & Co.*, (1904) 2 Ch. 208.

Shareholders who have, with full knowledge of the facts, received dividends paid out of capital cannot keep such dividends, and at the same time take proceedings against the directors to compel them to replace the amount of the dividend. Such a course would obviously be most inequitable. *Towers* v. *African Tug Co.*, (1904) 1 Ch. 558.

But where dividends are paid on the representation of the directors that they are being paid out of profits, the shareholders are not accountable or precluded from suing. *Flitcroft's case*, 21 C. D. 519.

Guaranteed Dividends.

An arrangement between a vendor and the company to guarantee certain dividends for a specified period may be valid if it involves merely the personal liability of the vendor. *Ex parte Jegon*, 12 Ch. D. 503. But such an arrangement is void as against the creditors of the company if the dividends thus become payable directly or indirectly out of the purchase price. *Re Menell et Cie.*, (1915) 1 Ch. 759.

Declaration of Dividends.

The articles commonly provide for the directors, with the sanction of a general meeting, declaring dividend; but sometimes, as in Table A., the clause runs that "the company in general meeting may declare dividends." See clause 95.

Dividend when declared is a debt due from company.

Where a dividend is declared and becomes payable it is a debt, and each shareholder is entitled to sue the company for his proportion. *Re Severn Rail. Co.*, (1896) 1 Ch. 559; Lindley, Com., 5th ed. 35, 437.

Until declaration the shareholders' right to sue does not arise. *Bond* v. *Barrow Hæmatite Steel Co.*, (1902) 1 Ch. 353.

Limitation of time for suing company.

If the shareholder omits to sue for more than six years, his claim may be barred (*In re Severn Rail. Co.*, (1896) 1 Ch. 564), unless the effect of the articles is to constitute the right to the dividends a specialty debt, when the shareholder has twenty years to recover *Re Drogheda Steam Packet Co.*, (1903) 1 Ir. R. 512. And see *Artizans' Land and Mortgage Corp.*, (1904) 1 Ch. 796. These decisions proceed on the footing that the dividends were specialty debts, because the certificates of title were under seal; but *quære* whether this is sound. Sometimes the articles of association (see clause 76 of the old Table A.) fix a shorter period, and provide for forfeiture if not claimed within that period; but the London Stock Exchange Committee objects to such a clause, and the clause does not appear in Table A. of 1908.

Declared but unpaid dividend passing on transfer.

A transfer of shares, after dividend declared, does not, as against the company, carry the dividend even where the transferee has expressly bought cum div.; but, as between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged. *Black* v. *Homersham*, 4 Ex. D. 24.

Apportionment of dividends between tenant for life and remainderman.

[As between tenant for life and remainderman, dividends, whenever declared, are apportionable under the Apportionment Act, 1870 (33 & 34 Vict. c. 35). *Re Oppenheimer*, (1907) 1 Ch. 399.

When a company declares a bonus or special dividend, the question whether it is to be treated as capital or income depends on the manner in which the company has elected to treat it. Some or all has been held to be dividend in *Price* v. *Anderson*, 15 Sim. 473; *Hopkins' Trusts*, 18 Eq. 696; and *Re Piercy*, (1907) 1 Ch. 289; and even though paid in shares, in *Malam* v. *Hitchens*, (1894) 3 Ch. 578, where the tenant for life was held entitled to the value of the dividend applied in acquiring the shares, the rest of the value of the shares being treated as capital.

Bonus shares have been treated as capital in *Barton's Trusts*, 5 Eq. 238; *Bouch* v. *Sproule*, 12 A. C. 385; *Jones* v. *Evans*, (1913) 1 Ch. 23.

If no dividend is declared by the company in respect of the period of the life of the tenant for life, nothing will be payable to him, even though the company has earned profits during that period. *Re Armitage*, (1893) 3 Ch. 337; *Re Sale*, (1913) 2 Ch. 697.]

Dividends are *primâ facie* payable in cash only.

In the absence of express authority in the articles, the company must pay dividends in cash. It may not pay them by the distribution of, for example, shares in another company, or debentures. *Hoole* v. *Great Western Rail. Co.*, 3 Ch. 262; *Wood* v. *Odessa, &c. Co.*, 42 C. D. 645. But it is very common, now, for the regulations to contain a clause authorizing the company to pay dividends in specie, *i.e.*, by the distribution of specific assets. See Company Precedents, Part I. p. 767.

Sending a dividend warrant by post will discharge the company if payment by post is authorized. *Thairlwall* v. *Great Northern Railway*, (1910) 2 K. B. 509.

As to income tax on profits and dividends, see cases in Company Precedents, Part I. 11th ed. p. 97.

As to dividends due to enemy shareholders, see p. 113, *ante*.

Capitalising Profits.

Capitalising profits.

Cases often occur in which it is desired to capitalise undivided profits. If the issued shares are only part paid up, this can be done by declaring a bonus out of such profits and making a call payable at the same date. But more commonly what is desired is to issue paid-up bonus shares to the members and at the same time to carry from reserve to capital account a corresponding amount. Such a transaction cannot be carried out exactly on these lines, for paid-up shares cannot be issued unless they are paid up by some one other than the company. Now, the reserve fund belongs to the company, and to issue shares on the footing that the company is to pay them up out of the reserve fund is irregular, for the payment is by the company. To do what is desired, it is therefore necessary to declare a bonus or dividend payable out of reserve (free of income tax), so that each member may have an individual right, and this can then be satisfied by the issue of paid-up shares. And see, further, Company Precedents, Part I. 11th ed. p. 1062.

Dividends during Construction.

It long since settled that a company could not pay dividends [illegible] capital, and that the payment of interest out of capital during the construction of a company's works was within this principle. To do such a thing, whether directly or indirectly, was *ultra vires*. See *Alexandra Palace Co.*, 21 C. D. 159, and *Flitcroft's case*, *supra*, p. 220. This rule occasioned great inconvenience; and at last, so far as regards Indian companies, the rule was relaxed by the Indian Railways Act, 1894. Thirteen years later—in 1907—the Legislature, in sect. 9 of the Companies Act, 1907, for which sect. 91 of the Act of 1908 has now been substituted, made the same concession in favour of companies under the Companies Acts.

The power, it will be observed, is carefully hedged round with conditions designed to prevent any abuse.

Agreements for Remuneration by Share of Profits.

Similar rules apply for the ascertainment of profits for this purpose as for the purpose of dividend. *Re Spanish Prospecting Co.*, (1911) 1 Ch. 92. Income tax should not be deducted for the purpose of ascertaining the amount of the profits for this purpose. *Johnston* v. *Chestergate Hat Co.*, (1915) 2 Ch. 338.

CHAPTER XVIII.

ACCOUNTS.

Duty of Directors to keep.

Directors' duty to keep accounts.

DIRECTORS are agents, and also in some sense trustees for the company. *Supra*, p. 178. This being so, they are under the clearest obligation to keep proper accounts of their receipts and payments, dealings and transactions on behalf of the company. It is one of the first duties of an agent, as Lord Eldon pointed out in *White* v. *Lincoln* (1803), 8 Ves. 363, to keep a clear account, and to communicate the contents of it to his principal. And see *Freeman* v. *Fairlie*, 3 Mer. 40; *Pears* v. *Green*, 1 J. & W. 135, 140; and, as to a *cestui que trust's* right to information, *Re Tillott*, (1892) 1 Ch. 86.

Provisions of Articles.

Provisions in articles.

The articles usually provide for the keeping of proper books of account in relation to the affairs of the company (cf. Table A., Arts. 103—108), and it is the duty of the directors to see that these books are kept; if they omit to do so, they commit a breach of duty, and are liable to the company in damages. The articles also usually provide that no member is to have a right of inspecting any account, or book, or document, of the company "except as conferred by statute, or authorized by the directors or by a resolution of the company in general meeting." A provision of this kind will not disentitle a shareholder to inspect the register of members, or the register of mortgages; for a member has a statutory right to inspect these under sects. 30, 100, 101 and 102 of the Act; but subject to these qualifications the provision is effective. See *supra*, p. 39. Occasionally the articles give a wider right of inspection; but even where they provide that the books, wherein proceedings of the company are recorded, may be inspected, a member has no right to inspect the minute book of the proceedings of directors. *Reg.* v. *Marquitta, &c. Co.*, 1 E. & E. 289.

The right of inspection includes a right to make extracts (*Mutter* v. *Eastern, &c. Co.*, 38 C. D. 92; *Nelson* v. *Anglo-American Land Agency*, (1897) 1 Ch. 130); and it is not necessary for the share-

holder seeking inspection to assign a reason (*Holland* v. *Dickson*, 37 C. D. 669); but the right to take extracts is impliedly negatived where the Acts give a right to have copies on payment (*Balaghat Mining Co.*, (1901) 2 K. B. 665, C. A., overruling *Boord* v. *Afrikan Consolidated Co.*, (1898) 1 Ch. 596). If need be the shareholder can obtain an injunction to enforce his rights.

A director is entitled *virtute officii* to inspect. *Burn* v. *London and South Wales Coal Co.*, W. N. (1890) 209.

A right of inspection given by the articles ceases on a voluntary winding-up. *Yorkshire Co.*, 9 Eq. 650; 18 W. R. 541, approved by Court of Appeal in *Kent Coalfields Syndicate*, (1898) 1 Q. B. 754.

On a winding-up, compulsory or under supervision, the power of the Court to order inspection of the register of members (sect. 30), or of the register of mortgages and charges (sect. 101), comes to an end (*Kent Coalfields Syndicate, supra*; *Somerset* v. *Land Securities Co.*, W. N. (1897) 29); but the Court is invested by sect. 221 with a discretionary power to permit inspection by creditors or contributories. See *North Brazilian Sugar*, 37 C. D. 83.

The articles generally provide that at the ordinary meeting in each year a profit and loss account for the past year, and a balance sheet, shall be submitted; and in the case of a public company, they generally go on to provide that copies of the account and balance sheet shall be sent to the members beforehand. In private companies it is commonly provided that the documents are not to be printed or circulated.

The books of account are usually to be kept at the registered office of the company. This has the advantage of protecting them against a lien. *Capital Fire Association*, 24 C. D. 408; as to which see *Hawkes Ackerman* v. *Lockhart*, (1898) 2 Ch. 1. In *Rapid Road Transit Co.*, (1909) 1 Ch. 96, a solicitor's lien was preserved in a winding-up.

Statutory Rights of Inspection to Holders of Preference Shares and Debentures.

Sect. 114 of the Act of 1908 confers new rights in this respect. The section runs thus:—

114.—(1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the first day of July nineteen hundred and eight.

This is a statutory recognition of what was becoming a common and very proper practice with companies.

Fraudulent Accounts.

Under 25 & 26 Vict. c. 96, s. 84, directors keeping fraudulent accounts or publishing fraudulent statements incur criminal liability.

As to falsification of books and papers in winding-up, see sect. 216 of the Act.

As to false returns, &c. under the Act of 1908, see sect. 281 of that Act.

Inspectors.

Under sects. 109, 110, provision is made for the appointment of inspectors by the Board of Trade or by a company to investigate the affairs of the company.

This is a power which has been very rarely used.

CHAPTER XIX.

AUDIT.

Audit

The articles of a company usually provide for the appointment of auditors and a periodical audit of the accounts. But this matter is one of so much importance, both to the public and to shareholders, that it has been deemed advisable by the legislature no longer to leave it to a voluntary arrangement between the shareholders but to regulate the matter by statute, thus acting on the principle adopted nearly thirty years ago in the case of banking companies' accounts. See special provisions by the Companies Act, 1879. The regulations dealing with this matter are now contained in sects. 112 and 113 of the Act of 1908, and are very commonly incorporated by references in the articles.

Duties of Auditors.

An auditor who accepts office pursuant to the articles of a company is bound to conform to the terms of such articles. "Auditors," said Lindley, L. J., in *Kingston Cotton Co.* (No. 2), (1896) 2 Ch. 284 (C. A.), "are, in my opinion, bound to see what exceptional duties, if any, are cast upon them by the articles of the company whose accounts they are called upon to audit. Ignorance of the articles and of exceptional duties imposed by them would not afford any legal justification for not observing them."

An auditor is also bound to make himself acquainted with his duties under the Companies Acts. *Republic of Bolivia Exploration Syndicate*, (1914) 1 Ch. 139.

In another leading case on the subject, *In re London and General Bank*, (1895) 2 Ch. 673, the same learned judge made some important observations on the general duties of auditors. "It is no part of an auditor's duty," he said, "to give advice either to directors or shareholders as to what they ought to do.

"An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question: How is he to ascertain that position? The answer is: By examining

the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance sheet showing that position according to the books, and to certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Building and Investment Co.* v. *Shepherd* 36 Ch. D. 787). An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for an error on his part, even if he were himself deceived without any want of reasonable care on his part—say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little inquiry will be reasonably sufficient, and, in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused, more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. But an auditor is not bound to be suspicious as distinguished from reasonably careful." And Lopes, L. J., in *In re Kingston Cotton Mills Co.* (No. 2), *supra*, p. 225, added: "Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold, would make the position of an auditor intolerable." In accordance with these principles, it was held in the above case, that auditors who, without any ground for suspicion, had accepted and acted on the certificate

of the manager of the company as to the amount and value of the company's stock, such manager having been long in the service of the company, and being a man of high character and unquestioned competence and trusted by everyone who knew him, was not under any liability, though the valuation proved to have been false to the knowledge of the manager. "The question," said Lindley, L. J., p. 287, "is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matter on which information from such a person was essential. I cannot think there was. The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier who has to account for the cash which he receives, and whose own account of his receipts and payments could not reasonably be taken by an auditor without further inquiry."

Though the auditors are agents of the company, constructive notice of facts coming to their knowledge is not imputed to the shareholders. *Spackman* v. *Evans*, L. R. 3 H. L. 171.

An auditor who commits a breach of his duty may be sued by the company in an action (*Leeds Estate, &c. Co.* v. *Shepherd*, 36 Ch. D. 787), or may be proceeded against in a winding-up for misfeasance under sect. 215 of the Act, replacing sect. 10 of the Winding-up Act, 1890. *In re London and General Bank*, (1895) 2 Ch. 673 (C. A.); *Kingston Cotton Mills Co.* (No. 2), (1896) 2 Ch. 279 (C. A.). But to be open to attack under the section an auditor must be an officer of the company. An auditor who is merely called in to audit the accounts *pro hac vice* is not an officer. *Western Counties Steam Bakeries*, (1897) 1 Ch. 617 (C. A.). An auditor may set up the Statute of Limitations. *Leeds Estate Building Co.* v. *Shepherd*, *supra*.

Directors are entitled to presume that auditors, like other officials of the company, are doing their duty, and are not bound to supervise or test the auditor's work. *Dovey* v. *Cory*, (1901) A. C. 477.

An auditor will be ordered to deliver up books and papers to the liquidator without prejudice to his—the auditor's—lien. *Findlay* v. *Waddell* (1910), S. C. 670, Ct. of Sess.

The Consolidation Act of 1908.

The provisions of the Companies (Consolidation) Act, 1908, as to the audit of companies' accounts are as follows:—

112.—(1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting.

(5) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.

(6) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(7) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

113.—(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before

the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3) The balance sheet shall be signed on behalf of the board by two of the directors of the company or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words.

(4) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached to it or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

(5) In the case of a banking company registered after the fifteenth day of August eighteen hundred and seventy-nine—

(a) if the company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and

(b) the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

Referring to para. (b) of sub-sect. (2) of the above section, it is to be noted that the auditors' report is to state whether, in their opinion, the balance sheet is properly drawn up so as to exhibit a true and correct view, &c. In forming their opinion, the auditors must exercise

their own judgment, and if they do in fact entertain the opinion they express, they will, in reporting it, have performed their statutory duty. In forming their opinion they may take into account the advice of lawyers and other experts, but auditors cannot shelter themselves under an expert's opinion. They cannot successfully plead that in reporting they expressed the opinion of some expert—not their own opinion. And it is to be borne in mind that whether an auditor did in fact entertain the opinion he reported or concurred in reporting is a question of fact. *Edgington* v. *Fitzmaurice*, 29 C. D. 183. Hence, if an auditor is sued for reporting untruly, in breach of his statutory duty, or prosecuted for a false statement (sect. 281), it will be for the tribunal, whether judge or jury, that tries the question to determine the fact.

The words "books and accounts and vouchers," it is apprehended, mean all the books, not merely the books of account of the company. Hence they include the minute book and letter books. And see the interpretation section, sect. 285.

Where the auditor's requirements are not complied with, the auditor should specify in his certificate in what respects they have not been complied with; and if there is no balance sheet on which to indorse the certificate, then the auditor should so specify in his report. But if the specification of the instances of non-compliance be lengthy, there seems no objection to the certificate stating that all the requirements have not been complied with, without specification of details, provided that it refers to the report for the details.

If the statutory meeting referred to in sect. 112 (5) means the meeting referred to in sect. 65, as it is submitted it does, it should be observed that that section only applies in the cases of companies limited by shares, and registered after the 31st of December, 1900. Except, therefore, in the case of such a company, the articles ought to expressly authorize the directors to fix the remuneration of the first auditors.

How far auditor bound by the books.

With reference to the words in sect. 113 (2) (b), "as shown by the books of the company," it is generally considered that these words do *not* impliedly exempt the auditor from travelling outside the books. With reference to the same words in the Companies Act, 1879, Lindley, L. J., said that the auditor must take reasonable care to ascertain that the books themselves show the company's true position. *London General Bank*, (1895) 2 Ch. 683.

That this is the meaning is emphasized by the preceding words in sect. 113 (2) (b), "according to the best of their information and the explanations given them."

Auditor's right to inspect books.

The auditor's right of access to the books of the company can be enforced in a proper case by mandatory injunction; but not where

litigation is pending between the company and the auditors, and the company may desire to appoint other auditors. *Cuff v. London and County Land Co.*, [1912] 1 Ch. 440.

Secret Reserves.

Companies occasionally desire to have secret reserves of undivided profits so as to conceal the large amount made in prosperous years and to furnish the directors with a special fund with which to mask losses, to augment the divisible profits in lean years, or provide for unexpected contingencies. Not a few successful companies create what is, in substance, equivalent to such a reserve by writing down excessively the value of some of their assets, but there are also a few cases where the articles expressly provide for a secret reserve and authorize the directors, in addition to the ordinary disclosed reserve, to establish a secret reserve and carry thereto so much of the annual profits as they think fit, and to apply such reserve as they deem expedient in the interests of the company without bringing it into the annual accounts and balance sheet. When such an authority is acted on and a secret reserve fund created, but not disclosed in the company's balance sheet, the question arises whether an auditor, provided he refers to the reserve fund as an "undisclosed asset," is justified under the provisions of sect. 113 of the Act in reporting that "in his opinion the balance sheet is properly drawn so as to exhibit a true and correct view of the company's affairs." According to *dicta* in *Newton v. Birmingham Small Arms Co.*, [1906] 2 Ch. 378, he may be so justified on the ground that the purpose of a balance sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better. But is this view reconcileable with the words of sect. 113, *supra*, p. 229? Can "true and correct view" be construed to mean "a view not less favourable than the true and correct view"? No doubt if the auditor reports in accordance with his "opinion" he will have discharged his duty, but whether the auditor did in fact honestly entertain the opinion stated is a question of fact (see *supra*, p. 230), and herein lies the danger.

Section 281 must be borne in mind, for it makes it a misdemeanour to make a statement false in any material particular, knowing it to be false, in any *report* . . . *balance sheet*, or other document required for the provisions of the Act relating to . . . "the appointment, and remuneration, and powers and duties of auditors."

CHAPTER XX.

NOTICES.

A COMPANY in the course of its business has frequent occasion to give notice to its members (*e.g.*, of calls, forfeiture, general meetings, &c., see *supra*, p. 166), and it would be impossible in most cases to give a personal notice. The articles therefore almost always provide in more or less detail for a more practical mode of serving such notices. They commonly provide that a notice may be given either personally or by post, and that in the latter case the notice is to be deemed to be served either "when it is posted," or "on the day following that on which it is posted." This is found more satisfactory than to provide (as in Table A., clause 97, of 1862) that the notice shall be deemed to be served when the letter containing the same would be delivered in the ordinary course of post; for it relieves the company from considering how many hours or days it will take for a letter, in the ordinary course of post, to reach the most distant of its members. Some articles, and Table A. of 1908, provide that "*unless the contrary is proved*, service is to be treated as effected at the time when the letter would be delivered in the ordinary course of post," but this form is not to be recommended; the presence of the words in italics may lead to disputes and doubts, and be productive of great inconvenience.

Shareholders resident Abroad.

Table A. (of 1862) made no special provision as to a shareholder who was abroad. If, then, it became necessary to serve a shareholder resident, say, in the South Sea Islands, it might, according to the words of that Table, be requisite to give several months' notice of a general meeting. This, of course, would be intolerable, and might paralyse the company's proceedings, but it was long since held in *Union Hill Silver Co.*, 22 L. T. 400, that it was not necessary in such circumstances to serve notice on shareholders resident outside the United Kingdom. This rule, being entirely consistent with common sense and common convenience, has been acted on ever since. It accords, too, with the view taken by the House of Lords in *Smith* v.

Darley, 2 H. L. C. 789; see also *Halifax Sugar Co.*, 62 L. T. 564. However, for many years past it has been usual (see first edition of Company Precedents, published in 1877) to make special provision as to service on members resident abroad, *e.g.*, by providing in the articles that a member so resident may notify to the company an address in England at which notices for him may be served, and Table A. (of 1908) contains a provision (clause 110) to that effect, but qualified by an extremely inconvenient clause (111), under which notice to a member who has no registered address or address for service in the United Kingdom must be given by advertisement. There is no need for any such provision where a notice is to be deemed to be served when it is posted, or on the day following, for such a provision applies to all members, and a member resident abroad must take his chance of getting the notice in time.

Notices to Executors of Deceased Members.

When notice of a general meeting is to be given to "the members," it is not necessary to give it to the executors of a deceased member, unless they too are members. *Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656.

But the articles may provide for notice to the executor or administrator . deceased member, and if they do, it must be given. Clauses 113, 114 of Table A. (of 1908) so provide, but the provision is open to objection.

Framing and Construing Notices.

See *supra*, pp. 166, 167.

Authentication.

A document or proceeding, including a notice, requiring authentication by a company, may be signed by any director, secretary, or other authorized officer of the company, and it need not be under the company's common seal, and may be in writing or in print, or partly in writing and partly in print. See sect. 117. And it is to be borne in mind that the expression "in writing" in an Act "shall, unless the contrary intention appears, be construed as including reference to printing, lithography, photography, and other modes of representing or reproducing words in a visible form." (Sect. 20 of the Interpretation Act, 1889.)

Notices to the Company.

The Act, in sect. 116, provides that "a document may be served on a company by leaving it at or sending it by post to the registered office of the company," and under sect. 285 the term "document" includes summons, notice, order, and other legal process, and registers.

It was held long since that the words "other documents" in the Act of 1862 included a writ of summons. *White* v. *Land, &c. Co.*, W. N. (1883) 174. See also *Pearks* v. *Richardson*, (1902) 1 K. B. 91, in which it was held that service of a summons for an offence punishable summarily *must* be at the registered office.

Sect. 116 of the Act above referred to must be read in conjunction with sect. 26 of the Interpretation Act, 1889, which runs thus:—

26. Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve," or the expression "give" or "send," or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Verbal Notice.

Verbal notice.

A verbal notice to a company is effective. Such a notice should be given to the secretary at the office or, in his absence, to a clerk. *Truman's case*, 1894) 3 Ch. 272. Notice to a managing director, in that character, on a matter affecting the business of the company under his management, is notice to the company. *Jaegen, &c. Co.* v. *Vallen*, 77 L. T. R. 180.

Constructive Notice.

A company is subject to the rules in regard to constructive notice; that is, notice which, though not actual notice, is in a Court of law or equity imputed to a person. Hence, notice to the company's agent in any particular matter is notice to the company (*Rolland* v. *Hart*, 6 Ch. 681; *Blackburn* v. *Vigers*, 12 App. Cas. 531, 543), unless the agent is acting in fraud of his principal (*Cave* v. *Cave*, 15 C. D. 639), for in such a case the presumption, of course, is that he will not disclose his own fraud. So notice may be imputed where the company has knowledge of a fact which in common prudence should have led to further

inquiry. *Jones* v. *Smith*, 1 Ha. 43; *Ware* v. *Lord Egmont*, 4 D. M. & G. 460; *A. W. Hall & Co.*, 37 C. D. 712. See further, Company Precedents, Part III., p. 158, and sect. 3 of the Conveyancing Act, 1882.

Knowledge of a fact by a single director is not necessarily notice to the company. *Hampshire Land Co.*, (1896) 2 Ch. 743; *Marseilles, &c. Co.*, L. R. 7 Ch. 161; *Young* v. *David Payne & Co.*, (1904) 2 Ch. 609; and a company is not to be taken to have notice of all its secretary knows, *e.g.*, of matter communicated to him as secretary of another company, for he is under no duty to pass the knowledge on. *Fenwick, Stobart & Co.*, (1902) 1 Ch. 507.

A director is not necessarily affected with constructive notice in the absence of actual knowledge of the facts which appear in the books of the company. *Coasters Limited*, (1911) 1 Ch. 86.

CHAPTER XXI.

RESOLUTIONS OF GENERAL MEETINGS.

THERE are various kinds of resolutions submitted to general meetings. Of these the most common are :—

1. Ordinary resolutions.
2. Extraordinary resolutions.
3. Special resolutions.

And to these may be added,

4. Resolutions requiring under the company's regulations a specified majority.

1. Ordinary Resolution.

An ordinary resolution is one which merely requires upon a show of hands a simple majority of the voters present, or, if a poll be duly demanded, a simple majority of the votes given thereat, whether in person or by proxy, where proxies are allowable. See, further, Company Precedents, Part I., p. 1100 *et seq.*

2. Extraordinary Resolution.

An extraordinary resolution is defined by sect. 69 (1) of the Act thus :—

69.—(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

To pass an extraordinary resolution requires, therefore, only one meeting, but the notice convening the meeting must specify the intention to propose the resolution "as an extraordinary resolution," *e.g.*, that the meeting "is convened to consider and, if thought fit, pass an extraordinary resolution that, etc." The words "as an extraordinary resolution" are new ; they were not contained in sect. 129 of

the Act of 1862, which defined "extraordinary resolution"; but it has been usual to use the words, and it was, under the Act of 1862, necessary to use them, or their equivalent, in the notice. See *Bridport Co.*, L. R. 2 Ch. 194; and Company Precedents, Part II., p. 834. See also sub-sects. (4) and (5) of sect. 69, *infra*.

3. Special Resolutions.

Nature of.

What is a special resolution is defined in sect. 69 (2) of the Act thus:—

(2) A resolution shall be a special resolution when it has been—

(a) passed in manner required for the passing of an extraordinary resolution; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a poll may be demanded, if demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(6) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

Nature of special resolutions.

A special resolution is a most useful part of the mechanism of a company. It is by and through the instrumentality of such a

"special resolution" that many of the most important things which a company is, by the Companies Acts, empowered to do are ordained to be done. In defining the requisite steps for such a resolution, the aim of the legislature seems to have been to secure that every important change shall be only made after due deliberation, and with the sanction, active or passive, express or tacit, of the great body of the shareholders of the company.

Acts for which requisite.

Acts for which requisite.

The following are some of the various things that a company may do by special resolution:—

(1) Change the name of the company, subject to sanction of Board of Trade. Sect. 8.

(2) Alter its objects, subject to sanction of Court. Sect. 9.

(3) Increase, or take power to increase, its capital where there is no power in the regulations. Sect. 41.

(4) Subdivide its shares into shares of smaller amounts. Sect. 41.

(5) Reorganise its capital. Sect. 45.

(6) Reduce its capital. Sect. 46.

(7) Convert any portion of its capital, uncalled, into reserve capital. Sect. 59.

(8) Alter its articles. Sect. 13.

Proceedings by.

Proceedings.

The following points should be noted in regard to a special resolution:—

(a) It requires two meetings at an interval of not less than fourteen *clear* days (*Railway Sleepers Co.* (1885), 29 Ch. D. 204), and not more than one calendar month.

(b) Each meeting must be duly convened in accordance with the articles of the company. If none, then as per Table A. If the articles so provide, the two meetings may be convened by the same notice. *North of England Steamship Co.*, (1905) 2 Ch. 15 (C. A.); *supra*, p. 168.

(c) It was at one time considered doubtful, by reason of the wording of sect. 69, whether the notice of the first meeting should not state the intention to propose the resolution "as an extraordinary resolution," and the intention to submit it for confirmation as a special resolution to a further meeting. It has now, however, been decided that these words are not necessary. *Re Penarth Pontoon Co.*, (1911) W. N. 240. The notice of the second meeting must specify the intention to submit the resolution for confirmation. See further as to notices, *supra*, p. 232.

(d) The meetings must be duly constituted, that is to say, a quorum must be present.

(e) The resolution must be passed at the first meeting by a three-fourths majority of the members *present* in person or by proxy.

(f) At the second meeting it must be confirmed by at least a simple majority of the members *present* in person or by proxy.

(g) At the first meeting, amendments within the notice may be made, but the resolution confirmed at the second meeting must be in the same form as that passed at the first meeting. *Torbock* v. *Lord Westbury*, (1902) 2 Ch. 871.

(h) At either meeting a poll may be demanded by such number of members not exceeding five as the articles fix, or in default by any three members.

(i) At each meeting, unless a poll is duly demanded, a declaration of the chairman that the resolution has been carried is to be *conclusive* evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same.

(j) Upon a show of hands, hands only can be counted, not proxies.

(k) At a poll the number of votes which each voter is by the articles entitled to is to be taken into account, and votes by proxy are (if the articles permit) to be allowed. The proxy votes for his principal.

It is important to note that a quorum is essential (*Cambrian Co.*, 23 W. R. 405); that voting is, in the first instance, by a show of hands (*Re Horbury Bridge Co.*, 11 C. D. 109); that proxies are only to be counted on a poll (*Ernest* v. *Loma Co.*, (1897) 1 Ch. 1); that at the second meeting no amendment can be put. *Wall* v. *London and Northern Assets Corporation*, (1898) 2 Ch. 469.

Declaration of Chairman—Conclusiveness.

Chairman's declaration.

The section, it will be observed, says that the declaration of the chairman (if no poll be demanded) is to be "conclusive"; and, in pursuance of this provision, the Court of Appeal, in *Re Gold Co.* (1879), 11 Ch. D. 719, held a declaration by a chairman conclusive, although out of seventeen present only eleven voted for and two against, and four abstained from voting. The word "conclusive" seems clear enough, and it is made still clearer when contrasted with the words used in sects. 23 and 33, where the legislature has made certain things *primâ facie* evidence only. This decision was followed by Cozens-Hardy, J., in *Hadleigh Castle Gold Mines*, (1900) 2 Ch. 419. And the Court of Appeal subsequently approved the case

last mentioned and overruled *Young* v. *South African, &c. Syndicate*, (1896) 2 Ch. 268, in which Kekewich, J., had decided that "conclusive" meant "*primâ facie*." See *Arnot* v. *United African Lands*, (1901) 1 Ch. 518.

But a chairman's declaration will not be conclusive where in making it he states the figures for and against, and those figures show that he erroneously declares that the resolution has been duly passed. *Re Caratal (New) Mines, Limited*, (1902) 2 Ch. 498.

4. Resolution requiring Special Majority.

Occasionally the regulations provide that something may be done by or with the sanction of a resolution passed by a majority of a special character—for instance, a majority of the members present in person or by proxy and entitled to three-fourths of the votes to which all the members are collectively entitled.

Notice to Registrar of Special and Extraordinary Resolutions.

A copy of every special and extraordinary resolution has to be printed and forwarded to the Registrar, and a copy is to be annexed to or embodied in the articles, and there are penalties for default. See sect. 70 of the Act.

CHAPTER XXII.

MAJORITY RIGHTS OF MEMBERS.

Majority rights of members

It is a cardinal rule of corporation law that *primâ facie* a majority of its members is entitled to exercise the powers of the corporation, and generally to control its operations.

Where no special provision is made by the constitution of a corporation, the whole are bound by the acts not only of the major part but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole or not. Bacon, Abridgment, II. 269.

"It cannot be disputed," said Lord Hardwicke in *Att.-Gen.* v. *Davy*, 2 Atk. 212, "that whenever a certain number of persons are incorporated, a major part of them may do any corporate act, or if all be summoned and part appear, a major part of those that appear may do a corporate act though nothing be mentioned in the charter of the major part."

This rule is equally applicable to a company under the Act of 1908, save so far as its constitution or articles, or the Act itself, exclude or modify the rule.

The Act does, however, modify the primary rule in certain cases. It requires, for instance, for the passing of a special resolution (sect. 69 (2)), or of an extraordinary resolution (sect. 69 (1)), a majority of three-fourths of those present at the meeting in person or by proxy, and, accordingly, where the Act, or the memorandum or the articles, require a special or an extraordinary resolution, a three-fourths majority is necessary; a bare majority is insufficient. Again, where the articles vest in the directors certain specific powers, *e.g.*, to make calls, forfeit shares, &c., the power, being delegated, resides with the directors exclusively, and a majority of the members cannot exercise the power, though it may sanction and approve of the exercise by the directors of such powers on any specific occasion. *Hampson* v. *Price's Patent Candle Co.*, 24 W. R. 754. Besides such cases of exclusive powers it often happens that the articles, whilst investing the directors with general powers, do not give them all the powers of the company; or it may be that, though they have all the powers of the company, they are, nevertheless, unable to exercise them in regard to some particular transaction by reason of their being themselves personally interested in such transaction. Where this is the case, the matter can be submitted to a general meeting, and the resolution of the meeting will sanction or not, as the case may be, what the directors have done or propose to do. *Grant* v. *United Switchback Rail. Co.* (1889), 40 Ch. D. 135.

The principle that the majority of members is entitled to control the company is the basis upon which rests the well-known

Rule in Foss v. Harbottle (2 Ha. 461).

Rule in *Foss v. Harbottle.*

In that case two members of an incorporated company took legal proceedings against the directors and others to compel them to make good losses sustained by the company by reason of the fraudulent acts of such directors, and the Court held that as the acts were capable of confirmation by the majority of the members the Court would not interfere; that is to say, it was left to the majority to complain or to condone as they might think best. See also *Mozley* v. *Alston*, 1 Ph. 790; and *McDougall* v. *Gardiner*, 1 Ch. D. 13, where a single shareholder complained of breach of the articles, and it was held that the litigation ought to be in the name of the company, for that it was for the majority to say whether they wished to complain or not. "In my opinion," said Mellish, L. J., "in that case, if the thing complained of is a thing which, in substance, the majority of the company are entitled to do, or if something has been done irregularly that the majority of the company are entitled to do regularly, or if something has been done illegally which a majority of the company are entitled to do legally, there can be no use in having litigation about it. The ultimate end, no doubt, is, that a meeting has to be called, and then ultimately the majority gets its wishes." See also *Harben* v. *Phillips*, 23 C. D. 14; *Duckett* v. *Gover*, 6 C. D. 82 (as to further proceedings, 25 W. R. 554); *Exeter and Crediton Rail. Co.* v. *Buller*, 5 Ry. Cas. 211; *Normandy* v. *Ind, Coope & Co.*, (19[illegible] 1 Ch. 84; *Ving* v. *Robertson & Woodcock, Ltd.*, 56 S. J. 412 ([illegible] directors votiug iu their owu interests). But this supremacy [illegible]he majority must be received with the following qualifications—(1) that no majority of shareholders can sanction that which is *ultra vires* the company (*supra*, p. 63; *Burland* v. *Earle*, (1902) A. C. 83); (2) that a majority is not entitled to commit a fraud on the minority (*Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350; *Burland* v. *Earle*, *supra*); (3) that a minority can prevent the company from acting on a special resolution obtained by a trick (*Baillie* v. *Oriental Telephone Co.*, (1915) 1 Ch. 503); (4) that an ordinary resolution inconsistent with the articles is not effectual. *Quin & Axtens* v. *Salmon*, (1909) A. C. 443. [In these four cases the minority can commence proceedings in the name of the company. In other cases, if the minority purport to do so, the action may be stayed and the name of the company struck out, and the solicitor may be ordered to pay the costs personally. *Marshall's Valve Gear Co.* v. *Manning*, (1909) 1 Ch. 267; *West End Hotels Syndicate* v. *Bayer* (1912), 29 T. L. R. 92.] See further Company Precedents, Pt. I., 11th ed., p. 1357.

CHAPTER XXIII.

REGISTERED OFFICE.

Registered office.

EVERY company under the Act of 1908 is bound (see sect. 62 of the Act of 1908) to have a registered office to which all communications and notices may be addressed. If a company carries on business without having such an office it incurs a penalty. The situation of the registered office fixes the domicile of the company. A company registered in England is not an "alien enemy," though all its members are alien enemies. *Continental Tyre Co.* v. *Daimler Co.*, (1915) 1 K. B. 893. The company's memorandum of association states, as we have seen, in what part of the United Kingdom the office of the proposed company is to be situate. This, once declared, becomes an unalterable condition of the company's constitution, which nothing short of an Act of Parliament can change. But though confined to that part of the United Kingdom—England, Scotland, or Ireland—which it has chosen by its memorandum, the company may, subject to that limitation, fix its office anywhere it likes within the chosen area, and change it from time to time provided it gives notice of each change to the registrar. See sect. 62 of the Act. The company is to paint or affix, and is to keep painted or affixed, its name on the outside of every office or place in which the business is carried on, in a conspicuous position in letters easily legible. See sect. 62; and under that section there is a penalty for default.

There are various provisions of the Act in relation to the registered office; thus sect. 30 of the Act provides that the register of members is to be kept at the registered office, and the right of inspection is to be exercised there. Again, under sects. 100, 101, 102, the register of mortgages and copies of registered documents are to be kept at the registered office, and the right of inspection is to be exercised there. So, too, by sect. 103, which provides for the publication, in case of banking and insurance companies and of certain other concerns, of a balance sheet, it is provided that a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on; and sect. 116 provides for the service of any notice, summons, order, and other document on the company at the registered office. See further, *supra*, p. 234. Where in an action or other legal proceeding it appears that the writ, petition, or other document cannot be served by reason of there being no registered office, the Court will make an order for substituted service.

CHAPTER XXIV.

MINUTES.

Minutes.

SECTION 71 of the Act provides that minutes are to be made and kept of all proceedings of general meetings and of directors or managers, and makes such minutes, if signed by the chairman of the meeting at which the proceedings were held, or by the chairman of the next succeeding meeting, evidence of the proceedings, *i.e.*, *primâ facie* evidence of the matters therein stated. The section, moreover, provides that until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had. The protection as well as convenience afforded to a company by these privileges is very great, and the utmost care should be used to keep the minutes in correct form and make them complete.

Not the only evidence.

There is no rule, however, which makes minutes the only admissible evidence, and a bargain or transaction may, therefore, be made out and established as against the company though not recorded in the minute book: *Re Pyle Works* (No. 2), (1891) 1 Ch. 184, where a contract to give security by way of indemnity to directors was made out though not entered. So a person may be proved to be a member although no allotment is entered in the minutes. *Re Great Northern Salt Co.* (1890), 44 C. D. 483. The Court, notwithstanding the minutes are made conclusive by the articles, may look and consider the regularity of the notice. *Betts & Co.* v. *Macnaghten*, (1910) 1 Ch. 430.

Minutes being only *primâ facie* evidence, they may be contradicted by other evidence. *Tothill's case*, L. R. 1 Ch. 85. But if signed by the chairman they are to be taken *primâ facie* to be correct. *Re Indian Zoedone Co.* (1884), 26 C. D. 70; and see *Southampton Dock Co.* v. *Richards*, 1 Man. & Gr. 448.

Where a notice is taken as read it must be treated as part of the *res gestæ*. *Betts & Co.* v. *Macnaghten*, (1910) 1 Ch. 430.

As to putting minutes in evidence.

A director who is present at a meeting at which the minutes of proceedings at a prior board are read and confirmed as correct is not thereby made responsible for what was done at such prior board *Lands Allotment Co.*, (1894) 1 Ch. 616; *National Bank of Wales* (1899) 2 Ch. 629; *Burton* v. *Bevan*, (1908) 2 Ch. 240. See, however, *Ashurst* v. *Mason*, 20 Eq. 225.

Omnia rite acta præsumuntur.

Entries in the company's books, which would be irregular unless based on resolutions of the board, afford, on the above principle, *primâ facie* evidence of the resolutions, even though no minute thereof is forthcoming. *Re Knight* (1867), L. R. 2 Ch. 321; *Great Northern Salt Co.*, 44 C. D. 483; and see *Lane's case*, 1 D. J. & S. 509.

Thus, a letter written by the secretary of the company will be assumed *primâ facie* to have been written with the authority of the directors although no minute appears to that effect. *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch. D. 687, p. 691. The absence, however, of any minute of an alleged transaction is material when the party who alleges the transaction was a director. *Re Rotherham Co.* (1884), 25 C. D. 109. "Directors," said Kekewich, J., "ought to place on record, either in formal minutes or otherwise, the purport and effect of their deliberations and conclusions; and if they do this insufficiently or inaccurately they cannot reasonably complain of inferences different from those which they allege to be right." *Re Liverpool Household Stores*, 59 L. J. Ch. 616.

Statute of Frauds.

As to Statute of Frauds.

The chairman's signature of the minutes stating the terms of a contract may be sufficient to satisfy the Statute of Frauds. *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; and see *Gibson* v. *Barton*, L. R. 10 Q. B. 332, for an instance in which the minute book was put in evidence.

Form of Minutes—Ordinary General Meeting.

Specimen of minutes of ordinary meeting.

The following will give some idea of the mode in which minutes are entered:—

The Fourth Ordinary Meeting of the —— Company, Limited, held the —— day of —— [at the registered office of the Company] at —— o'clock.

Mr. —— in the chair.

The Notice convening the Meeting was read by the Secretary.

The Minutes of the General Meeting of the Company held the —th ultimo were read by the Secretary, and signed by the Chairman.

It was resolved unanimously that the Report of the Directors, and the Accounts annexed thereto, be taken as read.

Upon the motion of the Chairman, seconded by Mr. ——, it was resolved unanimously [or as the case may be]—

That the Report of the Directors, and the Accounts annexed thereto, be, and the same are hereby, adopted.

Upon, &c., it was resolved that a dividend, &c.

Upon the motion, &c., it was resolved that Mr. —— be, and he is hereby, elected a director in the place of Mr. ——.

Upon, &c. [vote of thanks].

A. B., Chairman.

If an amendment be moved, the minutes will run thus:—

It was moved by the Chairman, and seconded by Mr. ——, That, &c.

An amendment was thereupon moved by Mr. ——, and seconded by Mr. —— [here set it out], *e.g.*—

"That the Report be received, but not adopted; and that a committee of five shareholders be appointed, with power to add to their number, to inquire into the formation and past management of the Company, and with power to call for books and documents, and to obtain such legal and professional assistance as may be necessary, such committee to report to a meeting to be called for ——day the —th of ——."

The amendment was put to the Meeting and negatived. The original question was then put to the Meeting and declared by the Chairman to be carried.

Form of Minutes—Extraordinary Meeting.

Specimen of minutes of extraordinary meeting.

Extraordinary General Meeting of the —— Company, Limited, held the —th day of ——, at, &c.

Mr. —— in the Chair.

The Notice convening the Meeting was read by the Secretary.

The Minutes of, &c.

Upon the motion of the Chairman, seconded by Mr. ——,

It was resolved unanimously that the capital of the Company be increased to £—— by the creation of —— new shares of £—— each.

A resolution moved by Mr. ——, and seconded by Mr. ——, That, &c., was negatived.

Mr. —— moved—

That, &c.

Mr. —— seconded this motion.

A show of hands having been called for, the Chairman declared [that —— hands were held up in favour of, and —— against the resolution, and] that the motion was [consequently] carried [or lost, as the case may be].

A poll was then demanded and taken, the numbers being as follow:—For the motion, 128 votes; against the motion, 72.

[The minutes may distinguish the number of personal votes, and of votes by proxy. The scrutineer's report (if any) will be entered.]

The Chairman then declared that the resolution was carried.

Form of Minutes—Board Meeting.

The minutes of a meeting of the directors will be as follows:— Specimen minutes of board meeting.

At a Meeting of the Directors held the —th day of —— at, &c.

Present, Mr. ——, Chairman of the Board; Mr. ——, and Mr. ——.

The Minutes of the Meeting of the —th were read and signed.

Upon the motion, &c., it was resolved, &c.

The proposed contract with A. B. for the purchase of, &c. was read, and it was resolved that the same be sealed, and the same was sealed accordingly.

The Secretary was directed to, &c.

A letter from, &c., addressed to the Secretary, having been read, and the Board being of opinion, &c., the Secretary was directed to reply, &c., and the manager was desired to, &c.

Mode of taking Minutes.

Mode of taking minutes generally.

The usual plan adopted is for the secretary to make notes at each meeting of what passes, and subsequently to enter the particulars in the proper minute book ready for reading and signature by the chairman after they have been read and confirmed at the next succeeding meeting. See sect. 71 (2).

Signing of minutes as regards evidence.

Sometimes, *e.g.*, in the case of legal proceedings, it may be requisite to put the minute book in evidence, but the minutes of the last meeting have not been signed. In such case the chairman can sign, for though it is usual for him to sign at the next succeeding meeting (*Southampton Dock Co.* v. *Richards*, 1 Man. & G. 448), he is not bound to wait. Minutes once made and signed ought never to be altered by striking out or adding anything. *Re Cawley & Co.*, 42 Ch. D. 226.

As to the conclusive effect of the chairman's declaration in case of a special resolution, see *supra*, p. 239.

CHAPTER XXV.

NAME OF COMPANY.

Company's name to be affixed outside office, and on notices, advertisements, &c.

The memorandum of association of every company under the Act must, as we have seen, state, amongst other things, the proposed name of the company, with "Limited" as part of it in cases where the company is limited, and the certificate of incorporation when given will then incorporate the company by such name. To this name the company must closely adhere. The name must be painted up or affixed to 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. Sect. 63. The name must also be mentioned (at the risk of heavy penalties for neglect to the company and the directors, sect. 63) in legible characters in all notices, advertisements, and other official publications of the company, 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, parcels, invoices, receipts, and letters of credit of the company. Sect. 63.

Object of the legislature.

Why this solicitude on the part of the legislature as to publication of a company's name? The answer is, that the legislature, whilst allowing limited liability, desired by this means to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was "limited." This policy it has fortified by pecuniary penalties; but it is not this only which makes neglect dangerous to directors. Sect. 63 provides that if any director, manager, or officer of a limited company, or any person on its behalf, signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, &c., wherein the name of the company is not mentioned in manner specified, he shall be personally liable to the holder of any such bill of exchange, &c., for the amount thereof unless the same is duly paid by the company. See *Atkin & Co.* v. *Wardle & Others*, 61 L. T. 23, in which the *South Shields Salt Water Baths Co., Limited*, was misdescribed in a bill as the *Salt Water Baths Co., Limited*, and it was held that the directors were personally liable on the bill. See also *Dermatine Co.* v. *Ashworth*, 21 Times L. R. 510.

Similarity of Names.

In choosing a name for a company, promoters must use care to avoid adopting a name which is too like that of another company, for the Act (by sect. 8) provides that no company is to be registered under a name identical with that by which a company in existence is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where the company in existence is in course of being dissolved, and signifies its consent in such manner as the Registrar requires. In view of this provision the Registrar is very particular as to names in registering companies, and it not unfrequently happens that, when the memorandum of association is taken in for registration, it is found that the name selected has already been adopted by some other company, or that it too nearly resembles the name of some other company already on the register. Hence delay and vexation. Even if the Registrar passes a name, this will not prevent the proprietors of any concern, whether registered or not, if prejudiced by the registration, from taking legal proceedings.

Must not take another company's name.

Exception to rule.

The principle on which the Court interferes in such cases (see *supra*, p. 27) is, not that there is a property in the name (*Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441), but that one person is not to be permitted to represent himself as carrying on the business which is carried on by another. The leading cases on this point, illustrating the principles on which the Court acts, are *Croft* v. *Day*, 7 Beav. 84; *Lee* v. *Haley*, L. R. 5 Ch. 155. See further cases, *supra*, p. 27. And as prevention is always better than cure, not only may a registered company be restrained from carrying on business as above, but promoters may be restrained from registering a company with a name calculated to deceive. See *Hendricks* v. *Montagu*, 17 C. D. 638, where the registration of a company as the Universe Life Assurance Association, Limited, was restrained, at the instance of an unregistered company known as the Universal Life Assurance Society.

Principle on which Court acts.

In cases like these, where the name adopted is merely descriptive of the character of the defendant's business, the Court has sometimes great difficulty in interfering. *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37; *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co., Limited*, 33 Beav. 548; *London Assurance Corporation* v. *London and Westminster Assurance Corporation, Limited*, 9 Jur. N. S. 843. But see now *Reddaway* v. *Banham*, (1896) A. C. 199; and *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, (1907) 2 Ch. 312; *Electromobile Co.* v. *British Electromobile Co.*, 98 L. T. 258; and *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) A. C. 83. If the Registrar exercises his discretion in the

matter, a mandamus will not lie against him. *Rex* v. *Registrar of Companies*, (1912) 3 K. B. 23.

A company purchasing the goodwill of an existing business purchases the right to the name under which it is carried on as part of the goodwill. *Levy* v. *Walker*, 7 Beav. 84.

If by inadvertence a company is registered with a name identical or closely resembling that of another company, sect. 8 (2) enables the first-mentioned company, with the sanction of the Registrar, to change its name.

Change of Name.

How company may change its name.

A company may by special resolution change its name, but only with the consent of the Board of Trade. Sect. 8 (3) of the Act. The proper course in such cases is to ascertain from the Registrar that there is no objection to the proposed name, apply to the Comptroller of Companies, Board of Trade, Whitehall Avenue, S.W., stating the circumstances which have rendered the change desirable, and requesting him to obtain the sanction of the Board to the proposed change. In due course this will be brought before the Board, and, if the requisite consent is obtained, notice will be given to the applicant, and the company will pass a special resolution carrying out the alteration. Thereupon the Registrar will issue a new certificate, as provided in the section, and the change of name will be completely effected. See *Shackleford, Ford & Co.* v. *Dangerfield*, L. R. 3 C. P. 407.

Companies to promote Art, Commerce, &c.: Word "Limited" dispensed with.

Omission of "limited" in name of company where to be formed for promoting commerce, arts, &c., without intention of paying dividends.

Licence of Board of Trade.

Where an association is about to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and the founders are willing to form it on the footing that its profits or income shall be applied in promoting its objects only, and that no dividend shall be paid to its members, the Board of Trade may grant a licence authorizing registration of the association with limited liability, but without the addition of the word "limited" to its name. See sect. 20 of the Act of 1908. Many associations have been registered under this section. At first the applications came almost exclusively from Law Societies, Chambers of Commerce, and Trade Protection Societies, but the advantages offered by the section are now better appreciated, and associations of all kinds apply. Examples are given below.

An association desirous of being incorporated with limited liability but without the word "limited" as part of its name, and of obtaining for that purpose a licence from the Board of Trade pursuant to sect. 19 of the Act, should, according to the rules now in force, make a written application to the Board for a licence, and with such application should transmit for the Board's consideration a draft in duplicate of the proposed memorandum and articles of association. A cheque for

five guineas must also be sent to cover counsel's fee for perusal of the draft documents. See further Company Precedents, Part I., pp. 498, 499.

The advantages of incorporation for such associations is great. The association gains in stability, public estimation, and credit. It becomes a body corporate with perpetual succession, just as if it were incorporated by Royal Charter or special Act of Parliament. It can adopt in lieu of "company" a more suitable name, such as chamber, club, college, guild, association. It can have a common seal; it can hold property* in its own name without the intervention of trustees; it can contract and take and defend legal proceedings in its own name; its affairs can be conducted much more efficiently, and—finally—its officers and members are freed from personal liability. Advantages of such companies and the members.

Associations obtaining the licence register, in almost all cases, as companies limited by guarantee. See *infra*, Appendix. The guarantee varies from 1*s.* to 10*l.* Generally, membership is constituted by election or by application in writing accepted by the governing body. Sometimes (*e.g.*, in charitable associations) a candidate for election must make a donation. The governing body is not infrequently called the committee or the council. When, as is often the case, the association is formed to absorb and continue some existing association of the same name, the members of this all join the registered association, and the property, if any, is transferred to it, and the incorporated association thus silently takes the place of its predecessor. See further as to the formation of such companies, Company Precedents, Part I., pp. 498, 499, where the clauses which the Board of Trade require to be inserted in the memorandum will be found.

The following are some examples of companies which have been so registered:— Examples of existing companies of the kind.

BENEVOLENT.

Birmingham Hospital Saturday Fund.
Clergy Pensions Institution.

CHAMBERS OF COMMERCE.

London Chamber of Commerce.
Associated Chambers of Commerce.

CLUBS.

Huddersfield Carlton Club.
Manningham Football Club.
Newcastle Junior Liberal Club.
St. Pancras Reform Club.
Smithfield Club.

COLLEGES.

Cheltenham Ladies' College.
University College, Bristol.

EXCHANGES.

Birmingham Exchange.
Manchester Coal Exchange.

HOSPITALS.

Dalrymple Home for Inebriates.
Home Hospitals Association for Paying Patients.

LAW SOCIETIES.

(*A great many.*)

* By sect. 19 of the Act a company "formed for the purpose of promoting art, science, religion, charity or other like object not involving the acquisition of gain by the company or the individual members thereof," is not to hold more than two acres of land, but by licence of the Board of Trade it may hold more.

MISCELLANEOUS.

Incorporated Council of Law Reporting.
Meteorological Council.
Palestine Exploration Fund.
Royal School of Art Needlework.

PROFESSIONAL.

Birmingham Medical Institute.
British Dental Association.
College of Organists.
Incorporated Society of Musicians.
Institution of Mechanical Engineers.

RELIGIOUS.

Church Army.
Mission to Deep Sea Fishermen.

SCIENTIFIC.

Philological Society.
Philosophical Society of Glasgow.
Physical Society of London.

SCHOOLS.

Clifton High School for Girls.
Glasgow School of Art.

Under sect. 20 (4) of the Act the Board of Trade has power to revoke its licence after due notice, and thenceforth the word "limited" must be used.

A company thus registered without the word "limited" can alter its objects with the sanction of the Court (see sect. 9 of the Act, and *supra*, pp. 77—80), but it may be requisite to obtain the consent of the Board of Trade. *St. Hilda's College*, (1901) 1 Ch. 556. *Primâ facie*, a company thus registered can pay a pension to an outgoing secretary. *Cyclists Touring Club* v. *Hopkinson*, (1910) 1 Ch. 179.

When use of Word "Limited" prohibited.

Sect. 282 of the Act provides that if any person or persons trade or carry on business under any name or title of which the word "Limited" is the last word, that person or persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding 5*l.* for every day upon which that name or title has been used.

CHAPTER XXVI.

CONTRACTS.

In regard to contracts by companies, three leading rules must be borne in mind :— Three particular rules as to contracts.

1. A contract *ultra vires* the company is wholly void and cannot be enforced or ratified. See *supra*, pp. 60—63. 1. Contract *ultra vires* company.
2. A contract, not *ultra vires* the company, but *ultra vires* the directors, may be ratified by the shareholders (*Grant* v. *United Switchback Co.*, 40 C. D. 135), and without such ratification may, under certain circumstances, be binding on the company by virtue of the Rule of estoppel recognized in *Royal British Bank* v. *Turquand*. *Supra*, p. 44. 2. Contract *ultra vires* directors but not company.
3. A contract made before the incorporation of a company by some person professing to act on its behalf cannot be ratified by the company after its incorporation. *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Empress Engineering Co.*, 16 C. D. 125; *Natal Land Co.* v. *Pauline Colliery Syndicate*, (1904) A. C. 120; *North Sydney Investment Co.* v. *Higgins*, (1899) A. C. 263; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146. 3. Contracts made for company before incorporation.

But there is nothing to prevent the company, when incorporated, from entering into a new contract to carry into effect the terms of the pre-incorporation contract. *Howard* v. *Patent Ivory Co.*, 38 C. D. 158; *In re Dale and Plant* (1889), 61 L. T. 206; *Natal Land Co.* v. *Pauline Colliery Syndicate*, *supra*. Sometimes the contract is made before incorporation with some person purporting to act as trustee for the company. In this case also it is usual to make a fresh contract after incorporation. Mere acting on the old contract does not make it binding on the company (*Re Northumberland Hotel Co.*, 33 C. D. 16), though it may give the trustee the right to indemnity. *Hardoon* v. *Belilios*, (1901) A. C. 118. Merely taking the benefit of a pre-incorporation contract does not bind the company to fulfil the obligations of that contract. *Re Northumberland Hotel Co.*, *supra*; *Rotherham Alum, &c. Co.*, 25 C. D. 103; *Clinton's Claim*, (1908) 2 Ch. 515, overruling *English and Colonial Produce Co.*, (1906) 2 Ch. 435.

On these general rules the legislature has now engrafted a fourth, viz. :—

4. That a company cannot make a binding contract until it is entitled to commence business. See *supra*, p. 58.

This provision is contained in sect. 87 (3) of the Act of 1908, replacing sect. 6 (3) of the Companies Act, 1900, and runs as follows:—

(3) "Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding."

"Provisional" here means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business. *Re Otto Electrical Manufacturing Co., Jenkin's case*, (1906) 2 Ch. 390.

Companies registered prior to January 1, 1901, and companies registered before 1st July, 1908, which do not invite the public to subscribe their shares, and private companies, are exempt from this provision. (Sect. 87 (6).)

The words of sect. 87 (3) are very wide and appear to include all contracts, including contracts of membership.

The words "shall be binding" do not give any statutory sanction to the contract, but mean that the contract is no longer provisional but complete: but it is only good for what it may be worth, *e.g.*, it may still be liable to be avoided for fraud, misrepresentation, &c.

As to the conditions with which a company must comply to entitle it to commence business, see p. 58.

Form of Contracts.

Contracts by, or by agents of, company.

According to the old common law rule a contract to bind a corporation had to be under its common seal. Modern decisions have relaxed this rule to some extent (see *South of Ireland Co.* v. *Waddell*, L. R. 4 C. P. 617); but the exigencies of business rendered a further relaxation of the rule desirable, and this was done by sect. 37 of the Companies Act, 1867, which is re-enacted in sect. 76 of the Act of 1908. The result of the enactment contained in that section is that a company can, as a general rule, contract without seal. It is sufficient if the contract is made by some person acting under the express or implied authority of the company; nor need the contract, as a general rule, be in writing even: it is sufficient if it is made by word of mouth, provided that the person who makes it has authority to make it on the company's behalf. Who is a person acting on the implied authority of the company, must depend on the articles of the company. Usually the directors have express authority to act on the company's behalf, and they can,

therefore, on the company's behalf, make contracts. So, too, if they appoint a manager or other official, he may be given authority by some resolution of the board, or by an instrument under the company's seal. See *Beer* v. *London and Paris Hotel Co.*, 20 Eq. 412; *Bryon* v. *Great Central Mining Co.*, 5 H. & N. 856; *Land Credit Co.*, 4 Ch. 460.

But the mere appointment of a manager by directors, under a power for that purpose, will only operate as a delegation to such manager of the ordinary commercial business of the company. *Cartmell's case*, L. R. 9 Ch. 696.

In contracts by a company acting by its agents, the better form is for the company to be made a party by its corporate name, the contract being signed by the agents on behalf of the company. No personal liability under the contract can attach to the agents where they sign "on behalf" of the company. *Gadd* v. *Houghton*, 1 Ex. D. 357, and see p. 199.

Contracts under Seal.

Contracts under seal.

As to the form which a contract to be sealed on behalf of a company should take, such a contract will be expressed thus: An agreement made this —— of —— between The —— Company, Limited, of the one part, and A. B., of the other part, and it will provide that "the said company shall [do so-and-so] and that the said A. B. shall [do so-and-so]" and will conclude, As witness the common seal of the company and the hand [and seal] of the said A. B., the day and year first above written.

Signed Contracts.

Contracts, where to be signed only.

As to the form which a contract to be signed on behalf of a company should take, the company by its corporate name should be made a party to it thus: "between the —— Company, Limited, of the one part, and A. B. of the other part," or it may be "between N. of —— on behalf of the —— Company, Limited, of the one part, and A. B. of —— of the other part."

In any case care must be taken to show on the face of the contract that the person who signs it is acting for, or on account or on behalf of, the company, by inserting words to that effect in the description of the parties, or in the body of the agreement, or in connection with the signature. Any of these places will do. See *Gadd* v. *Houghton*, 1 Ex. Div. 357. If the words "for the company" are written or printed immediately above or below or opposite the signature, that is sufficient.

Presumption of Regularity.

Contracts where presumed to be *intra vires* of the company (*supra*, p. 73), and where presumed to be *intra vires* of the directors (p. 44).

Oral Contracts.

Oral contracts.

Where it is desired to make an oral agreement the person who is make it on behalf of the company must have an express or implied authority, and then a contract made by word of mouth between him and the other party will bind the company, subject, of course, to the provisions of the Statute of Frauds and the Sale of Goods Act, 1893, which require that certain agreements shall be in writing signed by the party to be charged. Sect. 4 of the former Act is, in this connection, the most material section. It deals with various agreements, and, in particular, guarantees, contracts for sale of lands or any interest in or concerning the same, and agreements not to be performed within the space of a year from the making thereof. In such cases no action is to be brought unless the agreement on which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto authorized. It may be noted, however, that "the statute in this part of it does not say that unless these requisitions are complied with such agreement shall be void, but merely that no action shall be brought upon it." Per Jervis, C. J., *Leroux* v. *Brown* (1852), 12 C. B. 801; *Hoyle* v. *Hoyle*, (1893) 1 Ch. 84. Accordingly, an agreement in relation to such matters is not void because it is not in writing, and it can be enforced against the company if, by any means, an admission of the terms of the agreement signed by some duly authorized agent of the company can be produced in evidence. Thus, a proposal in writing accepted orally is a sufficient memorandum as against the proposer (*Reuss* v. *Picksley*, L. R. 1 Ex. 342); so a letter from the company to its own solicitor mentioning the terms of the contract made is sufficient (see *Gibson* v. *Holland*, L. R. 1 C. P. 1); or a letter to an agent of the person sought to be charged. *Bailey* v. *Sweeting*, 9 C. B. N. S. 843. A record of the terms of the contract in the minutes signed by the chairman may also suffice (see *Jones* v. *Victoria Graving Dock* (1877), 2 Q. B. D. 314; *Queensland, &c. Co.*, (1894) 3 Ch. 181), or part performance unequivocally referable to the contract. *Wilson* v. *West Hartlepool Rail. Co.*, 2 D. J. & S. 492; *Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 163. "The Court," as Bowen, L. J., said (*Hoyle* v. *Hoyle*, (1893) 1 Ch. 99), "is not in quest of the intention of the parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it."

As to disclosure of contracts in a prospectus, see *infra*, Chapter XXXV.

As to filing particulars of an oral contract for the issue of paid-up or partly paid-up shares for a consideration other than cash, see sect. 88 of the Act, and *supra*, p. 119.

CHAPTER XXVII.

THE COMMON SEAL.

To have a common seal is incidental to a corporation (*Sutton's Hospital case*, 10 Rep. 30 b); but sect. 16 of the Act of 1908 expressly declares that a company incorporated under that Act is to have a seal, and, by sect. 63 of the same Act, the company is required to have its name "engraven in legible characters on its seal." The right to a common seal.

The right to use the seal of the company for the purposes of its business is usually vested in the directors. Occasionally the power is vested in them by express words, but, more usually, their power arises from the terms of a general clause enabling them to exercise all the powers of the company (see, for example, Clause 71 of Table A.). It has been laid down that the executive of the company is, *prima facie*, entitled to use the common seal. *Barned's Banking Co.*, 3 Ch. 105. Who can use.

As to contracts under seal, sect. 76 of the Act enables a company, as a general rule, to contract without seal; it need only contract under seal where a private person would have to do so, *e.g.*, in the case of a covenant or of a bond. Contracts not under seal.

As to conveyances, demises, surrenders, certificates, &c., the section above referred to does not touch these instruments, and the ordinary rule prevails, namely, that where in the case of an individual a seal is requisite, it is requisite in the case of a company. Conveyances, &c.

Thus, to convey freehold property, and to assign or surrender leasehold property, or to give a power of attorney, a seal is requisite. And a seal is requisite for some instruments in order to obtain certain statutory advantages, *e.g.*, in the case of a certificate of title to shares (sect. 23 of the Act); in the case of a share warrant (sect. 37 of the Act); and see the Conveyancing Acts, 1881 and 1882, for various cases in which statutory incidents are annexed to *deeds*.

Where the articles contain special provisions as to the affixing of the seal, *e.g.*, that the instrument must also be signed by two directors, those who deal with the company are bound to see that the deed on the face of it accords with the articles. See *supra*, p. 44. Regulations as to use of seal.

But if the instrument is on the face of it regular, they have a right Presumption of validity.

to presume that the seal so affixed has been duly affixed, that the directors were duly appointed and their signatures duly made (*County Life Assurance Co.*, L. R. 5 Ch. 288; *Mahoney* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869); and the burden of proving the contrary rests with those who allege it. *Clark* v. *Imperial Gas, &c. Co.*, 4 B. & Ad. 315; *Hill* v. *Manchester, &c. Co.*, 5 B. & Ad. 866.

This is a corollary from the rule in *Royal British Bank* v. *Turquand*, *supra*, p. 44. See *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629. In the latter case the seal had been irregularly affixed to an instrument, but the company was held bound by it, for the instrument appeared to be in accordance with the articles, and the irregularity was only in regard to the "indoor" management, with which an outsider cannot be acquainted. On the other hand, it has been held in a later case, distinguishing *County of Gloucester Bank* v. *Rudry, &c. Co.*, that if the seal is affixed fraudulently by the secretary for his own private ends, the company is not estopped (*Ruben* v. *Great Fingall Co.*, (1906) A. C. 439). Where the presumption does not apply, as in the case of a non-trading corporation, an instrument to which the seal has been irregularly affixed is inoperative. *Bank of Ireland* v. *Evans' Trustees*, 5 H. L. C. 389; *Mayor of the Staple* v. *Bank of England*, 21 Q. B. D. 160; and see *London Freehold Land Co.* v. *Suffield*, (1897) 2 Ch. 608.

Delivery of deed: not required from a corporation.

A deed to be effective must be sealed and *delivered*; but, in the case of a corporation, the affixing of the seal imports delivery. "Le fait d'un corporation ne besoign ascun delivery mes l'apposition del common seale done perfection al ces sans ascun deliverie." Rol. Abr. 23 (I), 50; and see Comyns' Digest, Fact A (3), that "a common seal fixed to the deed of a corporation is tantamount to a delivery." Craise's Digest, 4th ed., 28, is to the same effect. Accordingly, whilst in the case of a private individual it is usual to add an attestation clause to the effect that the instrument was "signed, sealed, and *delivered*" in the presence of the witness, in the case of a company the clause merely states that "the common seal was affixed hereto in the presence of —— and ——."

Primâ facie, therefore, if the common seal is duly affixed to a deed it becomes operative (*London Freehold, &c. Co.* v. *Suffield*, (1897 2 Ch. 608), and it rests with those who allege the contrary to establish the fact.

Nevertheless a corporation can execute a deed in escrow, *i.e.*, can seal it subject to a condition suspending its efficacy.

As Lord Cranworth said in *Xenos* v. *Wickham*, L. R. 2 H. L. 310: "The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession. This, as a general proposition of law, cannot be controverted. It is not affected

by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or until some condition has been performed; but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow. . . . . I know of nothing intermediate between a deed and an escrow."

Whether a document sealed by a company was or was not intended to operate as a complete and operative instrument, or as an escrow, depends on the intention of the parties expressed or implied. See *Derby Canal Co.* v. *Wilmot*, 9 East, at p. 360, where the company's seal was affixed to a conveyance; but the clerk was directed to retain it until certain accounts were adjusted. Lord Ellenborough, C. J., and the rest of the Court, held that, "in order to give the instrument effect, the affixing of the seal must be done with intent to pass the estate. Otherwise it operates no more than a feoffment would do without delivery of possession, whereas here, though the seal was directed to be and was affixed to the instrument for form, yet it was with a reservation of any present effect to pass the title out of the company, as they do not choose to deliver over the possession of the conveyance till the accounts were settled between them and the purchaser." See, too, *Mowatt* v. *Castle Steel, &c. Co.*, 34 C. D. 58, which the Court found as a fact that debentures to bearer sealed by the company had not in fact been delivered, and held them void in consequence. It is quite consistent with this, however, that the company may be estopped from setting up non-delivery where an instrument under the seal is taken in good faith. *County of Gloucester Bank* v. *Rudry*, (1895) 1 Ch. 629. And see *Roberts* v. *Security Co.*, (1897) 1 Q. B. 111, and *London Freehold, &c. Co.* v. *Suffield, supra*, that the onus of proving that a deed duly sealed was only executed in escrow rests with those who so assert.

Whether sealed document a deed.

A document to which the seal is affixed is not necessarily a deed; thus a certificate of title to shares is not a deed (*The Queen* v. *Morton*, L. R. 2 C. C. R. 22); but it would seem that every *contract* under the seal is a deed, save only that, by the Bills of Exchange Act, 1882, s. 91, a corporation is empowered to seal, instead of signing, acceptances, indorsements and the like.

Foreign Seals Act.

Besides its common seal, a company may, under sect. 79 of the Act, obtain power to have an official seal for use abroad; and, under sect. 78 of the Act, it can authorize any person, as the attorney of the company, to execute, under his seal, deeds outside the United Kingdom.

CHAPTER XXVIII.

SECRETARY AND OTHER OFFICIALS.

Appointment and Remuneration of Secretary.

Appointment.

ALMOST every going company has its secretary. The articles sometimes contain a clause declaring who shall be the first secretary. In any case a resolution is usually passed appointing a secretary and stating his remuneration, and if the terms of appointment are special the agreement in regard thereto is generally put in writing.

A secretary is generally remunerated by a fixed salary.

Duties.

Duties.

The duties of the secretary vary with the size and nature of the company and the terms of the arrangement made with him. But in the ordinary course he is present at all meetings of the company, and of the directors, and makes proper minutes of proceedings thereat: issues, under the direction of the board, all necessary notices to members and others; conducts all correspondence with shareholders in regard to calls, transfers, forfeiture and otherwise, and keeps the books of the company, or such of them as relate to the internal business of the company, *e.g.*, the register of members, the share ledger, the transfer book, the register of mortgages, certifies transfers, &c., &c. He also makes all necessary returns to the Registrar of Joint Stock Companies.

Where the same person is secretary to two companies, A. and B., knowledge acquired elsewhere by him as secretary of A. Company is not to be treated as knowledge by him as secretary of B. Company, unless there is a duty to communicate the knowledge. *Re Fenwick, Stobart & Co., Deep Sea Fishery Co.'s Claim*, (1902) 1 Ch. 507, and see p. 234.

Powers.

Powers.

A secretary, as such, has no authority to bind the company by contract or to make representations as to the company's affairs to induce people to take shares so as to bind the company (*Barnett* v.

South London Tramways Co., 18 Q. B. D. 815); or to register a transfer until passed by the directors (*Chida Mines, Limited* v. *Anderson*, 22 Times L. R. 27); he can "certify" a transfer, but if he does so fraudulently the company will not be liable. *George Whitechurch, Limited* v. *Cavanagh*, (1902) A. C. 117. The secretary of the company there, in pursuance of a fraudulent scheme to benefit himself and an accomplice, certified that share certificates had been produced to him on a transfer when in fact they had not, and the House of Lords decided that the secretary's representation did not operate as an estoppel against the company; nor will the company be liable if the secretary forges the directors' signatures to a share certificate, and fraudulently affixes the company's seal thereto. And even where a secretary is held out as a person to answer certain inquiries the company, on the same principle, incurs no liability for untrue answers if made by the secretary for his own private ends. *British Mutual Bank* v. *Charnwood Forest Rail.*, 18 Q. B. D. 714.

In a subsequent case of *Ruben* v. *Great Fingall Consolidated*, (1906) A. C. 439, the House of Lords held the same principle to be applicable to a share certificate to which the secretary had fraudulently, for his private ends, affixed the seal of the company and forged the names of the directors.

See also as to cheques with forged signatures of directors, *Kepitigalla Rubber Estates* v. *National Bank of India*, 25 T. L. R. 402.

A secretary, as such, has no power to convene a general meeting (see p. 164), or to strike a name off the register of members (*Wheatcroft's case*, 29 L. T. 326), or to pass and register a transfer not approved by the directors. *Chida Mines* v. *Anderson*, 22 T. L. R. 27. In that case the secretary registered the transferee, and afterwards the directors refused to pass the transfer.

Liability.

Liability.

A company's secretary is liable to heavy punishment for falsifying any books or documents of the company. Sect. 216 of the Act. And he may incur liability and penalties under the Act in the following cases amongst others: Sect. 17 (2) (statutory declaration to obtain certificate of incorporation); sect. 87 (1) (c) (statutory declaration for company commencing business); sect. 26 (4) (signing the annual list of members and summary); and sect. 88 (3) (return of allotments). See also as to enemy shareholders, Appendix, p. 631. He is also liable for misfeasance if he receives an improper commission. *Barrow's case*, 28 W. R. 341; *McKay's case*, 2 Ch. D. 1. But a secretary is in a very different position to directors, and is not to be fixed personally with liability for a misapplication of the com-

pany's funds, though he may have known all about it. *Joint Stock Discount Co.* v *Brown* (1869), 8 Eq. 396.

A secretary sued for negligence may set up the Statute of Limitations *Municipal Freehold Land Co.* v. *Pollington* (1890), 63 L. T. 243.

A secretary who acts fraudulently or conspires with others is liable to prosecution.

Appointment of Officers and Agents generally.

Appointment of officers and agents.

An appointment of an officer or agent by a company is commonly made by instrument in writing pursuant to sect. 76 of the Act of 1908, and this course is a better one than placing reliance for the purpose, as is sometimes done, on the articles of association, for an appointment made by the articles is not, it seems, a contract in writing by the company at all, though it may be held to evidence the terms on which the company has agreed to employ the officer or agent. *Eley* v. *Positive Government, &c. Co.*, 1 Ex. D. 88; *Rotherham Co.*, 25 C. D. 103; and see *supra*, pp. 41, 42. Moreover, special stipulations are usually required on such appointment, and they cannot be so conveniently inserted in the articles as in a formal agreement for employment.

Specific performance.

It is a cardinal doctrine of equity that specific performance of a contract for personal service will not be ordered. *Stocker* v. *Brocklebank*, 3 M. & G. 250; *Mair* v. *Himalaya Tea Co.*, 1 Eq. 411. Service under coercion can never be satisfactory. But where there is a negative stipulation that an employee will not engage elsewhere, the Court will grant an injunction to restrain a breach thereof. *Lumley* v. *Wagner*, 1 D. M. & G. 604. To found this remedy by injunction, however, the company must put in the contract a clear negative covenant, or words amounting thereto. *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416.

Dismissal.

In the absence of express provision—that is, unless he has consented to forego it—an employee is entitled to reasonable notice of dismissal, or to compensation in lieu thereof (*Green* v. *Wright*, 1 C. P. D. 592); but there are certain things—going to the root of the contract—for which an employee may be dismissed summarily and without notice; for instance, wilful disobedience to any lawful order of the company (*Shaw* v. *Arnott*, 2 Stark. 256; *Amor* v. *Fearon*, 9 A. & E. 548), misconduct (*Pearce* v. *Foster*, 17 Q. B. D. 536; *Boston Deep Sea* v. *Ansell*, 39 C. D. 339), incompetence or permanent disability (*Hermer* v. *Cornelius*, 5 C. B. (N. S.) 236), speculating on the Stock Exchange (*Pearce* v. *Foster*, 17 Q. B. D. 536), or even an act of forgetfulness by an employee, if it has, or is calculated to have, serious results, may justify dismissal without notice. *Baster* v. *London and County Printing Works*, (1899) 1 Q. B. 901.

An order for winding-up is equivalent to dismissal (*Chapman's case*, 1 Eq. 346), and so is the appointment by the Court of a receiver and manager in a debenture action (*Reid* v. *Explosives*, 19 Q. B. D. 264); and it has long been considered that a resolution for voluntary winding-up operated in like manner. See, however, *Midland Counties District Bank*, (1905) 1 Ch. 357, adversely commented on in Company Precedents, Part I., p. 444.

Where power is reserved to the company at its absolute discretion to determine the engagement at an earlier date than that fixed, proper notice of the company's intention to terminate must be given. *African Association and Allen*, (1910) 1 K. B. 396. An officer who accepts an incompatible office, by doing so *primâ facie* vacates his original office. *Reg.* v. *Tidy*, 2 Q. B. 179.

Where an appointment is made for a fixed period, there may be an implied term on the company's part that it will not discontinue its business so as to disable itself from continuing the employment. *Ogdens* v. *Nelson*, (1905) A. C. 109; and compare with this *Rhodes* v. *Forwood*, 1 App. Cas. 256; *Railway and Electric Co.*, 38 C. D. 597; *Hamlyn* v. *Wood*, (1891) 2 Q. B. 488; *Turner* v. *Goldsmith*, (1891) 1 Q. B. 544; *Chapman's case* (1866), 1 Eq. 346. Winding-up.

At all events, if a company by winding up disables itself from carrying out its bargain to continue an employee in its employment, it cannot hold him to his share of the bargain not to compete in business with the company. *Measures Bros., Limited* v. *Measures*, (1910) 2 Ch. 248, C. A.

An employee or ex-employee may generally be restrained by injunction from revealing trade secrets. *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Robb* v. *Green*, (1895) 2 Q. B. 315. Trade secrets.

Where a servant is wrongfully dismissed from his employment, the damages for dismissal cannot include compensation for the manner of the dismissal. So a majority of the Law Lords held in *Addis* v. *Gramophone Co.*, (1909) A. C. 488.

CHAPTER XXIX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Company's Power to Issue.

Express and implied powers.

WHETHER a company can make, accept, indorse, or issue bills of exchange, promissory notes, and other negotiable instruments depends on its objects; it cannot issue such instruments unless it has an express or implied power given to it by its memorandum. In the case of *a trading company* there is an implied power to accept and issue bills and notes as there is to borrow—business convenience requires it—and there are other commercial concerns which may also have an implied power. See *Re Peruvian Rail. Co.* (1866), L. R. 2 Ch. 623. But usually the memorandum of association contains express power. The following are cases in which it has been held that companies had no such implied power, and illustrate the inconvenience of relying on an implied power:—*Bramah* v. *Roberts*, 3 Bing. N. C. 963 (a gas company); *Dickinson* v. *Valpy*, 10 B. & C. 128 (a mining company); *Steel* v. *Harmer*, 14 M. & W. 831 (a cemetery company); *Bateman* v. *Mid-Wales Rail. Co.* (1865), L. R. 1 C. P. 499 (a railway company).

Acceptance by Director in Name of Company.

How bills accepted, &c.

Sect. 77 of the Act enacts that a bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name or by or on behalf or on account of the company, by any person acting under its authority.

Thus, in order to accept a bill, all that is necessary is to authorize one of the directors, or the secretary, or someone else, to sign the acceptance on behalf of the company and then let the acceptance be in these terms:—

Accepted.

For the —— Company, Limited, and by its authority: payable at, &c.

Countersigned: N. *Secretary.* A. B. } *Directors.*

A bill may be:—

£. s. d. London, 1st March, 1878.

Three months after date, pay to ——, or order, one hundred pounds, value received.

For the —— Company, Limited.

To Mr. ——

A. }
B. } *Directors.*

A bill drawn on a company ought to be addressed to the company thus: "To the —— Company, Limited." *not* "To the Directors of the —— Company, Limited."

A promissory note may be:—

Three months after date, The —— Company, Limited, promises to pay to ——, or order, the sum of ——, value received.

For, &c. [as above].

An indorsement may be:—

Pay to ——, or order.

For, &c. [as above].

A cheque can be signed in the same way.

A bill, note, cheque, or indorsement may be accepted, drawn, or made on behalf of a company, by any person who has the necessary authority.

Acceptances under seal.

Under sect. 91 of the Bills of Exchange Act, 1882, it is provided: "That in the case of a corporation where a bill, note, cheque, indorsement, &c., is required to be signed, it is sufficient if the document be sealed with the corporate seal." Accordingly, if preferred, an acceptance can be in this form:—

Accepted.

Payable at the —— Bank, Limited.

As witness the common seal of the —— Company, Limited.

A promissory note runs in this form:—

The —— Company, Limited, hereby promises to pay to —— of —— on the —— day of —— next, the sum of £——.

As witness the common seal of the said company this —— day of ——.

Danger of omitting the word "limited," or not stating the name correctly.

In relation to bills of exchange and promissory notes the provisions of sect. 63 of the Act must be borne in mind, and accordingly the true name of the company must appear, and particularly the word "limited" must not be omitted. Any breach of this enactment involves heavy penalties, and, what is more, may impose personal liability on the directors. See the concluding words of the section. *Atkin* v. *Wardle*

(1889), 61 L. T. 23, is an instance in which directors were held personally liable on a bill which did not state the name of a company correctly; and see *Penrose* v. *Martyr* (1858), E. B. & E. 490, in which a bill addressed to a company omitted the word "limited" in describing it. It was accepted by "J. M., Secretary to the company," and it was held that he was personally liable. See also *Nassau Steam Press* v. *Tyler*, 70 L. T. 376, where the directors described the company by a wrong name and were held personally liable. But where a promissory note was framed thus, "I, ——, promise to pay, &c. to A. B. C., Limited," and was signed "A. B., Managing Director," it was held that A. B. was not personally liable. *Chapman* v. *Smethurst*, (1909) 1 K. B. 927, C. A., reversing (1909) 1 K. B. 73. And directors were held not personally liable where, owing to the length of the rubber stamp employed, the word "limited" overlapped the paper and did not appear. *Dermatine Co.* v. *Ashworth*, 21 Times L. R. 510.

"For" the company.

As to the importance of using the words "for" or "on account of" the company, see *supra*, pp. 254, 255, and sect. 26 of the Bills of Exchange Act, 1882. A note in the form "We, the directors of the A. Company, Limited, promise to pay," &c., signed by the chairman and three other directors, with the seal of the company in the corner, was held to bind the directors personally. *Dutton* v. *Marsh*, L. R. 6 Q. B. 361.

CHAPTER XXX.

CONVEYANCES, ASSIGNMENTS, LEASES, RELEASES, DEEDS OF COVENANT, ETC.

Conveyances, &c. by company.

When the directors, in pursuance of an agreement for sale or otherwise, desire to convey or assign property of the company to a purchaser or some other person, and also when they desire to grant a lease of, or to mortgage, the company's property, *the company* must be made a party to the deed by its corporate name,—not the directors,—and the company, not the directors, must thereby grant, or assign, or demise, as the case may be, and enter into such covenants as may be necessary. Thus, a conveyance of land will be to the effect following:—

> This Indenture made the —— day of —— between The —— Company, Limited, of the one part, and A. B., of, &c., of the other part. Whereas, &c.
>
> Now This Indenture Witnesseth that in pursuance of the said agreement, and in consideration of, &c., The said company, as beneficial owner, hereby grants unto the said A. B., all and singular [*description of the land*]: To hold the same unto and to the use of the said A. B. in fee simple. And the said company hereby covenants with the said A. B. that, &c.
>
> As witness the common seal of the said company and the hand and seal of the said A. B. the day and year first above written.

Conveyances, &c. to company.

In like manner where the directors have agreed to purchase or take on lease property, *e.g.*, land, buildings, letters patent, concessions, &c., on behalf of the company, the property will be conveyed, assigned, or demised respectively to the company, not the directors, unless in some special case it is desired to vest the property in the directors as trustees for the company. Accordingly, the company will be party to the deed, and the conveyance, assignment, or lease will be expressed to be made "to the said company and its assigns," and the covenants will be "with the said company and its assigns."

Some persons in deeds use the expression "the said company, its successors and assigns": but the word "successors" is unnecessary

(Co. Litt. 94 b), and, accordingly, may be, and generally is, omitted with advantage.

The above rules apply not only to conveyances, &c., but to releases and other deeds. Such instruments should all be made in the name of the company.

Notice. So, too, a notice by the company, *e.g.*, to dismiss an officer, will be given in the name of the company.

> The —— Company, Limited, hereby give you notice, &c.
>
> In witness whereof the company hath caused two of its directors to affix their signatures hereto this —— day of ——.
>
> For the company,
>
> A. } *Directors.*
> B. }

Writ. Again, in a writ of summons the company is named, as the party suing or being sued, thus:—

> The —— Company, Limited, Plaintiffs.
> against
> A. B. and C. D., Defendants.

Petition. So a petition by a company runs thus:—

> In his Majesty's High Court of Justice.
>
> The humble petition of the —— Company, Limited, showeth as follows, &c.

CHAPTER XXXI.

BORROWING POWERS.

Most companies, like individuals, require to borrow from time to time for the exigencies of their business. To entitle a company to borrow it must have power to borrow given to it by its constitution. Whether a company under the Act has or has not such a power will depend on the objects specified in its memorandum of association. If these objects comprise, as they usually do, an express power to borrow, there is of course no question; but it is not necessary to find an express power. It is sufficient if there is an implied power. An implied power arises whenever the objects are such that a power to borrow may fairly be regarded as incidental to the company's objects. This is the case with a *trading* company. It has—it must have—as incidental to carrying on its business, an implied power to borrow (*Bryon* v. *Metropolitan, &c. Co.*, 3 De G. & J. 123; *Ex parte City Bank*, L. R. 3 Ch. 758; *General Auction, &c. Co.* v. *Smith*, (1891) 3 Ch. 432); but in regard to non-trading companies, there must be something in the memorandum or articles to show expressly or inferentially that the company is to have power to borrow; for a company, as we have seen already (p. 60), under the Act, is a statutory corporation with limited powers. In the case of *The Queen* v. *Sir Charles Reed*, 5 Q. B. D. 483, Cotton, L. J., observed: "It was said that every corporation, unless restricted by its act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion this contention . . . . cannot be maintained. The power of a corporation established for certain specific purposes must depend upon what those purposes are, and except so far as it has express power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties, or fulfil the purposes for which it was constituted. . . . . A trading corporation stands, as regards an implied power of borrowing, in a very different position." See also *Baroness Wenlock* v. *River Dee*, 10 App. Cas. 359. If a company has no power by its constitution to borrow, it can now remedy the defect by applying to the Court under sect. 9 of the Companies (Consolidation) Act, 1908, to sanction its taking such a power, or

Where power to borrow exists.

How power may be obtained.

extending it if its existing power is unduly limited. *In re Reversionary Society*, (1892) 1 Ch. 615; *In re Empire Trust*, 64 L. T. 221; see also *P. Phipps' Northampton and Towcester Breweries*, 1897; *Midland Educational Co.*, 30 April, 1892; *Union Rolling Stock Co.*, January, 1894.

Limit of Borrowing Powers.

How borrowing powers limited.

Sometimes, though rarely, the memorandum of association limits the borrowing powers to a specific sum, or to a sum not exceeding the paid-up capital; but in ninety-nine cases out of a hundred there is no limit in the memorandum, and there is nothing whatever in the Act itself to limit borrowing powers. If, therefore, the company has express or implied power to borrow, it may from time to time borrow as much as it wants, subject to any restrictions in its articles.

Bound by regulations.

Usually the articles authorize the directors to exercise the company's borrowing powers. This authority may be given in two ways: either generally by a clause empowering the directors to exercise all such powers as may be exercised by the company, and are not by the articles or by statute expressly directed or required to be exercised or done by the company in general meeting (see Clause 71 of Table A.), or by a special clause empowering the directors to borrow or raise money; but it is not uncommon to provide that the directors shall not borrow more than a specified sum without the sanction of a general meeting. In considering the powers of the directors to borrow, it is not, therefore, necessary to find an express power to borrow; it is sufficient if the company has power, and the articles contain a clause like Clause 71 of Table A., vesting in the directors the general powers of the company. See *Patent File Co.*, L. R. 6 Ch. 83; and *Anglo-Danubian Co.*, 20 Eq. 339, *supra*.

Security.

Power to give security.

Where a company has power to borrow, it has, as incidental thereto, power to secure the repayment of borrowed money by mortgage or charge of all or any of its property, real or personal, present or future. *Australian, &c. Co.* v. *Mounsey*, 4 K. & J. 733; *Bryon* v. *Metropolitan, &c. Co., supra*; *Patent File Co.*, L. R. 6 Ch. 83.

Power to Mortgage uncalled Capital.

Uncalled capital, mortgage of.

At one time it was thought that this did not include a right to mortgage or charge uncalled capital (*Stanley's case*, 4 D. J. & S. 407); but in 1875, Jessel, M. R., decided that a mortgage of uncalled capital

was allowable where the company's articles of association gave the power, and there was nothing in the memorandum of association to the contrary (*Re Phœnix Bessemer Co.*, 44 L. J. Ch. 683; 32 L. T. 854); and accordingly, in the first edition of the author's work on Company Precedents, published in 1877, and in all subsequent editions, the author, after referring to this decision, gave forms of debentures charging the company's undertaking and its uncalled capital for the time being. Doubts having been raised as to the validity of such a mortgage, the matter was considered in the Court of Appeal in *Re Pyle Works*, 44 Ch. D. 534, and it was held that *Re Phœnix Bessemer Co.* was well decided. Subsequently the same question came before the Judicial Committee of the Privy Council, and it was again held that if there is power in the memorandum, or power in the articles and nothing in the memorandum to the contrary, uncalled capital can be effectually charged. *Newton* v. *The Debenture Holders of Anglo-Australian, &c. Co.*, (1895) A. C. 244. But "if the memorandum, when authorizing certain charges, has omitted to authorize a charge on uncalled capital, the omission may imply a prohibition." Per Lord Macnaghten, *S. C.*, p. 249.

Validity established.

And it is not essential that such a power to mortgage uncalled capital or future calls should be given in terms by the articles; something less may be sufficient; thus a power in the memorandum to mortgage the property *and rights* of the company is sufficient. *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156. So, too, a power to mortgage the company's "assets" appears to be sufficient (*Paye* v. *International, &c. Co.*, 68 Law Times, 435); or to raise money "in various modes," or "in such other manner as the company may determine" (*Jackson* v. *Rainford*, (1896) 2 Ch. 340); or to raise money on "any security of the company." *Newton* v. *Debenture Holders of Anglo-Australian, &c. Co., supra.* But a power to borrow on the *property* of the company will not authorize a charge on the company's uncalled capital, for uncalled capital is only "property" potentially, that is to say, when called up (*Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366); and even the words "property both present and future" are insufficient. *Streatham Estates Co.*, (1897) 1 Ch. 15; *In re Russian Spratts, Limited*, 78 L. T. 480.

What words sufficient to allow.

Such power may also be implied in the memorandum.

Can capital which, under sect. 58 or 59 of the Act of 1908 (substituted for sect. 5 of the Act of 1879), is "not capable of being called up except in the event and for the purposes of the company being wound up," be charged by the company under a power in its memorandum or articles to charge its uncalled capital?

As to mortgaging reserve capital.

The Court of Appeal has answered this question in the negative. *Bartlett* v. *Mayfair Property Co.*, (1898) 2 Ch. 28. Lindley, L. J., in his judgment in that case, said it was plain that sect. 5 of the

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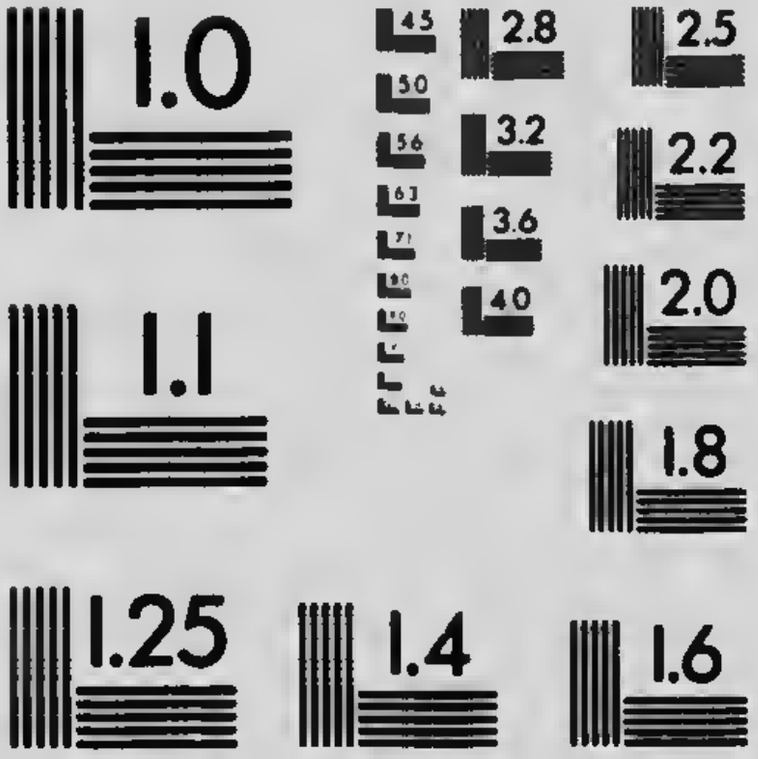

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Act (of 1879, now sect. 59) was framed, *inter alia*, "to preserve for the general creditors of the company" the reserve capital, and the learned judge considered that any mortgage of such reserve capital would defeat this object, and that to apply any part of the reserve capital to paying off such a mortgage "is not to apply the reserve capital for the purposes of the company being wound up within the true meaning of that expression as used in sect. 5, but to prevent such application."

But do the words of the Act justify the conclusion thus arrived at, for it is only from the words it has used that the intention of Parliament can be gathered. "I can only find the true intent and meaning of the Act from the Act itself." Per Lord Halsbury, L. C., *Salomon* v. *Salomon & Co.*, (1897) A. C. 22,* *infra*, Chapter XXXVI. Now, looking to the words of the Act, it is to be observed that, whilst the company is prohibited from calling up the reserved capital, there are no words prohibiting a mortgage or charge thereof.

If it had been intended by the legislature to prohibit any mortgage or charge, it would have been easy to say so; but the Act observes a significant silence. Why, then, depart from the well-settled rule of construction (*Powell* v. *Main Colliery Co.*, (1900) A. C. 366), by reading into the enactment words not contained in it, and thus deprive a company of the power of utilizing its reserve capital in times of special pressure? Take, for instance, the case of a bank with reserve capital, and suppose some sudden financial pressure caused by a money crisis or panic. Is the bank deprived by the Act of the power to obtain temporarily, on the security of its reserve capital, funds sufficient to enable it to tide over the crisis, or must it succumb simply because, with ample resources, it cannot at the critical moment make use of them? Such a conclusion would be most unfortunate.

Lindley, L. J., bases his judgment to a great extent on the fact that reserve capital, created upon the re-registration under the Act of an unlimited company, represents a liability which, before such re-registration, could not have been mortgaged, and from this he infers that, in the absence of express authority in the Act to mortgage, it cannot have been intended to remove this disability; but surely the answer is that the Act renders the reserve capital *part of the capital* of the company, though it is to remain uncalled; that uncalled capital is *primâ facie* capable of being mortgaged; that this had been decided

* "We must construe the statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute." Per Lord Brougham, L. C., *Fordyce* v. *Bridges*, 1 H. L. C. 4.

(see *supra*, p. 271) in 1875; that the legislature must be taken to have known the law, and to have intended the logical consequences of its enactment, save so far as a contrary intention is expressed; and that it must be taken, therefore, to have known that the reserve capital would *primâ facie* be capable of being mortgaged, and yet it only thought fit to provide that it should not be called up. The learned judge referred to *Heydon's case*, 3 Co. 7; but the cardinal rule of interpretation laid down in that case is that the Court is to consider what remedy Parliament has appointed, and the decisions in *Salomon* v. *Salomon & Co.*, (1897) A. C. 22, and *Wright* v. *Horton*, 12 App. Cas. 371, show clearly that it is not for the Court to supplement the remedy so appointed.

As to the argument that the payment of secured creditors is not one of "the purposes of the winding-up," this, it is submitted, is unsound. The payment off of secured creditors was clearly one of the purposes of a winding-up under the Act of 1862, and is not less clearly one of the purposes of a winding-up under the Act of 1908. A secured creditor can petition for a winding-up (*Western of Canada Co.*, 17 Eq. 1; *Moor* v. *Anglo-Italian Bank*, 10 C. D. 689; *Borough of Portsmouth Tramways*, (1892) 2 Ch. 362), and can apply in a winding-up to have his security realized (*Marine Mansions Co.*, 4 Eq. 601; *Fowler* v. *Broads Patent, &c. Co.*, (1893) 1 Ch. 724), and he can prove in a winding-up, although, if the company be insolvent, he must, if he proves, either value his security or give it up. Lastly, there are the remarks of Lord Macnaghten in *Newton* v. *Anglo-Australian, &c. Co.*, (1895) A. C. 244, at p. 250. The decision in that case supports the view that to prohibit the calling up of capital does not impliedly prohibit a mortgage thereof. No doubt what the Court had to construe in the case last mentioned were articles of association, not an Act of Parliament; but the same principles of interpretation apply to both. *Gray* v. *Pearson*, 6 H. L. C. 106. Upon the whole it is submitted that there is nothing in the Act of 1879 sufficient to show that it was intended to negative the company's power to mortgage or charge the reserve capital.

Property situate Abroad.

When the company desirous of borrowing holds property abroad, as is very commonly the case, it may have to consider how such property can best be made available as security. The leading principle to be borne in mind with regard to this is that immoveable property is governed by the *lex loci rei sitæ*, and therefore to perfect the title of the mortgagee or chargee upon property situate abroad the local law must be complied with. Unless it is, the title of the mortgagee or chargee may be intercepted by a local mortgage charge, lien, or execution. It would be impossible here to detail the various peculiar conditions of the

lex loci in different countries: sometimes the local law does not permit land to be vested in aliens, or in a foreign corporation; sometimes it does not recognize trusts or a floating charge; sometimes it does not allow concessions to be charged or chattels to be mortgaged unless possession is at once taken by the mortgagee. In cases like these the company should perfect as far as possible the security it offers according to the requirements of the local law. If it is unable to do this it may yet through its articles give constructive notice to all persons dealing with it of the charge, and so disentitle them to ignore it. Even without complying with the formalities required by the local la a relation to mortgages or transfers, it is still competent to a company to create an effective charge on property belonging to it in a foreign country; for the Court, sitting in Chancery in virtue of its jurisdiction *in personam*, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction (*Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444; W. & T. L. C., 7th ed., 755; *Cranstown* v. *Johnston*, 3 Ves. 170; *Mercantile, &c. Co.* v. *River Plate, &c. Co.*, (1892) 2 Ch. 303; Westlake, I. L. (1912). p. 230; *Duder* v. *Amsterdamsch Trustees Kantoor*, 1902 2 Ch. 132; *British South Africa Co.* v. *De Beers*, (1910) 1 Ch. 354: (1910) 2 Ch. 502); and in determining whether there is an equity the Court regards English, not foreign, law, and if according to English law there is an equity, *e.g.*, if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it, although the equity may be one not recognized by the *lex loci rei sitæ* (*Ex parte Pollard*, 4 Deac. 27; *Coote* v. *Jecks*, 13 Eq. 597; *Hicks* v. *Powell*, L. R. 4 Ch. 741; *Ex parte Holthausen*, L. R. 9 Ch. 722); but—and this is the danger of the situation—it will only enforce it subject to any rights which may in the meanwhile have been rightfully acquired under the local law of the foreign country. This is illustrated in *Maudsley* v. *Maudsley, Sons and Field*, (1900) 1 Ch. 602. There the debenture holders of an English company had a floating charge on its assets which included a French debt due to the company. A creditor of the company in France attached this debt by legal process in France, and the Court in England held that the title of the French creditor must prevail against a receiver for the debenture holders subsequently appointed. See further Company Precedents, Part III., pp. 74 *et seq.*

Mortgage of foreign property.

Mode of Borrowing.

How money raised.

A company which has power to borrow may borrow in such manner as it thinks fit. It can therefore raise money on a legal mortgage of any specific portions of its property, or by equitable mortgage, *e.g.*, deposit of title deeds, or by a floating charge on the whole undertaking of the company (see further, *infra*, pp. 308 *et seq.*), or by bonds, or by promissory notes, or by debentures or debenture stock. See as to these, *infra*, p. 283 *et seq.* Overdrawing the company's banking

account is borrowing. *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Society*, 9 App. Cas. 865.

Ultra vires Borrowing.

Borrowing *ultra vires* the company.

Where a company has no borrowing power or where the memorandum of association fixes a limit to the borrowing powers of the company—a very rare thing—any borrowing in the one case and any borrowing in excess of such limit in the other case is *ultra vires* the company, and securities given for the same are inoperative. In such cases the contract is not merely voidable, it is absolutely void and incapable of ratification, even if every member of the company purports to ratify the same; nor can the company make good an *ultra vires* borrowing by obtaining enlarged powers of borrowing under sect. 9 of the Act.

Ultra vires the directors.

So, too, if the company has unlimited powers of borrowing, but the directors, having only limited powers, exceed them. In such a case the borrowing, being *ultra vires* the directors, is irregular and the securities are inoperative, unless the company is estopped from alleging their invalidity under the rule in *Royal British Bank* v. *Turquand*, p. 44; or unless the shareholders elect, as they may do, to ratify the directors' act. *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

Ultra vires borrowing rights of lenders.

Where there is an *ultra vires* borrowing, the lender has no right of action in respect of the loan against the company itself, but he has certain rights in respect of the moneys received by the company under the transaction. He has, that is to say, if he intervenes before the money has been spent, a right to follow his money and to obtain an injunction restraining the company from parting with it. And even if the company has spent it he may be entitled, if it has been applied in paying off just debts owing to creditors of the company, to stand in the place of and to be subrogated to the rights of such creditors as simple contract creditors (*Blackburn Building Society* v. *Cunliffe Brooks*, 22 Ch. D. 61; 9 App. Cas. 857; *In re Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *In re German Mining Co.*, 4 D. M. & G. 56; *Baroness Wenlock* v. *River Dee* (No. 2), 19 Q. B. D. 155; *Neath Building Society* v. *Luce*, 43 C. D. 158; *Re Harris Calculating Machine Co.*, (1914) 1 Ch. 920; and *Sinclair* v. *Brougham*, (1914) A. C. 398); but not to any securities for their debts held by such creditors. *Re Wrexham, Mold and Connah's Quay Rail. Co.*, (1899) 1 Ch. 440 (C. A.). As to the rights of a depositor in a bank, where the whole banking business was *ultra vires*, as against the shareholders, see *Sinclair* v. *Brougham* (*Birkbeck Building Society*), (1914) A. C. 398, where it was held that the surplus assets after payment of valid debts must be distributed *pari passu* among the depositors and the shareholders in proportion to the amounts paid or subscribed by them.

Subrogations.

Where several companies—each of which had power to borrow but no power to borrow jointly—borrowed jointly on debentures, each company was held chargeable for what it received. *Johnston Foreign Patents*, (1904) 2 Ch. 234.

Personal liability of directors.

Nor is this all. The lender of *ultra vires* borrowed money has in some cases a right against the directors of the borrowing company personally for breach by them of their implied warranty of authority (*Firbank* v. *Humphreys*, 18 Q. B. D. 54; *Weeks* v. *Propert* (1873), L. R. 8 C. P. 427; *Chapleo* v. *Brunswick, &c. Society*, 6 Q. B. D. 696); and it makes no difference as to the liability of the directors in such a case that they did not know that they were exceeding their powers. *Weeks* v. *Propert*, *supra*.

Constructive Notice of Borrowing Limit.

Constructive notice.

As to how far a person lending to a company is bound to see that the internal regulations as to borrowing have been observed, see *Royal British Bank* v. *Turquand*, 5 El. & Bl. 248; 6 El. & Bl. 327; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 715; *Howard* v. *Patent Ivory Co.* (1888), 38 C. D. 156; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; and *Bryant* v. *La Banque du Peuple*, (1893) A. C. 170, and *supra*, p. 44.

But the benefit of the rule is reserved for persons dealing with a company in honest ignorance of the irregularity. A lender with notice of the irregularity cannot claim the protection of the rule. Thus where directors had only power to borrow in excess of 1,000*l.* with the assent of a general meeting, and without having obtained such assent had issued debentures for 2,500*l.* to themselves in respect of money lent to the company, it was held that, as they must be taken to have known that the internal regulations had not been complied with, the debentures could only stand good for 1,000*l.* *Howard Patent Ivory Co.*, 38 C. D. 156; *Tyne Mutual* v. *Brown*, 74 L. T. 283. And the mere fact that the directors propose to do something in excess of their powers under the articles will not entitle a person dealing with them to assume that their powers have been extended by a special resolution, for such a resolution requires registration. He must take the articles to be such as appear at the office of the Registrar of Companies to be in force. *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

Registration of Mortgages and Charges.

This is dealt with by two sections, sect. 100 and sect. 93.

Registration under Sect. 100.

Substituted for sect. 43 of the Act of 1862.

Sect. 100.

This section requires every limited company to keep a register of all mortgages and charges specifically affecting property of the company, and enter in it a short description of the property mortgaged

or charged, the amount of the mortgage or charge, and the names of the persons entitled to it.

Non-registration under this section does not affect the validity of the charge, even though the person entitled to it is a debenture holder. The sole penalty is the statutory fine of 50*l.*, and that only when the omission to register is wilful. *Re General South American Co.*, 2 C. D. 337; *Wright* v. *Horton* (1887), 12 App. Cas. 371.

The defect of sect. 43 was that under it inspection of the register was only given to any "creditor or member of the company," not to a person who might contemplate dealing with the company and would naturally wish to know the financial position of the company. But sect. 101 of the Act of 1908 now opens the register to the public on payment of a fee not exceeding 1*s.*, and the section below mentioned ensures a still greater measure of disclosure.

Registration under Sect. 93 of the Companies Act, 1908.

Sect. 93 of the Act (which takes the place of sect. 14 of the Act of 1900 and sect. 10 of the Act of 1907) provides for the registration in a public register at Somerset House of a company's mortgages and charges, and avoids, as against creditors and liquidators, mortgages and charges not duly registered within twenty-one days after their creation. The section runs as follows:—

93.—(1) Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

(a) a mortgage or charge for the purpose of securing any issue of debentures [or debenture stock]; or

(b) a mortgage or charge on uncalled share capital of the company; or

(c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(d) a mortgage or charge on any land, wherever situate, or any interest therein; or

(e) a mortgage or charge on any book debts of the company; or

(f) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under

this section the money secured thereby shall immediately become payable:

Provided that—

(i) in the case of a mortgage or charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and

(ii) where the mortgage or charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on land shall not for the purposes of this section be deemed to be an interest in land.

(2) The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the first day of July nineteen hundred and eight and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled pari passu is created by a company, it shall be sufficient if there are delivered to or received by

the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series the following particulars:—

(a) the total amount secured by the whole series; and

(b) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

(c) a general description of the property charged; and

(d) the names of the trustees, if any, for the debenture holders;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6) The company shall cause a copy of every certificate of registration given under this section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

(See *Yolland Husson and Birkett*, (1908) 1 Ch. 152, and *Canard Steamship Co.*, (1908) 2 Ch. 564.)

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7) It shall be the duty of the company to send to the registrar for registration the particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(8) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(9) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

With reference to this section the following observations occur—

(1) A mortgage or charge is "created" when the deed or agreement is executed or entered into, even though the advance is made subsequently. *Watson & Co.* v. *Spiral Globe Co.*, (1902) 2 Ch. 209; *Re Harrogate Estates, Ltd.*, (1903) 1 Ch. 498; *Appleyard* v. *New London and Suburban Co.*, (1908) 1 Ch. 621; *Esberger & Son, Ltd.* v. *Capital and Counties Bank*, (1913) 2 Ch. 366.

(2) Paragraphs (d) and (e) of sub-sect. (1) are new: they were first introduced in sect. 10 of the Act of 1907.

(3) The word "charge" includes an equitable charge whether created or evidenced by deed or instrument in writing or created by oral communication, express or implied, *e.g.*, by deposit of title deeds or by an agreement to deposit.

(4) The mortgage or charge is void as against the liquidator and creditors only. It is good as against the company, and the company may give a subsequent valid mortgage to secure the same debt. But if a subsequent creditor, even with notice of the first charge, takes a registered charge before the first charge is registered, he obtains priority. *Re Monolithic Co.*, (1915) 1 Ch. 643.

(5) "Book debts" are debts entered, or commonly entered, in books. See *Shipley* v. *Marshall*, 14 C. B. N. S. 566; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Dawson* v. *Isle*, (1906) 1 Ch. 633; *Law Car, &c. Corporation*, W. N. (1911) 91. Any assignment of a book debt is within the section if it is intended to be a security for a debt. *Saunder-*

son & Co. v. *Clark* (1912), 29 T. L. R. 579; and see *Ladenburg & Co.* v. *Goodwin, Ferreira & Co.*, (1912) 3 K. B. 275.

(6) As to sub-sect. (3), this provides for an alternative mode of registration (*Harrogate Estates Co.*, (1903) 1 Ch. 498), and it is applicable both to debentures and debenture stock. *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564.

(7) A mortgage of substituted property made pursuant to the provisions of an unregistered trust deed requires registration (*Cornbrook* v. *Law Debenture Corporation*, (1904) 1 Ch. 103), unless the company is not a party (*Bristol United Breweries* v. *Abbott*, (1908) 1 Ch. 279), or unless the debentures or debenture stock have been registered under sub-sect. (3). See *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564. As to a separate charge on profits, securing a bonus to debenture holders, see *Hoare* v. *British Columbia Association*, (1912) W. N. 235; 107 L. T. 602.

The section only applies to the specified classes of mortgages and charges. A simple mortgage or charge not for the purpose of securing an issue of debentures or debenture stock, and not within paragraphs (b), (c), (d) or (e) of sub-sect. 1, is not within the section: *e.g.*, a mortgage or charge on a concession, patent, or copyright, or a mortgage by deposit of dock warrants, bills of exchange, or other mercantile documents.

As to what is a bill of sale, see s. 4 of the Bills of Sale Act, 1878. A pledge of goods accompanied by delivery of possession to the pledgee is not a bill of sale (*Ex parte Hubbard*, (1896) 17 Q. B. D. 690); nor is an oral agreement giving security followed by possession (*Charlesworth* v. *Mills*, 1892) A. C. 231: *Ramsay* v. *Margrett*, (1894) 2 Q. B. 18); nor *prima facie* are inventories of goods with receipt attached (*Ramsay* v. *Margrett supra*; nor sale and hiring agreements. *North Central Waggon Co.* v. *Manchester Rail Co.*, 13 App. Cas. 554. See further Company Precedents, pp. 616 *et seq.*

As to paragraph (f), "floating [illegible] see *infra*, pp. 308 *et seq.*

If the security is under the [illegible] called, the obligation of the company to repay the money lent [illegible] as an unsecured liability, and matures at once. See sect. 93 (1).

The section does not apply to a charge given for the purpose of obtaining any loan guaranted by the Government in pursuance of any war obligation. 5 Geo. V. c. 11.

By sect. 96 of the Act provision is made for rectification of the register by a Judge of the High Court being satisfied that the omission to register a mortgage or charge within the time required by the Act, or that the omission or misstatement or particular with respect to such mortgage or charge "was accidental or due to inad-

vertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company or that, on other grounds, it is just and equitable to grant relief" may extend the time for registration on such terms and conditions as seem to the judge just and expedient. The words here, "accidental or due to inadvertence," have a very wide meaning. *Re Jackson & Co.*, (1899) 1 Ch. 348. In exercising this discretionary power of granting relief on terms, it has become the practice to insert in the order the following words:—"This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *Re Joplin Brewery Co.* (1902) 1 Ch. 79; *Re Spiral Globe Co.*, (1902) 1 Ch. 396; *Re Abrahams & Sons*, (1902) 1 Ch. 695; *Ehrmann Bros.*, (1906) 2 Ch. 697; *Cardiff Workmen's Cottage Co.*, (1906) 2 Ch. 627.

The words probably go further than they should. The proviso, as the Court of Appeal explained in *Re Ehrmann Bros., Ltd. (supra)*, is merely designed to protect rights acquired against the property of the company in the interval between the expiration of the twenty-one days for registering and the extended time allowed by the order. It does not protect the existing unsecured creditors *who have not obtained any security or charge upon the property subject to the debentures.* See *I. C. Johnson & Co.*, (1902) 2 Ch. 101 (C. A.), and pp. 199—201 of Part III. of Company Precedents. It does protect a secured creditor whose security is registered between the expiration of the twenty-one days and the extended time allowed by the order, even though he has notice of the prior unregistered charge. *Re Monolithic Co.*, 1915, 1 Ch. 643. Where an order extending the time is made, and these words appear in it, and before actual registration a winding-up commences, the mortgage or charge, if subsequently registered, is not effective as against the general body of the creditors. So held by Buckley, J., in *Anglo-Continental Carpet Co.*, (1903) 1 Ch. 914.

An order for extension will not be made after a winding-up commences. *Re Abrahams & Sons, supra.*

Sometimes, in cases where an extension of time is not obtainable, the company, in lieu thereof, may call in and cancel the debentures and issue new debentures, to be registered in due course. *Bowen* v. *Defries & Co.*, (1904) 1 Ch. 37.

Sect. 97 provides for entering satisfaction, sect. 98 for an index to the register, and sect. 99 for penalties for default in complying with the Act as to registration.

The Court has power to extend the time even where the default was made before 1st January, 1909. Sect. 38 of the Interpretation Act, 1889; *Herts and Essex Waterworks Co.*, (1909) W. N. 48; *Re Lush & Co.*, (1913) W. N. 39; 108 L. T. 450.

CHAPTER XXXII.

DEBENTURES AND DEBENTURE STOCK.

Meaning of "Debenture."

What is a debenture?

The term debenture is not a technical term. "I cannot find," said Chitty, J., in *Levy* v. *Abercorris Co.* (1888, 37 Ch. D. 264, "any precise legal definition of the term. It is not either in law or commerce a strictly technical term, or what is called a term of art." It is, however, a word which has been in use for many centuries, and is mentioned in the Parliament Rolls as early as the time of Henry V., 1414. The term is used also in the Paston Letters, 1455, and in 12 & 13 Edward IV., 1472, provision was made in regard to debentures under the seal of the staple of Calais. From thenceforth, the term appears from time to time in the statutes. It is a very wide term, but it is now generally used to signify a security for money, called on the face of it a debenture, and providing for the payment of a specified sum—say 100*l.*—at a fixed date, with interest meantime half-yearly. It usually gives a charge by way of security, and in most cases is expressed to be one of a series of like debentures. But the term, as used in common parlance, is of an extremely elastic character: for (a) it is sometimes used, both by lawyers and commercial men, to describe an instrument which is not called, on the face of it, a debenture, *e.g.*, a railway mortgage or bond. See *Gardner* v. *London, Chatham and Dover Rail.*, 2 Ch. 201. (b) It is used of an instrument which is not one of a series. *Levy* v. *Abercorris Co., supra.* "You may have a single debenture issued to one man." *Robson* v. *Smith*, (1895) 2 Ch. 118. (c) It is not confined to instruments issued by companies; clubs sometimes issue debentures, and, occasionally, individuals, *e.g.*, the Tichborne Bonds. (d) It is not the less a debenture because it is not under seal. *British India, &c. Co.* v. *Commissioners*, 7 Q. B. D. 165, in which case a debenture was merely signed by two directors. (e) Or because it does not provide for payment at any fixed date, but only in the event of winding-up, or in some contingency. (f) Or because there is no personal liability on the company to pay, but the security is to be as against the property of the company only. (g) Or because it does not contain any charge. The term

debenture is used in several Acts of Parliament in addition to the Companies Acts, *e.g.*, the Stamp Acts, 1870 and 1891, and the Bills of Sale Act, 1882.

Distinguished from "Debenture Stock."

What is debenture stock?

Debenture stock is a much more modern term than debenture. In substance the holders of debenture stock and the holders of debentures generally stand very much in the same position. The term debenture stock, in common parlance, is used to describe a debt owing by the company, payable at a fixed date, or in the event of winding-up, or some other contingency, and in the meantime carrying interest at a specified rate, and secured usually by a trust deed on the property of the company. The debt is generally made payable to trustees, and the beneficial interest thereof is represented by certificates held by the debenture stock holders. Sect. 92 makes provision for the prompt issue of the certificates. The difference between debentures and debenture stock—apart from the fractional sub-divisibility of the latter—is, that "a debenture" is the description of an instrument, whereas "debenture stock" is the description of a debt or sum secured by an instrument. It is, to use Lord Lindley's words, "borrowed capital consolidated into one mass for the sake of convenience."

Classes of Debentures.

Classes of debentures.

The principal kinds of debentures are the following:—

I. Debentures payable to registered holder.
II. Debentures payable to bearer simply.
III. Debentures payable to registered holder, but with interest coupons payable to bearer.
IV. Debentures payable to bearer, but with power for bearer to have them placed on a register and to have them at any time withdrawn therefrom.

In each case the debentures are usually secured by some mortgage or charge on property of the company, whether by trust deed, or in the debentures themselves, or in both ways.

A debenture, though one document, consists usually of two parts, (1) the body of the instrument containing the bond or covenant and charge, and (2) the indorsed conditions.

Class I.—Debentures to Registered Holder.

I. Debentures to registered holder.

The object of this form of debeuture is to meet the requirements of the money market, and to facilitate and simplify dealings. It may be convenient to go through the various provisions of the usual forms, and explain briefly their object and operation.

Form of.

The —— Company, Limited.

Issue of 100,000*l. of debentures of* 100*l. each, carrying interest at* 4 *per cent. per annum.*

No. ——. DEBENTURE. 100*l.*

Payment of principal.

1. *The —— Company, Limited (hereinafter called "the company"), will, on the —— day of ——, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to A. B. of —— or other the registered holder for the time being hereof, the sum of* [100]*l.*

The registered debenture has many advantages :—

1. The title of the debenture holder is recorded in the books of the company, and is consequently not exposed to the risks of loss or damage incident to a debenture to bearer passing from hand to hand.

2. The registered holder is the only person recognized by the company as entitled to the debentures. This simplifies dealings with the security.

3. The compauy having the names and addresses of the registered holders can more easily communicate with them where it wishes to do so for purposes of redemption, compromise, or reconstruction.

4. The registered debenture is a species of security well understood on Stock Exchanges and favoured by investors.

Consideration.

It will be observed that clause 1 does not express the consideration. In the case of a deed there is no need to do so; but if the instrument be under hand only, then the consideration should be stated, and even in the case of a debenture by deed, there is, perhaps, some advantage in showing, on the face of it, that it was, in fact, issued for valuable consideration. In such a case, where it is desired to be more explicit, the clause can begin with the words "For valuable consideration already received," or, if desired, "In consideratiou of the sum of £—— already received."

"Will pay."

The clause uses the term "will pay." This is a perfectly simple, intelligible and effective expression, and it is more suitable for an ordinary business document than the expression "covenants." But there is no magic in the term, and occasionally the words "undertakes," "promises," "covenants," or "binds itself," are substituted. See *Ex parte City Bank* (1867), L. R. 3 Ch. 758; *Norton* v. *Florence Land Co.* (1877), 7 Ch. D. 332.

Time for payment.

A debenture usually fixes a date for payment as above, *e.g.*, at the end of five, ten, twenty, or thirty years; but sometimes it is framed as a perpetual debenture, and in that case the clause runs "will, as and when the principal moneys hereby secured become payable in accordance, &c.," the intention being that the principal shall only become payable in the events specified in the conditions 8 and 9, *infra*, pp. 293, 294.

Occasionally, where there is a temporary loan on debentures, they are made payable on demand, and then the clause runs "will, on demand in writing," or "will, at the expiration of seven days after demand in writing, &c." Such debentures are often issued to a company's bankers as security for an overdraft.

Why payment to registered holder?

The object of making the debenture payable to the registered holder is to simplify the title, and enable the company to look to some specified person as the holder to whom it can make payments, and whose receipt will be a sufficient discharge to the company.

In the absence of provisions as to register and ancillary clauses, the company would have to take notice of any number of assignments, charges, and claims that might be brought to its notice.

Payment of interest.

2. *The company will, during the continuance of this security, pay to such registered holder interest thereon at the rate of —— per cent. per annum by half-yearly payments on the —— day of —— and —— day of —— in each year, the first of such half-yearly payments to be made on the —— day of —— next.*

Currency of interest.

A debenture almost always provides for payment of interest as in clause 2; but sometimes the interest is made payable quarterly. Very commonly the expression used is "will in the meantime pay," but there is some ambiguity in this expression. It may mean "until the date fixed for payment" or "until the date of actual payment." The latter construction would seem to accord best with the intention; and, as the words are ambiguous, should be preferred. Should, however, the former construction prevail, subsequent interest would only be recoverable by way of damages. *Goodchap* v. *Roberts* (1880), 14 Ch. D. 49; *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27; *Gordillo* v. *Weguelin*, 5 C. D. 303.

How judgment affects interest.

Moreover, if the holder should obtain judgment on the debenture, the interest would thenceforth cease to be payable under the debenture, for the contract would merge in the judgment, which carries interest at 4 per cent. only. *Re European, &c. Co.* (1876), 4 Ch. D. 33; *Ex parte Fewings* (1884), 25 Ch. D. 338. By using, however, the words "during the continuance of this security" both these difficulties are avoided. Sometimes interest is made payable only out of profits. See Company Precedents, Part III., p. 309. *Heslop* v. *Paraguay Central*, 54 S. J. 234.

See *Popple* v. *Sylvester* (1883), 22 C. D. 98, and the observations thereon in the last-mentioned case.

As to payment by uncashed cheque, see *Defries & Sons*, (1909) 2 Ch. 423.

3. *The company hereby charges with such payments its undertaking, and all its property, present and future* [*including its uncalled capital*]. **Charge.**

A mortgage debenture generally contains a charge as in clause 3. Sometimes the charge, however, is effected by a trust deed (see pp. 313, 314); but even where there is a trust deed, a general charge as above is very commonly inserted in the debenture. The word "charge" creates a good equitable mortgage; but equity is not particular as to the terms used, and the word "bind" or "mortgage" is equally effective. So, too, if it is stated that the property shall stand as a security, or shall be a security for payment, &c., that is sufficient. All that equity requires is a sufficient indication of the intention to charge. *In re Strand Music Hall Co.*, 3 D. J. & S. 147; *In re New Durham Salt Co.* (1891), 2 Meg. C. R. 360. **Charge in trust deed.**

As to the operation of a charge on the "undertaking," see *infra*, p. 308 *et seq.* A general charge as given in clause 3 is, by the Courts, treated as a floating security, as to which see *infra*, pp. 308 *et seq.* **Floating security.**

Sometimes, instead of a charge in general words as above, the debenture charges some specific property, *e.g.*, the company's brewery at —— or the company's patents, &c. Or the charge may be on some portion only of the property, *e.g.*, the book debts, present and future, of the company. **Charge on specific property.**

As to the words "including the uncalled capital." These words are very commonly inserted where the company has power to mortgage its uncalled capital. See *supra*, p. 270. The words "property, both present and future," do not cover the uncalled capital. *Johnson* v. *Russian Spratts*, (1898) 2 Ch. 149. **Uncalled capital.**

The inclusion of uncalled capital adds additional security, and, at the same time, does not prevent the company from calling up and dealing with its capital as and when required.

4. *This debenture is issued subject to, and with the benefit of, the conditions indorsed hereon, which are to be deemed part of it.* **Reference to indorsed conditions.**

The effect of these words in clause 4 is to import the indorsed conditions into the contract, and make them part of it. The rule "*verba relata inesse videntur*" applies. See Broom's Legal Maxims. **Are part of debenture.**

Sometimes the above clause is omitted and the conditions are set out on the face of the debenture. This is an alteration merely in form, not in substance. As to the conditions themselves, see *infra*, p. 288.

Sealing.

Given under the common seal of the company this —— day of ——.

The common seal of the above-named company was affixed hereto in the presence of ——. (L.S.)

Not always necessary.

A debenture is almost always under seal, but it need not be so; it may be under hand, and occasionally is. See *British India, &c. Co.* v. *Commissioners*, 7 Q. B. D. 165, where the debentures were merely signed by two directors on behalf of the company.

If the articles contain any special provisions as to affixing the seal, they must, of course, be observed. See *supra*, p. 257.

Indorsed Conditions.

On the back a series of conditions are indorsed as follows:—

The conditions within referred to.

"*Pari passu*" clause.

1. *This debenture is one of a series of* 1,000 *debentures, each for securing the principal sum of* 100*l. issued, or about to be issued, by the company. The debentures of the said series are all to rank pari passu in point of charge without any preference or priority one over another, and such charge, save as regards the hereditaments comprised in the indenture below mentioned, is to be a floating security* [*but so that the company is not to be at liberty to create any mortgage or charge on its freehold and leasehold land in priority to the said debentures*].

Where the debenture is one of a series, the first condition usually gives particulars as to the series, as above.

Condition 1 used commonly to be framed as above, but it proved to be open to this objection, that after paying off a debenture of the series the company could not issue in its place another debenture to rank *pari passu* with the others of the same class, although the total amount outstanding was kept within the limit. *Geo. Routledge & Sons*, (1904) 2 Ch. 474; *W. Tasker & Sons*, (1905) 1 Ch. 283; *Perth Electric Tramways*, (1906) 2 Ch. 216; *Russian Petroleum Co.*, (1907) 2 Ch. 540. To a great extent this difficulty has been removed by sect. 104 of the Act of 1908, but it is still desirable to supplement the section by the condition. Accordingly the condition should run thus: "This is one of a series of debentures of the company for securing principal sums not exceeding in the aggregate at any one time ——*l.* The debentures of the said series (whether original or not) are all to rank *pari passu*," &c. Thus framed the company can pay off a debenture, and later on issue a new one in its place, although it has not "purported" to keep

the debenture paid off alive, whereas under the section the company must, in order to be able to re-issue, "purport" to keep alive. See further as to priorities, *infra*, p. 319.

The condition, however, is not in all respects as efficacious as the section, for the condition only operates as between the company and the holders of debentures of the series, whereas the section operates as between the company and the holders of the debentures of the series *and the subsequent incumbrancers*. Thus, if the company pays off a debenture without purporting to keep it alive, and afterwards, under the condition, issues a debenture as one of the series, that debenture will not obtain priority over the then subsequent incumbrancers.

Why express "*pari passu*" provision?

The object of the above *pari passu* provision is to place all the debentures on the same level as to security; so that, if the security is to be enforced, whatever is realized from it shall be divided amongst them rateably, in proportion to the amounts paid up by each debenture (*Re Smelting Corporation*, (1915) 1 Ch. 472); and if more interest is in arrear on some of the debentures than on others, in proportion to the total amount due to each debenture holder for capital and interest. *Midland Express, Ltd.*, (1914) 1 Ch. 41. But for some such provision the debentures would rank in point of security according to their dates of issue; and, accordingly, the first issued would rank as a first charge, and the next issued as a second charge, and so on. *New Clydach, &c. Co.*, 6 Eq. 514. This would be entirely destructive of the marketable character of the security. Where there is a *pari passu* clause, a debenture holder, who seeks to enforce the security, must sue on behalf of himself and the other debenture holders. The presence of a *pari passu* clause does not, however, prevent a debenture holder, whose debt is due, from getting judgment and obtaining payment from the company if he can, and so, too, if, without judgment, he can obtain payment from the company, he cannot be called on to hand back what he has received for the benefit of the other debenture holders.

Effect as to set off.

[Where a holder of debentures of a series, containing a *pari passu* clause, owes money to the company, he cannot, on a distribution of the proceeds of sale of the company's assets, set off his debt against the amount due to him on his debentures. The principle to be applied is that where a person entitled to participate in a fund (viz., the proceeds of sale) is also bound to make a contribution (viz., his debt) in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute. *Cherry* v. *Boultbee*, 4 My. & Cr. 442; *Re Brown & Gregory, Ltd.*, (1904) 1 Ch. 627; and cf. *Peruvian Rail. Co.*, (1915) 2 Ch. 144.]

Floating charge.

"Such charge is to be a floating security." See further as to this, *infra*, p. 308. It is, and has been for many years, usual to state

expressly that the charge is a "floating security," although the presence of the word "undertaking" in the debentures imports this. And even where the word "undertaking" is not used, the fact that the charge is a general charge on all the property of the company as a going concern is regarded by the Court as a sufficient indication of intention that the charge is to be a floating security merely; for, otherwise, the business of the company would be paralysed. *Re Florence Land Co.* (1878), 10 Ch. D. 530; *Re Colonial Trusts* (1880), 15 Ch. D. 473.

Effect of, as to later specific charges.

In the above form the floating character of the charge is largely qualified; for one of the most important features of such a charge is that it leaves the company at liberty to create specific mortgages or charges ranking in priority thereto. The condition, as above framed, restricts this power. Occasionally the prohibition is not confined to the freehold and leasehold land, but is general. Such a general prohibition, however, is often found extremely inconvenient.

Later legal mortgage.

The prohibition, though good, is not absolutely protective; for, if the company disregarding it creates a legal mortgage or charge on the property in favour of a person who takes for value without notice of the character of the debenture holders' charge, such person, in accordance with the ordinary rules, obtains priority by virtue of the legal estate. See *English and Scottish, &c. Trust* v. *Brunton*, (1892) 2 Q. B. (C. A.) 700. And it has been held that an equitable mortgagee who obtains the title deeds and takes without notice of the debentures obtains priority. *Re Castell & Brown, Limited.* (1898) 1 Ch. 315. See also, as to a solicitor's lien, *Brunton* v. *Electrical Engineering Co.*, (1892) 1 Ch. 434. Where the clause expressly allows the company to mortgage its property, this does not authorise the company to create a further floating charge *pari passu* with the existing charge. *Re Benjamin Cope & Sons*, (1914) 1 Ch. 800.

Register to be kept.

> 2. *A register of the debentures will be kept at the company's registered office wherein there will be entered the names, addresses and descriptions of the registered holders and particulars of the debentures held by them respectively, and such register will at all reasonable times during business hours be open to the inspection of the registered holder hereof, and his legal personal representatives and any person authorized in writing by him or them.*

Shows title

The provision as to keeping a register is to simplify the title, and afford both to the company and the debenture holder, and those who may deal with the latter, a simple mode of ascertaining who is for the time being the proprietor of the debenture. Coupled with the next condition it has greatly facilitated dealings with debentures.

3. [*Save as in these conditions provided*] *the registered holder, or his legal personal representatives, will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of any trust, or, save as herein provided, and except as by some Court of competent jurisdiction ordered, to recognize any trust or equity affecting the title to the debentures or the moneys thereby secured.* Registered holder only recognized.

The object of condition 3 is to fortify the title of the registered holder by making the company agree to recognize him exclusively. There is nothing illegal in such a provision; the latter part of the condition is intended to relieve the company, as far as is practicable, from the obligation to take notice of trusts or equities. Such a provision cannot, of course, relieve the company from its duty to recognize an order of the Court (*Binney* v. *Ince Hall, &c. Co.*, 35 L. J. Ch. 363); but where there is such a condition, it is apprehended that a mere notice of an equity may be disregarded; for one who claims under a debenture must be bound by the terms of the contract, and cannot be allowed both to approbate and reprobate. See *Société Générale* v. *Walker*, 11 App. Cas. 20; *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 Ch. D. 302; *De Mattos* v. *Gibson*, 4 De G. & J. 276; *Werderman* v. *Société Générale d'Electricité* (1881), 19 Ch. D. 246; *Borland's Trustee* v. *Steel Brothers & Co.*, (1901) 1 Ch. 279; and *supra*, p. 156. In *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, there was no clause excluding the recognition of equities. How such clause operates.

4. *Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representatives. The transfer must be delivered at the registered office of the company with a fee of 2s. 6d., and such evidence of title or identity as the company may reasonably require, and thereupon* [*if this debenture remains registered in the name of the transferor the transferee will be recognized as having become entitled to the benefit of this debenture free from any equities, set-off or cross-claims which, but for this provision, the company would be entitled to set up against the transferor or transferee, and*] *the transfer will be registered and a note of such registration will be indorsed hereon. The company shall be entitled to retain the transfer.* Transfer.

The principal object of this clause also is to simplify the title to the debenture by providing for the delivery of every instrument of transfer to the company, so that if any question as to the title arises the company will have the requisite documents in its possession. In Working of clause.

the absence of some such provision, the company would only receive a notice of the transfer which might or might not be authentic. In practice the condition is found extremely useful. The clause says nothing about a debenture holder's trustee in bankruptcy. He has power to transfer under sect. 48 of the Bankruptcy Act, 1914.

A company is bound to exercise considerable care in regard to the registration of transfers, for if it registers a forged transfer it may incur serious responsibility. See *supra*, p. 143. The company (even in liquidation) is bound by the conditions. *Farmer* v. *Goy & Co.*, (1900) 2 Ch. 149. (Cozens-Hardy, J.)

Joint holders.

5. *In the case of joint registered holders, the principal moneys and interest hereby secured shall be deemed to be owing to them on a joint account.*

Condition 5 is commonly inserted, but having regard to sect. 61 of the Conveyancing Act, 1881, it is probably needless.

Closing of register

6. *No transfer shall be registered during the seven days immediately preceding the day by this debenture fixed for payment of interest.*

Object of.

Condition 6 is inserted in order to prevent the great inconvenience that may arise if transfers come in just when the half-year's interest is being calculated. Most companies like to send out the interest on the day it becomes due, and it is practically impossible to do this if a number of transfers come in during the calculations.

Exclusion of equities.

7. *The principal moneys and interest hereby secured will be paid* [*and such moneys are to be transferable free from and*] *without regard to any equities between the company and the original or any intermediate holder hereof, or any set-off or cross-claims, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the company for the same.*

Law as to equities.

Condition 7 is one of the most important conditions in the debenture. *Primâ facie* a debenture, being a chose in action, is only assignable subject to all equities between the company and the original subscribers. *Mangles* v. *Dixon*, 3 H. L. C. 702; *Ryall* v. *Rowles* (1748), 1 Ves. 348; Judicature Act, 1873, sect. 25 (6). Thus, in *Athenæum, &c. Soc.* v. *Pooley* (1858), 3 De G. & J. 294, debentures had been issued to A. as part of the consideration for property sold by him to the company. The price was excessive, and A. had bribed the company's manager who arranged the sale. A. afterwards transferred the debentures to B., who sold in the market to C., who bought without any notice of the

circumstances relating to their issue. C subsequently sought to enforce them as against the company. Held, that though C. was a purchaser *bond fide* without notice, yet being only a purchaser of a chose in action he could stand in no better position than A., and therefore that his claim failed. "Mr. —— appears to have bought these debentures innocently, but very imprudently, in the belief, probably, that they were good securities, and without notice of anything to the contrary. Unfortunately, however, he bought what the English law calls a chose in action, and it is too clearly settled to admit of question or argument that a person buying a chose in action, which can only be put in suit in the name of the original holder, cannot in general stand in a better position than the original holder." Per Knight Bruce, L. J., at p. 298.

But this "is a rule which must yield when it appears from the nature or terms of the contract that it"—the chose in action—"must have been intended to have been assignable free from and unaffected by such equities" (per Lord Cairns, L. J., *Re Agra, &c. Bank* (1865), L. R. 2 Ch. 397); and it is now a matter of course to insert such a provision in a debenture unless the circumstances are very special; for investors long since discovered the extreme inconvenience of dealing with a security which was liable to be defeated or depreciated by the unexpected intervention of some latent equity being sprung upon them.

The efficacy of the condition is exemplified by the decision of Cozens-Hardy, J., in *Farmer* v. *Goy & Co.*, (1900) 2 Ch. 149, which may be contrasted with *Re Taunton, Delmard & Co.*, (1893) 2 Ch. 175, and *Rhodesia Goldfields, Ltd.*, (1910) 1 Ch. 239.

In the absence of the bracketed words in this condition and in condition 3 the company can set up equities against an unregistered transferee of the debenture. *Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743; *Andrews* v. *Brown and Gregory*, (1904) 2 Ch. 448. The bracketed words go far to nullify this power.

The latter part of the condition is useful as fortifying the position of the registered holder, and relieving the company from going into the question of title. Such a stipulation is in point of law free from objection. See also as to excluding equities, *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 385; *Re Natal Investment Co.*, 3 Ch. 355; also *In re Blakely Ordnance Co.* (1867), L. R. 3 Ch. 154; *Higgs* v. *Northern Assam Tea Co.* (1869), 4 Ex. 387; *In re Northern Assam Tea Co.* (1870), 10 Eq. 458; *In re South Essex Estuary Co.* (1870), 11 Eq. 157.

Notice by company to pay off.

8. *The company may at any time give notice in writing to the registered holder hereof, his executors or administrators, of its intention to pay off this debenture, and, upon the expiration of six calendar months from such notice being given, the principal moneys hereby secured shall become payable.*

This is a condition commonly inserted. Sometimes the words "after the —— day of —— next" are inserted before the words "give notice," so that the holder may h at any rate, a term of five, or ten, or sometimes twenty years' quiet enjoyment of the security; but in large numbers of cases the clause is left as it stands above.

As to the mode of giving notice, see *infra*, p. 297.

Immediate payment where default as to interest or winding-up.

9. *The principal moneys hereby secured shall immediately become payable:—*

(a) *If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company, calls in such principal moneys; or*

(b) *If an order is made or an effective resolution is passed for the winding-up of the company.*

Repayment if default in interest.

It is now usual to provide as above. As to paragraph (a), it is more satisfactory to the investor to know that if his interest gets largely into arrear he can call up his principal, as in the case of an ordinary mortgage, and such a provision is valid. It is not regarded as a penalty against which equity can relieve. *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1; *Wallingford* v. *Mutual Society* (1879), 5 App. Cas. 685.

Repayment on winding-up.

As to paragraph (b), it was long since settled that where a winding-up ensues, the debenture holder is entitled to enforce his charge and obtain immediate payment, even though his debenture has not matured. *Hodson* v. *Tea Co.* (1880), 14 Ch. D. 859; *Wallace* v *Universal, &c. Co.*, (1894) 2 Ch. 547 (C. A.). Accordingly, the clause does not prejudice the position of the company, while, at the same time, it serves to make clear the position of the debenture holder—a position which otherwise would have to be ascertained from a study of the authorities. A clause such as 9 above enables the company to insist on paying off debenture holders in the event of the winding-up of the company. *Consolidated Goldfields* v. *Simmer and Jack East*, (1913) W. N. 41; 108 L. T. 488. On the happening of any other event in clause 9 the company cannot pay off a debenture holder and require him to release his security without satisfying him that all the debentures are paid off. *Re General Motor Cab Co.*, 56 S. J. 573, as explained in *Consolidated Goldfields* v. *Simmer and Jack East* (above).

Warrant for interest.

10. *In respect of each half-year's interest on this debenture a warrant on the compa[illegible] payable to the order of the registered holder hereof [illegible] e case of joint holders, to the order of that one whose n[illegible] stands first in the register as one*

of such joint holders, will be sent by post to the registered address of such registered holder, and the company shall not be responsible for any loss in transmission. The payment of the warrant, if purporting to be duly indorsed, shall be a good discharge to the company.

Until payment of the warrant, the debt is not ... *Re Defries & Son*, (1909) 2 Ch. 423.

10A. *At any time after the principal ... hereby secured ... wer to become payable, or after the security const... y the indenture ... point below mentioned becomes enforceable, ... tered holder of this debenture may from time to time, ... the consent in writing of the holders of the majority in ... the outstanding debentures of the same series, appoint by ... any person or persons approved by the trustees of the same indenture to be a receiver or receivers of the property charged by the ... (and not comprised in such indenture), and may ... the like consent remove any such receiver, and every such ... intment or removal shall be as effective as if all the holders of ... entures of the same issue had concurred there..., and a receiver so appointed shall have power* (1) *to take possession of ... and get in the property charged by the ... entures, ... that purpose to take all proceedings in ... ame of the ... y or otherwise as may seem expedient;* (2) *to carry on ... concur in carrying on the business of the company, and for ... se to raise money on the premises charged in priority to ... entures or otherwise;* (3) *to sell or concur in selling ... the property charged by the debentures after giving to the ... pany at least seven days' notice of his intention to sell, ... to carry any such sale into effect by conveying in the name and on behalf of the company or otherwise;* (4) *to make any arrangement or compromise which he or they shall think expedient in the interest of the debenture holders, and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of clause 8 of sect. 24 of the Conveyancing Act, 1881, or such of them as may seem proper and for the purposes aforesaid, be applied in or towards satisfaction* pari passu *of the debentures, and the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sects. 19 and 24 of the said Act, which provisions so varied and extended shall be regarded as incorporated herein.*

Receiver clause.

Such a provision as above is effective. *Henry Pound, Son and Hutchings* (1882), 42 Ch. D. 402 (C. A.). The power may be vested in a third party, but in such case is in the nature of a trust. *Maskelyne British Typewriter*, (1898) 1 Ch. 133. In the absence of such a clause, the provisions of the Conveyancing Act, 1881, as to the appointment of receivers, do not apply, at any rate to a debenture which is one of a series, charging the undertaking of the company. See *Blaker* v. *Herts, &c. Waterworks Co.* (1889), 41 Ch. D. 399. [One of the most important objects usually intended to be obtained by the incorporation of these provisions is to make the receiver the agent of the company, so that the debenture holders shall not be liable for his default. But in *Deyes* v. *Wood*, (1911) 1 K. B. 806, the receiver was held to be the agent of the debenture holders in spite of a clause similar to clause 10A above. This case may be capable of explanation on the ground that the numbers of the sections to be incorporated were omitted by mistake; but the judgments were not apparently based on this omission, and throw doubt on the effectiveness of the clause. In future the clause should expressly provide (if so desired) that the receiver shall be the agent of the company. See also *Bissell* v. *Ariel Motors*, 27 T. L. R. 73.

Where there is such an express provision the receiver ceases to be the agent of the company after the commencement of a winding-up; but he does not thereupon become the agent of the debenture holder. *Gosling* v. *Gaskell*, (1897) A. C. 595.]

An important advantage gained by the insertion of such a clause is as to the appointment of a receiver in winding-up. See *In re Henry Pound, Son and Hutchings*, *supra*.

Trust deed referred to

11. *The holders of the debentures of this 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 ——, and made between the company of the one part and —— and —— of the other part, whereby certain property was vested in trustees for securing the payment of the principal moneys and interest payable in respect of the said debentures.*

Where there is not to be any trust deed, the above clause is, of course, omitted.

The insertion of words as above imports into the debenture the provisions of the trust deed, and renders the security subject to the obligations of such trust deed, and entitled to the benefit of it. See p. 313, *infra*.

As to the advantages of a trust deed, see Company Precedents, Pt. III. p. 93.

12. *The principal moneys and interest hereby secured will be paid at the —— Bank, Limited, No. —, —— Street, London, or at the registered office of the company.* Place of payment.

It is usual to insert a clause as above. In the absence of some such provision, the ordinary rule prevails, and the company is bound to search out its creditor and pay him. Where a clause is framed in the alternative as above, it rests with the debenture holder to elect at which place payment shall be made, and he must communicate his election to the company. *Saunderson* v. *Bowes*, 14 East, 508; *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357.

13. *A notice may be served by the company upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it is posted, 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.* Service of notices on holder.

It is a matter of great convenience to the company to have some special mode like this of serving notice provided by the debenture. In the absence of such a provision, it is for the company, if it desires to give notice, *e.g.*, for the purpose of redemption, to find out the address of the debenture holder, and to take care that notice is effectually served on him. The above clauses relieve the company from this difficulty, or, at any rate, simplify the position very much.

Class II.—Debentures to Bearer.

In framing a debenture to bearer the object is to endow it with the characteristics of a negotiable instrument, and in particular (a) to make it transferable by delivery; (b) to make it transferable free from equities; (c) to render the delivery of the debenture and any interest coupon a good discharge to the company; (d) to enable the bearer to sue the company in his own name, if necessary; and (e) to insure a good title to any person who acquires the debenture *bonâ fide* for valuable consideration, notwithstanding any defect in the title of the person from whom he acquires it. II. Debentures to bearer.

The following are the clauses usually inserted. As to the negotiability of such instruments, see *infra*, p. 392.

Form of.

DEBENTURE TO BEARER.

The —— Company, Limited.

Issue of —— debentures of £—— each carrying interest at the rate of —— per cent. per annum.

No. ——. DEBENTURE. £——.

Payment of principal.

1. *The —— Company, Limited (hereinafter called "the company"), will, on the —— day of ——, or on such earlier day as the principal moneys hereby secured shall become payable in accordance with the conditions indorsed hereon, pay to the Bearer of this debenture on presentation of the debenture the sum of £——.*

Negotiability. In making the instrument payable to bearer the object is to make the security negotiable by the law merchant (see p. 302, *infra*), or, if not, then as far as practicable by contract, or estoppel. There is no objection in point of law to making the instrument payable to bearer without the production of any assignment. Per Rolt, L. J., *In re Blakely Ordnance Co.* (1868), L. R. 3 Ch. 159; *In re Natal Investment Co.* (1868), L. R. 3 Ch. 355.

Payment of interest.

2. *The company will, during the continuance of the security, pay interest thereon at the rate of —— per cent. per annum, by equal half-yearly payments on every —— day of —— and —— day of —— in accordance with the coupons annexed hereto.*

Coupons. In the case of a debenture to bearer it is necessary to provide for payment of interest in accordance with coupons annexed, for otherwise it would be necessary to insist on production of the debenture for payment of interest, and make some indorsement thereon of the payment. Where the payment is not to be made till a distant date, or the debenture is what is known as a perpetual one, it is usual in the first instance to issue with the debenture only a limited number of coupons providing for the payment of interest, say, for 10 or 20 years. In such case provision is made for the issue of further coupons when the original coupons are exhausted.

3. *The company hereby charges* [*as above*, p. 287].

Charge. As to the validity of a general charge as above, see p. 308. This clause is usually framed on the same lines as clause 3 in Form, *supra*, p. 291.

4. *This debenture is issued subject to, and with the benefit of, the conditions indorsed hereon, which are to be deemed part of it.* Reference to indorsed conditions.

See *supra*, p. 287.

Given under the common seal of the company this —— day of ——.

The form of coupon is as follows:—

The —— Company, Limited. Form of coupon.

Debenture No. ——. *Interest Coupon No. ——.*

For —— pounds. Half-year's interest due on the —— day of —— and payable at the —— Bank or at the registered office of the company (less income tax). ——l.

—— Secretary.

Indorsed Conditions.

The conditions within referred to:—

1. *This debenture is one of a series of, &c.* [*as above*, p. 288]. *Pari passu* clause.

2. *Annexed to this debenture are —— coupons, each providing for the payment of a half-year's interest. Such interest will be payable only on presentation and delivery of the coupon referring thereto.* Coupons.

There is no doubt as to the validity of such a stipulation as that in condition 2. *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 389; *Re Natal Investment Co.* (1868), L. R. 3 Ch. 355.

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 holder hereof.* Exclusion of equities.

As debentures to bearer are now negotiable by the law merchant, condition 3 is implied and might be omitted. See *infra*, pp. 302 *et seq.*

4. *If the principal moneys hereby secured shall become payable before the —— day of —— the person presenting this debenture for payment must surrender therewith the coupons representing subsequent interest, the company nevertheless paying the interest for the fraction of the current half-year.* Surrender of outstanding coupons on redemption of debentures.

The provisions of condition 4 probably only express what would otherwise be implied, but the condition is inserted in order to make the contract perfectly clear. It is obvious that a company could not allow future coupons to remain outstanding on the ground that they were to be treated as waste-paper. If presented, as they might be, and refused payment, it would damage the credit of the company.

Delivery of coupon good discharge.

5. *The delivery to the company of this debenture and of each of the said coupons shall be a good discharge for the principal moneys and interest therein respectively specified, and the company shall not be bound to inquire into the title of the respective bearers of such instruments or to take notice of any trust affecting such moneys or be affected by express notice of the right, title, or claim of any other person to such moneys or instruments.*

Condition 5 is—or was—beneficial both to the company and the debenture holders. It simplified and protected the position of both. That it is effective is unquestionable. *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 385; *Re Natal Investment Co.* (1868), L. R. 3 Ch. 355. Now, however, that the negotiability of debentures to bearer is established (*infra*, p. 302) the condition might safely be dispensed with.

Notice by advertisement to pay off.

6. *The company may at any time after the —— day of —— give notice by advertisement in the "Times" and one other London daily newspaper of its intention to pay off this debenture, and upon the expiration of six calendar months from such notice being given, the principal moneys hereby secured shall become payable.*

See *supra*, pp. 293, 294.

Immediate payment on default as to interest or winding-up

7. *The principal moneys hereby secured shall immediately become payable—*

(a) *If the company makes default, &c.* [as at p. 294, substituting "bearer" for "holder"]; or

(b) *If an order is made or an effective resolution is passed for the winding-up of the company.*

Debenture to be treated as negotiable.

[8. *This debenture is to be treated as negotiable, and all persons are invited by the company and the owner for the time being hereof to act accordingly.*]

The object of condition 8 was to fortify the title of the debenture holder for the time being by enabling him, if necessary, to establish direct privity of contract with the company, and to endow the instrument with the most important characteristic of a negotiable instrument, namely, that a person who acquires the instrument for value

obtains a good title notwithstanding any defect of title in the person from whom he takes it. The words of invitation are in the nature of an offer held out to all the world, requesting them to act thereon; and it seems probable that any person who does act on that invitation by altering his position is entitled as against the company to rely on his having so acted as an acceptance of the offer, and as therefore constituting a direct contract by him with the company. See *Agra and Masterman's Bank* (1867), L. R. 2 Ch. 397; and *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 256. But here again the negotiability of debentures to bearer now established (*infra*, p. 302), makes the condition superfluous.

9. *The principal moneys and interest hereby secured will be paid at the —— Bank, Limited, No. —, —— Street, London, or at the registered office of the company.* Place of payment.

10. [*Reference to trust deed, if any; as at p. 296, supra.*] Trust deed referred to.

11. [*Provision that notice may be given by advertisement, and deemed to be served on the day following that on which it is advertised.*] Notice by advertisement.

Class III.—Debentures to Registered Holder with Coupons to Bearer.

These are framed on the basis of the registered debenture above set forth (pp. 285—296), but condition 2 (p. 298) of the bearer debenture is substituted for clause 10 at p. 294, and the conditions are modified so as to provide for interest coupons. Form of

Class IV.—Debenture to Bearer capable of being registered.

This form of security may be said to combine the advantages of the registered debenture and the debenture to bearer. Those investors who prefer a debenture to bearer get it, and those who—like trustees—wish to avoid the risk incidental to the possession of an instrument to bearer can safeguard themselves by registering. The drawback is the stamp duty. As debentures to bearer they are charged with a stamp duty of 10*s.* per cent. on issue.

The form adopted for this convertible debenture usually provides for payment "to the bearer, or, when registered, to the registered holder of the debenture," and the conditions empower the bearer at any time to take it in to be registered in his name, and provide that thenceforth, whilst registered, the registered holder is to be regarded Form of

as the owner, and shall alone be entitled to give receipts for the principal moneys, and to transfer; and a further provision enables the registered holder at any time to have the registration cancelled and the instrument liberated and made again "to bearer."

Negotiability of Bearer Debentures or Instruments by Mercantile Custom.

Negotiability by law merchant.

From being ordinary choses in action debentures to bearer have now, after a somewhat prolonged controversy, been admitted into the select circle of negotiable instruments by virtue of the general custom of merchants.

It is a well-established common law rule that when a general custom is proved to exist as a fact, it is adopted by the common law and becomes part of it. The negotiability of bills of exchange, of bank notes, of cheques, of circular notes, of exchequer bills, and of foreign bonds to bearer, has been established in this way; but until recently there was no judicial decision recognizing a similar negotiability in the case of debentures to bearer. The contrary was indeed held in *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374. In that case the debenture in question had been stolen, and the plaintiff derived title from the thief; he was therefore not entitled to recover unless the debenture was negotiable. It was tacitly admitted at the trial that such instruments were treated as negotiable, and it was proved that the plaintiff gave value for the debenture without notice, and the jury found a verdict in his favour. This verdict the Court, Blackburn, Bramwell, Quain, and Archbold, JJ., set aside and entered a verdict for the defendants on the ground, amongst others, that as the debenture was an English instrument made in England, it could not be rendered negotiable by custom; "for as the instruments themselves," said the Court, "are of recent introduction, it can be no part of the law merchant, that is to say, of the ancient law merchant which forms part of the law, and of which the law takes notice." Per Blackburn, J., who delivered the judgment of the Court.

Views of Blackburn, J.

Contrary view of Exchequer Chamber and House of Lords.

This view of the law was manifestly unsound, and it was not long (1875) before it was emphatically disclaimed in the Exchequer Chamber (*Goodwin* v. *Robarts*, 10 Ex. 337), the Court consisting of Cockburn, C. J., Mellor, Lush, Brett, and Lindley, JJ. In that case, the instrument under consideration was scrip to bearer for a foreign government bond. It was proved that it was by custom treated as negotiable, but it was argued, on the authority of the last-mentioned case, that, as the custom was modern, it could not have effect. The Court, however, held that the custom, though modern, *was* effective, and the scrip negotiable; and the following luminous passage from

the judgment delivered by Cockburn, C. J., deals with, and effectually disposes of, the line of argument above referred to. "Having," said the Chief Justice, "given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to, is fixed and stereotyped and incapable of being expanded and enlarged, so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law forming part of the common law and, as it were, coeval with it. But, as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it." "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao* v. *Barnett*, 12 Cl. & Fin. 787, "it becomes a part of the law merchant which courts of justice are bound to know and recognize."

This decision was affirmed by the House of Lords (1 App. Cas. 476), partly on the ground that negotiability was established, and partly on the ground of estoppel.

The principles laid down by Cockburn, C. J., are so obviously sound that they have never since been questioned. No doubt the instrument with which the learned judge was dealing was not an English instrument. It was issued and stood in the place of a foreign bond, but it would be strange logic if the law merchant were competent from time to time to add foreign instruments to the list of negotiable instruments, and yet not competent to add to the list English instruments made in England, especially as the negotiability of foreign instruments depends entirely on the mercantile custom *here*, not on any foreign law or custom. *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515. Upon what ground is such an irrational distinction to be supported, and the growth of the law merchant to be

Power to add further English instru-

ments to list of negotiable instruments.

suddenly arrested? and why should it be held that the law merchant, which for centuries past has been competent to render English instruments, bills of exchange, bank notes, cheques, exchequer bills, &c. negotiable, is no longer operative? As Cockburn, C. J., said in the case referred to: "Why is it to be said that a new usage, which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage on a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?" There has been no such enactment, and there is no answer to this question; and this being the case, there can, it is submitted, be no doubt that the law merchant, as part of the common law, is at liberty now, no less than in the past, to enrich itself by impressing with the qualities of negotiability, where the convenience of commerce requires it, not only foreign instruments but also English instruments. The decision in *Rumball* v. *Metropolitan Bank* (1876), 2 Q. B. D. 194, is a clear authority that the list of English negotiable instruments is not closed. Nevertheless it was not until August, 1898, that the High Court had an opportunity of reconsidering the question whether debentures to bearer of English companies are or are not negotiable by the law merchant.

The question arose in *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; the instruments in that case being debentures to bearer issued by an English company—the Beira Junction Railway Company—in England. The debentures in question had been fraudulently taken from the plaintiff company and pledged with the defendant bank, which took them for value, in good faith, without notice. Evidence was given that by the custom of merchants in England, similar debentures to bearer were, and for some twenty years and upwards had been, dealt with as negotiable instruments; and it was held on this evidence by Kennedy, J., that the custom was efficacious; that the debentures, notwithstanding their being modern English instruments, were negotiable and, accordingly, that the plaintiff's claim failed.

"It appears to me," said the learned judge, "that upon the vital question of the effect of modern mercantile usage, such as I think has been sufficiently proved in the present case, it is impossible to treat the reasoning of the Court of Queen's Bench in *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374, and the reasoning of the Exchequer Chamber in *Goodwin* v. *Robarts*, L. R. 10 Ex. 337; 1 App. Cas. 476, as capable of reconciliation. I read the judgment of the Exchequer Chamber in the later case as plainly disapproving of the reasoning of the judgment in the earlier case. It cannot, I think, be maintained

that the judgment in *Goodwin* v. *Robarts* upon the effect of modern mercantile usage was unnecessary to the decision, nor, I think, can it be maintained that the two judgments are capable of reconciliation on the ground that the instrument in question in the earlier case was an English instrument, and the instrument in question in the later case was, though issued by a London agent, to all intents and purposes the scrip of a foreign government. In the first place, not only is there no hint in the judgment of the Exchequer Chamber, so far as it deals with the effect of modern mercantile usage, of an intention to confine it to the case of the scrip issued by a foreign government, or to exclude from the operative effect of modern mercantile usage an English instrument, but the Court of Exchequer Chamber prefaces this portion of the judgment by saying 'We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract.' In the second place, it seems to me impossible to suppose that if *Crouch* v. *Crédit Foncier of England* was thought by the Exchequer Chamber to be still outstanding and capable of support on so clear and definite a ground as this would be, their judgment would (as the only ground of support for the decision in that case) have expressly stated that it might well be supported on the ground that in that case there was substantially no proof whatever of general usage. . . . Lastly, in the case of *Rumball* v. *Metropolitan Bank*, a Divisional Court of the Queen's Bench Division in the year 1877, treated *Goodwin* v. *Robarts* as decisive of an action in which a similar question arose upon an English instrument. The Court, it may be noted, consisted of Cockburn, C. J., and Mellor, J., the former being the judge who had delivered the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*, and the other one of the judges who took part in the decision of that case. It is impossible to suppose that they were not fully aware of all that could possibly be held to distinguish, if anything could, the two decisions, and *Crouch* v. *Crédit Foncier of England* was cited to them in argument. But in their considered judgment they held the matter of the effect of usage in conferring negotiability upon an English instrument, although not negotiable by statute or by the ancient law merchant, as settled by the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*. It appears to me that, having regard to the decisions of the Exchequer Chamber in *Goodwin* v. *Robarts* and of the Queen's Bench Division in *Rumball* v. *Metropolitan Bank*, if I have come, as I have, to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions, and these decisions . . . . appear to me practically to overrule the decision in *Crouch* v. *Crédit Foncier of England*, and to govern this case."

P.

Thus, at last, was the sterilizing and retrograde doctrine laid down in *Crouch* v. *Crédit Foncier* disposed of, and the negotiability by the law merchant of debentures to bearer recognized and finally established. In a recent case, *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144, Bigham, J., in following the decision in *Bechuanaland Exploration Co.* v. *London Trading Bank*, *supra*, said: "In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been proved so often, and its convenience is so obvious, that it must be taken now to be part of the law."

This satisfactory termination of a long-standing controversy renders the draftsman's task in framing a debenture to bearer a comparatively simple one. All that is necessary is to make the instrument in terms payable to bearer, and to take care that no condition or stipulation appears which is repugnant to or inconsistent with the nature of a negotiable instrument. See, further, Company Precedents, Part III., p. 31 *et seq.*

Proof of Negotiability.

Having regard to the decisions in *Bechuanaland Exploration Co.* v. *London Trading Bank* and in *Edelstein* v. *Schuler & Co.*, *supra*, the High Court, it is presumed, will now take judicial notice of the negotiability of debentures to bearer, for "when a general usage has been judicially ascertained and established it becomes part of the law merchant which Courts of justice are bound to know and recognize, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case." Per Lord Campbell in *Brandao* v. *Barnett*, 12 Cl. & Fin. 787. However, it may be well to bear in mind that in order to prove negotiability it is only necessary to prove that the instrument is in form negotiable, *e.g.*, payable to bearer, and that it is in fact by general custom treated as negotiable. See *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Venables* v. *Baring Brothers*, (1892) 3 Ch. 527; and *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515. Nor does the Court require the custom to be proved by a cloud of witnesses. Thus, in the first of the above-mentioned cases, the instruments in question—Argentine Cedulas—were to bearer, and their negotiability was established by the evidence of a bank manager. Lord Watson said (p. 212): "Each bond, according to its tenor, appears to me to represent that the document will pass from hand to hand, and that any *bonâ fide* holder will be entitled to claim fulfilment of its terms. . . . Then there is

Proof of negotiability.

direct testimony to the effect that, on the London Stock Exchange, the bonds do pass from hand to hand by delivery only, and are treated as negotiable securities, and no attempt was made to shake that testimony either by cross-examination or by adducing evidence to the contrary." And Lord Macnaghten said (p. 224): "The Cedulas in question are foreign bonds, with coupons attached, payable to bearer. Admittedly, they pass from hand to hand on the Stock Exchange, and, according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the quality of complete negotiability."

So, in *Venables* v. *Baring Brothers & Co.*, (1892) 3 Ch. 527, 539, American railway bonds to bearer were held to be negotiable, on the evidence of business men that such bonds were here always treated as negotiable. "The only question," said Kekewich, J., "I have to consider is, whether they—the railway bonds in question—are negotiable according to the law merchant as part of the common law of England. On this point I have had the evidence of several gentlemen competent to speak, and they say that they have no doubt about the matter at all." See also *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120. It is not necessary to show a custom in relation to the securities of the particular company. It is sufficient that instruments of a like character issued by other companies are treated as negotiable. See *Venables* v. *Baring Brothers & Co., supra*. Nor, again, is it necessary to show that the instrument fulfils the conditions of a promissory note. *Rumball* v. *Metropolitan Bank* (1876), 2 Q. B. D. 194; *Goodwin* v. *Roberts* (1875), 1 App. Cas. 476.

An idea at one time prevailed that an instrument under seal could not by the law merchant acquire the character of negotiability, but there appears to be no substantial foundation for this view. In *Crouch* v. *Crédit Foncier*, *supra*, the Court no doubt regarded *Glyn* v. *Baker*, 13 East, 509, as a strong authority that a promissory note could not be under seal, but in that case no evidence of negotiability by custom was adduced, and in *Venables* v. *Baring Brothers & Co.*, (1892) 3 Ch. 527; and *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658, where such evidence *was* adduced, the instruments were held to be negotiable, though under seal.

By sect. 106 of the Act of 1908 the doubt as to the validity in Scotland of debentures to bearer is removed.

Floating Charge.

Validity and nature of floating charge.

The validity and effect of what is now called a "floating charge" on the property, both present and future, of a company was first recognized in *Re Panama, &c. Co.* (1870), L. R. 5 Ch. 318, by Giffard, L. J. In that case the company had issued debentures, and thereby charged its "undertaking" with the payment thereof. It was held that the word "undertaking" meant all the property, present and future, of the company, and that the charge thereon was effective and was to operate by way of floating security. Giffard, L. J., said: "I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that a debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits or of any dealing with the property of the company in the ordinary course of their business. I see no difficulty or inconvenience in giving that effect to this instrument, but the moment the company comes to be wound up and the property has to be realized, that moment the rights of these parties beyond all question attach. My opinion is that, even if the company had not stopped, the debenture holders might have filed a bill to realise their security. I hold that under these debentures they have a charge upon all property of the company, past and future, by the term 'undertaking,' and that they stand in a position superior to that of the general creditors who can touch nothing until they are paid."

This decision was of the utmost importance, not merely because it put this construction on the word "undertaking"—a word which had been largely used in debentures—but because it recognized clearly what many other nations do not recognize—the legal validity of a general charge on all the property of a company, both present and future, by way of floating security. Long previously it had, no doubt, been decided that in equity future property, or even possibilities, could be effectually charged. *Row* v. *Dawson* (1749), 1 Ves. 331; *Townshend* v. *Windham* (1750), 2 Ves. 1; *Bennett* v. *Cooper* (1845), 9 Beav. 252 (subsequently recognized in *Tailby* v. *Official Receiver*, 13 App. Cas. 523). And *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191, was sufficient to show that a charge on all the property, present and future, of a company was not too indefinite to take effect, and these principles being established there was, of course, no difficulty in holding that such a charge—provided the intention was sufficiently expressed—could be made subject to the company's power to deal with the property notwithstanding the charge.

It is not necessary, however, to the creation of a floating charge that the word "undertaking" should be employed. Any words charging all the property of a going company will be construed as meant to give a floating charge only, and for the very good reason that unless so construed such a charge would paralyze the company's business. See *Wheatley* v. *Silkstone Co.*, 29 C. D. 715; *Florence Land Co.*, 10 C. D. 530; *Colonial Trusts Corporation*, 15 C. D. 465. A charge on part only of the property where necessary to effectuate the intention, expressed or implied, will be treated as a floating charge. *Re Yorkshire Woolcombers' Association*: *Houldsworth* v. *Yorkshire Woolcombers' Association*, (1904) A. C. 355.

A charge on furniture and plant "which now are or may be placed on the premises" has been held to be a floating charge. *National Provincial Bank* v. *United Electric Theatres*, (1915) W. N. 397.

The nature of a floating charge has been elucidated still further in subsequent cases, and the following points have been settled:— Some subsequent cases.

(1) A floating charge operates as an *immediate* and continuing charge on the property charged subject only to the company's powers to deal with the property in the ordinary course of its business. *Florence Land Co.*, 10 C. D. 541; *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627; *Hubbuck* v. *Helms*, 56 L. T. 232; *Foster* v. *Borax Co.*, (1901) 1 Ch. 326; *Nelson & Co.* v. *Faber & Co.*, (1903) 2 K. B. 367.

(2) A floating charge, unless otherwise agreed, leaves the company at liberty to create specific mortgages ranking in priority to the floating charge. *Wheatley* v. *Silkstone Coal Co.* (1885), 29 C. D. 715; *Government Stock, &c. Co.* v. *Manila Rail. Co.*, (1897) A. C. 81; *Re Castell & Brown, Limited*, (1898) 1 Ch. 315. And by dealings with debtors to give them a right of set- *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; *Nelson* v. *F* , *supra.*

(3) Notice of the floating charge does not postpone the subsequent specific mortgages. *Re Hamilton's Windsor Ironworks*, 12 C. D. 712.

(4) But a floating charge is valid as against execution creditors. *In re Opera*, (1891) 3 Ch. (C. A.) 260; *Taunton* v. *Sheriff of Warwickshire*, (1895) 2 Ch. 319; *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627; *Davey & Co.* v. *Williamson & Sons*, (1898) 2 Q. B. 194; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771; *Duck* v. *Tower Galvanizing Co.*, (1901) 2 K. B. 314; *London Pressed Hinge Co.* (1905), 21 T. L. R. 322. Save that if the execution creditor takes property in execution, and completes the execution, *e.g.*, by seizure and sale by the sheriff, or a garnishee order absolute (but not a garnishee order *nisi*: *Norton* v. *Yates*, (1905) W. N. 175) whilst

the charge floats, he obtains, it has been held, priority. *Evans* v. *Rival Granite Quarries*, (1910) 2 K. B. 979.

(5) It is also valid as against the general creditors, whether in a winding-up or otherwise. *General South American Co.*, 2 C. D. 337.

(6) But sect. 212 of the Act has qualified its operations to some extent where debentures carrying a floating charge are issued within three months of winding up. By this section a floating charge created within three months of the commencement of a winding up is invalid unless it is proved that the company was solvent immediately after the creation of the charge, except to the amount of any cash paid to the company at the time of or after the creation of, and in consideration for, the charge, with interest at 5 per cent. (Sect. 212.) Money paid a few days before and in reliance on the charge is cash paid "at the time" within this section. *Columbia Fireproofing Co.*, (1910) 2 Ch. 120. As to the meaning of "cash," see *Re Orleans Motor Co.*, (1911) 2 Ch. 41.

(7) A floating charge, unless otherwise agreed, retains its floating character until a receiver is appointed or a winding-up commences. *Re Florence Land Co., supra; Government Stock, &c. Co., supra; Foster* v. *Borax Co., supra; Nelson & Co.* v. *Faber & Co., supra; Evans* v. *Rival Granite Quarries*, (1910) 2 K. B. 979. The charge ceases to be a floating charge on a winding-up even though the debentures are not repayable under the express terms of the debentures. *Re Crompton & Co., Ltd.*, (1914) 1 Ch. 954.

(8) [A landlord can distrain for rent before the appointment of a receiver. Afterwards he can still distrain at common law, but not as against a receiver appointed by the Court, without leave of the Court, and not on lands not comprised in the lease. *Re Roundwood Colliery Co.*, (1897) 1 Ch. 373.]

The best general description of a floating security is that given by Lord Macnaghten in *Government Stock Co.* v. *Manila Rail. Co.*, (1897) A. C. at p. 86.

"A floating security," said his Lordship, "is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying condition it happens to be in from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." See also *Houldsworth* v. *Yorkshire Woolcombers*, (1904) A. C. 355.

Pending any such intervention, the company has a free hand to deal with and dispose of the property charged in the ordinary course of the company's business. It may do so by way of sale, lease, exchange, specific mortgage, or otherwise, as it deems most expedient. Thus, an assignment by the company of arrears of rent made before the appointment of a receiver gives the assignees a good title as against debenture holders having only a floating charge; but if the land is specifically charged by the debentures, the debenture holders can claim the rents. *Re Ind. Coope & Co.*, (1911) 2 Ch. 223. Subsequent dealings by company with property subject to floating charge.

This power to create a specific mortgage ranking on the property charged in priority to the debenture charge, was clearly not at first contemplated; for Gifford, L. J., in *Re Panama, &c. Co.*, *supra*, in stating that the company might, notwithstanding the charge, deal with its property, added: "I do not refer to such things as sales or mortgages of property"; but the law of debentures, like all branches of a living law, is constantly growing; and it was held in *Re Florence Land Co.* (1878), 10 Ch. D. 530, and in *Re Colonial Trusts* (1880), 15 Ch. D. 465, that the floating charge left the company at liberty to create specific mortgages or charges in priority to such floating charge. In the latter case it was laid down (at p. 472) that it would be a monstrous thing to hold that a floating security prevented the making of specific charges, or specific alienations of property, because so to hold would destroy the very object for which the money was borrowed—the carrying on the business of the company.

In a subsequent case it was urged that where the subsequently-created charge was only an equitable security, it ought not to have priority over the equitable charge of the debenture holder; but this, too, was overruled. See *Wheatley* v. *Silkstone Co.* (1885), 29 Ch. D. 715, where the company, after creating a floating charge on its undertaking, had created a subsequent equitable charge in favour of its bankers by deposit of title deeds, and North, J., after referring to the authorities, said: "Those authorities furnish a very clear and intelligible principle to be followed in this case. I find that the debenture is intended to be a general floating security over all the property of the company as it exists at the time when it is to be put in force; but it is not intended to prevent, and has not the effect of in any way preventing, the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course, and inasmuch as I find that in the ordinary course of business, and for the purpose of the business, this mortgage was made, it is a good mortgage upon, and a good charge upon, the property comprised in it, and is not subject to the claim created by the debentures."

This decision is a specially strong one, because the debentures in

question were expressed to be by way of *first charge* on the undertaking: but in regard to this the learned judge said: "I find also that the 'first charge' referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises, and can have effect given to it. There will be a declaration, therefore, that the charge of the plaintiffs is prior to the debentures." See also *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. 174.

In balancing equities between debenture holders under a floating charge and subsequent specific incumbrancers, it must not be forgotten that the debenture holders are presumed to be cognizant of the above-mentioned decisions and to have contracted on the footing thereof.

Prior mortgages, prohibition of.

The extreme elasticity of a floating charge, and the wide powers which it thus allows to the company of dealing with the debenture holders' property, are in some cases considered excessive, and, accordingly, it is not uncommon to insert in the instrument creating the charge words to the effect that the floating charge is *not* to authorize the company to create any mortgage or charge ranking in priority to or *pari passu* with the debentures, and this qualification is for the most part effective. Thus, if the company creates a mortgage in favour of any person who has notice of the floating charge and qualification, such person ranks after the floating charge. But a person who obtains a legal mortgage, and makes out (a) that he was not aware of the existence of the floating charge; or (b) that though he was aware of the charge he was not aware of the qualification, is entitled to priority by virtue of the legal estate. *English, Scottish, &c. Co.* v. *Brunton*, (1892) 2 Q. B. 700; *Coveney* v. *Persse*, (1910) 1 Ir. R. 194. Such a qualification, too, in a floating charge is to be strictly construed. See *Brunton* v. *Electrical, &c. Corporation*, (1892) 1 Ch. 434, where it was held that the qualification did not prevent the company's solicitor from acquiring a lien in priority to the debentures; and see *Robson* v. *Smith*, (1895) 2 Ch. 118. Nor will the prohibition prevent a subsequent equitable mortgagee who obtains the title deeds of property comprised in the debenture holder's security and takes without notice from obtaining priority. *Castell & Brown, Limited*, (1898) 1 Ch. 315; *Standard Rotary Machine Co.*, 95 L. T. 829. Nor will it prevent a mortgage to a vendor of after-acquired property to secure purchase-money (*Wilson* v. *Kelland*, (1910) 2 Ch. 306), or a mortgage to secure an advance of part of the purchase-money by a third party. *Re Connolly Bros., Ltd.*, (1912) 2 Ch. 25. Where a specific charge is made expressly subject to a floating charge, the specific charge is postponed as from the date when the floating charge becomes crystallised by the appointment of a receiver. *Re Robert Stephenson & Co., Ltd.*, 107 L. T. 33.

Uncalled Capital.

As to mortgaging this, see *supra*, p. 270.

It is nearly always included in the security for debentures and debenture stock. *Primâ facie* it does not prevent the company from forfeiting shares for non-payment of calls. *Agency Land and Finance Co.*, 20 T. L. R. 41.

Perpetual Debentures and Debenture Stock.

For many years it has been quite common to issue debentures or debenture stock described as "perpetual" or "irredeemable," meaning that such debentures were made payable only in the event of a winding-up or some serious default by the company. Sometimes, also, debentures and debenture stock were made payable at a remote period, such as fifty or a hundred years after issue. In cases like these, doubts often arose whether the securities were effective, or whether the indefinite or prolonged postponement of the right of redemption was not in effect a "clog on the equity," and, as such, void. See Company Precedents, Part III., p. 122 *et seq.* To quiet these doubts, and to bring the law into accord with what it has commonly been taken to be, sect. 103 of the Act of 1908 enacts as follows:—

103. A condition contained in any debentures or in any deed for securing any debentures [or debenture stock], whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures [or debenture stock] are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Trust Deeds.

Trust deeds.

Debentures and debenture stock are constantly secured by a trust or covering deed, conveying property of the company to trustees in favour of the debenture holders, charging other property and containing a number of ancillary provisions regulating the respective rights of the company and the debenture holders. Whether there should be a trust deed or not must depend on the circumstances; where the debentures are issued only for a temporary purpose, *e.g.*, to bankers as security for an overdraft or to other persons for a short term, or are to be taken up by the directors, a deed may be dispensed with; but in transactions of any magnitude there is a growing disposition to supplement the debentures by a trust deed, as improving the security.

Its advantages may be briefly summarised as follows:—

1. It constitutes trustees charged with the duty of looking after the rights and interests of the debenture holders.
2. The debenture holders can by these trustees of theirs enter and sell the property comprised in the security.
3. The legal estate is vested in the trustees with the protection which it carries with it.

As regards the frame of it, a trust deed usually contains a legal mortgage of the principal properties, *e.g.*, in the case of a brewery, the brewery and tied houses, and a general charge by way of floating security on the rest of the assets and undertaking. Following on the conveyance and charge comes a clause specifying the various events on the happening of which the security is to become enforceable.

1. Default in payment of principal or interest.
2. Winding-up.
3. Breach of covenant.
4. Appointment of a receiver.

Other events are sometimes added.

The trust deed then provides that when the security becomes enforceable, the trustees may at their discretion and shall, at the request of a specified proportion of the debenture or debenture stockholders, realise the mortgaged premises, and apply the net proceeds in paying off the debentures or debenture stock and hand the balance to the company.

The deed also empowers the trustees to appoint receivers to carry on the business; provides for the trustees' indemnity, for meetings of the debenture holders, giving large powers to majorities, and imposes on the company certain obligations as regards insurance, repairs, furnishing information, further assurance, &c. In the case of debenture stock, the trust deed, in addition to the above provisions, usually constitutes the stock by a covenant therein contained—on the part of the company—to pay the amount of the stock, and the interest, or by an acknowledgment of indebtedness to the trustees for the amount thereof. The trustees are commonly given remuneration by the deed, but, unless otherwise provided, this ranks after the debenture or debenture stock holders. *Hodgson* v. *Accles*, 51 W. R. 57; W. N. (1902) 164. The deed usually provides otherwise, and gives the trustees a lien, which is effective. *Re Piccadilly Hotel, Ltd.*, (1911) 2 Ch. 534.

The trustees are not usually entitled to remuneration after the appointment of a receiver unless they render appreciable services after such appointment. *Re Locke & Smith, Ltd.*, (1914) 1 Ch. 687.

See further Company Precedents, Part III., pp. 93 *et seq.* and 323 *et seq.*; and as to application of compensation money for refusal to

renew licences of public-houses, see *Noakes* v. *Noakes*, (1907) 1 Ch. 64; *Dawson* v. *Braine's Tadcaster Breweries Co.*, (1907) 2 Ch. 359; *Bentley's Yorkshire Breweries*, (1909) 2 Ch. 609. As to income-tax on distribution, see *Smith* v. *Law Guarantee and Trust Society*, (1904) 2 Ch. 569.

Registration of Debentures under Bills of Sale Acts.

Bills of Sale Acts.

In *Standard Manufacturing Co.*, (1891) 1 Ch. 627 (C. A.), it was held that the Bills of Sale Acts, 1878 and 1882, did not apply to companies under the Act of 1862. The principle of the decision (Lord Halsbury, L. C., being a party to it) was expressed by Bowen, L. J., who delivered the judgment of the Court, in these words: "We think that this appeal should therefore be allowed with costs, both here and below, on the ground that the mortgages or charges of any incorporated company, for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878." The Companies Act, 1908, gives in effect a legislative recognition to this decision as good law. Debentures, not being bills of sale within the Bills of Sale Acts, are accordingly not void as against execution creditors for want of registration under those Acts. See *Standard Manufacturing Co., supra*: *Taunton* v. *Sheriff of Warwickshire*, (1895) 2 Ch. 319; *Robson* v. *Smith*, (1895) 2 Ch. 118; and *Re Opera Co.*, (1891) 3 Ch. 260. Nor are debentures in any way invalidated by those Acts as against the liquidator of the company as representing creditors of the company (*Marine Mansions Co.* (1867), 4 Eq. 601; *Asphaltic Wood Co.* (1878), 49 L. T. 159); and the fact that the debenture holders' chattel property remains at the date of winding-up in the possession of the company as reputed owner makes no difference; for sect. 10 of the Judicature Act, 1875, has not introduced the order and disposition clause into winding-up with other bankruptcy rules. *Crumlin Viaduct Works Co.* (1879) 11 C. D. 755; *Gorringe* v. *Irwell, &c. Works* (1886), 34 C. D. 129.

But now any mortgage or charge to secure debentures, or in the nature of a bill of sale, must be registered under sect. 93 of the Act of 1908, as to which see p. 277, *ante*. This is the substitute, in the case of companies, for registration by individuals under the Bills of Sale Acts.

Transfer of Debentures.

Transfer of debentures.

A debenture to bearer is transferable by delivery. So is a debenture-stock certificate to bearer. A debenture to registered

holder is transferable in the manner specified therein; and, if no mode of transfer is specified, sect. 25 (6) of the Judicature Act, 1873, applies, and enables the owner to transfer by instrument in writing; and, after notice thereof to the company, the transferee can sue in his own name. *Primâ facie*, a transferee of a debenture not to bearer takes subject to all equities. *Supra*, p. 292. But, as appears above, the instrument usually excludes equities. As to forged transfers, see p. 136. After a resolution to wind up voluntarily a debenture of the company in the hands of a shareholder can only be assigned subject to future calls. *In re China Steamship Co.*, 7 Eq. 240; and see *Re Taunton, Delmard, Lane & Co.*, (1893) 2 Ch. 175, and *Partridge* v. *Rhodesia Goldfields*, (1910) 1 Ch. 239. It is otherwise where the debenture is by its terms to be transferable free from equities. *Supra*, p. 292. But even there the terms of the debenture may be such that the transferee cannot, until registration, maintain his title to the benefit of the provision. In practice, a transfer is generally framed very much on the lines of the transfer of shares given in Table A. and is signed both by the transferor and the transferee, and is taken in to the office of the company to be registered. Thereupon the company's official registers the transfer, and a note of registration is endorsed.

It was held in *Driver* v. *Broad*, (1893) 1 Q. B. 744, that debentures creating a floating charge on the undertaking of a company which included land created an interest in land, and that a contract for the sale of such a debenture was a contract for the sale of an interest in land within the 4th section of the Statute of Frauds, and therefore not enforceable unless in writing signed by the vendor or his agent. This would seem to apply to debentures to bearer charged on land as well as to registered debentures; but the solution of the difficulty is that once delivery of a debenture to bearer is effected pursuant to the contract, the bearer is brought into direct privity with the company under whose seal the debenture is given, and his title is evidenced by writing.

Blank transfers.

Where by the conditions a registered debenture is only transferable by deed, it must be borne in mind that a blank transfer—that is, a deed executed by the transferor with a blank for the name of the transferee—is, as a deed, void (*Hibblewhite* v. *McMorine*, 6 M. & W. 200), and the person with whom such a blank transfer is deposited cannot fill up the blank and re-deliver the instrument without a power of attorney under seal. This is very inconvenient. But where a deed is not required, a transfer in blank, though inchoate, can be made operative by filling up the blank, and the authority so to fill it up may be oral or may be implied. See *supra*, p. 133.

Under the Forged Transfer Acts, 1891 and 1892, a company is now

empowered to make compensation to persons who have suffered loss from accepting in good faith forged transfers of the company's stock, shares, or securities or transfers executed under a forged power of attorney.

The stamp duty on a transfer of a debenture on sale is upon an *ad valorem* scale, fixed by sect. 122 of the Stamp Act, 1891, and on a contract note on a varying scale from 6*d.* to £1 fixed by the Finance (1909-10) Act, 1910, s. 77. See Customs and Inland Revenue Act, 1893, c. 7, s. 3

The stamp on surrender or discharge is 6*d.* per 100*l.*

Discount.

Debentures may be issued at a discount where the directors have the general powers of the company, and there is nothing in the regulations or memorandum to prevent issue at a discount. *Re Anglo-Danubian Co.* (1875), 20 Eq. 339; *Re Regent's Canal, &c. Co.* (1876), 3 Ch. D. 43; *Campbell's case* (1876), 4 Ch. D. 470. 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. But where a debenture issued at a discount contains a clause enabling the holder to call for the allotment in satisfaction of fully paid up shares equal to the full nominal amount of the debenture, that clause, it has been held, is objectionable. *Moseley* v. *Koffyfontein Mines, Limited*, (1904) 2 Ch. 108.

See also *Bury* v. *Famatina Development Co.*, (1910) A. C. 439, affirming the Court of Appeal. In this case bonus certificates payable out of profits were issued with debentures, and it was held that to satisfy such certificates by the issue of paid-up shares was *ultra vires*. See *supra*, p. 69.

Deposit of Debentures or Certificates.

Sometimes money is raised by the deposit by the directors of debentures or certificates of debenture stock which they have power to issue. There is no objection *primâ facie* to such a mode of raising money. If the instrument deposited is negotiable the depositee gets the legal title, and if the instrument is to registered holder the depositee obtains a good equitable title, even though the debentures deposited are only in blank. *Re Regent's Canal Ironworks Co.* (1876), 3 Ch. D. 43; *Re Strand Music Hall*, 3 De G. & S. 147; *Hampshire Land Co.*, (1896) 2 Ch. 743. If the company is insolvent, the person with whom the debentures are deposited can claim a dividend on the deposited debentures *pari passu* with the other debentures of the series, until the whole of the debt as security for which the debentures were deposited has been paid. *Re Regent's Canal Ironworks*, 3 Ch. D. 43.

Debentures agreed to be Issued.

Effect of agreement only to issue debentures.

Where money is advanced to a company upon the terms that debentures charged upon the undertaking, or upon any specified property of the company, shall be issued by way of security, the lender at once obtains a charge in equity; for equity treats that as done which ought to be done. *Levy* v. *Abercorris Slate Co.*, 37 C. D. 264; *New Durham Salt Co.*, 7 T. L. R. 13; *Tailby* v. *Official Receiver*, 13 App. Cas. 523. The deposit by way of security of debentures containing a blank for the payee's name affords evidence of an agreement to give security by complete debentures in the form of those so deposited. *Re Strand Music Hall*, 3 De G. J. & S. 147; *Re Queensland Land and Coal Co.*, (1894) 3 Ch. 181; *Re Hampshire Land Co.*, (1896) 2 Ch. 743; *Peppe* v. *Neath District, &c. Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771.

Thus, where a prospectus offered for subscription 20,000*l.* worth of mortgage debentures "to be secured on the entire property of the company," and S. applied for debentures "upon the terms of the company's prospectus," and a resolution to allot was passed by the directors and notified to S., but no allotment took place, and afterwards a trust deed was executed charging certain property specified "in the schedule" in favour of the debenture holders, but no schedule was annexed; the Court in the winding-up held S. entitled to a charge on the entire property of the company. *Re New Durham Salt Co.* (1891), 2 Meg. 360; 7 T. L. R. 18.

The operation of these cases is, however, to some extent modified by sect. 93 of the Companies Act, 1908, requiring particulars of every mortgage or charge for securing debentures or debenture stock to be registered "within twenty-one days after the date of its creation," and in default avoiding the charge as against creditors. Hence it is apprehended that where there is an agreement for a charge, as in the case last mentioned, the equitable charge must be registered; even where, as in the case of debentures executed in blank and deposited by way of security, there is no accompanying memorandum of deposit. But although the Court would be unable to treat an unregistered agreement in writing to give a mortgage or charge as a subsisting charge (*Ex parte Mackay*, 8 Ch. 643), it would in some cases be able to compel the company to specifically perform the agreement by creating the requisite securities (*Ex parte Homan, Re Broadbent*, 12 Eq. 598; *Ex parte Hauxwell*, 23 C. D. 627), and might in such a case, if the company was solvent, allow an extension of the time for registration. See sect. 96.

Scrip certificates for debentures or debenture stock, where the

debentures or trust deed are not to be issued or executed for some time, are occasionally registered so as to afford interim protection.

Priorities of Debenture Holders.

Priorities of debenture holders.

Questions as to the priority of different series of debentures do not often arise, but it may be well to indicate how they arise and how they may be solved.

Unpaid vendor. *Wilson* v. *Kelland*, (1910) 2 Ch. 306; *Hoffman* v. *Boynton*, (1910) 1 Ch. 519.

The priorities of debentures depend on various considerations—on the true construction of the instrument or instruments creating them, on the rule that the legal estate *primâ facie* gives priority, or the rule that *prima facie* he who is first in time has the better equity, and on the registration or non-registration under sect. 93 of the Act, or under sect. 14 of the Act of 1900, or sect. 10 of the Act of 1907. As a general, almost invariable, rule, debenture holders of the same series are made to rank *pari passu inter se;* even if it is not so expressed the Court will, from slight indications, infer equality. Where such equality exists, no individual debenture holder is allowed to get an advantage for himself. If he gets judgment, the judgment enures for the benefit of all the debenture holders (*Bowen* v. *Brecon Rail. Co.*, L. R. 3 Eq. 541): if he obtains a collateral security he holds it as trustee for all. *Small* v. *Smith*, 10 App. Cas. 131; *Lamlowners* v. *Ashford*, 16 C. D. 411. The series constitutes, in fact, one great contributory mortgage. Whether a company can redeem some of the debentures of a series and re-issue them to rank *pari passu* with those left unredeemed is a nice question, which must be determined on construction of the language of the debenture, and the terms of sect. 104 of the Act. The object of this section is to override the principle laid down by the Court. *George Routledge & Co.*, (1904) 2 Ch. 474; *W. Tasker & Sons*, (1905) 1 Ch. 283; *Perth Electrical Tramways*, (1906) 2 Ch. 216; *Russian Petroleum Co.*, (1907) 2 Ch. 540, according to which a debenture once paid off was extinguished, and could not be re-issued, and it appears to have in a great measure done this. *Fitzgerald* v. *Persse*, (1908) 1 Ir. R. 279. Though the construction of the section presents many points of difficulty.

The issue of part of a series of debentures which are all to rank *pari passu* does not by implication restrict the company's power as regards the terms on which the rest of the issue may be dealt with. *Regent's Canal*, 3 C. D. 43. The company may even issue the balance of such debentures, although a debenture holders' action has been commenced, at any time before a receiver has been appointed in the action. *Hubbard* v. *Hubbard*, 68 L. J. Ch. 54; and see *Geisse* v. *Taylor*, (1905) 2 K. B. 658.

Where two or more series of debentures are issued giving a floating

charge, they will rank according to the date of issue, in the absence of anything to show that they are to rank *pari passu*. *James* v. *Boythorpe Colliery Co.*, 2 Meg. 55; *Gartside* v. *Silkstone Coal Co.*, 21 C. D. 762; and see *Lister* v. *Henry Lister & Son*, 41 W. R. 330. Hence, where mortgage debentures of a specific series are to rank *pari passu*, the company cannot issue debentures of some further series to rank *pari passu* with the original series, unless the terms of the last-mentioned series have reserved such a power to the company, either expressly or impliedly. *Ibid.* The reservation of a power to create mortgages is not sufficient for this purpose. *Re Benjamin Cope & Sons*, (1914) 1 Ch. 800.

Specific Property charged.

Where a company issues a series of debentures, themselves charging, or accompanied by a trust deed charging, *specific* property of the company, such a charge ranks *primâ facie* in priority to any subsequent charge on the same property by the company on the principle *qui prior est tempore potior est jure*: but this rule yields to that reverence with which the law always regards the legal estate and the *bonâ fide* purchaser for value, and if, consequently, the company creates a subsequent charge, whether in favour of debenture holders, or otherwise, and the persons in whose favour such charge is created advance their money in good faith, without notice (actual or constructive) of the prior debenture charge, and get the legal estate; then, by virtue of such legal estate, they take priority over the prior charge of the debenture holders. It is to prevent this danger that the legal estate is usually vested in trustees to secure the debenture holders. See Company Precedents, Part III., p. 93.

Floating Charge.

As to property comprised in a floating charge, we have already seen that debenture holders having a charge thereon may be postponed to subsequent specific mortgages (p. 312), and this, in some cases, even though the conditions of the charge prohibit the creation of prior mortgages (p. 312). If there is no such prohibition, the subsequent specific mortgage takes priority, by virtue of the fact that the floating security is a floating security, and, by its very nature, therefore, permits the company, in carrying on its business, to create charges in priority to it. If there is such a prohibition, then the subsequent mortgagee takes priority—in cases where he does so—by virtue of his good faith and the legal estate or a better equity. *Bower* v. *Foreign Gas Co.*, W. N. (1877) 222; *Brunton* v. *Electrical Engineering Co.*, (1892) 1 Ch. 434; *Castell & Brown*, (1898) 1 Ch. 315; *Valletort Sanitary Steam Laundry*, (1903) 2 Ch. 654; and see Company Precedents, Part III., p. 142 *et seq.*

Sect. 209 (2) (b) of the Act of 1908 gives local rates, clerks' and servants' salaries and workmen's wages priority in a winding-up over debenture holders with a floating charge. See p. 410, *post*, and Ann. Pr 1915, p. 2196.

Majority Clauses.

Majority clauses.

Debenture trust deeds commonly, and sometimes debentures, contain provisions enabling the majority—say three-fourths—of the holders of the debentures or debenture stock at a meeting, to assent to modifications of the rights of the holders as a class. The object of such a power is, of course, to prevent a perverse or unreasonable minority from obstructing a beneficial arrangement, *e.g.*, where it may be necessary to give the company time for payment of interest or to allow reduction of the rate, or enable it to raise further funds by a fresh issue of debentures to rank *pari passu*. The operation of such a clause has been discussed in a number of cases (*Follit* v. *Eddystone*, (1892) 3 Ch. 75; *Mercantile Co.* v. *International Co. of Mexico*, (1893) 1 Ch. 484, n. (C. A.); *Mercantile Trust Co.* v. *River Plate Co.*, (1894) 1 Ch. 578; *Re Dominion of Canada Freehold Estate Co.*, 55 L. T. 347; *Sneath* v. *Valley Gold Co.*, (1893) 1 Ch. 477 (C. A.); *Walker* v. *Elmore's German Metal Co.*, 85 L. T. 767 (C. A.); *Kent Collieries*, 23 T. L. R. 559; *Cox-Moore* v. *Peruvian Corporation*, (1908) 1 Ch. 604); *Shaw* v. *Royce, Limited*, (1911) 1 Ch. 138; *Northern Assurance, Ltd.* v. *Farnham United Breweries*, (1912) 2 Ch. 125; and the result of these cases may be summed up by saying that the powers of the meeting depend entirely on the true construction of the provisions in question. And each class of persons may vote in accordance with their own interests, provided that the whole scheme is fair. *Goodfellow* v. *Nelson Line, Ltd.*, (1912) 2 Ch. 324. In several cases, the provisions of the clause were held sufficient to enable the majority to bind the class to accept shares of a new company in satisfaction of the securities of the existing company, but they have been held not to enable the company to sell its assets and distribute them among those of the debenture holders who were willing to accept the lowest price for their debentures. *New York Taxicab Co.*, (1913) 1 Ch. 1. See further sect. 120 of the Act.

Return of guarantee. L. J., 21 Jan. 1911, p. 716: *Heslop* v. *Paraguay Central*, 54 L. J. 235.

Specific Performance.

Specific performance of a contract to take or to subscribe for debentures could not under the old law be enforced. Thus, if A. agreed to take up debentures of the company, and failed to pay, he could not be forced to pay up, the theory of law being that the company could get the loan elsewhere and did not need to invoke the

Specific performance.

special jurisdiction of equity to aid it. All that the company could do was to sue the defaulter for the damages (if any) it had sustained. *South African Territories, Limited* v. *Wellington*, (1897) 1 Q. B. 692 (C. A.); (1898) A. C. 309. By sect. 105, however, of the Act, "A contract with a company to take and pay for any debentures of the company may be enforced by an order for specific performance."

Where debentures are issued payable by instalments, and the company has declared the debentures forfeited, the company cannot recover calls made before the forfeiture under this section. *Kuala Pahi Estate* v. *Mowbray*, (1914) W. N. 321.

Books.

Books.

The books of the company may be a very important part of the debenture holders' security. The words "all the property of the company" in the debenture holder's charge, though, *primâ facie*, amply sufficient to cover them, have been held not to extend to the company's books. See *Clyne Tin Plate Co.* (1882), 47 L. T. 439; *Engel* v. *South Metropolitan Co.*, (1892) 1 Ch. 442. The generality of this proposition seems, however, to require some qualification, at least, to render it reconcileable with *Re Capital Fire Insurance Association* (1883), 24 C. D. 408. That case—which was one of solicitor's lie draws a distinction between different kinds of books. There are books which, by the provisions of the Companies Acts, are to be kept at the office of the company, such as the register of members and the register of mortgages; and for the directors to mortgage or charge these would, as Cotton, L. J., points out, be to deal with the property of the company in a way inconsistent with its objects and constitution; and the same principle applies to books which, by the articles of the company, are to be kept at its office—such, for instance, as the directors' minute-book; but these obviously reasonable restrictions seem the only just limit on the company's power of creating a charge over its books.

Debenture Stock.

In the matter of security, of payment of interest, and of transfer, debenture stock differs hardly at all from debentures; as to the time of payment it differs in being generally made payable only in the event of a winding-up, and not at a fixed date. It is in its divisibility that debenture stock differs mainly from debentures. A debenture is always for a fixed sum, say 100*l.*, and this sum is only transferable as an entirety; whereas debenture stock, unless the regulations otherwise provide, can be transferred in any amounts, *e.g.*, 550*l.*, or 71*l.*, or 13*l.*, and several small holdings can be consolidated into one larger holding, a single certificate being

obtained for the aggregate amount. But, to prevent complications, the articles commonly make the stock transferable in amounts of not less than 1*l.*, or 5*l.*, or 10*l.*

Constitution.

Constitution by trust deed.

Debenture stock, as mentioned above, is generally constituted by a trust deed. The deed contains a covenant for the payment, either at a fixed date or in certain events (*e.g.*, a winding-up), of a specified capital sum—say 100,000*l.*—which is to be called the stock, and for the payment of interest, and gives to the trustees security, by way of mortgage or charge, as in a debenture trust deed. It contains also provisions for the keeping of a register of the beneficial owners of the stock, and for transfers and transmissions thereof, and for the issue to such owners of certificates of title, and for meetings of the stock-holders, &c., and it usually reserves to the company power to redeem at a premium before maturity.

Debenture stock of a company under the Companies Act, 1908, is essentially different from debenture stock issued by railway and other companies under the Companies Clauses Act, 1863.

Under the terms of the deed, there is not usually any direct contract by the company with the stock-holder; but he is a beneficiary, and, as such, the Court will recognize and protect his title. *Re Empress Engineering Co.* (1878), 16 Ch. D. 128; *Gaudy* v. *Gaudy* (1885), 30 C. D. 57. It is not easy to reconcile with this, *Dunderland Iron Ore Co.*, (1909) 1 Ch. 446.

Stock Certificate.

Form of stock certificate.

The stock certificate issued to the owners usually runs as follows:— "This is to certify that —— of —— is the registered proprietor of £—— debenture stock of the above-named company," and is under seal.

As to the danger of giving an incorrect certificate, see *supra*, pp. 143, 144.

Remedies of Debenture and Debenture Stock-holders.

Where Debenture carries no Charge.

Remedies.

Where the debenture is not secured by any mortgage or charge, the remedy of the holder is either to bring an action to enforce the debenture and obtain judgment and then levy execution on the property of the company; or he may, either before or after judgment, present a petition for the winding-up of the company, or, if there be a winding-up in progress, he can prove in the winding-up for the amount due to him, but, not having any security, he has no priority

either in the winding-up or otherwise; he ranks merely with the ordinary creditors.

Debentures or Debenture Stock carrying a Mortgage or Charge.

In this case, the remedies open to the debenture holder or debenture stock-holder necessarily depend on the terms of the security, and these terms must be scrutinised accordingly. Ordinarily, the remedy of a debenture holder, when the company is in default as regards principal or interest, is to bring an action against the company to obtain payment and to enforce his securities. Where a debenture holder is required to give notice to the company prior to action he must do so *Rogers & Co.* v. *British, etc. Association*, 68 L. J. Q. B. 14. In such an action, the debenture holder plaintiff sues on behalf of himself and the other members of the class, and the Court usually appoints a receiver (if necessary a manager also), and by its judgment declares the debentures to be a charge on the property, directs inquiries as to who are the holders, and the amount due, and either orders a sale of the property or gives liberty to apply for a sale. See Company Precedents, Part III., pp. 481 and 720 *et seq.*

As a rule the undertaking of a company carrying on some service to the benefit of the public cannot be sold. The Crystal Palace is not, however, exempt from sale as a public undertaking. *Crystal Palace Co.*, 130 L. T. N. 483.

Where Trust Deed.

Where there is a trust deed, whether for securing debentures or debenture stock, the trustees can be plaintiffs in an action for enforcing the charge; but, commonly, the action is brought by a holder of the debentures or debenture stock, and the company and the trustees are made defendants. In such an action, similar relief is usually granted. See Company Precedents, Part III., p. 481.

*Appointment of Receiver.**

Receiver.

In an action to enforce the security, the Court has power to appoint a receiver, and is usually asked to exercise it; and this power is not confined to cases in which the principal or interest on the debenture or debenture stock is in arrear. A receiver may be appointed whenever the security is in danger. Thus, where a company had become insolvent and closed its works, a receiver was appointed. *McMahon* v. *North Kent Iron Works*, (1891) 2 Ch. 148. So, where a winding-up of the company takes place or is imminent. *Victoria Steamboats Co.*, (1897) 1 Ch. 158; *Hodson* v. *Tea Co.*, 14 C. D. 859. *Wallace* v. *Universal Co.*, (1894) 2 Ch. 547. Or, where a company is

* See generally Riviere on Receivers.

disposing of its undertaking in violation of the terms of the security (*Hubbuck* v. *Helms*, 56 L. T. 232; but see *Foster* v. *Borax Co.*, (1901) 1 Ch. 326); or where there are judgments against the company. *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574. See also *Victoria Steamboat Co.*, *Smith* v. *Wilkinson*, (1897) 1 Ch. 158, in which it was held that the power to appoint a receiver included, also, power to appoint a manager in such cases; and in such cases the Court, after appointing a receiver, can enforce the security. *Carshalton Park Estate*, (1908) 2 Ch. 62. The mere fact that the assets would, if realised, be insufficient to pay the debenture holders in full is not a valid ground for the appointment of a receiver. *New York Taxicab Co.*, (1913) 1 Ch. 1. But see *Re Braunstein and Marjolaine, Ltd.*, (1914) W. N. 335; 58 Sol. J. 755; and where the company proposed to distribute among its members a reserve fund which was its only remaining asset, a receiver was appointed. *Re Tilt Cove Copper Co.*, (1913) 2 Ch. 588.

Where the company is registered in this country, it is no objection to the appointment of a receiver that the property is abroad. *Ex parte Pollard*, 4 D. & C. 27; *Coote* v. *Jecks*, 13 Eq. 597. See Company Precedents, Part III., p. 444.

The appointment of a receiver by the debenture holders under their debenture does not necessarily prevent the Court from appointing a receiver. *Re "Slogger" Automatic Co.*, (1915) 1 Ch. 478.

Leave of the Court under the Courts (Emergency Powers) Act, 1914, is not necessary. *Re Farnol, Eades, Irvine & Co.*, (1915) 1 Ch. 22. See further Appendix, p. 634.

If a receiver is appointed "upon his giving security," he is not entitled to take possession until he has given security, and until then he is not to be deemed to be in possession as against third parties. *Edwards* v. *Edwards*, 2 C. D. 291. But if the order appoints the receiver out and out, and orders him to give security, the appointment takes effect at once, and he is entitled to take possession before security given, and as against third parties is to be deemed to be in possession as from the time the order is perfected. *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588, in which case the appointment was held good as against execution creditors; and *Ex parte Evans*, 11 C. D. 691; 13 C. D. 252. So, a landlord who distrains after the making of a receivership order, but before it is drawn up, will not be disturbed. *Lee* v. *Roundwood Colliery Co.*, (1897) 1 Ch. 373.

When the Court appoints a receiver of property, it in effect takes the custody of the property into its own hands—for the receiver is an officer of the Court—and thus assumes the protection and safe keeping of it for the benefit of the parties interested in it. The receiver being an officer of the Court, any interference with him, whether by a party to the action or by a stranger, is a contempt of Court and punishable

accordingly. Thus, proceedings for recovery of possession cannot be commenced by a first mortgagee without leave of the Court. *Re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497. See, however, as to independent actions by debenture holders, *Cleary* v. *Brazil Rail. Co.*, (1915) W. N. 178. [This decision may be supported on the ground that there was no interference with the company's assets until execution.]

The duty of a receiver as such is confined to taking possession and protecting the property over which he is appointed. *Manchester and Milford Rail. Co.*, 14 C. D. 645. And see, as to the powers of a receiver, *Swaby* v. *Dickon*, 5 Sim. 629, 631; *Bristow* v. *Needham*, 2 R. 629; *Parker* v. *Dunn*, 8 Beav. 497; *Ireland* v. *Eade*, 7 Beav. 55; *Moss Steamship Co.* v. *Whinney*, (1912) A. C. 254 (as to giving a lien on the company's goods); and Company Precedents, Part III., p. 150 *et seq.*

As to the power of a receiver to disregard contracts made by the company, see *Re Newdigate Colliery*, (1912) 1 Ch. 468; *Thames Ironworks*, 28 T. L. R. 273; (1912) W. N. 66; *Re Great Cobar, Ltd.*, (1915) 1 Ch. 682.

The question whether a receiver shall take proceedings in the name of the company is entirely in the discretion of the Court. The plaintiff in the debenture holders' action cannot insist on proceedings by the company against him being dropped. *Viola* v. *Anglo-American Co.*, (1912) 2 Ch. 305.

When a receiver and manager is appointed *by the Court*, he "accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate." Per Rigby, L. J., *Owen* v. *Cronck*, (1895) 1 Q. B. 265; *Burt* v. *Bull*, (1895) 1 Q. B. (C. A.) 276; and *Gosling* v. *Gaskell*, (1897) A. C. 575. But as to his indemnity when in default, see *British Power Traction Co.*, (1910) 2 Ch. 470; *Re British Tea Table*, 101 L. T. 707.

A receiver carrying on a company's business may be personally liable to compensate workmen under the Workmen's Compensation Act, 1897.

But a receiver in a debenture holders' action will not, at the instance of a landlord, be ordered to pay the rent of leasehold premises mortgaged by sub-demise to the trustees for the debenture holders, there being no privity in such a case between the lessor and sub-lessees. *Hand* v. *Blow*, (1901) 2 Ch. 721; and see *Re J. W. Abbott & Co.*, (1913) W. N. 284; 30 T. L. R. 13 (where the receiver was in possession).

Where the security comprises leasehold property and fixtures, and the company by passing a voluntary resolution to wind up forfeits the lease, the receiver may remove the fixtures within a reasonable

time. *Re Glasdir Copper Mines; English Electro-Metallurgical Co.* v. *Glasdir Copper Mines*, (1904) 1 Ch. 819.

A receiver is bound (sect. 107) to pay forthwith out of the first assets coming to his hands creditors entitled to preferential payments (see p. 410, *post*). If he distributes the assets or uses them up in carrying on the business without providing for these preferential payments, he renders himself liable. *Woods* v. *Winskill*, (1913) 2 Ch. 303. As to rates see *National Provincial Bank* v. *United Electric Theatres*, (1915) W. N. 397.

The appointment of a receiver and manager, if of a permanent character, operates as a discharge of the company's servants. *Reid* v. *Explosives Co.* (1887), 56 L. J. Q. B. 388.

A receiver or receiver and manager may be appointed in proceedings commenced by originating summons. *Re Francke*, 57 L. J. Ch. 437; *Gee* v. *Bell*, 35 C. D. 160; Ann. Pr., notes to Ord. LV. r. 5a.

A director appointed receiver and manager in a debenture holder's action is not thereby disentitled to be paid his fees as director. *Re South Western of Venezuela Rail. Co.*, (1902) 1 Ch. 701.

Under sect. 94 of the Act the appointment of a receiver must be registered, see p. 478; and as to filing his accounts, see sect. 95 of the Act, *infra*, p. 478.

Leave to Borrow.

Borrowing.

In debenture holders' actions the business of the company is commonly the most valuable asset, and in order to protect and preserve it as a going concern, and for this or other pressing exigencies, the Court has jurisdiction—which it frequently exercises—to authorize the receiver to borrow money in priority to the debentures or debenture stock. *Greenwood* v. *Algeçiras (Gibraltar) Rail. Co.*, (1894) 2 Ch. 205; *Lathom* v. *Greenwich Ferry*, 72 L. T. 790. The receiver should keep within the limits allowed. *Glasdir Copper Mines*, (1906) 1 Ch. 365; *British Power Traction Co.*, (1906) 1 Ch. 497.

The jurisdiction to raise a salvage loan of this kind is beneficial to all persons interested, and has saved many a well-known concern from destruction. See as to this power, *In re Regent's Canal Works* (1876), 3 Ch. D. 411; *Ex parte Izard* (1883), 23 Ch. D. 75; *Securities Investment Corp.* v. *Brighton Alhambra* (1893), 68 L. T. 249; *In re Ormerod*, W. N. (1890) 217; *Milward* v. *Avill & Smart*, 4 Mans. 403; *Re Glasdir Copper Mines*, (1906) 1 Ch. 365; *Robinson Printing Co.* v. *Chic, Limited*, (1905) 2 Ch. 123.

The expenses of realization rank before securities given by the receiver and manager. *Strapp* v. *Bull*, (1895) 2 Ch. 1; *Re Glasdir Copper Mines*, W. N. (1905) 57; *Re London United Breweries*, (1907) 2 Ch. 511.

Foreclosure.

Foreclosure. This is a remedy which is occasionally available in debenture holders' actions. See *Sadler* v. *Worley*, (1894) 2 Ch. 170; *Elias* v. *Continental, &c. Co.*, (1897) 1 Ch. 511. But not, generally speaking, where debentures and debenture stock are secured by trust deed. *Schweitzer* v. *Mayhew*, 31 Beav. 37. As to the necessary parties, see *Wallace* v. *Evershed*, (1899) 1 Ch. 891; *Elias* v. *Continental Co.*, *supra*.

Remedy by Winding-up Petition.

Winding-up A debenture holder or debenture stock-holder, to whom the company is indebted in a sum presently payable, can demand payment, and, if default be made, can petition for the winding-up of the company, and this, whether he be the registered holder of the security, or the holder of a security to bearer. *Re Olathe Silver Co.* (1884), 27 Ch. D. 278; *Re Uruguay Central Rail. Co.* (1879), 11 Ch. D. 372. And the mere fact that he has obtained the appointment of a receiver does not preclude him from applying for a winding-up order. *Borough of Portsmouth Tramways*, (1892) 2 Ch. 362. As against the company he is entitled to a winding-up order *ex debito justitiæ*, but not so as against the wishes of the majority of the creditors. *Western of Canada Co.* (1873), 17 Eq. 1; *Chapel House Colliery Co.*, 24 C. D. 259. The holder of a mortgage debenture, who applies for a winding-up order, is not bound to give up his security. *Moor* v. *Anglo-Italian Bank* (1878), 10 Ch. D. 681. Where there is nothing presently due to the debenture stock-holder, he had formerly no *locus standi* to present a winding-up petition. *Re Melbourne Brewery Co.*, (1901) 1 Ch. 453 (Wright, J.). But if the company is insolvent his position is, in this respect, altered by sect. 137 of the Act of 1908.

Remedies without aid of Court.

Action by debenture holder. A debenture holder is not bound to come in and enforce his rights in a winding-up. He may exercise such powers of realization as are given him by his securities, *e.g.*, appointment of a receiver or sale, and, where it is necessary to bring an action, he can apply to the Court and the Court will give liberty to bring or proceed with the action as a matter of course, winding-up notwithstanding. *Lloyd* v. *David Lloyd & Co.* (1877), 6 Ch. D. (C. A.) 339; *Joshua Stubbs, Limited*, (1891) 1 Ch. 475; *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268.

A receiver may be appointed under a trust deed or debenture and may, if so provided, be responsible as the agent of the company, *supra*, p. 296.

Proof by Debenture Holders.

Proof.

In the case of a solvent company a debenture or debenture stock-holder can prove for his principal and interest (*In re Colonial Trust Corporation* (1879), 15 Ch. D. 473), and is not bound to value his security before proving (*Kellock's case* (1867), L. R. 3 Ch. 769). But if the company is insolvent, which it is taken *primâ facie* to be if in winding-up (*Re Milan Tramways Co.* (1884), 25 Ch. D. 587), sect. 10 of the Judicature Act, 1875, applies, and the holders of secured debentures who want to prove must value their securities, or must realize them and then prove for the balance; and for the purpose of ascertaining the balance for which he can prove, the debenture holder can only apply the proceeds of his security in payment of interest accrued up to winding-up. He may then prove as an unsecured creditor for the balance of the principal and interest due at the commencement of the winding-up after deducting the amount arising from realization of his security. *Quartermaine's case*, (1892) 1 Ch. 639.

Where a debenture is not payable and a winding-up commences, the holder can nevertheless prove for the full amount of the principal subject to a rebate of interest and also value and prove the liability to pay future interest to maturity where, by the terms of the instrument, the principal carries such interest to maturity. *Re Browne and Wingrove, ex parte Ador*, (1891) 2 Q. B. (C. A.) 574.

Debenture holders and debenture stock-holders are entitled as against their securities, whether the company be solvent or insolvent, to take principal, interest up to date of payment, and costs. *Cotterell* v. *Stratton* (1872), L. R. 8 Ch. 302; *Re Talbot* (1888), 39 C. D. 567.

As to interest after judgment, see *Re European Central Rail.* (1876), 4 Ch. D. 33; *Re Sneyd* (1884), 25 Ch. D. 338; *Re Agriculturist Cattle Co.*, 4 Ch. D. 34, n.; and *Popple* v. *Sylvester* (1883), 22 Ch. D. 98.

As to set-off, see *Re Taunton, Delmard & Co.*, (1893) 2 Ch. 175; *Re Smith & Co.*, (1901) 1 Ir. R. 73; and *Rhodesia Goldfields*, (1910) 1 Ch. 239.

As to income tax, see *Smith* v. *Law Guarantee and Trust Society*, (1904) 2 Ch. 569.

As to adding costs to the security, see *Johnstone* v. *Cox* (1881), 19 Ch. D. 17, 19.

As to costs in a representative debenture holder's action, see *Wright* v. *Kirby*, 23 Beav. 863; *Ford* v. *Earl of Chesterfield*, 21 Beav. 426; *Batten* v. *Dartmouth Harbour Commissioners*, 45 C. D. 612; *Carrick* v. *Wigan Tramways Co.*, W. N. (1893) 98; *Re New Zealan' Midland Railway, Smith* v. *Lubbock*, (1901) 2 Ch. 357; *Re Clayton Engineering and Electrical Construction Co.*, 90 L. T. 283; *Mortgage Insurance Co.* v. *Canadian Agricultural Coal Co.*, (1901) 2 Ch. 377. [These cases

establish the rule that where the assets are insufficient to pay in full the series of debentures on behalf of which the plaintiff sues, the plaintiff is entitled to solicitor and client costs out of the fund. Where, however, the assets are sufficient to pay this series in full, but insufficient to pay any subsequent series in full, the plaintiff can only get party and party costs out of the assets. See also *Re W. C. Horne & Sons, Ltd.*, (1906) 1 Ch. 271.]

The company and the subsequent incumbrancers, though necessary parties (*Wilcox & Co.*, W. N. (1903) 64) must, where sued by the first debenture holders, look to the surplus for their costs. *Clayton Engineering Co.*, W. N. (1904) 28; 90 L. T. 283. [They are, however, sometimes allowed costs where their presence has been beneficial to the realization of the assets.]

A debenture holder, though suing on behalf of himself and others, is *dominus litis*, and accordingly can stop the action when he chooses, *e.g.*, on his claim being satisfied. *Ward* v. *Alpha Co.*, (1903) 1 Ch. 203.

As to the position of non-claiming debenture holders, see *Ashley* v. *Ashley*, 4 C. D. 757, and *Saragossa and Mediterranean Rail. Co.*, (1904) A. C. 159.

Where a debenture is guaranteed by a guarantee company, both companies being insolvent, the holder can prove in the winding-up of the guarantee company for the balance remaining after realizing his security; but he is not directly entitled to the benefit of any re-insurance effected by the guarantee company. *Re Law Guarantee and Trust Society*, (1915) 1 Ch. 340.

CHAPTER XXXIII.

PROMOTERS.

Typical promoter—his usual business.

The promoters of a company are those who form or float it, that is to say, the leading spirits of the enterprise, or principal actors, for not every member of the *dramatis personæ*, or every subordinate employed by the promoters, is to be regarded as a promoter. The typical promoter—the promoter in the fullest sense of the term—starts the scheme of forming the company, negotiates with the vendors (if any), gets together the board of directors, retains brokers, bankers, and solicitors for the company, has the memorandum and articles of association prepared, provides the registration fees, drafts the prospectus, pays for the expense of issuing it, &c.; in a word, undertakes—to use the language of Cockburn, C. J.—to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose. *Twycross* v. *Grant*, 2 C. P. D. 469; *Bagnall* v. *Carlton*, 6 C. D. 371; *Emma Co.* v. *Lewis*, 40 L. T. 68; 4 C. P. D. 396; *Lydney and Wigpool Co.* v. *Bird*, 33 Ch. D. 85; *Whaley Bridge* v. *Green*, 5 Q. B. D. 109; *Gluckstein* v. *Barnes*, (1900) A. C. 240; *Re Sale Hotel and Botanical Gardens*, 78 L. T. 368 (C. A.); *Olympia, Limited*, (1898) 2 Ch. 181; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392; *Leeds and Hanley Theatre of Varieties*, (1902) 2 Ch. 809.

Constructively.

But a person may be a promoter who has taken a much less active part in the promotion proceedings. Anyone who assists in the promotion, *e.g.*, by obtaining a director, or agreeing to place shares, or negotiating an agreement, for a special fee or consideration payable if the company is floated, may find himself held to be a promoter. Persons who are engaged in the promotion of a company are sometimes extremely sensitive in regard to being termed promoters. A., for example, may really be taking an active part in the promotion, yet he will altogether disclaim the status of a promoter, and declare that B. is the real promoter. Promotership is, however, a question of acts, not words or names; and if a man takes part—though only a subordinate part—in the promotion, he must not be surprised to find himself saddled with the responsibility attaching in law to the promoter—a responsibility of a most onerous character.

The Fiduciary Relation of Promoters.

Fiduciary position of promoters.

The promoters of a company, as Lord Cairns said in *Erlanger* v. *New Sombrero*, 3 App. Cas. 1236, "stand undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation;" and Lord Blackburn, in the same case, after pointing out the extensive powers possessed by promoters, said: "I think that those who accept and use such extensive powers are not entitled to disregard the interest of the corporation altogether. They must make a reasonable use of the powers which they accept from the legislature; and, consequently, they do stand, with regard to that corporation, when formed, in what is commonly called a fiduciary relation to some extent." This doctrine is now well established. See the cases below mentioned. The importance of the rule, which thus creates a fiduciary relationship between the promoter and the company he brings into existence, will be at once seen when we consider its consequences —the corollary which the law deduces from it—namely, that a promoter, being in a fiduciary position, may not make, either directly or indirectly, any profit at the expense of the company he promotes, without the knowledge and consent of the company, and that if he does make a secret profit in disregard of this rule, the company can compel him to account for it. Thus, in *Emma Mining Co.* v. *Grant*, 11 C. D. 918; *Bagnall* v. *Carlton*, 6 Ch. D. 371; *Gluckstein* v. *Barnes*, (1900) A. C. 240; *Whaley Bridge Co.* v. *Green*, *supra*; *Mann* v. *Edinburgh Northern Trams Co.*, (1893) A. C. 69; and *Leeds and Hanley Theatre of Varieties, Limited*, *supra*, promoters were compelled to surrender secret profits; and the fact that the promoter is acting as agent for the vendors, or for other promoters, will not exonerate him from accounting to the company, when formed, for any secret profit made by him. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85. The same principle applies where a promoter desires to sell his own property to the company. He is quite entitled to do so; but he is bound to protect the company he has created—so at least Lord Cairns held—by furnishing it with an independent and competent board of directors, and by disclosing his interest in the property to such directors, so that they can exercise an intelligent judgment on the transaction. *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1236.

No secret profits permitted.

The proposition of Lord Cairns must, however, be accepted with some qualification in view of the remarks of Lindley, M. R., in *Lagunas Nitrate*

Co. v. *Lagunas Nitrate Syndicate*, (1899) 2 Ch. 302, 422. "Notwithstanding," he says, "all that has been said in *Erlanger* v. *New Sombrero Phosphate Co.* about the duties of the promoters of a company to furnish it with an independent board of directors, that decision does not require, or indeed justify, the conclusion that if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors or the agents of the intended vendors of property to the company, the company can set aside an agreement entered into by them for the purchase of such property simply because they are not an independent board. After *Salomon's case* I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors if the real truth is disclosed to those who are induced by the promoters to join the company." A promoter-vendor cannot evade this liability of disclosure by putting in a nominee-vendor to sell to the company (*Glasier* v. *Rolls* (1889), 42 C. D. 442), or by making disclosures merely to a board of directors who are under his influence or in his pay. "It is," said Lord Halsbury, L. C., in *Gluckstein* v. *Barnes*, (1900) A. C. 247, "too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of what these directors were the proper guardians and trustees. They were there to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders."

"Disclosure," said Lord Macnaghten in the same case, "is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company when as yet there were no shareholders is a mere farce."

So, too, a mere constructive disclosure will not do: that is, a promoter of a company whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to. *Re Olympia, Limited*, (1898) 2 Ch. 153 (C. A.); *Gluckstein* v. *Barnes*, (1900) A. C. 240.

Accordingly, to be effective, disclosure must be to the shareholders as a body, not to a select circle of the promoters' nominees. Supposing, however, all the members of the purchasing company are by the articles of association and prospectus or otherwise made aware of the real facts of the case, the want of an independent board will not invalidate the agreement. *Volenti non fit injuria*. *Salomon* v. *Salomon*, (1897) A. C. 22; *British Seamless Paper Box Co.*, 17 Ch. D.

467; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392; *Re Sale Botanical Gardens*, 78 L. T. 368.

Where a promoter in selling his property to the company does not comply with his obligations as regards disclosure and otherwise, the sale may be set aside at the instance of the company. See *Erlanger* v. *New Sombrero Co.*, *supra*. And if for any reason rescission has become impossible, the company is entitled to damages against the promoter, and the measure of such damages is the difference in value between the price paid by the company and the actual value of the property at the date of the purchase. *Leeds and Hanley Theatre of Varieties*, (1902) 2 Ch. 809 (C. A.).

When a promoter acquires property after he has commenced to promote and sells it to the company, a question of fact is raised as to whether or not he acquired it as trustee for the company. There is no presumption of law that he did. *Omnium Electric Palaces* v. *Baines*, (1914) 1 Ch. 332.

In relation to disclosure it must be borne in mind that a half disclosure is sometimes worse than none; for example, if the prospectus states that the promoters are making 30,000*l.*, whereas they are really making 50,000*l.*, the partial concealment falsifies the statement made. *Gluckstein* v. *Barnes*, (1900) A. C. 240.

The Act of 1908 now provides in sect. 81 for the fullest disclosure by vendors to the company. See pp. 344 *et seq.*

Remuneration of Promoter.

Remuneration.

"The services of a promoter are very peculiar. Great skill, energy and ingenuity may be employed," as Lord Hatherley, L. C., said (*Touche* v. *Metropolitan, &c. Co.*, L. R. 6 Ch. 671), "in constructing a plan and bringing it out to the best advantage." This is quite true; and, accordingly, when a company has obtained the benefit of such services, no one is disposed to complain of the promoters getting some substantial advantage out of the promotion. The misfortune is that promoters are rarely satisfied with a reasonable remuneration. The modes in which promoters obtain their remuneration vary considerably. Sometimes the promoters agree with the owner of a going business or some other property that they will form and float a company to acquire the same, and the vendor in consideration of their doing so agrees to pay them a commission or part of the consideration for the sale when received. Sometimes the plan resorted to is for the promoters to purchase the business, concession, patent or other property, which the proposed company is formed to acquire, and then to resell to the company at a profit. In other cases the promoters form the company with part of its share capital in founders'

shares, or deferred shares, and then take these founders' or deferred shares credited as paid up, in consideration of their paying the expenses of forming and floating the company.

In such cases, that is, of shares allotted as fully paid but not for cash, a contract or particulars must still be filed (though sect. 25 of the Companies Act, 1867, is repealed) under sect. 88 (1) (b), and the shares must be entered as fully paid in the return of allotments required by the same section of the Act. In other cases the promoters are content to accept as their remuneration the privilege of subscribing for a certain number of shares of small amount carrying valuable rights, *e.g.*, founders' or deferred shares, and paying for the same in cash, relying for their profit on the likelihood of such shares largely increasing in value in the near future.

Sometimes promoters take an option to subscribe within a year for a certain portion of the company's unissued shares at par. If the shares in the company are likely to go to a premium, such an option may be of considerable value. As to the effect of a voluntary winding-up on such option, see *In re South African Trust Co., Ex parte Hirsch* (1896), 74 L. T. 769.

Under the enabling power in sect. 89 of the Act such an option may be given as the consideration for subscribing for, underwriting or placing shares. *Hilder* v. *Dexter*, (1902) A. C. 474.

Sometimes the articles of association provide for the directors paying a specified sum to the promoters in respect of their services in promoting the company; but a clause of this kind gives, it must be remembered, merely an authority to the directors to pay such expenses, and does not constitute a contract on which the promoter can sue the company. *Rotherham Alum, &c. Co.*, 25 C. D. 103. Nor will the presence of such a clause justify the directors in paying out money without due inquiry. *Englefield Co.*, 8 C. D. 388; *Marzetti's case*, 28 W. R. 541.

Whatever be the nature of the remuneration, it must be disclosed in the prospectus if paid within two years. See sect. 81 (1) (j).

A promoter can only recover from the company what he has paid in preliminary expenses where he proves a contract by the company to pay. *English and Colonial Produce Co.*, (1906) 2 Ch. 435. According to that decision, however, the promoter can, without proving a contract, recover the registration fees, but this has since been overruled. See *National Motor Mail Coach Co.*, (1908) 2 Ch. 515, C. A., affirming Swinfen Eady, J.

Statute of Limitation and Bankruptcy.

A promoter who has abused his fiduciary position is generally held liable as a constructive trustee, and upon the footing that he has been

guilty of fraud; but a claim against him will be barred by a delay of six years after the discovery by the company of the facts. *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 325; Company Precedents, Part I., p. 140. In case of bankruptcy of a promoter, an order of discharge does not release him from any liability incurred by fraud or fraudulent breach of trust. See *Emma Silver Co.* v. *Grant*, 17 C. D. 122, and Bankruptcy Act, 1914, s. 28 (1). See also as to bankruptcy, *Re Kent County Gas Co.*, (1913) 1 Ch. 92.

Liability of Promoters in respect of Prospectuses.

Liability.

Promoters who take part in the issue of prospectuses offering shares, debentures or debenture stock for subscription may incur serious liabilities in regard thereto. They may, if the prospectus omits to give the information required by sect. 81 of the Companies Act, or makes any untrue statement, be held liable to compensate subscribers for any damage sustained by them. See further, Chapter XXXV., *infra*.

CHAPTER XXXIV.

UNDERWRITING.

Object of.

Business men now-a-days like, and quite properly, to cover all the commercial risks they can. Hence the spread of insurance in modern times. Underwriting is only an application of the same principle to company formation. It is a safeguard—a precaution; the object being to insure against the risk that shares, debentures, or debenture stock offered for subscription may not be taken up. The investing public is variable and capricious; it cannot be always relied on to appreciate even the best and soundest undertakings. It is easily alienated or put off. A very trifling circumstance will at times render an appeal to the public to subscribe abortive. For instance, some enemy of the concern writes a letter to the newspapers containing untrue statements about the company. This may be sufficient to stop subscriptions, even though the directors at once contradict the statements; so, too, if, just at the time that the prospectus is issued, some other more attractive concern is appealing to the public, or if the money market happens to be depressed, the public may decline to subscribe. In order to meet contingencies like these, it is extremely common now to get the shares, debentures, or debenture stock underwritten before they are offered for public subscription.

Special circumstances, too, often demand that the success of an issue should be assured: for instance, a company may have put its "minimum subscription" at 50,000*l.*; if the public does not come in and take up shares to that amount, the directors cannot go to allotment, and the enterprise is ruined. Or a firm may be converting its business into a company, and a large part of its assets consist of loans, deposits and other capital left in the concern by a deceased partner, and these liabilities the proceeds of the issue are intended to clear off; here, again, the failure of the issue would be disastrous. Or a going company may wish to raise further funds by the issue of new shares or debentures or debenture stock; but, owing to the state of the market or other special circumstances, a risk attends the issue.

Non-success would seriously damage the credit of the company. In such cases underwriting is found of great use.

Form of Underwriting Agreement.

Generally, the underwriting is done by a number of persons, but at times the whole of an issue is underwritten by a company or by one or two persons. The *modus operandi* is as follows:—The underwriter writes a letter addressed to the vendor or promoter or to the company agreeing to underwrite a specified amount of what is to be offered, upon the footing that he is only to be bound to take up his rateable proportion of what the public does not take up; and that in any event he is to be paid a commission, either in cash or paid-up shares, or an option, or in some other shape. Such a letter is generally expressed in the form of an agreement, "I agree to underwrite," &c., but in law it operates only as an offer; and, to become binding—to be converted into a contract—it must be accepted by the other party, and notice of such acceptance given to the underwriter. *Re Consort Derp, &c. Co.*, 1897, 1 Ch. (C. A.) 575. The acceptance may be in writing or oral (*North Charterland Co.* (1896), 13 T. L. R. 80), and it is *primâ facie* no objection that the notice of acceptance is not given until after the list has closed (*Hemp Cordage, &c. Co.*, (1896) 2 Ch. (C. A.) 121), for the Court is not disposed to import into underwriting contracts implied conditions in derogation of the express terms of the contract. *Crown Lease Proprietary Co.*, 14 T. L. R. 47. Where the agreement is to underwrite on the terms of a specified prospectus, a serious variation of the terms of the prospectus may vitiate the contract, even though the agreement expressly allows for variations in the prospectus. *Warner International Co., Ltd.*, (1914) W. N. 61; 110 L. T. 456. The underwriting letter usually provides that if the underwriter makes default in applying, the other party to the underwriting agreement may apply for the shares on his behalf. This authority, if properly framed, is effective and irrevocable where there is a complete contract, as above; for, in such cases, it is one of the terms of the contract that the authority shall subsist, and it is not open to one party to a contract by any notice to the other to revoke what is a term of the contract. *Carter* v. *White*, 25 Ch. D. 666; *In re Hannan's Empress Mining Co., Carmichael's case*, (1896) 2 Ch. (C. A.) 643. The executors of a deceased underwriter are liable on the underwriting contract. *Warner Engineering Co.* v. *Brennan*, 30 T. L. R. 191; *Ex parte Pathé Frères*, (1914) 2 K. B. 299.

Conditions Precedent.

It happens sometimes, however, that such an authority is expressed

in contingent terms, as, for instance, "I will, *if called on by you*, subscribe, &c.," or "*If I make default* you are to be at liberty, &c." Where this is the case, the authority does not arise until after condition performed, that is, after the underwriter has been called on to subscribe; and, accordingly, if the other party exercises the authority before that has been done, the allotment will be ineffective. *Ormerod's case*, (1894) 2 Ch. 474; *Brussels Palace of Varieties* v. *Prockter*, 10 T. L. R. 72; and see *Sangster* v. *Netter*, 9 T. L. R. 441.

Even where the underwriting letter has not been accepted by the person to whom it was addressed, and there is, therefore, no contract, the underwriter may, in some cases, be held bound by an application made by the other party in professed exercise of the authority conferred by the letter in his possession. *Henry Bentley & Co.*, 69 L. T. 204; *Ex parte Harrison*, 69 L. T. 204; *In re Bultfontein Sun Diamond Mine* (1896), 12 T. L. R. 461.

The principle of this is that the applicant has an *apparent* authority from the underwriter to apply, and the underwriter is therefore, as against the company accepting the application in good faith and without notice of any qualification or condition affecting the authority, estopped from denying the validity of the authority. *Ex parte Harrison*, *supra*, is a good instance, where the collateral condition qualifying the underwriting agreement was contained in a separate letter not shown to the company by the applicant for shares.

The principle would, of course, not apply if the company knew from the form of the letter or *aliunde* that the authority was qualified or conditional.

An agreement to take shares must be distinguished from an agreement to place shares. *Gorrissen's case*, L. R. 8 Ch. 507. One who merely agrees to place does not underwrite, and is not bound to take those he does not place.

Formerly the Court had no jurisdiction in the case of a contract underwriting debentures or debenture stock to compel the underwriter to specifically perform the contract. The company's remedy—and it was a very inadequate one—was to sue the underwriter for damages. *South African Territories* v. *Wallington*, (1898) A. C. 309. But this antiquated technicality has now been put an end to by sect. 105 of the Act of 1908, which provides as follows: "A contract with a company to take up and pay for any debentures [or debenture stock] of the company may be enforced by an order for specific performance," *i.e.*, in the particular case of underwriting that the underwriter shall pay over to the company the purchase-money of the debentures or debenture stock he takes, and shall receive the debentures or debenture stock in return.

An underwriting contract, if under hand, requires a 6*d.* stamp; if under seal, a 10*s.* stamp. The fact that the contract contains an

authority to apply for shares on the underwriter's behalf does not render a power of attorney stamp requisite. *Walker* v. *Remmett*, 15 L. J. Ch. 8, 174.

Payment of Underwriting Commission by Company.

Prior to 1st January, 1901, the great mass of the underwriting was done by arrangement between the promoters or vendors, or persons *ejusdem generis*, and the underwriters. Companies were not much in the habit of themselves entering into direct relations with underwriters owing to the existence of grave doubts as to whether a company could properly pay an underwriting commission for getting its capital subscribed. See *Faure Accumulator Co.*, 40 C. D. 141; and *Ooregum Co.* v. *Roper*, (1892) A. C. 125. And although in *Metropolitan Coal Consumers' Association* v. *Scrimgeour*, (1895) 2 Q. B. 604, the Court of Appeal was of opinion that the payment of a small commission, *e. g.*, 2½ per cent., by a company to *brokers* for their services as such was not *ultra vires*, this decision did not by any means remove all doubts and difficulties.

The Companies Act, 1900, s. 8, however, made important alterations in the law as to payment by a company of a commission for the underwriting of its share capital. It made it lawful for a company, upon any offer of shares for public subscription, subject to certain conditions, to pay such commission, and at the same time it prohibited all payments or allotments of shares by way of commission, whether direct or indirect, other than those expressly sanctioned, and it in effect deprived vendors and promoters of the power to pay such commissions. This section was amended by sect. 8 of the Companies Act, 1907, which relaxed the restrictions imposed by the Act of 1900, and not only allowed commissions to be paid when there was not offer of shares to the public, but relieved vendors and promoters from the prohibition against paying such commissions out of funds coming to them from the company. Sect. 89 of the Act of 1908 has now taken the place of these enactments. It runs as follows:—

Act of 1908. 89.—(1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorized by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

(a) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

(b) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form* signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3.) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Thus at last the vexatious restrictions imposed by the Act of 1900 on the payment of underwriters' commission have to a great extent been removed, and reasonable facilities have been given for securing the placing of unissued shares.

On a reconstruction the new company may now pay a commission to contractors to buy from the liquidator the balance of shares required to carry through the reconstruction. *Barrow* v. *Paringa Mines*, (1909) 2 Ch. 658.

It may still, however, be convenient to refer to a few of the decisions on the repealed sect. 8 of 1900.

1. "*Offer . . . to the public.*" (*Burrows* v. *Matabele Gold Reefs*, (1901) 2 Ch. 23; *Booth* v. *New Afrikander Gold Mining Co.*, (1903) 1 Ch. 295.

An offer by a promoter to a few of his friends, relations or customers was held not to be an offer to the public. *Sleigh* v. *Glasgow and Transvaal Options*, G. F. 420, Ct. of Sess. See also *Shewell* v.

* This applies to private companies.

Combined Incandescent Mantles Syndicate, 23 L. T. R. 482. But a distribution of 3,000 copies of a prospectus among the members of certain gas companies was held to be an offer to the public. *South of England Natural Gas Co*, (1911) 1 Ch. 573.

It was held that articles authorizing payment of commission at a certain rate per cent. did not authorize payment of a lump sum by way of commission. *Booth* v. *New Afrikander Gold Mining Co., supra.*

As against these disabling decisions it was held that this section did not prohibit the common and convenient practice in the City of remunerating underwriters by giving them the call of shares at par or at a premium. *Hilder* v. *Dexter*, (1902) A. C. 474. But it required all the wisdom and good sense of the House of Lords to arrive at this conclusion in the face of the unfortunate wording of the section.

Payment of a commission out of profits is not prohibited by the section.

The restrictions of sect. 89 apply to a private company, though it does not issue a prospectus. *Dominion of Canada Syndicate* v. *Brigstocke*, (1911) 2 K. B. 648.

Paragraph (3) must be read by the light of *Metropolitan Coal Consumers' Association* v. *Scrimgeour*, (1895) 2 Q. B. 604. It covers a reasonable commission, say, as in that case, a commission not exceeding 2½ per cent. for brokerage to a broker.

Disclosure in Annual Summary and Balance Sheets.

Further provision for disclosure is made in sects. 26 and 90.

Sect. 26 of the Act requires that the annual summary shall state, *inter alia*, (f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures since the date of the last return.

Sect. 90 further provides for commission and discount appearing in the company's balance sheet: "Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off."

Misrepresentation in Prospectus.

An underwriter who takes up shares on the faith of a prospectus containing untrue statements has the same right to repudiate these shares as any other subscriber for shares. *Karberg's case*, (1892) 3 Ch. 1 (C. A.).

CHAPTER XXXV.

PROSPECTUSES.

Prospectus.

When a company is desirous of raising money* by a direct appeal to the public, the usual course is for the company to issue a prospectus offering for public subscription shares in the company or debentures or debenture stock of the company.

For a time the stringent provisions of the Companies Act, 1900, in regard to prospectuses largely diminished the number of cases in which such an appeal was made, but the prospectus is now returning into favour, and its advantages as a mode of appealing to the general public are too great and obvious for it to be likely that it will be replaced for long by any other method of appeal.

Filing Prospectuses.

The Companies Act, 1908 (re-enacting with modifications sect. 9 of the Companies Act, 1900), makes provision for filing prospectuses as follows:—

Prospectus.

Filing of prospectus.

80.—(1.) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2.) A copy of every such prospectus signed by every person who is named therein as a director or proposed director of the company, or by his agent authorized in writing, shall be filed for registration with the Registrar of Companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3.) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5.) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue

* As to fresh issues of capital during the war, see the Treasury Regulations, Appendix, p. 632.

of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

In reading the above requirements, it must be borne in mind that under sect. 285 of the Act, prospectus means any prospectus, notice, circular, advertisement, or other invitation offering to the public, for subscription or purchase, any shares or debentures [or debenture stock] of a company.

The object of sect. 80 is twofold: (1) to preserve an authoritative record of the terms on which the public are invited by the company to subscribe for shares or debentures, and (2) to secure that the directors of the company accept responsibility for the statements in the prospectus.

Form of Prospectus.

Heading. The prospectus usually states by way of heading the date of filing, the name of the company, the amount of the capital, the names of the directors and other officials, what is offered for subscription—whether shares, debentures, or debenture stock—and the Terms. terms of issue. This heading is followed by a concise narrative of the circumstances in which the company is formed, and the prospects it has of success. The prospectus also states where application forms can be obtained, and offers the memorandum and articles, the contracts, and the form of debenture and trust deed (if any) for inspection.

Statements in Prospectus.

Rules for framing. In framing the prospectus the following rules must be borne in mind:—

(1.) The prospectus should not contain any misrepresentation of any material fact, or any deceptive or misleading statement, or any ambiguous statement which is not true in every sense in which it might be reasonably understood.

(2.) It should disclose every material fact and contract, subject to the qualifications below mentioned.

(3.) The prospectus should comply with the requirements of sect. 81 of the Act. See p. 347.

(4.) Sect. 72 of the Act—as to the appointment of directors—should be borne in mind.

(5.) The provisions of sect. 84 (substituted for sects. 3 and 5 of the Directors' Liability Act, 1890) should also be borne in mind, and all due precautions taken accordingly.

Neglect of these precautions may give the allottee—

(a) The right to rescind the contract and repudiate the allotment.

(b) The right to sue for damages or compensation those who have issued the prospectus, and others who are, by statute or common law, responsible.

The golden rule as to framing prospectuses.

The obligation of those who issue prospectuses inviting application for shares was long since laid down by Vice-Chancellor Kindersley in *Brunswick, &c. Co.* v. *Muggeridge* (1861), 1 Dr. & Sm. 383, in words which Page Wood, V.-C., described as a "golden legacy." *Henderson* v. *Lacon* (1867), 5 Eq. 249. "Those," said the Vice-Chancellor, "who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to 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 shares." And in *Central Railway of Venezuela* v. *Kisch*, L. R. 2 H. L. 123, Lord Chelmsford said that no misstatement or concealment of any material facts or circumstances ought to be permitted; that the public who were invited by a prospectus to join in any new venture ought to have the same opportunity of judging of everything which has a material bearing on the true character of the adventure, as the promoters themselves possessed, and that the utmost candour ought to characterise their public statements; and his Lordship referred with approval to the rule laid down by Kindersley, V.-C., as above mentioned.

This "golden rule" is, perhaps, somewhat of a "counsel of perfection"; at all events, it has been qualified by subsequent decisions, not, indeed, as regards any active misstatements in the prospectus, but as to the effect of mere non-disclosure. Thus, in *Peek* v. *Gurney*, L. R. 6 H. L. 403, it was held that, to support an action of deceit, there must be some active misstatement of fact, or, at all events, such a partial or fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false. This, it will be observed, was said in regard to an action of deceit, in which fraud is of the essence of the action, and which differs essentially from one brought to obtain rescission on the ground of misrepresentation of a material fact (per Herschell, L.C., *Derry* v. *Peek* (1889), 14 App. Cas. 359); but Romer, J., in *McKeown* v. *Boudard, Everard & Co.* (1896), 74 L. T. 712, has held that, even in an action for rescission, proof of mere non-disclosure of material facts is not enough to entitle the plaintiff to relief; for the duty of disclosure in the case of a prospectus inviting

share subscriptions, as Lord Watson said in *Aaron's Reef* v. *Twiss*, (1896) A. C. 273, is not the same as in the case of a proposal for marine insurance. Thus, a prospectus not stating that the directors have been presented with their qualification by the company's contractor will not entitle a person who has taken shares on the faith of the prospectus to rescind his contract. *Heymann* v. *European Central Rail. Co.*, 7 Eq. 154. The *suppressio veri* must be such as to falsify the prospectus. A half truth, for instance, represented as a whole truth may be tantamount to a false statement. *Aaron's Reef* v. *Twiss*, (1896) A. C. 276. "I do not care," said Lord Chancellor Halsbury in that case, "by what means it is conveyed—by what trick or device, or ambiguous language; all these are expedients by which fraudulent people seem to think that they can escape from the real conditions of the transaction. If, by a number of statements, you intentionally give a false impression, and induce a person to act on it, it is not the less false, although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue." Note also the observations of Lord Watson in that case, at p. 287, and see *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421 (C. A.), where the same principle was acted on. The legislature plainly, however, recognized, in sect. 38 of the Companies Act, 1867, the duty of disclosure (see *infra*, p. 350), so far as dates and parties to material contracts are concerned. And although the Companies Act, 1900, repealed that section, it was only to substitute for it a still wider statutory duty—to disclose a great number of material facts which should or may throw light on the character of the undertaking. See the section below

Company not necessarily responsible for prospectus.

A company is not responsible for the statements in a prospectus unless it is shown that the prospectus was issued by the company or by someone with the authority of the company—by the board of directors, for instance. If it is, the company is responsible, and cannot keep a contract for shares obtained by it if the statements contained in it were false or misleading. *National Exchange Bank* v. *Drew*, 2 Macq. 124; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317. The company is also responsible if, though the prospectus is issued by the promoters, the board ratify and adopt the issue, for the prospectus is the basis of the contract for shares. *Pulsford* v. *Richards*, 17 Beav. 97; *Jennings* v. *Broughton*, 17 Beav. 234. Hence, if the company, acting by the board of directors, allot shares knowing that they have been subscribed on a particular prospectus or statement of facts, the company is responsible. *Henderson* v. *Lacon*, 5 Eq. 249; *Ross* v. *Estates Investment Co.*, 3 Ch. 682; *Lynde* v. *Anglo, &c. Co.*, (1896) 1 Ch. 178; *Karberg's case*, (1892) 3 Ch. 1. Where a company publishes an abridged prospectus abroad, a foreigner who subscribes on the faith of it may be entitled to relief. *Roussell* v. *Burnham*, (1909) 1 Ch. 127.

Disclosure under the Companies Act, 1908.

Section 81 of the above Act provides as follows:—

81.—(1.) Every prospectus* issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

(a) the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

(b) the number of shares, if any, fixed by the articles of association as the qualification of a director, and any provision in the articles of association as to the remuneration of the directors; and

(c) the names, descriptions and addresses of the directors or proposed directors; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the

* By section 285 of the Act, it is enacted that unless the context otherwise requires, "Prospectus means any prospectus, notice, circular, advertisement or other invitation offering to the public, for subscription or purchase, any shares or debentures [or debenture stock] of a company."

vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and

(g) the amount (if any) paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good-will; and

(h) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(i) the amount or estimated amount of preliminary expenses; and

(j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or inteuded to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and

(l) the names and addresses of the auditors (if any) of the company; and

(m) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by the company, or where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(n) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred on the holders of the several classes of shares respectively.

(2.) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or condi-

tional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase money is not fully paid at the date of issue of the prospectus; or

(b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

(3.) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4.) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5.) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6.) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof; or

(b) the non-compliance arose from an honest mistake of fact on his part:

Provided that in the event of non-compliance with the requirements contained in paragraph (m) of sub-sect. (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7.) This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons; but, subject as aforesaid, this section shall apply to any prospectus, whether issued on or with reference to the formation of a company or subsequently.

(8.) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply

in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9.) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

The duty to be candid.

Here we have the latest of a series of enactments in which the legislature has sought to compel candour on the part of directors in dealing with the public; and there is good reason for insisting on such candour. The directors know all about the intended company, the public knows only what the directors choose to tell it. At first the law contented itself, as we have seen, by declaring directors to be under a general obligation of *bona fides* in dealing with the public, but this having proved insufficient, the Companies Act, 1867, was passed, requiring disclosure in a prospectus of the dates and names of the parties to any contract entered into by the company; in default the prospectus was to be deemed fraudulent. Then came the Directors' Liability Act, 1890, further penalizing careless statements; then the Companies Act, 1900; then the Companies Act, 1907; and now, in the Companies Act, 1908, we have all this legislation consolidated and culminating in the above elaborate scheme of statutory particulars. As a rule, there is no great difficulty in complying, at any rate, as regards a new company, with paragraphs (a) contents of memorandum, (b) directors' qualification and remuneration, (c) directors' names and addresses, (d) the minimum subscription, (h) the amount of underwriting commission, (i) the amount of preliminary expenses, (j) the amount paid to any promoter, (l) the names of the auditors, (m) the interest of the directors in the promotion or property of the company—although in some cases this is not an easy thing. The chief difficulty is connected with (f), as to the company's vendor and the amount payable to him in cash, shares and debentures, having regard to the very wide meaning given to the word "vendor" in sub-sect. (2). The object clearly is to strip off the mask—as Lord Davey said—which often conceals the real vendor, and to get at the truth of who is the person really profiting by the promotion and what amount of profit he or the successive vendors are making between them at the expense of the company. But the aim of the clause, laudable as it may be, is one thing, and its operation is another. The conscientious director is much embarrassed by it; the unscrupulous director can easily comply with the letter, and yet, by a multiplicity of details, baffle inquiry and throw dust in the eyes of investors.

Moreover, the paragraph contains no qualifying words like paragraph (k). It does *not* exclude particulars of purchases in the ordinary course of business. In terms it requires the disclosure of particulars as to transactions which may be wholly immaterial, and the disclosure of

which may seriously prejudice the company. But it would seem that the non-disclosure of immaterial matter would not involve substantial risks, seeing that a subscriber, in such a case, would be puzzled to prove that, had there been disclosure, he would not have subscribed. See *infra*, p. 360. The paragraph does not require that the prospectus should, in the case of a completed purchase, disclose the amount of the purchase money paid by the vendor upon his acquisition of the property. *Brookes* v. *Hansen*, (1906) 2 Ch. 129.

Several of the other paragraphs of the section as existing in the Acts of 1900 and 1907 were found very objectionable—that is, vexatious—in some cases. Thus the concluding part of paragraph (d) was, in the case of companies which had been in existence for some years, difficult to comply with. So, also, paragraphs (h) and (j) involved going into matters which occurred many years ago, for there was no limit as regards time. Paragraph (m), again—with reference to directors' interests in the promotion or property of the company—in some cases involved great difficulty.

So onerous and exacting has the law been found that it has not been uncommon for companies to dispose of their shares and debentures privately, leaving their purchaser to offer them to the public. This, if he is not and has not been "engaged or interested in the formation of the company," he can do without troubling himself about the section.

A person who took shares in a company on the faith of a prospectus might be debarred by a waiver clause in the prospectus from pursuing his remedy under sect. 38 of the Companies Act, 1869, for non-disclosure of a contract in the prospectus, provided the waiver clause was honestly made. *Cackett* v. *Keswick*, (1902) 2 Ch. 456; *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421; *Macleay* v. *Tait*, (1906) A. C. 24. But a waiver clause is not available so far as sect. 81 of the Companies Act, 1908, is concerned. See sub-sect. (4).

No penalty is imposed for non-compliance with the section, and the inference seems to be that anyone aggrieved by the neglect of the statutory duty has a right of action for damages against the directors or promoters or other the persons responsible for the neglect. See as to this *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441; *Cowley* v. *Newmarket Local Board*, (1892) A. C. 345; *Municipality of Picton* v. *Geldert*, (1893) A. C. 524; *Saunders* v. *Holborn District Board of Works*, (1895) 1 Q. B. 64; *Johnston* v. *Consumers Gas Co. of Toronto*, (1898) A. C. 447; *South of England Natural Gas Co.*, (1911) 1 Ch. 573.

Paragraph (9) preserves the liability of directors and others to be sued for misrepresentation under sect. 84, or in an action of deceit.

Rescission of Contract.

Rescission of contract to take shares, debentures, &c. where prospectus faulty.

Where shares, debentures or debenture stock are subscribed for on the faith of a prospectus containing a misrepresentation, the allottee is entitled to repudiate the shares and claim his money back, for it is a general rule that a contract induced by a material misrepresentation is voidable, and may, at the option of the party deceived, be rescinded, and it makes no difference that the misrepresentation was an innocent one. *Smith's case*, 2 Ch. 604, 615; *Reese River, &c.*, L. R. 4 H. L. 79; *London & Staffordshire Co.*, 24 Ch. D. 149. The same principle applies to misrepresentations made by agents of the company and *not contained in a prospectus*. *Hilo Manufacturing Co.* v. *Williamson* (1912), 28 T. L. R. 151.

When right to rescind lost.

Though voidable, the contract is valid until rescinded, and a consequence of this principle is that an allottee of shares who discovers that he has been deceived is bound at once to make up his mind—to elect—whether he will rescind his contract or not, for his name being on the register he is being held out as a member and a contributor to the assets. *Supra*, p. 126.

"It is impossible," as Lord Cairns said, in *Re Cuchar Co.*, L. R. 2 Ch. 417, "to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position."

Hence, a very short delay after discovery, say a fortnight or so deprive him of the right to rescind. See *Scottish Petroleum*, 23 Ch. D. 413; *Taite's case*, 3 Eq. 795; *Peel's case*, 2 Ch. 674; *Skelton's case*, 68 L. T. 210. And the principle applies where he has the means of knowledge as well as actual knowledge. Thus, even if he has no absolute proof of misrepresentation he may lose his right to rescind if, after being told that there has been a misrepresentation, he stands by inactive and takes no steps to look into the matter. *Ashley's case*, 9 Eq. 269; *Scholey* v. *Central Rail. Co. of Venezuela*, 9 Eq. 266, n. And if so, it is doubtful whether he can rely on other misrepresentations discovered during the trial of the action. *Christineville Rubber Estates*, (1911) W. N. 216; 81 L. J. Ch. 63.

So, too, he may lose his right to rescind by an implied ratification; if, that is, after discovering that he has a right to rescind, he treats the contract as subsisting, for instance, by endeavouring to sell the shares (*Ex parte Briggs*, 1 Eq. 483), or by executing a transfer (*Crawley's case*, 4 Ch. 322), or by paying calls or receiving dividends (*Scholey* v. *Central Rail. Co.*, 9 Eq. 266, n.; *Re Dunlop-Truffault Cycle Co., Shearman's case*, 66 L. J. Ch. 25), or by attending and voting at a general meeting in person or by proxy (*Sharpley* v. *Louth, &c. Co.*, 2 C. D. 663); but

he is allowed a reasonable time to obtain evidence before taking action. *Central Rail. Co.* v. *Kisch*, 2 H. L. 99. Acting as a member is not a bar when the shareholder has previously issued a writ claiming rescission, for that is a definitive election to rescind. *Tomlin's case*, (1898) 1 Ch. 104; Company Precedents, Part I., p. 180. Negotiations may also excuse delay. *Tibbatts* v. *Boulter* (1895), 73 L. T. 534. A transfer of part of the shares before discovery does not preclude relief as to the rest. *Re Mount Morgan, &c. Co.*, 56 L. T. 622.

Winding-up a bar to rescission.

A fortiori, is winding-up a bar to rescission, for, on winding-up, the rights of the whole body of the company's creditors have intervened. Where, therefore, an allottee of shares waits until after the commencement of the winding-up, his right to rescind is gone. *Oakes* v. *Turquand*, L. R. 2 H. L. 325. If on the register at the commencement of the winding-up, though under a voidable contract, he cannot escape unless he has commenced legal proceedings to enforce rescission before the date of the winding-up. *Oakes* v. *Turquand, supra*; *Burgess' case*, 30 C. D. 507; *Reese River Co.* v. *Smith*, L. R. 4 H. L. 64.

An allottee, where the allotment is irregular under sect. 86 of the Companies Act, 1908, is in a different position. It is enough that he gives notice of avoidance, within the month allowed, without taking legal proceedings. *Re National Motor Mail Coach Co.*, (1908) 2 Ch. [illegible].

Prompt repudiation of shares, when effective.

An allottee who repudiates is safe if the company gives in and [illegible] his name from the register, and an order of Court in such a [illegible] not necessary *Wright's case*, L. R. 7 Ch. 55), for the company [illegible] bound to fight every claim.

Injunction.

[illegible] the shareholder is suing for rescission, the Court can on [illegible] a forfeiture of the shares pending the hearing. *Lamb* [illegible] *Rubber*, (1908) 1 Ch. 845.

Rescission retrospective.

Where a contract is rescinded for misrepresentation, it is rescinded *ab initio*, and accordingly the shareholder cannot, in a winding-up, be placed on the list of contributories even as a past member. *Wright's case, supra*.

Misrepresentation to be of fact to entitle shareholder to relief.

A misrepresentation, to entitle an allottee to relief, must be one of *fact*. *Eaglesfield* v. *Marquis of Londonderry*, 4 C. D. 702. It must be material, and the applicant for shares must have relied upon it. To give a few instances. Where it was stated that more than one-half the first issue of shares had already been subscribed for, when in fact such subscription was a sham one, this was held a misrepresentation entitling the applicant to rescission. *Ross* v. *Estates Investment Co.*, L. R. 3 Ch. 682; *Kent* v. *Freehold Land Co.*, 3 Ch. 493; *Henderson* v. *Lacon*, 5 Eq. 249; *Arnison* v. *Smith*, 41 C. D. 348.

So where it was falsely stated that the surplus assets as appearing

by the last balance sheet amounted to upwards of 10,000*l*. *Re London and Staffordshire Bank*, 24 C. D. 149.

So where it was stated that a particular mine was in full operation and making large daily returns when it was, in fact, unproductive and worthless. *Reese River* v. *Smith*, L. R. 4 H. L. 64.

So where it was falsely represented that patented articles were a commercial success and beyond the experimental stage. *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421.

So where a promoter who was to get part of the purchase money was untruly put forward as one of the vendors. *Capel* v. *Sims*, 58 L. T. 807.

So where it was stated untruly that the vendor was to pay all the preliminary expenses. *Re Liberian Government Concessions*, 9 T. L. R. 136.

So where it was stated untruly that the company was the sole manufacturer of asbestos in France and had a practical monopoly. *Hyde* v. *New Asbestos Co.*, 8 T. L. R. 121.

So where it was stated untruly that the company's process was a commercial success. *Stirling* v. *Passburg Grains*, 8 T. L. R. 71.

So where it was stated that no promotion money was to be paid, whereas there was in truth a large sum to be so paid. *Lodwick* v. *Earl of Perth*, 1 T. L. R. 76.

So where it was stated that the vendors of nitrate grounds had obtained, brought to them in pipes, a supply of water, and that the company would have the right of using a certain part of the water, whereas in truth the water supply was insufficient. *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392, 397, 429.

A statement in a prospectus as to the persons who are to be directors is a material statement, and, if untrue, a person subscribing on the faith thereof is *primâ facie* entitled to rescind. *Re Scottish Petroleum Co.*, 23 Ch. D. 413; and see *Anderson's case*, 17 Ch. D. 373; *Smith* v. *Chadwick*, 20 Ch. D. 50; *Wainwright's case*, 62 L. T. 30; *Kent County Gas Co.*, 95 L. T. 756.

Where a company was formed to buy a mine, and extracts from the report of an expert were set forth which gave a misleading impression of that report and induced the belief that the mine was similar to a rich adjacent mine, it was held that a subscriber was entitled to relief. *Re Mount Morgan Co.*, 56 L. T. 622.

It is a misrepresentation to state in a prospectus that share capital has been "subscribed" when it has only been allotted in fully paid shares to the company's contractor (*Arnison* v. *Smith*, 40 Ch. D. 567), or that the company has contracted for the purchase of a property when, in fact, there is only negotiation. *Ross* v. *Estates Investment Co.*, L. R. 3 Ch. 682.

A prospectus often refers to reports. In such a case, if the company will take upon itself to assume the authenticity of the reports and represent as facts the matters stated in those reports, it must take the consequences should they prove false. *In re Reese River Silver Mining Co.*, L. R. 2 Ch. 611; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Mair* v. *Rio Grande Rubber Estates*, (1913) A. C. 853. If the company does not intend to issue the shares on the basis of the facts stated in the report, it must dissociate itself from the report in clear and unambiguous terms. Calculations of profits based on statements in the report may amount to a misrepresentation. *Re Pacaya Rubber Co.*, (1914) 1 Ch. 542. But if the persons issuing a prospectus merely refer to the report, *e.g.*, of a mine, as telling all they know, and propose to send out someone to test it, they will not be treated as guaranteeing its truth. *In re British Burmah Lead Co.*, 56 L. T. 815. Under the Companies Act, 1908, s. 84, *infra* (re-enacting the Directors' Liability Act, 1880), directors who make untrue statements in a prospectus, purporting to be extracts from reports or valuations by engineers, valuers, accountants or other experts, must be prepared to show that the statements fairly represent the expert opinion. Effect of reports referred to in prospectus.

Other instances of misrepresentation may be found in *Jackson* v. *Turquand*, L. R. 4 H. L. 305; *Denton* v. *Macneil*, 2 Eq. 352; *Moore* v. *Explosives Co.*, 56 L. J. Q. B. 235; *Wright's case*, L. R. 7 Ch. 55; *Lyon's case*, 35 Beav. 646; *Bellairs* v. *Tucker*, 13 Q. B. D. 562; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 724; *Nicol's case*, 3 De G. & J. 387; *In re Devala Provident Gold Mining Co.*, 22 Ch. D. 593; *Arnison* v. *Smith*, 41 Ch. D. 348; *Drincqbier* v. *Wood*, (1899) 1 Ch. 393.

The statement that something *will* be done is not a statement of an existing fact within the rule. *Beattie* v. *Ebury*, 7 Ch. 804; *Alderson* v. *Maddison*, 5 Ex. Div. 293; 8 App. Cas. 467; *Bellairs* v. *Tucker*, *supra*. But a representation of belief, opinion, expectation, or intention is a representation of fact, for "the state of a man's mind is as much a matter of fact as the state of his digestion." Per Bowen, L. J., *Edgington* v. *Fitzmaurice*, 29 C. D. 483. Statement only of belief, opinion, &c.

Nor is there any safety in ambiguous statements, which, in one sense, are true, though in another, not true, "which keep the word of promise to the ear and break it to the hope"; for the rule is that the applicant is entitled to put any reasonable construction on such a statement, and if, according to that construction, it is untrue, he is entitled to relief. *Hallows* v. *Fernie*, 3 Ch. 476; *Arkwright* v. *Newbold*, 17 Ch. D. 322; *Smith* v. *Chadwick*, 9 App. Cas. 187. Ambiguous statements.

One thing is clear on the authorities, and that is, that if a prospectus contains statements of fact, the recipient is entitled to rely thereon. He is not bound to verify them. Thus, if the prospectus states the Reliance of applicant on statement of fact without

trying to verify.

Notice of contents of documents by prospectus offered for inspection.

effect or terms of a document, or purports so to do, and offers it for inspection, he is not bound to inspect it. He is entitled to assume in either case that the prospectus is true, "for when men issue a prospectus in which they make statements of the contracts made before the formation of the company, and then state that the contracts may be inspected at the office of the solicitors, it has always been held that those who accepted these false statements as true, were not deprived of their remedy merely because they neglected to go and look at the contracts." Per Jessel, M. R., *Redgrave* v. *Hurd*, 20 Ch. D. 14; and *Smith* v. *Chadwick*, 20 Ch. D. 57; 9 App. Cas. 187; *Re Mount Morgan West Gold Mine Co.*, 56 L. T. 622. The answer is, "You put me off my guard" (per Lord Chelmsford); see also *Aaron's Reef* v. *Twiss*, (1896) A. C. 273, in which Lord Watson said: "It was argued for the company that, inasmuch as the contracts for the purchase of the concession were generally referred to towards the end of the prospectus, the respondent must be held to have notice of their contents. This appears to me to be one of the most audacious pleas that ever was put forward in answer to a charge of fraudulent misrepresentation. When analyzed, it means simply that a person, who has induced another to act upon a statement made with intent to deceive, must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would expose the fraud."

Whether non-compliance with sect. 81 of the Act of 1908 gives right to rescind.

The question whether breach of the requirements of sect. 81 of the Companies Act, 1908, will give a subscriber the right to repudiate the allotment made to him, and to compel rescission of the contract, remains for consideration. When the breach involves the misstatement of a material fact, there will, of course, be a right of rescission under the general law, as above, pp. 352, 353, and in this connection it must be borne in mind that the statement of a half truth may amount to a misstatement. But where the breach consists in the mere omission to state some fact which ought under this section to be stated, and the omission to make that statement does not falsify that which is stated, it will probably be contended, and it has been recently held, that the section gives no right of rescission. *Wimbledon Olympia, Limited*, (1910) 1 Ch. 630, followed by Swinfen Eady, J., in *South of England Natural Gas, &c. Co.*, W. N. (1911) 80. This accords with *Gover's case*, 1 C. D. 191.

Prospectus to be deemed addressed to all who apply on strength of it.

The proper office of a prospectus is to invite the public to take shares in the new company, and it is to be treated as addressed exclusively to those who subscribe for shares in response to it, and not to other persons who may read it and buy shares in the market on the faith of it. Those persons, therefore, who buy in the market cannot, as a general rule, sue upon it. Nor will a false report made by

directors to a general meeting entitle a person who buys shares on the faith of it *from a shareholder* (as distinguished from taking them from the company) to rescind his contract. *Ex parte Worth* (1859), 4 Drew. 529; *Peek* v. *Gurney*, L. R. 6 H. L. 403; *Nicol's case*, 3 De G. & J. 387. But this rule does not apply where it is shown that the prospectus was intended and used to induce purchasers in the market to buy the shares. *Andrews* v. *Mockford*, (1896) 1 Q. B. 372; and see *Duranty's case* (1858), 26 Beav. 268.

Sect. 84 re-enacting the provisions of the Directors' Liability Act, 1890.

Directors' Liability Act, 1890.

The Directors' Liability Act, 1890 (now incorporated in the Companies Act, 1908, s. 84), was passed with a view to strengthen the supposed inadequacy of the law as declared in *Peek* v. *Derry*, 14 App. Cas. 337, in respect of directors' liability. In that case it was finally decided that in order to obtain, in an action of deceit, any personal remedy in damages against directors who issued a prospectus containing untrue statements, it was necessary for the plaintiff to prove affirmatively that the statements were made fraudulently, that is to say, either with knowledge that they were false, or recklessly, *i.e.*, not caring whether they were true or false, or not believing them to be true. To discharge this obligation—to prove a psychological fact—was in many cases a matter of impossibility. It was not enough to prove that the director sued had been guilty of the grossest negligence, or that he made the statement without any reasonable grounds for believing it to be true. The question was, had he made it fraudulently—did he or did he not believe it to be true? The Act of 1890 altered this, and shifted the onus, and sect. 84 of the Act of 1908 has adopted the same rule, and under the law as it now stands, if an allottee once proves that a material statement in the prospectus is untrue, and that he took shares on the faith of the prospectus and sustained damage, he is entitled to sue every director and every person who has authorized the issue of the prospectus, and to compel them to pay compensation for his loss. The statement once proved untrue in such an action, the director is *primâ facie* made liable. To escape, he must prove affirmatively that he had reasonable grounds to believe the statement to be true, and that he did, in fact, believe it to be true, or as an alternative, he must prove that the statement, if made on the authority of an expert, was, in fact, made on the authority of such expert and fairly represented his opinion. See the words of the section, *infra*.

Thus a director makes a statement which is untrue within the

meaning of sect. 84 of the Act of 1908 if he states in a prospectus that the company has acquired a specified property, when in fact it has not at the time acquired it, though the director honestly believes that it has been acquired. The uncorroborated statements of a vendor, still less of a vendor-promoter, afford no reasonable grounds for believing that his statements are true. *Adams* v. *Thrift*, C. A., (1915) 2 Ch. 21.

When a director knows that a prospectus is being issued inviting persons to take, *e.g.*, debentures, and abstains from asking to see it until after action brought on account of misrepresentations therein, it is too late for him to give "reasonable public notice that it was issued without his consent," under Directors' Liability Act, 1890, s. 3 (Companies Act, 1908, s. 84 (1) (c) (ii)). *Drincqbier* v. *Wood*, (1899) 1 Ch. 393.

As to the contribution from co-directors given by sect. 5 of the Directors' Liability Act, 1890 (Companies Act, 1908, s. 84 (4)), see *Gerson* v. *Simpson*, (1903) 2 K. B. 197; *Shepheard* v. *Bray*, (1907) 2 Ch. 571.

It is not at all clear what is the period of limitation for bringing an action under the Act. The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), appears to fix two years, but dealing with the corresponding provisions in the Act of 1890, the Court of Appeal in *Thomson* v. *Lord Clanmorris*, (1900) 1 Ch. 718, disregarding the words of the Act, held it inapplicable, and seemed inclined to think that six years was the period under 21 Jac. 1, c. 16.

The cause of action first arises for the purposes of the Act when the plaintiff sustains damage by reason of the breach of statutory duty. Presumably—the action being for a statutory debt—a deceased director's estate is liable. *Frankenburg* v. *Great Horseless Carriage Co.*, (1900) 1 Q. B. 504. As to proof in bankruptcy, see Bankruptcy Act, 1914, s. 30; and *Greenwood* v. *Humber & Co.*, W. N. (1898) 162.

As to the measure of damages, see *McConnell* v. *Wright*, (1903) 1 Ch. 546.

Action of Deceit.

Old remedy by action of deceit.

The old remedy by action of deceit has now to a large extent been superseded—so far as directors are concerned—by the easier and more efficacious remedy under the Directors' Liability Act, 1890, and sect. 84 of the Act of 1908, which has taken its place. To maintain an action of deceit, as already mentioned, actual fraud had to be proved against the defendant—that he knowingly made an untrue statement of a fact in the prospectus. *Peek* v. *Derry*, 14 App. Cas. 337.

In such an action mere non-disclosure of facts was not and is not

sufficient, unless the non-disclosure is such as to make the statements in the prospectus false. *Peek* v. *Gurney*, L. R. 6 H. L. 403; *Aaron's Reef* v. *Twiss*, (1896) A. C. 273.

The defendant in an action of deceit has various defences, though some once open are now closed to him under the Directors' Liability Act, 1890, and sect. 84 of the Act of 1908. Thus, he may escape if he can prove that he did believe the fact stated, even though his belief was not based on reasonable grounds, for if he believed the statement fraud is negatived (*Derry* v. *Peek*, 14 App. Cas. 337); or, again, he may escape if he can prove that the plaintiff was not, in fact, misled, *e.g.*, that he knew the statement to be false when he applied for the shares, but he cannot avail himself, as we have seen above, of the "audacious plea" that the plaintiff might easily, by inquiry or otherwise, have ascertained that the statement was untrue. *Aaron's Reef* v. *Twiss*, (1896) A. C. 273.

Sect. 38 of the Companies Act, 1867.

This section was repealed by the Companies Act, 1900; but it is desirable to refer to some of the decisions, as the repeal is without prejudice to any right of action acquired under the section, and the views taken by the Courts may throw much light on the corresponding provisions of sect. 81 (1) (k) of the Act of 1908 (*supra*, p. 348).

Statement in prospectus of contracts (sect. 38 of Companies Act, 1867).

Section 38 was expressed in the widest possible terms; so wide, that the Courts, in order to make it workable, have been obliged to imply some limitation; for it would be practically impossible to specify in a prospectus, at any rate in some cases, all the various contracts that have been made by the directors or promoters of a company. Accordingly, after much litigation and difference of judicial opinion (see *Sullivan* v. *Mitcalfe*, 5 C. P. D. 465; and *Gover's case*, 1 Ch. D. 200), it was settled that what the section in effect required was, that the prospectus should state the date and parties to every *material* contract made by the company, or by the directors or promoters thereof, meaning by material 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 (*Sullivan* v. *Mitcalfe*, *supra*, followed; *Cuckett* v. *Keswick*, (1902) 2 Ch. 456). If material it makes no difference whether the contract not disclosed is executed or executory. *Broome* v. *Speak*, (1903) 1 Ch. 586 (C. A.); 71 L. J. Ch. 716; 72 L. J. Ch. 251. Nor can a director escape liability for non-disclosure of a material contract, of the existence of which he was aware, by professing ignorance of the contents or materiality of the contract, or by alleging that he left the matter to his legal advisers. *Watts* v. *Bucknall*, (1903) 1 Ch. 766;

Tait v. *Macleay*, (1904) 2 Ch. 631; *Shepheard* v. *Broome*, (1904) A. C. 342. The importance of complying with the requirements of the section was great; for if not complied with the prospectus was to be deemed fraudulent on the part of the promoters, directors, &c., knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he had notice of such contract, that is, the undisclosed contract.

The omission to specify the contract may have been perfectly innocent; the director may have been acting under the advice of an experienced solicitor; he may, in the exercise of an honest judgment, have come to the conclusion that the contract was not material; all these things availed and avail him nothing. If he has, in fact, not complied with the section, he is to be deemed the author of a fraudulent prospectus.

To exonerate himself from this discreditable imputation he must show that he was not responsible for the prospectus; in other words, that he was defrauded or deceived into giving his sanction to it. *Watts* v. *Bucknall*, (1902) 2 Ch. 628; (1903) 1 Ch. 766; *Hoole* v. *Speak*, (1904) 2 Ch. 732.

Nor was it possible to escape the section by making the contract a merely verbal one, for it was held that a verbal contract was as much within the section as a contract in writing (*Capel* v. *Sims Composition Co.*, 36 W. R. 689; *Arkwright* v. *Newbold*, 17 C. D. 301), and where a contract is rescinded by another contract the latter and perhaps both may have to be specified. *London and Northern Bank, Haddock's case*, W. N. (1902) 84.

There is, however, this saving element in the situation, that in order to obtain relief under the section the plaintiff must show that but for the omission to disclose the contract he would not have subscribed. This essential condition was not fully appreciated until the House of Lords recognized it in *Macleay* v. *Tait*, (1906) A. C. 24.

The expression "knowingly issue" in sect. 38 means issuing with knowledge of the existence of the omitted contract. It is no defence, as mentioned above, that the director or promoter honestly considered the contract not to be material. *Twycross* v. *Grant*, 2 C. P. D. 542.

The section applied not only to a full prospectus or notice but also to an abridged prospectus, even though the abridged prospectus stated where a full prospectus can be obtained. *Army, &c. Society* v. *Craig*, 8 T. L. R. 227. But the section was confined to a prospectus offering shares for subscription, and did not apply to one offering debentures or debenture stock. *Cornell* v. *Hay*, L. R. 8 C. P. 328.

The extreme difficulty of determining in many cases whether a

particular contract which had been made did or did not fall within the section, and the desire in other cases of persons to escape from the performance of the obligation imposed by the section, led to the adoption of what was commonly known as a "waiver clause," that is to say, to a condition in the prospectus followed by a corresponding clause in the form of application to the effect that the applicant waived any claim he might have for non-compliance with the section. Such waiver clauses had been in use even before 1877, as witness the evidence of the late John Morris before the Select Committee on the Companies Acts in that year, and prior to the Act of 1900 had become almost universal.

The view of the Court of Appeal in the more recent cases on the subject (*Cackett* v. *Keswick*, (1902) 2 Ch. 456, following *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421, and *Watts* v. *Bucknall*, *supra*) was, that a person who takes shares in a company, on the faith of a prospectus, may be debarred by a waiver clause from pursuing his remedy under sect. 38 of the Companies Act, 1867, for non-disclosure of a contract in the prospectus, provided the waiver clause was honestly made and directed the attention of the intending shareholder to the nature of the contract in question. At last, in *Macleay* v. *Tait*, (1906) A. C. 24, the House of Lords came to the same conclusion that an honest waiver clause was valid. In excluding waiver clauses in the future, for the purposes of the Companies Act, 1908 (see sect. 81 (4), substituted for sect. 10 of the Act of 1900), the Legislature has no doubt been actuated, not so much by any intrinsic objectionableness in the clause, as by a consideration of its liability to abuse.

Non-compliance with sect. 38 did not give an allottee a right to repudiate his shares, or any right of action against *the company*. *Gover's case*, 1 C. D. 182. The remedy given by the section was, by implication, an action for damages against the directors or others who have issued what is "to be deemed to be" a fraudulent prospectus. In order to succeed in such an action the plaintiff must prove (1) that the prospectus omitted to state the date and parties to some contract; (2) that such contract was material in the sense above mentioned; (3) that the applicant took shares in the company on the faith of such prospectus; and (4) that he has sustained damages—*e.g.*, by reason of the shares turning out to be worthless or being otherwise depreciated.

Non-compliance with sect. 38 gives no right to repudiate shares, but remedy against directors or others for damages.

Attention should be called to the concluding words of the section, "unless he had notice of such contract." It seems that to be effective the notice must be of the material contents of the contract, not merely of its existence. *Watts* v. *Bucknall*, (1903) 1 Ch. 766.

What is "notice of contract" in sect. 38.

And according to a decision (*Nash* v. *Calthorpe*, W. N. (1905) 100)

the applicant for the purposes of (3) or (4) must prove that had he known of the omitted contract he would not or might not have taken the shares.

Debenture Prospectuses.

Debenture prospectuses.

As to prospectuses offering debentures, debenture stock, and other securities for subscription, the rules above stated apply for the most part, but subject to the following qualifications :—

(1.) Mere delay after discovering misrepresentation is not so dangerous as in the case of shares, for there is no holding out as in the case of shares (see pp. 126, 352); nevertheless, any act shewing an election to affirm the contract destroys the right of rescission; thus, if a debenture holder, entitled to repudiate, after discovering the facts giving such right to repudiate, acts as a debenture holder, *e.g.*, by voting at a meeting or otherwise, he thereby disentitles himself to relief.

(2.) Sect. 84 of the Act of 1908, replacing the Directors' Liability Act, 1890, is applicable to debenture prospectuses.

(3.) An action of deceit is available where there is a *fraudulent* misrepresentation.

(4.) Sects. 80, 81 of the Companies Act, 1908, are also applicable.

A prospectus offering debentures or debenture stock is headed with the name of the company, states the nominal and issued capital of the company, the number and description of the debentures or debenture stock offered, the nature of the security, the terms of issue, the names of the directors, bankers, solicitors, brokers, auditors, and secretary, the objects and prospects of the company, the facts required by sect. 81 of the Act of 1908 to be stated, how applications are to be made, and where copies of the prospectus, of the memorandum and articles of association, and of the debentures and debenture stock deed may be inspected.

CHAPTER XXXVI.

STATEMENT IN LIEU OF PROSPECTUS.

The onerous and indefinite obligations as to disclosures imposed on directors and promoters by sect. 10 of the Companies Act, 1900, to a great extent checked the use of the prospectus for company promotion, and augmented the number of companies floated by other means, *e.g.*, by obtaining subscriptions on forms of application accompanied by oral statements, or by selling shares in the company in the stock market through financiers and others, or by means of a pooling syndicate, or otherwise.

To rectify this unfortunate result the legislature, in sect. 82 of the Act of 1908 (replacing sect. 1 of the Act of 1907) requires, where a prospectus is not issued [and the company is not a private company, sect. 82 (2)], the filing of a statement in lieu of prospectus. The section runs thus:—

82. A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures [or debenture stock] unless before the first allotment of either shares or debentures [or debenture stock] there has been filed with the Registrar of Companies a statement in lieu of prospectus, signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

"Prospectus" in this section means as provided by sect. 285, any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures [or debenture stock] of a company.

The statement in lieu of prospectus is to be framed in accordance with the form set forth in the Second Schedule to the Act (see *infra*, p. 536), and on referring to that form it will be seen that the disclosure required is almost as extensive as that required in the case of a prospectus inviting subscriptions for shares in a new company.

Accordingly, in filling up the form of statement the observations in Chapter XXXV. as to the contents of a prospectus may be referred to in illustration and explanation. The statement is to be signed by every person who is named in it as a director or a proposed director of the company, or by his agent authorized in writing.

The statement is, amongst other things, to state the "minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment." These words refer to sect. 85, which provides, in para. (7), that—

"(7.) In the case of the first allotment of share capital, payable in cash, of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription, that is to say,

"(a) The amount (if any) fixed by the memorandum or articles, and named in the statement in lieu of prospectus, as the minimum subscription upon which the directors may proceed to allotment; or

"(b) If no amount is so fixed and named, then the whole amount of the share capital other than that issued, or agreed to be issued, as fully or partly paid up otherwise than in cash,

has been subscribed, and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

"This sub-section shall not apply to a private company, or to a company which has allotted any shares or debentures [or debenture stock] before July, 1908."

In this connection it is also necessary to bear in mind sect. 86, making allotments in contravention of the above provision voidable, and rendering directors liable; and sect. 87, which prohibits the company from commencing business, or exercising its borrowing powers, until the conditions therein specified have been complied with; and sect. 83, which prohibits a company from varying before the statutory meeting any contract referred to in the statement in lieu of prospectus, except subject to the approval of the statutory meeting.

A person who applies for shares on the faith of statements contained in a statement in lieu of prospectus has apparently the same right of rescission, if they are false, as if they were contained in a prospectus. But such misstatements or omissions in a statement in lieu of prospectus, if not relied upon, do not render subsequent allotments void. *Blair Open Hearth*, (1914) 1 Ch. 390.

The statement is clearly a document required by or for the purposes of the Act, specified in the Fifth Schedule (*viz.*, to comply with sect. 82), and accordingly if any person wilfully makes in it a statement false in

any material particular, knowing it to be false, he is guilty of a misdemeanour, and liable on indictment to imprisonment for a term not exceeding two years with or without hard labour, and on summary conviction to imprisonment for not exceeding four months with or without hard labour, and in either case to a fine (not exceeding 100*l.*), in lieu of or in addition to such imprisonment. See sect. 281.

Sect. 72 also (as to appointment of directors), where applicable, must be borne in mind. See pp. 181, 182.

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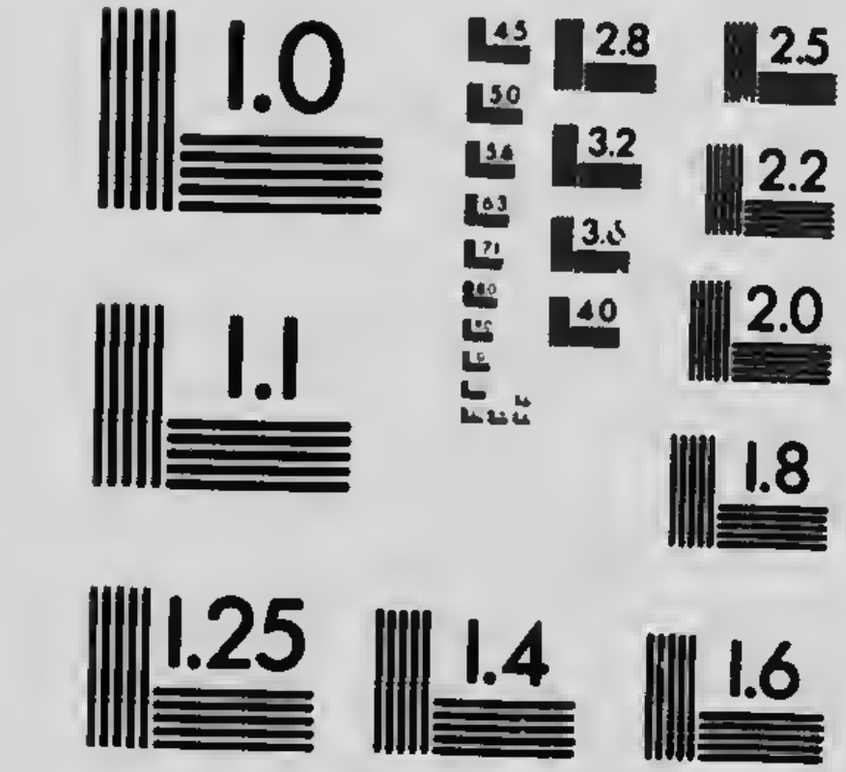

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CHAPTER XXXVII.

PRIVATE COMPANIES.

Section 37 of the Companies Act, 1907, gave at last, what had long been desired, a definition of a Private Company. This definition, now re-enacted by sect. 121 of the Act of 1908, as amended by the Companies Act, 1913, runs thus:—

121.—(1.) For the purposes of this Act the expression "private company" means a company which by its articles—

(a) restricts the right to transfer its shares; and

(b) (Act of 1913, s. 1 (2) (b)) limits the number of its members (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were while in such employment and have continued after the determination of such employment to be members of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures [or debenture stock] of the company.

(2.) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the Registrar of Companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3.) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

But though the private company has now received statutory recognition and an authoritative definition, it must not be supposed that the private company —either the name or the thing—was first brought into use by the Companies Act, 1907; for both the name and the thing with substantially the same incidents and signification have been well known for upwards of thirty years. The term was already in use—though only to a limited extent—when the author's work on "Private

Companies" was first published some thirty years ago, and the twenty-nine editions of that work which have appeared in the interval may not have been without their effect in familiarizing the public with this useful form of company association. Certain it is that private companies, or incorporated partnerships as they may be called, constitute more than a third nowadays of the whole number of companies registered.

Many judicial references to the private company may be cited. As long ago as 1881, in *British Seamless Paper Box* (1881), 17 Ch. D. 467, Cotton, L. J., said "when the company was formed it was intended to be a private company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to then existing shareholders." And Lindley, L. J., in *In re George Newman & Co.*, (1895) 1 Ch. 685, observed: "It is true that this company was a small one, and is what is called a private company." Lord Macnaghten also, in *Salomon* v. *Salomon & Co.*, (1907) A. C. 22, said "that among the principal reasons which induce persons to form private companies . . . are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money."

But the term "private company" having now been appropriated by the legislature to a company with precisely defined incidents, it will, no doubt, in the future be used exclusively in its technical sense—in the sense attached to it by the Act.

Not only does the legislature recognize the private company: it may be said to bestow its benediction upon it. It grants it special privileges and immunities. In particular, it gives no countenance to the absurd prejudice which has at times prevailed against the so-called "one-man" companies. So far from doing so it permits a private company to consist of any two persons instead of seven, as in the case of a public company, and thus facilitates, in no small degree, the formation and working of small private companies. Moreover, the Act goes still further. In particular—

1. Exceptional facilities are granted in regard to the formation of a private company. Other companies have to comply with a whole series of preliminary conditions before they can commence business, including the filing of a prospectus, or of a detailed statement in lieu of a prospectus. But a private company is formed in the simplest way, by delivering to the registrar a memorandum and articles of association and paying the requisite fees; whereupon the certificate of incorporation is issued, and the company can commence business at once. See sect. 82 (2) and sect. 72 (3) as to filing consents and contracts by directors.

2. Another important exemption is conceded to private companies by sect. 26. That section requires every company, other than a

private company, to file with the registrar annually "a statement in the form of a balance-sheet, audited by the company's auditors, and containing a summary of its capital, its liabilities, and its assets, and giving such particulars as will disclose the general nature of such liabilities and assets, and how the values of the fixed assets have been arrived at." These requirements do not apply to a private company.

3. A private company is exempt from the provisions of sect. 65, which requires the filing with the registrar of the report as to the position of the company, which has to be sent to the members seven days before the statutory meeting in accordance with the section. The company is, however, bound to convene a statutory meeting. *Gardner* v. *Iredale*, (1912) 1 Ch. 700.

4. A private company is exempt from the provisions of sect. 114, which gives to the holders of preference shares, debentures and debenture stock the same right to receive and inspect the balance-sheets of the company and the reports of the auditors, and other reports, as are possessed by the holders of ordinary shares in the company.

5. Lastly, sect. 89 modifies the law in respect of the payment of commissions to persons for subscribing, or underwriting, or placing shares. Under sect. 8 of the Act of 1900, such commissions could only be paid "upon an offer of shares to the public" for subscription, but now private companies will be able to pay such commissions without making any such offer. A statement in prescribed form must then be filed for the purpose of disclosing the amount or rate of commission. Sect. 89 (1) (b), and see the prescribed form, W. N. 11th July, 1908, p. 223.

Regard being had to these privileges and immunities—

1. Existing concerns hitherto worked as private companies will, no doubt, as a general rule, where practicable, desire to bring themselves within the definition of a private company under the Act of 1908, and with a view thereto will pass the requisite special resolution.

2. Companies hereafter formed and intended to be worked as private companies will, as a rule, be registered as private companies under the Act of 1908, and their articles of association will be framed accordingly.

3. Existing public companies (whether formed before or after 1st April, 1909), which can conveniently be worked as private companies, will in like manner alter their regulations by special resolution.

In order to convert an existing company into a "private company" within sect. 121 of the Act of 1908, it is necessary to pass a special resolution altering the company's articles so as to limit the number of members, to prohibit any invitation to the public to subscribe for its shares, debentures, or debenture stock, and impose restrictions on the transfer of its shares. These alterations will satisfy the statutory

definition, but they are not the only alterations requisite. The articles generally must be considered, for there may be other provisions inconsistent with those indicated, and they must be altered accordingly. For example, power to issue share warrants to bearer must be struck out.

The private character of such a company may at any time be terminated in the manner indicated in sect. 121 of the Act, or by any alteration of its articles, so as to remove any of the restrictions required by sect. 121, or by default in complying with any of those restrictions. Prior to the Companies Act, 1913, there was no prohibition in the Companies Acts against disregarding the articles in so far as they bring the company within the definition. Thus, where the number of members in fact exceeded fifty, it was held that the company had not ceased to be a private company. *Park* v. *Royalties Syndicate, Ltd.*, (1912) 1 K. B. 330.

But now by the Companies Act, 1913—

Sect. 1 (1). Where the articles of a company include the provisions which, by sect. 121 of the Companies (Consolidation) Act, 1908, as amended by this Act, are required to be included therein in order to constitute the company a private company for the purposes of that Act, and default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions of that Act mentioned in the schedule to this Act, and thereupon the said provisions shall apply to the company as if it were not a private company:

(The schedule refers to sect. 26 (3) as to annual return in form of balance sheet; sect. 114 as to the right of preference shareholders to inspect balance sheets; sect. 115 and sect. 129 (iv) as to minimum number of members of a company.)

Provided that the Court on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.

(3) Every private company shall send with the annual list of members and summary required to be sent under sect. 26 of the Companies (Consolidation) Act, 1908, a certificate signed by a director or the secretary that the company has not since the date of the last return, or in the case of a first return since the date of the incorporation of the company issued any invitation to the public to subscribe for any shares or debentures of the company; and, where the list of members discloses the fact that the number of members of the company exceeds

fifty, also a certificate so signed that such excess consists wholly of persons who under sect. 121 of that Act as amended by this section are to be excluded in reckoning the number of fifty.

Instances of Conversion.

Instances of conversion of concerns into private companies.

Many of the most successful trading concerns of the day have been, and are being daily, converted into private companies; in fact—according to the Registrar's estimate—fully one-third of the whole number of companies registered are private companies. The following are a few examples:—

Crosse & Blackwell, Limited (preserve makers).
De la Rue & Company, Limited (printers).
W. & A. Gilbey, Limited (wine merchants).
Henry Blacklock & Co., Limited (publishers of "Bradshaw").
Huntley & Palmer, Limited (biscuit makers).
J. J. Colman & Sons, Limited (mustard).
Marshall & Snelgrove (drapers).
Merryweather & Sons, Limited (fire engineers).
Mudie's Select Library, Limited (circulating library).
Peter Robinson & Company, Limited (drapers, etc.).
The "Morning Post," Limited (newspaper).

Different Objects sought by Conversion.

Various objects of conversion.

Although a large number of private companies are thus formed to take over existing businesses, the main object of conversion in many cases may be of a different character. Hundreds of companies and syndicates are formed every year for the purpose of establishing and carrying on some new business or to carry out some contemplated undertaking, enterprise, or transaction, which can best be carried out by means of the formation of a private company.

One man company.

In these private companies, as already mentioned, it has in the past been common for one, two, or three members to hold the great bulk of the capital, whilst a few extra members held one share each, and were merely nominees of the principal shareholder or shareholders. These extra members were added whilst the Act required, as a condition of incorporation, that there should be seven members, each holding at least one share apiece, and it was necessary to provide for these extra subscribers, but now two persons are sufficient to constitute a private company, and thus the extra subscribers can be dispensed with

Thousands of companies have been formed in the last quarter of a century in this way—*i.e.*, with extra or nominee subscribers—

and it was not until the year 1894 that any doubt was entertained as to the regularity of such companies. In that year, however, in the case of *Broderip* v. *Salomon*, the regularity of a company constituted on these lines was impeached in the High Court of Justice. When the matter came before the Court of Appeal ((1895) 2 Ch. (C. A.) 323), the learned judges were of opinion that the Act contemplated the incorporation of seven independent *bonâ fide* members who had a mind and will of their own, and who were beneficially and substantially interested in the concern, and not mere nominees or trustees for some one or more principal shareholders; and they accordingly held a company not so constituted an abuse of the Companies Acts, and the principal shareholder liable for the debts of the company. This view, however, of the requirements of the section was erroneous and unsound, and it was decisively rejected by the House of Lords on appeal. See *supra*, p. 56, and the report; *Salomon* v. *Salomon & Co.*, (1897) A. C. 22. The House of Lords there held that the company whose legal status was challenged was regularly and properly constituted, inasmuch as there were seven members, 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 same principle applies to private companies under the new Act.

Broderip v. *Salomon*, and *Salomon* v. *Salomon & Co.*

Advantages.

The inducements to such conversion are:—

Advantages of conversion into private companies.

(1.) The protection of limited liability which the members obtain. This alone is the greatest possible boon to traders. "If," says the ordinary law, "you want to trade, you must risk all you have—every farthing." This is bad enough in the case of an individual trader, but it is worse still in the case of a partner, for partnership is based on mutual confidence, and if one partner abuses that confidence—nay, if he is guilty only of indiscretion or want of judgment, without fraud—he may commit his co-partner to ruinous liabilities by reason of the doctrine of English law that each partner, so far as the outside world is concerned, is the unlimited agent of the other partner or partners in all matters within the scope of the partnership business. This risk is eliminated by conversion. For not only the amount at stake is limited, but the agency of the directors is restricted by articles of which all the world has notice.

The Limited Partnerships Act, 1907, now allows a member of a firm to acquire the privilege of limited liability, but the privilege is qualified by statutory conditions, which put the "limited partnership" at a great disadvantage as compared with the private company.

(2.) The advantages incident to incorporation, particularly in respect of the holding of property and the continuance of the concern notwithstanding deaths, bankruptcy, transfer of shares, or other change of interest or title. Take the case of a partner dying, for instance. "The position of the executors of a deceased partner is," says the learned author of Lindley on Partnership, "one of considerable hardship and difficulty: if they insist on an immediate winding-up of the firm they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on the executors may run the risk of being ruined themselves." With incorporation these difficulties vanish. The shares of the deceased partner form part of his estate and are bequeathed in trust or otherwise dealt with as may be convenient, and the estate is represented on the board of directors by his trustees or their nominees, who being mere agents of the company can act without incurring personal liability. The bankruptcy, again, of a partner dislocates a partnership. With a company the trustee in bankruptcy sells the shares of the bankrupt, or if worthless, disclaims; the company on its part proves for the estimated value of future calls, and there is an end of it. So, again, in the matter of contracts, in the admission of new members and the retirement of old members, in the sale, mortgage, and settlement of shares the company enjoys a striking superiority. The property again in the case of a partnership is constantly having to be conveyed with the admission, retirement, death, or bankruptcy of a partner; with a company the property is vested in it as a body corporate. Shareholders may come and go, but no changes of individual membership affect the title.

(3.) The borrowing facilities, especially on debentures and debenture stock. By means of these securities a company can raise a large sum on easy terms by the contributions of a number of small lenders on the same co-operative principle on which a company's capital is subscribed. They are securities, too, with which the public is familiar, easily enforced and readily transferable. If issued by a company in good repute they are a very marketable security. So advantageous, indeed, is this mode of raising money found to be, that it is by no means uncommon for a business to be converted into a company solely for the purpose of raising a loan by the issue of debentures or debenture stock.

(4.) The simplification of arrangements as between the members

and the concern, which, in the case of an ordinary partnership, would be extremely complicated. Thus, if a shareholder is indebted to a company for money lent or in respect of a call made on his shares, the company can sue for the loan or call without difficulty. Conversely, if a shareholder lends money to the company, he can sue for it and enforce any security given him by the company, just as if he were not a shareholder, and should the company fail, he can prove for the money lent in competition with the outside creditors. In the case of partnership one partner cannot sue another except for an account, and great inconveniences arise in seeking to enforce contracts between the members of a partnership; while should the firm become insolvent, a member of it is disentitled to prove in competition with the outside creditors of the firm.

Specimen Cases for Private Companies and Syndicates.

A firm consists of several members, each of whom has laid by some private means which he is desirous of freeing from the risk of trade. To effect this they convert the business into a private company, they become the sole directors of the company, and they receive paid-up shares in substitution for their interests in the business. Henceforth their assets outside the businss are free from risk.

A firm consists of several members, one of whom is entitled to the greater part of the capital, and also to private means. He is disposed to retire on the fortune he has accumulated. If his liability could be limited, he would be willing to leave part of his capital in the business, and to assume the position of a sleeping partner. The best way in which this can be effected is by converting the business into a company, and it is accordingly done.

A capitalist is willing to supply a trader, or a trading firm in whom he has confidence, with additional capital in consideration of a share of the profits, but does not wish to incur the liabilities of partnership, though he wishes to have a voice in the management. He therefore stipulates that the business shall be converted into a company. He will then bring in the additional capital by taking shares in the company to the amount agreed on, and paying for the same in cash. In such a case it is very common for the capitalist to stipulate also that he or his nominee shall be one of the directors for a term of years, and sometimes that the shares to be allotted to him shall be preference shares.

Another example is given by the late Sir George Jessel, M. R.: "A man dies, leaving his property to three or four sons. He is the senior

partner in a concern. If the capital were taken out the concern would be ruined. The junior partners cannot go on: they say to the children who are not in the business, and who have succeeded to large fortunes 'If you shut up the business you will lose a great deal; let us form it into a limited company, which will enable you gradually to draw out of the concern, and, in the meantime, it can go on as usual.' I have known that done with great success."

The above are all cases of conversion, i great numbers of private companies are formed to establish some new business or carry out some special operation, or transaction, or adventure.

The following is an example:—

A., B. and C. desire to start a newspaper, or to supply a village or town with waterworks, or to build a theatre or a town hall, or to acquire and work a building estate, or to provide a race-course or a cricket ground or swimming baths, or to erect some flats, or some workmen's dwellings; but they do not wish to incur unlimited liability. Accordingly they register a private company and take up shares thereof to the extent of the capital which they are disposed to embark. Each of the subscribers becomes a director, and further funds, if wanted, are raised by the issue of further shares or of debentures.

Similar examples might be multiplied indefinitely.

Formation and Constitution.

Formation and constitution

A private company is constituted like any other company, namely, by registration, with a memorandum and articles of association. It has been affected in a number of points by the Act of 1908. Thus the application to register must be signed by the subscribers and be in a special form showing that the company does not issue an invitation to the public to subscribe. It must also be accompanied by a statutory declaration as provided in sect. 17.

The memorandum and articles must be subscribed by at least two persons, and the number must be kept up to two.

The articles must contain special provisions, as required by sect. 121 of the Act.

If the articles require a share qualification for the directors, sect. 73 applies, and the directors must not act without one.

Private companies must, like public companies, make a return of allotments to the registrar under sect. 88.

A private company can pay underwriting commission in respect of shares in its capital. Sect. 89.

A private company may commence business immediately on its incorporation. Sect. 87 (6).

A private company must hold the statutory meeting provided for by sect. 65.

A private company must, under sect. 66 convene an extraordinary meeting on requisition.

A private company must register its mortgages and charges under sect. 93.

A private company must keep a register of its directors and notify changes to the registrar. Sect. 75.

The provisions as to audit (sect. 112) and the altered form (sect. 26, except sub-s. (3)) of a company's annual return also apply to private companies.

A private company may register articles of its own, or it can adopt Table A. altogether or in part.

Number of Members.

The articles have to limit the number of members to fifty, as required by sect. 121.

Transfer of Shares.

It is now a statutory condition of a "private company" that its articles "restrict the right to transfer its shares." Sect. 121 (1) (a).

As to the particular form which this "restriction" shall take, clauses are generally inserted with a view to preserving, as far as practicable, the private character of the concern. The general plan is to prohibit a member or his executors or administrators from transferring his shares to any outsider, unless and until the shares have first been offered to the continuing members, either at par or at a fair value to be fixed by the auditor, or ascertained by arbitration, or by some sliding scale, or at the "current price" fixed half-yearly by a general meeting, or at, say, ten times the average yearly dividend, or at the amount paid up with an addition proportioned to the average profits during, say, the last three years past, or otherwise; and the clauses usually go on to provide that if none of the continuing members desire to purchase, then that the shares may be transferred to an outsider; but even in that case the directors are usually given a very wide discretion as to approving of the admission of an outsider. The validity of such provisions is clear. *Borland's Trustee* v. *Steel Brothers & Co.*, (1901) 1 Ch. 279; *Att.-Gen.* v. *Jameson*, 2 Ir. R. 644. See, further, Company Precedents, Part I. 11th ed. It is sufficient if the directors are given a discretion as to registering transfers, but the restrictions must extend to all shares, present and future.

Directors.

Directors.

The articles commonly vest the management in a small number of directors, or in a "governing" or "permanent" or "life" director. In the latter case it is a common course to insert provisions enabling such governing or permanent director to appoint, if and when he thinks fit, other persons to be ordinary directors to act under him, and to determine their powers, duties, and remuneration; also to remove any ordinary director from office. A permanent or governing director is generally given very wide powers in regard to the management of the business of the company. Sometimes two or more persons are appointed joint governing or permanent directors with like powers. Usually, the powers of a governing or permanent director are limited to the time during which he holds a certain large proportion of the capital—*e.g.*, one-half or one-third of the issued capital—and sometimes his powers are made transmissible, in case of his death, to his executors or their nominee, but so long only as the shares or a large proportion of them remain part of his estate.

The weak point of the ordinary joint stock trading company is undoubtedly its management by deputy; but in the case of the private company the shareholders manage the business and trade with their own money. If profits are made they pocket them; if losses occur they must be met out of assets which they have personally supplied. In the case, therefore, of private companies, there is the best possible guarantee that the directors will not be negligent of their duties or careless of the interests of the concern, and as a consequence their solvency, as Vaughan Williams, L. J., once observed, compares very favourably with that of other companies.

Compulsory Retirement of Members.

Compulsory retirement.

Unity of aim and unity of action is always of importance in any co-operative enterprise, and to secure this it is very common to provide that a large proportion in value of the shareholders—say nine-tenths—shall be at liberty to buy out any small shareholder by paying him the fair value of his share; this is a safeguard which experience has shown to be desirable; for there is always a possibility that some person may be admitted into the company who may afterwards be found cantankerous, or a secret enemy, or otherwise detrimental to the harmonious working of the company.

Obligations of Private Company.

Obligations of private company.

It must be borne in mind that a private company, though it has special features of its own, is none the less subject to the provisions of the Companies Acts, and must conform thereto. This was pointed out by Lord Macnaghten in *Trevor* v. *Whitworth*, 12 App. Cas. 409. "It is said," remarked that learned judge, "that the company was a family company; but a family company, whatever the expression means, 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. It can have no special privilege or immunity. It was said that the board did not want Whitworth's shares to be sold to outsiders or put on the market. Unfortunately there was nothing special in that."

Directors, too, of a private company will be equally liable for a misapplication of the company's funds or for other misfeasance. Thus, in *Newman & Co.*, (1895) 1 Ch. 685, one Newman had converted his business into a private company, and had applied funds of the company, with the privity and consent of the other members, to *ultra vires* purposes, and it was held that he was guilty of misfeasance, and that the fact that it was a private company did not in any way exempt or protect him. A private company is subject to the restrictions of sect. 89 as to underwriting commissions. *Dominion of Canada Syndicate* v. *Bright*, (1911) 2 K. B. 648.

See furth[illegible] as to private companies the twenty-ninth edition of the author's work intituled "Private Companies and Syndicates."

Conversion of Private into Public Company.

Conversion into public company.

Sub-sect. (2) of sect. 121 (*supra*, p. 366) states how a private company may turn itself into a public company. Not only has a statement in lieu of prospectus to be filed, but the Registrar insists that sect. 72 applies, and therefore that where the directors have not subscribed the memorandum for their qualification shares the company must procure them to sign and file a contract to take their qualification shares, even though they already hold their qualification—which seems somewhat absurd. However, there is a short cut open, for if by special resolution the company deprives itself even of some of the characteristics of a private company, *e.g.*, the limit of members and prohibition against issue of prospectus, it ceases to be a private company, even though it has not complied with all the conditions in sub-sect. (2).

CHAPTER XXXVIII.

COMPANIES LIMITED BY GUARANTEE.

Companies limited by guarantee.

BESIDES companies limited by shares and unlimited, the Act of 1908 allows of the formation of companies limited by guarantee. Such companies may be formed, with or without a capital divided into shares.

The provisions relating to them may be found in sects. 4, 10 and 21 of the Act.

Sect. 4 is as follows:—

4. In the case of a company limited by guarantee—

(1) The memorandum must state—

(i) The name of the company, with "Limited" as the last word in its name;

(ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;

(iii) The objects of the company;

(iv) That the liability of the members is limited;

(v) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2) If the company has a share capital—

(i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(ii) No subscriber of the memorandum may take less than one share;

(iii) Each subscriber must write opposite to his name the number of shares he takes.

By sect. 10, in the case of a company limited by guarantee there must be registered with the memorandum articles of association signed by the subscribers to the memorandum, and prescribing regulations for the company. A considerable number of associations have availed themselves of this form of incorporation under the corresponding provisions of the Act of 1862 (sects. 9 and 14): for example, associations for mutual insurance, *e.g.*, for insuring against marine risks, for insuring against accidents, for indemnifying the members against liability to pay compensation to injured employés, for trade protection, for mutual information, for exploring mines, testing patents, pooling shares and debentures, and for pooling and realising produce of various kinds. The great majority of the companies which register as companies limited by guarantee are, however, associations intended to be supported by annual subscriptions or donations, and registered by licence of the Board of Trade without the word "Limited." See sects. 19 and 20.

See also sect. 56 as to reduction of capital.

Prior to the Companies Act, 1900, it was permissible to form a company limited by guarantee, with articles dividing the undertaking into shares of no nominal amount—a most convenient form of association; but sect. 27 of the Act of 1900 prohibited this, and sect. 21 of the Act of 1908 has continued the prohibition.

Mode of Formation.

How formed.

In order to form a company limited by guarantee, a memorandum and articles of association must be prepared. The memorandum will accord with Form B. in the Third Schedule to the Act of 1908, but where there is a capital divided into shares the amount must be stated as in Form A., and the two forms must be amalgamated. In either case there is a clause by which every member of the company undertakes to contribute, in the event of winding-up, a limited sum. See *supra*, sect. 4. The quantum of this undertaking varies from 1*s.* to 10*l.* and upwards. If there are no defined shares, the words declaring that "the subscribers respectively agree to take the number of shares set opposite their names" must be omitted. The articles of association will contain appropriate provisions.

Register of Directors.

Directors.

A company limited by guarantee is bound to keep a register of its members (*supra*, p. 124) and of mortgages (*supra*, p. 277), and must give notice to the registrar of special resolutions. *Supra*, p. 240. Moreover, sect. 75 of the Act provides that such a company shall keep

at its office a register of its directors or managers, and shall send to the registrar a copy of such register, and shall further notify any change that takes place in such directors or managers. The executive body, by whatever name called, will be the managers within the meaning of this section. Directors who are *ex officio* members of the company are not as such liable on the guarantee. *Re Premier Underwriting Association* (*No.* 2), (1913) 2 Ch. 81. Unless it has a capital divided into shares a company limited by guarantee has not to make the annual return as to its members, &c. in accordance with sect. 26. And companies registered under sect. 23 of the Act of 1867, or sect. 20 of the Act of 1908 (see *supra*, p. 250), are relieved from the obligations imposed by sect. 75 of the Act of 1908. Sect. 88, as to return of allotments, does not apply to a company limited by guarantee. Persons who have ceased to be members of the company within a year of a winding-up are not liable unless the existing members are unable to satisfy the contributions required from them. *Re Premier Underwriting Association* (*No.* 1), (1913) 2 Ch. 29.

Stamp Duty.

Stamp. Upon the registration of a company limited by guarantee, the memorandum must be stamped with duty as provided by Table B. in the First Schedule to the Act. Where there is no capital divided into shares the amount is proportioned to the number of members, and accordingly the articles usually state that "for the purposes of registration the company is to consist of [*e.g.*, 100] members." When the number is not to exceed twenty the fee is 2*l.*; when it exceeds twenty, but does not exceed 100, the fee is 5*l.*; and so on up to 20*l.* When the number is to be unlimited the fee is 20*l.* Most of the observations contained in this work apply *mutatis mutandis* to companies limited by guarantee.

Where the company has a capital divided into shares the registration fees are the same as in the case of a company limited by shares. See Table B. aforesaid.

CHAPTER XXXIX.

UNLIMITED COMPANIES.

Unlimited companies.

COMPANIES with unlimited liability are rarely formed now. While limited companies have been increasing by "leaps and bounds," unlimited companies have dwindled nearly to zero. Accordingly it will not be necessary here to say much about them. The statutory requirements as to such companies are contained in sects. 5, 10, 57 and 58 of the Act. An unlimited company requires a memorandum and articles of association, and may have a joint stock capital divided into shares, or no such capital. Its name will not include the word "Limited." If the company is wound up, the liability of its members to contribute to the payment of the debts and costs of winding-up will be unlimited. It having been held that mutual insurance associations, consisting of more than twenty persons, are illegal unless registered, a considerable number of mutual insurance associations have been formed and registered as unlimited companies, but it is now found preferable to form and register such associations as companies limited by guarantee. Of late years a good many loan clubs have been registered as unlimited companies. Several banks and insurance companies are also so registered.

Companies formed under the Act of 1844, or by special Act, or otherwise, sometimes register as unlimited (see p. 385) in order at once to wind up voluntarily. This is allowable. *Southall* v. *British Mutual Soc.*, 6 Ch. 619.

Where an association is registered as an unlimited company, it is always open to the members to re-register it as a limited company under the provisions of sects. 57 and 58 of the Act.

CHAPTER XL.

THE ASSURANCE COMPANIES ACT, 1909.

The legislation.

THE growth of insurance companies, the accumulation of the colossal funds which they control, and the constant extension of their business to new classes of risks is one of the most striking commercial developments of the last half century. In a group of detached Acts—the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), and the Life Assurance Companies Act, 1871 (34 & 35 Vict. c. 58), and the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), and the Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46) —the Legislature had dealt in its usual piecemeal fashion with the subject, and had established a variety of salutary rules for the formation and regulation of life assurance companies and employers' liability insurance companies designed to secure their solvency and stability. These Acts were set out in former editions of this work, and commented on in Chapter XL. of the same work. But the time had come when—like the Companies Acts—they needed to be revised, and consolidated and extended; and this useful work has now been accomplished in the shape of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49). This Act, set out *infra*, pp. 552 *et seq.*, re-enacts with amendments and additions (see *infra*) most of the provisions contained in the repealed Acts, and it extends these provisions to companies for accident and fire insurance.

The principal points in this new legislation calling for notice are:—(1) the scope of the Act; (2) the requirements as to deposits; (3) the separation and appropriation of the funds; (4) balance sheets, valuations and accounts; (5) transfer of business and amalgamation; (6) winding-up; (7) reduction of contracts.

Scope of the Act.

1. *Scope of the Act.*—This is very comprehensive. The Act is to apply to all companies (exclusive of Friendly Societies and Trade Unions) whether established before or after the commencement of the Act (1 July, 1910), and whether established within or without the United Kingdom, to carry on within the United Kingdom assurance business of any of the following classes:—(a) life assurance; (b) fire insurance; (c) accident insurance; (d) employers' liability insurance; (e) bond investment business; but subject as respects any class of assurance business to the special provisions in regard to that class. These special provisions or sets of rules will be found in sects. 30, 31, 32, 33, and 34 of the Act.

Deposits.

2. *Deposits.*—On this point sect. 2 of the Act introduces two important

changes. It requires an assurance company to deposit in Court 20,000*l.* in respect of *each class of business*—life, fire, accident, employers' liability and bond investment business—which it transacts. The deposit in each case is to be invested and the interest paid to the company. In the case of a new company the deposit has to be made before the certificate of incorporation is issued. The deposit under the new Act is not dispensed with even though a deposit has already been made under the Act of 1870 or 1907, and withdrawn (sect. 30 of 1870), and the company might therefore have been assumed to be well-established, sound and solvent.

Following up this principle of differentiating the various classes of insurance business carried on by one and the same company, the deposit is to become part of the assurance fund appropriated for each particular class of insurance business. Under sect. 3 of the Act of 1870, the deposit was to be returned when the assurance fund accumulated out of premiums amounted to 40,000*l.* (*Le Phenix* (1888), 58 L. T. 512; *Scottish Economic Life Assurance Co.* (1890), 38 W. R. 684; *Colonial Mutual Soc.* (1882), 21 Ch. D. 837; *Popular Life Assurance Co.*, W. N. (1908) 222; *Life and Health Assurance Association*, W. N. (1910) 45); but the Act of 1909 contains no such provision, and the deposit therefore will have to remain in Court as a continuing security for the policy holders.

3. *Separation and Appropriation of Funds.*—The same principle of differentiation is applied to the company's funds. By sect. 3 of the Act, there is to be a separate fund kept for each class of assurance business, and the receipts in respect of assurance business of a class are to be placed in such separate fund, and the fund is to be "as absolutely the security of the policy holders of the class as though it belonged to a company carrying on no other business other than assurance business of that class," and is not to be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable. Funds.

4. *Balance Sheets, Valuation and Accounts.*—There is an important group of sections—sects. 4-9—relating to these matters, designed to secure as far as possible the financial soundness of the undertakings in the interests of the public. Balance sheets, &c.

Sect. 4 provides for an annual revenue account, profit and loss account and balance sheet framed in accordance with the scheduled forms.

Sect. 5 provides for periodical investigation and valuations at intervals of not more than five years.

Sect. 6 provides for a statement of the assurance business.

Sect. 7 provides for the deposit of the accounts, statements, &c. with the Board of Trade, who are to examine them, and if they find

anything "inaccurate or incomplete" to call the company's attention to it. This official criticism may well prove a valuable guarantee.

Sect. 8 provides for the delivery to policy holders on request, copies of the documents.

Sect. 9 provides for audit of the company's accounts.

Sect. 10 provides for the keeping of registered holders' addresses.

Sect. 11 provides for printing of the deed of settlement for furnishing to shareholders and policy holders.

Sect. 12 in effect prohibits the publication of any notice as to the capital without specifying the amount subscribed and the amount paid.

Transfer and amalgamation.

5. *Transfer and Amalgamation.*—Sect. 13, which takes the place of sect. 14 of the Act of 1870, provides in effect that no assurance company shall amalgamate with another or transfer its business to another unless the amalgamation or transfer is sanctioned by the Court in accordance with the section. After the transfer or amalgamation is sanctioned, certain statements as to assets and liabilities, copies of the transfer or amalgamation agreement, &c. are to be deposited with the Board of Trade (sect. 14). It will be borne in mind that the sect. 13, like sect. 14 of the Act of 1870, is not an enabling one. It does not, that is, give a company by implication power to transfer or amalgamate, but merely operates as restriction of the company's power if it has one (*Re Sovereign Life Assurance Co.*, 42 C. D. 540; Company Precedents, 10th ed., Part I., p. 1224).

Winding-up.

6. *Winding-up.*—Sect. 15 of the Act of 1909 makes special provision for the winding-up of an assurance company. As to the method of proof in respect of policies, see *Re Law Car and General Insurance Co.*, (1913) 2 Ch. 103.

Novation.

7. Sect. 7 of the Life Assurance Companies Act, 1870, made special provisions as to novation, and enacted that where a company has transferred its business to or has been amalgamated with another company, no policy holder of the first-mentioned company who shall pay to the other company the premiums accruing due in respect of its policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or his agent lawfully authorised. No similar provisions, strange to say, are to be found in the Act of 1909. Thus the old law appears to be restored, as to which see *Family Endowment Society*, 5 Ch. 118; *Spencer's case*, 6 Ch. 362; *Manchester, London, &c. Assoc.*, 9 Eq. 643; *Kettle's case*, 9 Eq. 306.

CHAPTER XLI.

REGISTRATION UNDER SECT. 249 OF EXISTING COMPANIES.

Registration under Part VII. of Companies Act. 1862, and s. 249 of the Act of 1908.

PART VII. of the Act of 1862 authorized the registration of companies existing before registration. These provisions have been re-enacted in sects. 249—255 of the Act of 1908. Most of the companies which so registered were old companies formed by deed of settlement or charter, or letters patent obtained before the Act of 1862, but some companies formed since that Act have been registered. If the company is a joint stock company it can register as a company limited by shares; otherwise it must register as a company limited by guarantee or an unlimited company. But in any case there must be at least seven members.

Mode.

In order to register, a resolution for registration must be passed at a meeting of the company, and application in writing must then be made to the registrar accompanied by a copy of the company's deed of settlement, charter or other instrument by which it was constituted, and a list of shareholders, &c., and in due course the registrar will certify that the company is incorporated and, if so, with limited liability. Thereupon the company is placed very much in the same position as if it had originally been formed under Part I. of the Act. The course of procedure is fully stated in sects. 249—257 of the Act, and the necessary forms are given in Company Precedents, Part 1., pp. 624 *et seq.*

Object of registration.

The objects of existing companies in registering under this part of the Act are various. In most cases registration is dictated by a desire to obtain the benefit of limited liability and the advantages of incorporation. Sometimes the registration is adopted with a view to the voluntary winding-up of the company; for after registration that course is open to the members. Occasionally the object is to reconstruct the company (*infra*, p. 423), when reconstruction cannot otherwise be effected with the consent of every member.

CHAPTER XLII.

ILLEGAL ASSOCIATIONS.

Illegal associations.

The Act of 1908, as we have seen, affords great facilities for forming companies, but before it introduces the machinery of formation the Act, in sect. 1, clears the ground by declaring illegal all large unregistered companies or associations subsequently formed, and thus indirectly compelling associations with anything but a very small membership to avail themselves of the provisions of the Act. Section 1, the section in question (which is a re-enactment of sect. 4 of the Act of 1862), provides, in effect, as follows:—

(1) That after the commencement of the Act no company, association, or partnership consisting of more than ten members is to be formed for carrying on the business of banking unless registered under the Act or formed in pursuance of some other Act of Parliament or of letters patent: and

(2) That no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of the Act for the purpose of carrying on any *other* business (*i.e.*, other than banking) 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 under the Act, or is formed in pursuance of some other Act, or of letters patent, or is a company engaged in working mines within the Stannaries [Devon and Cornwall].

Decided meaning of above provisions.

The meaning of these prohibitions, as interpreted by the Courts, is that any company or association formed in violation of the section is an illegal association, and the policy of the enactment is well expounded by James, L. J., in *Smith* v. *Anderson* (1880), 15 Ch. D. at p. 273. "The object of the Act," says the Lord Justice, "was to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great expense, which was a public mischief to be repressed."

And this object the Act may be said effectually to have accomplished. Thus an association which is illegal cannot be wound up, under the Act of 1908, at the instance either of the association, of a creditor, or of a shareholder. *Re South Wales Atlantic, &c. Co.* (1875), 2 C. D. 763;

Re Padstow Association (1882), 20 Ch. D. 137; *Ex parte Hargrove* (1875), L. R. 10 Ch. 542; *Ilfracombe Building Society*, (1901) 1 Ch. 102. See, however, *One and All Sickness Association*, 25 T. L. R. 674. So, too, an action by an illegal association, whether against a member or any other person, must fail if the illegality of the association is disclosed. *Re Day* (1876), 1 Ch. D. 699. If the association has lent money, and as security obtained a promissory note, it cannot sue thereon. *Shaw* v. *Benson*, 11 Q. B. D. 563. And, conversely, a member or outsider cannot sue such an association, for it can contract no debts (*Re Lona n Marine Association* (1869), 8 Eq. 176), and can enter into no contracts. *Jennings* v. *Hammond* (1882), 9 Q. B. D. 229; and see *Hume* v. *Record Reign Jubilee Syndicate*, 80 L. T. 404. In a word, the association is a phantom. It has no legal existence.

Many attempts have been made to escape from the provisions of the section, but seldom successfully; the words are too wide. It was at one time thought, for example, that mutual assurance associations were not within the section—not "associations for gain"; but these doubts —or hopes—were dispelled by the decision in *Re Padstow Association* (1882), 20 Ch. D. 149.

In *Re Thomas* (1884), 14 Q. B. D. 379, again, it was contended that an unregistered loan society consisting of more than twenty members was not illegal, because in its inception it comprised less than twenty members, but this contention was overruled. "I cannot," said Cave, J., "assent to the doctrine that, because a society is projected by less than twenty people originally, and subsequently grows to more than twenty, it is outside the Act and does not require registration. This would be making a laughing-stock of the Act."

These cases must, however, be read with *Smith* v. *Anderson* (1880), 15 Ch. D. 258, a decision of the Court of Appeal in which it was held that an investment trust was not an illegal association although there were more than twenty beneficiaries entitled to the benefit of it, the *ratio decidendi* being that the business, if business it was, was carried on by the trustees, who were less in number than twenty.

Wigfield v. *Potter* (1881), 45 L. T. 612; *Re Siddall* (1885), 29 Ch. D. 1; *Crowther* v. *Thorley*, 50 L. T. 43, are other instances in which unregistered land companies of more than twenty members have been held to be not illegal on the ground that they were formed merely for acquiring and dividing land between the members, and not for carrying on any business of land jobbing or trafficking in land.

In a recent case (*Marrs* v. *Thompson*, 17 T. L. R. 365 (C. A.)), the trustees of an unregistered society consisting of more than twenty members were held entitled to sue the society's treasurer for the recovery of money of the society in his hands, but it is not easy to reconcile the decision with *Re Padstow Association*, *supra*.

CHAPTER XLIII.

WINDING-UP.

A COMPANY once incorporated under the Companies Acts cannot be put an end to except through the machinery of a winding-up (*Princess of Reuss* v. *Bos*, L. R. 5 H. L. 193), or by removal from the register as a defunct company under sect. 242 of the Act of 1908, which takes the place of sect. 7 of the Companies Act, 1880, as amended by sect. 26 of the Companies Act, 1900.

Acts and Rules applicable.

Acts and Rules applicable.

Parts IV. and VIII. of the Act (1908), and the Rules made under that Act, contain the provisions applicable to the winding-up of companies.

Modes of Winding-up.

Kinds of winding-up.

The different kinds of winding-up are as follows:—

1. By the Court.
2. Voluntary, (1) Purely voluntary.
   (2) Under the supervision of the Court.

Of these two a simple voluntary winding-up is by far the more common, and this is consonant with the policy of the Companies Act, which contemplates that shareholders shall manage their own affairs, and as one of them, winding-up: but the Act has defined certain circumstances in which a creditor or contributory is entitled to invoke the intervention of the Court and have the assets administered by the Court. The original provisions relating to a compulsory winding-up by the Court were contained in the Companies Act, 1862, sects. 74—128, but they were supplemented and largely added to and altered by the Companies (Winding-up) Act, 1890, and the rules and orders made thereunder.

Courts having Jurisdiction to Wind up.

Courts having jurisdiction.

The following are the Courts having jurisdiction to wind up companies in England and Wales:—the High Court, the Palatine Courts of Lancaster and Durham, and, as a general rule, all the County Courts having bankruptcy jurisdiction. Which of these Courts, in any particular case, has jurisdiction to wind up a company depends on the amount of the paid-up capital of the company. See sect. 131. If the paid-up capital is over 10,000*l.*, then the jurisdiction is in the High Court; but, as regards companies whose registered office is within the jurisdiction of the Palatine Courts aforesaid, these Courts have concurrent jurisdiction. If the paid-up capital does not exceed 10,000*l.* the jurisdiction is in the County Court, unless the registered office of the company is within the metropolis, in which case the jurisdiction is in the High Court. See *Southsea Garage, Limited*, 55 S. J. 314. The Stannaries jurisdiction has now become vested in a County Court. See sect. 131 (4), and Company Precedents, Pt. II. pp. 22—28.

Over what Companies.

Over what companies have Courts jurisdiction.

The companies subject to this jurisdiction are the following:—

(a) Companies formed and registered under Part I. or registered under Part VII. of the Act of 1908.

(b) Existing companies as defined in sect. 285 of the Act of 1908, which says, "existing company means a company formed and registered under the" Joint Stock Companies Acts, or under the Companies Act, 1862.

(c) Companies registered but not formed under the Companies Act, 1862. See sect. 246.

(d) Companies registered as limited under the Companies Act, 1879.

(e) Unregistered companies, as defined in Part VIII. of the Act of 1908, that is to say, "Any partnership, association, or company (except railway companies incorporated by Act of Parliament) consisting of more than seven members and not registered under this Act," and having a registered office in England and Wales.

Examples of unregistered companies which have been ordered to be wound up are:—

1. Companies incorporated by special Act.

Bradford Navigation Co., 10 Eq. 331; *Wey and Arun Canal*, 4 Eq. 197; *Brentford Tramways Co.*, 26 C. D.

527; *South London Fish Market*, 39 C. D. 324; *Barton-upon-Humber Water*, 42 C. D. 585; *St. Neots Water*, 22 T. L. R. 478.

2. Companies incorporated by Royal Charter.
   Oriental Bank Corporation, 54 L. J. Ch. 481; *Bank of South Australia*, (1895) 1 Ch. 578.
3. Foreign and colonial companies having assets and liabilities in England.
   Queensland Mercantile Agency, 58 L. T. 878; *Mercantile Bank of Australia* (1892) 2 Ch. 204; *Jarvis Conklin Mortgage*, 11 T. L. R. 373; *North Australian Co.* v *Goldsborough Co.*, 61 L. T. 717; *Syria Ottoman Rail. Co.*, 20 T. L. R. 217.
4. Building societies formed prior to the Building Societies Act, 1874.
   Doncaster Building Society, 3 Eq. 158; *Queen's Building Society*, L. R. 6 Ch. 815; *Smith's Trustees* v. *Irving and Fullarton Building Society*, 6 F. 99, Ct. of Sess.; *Ilfracombe F. B. M. Building Society*, [1907] 1 Ch. 102.
5. Trustees' savings banks.
6. Friendly Societies.
   Irish Mercantile Loan Society, [1907] 1 Ir. R. 98; *Tean Friendly Society* (1914), 58 Sol. J. 234; *Victoria Society, Knottingley*, (1913) 1 Ch. 167.
7. Life assurance companies.
   Great Britain Mutual, 16 C. D. 246; *Masonic and General, Re Sharpe*, (1892) 2 Ch. 154.
8. An association for purchase and division of an estate. *Re Osmondthorpe Hall Society* (1913) W. N. 243; 58 Sol. J. 13. (A member who had paid up all instalments due from him being treated as a contributory.)

See Company Precedents, Pt. II. p. 16 *et seq.*

Cases for Winding-Up.

The following are the several grounds on which a winding-up order may be made:—

Sect. 129. A company may be wound up by the Court—

(i) if the company has by special resolution resolved that the company be wound up by the Court:

(ii) if default is made in filing the statutory report or in holding the statutory meeting:

(iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(iv) if the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven:

(v) if the company is unable to pay its debts:

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

Inability to pay Debts.

Inability to pay debts.

This is the usual ground for a petition. In sect. 130 the Act states the cases in which a company is to be "deemed unable to pay its debts." See Appendix. In most cases the evidence is given under the fourth paragraph of that section by proving "to the satisfaction of the Court that the company is unable to pay its debts." The fact that the petitioner has made repeated applications for payment, and that the company has neglected to pay, affords cogent evidence that it is unable to pay its debts, and this is the evidence generally relied on. Almost the only answer open to the company is to show that the debt claimed is *bond fide* disputed, in which case a winding-up petition is not a proper mode of enforcing it. *Re Gold Hill Mines*, 23 C. D. 210. Where the debt is undisputed, it is futile for the company to say, "We are able to pay our debts, but we do not choose to pay this particular debt." The Court will not listen to such a defence. See Company Precedents, Pt. II. pp. 49—53.

The "Just and Equitable" Clause.

It was at one time thought that these words, as appearing in sect. 79 of the Act of 1862, ought to be confined to cases *ejusdem generis* with the previous cases, but this construction was subsequently held erroneous. *Australian Joint Stock Co.*, W. N. (1897) 48; *Sailing Ship "Kentmere" Co.*, W. N. (1897) 58. Under these words winding-up orders have been made on the ground (a) that the substratum of the company was gone (*German Date Coffee Co.*, 20 C. D. 169; *Haven Gold Co.*, 20 C. D. 151; *Red Rock Gold Mining Co.*, 61 L. T. 785); (b) that the company was a bubble (*London and County Coal Co.*, 3 Eq. 355); (c) that the company was conceived and brought forth in fraud; (*T. T. Brinsmead & Sons*, (1897) 1 Ch. 45); on appeal, (1897) 1 Ch. 406; (d) that full investigation was necessary (*Peruvian Amazon Co.*, 29 T. L. R. 384).

Petition for Compulsory Winding-up Order.

Petition for compulsory winding-up order.

See as to this, sect. 137 of the Act of 1908. A petition may be presented (1) by the company; (2) by any creditor; (3) by any contributory; (4) by the Official Receiver under sub-sect. (2) of sect. 137.

And the right to petition, being a statutory right, cannot be excluded by a clause in the articles of association. *Re Peveril Gold Co.*, (1898) 1 Ch. 122.

Petitions by the company are not very common; for if a company desires to wind up it has only to pass a special resolution. or an extraordinary resolution for voluntary winding-up. See sect. 182 of the Act. Sometimes the directors deem it advisable to get a friendly creditor to present a petition in order to gain time to pass a resolution for winding-up in the meanwhile, and then the creditor at the hearing asks for a supervision order. Nor are petitions by contributories very common, for the theory of the Act is that shareholders shall manage their own affairs, and winding-up is one of them. The great bulk of winding-up petitions are by creditors, a petition for a winding-up order being a proper as well as effective mode of enforcing payment of a debt due from a company.

Creditor's Petition.

Creditor's petition.

Any person to whom the company is indebted in a sum of money presently due is indisputably a creditor, and entitled to present a petition. See sect. 137 of the Act. In this respect the Act re-enacts the provisions of the Act of 1862, s. 82. Under that Act it was held that the following could petition:—The assignee of a debt, whether at law or in equity (*Paris Skating Rink Co.*, 5 C. D. 959; *Re Montgomery Moore Ship Collision Doors Syndicate*, 72 L. J. Ch. 624); the depositary by way of mortgage of debentures to bearer, the interest on which was in arrear (*Olathe Silver Mining Co.*, 27 C. D. 278); the executor of a deceased life policy holder in respect of an admitted claim, a sum by the policy made payable out of the assets (*Masonic and General Life Assurance Co.*, 32 C. D. 373); a secured creditor (*Moor* v. *Anglo-Italian Bank*, 10 C. D. 681), even after obtaining the appointment of a receiver in an action. *Borough of Portsmouth Tramways Co.*, (1892) 2 Ch. 362.

But it was held that a garnishee order against a company did not make the garnishor a creditor of the company (*Combined Weighing Machine Co.*, 43 C. D. 99); and that a person who had a claim against the company for unliquidated damages was not a creditor within the section (*Pen-y-Van Colliery Co.*, 6 C. D. 477); nor was a person who had guaranteed the payment of a debt due from the company, but had not paid such debt. *Vron Colliery Co.*, 20 C. D. 442. It was also held that a landlord was not a creditor as regards future rent (*United Club*, 60 L. T. 665); nor the holder of a bill of exchange not yet payable (*W. Powell & Sons*, W. N. (1892) 94); nor a holder of debentures not yet payable. *Melbourne Brewery Co.*, (1901) 1 Ch. 453. But the Act of 1908 has in this respect

modified the law, for under sect. 137 a "creditor" includes "any contingent or prospective creditor or creditors." *British Equitable Bond, &c. Co.*, (1910) 1 Ch. 574. Such a creditor has, however, to give security for costs, and before the hearing show a *primâ facie* case. (Sect. 137 (1) (c).) A petitioning creditor who cannot get paid a sum presently payable has *primâ facie* a right, *ex debito justitiæ*, to a winding-up order (*Bowes* v. *Hope Mutual, &c. Society* (1845), 11 H. L. C. 402; *Re Western of Canada*, 17 Eq. 1; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259); even though the assets are overcharged by debentures (*Alfred Melson & Co.*, (1906) 1 Ch. 841; *Crigglestone Coal Co.*, (1906) 2 Ch. 327; *Re Clandown Colliery Co.*, (1915) 1 Ch. 369; and see now sect. 141 (1) of the Act). It has been held that the Courts (Emergency Powers) Act, 1914 (see Appendix, p. 634), makes no difference to this *primâ facie* right (*Re Globe Trust*, (1915) W. N. 221); but see *Re A Company*, (1915) 1 Ch. 520. This *primâ facie* right to a winding-up order is qualified by another rule, viz., that the Court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the Court in its discretion may refuse the order. *Re West Hartlepool Co.* (1874), L. R. 10 Ch. 618; *Western of Canada Co.* (1878), 17 Eq. 1; *Chapel House Colliery Co.* (1883), 24 Ch. D. 259. See Company Precedents, Pt. II. pp. 77, 78. Moreover, securities may be so framed that the debenture or debenture stock holder is not a creditor capable of petitioning (*Uruguay Central Co.*, 11 C. D. 372; *Dunderland Iron Co.*, (1909) 1 Ch. 446); but query whether this decision can be supported. Creditor's right to order.

Whether the Court will make an order or not, does not depend solely on the wishes of the creditors. The Court is now, under Part IV. of the Act, invested with a wide jurisdiction in the interests of commercial morality; and if the facts disclose a strong *primâ facie* case for investigation into the formation or promotion of the company, or the issue of debentures by it, the Court will make a compulsory order irrespective of creditors' opposition. *Re Bishop & Sons, Limited*, (1900) 2 Ch. 254; *Re Lichtenstein*, 23 T. L. R. 424; *Re Clandown Colliery Co.*, (1915) W. N. 75.

By sect. 197 of the Act, the voluntary winding-up of a company is not to be a bar to the right of any creditor of such company to have the same wound up by the Court if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up (*Re Gold Co.*, 11 Ch. D. 701; *Re Haycraft Gold Reduction Co.*, (1900) 2 Ch. 230; *Re Gutta Percha Corporation*, (1900) 2 Ch. 665); but the Court may in its discretion refuse the order if it will not benefit the creditors generally, but only the petitioning creditor. *Re Greenwood*, (1900) 2 Q. B. 306.

Contributory's Petition.

Contributory's petition.

Such petitions are comparatively rare; for the Act establishes a domestic tribunal as between the members and the company, and thus enables the members themselves, by passing the requisite resolutions, to determine whether there shall be a voluntary liquidation, or whether the Court shall be asked to make a compulsory order. See sect. 182; *Langham Skating Rink* (1877), 5 Ch. D. 683. Accordingly, a contributory, to obtain an order, must make out a special case, and the case usually made out is that it is just and equitable that the company shall be wound up because the substratum of the company is gone. See *Re Suburban Hotel Co.* (1867), L. R. 2 Ch. App. 737; *Re German Date Co.* (1882), 20 Ch. D. 169; *Re Haven Gold Co.* (1882), 20 Ch. D. 151; *Re Brinsmead & Sons*, (1897) 1 Ch. 45; *Symington* v. *Symington's Quarries, Limited*, 8 F. 121, Ct. Sess.; *Pirie* v. *Stewart*, 6 F. 847, Ct. Sess. The substratum is held to be gone when the main object for which the company was formed has become impracticable. *Re Suburban Hotel Co., supra.*

In such a case shareholders may fairly claim that they ought no longer to be forced to risk their property in going on. No contributory of a company is, by sect. 137, to be capable of presenting a petition unless (i) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven, or (ii) the shares in respect of which he is a contributory or some of them were originally allotted to him or have been held by him and registered in his name for at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder: the object, of course, being to prevent a person buying shares in order to qualify himself to wreck the company. "Held" means standing in the name of the contributory petitioner. *Wala Wynaad*, 21 C. D. 849.

Registration of a wife's shares in the name of her husband is for this purpose sufficient. (Sect. 137 (3).)

Occasionally, a contributory petitions on the ground that the company is insolvent or unable to pay its debts; but in such case the petitioner, if fully paid, must allege and prove that there will be a substantial surplus for the shareholders (*Re Rica Gold Co.* (1879), 11 C. D. 36); otherwise he has no interest which the Court ought to regard. But see now sect. 141, and see Company Precedents, Pt. II. p. 73.

The Court may also make a compulsory order on the petition of a fully-paid shareholder if satisfied that the voluntary winding-up is likely to prejudice the shareholders. *Re National Co. for Distribution of Electricity*, (1902) 2 Ch. 34.

It is open, too, to the petitioning shareholder to show the Court that he will derive some real benefit from a compulsory order. *Re Doré Gallery*, W. N. (1891) 98; *Anglo-Austrian Co.*, 35 S. J. 469.

Mismanagement by directors is not a ground for a shareholder petitioning. He should call a meeting. *Re Professional Benefit Building Society*, L. R. 6 Ch. 862.

A shareholder who is in arrear with calls must make out a very special case to justify his petitioniug in such circumstances, and he may be required to pay the calls into Court or to give an undertaking for payment of them. *Diamond Fuel Co.*, 13 C. D. 400; *Crystal Reef Co.*, (1892) 1 Ch. 408.

The fact that a voluntary winding-up is in progr » is *primâ facie* a bar to a winding-up on a shareholder's petition (*Bank of Gibraltar*, L. R. 1 Ch. 74; *Imperial Bank of China*, L. R. 1 Ch. 339; *London and Mercantile Discount Co.*, L. R. 1 Eq. 277), because a shareholder is bound by the wishes of the majori but the Court has a discretion, and if it sees cause will examine into the composition of the majority passing the resolution to make sure that it represents the real wishes of the shareholders. *Re Varieties*, (1893) 2 Ch. 235. *Primâ facie* a petition by a fully paid up shareholder alleging that the company has uo assets will be dismissed. *Kaslo-Slocan Co.*, W. N. (1910) 13.

Petition by Official Receiver.

Sect. 137 (2) of the Act provides that where a company is being wound up voluntarily or subject to supervision in England, a petition may be presented by the official receiver attached to the Court having jurisdiction to wind up the company, as well as by auy other person authorized in that behalf under the other provisions of this section, but the Court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding-up, or winding-up subject to supervision, cannot be continued with due regard to the interest of the creditors or contributories.

As to the meaning and operation of this section, see *Re Jubilee Sites Syndicate*, (1899) 2 Ch. 204.

Form of Petition.

A petition to the High Court is headed:— Form of petition. Rule 11, p. 599.

In the High Court of Justice.
(Companies Winding-up.)
Mr. Justice ——.
In the matter of the Companies (Consolidation) Act, 1908,
and
In the matter of the —— Company, Limited.

It then proceeds thus:—

To His Majesty's High Court of Justice.

The humble petition of —— of —— showeth as follows:—

Then follow statements as to the incorporation of the company, situation of its registered office, amount of its paid-up capital (to show jurisdiction), the circumstances founding the title to relief, *e.g.*, that the company is indebted to the petitioner in a specified sum, and that he has made repeated applications for payment, but without success, that the company is unable to pay its debts, and then the petition concludes with the prayer "that the company may be wound up under the Companies (Consolidation) Act, 1908." There is a note at the foot to the effect that it is "intended to serve this petition on the company." In framing a petition, it is essential to allege a case for winding-up within the Act. See sect. 129. If no case is alleged, the petition, unless the Court should give liberty to amend, is demurrable, and will be dismissed with costs. *Re Wear Engine Works Co.* (1873), L. R. 10 Ch. 188.

Presentation and Answering.

Rule 26, p. 601.

A winding-up petition to the High Court is presented at the office of the Registrar in Winding-up, who appoints the time and place at which the petition is to be heard. Winding-up Rules, 1909, r. 26. After a petition has been presented, the petitioner must, on a day to be appointed by the registrar, not less than two days before the day appointed for the hearing of the petition, attend before the registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service have been duly filed, and that the provisions of the rules as to winding-up petitions have been duly complied with by the petitioner.

Where several petitions are presented, they rank according to the date of presentation. *Re Building Societies Trust*, 44 C. D. 144; *Re Bamford*, (1910) 1 Ir. R. 390.

A summons under the Courts (Emergency Powers) Act, 1914, is not necessary. *Re A Company*, (1915) 1 Ch. 520, and Appendix, p. 634.

Advertisement of Petition.

Advertising the petition. Rule 27, p. 601.

Every petition is to be advertised seven clear days before the hearing. *City and County Bank*, L. R. 10 Ch. 471; *London India-rubber*, 14 W. R. 594. If the company's registered office is within ten miles of the Royal Courts of Justice, the advertisement is to be inserted in the *London Gazette* and in one London daily morning newspaper, or in such other newspaper as the Court directs; in the case of any other company, once in the *London Gazette* and once in a local newspaper. See the Rules. Every advertisement of a petition is

to contain a note at the foot thereof stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner. Notice of intention to appear must be given by any person intending to do so (see Rule 33, p. 602), and must contain names and addresses. *Descours, Parry & Co.*, W. N. (1909) 50.

Any error in the title, name, day or place for hearing may render the advertisement useless (*Manure Co.*, W. N. (1876) 234; *Army and Navy Hotel*, 31 C. D. 644; *Newcastle Co.*, W. N. (1888) 246; *London and Provincial Pure Ice*, W. N. (1904) 136); but a formal defect where no one is misled will not invalidate the petition. *Broad's* v. *Patent Co.*, W. N. (1892) 5; see Company Precedents, Pt. II., p. 98.

The Court will restrain the issuing of the advertisements when the petition is an abuse of the process of the Court. *Re A Company*, (1894) 2 Ch. 349.

Service.

Service of petition. Rule 28, p. 601.

The petition is to be served on the company, unless it is presented by the company itself. See Rules of 1909; *Chester & Co.*, 52 W. R. 189. Where it is impracticable to serve the petition in the manner therein mentioned, the Court, *e.g.*, when the company's registered office is closed or pulled down, will make a special order, *e.g.*, to serve upon one or two officials connected with the company, and direct that such service should be deemed to be service on the company. See Company Precedents, Pt. II. p. 101.

Evidence in Support.

Evidence in support of petition. Rule 29, p. 601.

The Rules provide for the filing of an affidavit by the petitioner in general terms, stating, in effect, that the statements in the petition relating to his own acts and deeds are true, and that he believes the other statements to be true. This is known as the statutory affidavit, and the Rules make this affidavit *primâ facie* evidence of the statements in the petition. It must be sworn and filed within four days after the presentation of the petition, and notice of the filing must be given to the company. *New Weighing Machine Co.*, W. N. (1896) 48.

The object of the statutory affidavit is to prevent the abuse of putting upon the file long affidavits in support of the petition which may turn out to be unnecessary. Per Lindley, L. J., *Re Gold Hill Mines*, 23 C. D. 214.

Affidavits, if put in in opposition to the petition, must be fi[illegible] within seven days of the date of the filing of the statutory affidavit. [illegible]ing-up Rules, 1909: and *Re Evans*, W. N. (1892) 126. Th[illegible]ner

Rule 35, p. 602.

may also be cross-examined as well as the opposing deponents; but the Court has a discretion as to allowing cross-examination in a winding-up petition, and refused, for example, to allow a petitioner to cross-examine the respondent company's witnesses where the petitioner had no direct evidence but the statutory affidavit, and wanted to cross-examine as to the company's business, means and *bona fides*. *London Fish Market Co.*, 27 S. J. 600; and see *Re Emma Silver Mining Co.*, L. R. 10 Ch. 194; *Re West Devon Mine*, W. N. (1884) 139. If necessary, witnesses who decline to make affidavits can be called and examined at the instance of any party interested. Company Precedents, 11th ed. Pt. II. pp. 191, 195.

Hearing of Petition.

Hearing. Rule 32, p. 602.

Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, may make an interim order, or any other order that it deems just. Companies Act, 1908, s. 141. In all matters relating to the winding-up —and winding-up includes the petition—the Court may, by sect. 145 of the Act, have regard to the wishes of creditors and contributories, and may, if expedient, direct meetings to be summoned to ascertain such wishes. See in Appendix, s. 152. If the company is solvent, the wishes of contributories, as the persons chiefly interested in the assets, carry most weight; if the company is insolvent, the wishes of creditors. Instances in which the Court has acted on this principle are *Western of Canada Co.*, 17 Eq. 1; *Chapel House Colliery*, 24 C. D. 259; *Re Professional Benefit Building Society*, L. R. 6 Ch. 856; *Re City and County Bank*, L. R. 10 Ch. 470; *Haven Gold Company*, 20 C. D. 151; *T. E. Brinsmead & Sons*, (1897) 1 Ch. 45; affirmed (1897) 1 Ch. 406. Since the Winding-up Act, 1890, a new element—that of public policy in regard to commercial morality—has been introduced into the consideration of the question of the propriety of a winding-up order. It is illustrated in *Re Krasnapolsky Co.*, (1892) 3 Ch. 174; *New Oriental Bank Corporation*, (1892) 3 Ch. 563; *J. H. Evans & Co.*, W. N. (1892) 126; *General Phosphate Corporation*, W. N. (1893) 142; *Re Medical Battery Co.*, (1894) 1 Ch. 444; *Crigglestone Coal Co.*, (1906) 2 Ch. 327. See also *Bishop & Sons, Limited*, (1900) 2 Ch. 254; *Melson & Co.*, (1906) 1 Ch. 841; *Re Clandown Colliery*, (1915) W. N. 75. The principle of these last three cases has now received statutory confirmation in sect. 141 (1) of the Act of 1908, providing that an order is not to be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

The Court will not order a petition to stand over for a lengthened

period: it would not be just to the company. *Chapel House Colliery Co.*, 24 C. D. 267.

The Court has now power, under the Winding-up Rules, to substitute as petitioner any creditor or contributory who in the opinion of the Court would have a right to present a petition.

Commencement of Winding-up.

In the case of a winding-up by the Court the winding-up dates from the presentation of the petition (sect. 139). A voluntary winding-up dates from the passing of the (confirmatory) resolution (sect. 183). Where a winding-up order is made after a voluntary winding-up has commenced, the winding-up dates from the presentation of the petition. *Re Russell Hunting Record Co.*, (1910) 2 Ch. 78.

As to commencement of winding-up for the purposes of preferential payments, see p. 411, *post*.

Winding-up Order.

Winding-up order.

Rule 37 *et seq.*, p. 602.

The order is to the effect that the company be wound up by the Court under the Companies Act, 1908.

The effect of a winding-up order is, by sect. 205 (2) (which takes the place of sect. 153 of the Act of 1862), to avoid all dispositions of the property (including things in action) of the company made between the commencement of the winding-up—*i.e.*, the presentation of the petition—and the winding-up order, unless the Court otherwise orders; but the practice of the Court is to allow such payments or dispositions pending petition if made honestly and in the ordinary course of business. *Re Neath Harbour Smelting & Rolling Works*, 35 W. R. 827; *Re Wiltshire Iron Co.*, L. R. 3 Ch. 443; *Re Liverpool Service Association*, L. R. 9 Ch. 511; *Bolognesi's Case*, L. R. 5 Ch. 567; *Re Oriental Bank Corporation*, 28 C. D. 634; *Gorringe* v. *Irwell Indiarubber Works*, 34 C. D. 128. See Company Precedents, Pt. II. pp. 448, 449.

Costs.

The winding-up order usually gives the petitioning creditor and the company their costs, and also one set of costs to creditors, and one set to contributories supporting the petition (*Humber Ironworks Co.*, L. R. 2 Eq. 15; 35 Beav. 346; *European Banking Co.*, 2 Eq. 521; *Peckham Trams*, 57 L. J. Ch. 462), but there is no hard and fast rule. Where the contributories and the creditors appear by the same solicitor, one set of costs only will as a rule be allowed. *Re Silberhütte Supply Co., Ltd.*, (1910) W. N. 81. The costs are paid in the first

place (subject to incumbrances) out of the company's assets. Rule 187 of 1909. See also on the subject of costs, *Ibo Investment Trust, Limited*, (1904) 1 Ch. 26; *Consolidated Exploration Co.*, (1899) 2 Ch. 599; *Leyton and Walthamstow Cycle Co.*, 50 W. R. 93; *Re Bamford*, (1910) 1 I. R. 390.

As to security for costs on appeal, *Consolidated South Rand Mines*, W. N. (1909) 66; and as to costs on an appeal, see *Ibo Investment Trust, Limited*, (1903) 2 Ch. 373.

Provisional Liquidators.

Provisional liquidators.

The Court has jurisdiction to appoint a provisional liquidator before or after winding-up order. Sect. 149 (2), (3). An appointment before winding-up is not often made, except by consent; but, on the winding-up order being made, the official receiver becomes, *ipso facto*, provisional liquidator until a liquidator is appointed. See sect. 149 (3) (b) of the Act, and *Reid and Sons*, (1900) 2 Q. B. 634. The powers of a provisional liquidator are usually restricted, more or less, by the Court under sect. 149 of the Act. See Company Precedents, Pt. II. pp. 160—173.

Proceedings following on Winding-up Order.

Subsequent proceedings.

When a winding-up order is made, the registrar sends to the official receiver a notice informing him that the order has been pronounced. The official receiver thus set in motion occupies a double position. He is an officer of the Board of Trade appointed by it for the purposes of winding-up under the Act, see sect. 146; but he is also answerable to the Court for the performance of his duties. Notice is sent to him because, on a winding-up order being made, the official receiver becomes *virtute officii* provisional liquidator (see sect. 149 (3) (b)) until a liquidator, if any, is appointed. As provisional liquidator it is his duty to take possession of and protect the assets, and to call on the directors to furnish him with a statement of the company's affairs, which has to be made out in accordance with a statutory form and verified by affidavit (see sect. 147 of the Act); and for the purpose of investigating the company's affairs he may require the attendance of the persons furnishing the report to answer questions. A director refusing to make out a statement may be committed for disobedience. *New Par Consols*, (1898) 1 Q. B. 673. Of this statement, when complete, the official receiver prepares a summary for the information of creditors and contributories, appending to it observations of his own on the formation, management, &c. of the company, and, as soon as practicable, submits his preliminary report to the Court as to the causes of failure

and the necessity for inquiry (sect. 148); but the unravelling of the company's affairs being a long business, it is not now necessary that the first meetings of creditors and contributories provided for by sect. 152 of the Act should be delayed until the investigation is concluded, and they are consequently summoned at once for the purpose of determining two preliminary questions:—

1. Whether they desire a liquidator of their own choosing in place of the official receiver as liquidator; and Rule 115, p. 613.
2. Whether there shall be a committee of inspection; and, if so, of whom it shall consist.

Creditors must prove a debt due to them from the company before they can vote at this first meeting. See Rules of 1909, and *Ex parte Ruffle*, L. R. 8 Ch. 1001; *Re Parrott*, 63 L. T. 777; *Henry Lister & Co.*, (1892) 2 Ch. 417; *Re Newton*, (1896) 2 Q. B. 403. Voting may be in person or by proxy.

The result of the wishes of the meetings on the points thus submitted to them is reported to the Court, and the Court fixes a day for considering such wishes, and, if it approves, giving effect to them. If there is a difference of opinion the Court is to decide. Sect. 152 (2). Where a person other than the official receiver is appointed liquidator he must notify his appointment to the Registrar of Companies, and give security to the satisfaction of the Board of Trade before he can act. Sect. 149 (3) (c). Company Precedents, Part II. p. 290 *et seq.*

The official receiver then hands over the "property" of the company to such liquidator. Companies Winding-up Rules, 1909. This expression "property" does not include notes and memoranda representing information obtained from officers of the company. *Re Lake George Mines, Limited*, (1904) 1 Ch. 803.

Duties and Powers of the Liquidator.

The liquidator's principal duties—speaking generally—are to take possession of and protect the assets, to make out the requisite lists of contributories and of creditors; to have disputed cases adjudicated upon, to realize the assets subject to the control of the committee of inspection (if any) in certain matters, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide the surplus amongst the contributories, and to adjust their rig But before he makes any such distribution he ought to take ever, means to satisfy himself that all creditors are paid, not only by advertising, but by writing to those creditors of whose existence he knows, and asking them if they have any claims Duties of liquidator

against the company. See *Pulsford* v. *Devenish*, (1903) 2 Ch. 625. As to payment of statute-barred debts, see *Fleetwood and District Syndicate*, (1915) 1 Ch. 486. He must also be careful to provide, before distribution, for income tax due to the Crown. *New Zealand Joint Stock Corporation*, 23 T. L. R. 238.

A number of his statutory powers—not, of course, exhaustive—are specified in sect. 151 of the Act of 1908, which takes the place of sect. 94 of the Act of 1862. Some of these he can exercise only with the sanction of the Court or of the committee of inspection, if any; others without such sanction. For instance, the liquidator may without any such sanction sell any property of the company, prove in the bankruptcy or insolvency of any contributory, accept and make bills of exchange or promissory notes on security of the assets, take out administration to a deceased contributory, execute deeds, receipts, and other documents, and do and execute all other things that may be necessary for winding up the affairs of the company and distributing its assets: but he cannot (see sect. 151 of the Act) bring or defend actions or other legal proceedings, civil or criminal, or carry on the business of the company, or compromise with creditors or contributories under sect. 120 of the Act, or make calls (*Re North Eastern Insurance Co.*, (1915) W. N. 210), or employ a solicitor, without the sanction of the Court or of the committee of inspection, if any. The sanction required for the employment of a solicitor must be obtained before the employment, except in cases of urgency. Sect. 151 (1) (c).

The liquidator or any creditor or contributory can apply to the Court by summons to determine any question arising in the winding-up (sect. 193). Questions between the company and third parties cannot be determined on such a summons. *Re Centrifugal Butter Co.*, (1913) 1 Ch. 188.

A liquidator must pay all moneys received by him into the Companies Liquidation Account at the Bank of England. If he retains for more than ten days a sum exceeding 50*l.*, he may be liable to pay interest at 20 per cent. Companies Act, 1908, s. 154. See Company Precedents, Part II. pp. 333 *et seq.*

But he may be allowed to have an account with any other bank if the committee of inspection satisfy the Board of Trade that it is desirable for the purposes of the liquidation.

Board of Trade's Audit of Liquidator's Accounts.

Board of Trade audit.

This is provided for in sect. 155 of the Act. See Company Precedents, Part II. p. 297.

Removal of Liquidator.

A liquidator may be removed by the Court "on cause shown" (sect. 149 (6)). A liquidator was removed where he insisted on acting in the interests of shareholders only, though there was no reasonable prospect of paying the debts in full. *Re Rubber and Produce Investment Trust*, (1915) 1 Ch. 382.

An order for removal was refused where the applicant had no support from other creditors. *Re Amalgamated Properties of Rhodesia*, 30 T. L. R. 405.

The Committee of Inspection.

Committee of inspection.

The creditors and contributories may, as stated above, at their first meetings decide to have a committee of inspection. This is a little bit of machinery which has been imported into winding-up from the practice in bankruptcy. See sect. 160 of the Act of 1908. The committee consists of a joint body of creditors and contributories, and its function is to assist the liquidator and supervise his proceedings. It is to meet at such times as the committee from time to time may appoint and is to act by a majority. General meetings of creditors and contributories may be summoned by the liquidator, and if any conflict of opinion arises between such meetings and the committee of inspection, the liquidator is to follow the directions of the meetings in preference to those of the committee. The sanction of the committee, as an alternative to leave of the Court, is necessary to the exercise by the liquidator of certain of his powers under sect. 151. The liquidator should not obtain leave of the Court *ex parte* to appoint a solicitor or take any similar step to which he knows the committee object. *Re Consolidated Diesel Engine*, (1915) 1 Ch. 192. The Court, however, is by no means bound by the decision of the committee. *Re North Eastern Insurance Co.*, (1915) W. N. 210.

The Court may also order the liquidator to summon a meeting with a view to reconstitute the committee of inspection so as more fairly to represent creditors. *Re Radford and Bright, Limited* (No. 1), (1901) 1 Ch. 272; see also *Re Radford and Bright* (No. 2), (1901) 1 Ch. 735.

No member of the committee of inspection can become a purchaser of the company's assets either directly or indirectly, or derive any profit out of winding-up transactions or receive any remuneration without the sanction of the Court. This sanction of the Court must in all cases be obtained before the business is commenced from which the profit is derived; it cannot be given after. *Ex parte Gallard*, (1896) 1 Q. B. 68.

Contributories.

Contributories.
Rule 77 *et seq.*, p. 669.

An important part of a liquidator's duty in getting in the company's assets is to require payment by contributories of the amount, if any, uncalled on their shares in the company.

"Contributory" means every person liable to contribute to the assets of a company under the Act in the event of the company being wound up. See sect. 124 of the Act of 1908. The liability of a contributory is defined in sect. 123 of the Act. For the purpose of enforcing this liability the liquidator makes out a list of the persons he claims to treat as contributories, and gives each of such persons notice that they are included in the list and for what amount, and that he proposes on a stated day to settle the list. On the day in question the liquidator hears any objections by contributories to their being included in the list, and after such hearing settles the list one way or the other finally, and notifies the contributories. Any person who considers himself aggrieved can apply to the Court by originating summons to have his name removed from the list. The list of contributories is made out in two parts, A. and B., in accordance with sect. 123 of the Act of 1908. The A. contributories are the present members and are primarily liable. The B. contributories are the past members—that is, those who have ceased to be members within a year preceding the winding-up—and these are only liable to contribute after the A. contributories are exhausted. That is to say, a B. contributory is not liable to contribute in respect of any debt of the company contracted after he ceased to be a member, nor unless the existing members are unable to satisfy the contributions required to be made by them, and he cannot be called upon to pay more than the amount, if any, which remains unpaid on the shares which he held; see the section (sect. 123) and *Hilbert* v. *Banner*, L. R. 5 H. L. 28; *Webb* v. *Whiffin*, L. R. 5 H. L. 718; *Brett's case*, 6 Ch. 800; 8 Ch. 800; and *Morris's case*, L. R. 7 Ch. 200; L. R. 8 Ch. 810. The list distinguishes also between persons who are contributories in their own right and persons who are contributories as representatives of others.

A call can only be made on contributories with the sanction of the committee of inspection, if there is one, and if there is not, of the Court. Sect. 166 of the Act. It is not necessary that debts or liabilities should be established against the company before a call can be made. "Debts and liabilities" in sect. 166 (Companies (Consolidation) Act, 1908) mean estimated debts and liabilities. *Re Contract Corporation*, L. R. 2 Ch. 95. In sanctioning a call the Court may allow payment by instalments. *Law Guarantee Society*, 25 T. L. R. 565. A call made in winding-up is in the nature of a specialty

debt. *Buck* v. *Robson*, L. R. 10 Eq. 629; *Re Muggeridge*, L. R. 10 Eq. 443. Payment of a call is enforced by an order of the Court made in chambers on summons by the liquidator. Companies Act, 1908, s. 166; Winding-up Rules, 1909. Such an order, called a "balance order," is a summary statutory proceeding for the purpose of enabling the liquidator to get payment from a contributory in lieu of proceeding by action. *Ex parte Whinney*, 13 Q. B. D. 478. A balance order is not, however, a "final judgment" which will found a bankruptcy notice against the contributory. *Re Sanders*, 13 Q. B. D. 476. An action lies by the liquidator in the name of the company against a contributory for calls made before the winding-up, notwithstanding that the liquidator has obtained a balance order in the winding-up for payment of the same moneys under sect. 166 of the Act. *Westmoreland Slate Co.* v. *Feilden*, (1891) 3 Ch. 15. Where a director has received, in breach of trust, a present of paid-up shares from the company's vendor, he may be made liable for misfeasance, but he cannot be made liable as a contributory for unpaid shares. *Carling's case*, 1 Ch. D. 115; *Re Innes & Co.*, (1903) 2 Ch. 254. The same principle applies to arrears of calls on forfeited shares. *Ladies' Dress Association, Ltd.* v. *Pulbrook*, (1900) 2 Q. B. 376.

Set-off.

By sect. 207 of the Act, in the winding-up of an insolvent company the bankruptcy rules apply as regards the rights of secured and unsecured creditors, debts provable, valuation of annuities and future and contingent liabilities. This section incorporates into the winding-up of companies sect. 31 of the Bankruptcy Act, 1914, which allows set-off where there have been mutual credits, mutual debts or other mutual dealings. Where, therefore, at the commencement of the winding-up A. has a money claim against the company, and the company has a money claim against A., one claim can be set off against the other. *Sovereign Life Assurance Co.* v. *Dodd*, (1892) 2 Q. B. 573, at p. 578; *H. E. Thorne & Sons, Ltd.*, (1914) 2 Ch. 438.

But a contributory in a limited company who is also a creditor of the company cannot on a winding-up set off his debt against a call made on him by the liquidator (*Grissell's case*, L. R. 1 Ch. 528; *Gill's case*, 12 C. D. 755) until all the creditors have been paid in full (sect. 165 (3)); and this is so though in an action by the company, before winding up, to enforce the call the shareholder has obtained unconditional leave to defend under Ord. XIV. *Re Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70; or though the company has agreed that there shall be such a set-off. *Re Law Car & General Corporation*, (1912)

1 Ch. 405. And the liquidator cannot set off a debt due to the company from a *deceased* insolvent contributory against the amount due to the contributory in the liquidation. *Re Peruvian Railway Construction Co.*, (1915) 2 Ch. 144. The principle is that where a person entitled to contribute to a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate until he has fulfilled his duty to contribute (*S. C.*, at p. 150); and where the question of set-off arises in respect of the estate of a deceased debtor, the "mutual dealings" section does not apply, since there were no mutual dealings between the company and his estate. *S. C.*, and see *H. E. Thorne & Sons* (above).

Misfeasance Claims.

Misfeasance claims.
Rule 68 *et seq.*, p. 607.

It frequently happens that the promoters, directors, managers, or other officers of a company are accountable to it for money of the company misapplied by them or wrongfully received, or for which in their fiduciary character they are accountable to the company; or the directors may have been guilty of some negligence or misfeasance for which they are answerable to the company in damages. In these cases the Companies Act, 1862, provided in sect. 165 a summary remedy by misfeasance proceedings. This section was replaced by sect. 10 of the Winding-up Act, 1890, which was wider in its scope than the older section, and sect. 10 has again been replaced by sect. 215 of the Act of 1908. It runs as follows:—

(1.) Where in the course of the winding-up of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property, or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

(2.) This section shall apply notwithstanding that the offence is one for which the offender may be criminally liable. . . .

It is the duty of the liquidator—as part of his general duty of collecting the assets of the company—to proceed under this section against delinquent directors and others when he sees good ground for

doing so, and from the commencement of the Companies Act, 1862, the misfeasance summons has been constantly resorted to: for example, where directors have used the funds of the company for objects not sanctioned by the company's memorandum of association (*Cullerne* v *London and Suburban Building Society*, 25 Q. B. D. 485; *Re Liverpool Household Stores*, 59 L. J. Ch. 616; *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381; *Hardy* v. *Metropolitan Land Co.*, L. R. 7 Ch. 427; *Coats* v. *Crossland*, 20 T. L. R. 800); or paid dividends out of capital (*Re National Funds Assurance Co.*, 10 C. D. 118; *Flitcroft's case*, 21 C. D. 519; *Re Sharpe*, (1892) 1 Ch. 154; *Moxham* v. *Grant*, (1900) 1 Q. B. 88), or made secret profits (*Hay's case*, L. R. 10 Ch. 593; *Carling's case*, 1 C. D. 115; *Pearson's case*, 5 C. D. 336), or sold their own property to the company. *Re Cape Breton Co.*, 29 C. D. 795. Bankers of a company are not officers within the section (*Imperial Land Co. of Marseilles*, L. R. 10 Eq. 298), nor *primâ facie* is the company's solicitor (*Great Western Forest of Dean*, 31 C. D. 496); but he may be when he does all the work for a fixed salary. *Liberator Building Society*, 71 L. T. 406.

An auditor, if an "officer" of the company, may be proceeded against under this section. *Kingston Cotton Mills Co.* (No. 2), (1896) 2 Ch. 279; *London and General Bank*, (1895) 2 Ch. 166. But an accountant who is merely called in—*pro hac vice*—to audit the accounts of the company is not an "officer." *Western Counties Steam Bakeries*, (1897) 1 Ch. 617. See p. 227. No set-off is allowed on a proceeding under the section. An order for payment of money under the above misfeasance section constitutes a "final judgment" within the meaning of the Bankruptcy Act, 1914, s. 1 (1) (g), and will found bankruptcy proceedings (by way of bankruptcy notice) against the delinquent director or officer. Sect. 215 (3). An order for security for costs will not as a rule be made. *Strand Wood Co.*, (1904) 2 Ch. 1.

Examination before the Registrar.

For the purposes of misfeasance proceedings and to ascertain what assets are outstanding, the Court may, at the instance of the liquidator under sect. 174 of the Act of 1908 (which takes the place of sect. 115 of the Act of 1862), summon before 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 may deem capable of giving information concerning the trade, dealings, estate or effects of the company. The jurisdiction of the Court to make the order is discretionary. *Joseph Haryreaves, Limited*, (1900) 1 Ch. 347. Rule 73, p. 608.

The pendency of an action by the liquidating company against an

examinee or third party may be a ground for postponing the examination. *Re London and Northern Bank, Ex parte Archer*, 85 L. T. 698; and see *Re North Australian Territory Co.*, 45 Ch. D. 87. But otherwise pendency of civil proceedings in the same matter is no excuse. *Re Reliance Taxi-Cab* (1912), 28 T. L. R. 529.

The examination is held before the registrar in winding-up or an examiner of the Court. It is a strictly private proceeding, and if a witness is attended by his solicitor the registrar or examiner may, as a condition of such solicitor being present, exact an undertaking from him not to use the information acquired for any other purpose than re-examination. *Re London and Northern Bank; Haddock's case*, (1902) 2 Ch. 73. To inspect the depositions when filed a special case must be made. *Merchants' Fire Office*, (1899) 1 Ch. 432. An examinee cannot refuse to answer any question unless it involves a question of privilege or is incriminating. He must give all the information he is capable of giving. *Re Ottoman*, W. N. (1867) 164. The examination may be ordered to be made in open Court, but this should not be done except in very exceptional circumstances. *Re Property Insurance Co.*, (1914) 1 Ch. 775. As to public examiuation under sect. 175, see below.

Public Examination of Directors and Others.

Public examination.

In addition to the report of the official receiver—referred to above, p. 400—summarizing the statement of affairs and commenting on the history of the company, the official receiver may present a further report stating the manner in which the company was formed and whether, in his opinion, any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company; and the Court may, after consideration of any such report, direct the persons implicated, or the directors, to attend before the Court and be publicly examined on oath. Sect. 175. This public examination was by the Act of 1890 imported from bankruptcy, but the analogy of a director and a bankrupt is not exact. The section 8 in the Act of 1890 was at first largely resorted to, but its operation was considerably curtailed by the decision of the House of Lords in *Ex parte Barnes*, (1896) A. C. 146, and of the Court of Appeal in *Civil, Naval and Military Outfitters*, (1899) 1 Ch. 215, holding that no order for public examination of a particular person can be made unless the official receiver expresses the opinion that such person has been guilty of fraud, and shows how he is connected with the facts. The time for applying to discharge an order for public examination is fourteen days from the service of the order. *National Stores*, (1899) 2 Ch. 773. The number

of persons—directors, promoters, officers, &c.—examined under this jurisdiction in 1914 was, according to the latest Board of Trade return, 25. For all practical purposes of a winding-up—as distinguished from the pillorying of delinquent directors before trial—the procedure under sect. 174 is quite sufficient.

As to the control of the Court over questions to be put at a public examination, see *Re London and Globe Finance Co.*, 50 W. R. 253.

A liquidator will not be ordered personally to pay the costs of a director-examinee who has exculpated himself, unless the liquidator has accepted the position of a litigant. *Tweddle & Co.*, (1910) 2 K. B. 697.

The Court may order the person procuring the examination to pay the witnesses their costs. *Appleton, French & Scrafton, Limited*, (1905) 1 Ch. 749.

Creditors.

Creditors.

The remedy of a creditor is solely against the incorporated company. *Oakes* v. *Turquand*, L. R. 2 H. L. 357. When the legislature introduced the principle of limited liability, it set up, as Lord Cairns said (*Re Reese River Mining Co.*, L. R. 2 Ch. 616), the company, and the company alone, as that with which creditors or third persons could contract.

But creditors may have a claim in damages against a liquidator personally for breach of his statutory duty, if he has not used proper diligence to ascertain their claims before the company has been dissolved, and they have thus lost their remedy against it. *Pulsford* v. *Devenish*, (1903) 2 Ch. 625; *Argyll's Ltd.* v. *Coxeter* (1913), 29 T. L. R. 355.

The company's debts and liabilities are ascertained as they exist at the date of the winding-up order (*Re General Rolling Stock Co.*, 20 W. R. 762; Winding-up Rules, 1909), for "as the tree falls, so it must lie." *Warrant Finance Co.'s case*, L. R. 4 Ch. 647; *Emmerson's case*, L. R. 2 Eq. 236; *Duncan & Co.*, (1905) 1 Ch. 307.

Creditors entitled to Prove.

What creditors entitled to prove. Rule 88 *et seq.*, p. 611.

The creditors entitled to prove are specified in sect. 206 of the Act of 1908, subject to the qualifications introduced by sect. 207 of the same Act as regards insolvent companies, which last-mentioned section takes the place of sect. 10 of the Judicature Act, 1875. Under the combined effect of these sections there is the widest possible scope for proof. Every kind of liability, however difficult of valuation, is provable unless

declared by the Court incapable of being fairly estimated (*Hardy* v. *Fothergill* (1888), 13 App. Cas. 351), the object of the Act being "to put all unsecured creditors upon an equality, and to pay them *pari passu*." Per Lindley, L. J., *Re Oak Pitts Colliery Co.* (1882), 21 Ch. D. 329. Accordingly, not only creditors to whom the company is indebted in sums presently due can prove, but also creditors whose debts are not yet due, and not only creditors but persons who have any claim or who may have any claim against the company, *e.g.*, a person who has a claim for damages for breach of contract (*Bradford Tramways and Omnibus Co.*, 68 J. P. 362), or for the determination of a contract, *e.g.*, a policy of insurance, by the company's going into liquidation; any liability, in fact, of the company existing at the commencement of the winding-up may be proved, and not merely debts due at the commencement of the winding-up. See *Macfarlane's claim* (1884), 17 Ch. D. 339; *Re Printing Co.* (1878), 8 Ch. D. 538; *Re Albion Steel Co.* (1877), 7 Ch. D. 547.

Set-off as regards creditors.

In the case of an insolvent company where there are mutual debts and credits, or mutual dealings between the company and any other person, an account, as in bankruptcy, is to be made out, and the balance only proved for. So held on sect. 10 of the Judicature Act, 1875; *Mersey Steel Co.* v. *Naylor*, 9 App. Cas. 434; Company Precedents, Pt. II. p. 526. But this rule only applies where the cross-claims are "commensurable." See *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. D. 459; and *Mid-Kent Fruit Factory*, (1896) 1 Ch. 567; *Auriferous Properties, Limited* (No. 1), (1898) 1 Ch. 691; *Leeds and Hanley Co.*, (1904) 2 Ch. 45.

Payment Pari Passu and Preferential Payments.

Pari passu.

All debts due to unsecured creditors must be paid *pari passu* and equally. *Black & Co.'s case*, L. R. 8 Ch. 262. Judgment creditors have no priority. *Re Leinster Contract Corp.*, (1903) 1 Ir. R. 517. This is the general rule, but it has exceptions, and on it the legislature has further engrafted provisions for priorities in certain cases. Thus the Crown has a prerogative to be paid first and in full out of the assets of a company which is being wound up. *Re Oriental Bank*, 28 C. D. 643; *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; Company Precedents, Part II. p. 506. And by sect. 209, parochial and other rates, the salary of any clerk or servant (for four months before winding-up, not exceeding 50*l.*) and the wages of any labourer or workman (for two months before winding-up, not exceeding 25*l.*) of a company are given priority even over debenture holders (sub-sect. (2) of sect. 209), and are to be paid *pari passu* and in full out of the

assets. A secretary of a company who devotes himself exclusively to the business thereof may be a clerk or servant within the section (*Cairney* v. *Back*, (1906) 2 K. B. 246), or a director employed as editor of a paper. *Re Beeton & Co., Ltd.*, (1913) 2 Ch. 279. Not so a managing director (*Newspaper Proprietary Syndicate*, (1900) 2 Ch. 349), nor the contributors to a paper. *Re Beeton & Co., ubi sup.* See also *G. H. Morrison & Co., Ltd.* (1912), 106 L. T. 731 (chemist's assistant). Where the company is wound up by the Court after a voluntary winding-up has commenced, the date for the purposes of this section under sub-sect. (5) is the date of the commencement of the voluntary liquidation. *Re Havana Exploration Co.*, (1915) W. N. 348. Another priority is given under the Savings Bank Act, s. 10, and by the Workmen's Compensation Act, 1897, s. 5, as to which see *Re Pethick, Dix & Co.*, (1914) W. N. 403. See also sect. 241 of the Act of 1908 as to club funds. As to priorities between rates and costs, see *Corporation of Westminster* v. *Chapman*, (1915) W. N. 378.

Secured Creditors.

Secured creditors.

A secured creditor is one who has some mortgage, charge or lien on the company's property.

An execution creditor who has seized before the commencement of a winding-up is a secured creditor (*Re Printing and Numerical Registering Co.*, 8 C. D. 538); but not if he has merely delivered the writ of *fi. fa.* to the sheriff. *Ex parte Nelson*, 14 C. D. 45.

A solicitor who holds a lien on documents of a liquidating company for his costs against the company is a secured creditor, and must mention his lien in his proof. *Re Safety Explosives, Limited*, (1904) 1 Ch. 226.

A creditor who has obtained the appointment of a receiver of land by way of equitable execution is also a secured creditor. *Anglo-Italian Bank* v. *Davies*, 9 C. D. 275.

A landlord is not a secured creditor because he has a power of distress (*Thomas* v. *Patent Lionite Co.*, 17 C. D. 257; *Re Coal Consumers' Association*, 4 Ch. D. 629); nor is a creditor of a company who has obtained a garnishee order nisi attaching a debt due to the company but has not served it on the debtor before a winding-up. *Re Stanhope Silkstone Collieries Co.*, 11 C. D. 160. But the attachment of a debt due to a company by the service of a garnishee order nisi before the filing of a petition to wind up the company constitutes the garnishor a secured creditor with priority over the liquidator. *National United Investment Corp.*, (1901) 1 Ch. 950.

A secured creditor has several alternatives:—

1. He may rest on his security and not prove.
2. He may realise his security and prove for the deficiency.

3. He may value it and prove for the deficiency after deduction of the assessed value, in which case the liquidator may redeem at such assessed value.
4. He may surrender his security and prove for the whole debt. Bankruptcy Act, 1914, s. 7 (2), and Schedule II. Rules 10 to 18, made applicable to winding-up by Judicature Act, 1875, s. 10; *Re Withernsea Brick Works*, 16 C. D. 337.

If a creditor values his security he cannot prove for more than the balance, though the security realises less than his valuation. *Williams* v. *Hopkins*, 18 C. D. 370. If he wilfully omits to mention his security in his proof, he will not generally be allowed to amend. *Safety Explosives*, (1904) 1 Ch. 226.

Interest.

When a company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the date of the winding-up order, unless the assets are enough to pay all debts in full. *Humber Ironworks Co.* v. *Warrant Finance Co.*, L. R. 4 Ch. 647; *Hughes' case*, 13 Eq. 623; conf. *Ex parte Ador*, (1891) 2 Q. B. 574.

Rule 97 of the Winding-up Rules, 1909, specifies certain cases in which interest may be proved for (*post*, p. 611).

If by the course of dealing between the company and the creditor there is an implied contract to pay interest, the creditor is entitled to interest on admitted debts down to the date of paying the final dividend, provided there are surplus assets. *Duncan & Co.*, (1905 1 Ch. 307.

Mode of Proving.

Procedure. The Court fixes a certain day within which creditors of the company are to prove their debts or claims. Companies Act, 1908, s. 169. A debt may be proved by delivering or sending through the post in a prepaid letter to the liquidator an affidavit in the statutory form verifying the debt. Winding-up Rules, 1909, r. 89. A creditor may come in and prove at any time before final distribution of the assets, but he cannot disturb any dividend already paid. *Re General Rolling Stock Co.*, L. R. 7 Ch. 646; *Hicks* v. *May*, 13 C. D. 236. The liquidator examines every proof tendered, and notifies the person tendering it either that he admits it or rejects the proof in whole or in part, or requires further evidence. Winding-up Rules, 1909, rr. 88—114.

Costs. A creditor is, by the Winding-up Rules, to bear the cost of proving his debt unless the Court otherwise orders. A mortgagee cannot prove for mortgagee's costs on winding-up of the company which guaranteed

the mortgage. *Law Guarantee Trust*, 108 L. T. 830. As to a solicitor proving for costs due before winding-up, and taxation of such costs in the winding-up, see *Re Palace Restaurants, Ltd.*, (1914) 1 Ch. 492. See Company Precedents, Part II. p. 505.

Staying Proceedings.

Staying.

"The object of the winding-up provisions of the Companies Act, 1862," said Lindley, L. J., in *Re Oak Pitts Colliery Co.*, 21 C. D. 329, "is to put all unsecured creditors upon an equality and to pay them *pari passu*." To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding-up would resolve itself into a scramble for the assets. Accordingly, sects. 140, 142, and 211 of the Act give the Court jurisdiction in various cases to restrain proceedings. Sect. 24 (5) of the Judicature Act, 1873, modified these provisions to some extent, for, having regard to that section, no proceeding in the High Court can be restrained by injunction, but this has not altered in substance the jurisdiction. All that is necessary, where an action is pending against the company in the High Court, is to apply to the particular branch of the Court in which it is pending for an order to stay proceedings. See *Re Artistic Colour Co.* (1880), 14 Ch. D. 502; *Re General Service Co.*, (1891) 1 Ch. 496. As regards inferior Courts injunctions can be granted. This is, generally speaking, only necessary where a winding-up petition is pending. Sect. 140. Where a winding-up order has been made, the combined effect of sects. 142 and 211 is that such order operates automatically as a stay of all actions, executions, distresses, sequestrations, &c. against the company, subject to the discretion of the Court to allow such actions, executions, &c. to proceed notwithstanding the winding-up. *Re Vron Colliery Co.* (1882), 20 Ch. D. 446. Thus, a distress levied before winding-up will not be restrained, even though it be for rent in advance. *Venner's Electrical Appliances* v. *Thorpe*, (1915) 2 Ch. 404. In this way creditors and others are compelled to come in and prove their claims in the winding-up, and a rateable and just distribution of the company's assets is effected. *Re International Pulp Co.* (1876), 3 Ch. D. 598. See further, Company Precedents, Part II. p. 451 *et seq.*

Liberty to Proceed.

Liberty to proceed.

The power of the Court to allow actions and other proceedings to be brought, taken, or proceeded with, notwithstanding a winding-up order (sect. 140 of the Act), is often exercised. Thus secured creditors are, as a matter of course, given liberty to proceed with any

action for enforcing their securities. *Lloyd* v. *Lloyd & Co.* (1877), 6 Ch. D. 339. So, too, liberty to proceed is often given where outsiders are involved in some dispute with the company, and it is desirable that the dispute should be decided in an action by the ordinary tribunals: for instance, in the case of an action against the company for damages under Lord Campbell's Act, *Re Thurso New Gas Co.* (1889), 42 Ch. D. 491; or for specific performance, *Thames Plate Glass Co.* v. *Land Co.* (1870), 11 Eq. 248; or for trespass, *Wyley* v. *Exhall Coal Co.*, 33 Beav. 538; or to proceed with an execution, where execution was delayed by a trick, *Armorduct Co.* v. *General Incandescent Co.*, (1911) 2 K. B. 143 (a voluntary liquidation); or to bring a new action for the purpose of obtaining the fruits of an earlier action, *National Provincial Insurance*, 56 Sol. J. 290. *McEwen* v. *London, Bombay and Mediterranean Bank*, 15 W. R. 245; *Re Marine Investment Co.*, 17 L. T. 535; *Re Strand Hotel Co.*, W. N. (1868) 2, are other examples. The leave must not be given on an *ex parte* application. *Western Brazilian Telegraph Co.* v. *Bibby*, 42 L. T. 821. Costs of unsuccessful litigation by the liquidator are payable first out of the company's assets. *Wenborn & Co.*, (1905) 1 Ch. 413; *Re Pacific Coast Syndicate*, (1913) 2 Ch. 26. Proceedings against a company in liquidation may be transferred to the Chancery Division and assigned to the Company Judge (W. U. Rule 42) even though other parties are concerned. *Pacaya Rubber Co.*, (1913) 1 Ch. 218. See further, Company Precedents, Part II. pp. 657 *et seq.*

Wishes of Creditors and Contributories.

Wishes of creditors and contributories.

The Court may have regard to these. See sect. 145 (substituted for sect. 91 of the Act of 1862) and also sect. 118; *Re Western of Canada Oil Co.*, 17 Eq. 5; *Re Chapel House Colliery Co.*, 24 Ch. D. 259; *West Hartlepool Colliery Co.*, 10 Ch. 618; *Re Great Western Forest of Dean Consumers Co.*, 31 Ch. D. 773; *Re Langham Skating Rink Co.*, 5 Ch. D. 669; *In re Suburban Hotel Co.*, L. R. 2 Ch. App. 737, and p. 140; Company Precedents, Part II. p. 121.

Misfeasance and Breach of Trust.

Misfeasance and breach of trust.

Sect. 10 of the Act of 1890, which was substituted for sect. 165 of the Act of 1862, is now in its turn replaced by sect. 215 of the Act. It affords a summary mode of enforcing claims against directors, trustees, and other officers, and against promoters of companies, in respect of any moneys or property of the company, or misfeasances or breaches of trust. See *supra*, pp. 206 *et seq.*, for a number of cases in which such claims have been enforced. See also Company Precedents, Part II. pp. 697 *et seq.*

Compromises.

Compromises.

Sect. 214 of the Act of 1908 is now substituted for sects. 159 and 160 of the Act of 1862. Under these sections the Court has a wide power of sanctioning compromises with creditors and contributories, and this power is frequently exercised. As to compromises with creditors under sect. 120 of the Act (substituted for sect. 2 of the Joint Stock Companies Arrangement Act, 1870), see *infra*, Arrangements. See Company Precedents, Pt. II. p. 978 *et seq.*

Fraudulent Preference.

Fraudulent and undue preference.

Sect. 210 of the Act of 1908 (substituted for sect. 164 of the Act of 1862) in effect renders the provisions of the bankruptcy law for the time being on this subject applicable to winding-up. *Gallagher, Slater and Mason's case* (1882), 30 W. R. 378. To found a case of fraudulent preference, it must appear that the transaction took place within three months of the commencement of the winding-up, and that the dominant motive in the mind of the company, acting by its directors, was to prefer the creditor. If the payment, &c. was made by the directors with a view to shielding themselves from civil or criminal proceedings, or to relieve a surety, this is not a fraudulent preference. *Re Blackpool Motor Car Co.*, (1901) 1 Ch. 77; *Blackburn & Co.*, (1899) 2 Ch. 725; *Re Stenotyper, Limited*, 8 Mans. 203; *Jackson* v. *Bassford*, (1906) 2 Ch. 467.

Where a compulsory order supersedes a voluntary winding-up, the "commencement of the winding-up" is the date of the presentation of petition, not of the resolution to wind up. *Russell Hunting Record Co.*, (1910) 2 Ch. 78.

The provision in sect. 210 of the Act, as to the fraudulent preference by an insolvent company, like the analogous provision in sect. 44 of the Bankruptcy Act, 1914, is for the benefit of *all* the creditors of the company, and cannot be invoked if the result of recovering the property comprised in the fraudulent instrument will not be for the benefit of the creditors at large, but only of one creditor or one class of creditors, *e.g.*, debenture holders. *Willmott* v. *London Celluloid Co.*, 34 C. D. 147; *Ex parte Cooper*, L. R. 10 Ch. 510.

Sect. 31 of the Bankruptcy Act, 1914—the mutual debts and credits section—will not prevent a transaction from being a fraudulent preference if it would be so but for the section. *Kent's case*, 39 C. D. 266. See Company Precedents, Part II. pp. 719—721.

Prosecution of Directors and Promoters.

Prosecution.

The Court has power under sect. 217 of the Act of 1908 (substituted for sect. 166 of the Act of 1862), to direct a prosecution of delinquent

directors, managers, officers, or members of the company, and in a proper case will do so. *London and Globe Finance Corporation*, (1903) 1 Ch. 728.

Adjusting Rights of Contributories.

Adjusting rights of contributories.

Subject to the payment of the creditors and of the costs of winding-up, the assets in a winding-up are distributable amongst the members or contributories in accordance with their rights and interests; and for this purpose it must be borne in mind that the uncalled capital is to be regarded as part of the assets. *Bridgwater Navigation Co.*, 14 App. Cas. 525; *Welton* v. *Saffery*, (1897) A. C. 299.

What those rights and interests are is to be ascertained, as a rule, from the memorandum & articles.

In the absence of any special provision the assets available for distribution amongst the members, if sufficient or more than sufficient to pay off the whole of the paid-up capital, are to be applied first in paying off such paid-up capital, and the balance is to be distributed amongst the members or contributories in proportion to the nominal amount of the share capital held by them; but, if insufficient to do this, then such assets are distributable in such manner that the loss of capital which has been sustained may be thrown on the members in proportion to the *nominal* capital held by them respectively. *Maude's case*, 6 Ch. 51; *Driffield Gas Light Co.*, (1898) 1 Ch. 451; *Anglo-Continental Corporation of Western Australia*, (1898) 1 Ch. 327. *Primâ facie*, preference shares are not entitled to any preference in winding-up. *London Indiarubber Co.*, 5 Eq. 518; *Welton* v. *Saffery*, *supra*; and *supra*, p. 85. Where shares are unequally paid up, a call to equalize must, unless the articles otherwise provide, be made: *Maude's case*, *supra*: and on the same principle, where shares have been issued at a discount, the amount credited by way of discount is to be treated as so much uncalled capital, and the rights are to be adjusted accordingly. *Welton* v. *Saffery*, *supra*. Sometimes the memorandum & articles contain express provisions as to the distribution of assets in winding-up, *e.g.*, provide that the preference shares shall rank first, sometimes that the ordinary shares shall take the whole of the surplus. In default of any such special provisions the surplus is distributable among both classes of shareholders in proportion to the nominal amount of the shares held by them. *Bridgwater Navigation Co.*, *supra*, p. 85; *Re Odessa Waterworks Co.*, W. N. (1897) 166; *Re Mutoscope and Biograph Syndicate*, (1899) 1 Ch. 896; *Crichton's Co.*, (1902) 2 Ch. 86. "Surplus assets" in articles has no technical meaning. *Re New Transvaal Co.*, (1896) 2 Ch. 750. It may mean the fund remaining in the hands of the liquidator after all claims of outside creditors and costs of winding-

up have been met (*Crichton's Oil Co.*, (1902) 2 Ch. 86), or it may mean what remains after payment also of the capital paid up on all classes of shares. *Ramel Syndicate, Ltd.*, (1911) 1 Ch. 749. The meaning must in each case be determined by the context.

Where the liquidator proves for calls in the bankruptcy of a shareholder, that does not make the shares paid-up for the purpose of participating in surplus assets. *West Coast Goldfields*, (1906) 1 Ch. 1.

As to capital paid up in advance of calls, and interest thereon, see *Wakefield Rolling Stock Co.*, (1892) 3 Ch. 165.

See further, Company Precedents, Pt. II. p. 597 *et seq.*

Release of Liquidator.

Release of liquidator

This is provided for in sect. 157 of the Act of 1908, and Winding-up Rules, 1909, r. 197.

See Company Precedents, Pt. II. p. 783.

Unclaimed Dividends.

Unclaimed dividends.

Sect. 224 of the Act makes special provision as to these. If unclaimed for more than six months, they have to be paid into the Bank of England to the Companies Liquidation Account. The liquidators are bound to furnish accounts to the Board of Trade, and there are stringent provisions for enforcing payment. See Company Precedents, Part II. p. 348 *et seq.*; and *In re Land Mortgage Bank of Florida*, (1898) 1 Ch. 444. See *infra*.

Staying Winding-up Proceedings.

Staying winding-up

Sect. 144 of the Act gives the Court a discretion to stay the proceedings under a winding-up order. In exercising this discretion the Court will be guided by the analogy of bankruptcy in rescinding a receiving order—that is to say, it will consider the interests of commercial morality and not merely the wishes of creditors, and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation. *Re Telescriptor Syndicate*, (1903) 2 Ch. 174.

Dissolution of the Company.

Dissolution of company.

When the affairs of the company have been completely wound up, the Court is, by sect. 172 of the Act, to make an order that the company be dissolved from the date of such order, and the company is dissolved accordingly. Notice of the order is to be communicated by the liquidator to the Registrar, and the Registrar is to make a minute of the order.

Under the old practice, it was the usual course, when a winding-up was completed, to make an order for dissolution and for the destruction of the books, but, of late years, such orders have been less commonly made. See Company Precedents, Pt. II. p. 792.

Upon dissolution the real assets revert to the donors or their heirs (Co. Litt. 23 b), leases determine (*Hastings Corporation* v. *Letton*, (1898) 1 K. B. 378), and personal assets vest in the Crown as *bona vacantia* *Re Higginson, Ex parte Att.-Gen.*, (1899) 1 Q. B. 329. But any trust affecting the premises is not displaced.

As to obtaining a vesting order where a company which holds property in trust is dissolved, see *General Accident Co.*, (1904) 1 Ch. 147; *Taylor's Agreement Trusts*, (1904) 2 Ch. 737; *Richard Mills & Co.* *Smith* v. *The Co.*, W. N. (1905) 36; *Bomore Road (No. 9)*, (1906) 1 Ch. 359.

The dissolution may be declared void within two years (sect. 223); see *Re Henderson's Nigel, Ltd.*, (1911) W. N. 159 (undistributed assets, the Crown not claiming them as *bona vacantia*).

A company some of whose shares were held by the dissolved company was held to be "a person interested" under the Act for the purpose of enforcing a call on the shares. *Re Spottiswoode, Dixon & Hunting, Ltd.*, (1912) 1 Ch. 410.

Voluntary Winding-up.

Voluntary winding-up

Of the companies which come to be wound up, by far the larger number—about 90 per cent.—are wound up voluntarily; and this is in accordance with the Companies Acts, which contemplate voluntary winding-up as the normal mode of liquidation. Unregistered companies cannot wind up voluntarily under the Act, but they can register under Part VII. of the Act (*Southall* v. *British Mutual*, L. R. 6 Ch. 614), and then wind up voluntarily. The proceedings in a voluntary winding-up are now subject to many statutory and official regulations—as will be seen below—from which they were formerly exempt. Voluntary winding-up is initiated by a resolution of the shareholders. See sect. 182. This may be either a special resolution, defined by sect. 69 of the Companies Act, 1908, requiring that the company be wound up voluntarily, or an extraordinary resolution to the effect that it has been proved to the satisfaction of the shareholders that the company cannot, *by reason of its liabilities*, continue its business, and that it is advisable to wind up the same. An extraordinary resolution is a resolution passed at a single meeting by the statutory majority as in sub-sect. (1) of sect. 69 of the Act provided. Of these two the extraordinary resolution is the most convenient—as being the quickest—where the company is insolvent and

being pressed by creditors; but it is inapplicable where the company desires to wind up for reasons other than inability to carry on its business by reason of its liabilities, *e.g.*, with a view to reconstruction; hence, in these cases the special resolution must be resorted to. In either case the commencement of the winding-up dates from the passing of the resolution. See sect. 183 of the Act. This, in the case of a special resolution, is the date of the confirmatory resolution. Sect. 69. Proper notices must be given, otherwise the resolution will not be valid. Thus a resolution for voluntary winding-up is not valid if passed at an extraordinary general meeting convened by the secretary on his own initiative without the authority of the board of directors. *In re Haycraft Gold Reduction Co.*, (1900) 2 Ch. 230; *Re State of Wyoming Syndicate*, (1901) 2 Ch. 431, *supra*, p. 164. As to the proceedings at the meetings, see Company Precedents, Pt. II. p. 835 *et seq.* The resolution, when passed, must be advertised in the *Gazette*. See sect. 185 of the Act.

A resolution to wind up voluntarily is not necessarily invalid because it is followed by other resolutions which are *ultra vires*. *Thomson* v. *Henderson Transvaal Estates*, (1908) 1 Ch. 765.

After commencement of a voluntary winding-up the company is to cease to carry on its business, except so far as may be required for the beneficial winding-up thereof, but the corporate powers are to continue until dissolution. Sect. 184. Notice of the passing of a resolution to wind up voluntarily must be given by advertisement in the *Gazette*. Sect. 185. The course of proceeding under a voluntary winding-up is sketched in sect. 186 of the Act. A liquidator is to be appointed, and with his appointment the directors' powers are to cease. He can be appointed as soon as the resolution for winding-up has been passed even without notice. *Bethell* v. *Trench Tubeless Co.*, (1900) 1 Ch. 408. But the person so chosen as liquidator by the shareholders is liable to be displaced or to have an additional liquidator associated with him by a resolution of the creditors followed by an application to the Court. See sect. 188 (2). See *infra*.

He must, within twenty-one days of his appointment, file with the Registrar of Companies notice of his appointment in the form prescribed by the Board of Trade. Sect. 187. See p. 499.

The liquidator may settle the list of contributories and make calls, and the property of the company from that and other sources is to be applied in satisfaction of the company's liabilities *pari passu*, and subject thereto is to be distributed among the members according to their rights and interests in the company. The powers given to the liquidator are very large. In addition to the other powers conferred upon him by sect. 186, he may exercise—and without the sanction of the Court—all the powers given by the Companies Act, 1908, s. 151, to a

liquidator in a winding-up by the Court. He can get an order for the examination of directors and others under sect. 174, he can have actions and executions against the company stayed (*Poole Firebrick Co.*, L. R. 17 Eq. 268; *Currie* v. *Consolidated Kent Collieries Corporation*, (1906) 1 K. B. 134); he can get an order for delivery up of books and papers in the hands of an auditor (*Findlay* v. *Waddell* (1910), S. C. 670, Ct. Sess.), and he can take misfeasance proceedings under sect. 215 of the Act. He can sanction a transfer of shares after the date of the winding-up. See sect. 205 of the Act; *Taylor, Phillips and Rickards' cases*, (1897) 1 Ch. 298. If he requires at any time the advice or protection of the Court, he can apply for it under sect. 193; and he constantly does so—usually by summons (*Wakefield Rolling Stock Co.*, (1892) 3 Ch. 165)—in such matters as borrowing, bringing or defending actions, the making of calls, the taking of misfeasance proceedings, compromises, adjusting the rights of contributories, adjudicating on disputed claims, settling the list of contributories, the payment of dividends, and many other like matters. Any contributory or creditor or the liquidator may also apply under the section to the Court.

The power for a creditor so to apply was first conferred by sect. 25 of the Act of 1900, and the power is preserved by sect. 193 of the Act of 1908.

But no person other than the liquidator, a contributory or a creditor has any *locus standi* under sect. 188 to make an application to the Court in a voluntary winding-up, *e.g.*, to remove the liquidator and appoint a new one. *New de Kaap, Limited*, (1908) 1 Ch. 589.

Sect. 188 of the Act contains special provisions for safeguarding the rights of creditors under a voluntary winding-up. These provisions were introduced by the Companies Act, 1907. The liquidator is, within seven days of his appointment, to send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors will be held on a date not less than fourteen or more than twenty-one days from the appointment of the liquidator, at a specified place and hour. He is also to advertise the meeting in the *Gazette* and in two local newspapers. At this meeting the creditors are to determine whether an application shall be made to the Court for the appointment of a liquidator in the place of the shareholders' nominee or to act jointly with him, or for the appointment of a committee of inspection, and if they decide on any of these things the application may be made to the Court by any creditor nominated by the meeting, and the Court is empowered to make the order or such other order as may seem just, having regard to the interests of the creditors and contributories. No appeal is to lie from the order, and the Court is given complete discretion as to the costs of the application.

These provisions may be said to be a statutory recognition of *Pulsford* v. *Devenish* ((1903) 2 Ch. 625), in which Farwell, J., strongly emphasized the duty of a liquidator in regard to the payment of creditors of the company. *New Zealand Joint Stock*, 23 T. L. R. 238. It is not enough for him, the learned judge hold, to advertise for creditors; he must write to any creditors of whose existence he knows, and who have not sent in claims, and ask them if they have claims. If the liquidator fails to perform his statutory duty under sect. 188, and the company is dissolved, so that the creditor loses his remedy against it, the liquidator is personally liable to the creditor in damages. This is not in conflict with *Knowles* v. *Scott*, (1891) 1 Ch. 717. There the company had not been dissolved. Liquidator's duty to creditors.

All costs, charges and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, are, by sect. 196 of the Act, payable out of the assets of the company in priority to all other claims; but this does not give priority over secured creditors of the company except so far as the liquidator's costs are costs of preservation or realization, of which the secured creditor has had the benefit. *Regent's Canal Ironworks Co., Ex parte Grissell*, 3 C. D. 411; conf. *Anglo-Austrian Printing Union*, (1895) 2 Ch. 891.

The Court has power to stay a voluntary winding-up, so that the company may resume business, and the power is often exercised, *e.g.*, upon any arrangement with creditors. *S.S. Titian*, 36 W. R. 347; *Hafna Mining Co.*, 84 L. T. N. S. 403. The Court has power also to stay proceedings against the company after a voluntary winding-up has commenced (sect. 140). *Westbury* v. *Twigg*, (1892) 1 Q. B. 77; *Armorduct Co.* v. *General Incandescent Co.*, (1911) 2 K. B. 143.

A voluntary liquidator is subject to sect. 224 of the Act (substituted for sect. 15 of the Companies Winding-up Act, 1890), and if the winding-up is not concluded within one year after its commencement, must send to the Registrar of Joint Stock Companies a periodical return of the state of the liquidation, and must pay in unclaimed or undistributed balances in his hands for six months into the Companies Liquidation Account at the Bank of England. Moreover, if a voluntary winding-up is unduly protracted or is not being conducted with a due regard to the interests of the creditors or contributories, the official receiver may present a petition to have the company wound up by the Court. See sect. 137 (2) of the Act. So, again, by sect. 197 of the Act, the voluntary winding-up of a company is not to be a bar to the right of any creditor of such company to have it wound up by the Court if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up. *Re New York Exchange Co.*, 39 C. D. 415; *Re Russell, Cordner & Co.*, (1891) 3 Ch. 171; *National*

Co. for Distribution of Electricity, (1902) 2 Ch. 34; *Bishop & Sons*, (1900) 2 Ch. 254; *Lichtenstein*, 23 T. L. R. 424; and p. 394, *ante*. These are safeguards against any abuse of the voluntary system.

As soon as the liquidator has done his work and the affairs of the company are fully wound up, the liquidator makes up an account showing the manner in which the winding-up has been conducted and the property of the company disposed of, and calls, by advertisement in the *Gazette* one month previously, a general meeting of the company for the purpose of laying the accounts before the shareholders, and giving them any explanation that may be required. A return is made to the registrar by the liquidator of the meeting having been held and the date of it, and on the expiration of three months from the registration of the return the company is to be deemed to be dissolved. (See sect. 195 of the Act.) But the Court is given power by sect. 223, at any time within two years, on the application of the liquidator or any person interested, to declare the dissolution void.

Winding-up under Supervision.

Winding-up under supervision.

When a resolution has been passed by a company to wind up voluntarily, the Court may—by sect. 199 of the Act—make an order directing that the voluntary winding-up shall continue, but subject to the supervision of the Court, and on such terms and conditions as the Court thinks just. In making or refusing a supervision order the Court has regard, as in the case of a petition for a compulsory order, to the wishes of creditors and contributories. Sect. 145. Thus the Court will not make the order on a shareholder's petition against the wishes of a majority of the other shareholders, but if the resolution was passed by the preponderating influence of a shareholder whose conduct is impeached (*Varieties, Limited*, (1893) 2 Ch. 235; *Medical Battery*, (1894) 1 Ch. 444), or if the petition is supported by creditors, the case is different (*Lonsdale Vale Ironstone Co.*, 16 W. R. 601); so, too, a supervision order may be made where investigation is required and the assets are large. *Barned's Banking Co.*, 14 W. R. 722. The fact that creditors were enabled by a supervision order to apply to the Court was a good reason at one time for making the order; but since the Companies Act, 1900, s. 25 (for which sect. 193 of the Act of 1908 is substituted), giving creditors power to apply to the Court in a purely voluntary winding-up, this ground no longer exists. There are two other grounds, however, on which a supervision order is still useful—(i) it operates automatically as a stay of actions and other proceedings against the company just as a winding-up order does (see sect. 142 of the Act); and (ii) it is competent to the Court on making a

supervision order to appoint an additional liquidator or liquidators to act with the existing liquidator. See sect. 202. This is a valuable power, because in a large number of cases in which a supervision order is asked the cause is dissatisfaction on the part of either shareholders or creditors with the appointment or conduct of the acting liquidator.

In making a supervision order the Court commonly inserts as conditions of the order (1) that the liquidator shall file with the registrar a monthly—now a quarterly (*Horner & Co.*, 5 Manson, 355) report in writing as to the position and progress made with the winding-up and with the realization of the assets, and as to any other matters connected with the winding-up as the Court may from time to time direct, and (2) that no bills of costs, charges, or expenses, or special remuneration of any solicitor employed by the liquidator, or any remuneration, charges, or expenses of such liquidator, or of any manager, accountant, auctioneer, broker, or other person are to be paid out of the assets of the company unless such costs, charges, expenses, or remuneration have been taxed or allowed by the registrar. See *Civil Service Brewery Co.*, W. N. (1893) 5; 37 S. J. 194; *Waterproof Materials Co.*, W. N. (1893) 18; 37 S. J. 231; *Pritchard, Offor & Co.*, W. N. (1893) 153; *New Morgan Gold Mining Co.*, 0093 of 1893, and *Theatrical Trust*, 00177 of 1893.

The taxed costs of the solicitor employed by the liquidator incurred during the period down to the date of the supervision order must be paid out of the assets before any remuneration due to the liquidator up to that time. So also must any costs properly incurred after the date of the order in getting in assets of the company or in work done on the instructions of the liquidator. *Sanitary Burial Association*, (1900) 2 Ch. 289.

Separate costs of the company and the liquidators will not be allowed as a rule on the petition.

A supervision order does not affect the commencement of the winding-up, which is still the date of the resolution.

Reconstruction.

Reconstruction.

A company at times finds itself embarrassed by something in its constitution prejudicial to the successful carrying on of its business. It may have started with too restricted an objects clause in its memorandum of association, and the desired extension may not fall within the scope of relief afforded by sect. 9 of the Act, or, being at an end of its financial resources, it may be necessary to provide further capital to work the undertaking. In these and other cases it is common for the company to reconstruct. There are, roughly speaking,

three ways of doing this: (1) By a sale and transfer of assets under sect. 192 of the Act (substituted for sect. 161 of the Act of 1862). (2) By a sale under the memorandum, followed by a winding-up. See Company Precedents, Part I., p. 1431 *et seq.* (3) By proceedings under sect. 120 of the Act (substituted for sect. 2 of the Joint Stock Companies Arrangement Act, 1870).

Where the reconstruction is to be under sect. 192 of the Act a special resolution should be passed that it is desirable to reconstruct, that the company accordingly be wound up voluntarily, appointing liquidators, and authorizing them, under sect. 192, to transfer the undertaking to a new company on the terms of a specified draft agreement in consideration—say—of paid-up, or partly paid-up, shares in the new company, to be distributed amongst the members of the old company or those who elect to take them. The sale must be *to a company* (*Bird* v. *Bird's Patent Sewage* (1874), L. R. 9 Ch. 358), or an agent for a proposed company (*Re Hester & Co.* (1874), 44 L. J. Ch. 757), not to an individual. The distribution is worked out in the subsequent winding-up.

Subject to certain exceptions, any member may, under the section, dissent from the sale and claim payment in cash of the value of his interest. If this value cannot be agreed, it must be assessed by arbitration. Sect. 192; *Mysore Gold Co.*, 42 Ch. D. 535. A dissentient member will not be given liberty to examine the officers of the company under sect. 174 (replacing sect. 115, Companies Act, 1862), with a view to obtaining evidence to enhance the value of his interest. *British Building Stone Co.*, (1908) 2 Ch. 450. The notice of dissent must expressly give the liquidator notice either to abstain from carrying the resolution into effect or to purchase the dissentient member's interest. *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808, 810; *Re Demerara Rubber Co.*, (1913) 1 Ch. 331. The liquidator may, however, waive technical informalities, such as incorrect service of the notice of dissent. *Brailey* v. *Rhodesia Consolidated*, (1910) 2 Ch. 95. The executors of a deceased member may exercise the right of dissent. *Llewellyn* v. *Kasintoe Rubber Estates*, (1914) 2 Ch. 670.

Under sect. 162 of the Act of 1862, a sale could be made to a foreign company (*Ex parte Fox*, L. R. 6 Ch. 176): not so under sect. 192, for by sect. 285 "company" is defined so as not to include a foreign company. *Thomas* v. *United Butter Companies of France*, (1909) 2 Ch. 484.

It seems that a clause in the articles negativing the right of a member to dissent is not valid. *Payne* v. *The Cork Co.*, (1900) 1 Ch. 308; *Re Baring Gould & Sharpington, &c. Syndicate*, (1899) 2 Ch. 80, *sed qu.*

If the company proceeds under sect. 192, members who do not assent or dissent may get nothing. *Higg's case*, 2 H. & M. 657. It is no objec-

tion that the sale is to be for shares with liability on them—that is, for partly paid-up shares. See *Re City and County, &c. Investment Co.*, 13 Ch. D. 475; *Postlethwaite* v. *Port Phillip Co.*, 43 C. D. 452. The notice convening the meetings must show that the proceeding is under sect. 192. The agreement may limit the time within which the members must come in and claim their shares in the new company; if no time is fixed they have only a reasonable time to exercise their option. *Postlethwaite* v. *Port Phillip Co., supra; Burdett-Coutts* v. *True Blue*, (1899) 2 Ch. 616. A general meeting can only decide on the nature of the consideration to be accepted from the new company. It cannot (unless the regulations of the old company so provide) direct a distribution of the consideration, *e.g.*, the shares, &c. in the new company, otherwise than in accordance with the rights of the contributories of the old company. *Griffiths* v. *Paget* (1876), 5 C. D. 894. To effect this it is necessary to take proceedings under sect. 120 of the Act. A reconstruction agreement may provide compensation for outgoing directors, but the notice of the meetings must disclose same. *Kaye* v. *Croydon Tramways*, (1898) 1 Ch. 358; *Tiessen* v. *Henderson*, (1899) 1 Ch. 861; *Southall* v. *British Mutual, &c. Soc.*, 6 Ch. 614.

Amalgamation.

Amalgamation.

Where two or more companies desire to unite their undertakings, the operation is commonly carried out under sect. 193 of the Act. In some cases the amalgamation is effected by the registration of a new company which takes over the several undertakings of the existing companies; in other cases, one of the existing companies takes over the undertaking or undertakings of the other concerns, but to do this it must be expressly authorized by the company's constitution, for it is not within the ordinary scope of a company's objects to purchase the goodwill of another. *Ernest* v. *Nicholls* (1857), 6 H. L. C. 414. See, further, as to the distinction between reconstruction and amalgamation, and the procedure, Company Precedents, Part I. p. 1481 *et seq.*

Reconstruction and Amalgamation by Sale under a Power in the Memorandum.

Reconstruction and amalgamation by sale under power in memorandum of association.

Another mode of effecting a reconstruction or amalgamation has been frequently adopted with success during the last twenty years, viz.:—

(1.) To sell the company's undertaking under a power (*supra*, p. 66) in its memorandum of association for paid-up shares

in a new company to be allotted to the selling company or its nominees;

(2.) Subsequently to resolve on a voluntary winding-up, and pursuant to a power in the articles, to authorize the liquidator, after paying or providing for the debts and liabilities, to distribute the surplus proceeds of sale, namely, the shares amongst the members of the company according to their rights and interests.

This mode was, in many cases, found preferable to proceeding under sect. 161 of the Act of 1862 (sect. 192, 1908); for example, in cases in which it was desired to reconstruct conditionally on the new company finding further capital by the issue of shares or debentures, or conditionally on the selling company coming to some specified arrangement with its debenture holders. In such cases the agreement for sale reserved power to rescind if the condition was not fulfilled within a specified time, and in case of rescission the selling company could then continue its business; whereas, if it proceeded under sect. 161, that would not have been feasible, for it would have passed into liquidation.

So, in the case of amalgamation, if several companies agreed to sell their undertakings to a new company, or to one of the amalgamating companies conditionally on the purchasing company placing further capital or complying with some other condition. If the condition was not fulfilled the agreements could be rescinded and the several companies continue their business.

There was a further advantage in adopting this mode, in that it enabled the company or companies to avoid the danger arising from the provisions of sect. 161 in favour of dissentient members, for that section has not uncommonly been used by dissentients for blackmailing purposes. And the costs of an arbitration are in some cases capable of being run up to a very large sum. In one case they amounted to 10,000*l.*, or thereabouts.

There was ample authority for adopting this mode of reconstruction or amalgamation. Thus, in *Cotton* v. *The Imperial and Foreign Agency and Investment Corporation*, (1892) 3 Ch. 454, where this mode was adopted, Chitty, L.J. (then J.), refused an injunction to restrain the company from acting on the agreement for sale to the new company, holding that the agreement, made as it was under the power contained in the company's memorandum of association, was valid, notwithstanding that it was made in contemplation of a voluntary winding-up and distribution, and that the resolution for voluntary winding-up and distribution in specie was passed shortly after the resolution ratifying the agreement. His lordship did not decide that the proposed distribution of the shares was valid, but there being power in the articles to distribute in specie a distribution in exercise of the

power was regarded with equanimity. So, too, in *New Zealand, &c. Co.* v. *Peacock*, (1894) 1 Q. B. 622, the validity of such a scheme came into question. In that case the company, under a power in its memorandum, agreed to sell its undertaking and a call to be made by its directors, to a new company, and the sale was made in contemplation of a voluntary winding-up and distribution. The call was made, and afterwards the resolution for voluntary winding-up was passed. In the action the liquidator sought to enforce payment of the call, and it was objected that the call was made for the purposes of an *ultra vires* scheme, and was therefore invalid; but the Court of Appeal (Lindley, A. L. Smith, and Davey, L.JJ.) held that the scheme was not *ultra vires*, and therefore that the call was not invalid. And these decisions were followed in several other reported cases, and were largely acted on.

The *Bisgood case.*

In a recent case, however (*Bisgood* v. *Hendersons, &c. Co.*, (1908) 1 Ch. 743, below referred to as the *Bisgood case*), a scheme of reconstruction in its main features closely resembling that adopted in *Cotton* v. *The Imperial, &c. Corp., supra*, has been held by the Court of Appeal to be *ultra vires* on the ground or principle that sect. 161 of the Act of 1862 by implication prohibits a company from selling its undertaking for shares under a power in its memorandum—where the sale is made at a time when a voluntary winding-up and distribution of the shares is "proposed." In other words, the Court's view was that "If the company is proposed to be wound up, and the transaction is a sale and distribution, then . . . . the statute provides that sale by conversion into money may be replaced by exchange for shares on the terms, *but only upon* the terms, of complying with the provisions of sect. 161," and as a corollary the Court held that *Cotton* v. *Imperial, &c. Corp., supra*, was wrongly decided.

Serious doubts, however, exist whether the ground or principle of the decision in the *Bisgood case*—namely, that the section is to be treated as implying such a prohibition—is sound, although it may be that the actual decision, looking to the special features of the case, was correct.

Objections to *Bisgood case.*

The following are some of the principal objections which have been raised to the construction thus placed by the Court on sect. 161 of the Companies Act, 1862, for which sect. 192 (in similar terms) of the Act of 1908 is now substituted:—

In the first place it is objected that there is no sufficient reason for implying the prohibition. The section is affirmative in its terms, and (1) enables a liquidator who, in a voluntary winding-up, is selling the undertaking to receive shares in another company in compensation if he is authorized so to do by special resolution, and it also (2) enables the company to give that authority to the liquidator by special resolu-

tion passed in the course of the winding-up or antecedently thereto. And it is urged that there is nothing in the section or elsewhere in the Act to indicate an intention on the part of the legislature to curtail or derogate from the power of a company to sell under its memorandum of association prior to the commencement of the winding-up.

It is conjectured that in treating the prohibition as implied by the terms of sect. 161, the Court conceived that the implication was justified by the well-known rule of construction recognized in *Chambers* v. *Manchester and Milford Railway* (5 B. & S. 588), and in *Baroness Wenlock* v. *River Dee Co.* (10 App. Cas. 350) and other cases, that where the legislature gives a company express power within certain limits to do a specified thing, it is to be taken *primâ facie* to impliedly prohibit any transgression of the power so given. But applying that rule to sect. 161, it is pointed out that the rule merely goes to prohibit *the liquidator* of a company from selling for shares otherwise than under the section, and to prohibit the company from *authorizing its liquidator*, or proposed liquidator, to sell for shares in another company except under the section, and it is maintained that it is not possible by applying the rule to spell out any intention to curtail the powers of the company whilst a *going concern*.

It is also objected that, in arriving at the implication in question, the Court seems to have overlooked sects. 131 and 133 of the Act of 1862 (replaced by sects. 184 and 186 of the Act of 1908), which have an important bearing on the construction of sect. 161 [192]. Under sect. 131, there was an express provision that "in a voluntary winding-up the company's corporate state and all its corporate powers shall continue . . . until the affairs of the company are wound up"; and under sect. 133 (5), these corporate powers were to be exerciseable by the directors, with the sanction of a general meeting or of the liquidators, so that where a company has power under its memorandum to sell its undertaking for shares in another company, that, being one of its corporate powers, can be exercised in the course of a voluntary winding-up, with the sanction of the company in general meeting or of the liquidators. And such a sale would not be fettered in any way by sect. 161 [192]. It is an alternative power, and the fact that it is reserved is inconsistent with the view of the Court of Appeal that the Act impliedly prohibits in winding-up a sale for shares otherwise than under sect. 161.

Again, it is argued that it would have been easy for the legislature, if so minded, to have inserted in sect. 161 [192] words to the effect that "except under or with reference to this section, no sale of the company's undertaking shall be made for shares or other interests in any other company where a voluntary winding-up and distribution of such shares is proposed."

But the section observes a significant silence on this point, and what

adds not a little to the force of this criticism is that it appears from the context that where the legislature desired to invalidate transactions entered into in contemplation of winding-up, it did so by express provision, *e.g.*, in sect. 164 [210], where, by apt words, certain transactions in contemplation of winding-up were invalidated.

Further, it is objected that to imply in sect. 161 the prohibition relied on by the Court of Appeal is to disregard the principle recognized and emphasized by the House of Lords in *Salomon* v. *Salomon & Co.*, (1897) A. C. 22. In that case the Court of Appeal held that the Act of 1862 impliedly contained provisions and conditions not expressed in it, but the House of Lords reversed the decision, holding that there was nothing to justify the implication, and that the Act of 1862 was to be taken as it stood, and that it was not for the Court to supplement it by implied prohibitions and conditions. See *supra*, p. 57.

It is also objected that the principle of the *Bisgood case* is inconsistent with the decision of the Court of Appeal in *New Zealand, &c. Co.* v. *Peacock*, (1894) 1 Q. B. 622, above referred to (p. 427, *supra*), and that the Court of Appeal in 1907 had no power to overrule that decision of the Court of Appeal in 1894.

It is also objected that inasmuch as the decisions in *Cotton* v. *The Imperial, &c. Co.* and in *New Zealand, &c. Co.* v. *Peacock* were of considerable standing, and had been acted on in hundreds of cases by thousands of people, they should not have been disturbed—the principle *stare decisis* should have been acted on by the Court, and to depart from that principle was mischievous.

It is also pointed out that the Court of Appeal misapprehended the decision in *Cotton* v. *The Imperial, &c. Co.*, for it represents Chitty, J., to have decided in that case, that "under clauses in the memorandum of association the company might sell its whole undertaking . . . and might under the authority of special resolutions divide the proceeds of sale amongst the members without the safeguard provided by sect. 161"; whereas, in truth, all that the judge decided was that the sale under the memorandum for shares was valid.

Nor, it is pointed out, do the decisions relied on by the Court of Appeal in the *Bisgood case* justify the construction placed by the Court on sect. 161. Thus, to take them in order, *Welton* v. *Saffery*, (1897) A. C. 299, on which the Court placed great reliance, when examined has in reality no application. It merely decided that where the Act of 1862 expressly or impliedly prohibits a thing, such as the issue of shares at a discount, the thing is *ultra vires* for all purposes, and cannot be treated as binding on the members *inter se* in a winding-up, even after the creditors have been paid off. The decision, therefore, does not in any way show that *Cotton* v. *The Imperial, &c.*

Corporation was wrongly decided, or that the implication made by the Court of Appeal is justified.

So, too, *Peveril Gold Mines*, (1898) 1 Ch. 122, merely shows that a company cannot by any provision in its articles deprive its members of the right to petition for a winding-up of the company, and *Re Baring-Gould and Sharpington Syndicate*, (1899) 2 Ch. 80, and *Payne* v. *Cork Co.*, (1900) 1 Ch. 308, merely decided that where proceedings are taken under sect. 161 the whole section must have effect, and therefore dissentients cannot be deprived of their rights under the section by virtue of a clause in the articles.

Taken together, the above objections to the principle on which the *Bisgood case* was decided constitute, it must be admitted, a serious impeachment of that principle. The Court, in its solicitude to prevent what it called "iniquitous cases of reconstruction"—that is, cases in which people were, in effect, obliged to elect whether they would take partly paid shares or have them sold at perhaps a low price—seems to have strained the construction of the Act. This is the more to be regretted, because the decision might have been put on other grounds, and because reconstruction schemes on the lines in effect sanctioned in *Cotton* v. *The Imperial, &c. Corporation* have not at all been confined to iniquitous cases. Large numbers of them have been of a perfectly fair and *bonâ fide* character, and have been carried through with entire success.

It is to be hoped, therefore, that the principle of the *Bisgood* decision will before long be re-considered by a higher tribunal. In the meantime this decision has been followed and applied in *Etheridge* v. *Central Uruguay Railway*, (1913) 1 Ch. 425.

Arrangements.

Arrangements.

Companies, like individuals, find it necessary sometimes to make an arrangement with their creditors. Such an arrangement with creditors, in the case of a company, is commonly effected under sect. 120 of the Act. See Appendix. The machinery of the Act is available where there is, and also where there is not a winding-up in progress. The course of proceeding is to apply to the Cou by summons in the first instance, to direct meetings of the different classes of creditors (which includes debenture holders: *Re Alabama, &c. Co.*, (1891) 1 Ch. (C. A.) 213; *Slater* v. *Darlaston Steel Co.*, W. N (1877) 165), and of the members or contributories, to be held to consider the proposed scheme of arrangement. The Court usually makes an order for this purpose, appoints a chairman of the meetings, and directs them to be convened by circular or advertisement. The resolution of the meeting is required to be passed by a three-fourths majority

in value of those who are present in person or by proxy. In voting, debenture holders to bearer must produce their debentures. *Re Wedgwood Coal Co.* (1877), 6 Ch. D. 627. The resolution having been passed by the requisite majority, a petition is then presented to the Court to sanction the scheme; and, if approved, an order in due course is made. Schemes of the most varied character are adopted. The commonest form of scheme is that a new company shall be formed; that the debenture holders of the existing company shall take in exchange debentures or preference shares of the new company; that the unsecured creditors of the existing company shall take a composition of so much in the pound payable partly in cash and partly in shares, or partly in debentures; and that the shareholders shall receive shares in the new company with a liability attached. Any scheme which is fair and reasonable, and made in good faith, will be sanctioned. *Re Alabama, &c. Co.*, (1891) 1 Ch. (C. A.) 213. It is now settled that there is no objection to a scheme by which debenture holders are to accept fully paid shares in satisfaction of their debts, and the Court will under such a scheme compel dissentient debenture holders to surrender their securities. *Empire Co.* (1890), 44 Ch. D. 402; and see *Alabama Co.*, *supra*, and *Re Dominion of Canada Freehold Estate Co.* (1886), 58 L. T. 347. Not uncommonly the scheme provides that debenture holders of the existing company shall grant an extension of time for payment, say, five or ten years, and that creditors shall accept some composition, or, perhaps, second debentures or shares, and that the winding-up shall be stayed, and that the company shall resume business. This avoids the necessity for a new company. For examples of other schemes, see Company Precedents, Pt. II. pp. 997 *et seq.*

Sect. 120 of the Act of 1908 in effect re-enacts the Act of 1870, with the extension introduced by sect. 24 of the Act of 1900 so as to apply to an arrangement between the company and the members thereof or any class thereof, and so as to make the section available without a winding-up.

Where an arrangement was combined with a reconstruction under sect. 161 of the Act of 1862, it was held that it ought to provide for payment out of dissentient members. *Canning Jarrah Timber Co.*, (1900) 1 Ch. 708. And where there was in fact no arrangement with creditors, but a scheme for the sale of the whole of the company's undertaking to a new company, without any provisions for dealing with dissentient shareholders, the Court has declined to approve the scheme. *Re General Motor Cab Co.*, (1913) 1 Ch. 377. A reconstruction can, however, be carried out by this method where proper provision is made for dissentient members. *Re Sandwell Park Colliery Co.*, (1914) 1 Ch. 589. And a *bonâ fide* arrangement with creditors may in

a proper case be sanctioned by the Court without giving to dissentient members (by analogy to sect. 192 of the Act) the right to payment out of the value of their interests. *Standard Exploration Co.*, Buckley, J., 21st March, 1903; *Sorabie* v. *Tea Corporation*, (1904) 1 Ch. 12; Company Precedents, Part II., p. 997 *et seq.*

Proceedings in an English Court under the Joint Stock Companies Arrangement Act, 1870, or under sect. 120 of the Act of 1908, or the Companies Acts generally, cannot be pleaded in a colony as a defence to an action by a colonial creditor, those Acts not extending to the colonies or being intended to bind them. *New Zealand Loan and Mercantile Agency Co.*, 67 L. J. P. C. 10; 77 L. T. 603; 46 W. R. 239.

Where a scheme of arrangement is proposed in regard to a company not being wound up, the Court has no jurisdiction to restrain actions and proceedings against the company. *Booth* v. *Walkden Spinning Co.*, (1909) 2 K. B. 368. This is a defect in the Act. See *contra*, the Railway Companies Act, 1867, sect. 9, which provides whilst the scheme is pending no execution shall be available without the leave of the Court.

As to the form of proxy to be used, see form approved by Swinfen Eady, J., W. N. (1910) 154. And as to separate class meetings, see *United Provident Assurance Co.*, (1910) 2 Ch. 477.

A creditor who did not put forward a claim at the time of the deed of arrangement may be allowed to prove under it. *Curtis* v. *B. U. R. T. Co., Ltd.*, 28 T. L. R. 585.

CHAPTER XLIV.

PENSIONS AND GRATUITIES.

Pensions and gratuities.

The question whether it is within the powers of a company under the Act of 1908 to grant a pension or gratuity to an employee or ex-employee, or to his dependants, or to give a gratuity to its workmen and others, not uncommonly arises for consideration. Sometimes the company's memorandum contains an express sanction for these objects, *e.g.*, it gives power to the company "to establish and support, or aid in the establishment and support, of associations, institutions, funds, trusts, schemes and conveniences calculated to benefit employees or ex-employees of the company or its predecessors in business, or the dependants or connections of such persons, and to grant pensions and allowances, and to make payments towards insurance, and to subscribe and guarantee money for charitable or benevolent objects, or for any exhibitions, or for any public, general, or useful object." Such provision puts the company's power in regard to the matters specified beyond all question.

Implied powers.

But apart from such an express sanction, a company may have, as incidental to its business, an implied power which will cover a part at least of the ground. This was well pointed out by Bowen, L. J., in *Hutton* v. *West Cork Rail. Co.*, 23 C. D. 672, where a company had voted a gratuity to its directors: "You cannot say that the company has only got power to spend the money which it is bound to pay according to law; otherwise the wheels of business would stop. Nor can you say that directors, who have got all the powers of the company given to them . . . are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether as well as being *bonâ fide* it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit." It was on this principle that Sir George Jessel, M. R., in *Hampson* v. *Price's Patent Candle Co.*, 24 W. R. 754,

held that "a company might lawfully expend a week's wages as gratuities for its servants, because that sort of liberal dealing with servants eases the relation between masters and servants, and is in the end a benefit to the company." So also in *Henderson* v. *Bank of Australia*, it was held to be within the powers of a banking company to give the family of a deceased manager a pension for a term of years. See also *Cyclists' Touring Club* v. *Hopkinson*, (1910) 1 Ch. 179, which shows that the principle is not confined to trading companies. In any case the power of paying gratuities stops on the commencement of a winding-up, for it is a power incidental to the carrying on of the company's business as a *going concern*. *Hutton* v. *West Cork Rail. Co.*, 23 C. D. 654; *Stroud* v. *Royal Aquarium*, W. N. (1903) 146; 89 L. T. 243.

A subscription for outside purposes, *e.g.*, a subscription to the Imperial Institute (*Tomkinson* v. *S. E. Rail. Co.*, 56 L. T. 813) stands on a very different footing. It may be shown to be for the benefit of the company, but in the absence of express authority it is not a form of expenditure easy for directors to justify.

CHAPTER XLV.

POWERS OF ATTORNEY.

Powers of attorney.

THE directors of a company sometimes have occasion to affix the common seal of the company to a document (commonly called a power of attorney) authorizing some person or persons on the company's behalf to execute or do some deed, instrument or thing, whether in the United Kingdom or abroad.

Sect. 78 of the Act of 1908 runs as follows :—

Sect. 78 of Act of 1908.

S. 78. A company may by writing under its common seal empower any person, either generally or in respect of any specified matters, as its attorney to execute deeds on its behalf in any place not situate in the United Kingdom, and every deed signed by such attorney on behalf of the company and under his seal shall bind the company and have the same effect as if it were under its common seal.

Besides this, sect. 79 enables a company whose objects require or comprise the transaction of business in foreign countries, to have an official seal for use abroad if its articles authorize it. See *infra*. And the articles very commonly contain more or less elaborate provisions as to local management. See Company Precedents, Part I., p. 756. Moreover, it is well to bear in mind sects. 46, 47 and 48 of the Conveyancing and Law of Property Act, 1881. Under these the donee of a power of attorney can execute and do any assurance, instrument or thing in and with his own name and signature, and under his own seal where sealing is required by the authority of the donor of the power, and protect persons acting thereunder and allow of the deposit of the original instrument in the High Court, and sects. 8 and 9 of the Conveyancing Act, 1882, enable the power of attorney for valuable consideration to be made irrevocable, and enable the power of attorney, whether for value or not, to be made irrevocable for a fixed time.

Strict construction.

Powers of attorney are strictly construed, as, for example, power of attorney to act prior to the happening of some contingency may render it necessary to prove that such contingency has not happened (*Danby* v. *Coutts*, 29 C. D. 500); and so the operation of a power of attorney may be cut down with reference to what appears to have been the

purpose for which it was executed. *Attwood* v. *Munnings*, 7 B. & C. 278; *Jonmenjoy* v. *Watson*, 9 A. C. 561; *Jacobs* v. *Morris*, (1902) 1 Ch. 816; *Hambro* v. *Burnand*, (1904) 2 K. B. 14.

Put on inquiry.

Primâ facie those who deal with a person acting under, or purporting to act under, a power of attorney, are bound to inquire into the authenticity of the power. *De Bouchont* v. *Goldsmid*, 5 Ves. 213, per Lord Eldon; *Sheffield* v. *London Joint Stock Bank*, 13 A. C. 333; *Bryant* v. *Banque du Peuple*, (1893) A. C. 170. Where the agent is acting under a written authority, and what he does comes within the terms of that authority, the principal cannot repudiate on the ground that the agent acted in his own interests and not in those of the principal, unless the other party was aware of the facts. *Hambro* v. *Burnand*, (1904) 2 K. B. 10. And where the agent has powers exercisable in special circumstances, it seems that a person dealing with him *bonâ fide* need not inquire whether those special circumstances have arisen. *Montaignac* v. *Shitta*, 15 A. C. 357. An attorney is an agent, and therefore subject to the well-settled rule that an agent cannot appropriate any illegitimate profit. (*Parker* v. *McKenna*, 10 Ch. 96; *Bray* v. *Ford*, (1896) A. C. 44; and as to sub-agents, *Powell* v. *Jones*, (1905) 1 K. B. 11. Under the Stamp Act, 1891, a power of attorney generally requires a 10*s*. stamp.

Illegitimate profits.

CHAPTER XLVI.

FOREIGN COMPANIES.

SECTION 274 of the Act (replacing sect. 35 of the Act of 1907) imposes certain requirements on companies incorporated outside the United Kingdom, which, on 1st July, 1908, has a place of business in the United Kingdom or afterwards establishes such a place of business. Such companies are required to file with the Registrar of Companies:—

(a) a certified copy of the charter, statutes, or memorandum and articles creating the corporation and defining its constitution;

(b) a list of the directors of the company;

(c) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept service of process and notices on behalf of the company.

In case of any alterations in any of these, notice of the alteration must be filed with the registrar (1).

Service on the persons made agents for service under (c) is to be sufficient (2).

Every such company must also file with the registrar an annual statement, in the form of a balance sheet containing the particulars required to be given in its annual summary by a company registered in the United Kingdom with a share capital.

If the foreign company uses the word "Limited" as part of its name the section makes further requirements.

(a) The company must, in every prospectus it issues inviting subscriptions for its shares or debentures, state the country in which it was incorporated.

(b) It must conspicuously exhibit in every place in the United Kingdom where it carries on business the name of the company and the country where it was incorporated.

(c) It must have the name of the company and of the country of its incorporation mentioned in legible characters in all billheads and letter paper, and in all notices, advertisements, and other official publications of the company.

These are just and reasonable conditions, to which no honest foreign trading company can fairly take exception; while to investors, or persons having dealings with the foreign company in the United Kingdom, they afford a much-desired information and protection.

By sect. 275 of the Act, a company incorporated in a British possession which has filed with the registrar the documents and particulars specified in paragraphs (a), (b) and (c) of sub-sect. 1 of sect. 275 is to have the same power to hold lands in the United Kingdom as if it were a company incorporated under the Act.

A sale to a foreign company on reconstruction cannot be effected under sect. 192 of the Act. *Thomas* v. *United Butter Cos.*, (1909) 2 Ch. 484.

Foreign or colonial companies having assets and liabilities in England may be wound up by the Court in England. *Re Mercantile Bank of Australia*, (1892) 2 Ch. 204.

CHAPTER XLVII.

LEADING CASES.

Leading cases.

It may be convenient here to bring together some of the leading cases in relation to companies under the Companies Acts.

1.—**Andrews v. Gas Meter Co.**, (**1897**) 1 Ch. 361: which decided that a company can, by taking the proper steps, create and issue preference shares, although not authorized so to do by its memorandum or by its articles as originally framed, and overruled *Hutton* v. *Scarborough Cliff Hotel Co.* (No. 2), 2 Dr. & Sm. 514. See *supra*, p. 83.

2.—**Ashbury v. Watson** (**1885**), 30 C. Div. 376: which decided that where the rights attached to several classes of shares are set out in the memorandum of association they are unalterable. See *supra*, p. 88.

3.—**Ashbury Railway Carriage and Iron Co. v. Riche** (**1874**), L. R. 7 H. L. 671: which decided that the powers of a company under the Act of 1862 were limited by its objects. See *supra*, p. 61.

4.—**Bahia and San Francisco Railway Co.** (**1868**), L. R. 3 Q. B. 595: in which it was held that a company which issued a certificate of title to shares might be estopped by persons acting thereon *bonâ fide*. See other cases, *supra*, p. 143.

5.—**Barnes, Ex parte**, (**1896**) A. C. 146: which decided that a public examination of a person cannot be ordered under sect. 8 of the Companies Winding-up Act, 1890, unless the official receiver has found fraud against such person. See *supra*, p. 408.

6.—**Barwick v. English Joint Stock Bank** (**1866**), L. R. 2 Ex. 265: deciding that a company is answerable in an action of deceit for the fraud of its directors in managing the affairs of the company to the same extent as if the fraud were its own. See *supra*, p. 74.

7.—**Bowes v. Hope Mutual Life Insurance Society (1865)**, 11 H. L. C. 402: which decided that a creditor who cannot get paid is *primâ facie* entitled *ex debito justitiæ* to a winding-up order. See also *Western of Canada Co.*, 17 Eq. 1. See *supra*, p. 393.

8.—**Bradford Banking Co. v. Briggs (1886)**, 12 App. Cas. 29: deciding that notice given to a company by an equitable mortgagee is not notice of a trust which a company is prohibited from receiving by sect. 30 of the Companies Act, 1862. See *supra*, p. 157.

9.—**Re Bridgwater Navigation Co., Limited (1889)**, 14 App. Cas. 525: which decided that where there were preference shares and ordinary shares the holders of both classes were (subject to any provision to the contrary) entitled to share *pari passu* in the surplus assets in the winding-up, after paying off the whole of the paid-up capital. See *supra*, p. 85.

10.—**British and American Trustee and Finance Corporation v. Cooper, (1894)** A. C. 399, and *Poole* v. *National Bank of China*, (1907) A. C. 229, which decided that, under the Companies Acts, 1867 and 1877, the Court had jurisdiction to sanction any kind of reduction whatsoever. See *supra*, p. 93.

11.—**British Equitable Life Assurance Co. v. Baily, (1906)** A. C. 35: which decided that a company may alter its articles so as to vary a contract with an outsider, if the outsider has taken his contract subject to the risk of the articles being altered. See *supra*, p. 49.

12.—**Burkinshaw v. Nicolls (1877)**, 3 App. Cas. 1004: which decided that where a company issues a certificate to the effect that certain shares were fully paid up, it may be estopped from denying their being paid up as against anyone acting upon such certificate in good faith. See also *Bloomenthal* v. *Ford*, (1897) A. C. 156; and *Balkis Co.* v. *Tompkinson*, (1893) A. C. 396. See *supra*, p. 144.

13.—**Davis v. Bank of England (1824)**, 2 Bing. 393: deciding that a forged transfer of stock does not affect the title of the stockholder to the stock and dividends on it. See *supra*, p. 135.

14.—**Dovey v. Cory, (1901)** A. C. 477: deciding that a director is entitled to rely on his subordinates doing their duty in the absence of any ground for suspicion, and is not liable if, owing to the fraud or neglect of such subordinates, the company sustains damage. See *supra*, p. 202.

15.—**Ernest v. Nicholls (1857)**, 6 H. L. C. 419: deciding that all who deal with a company are to be deemed to have notice of its registered documents. See *supra*, p. 44.

16.—**Foss v. Harbottle (1843)**, 2 Hare, 461: which decided that the Court will not interfere in the internal affairs of a company where there is nothing *ultra vires* the company. It leaves the matter to the majority. See *supra*, pp. 176, 242.

17.—**Griffith v. Paget (1877)**, 5 C. D. 894; 6 C. D. 515: which decided that, upon a sale under sect. 161 of the Companies Act, 1862, it was not allowable to provide for a distribution of the assets otherwise than in accordance with the legal rights of the parties. See *supra*, p. 425.

18.—**Grissell's case (1865)**, 1 Ch. 528: which decided that a shareholder in a company who was a creditor thereof could in the winding-up prove in competition with the outside creditors, but was not entitled to set off his debt against calls. See *supra*, p. 405.

19.—**Hardy v. Fothergill (1888)**, 13 App. Cas. 351: deciding, in effect, that every liability of a company, however difficult of valuation, is provable in the winding-up, unless declared by the Court "incapable of being fairly estimated." See *supra*, p. 410.

20.—**Hartley's case (1875)**, 10 Ch. 157: which decided that where shares have been issued for a consideration other than cash, and by mistake the requisite contract had not been filed pursuant to sect. 25 of the Companies Act, 1867, it was open to the parties themselves to rectify the mistake without going to the Court. See *supra*, p. 121.

21.—**Kelner v. Baxter (1866)**, L. R. 2 C. P. 174: which decided that where A., before the incorporation of a company, purports to make a contract on the company's behalf with B., the company cannot ratify such contract, and A. is personally liable on it. See *supra*, p. 253.

22.—**New Sombrero Co. v. Erlanger (1862)**, 3 App. Cas. 1218: which decided that the promoters of a company stand in a fiduciary position to it. See *supra*, p. 332.

23.—**Oakbank Oil Co. v. Crum (1883)**, 8 App. Cas. 65: deciding that *primâ facie* a company has no power to pay a dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than others, unless pursuant to the Companies Act, 1867, s. 24 (3), its regulations so provide. See *supra*, p. 214.

24.—**Oakes v. Turquand (1867)**, L. R. 2 H. L. 375: deciding (1) that a contract induced by fraud or misrepresentation is not void, but voidable at the option of the party defrauded; until avoided, it is valid; (2) that it is too late to rescind after the rights of creditors have intervened on a winding-up. See *supra*, p. 353.

25.—**Ooregum Gold Mining Co. v. Roper, (1892)** A. C. 125: deciding that a company limited by shares has no power to issue its shares at a discount, and that the registration of a contract under sect. 25 of the Companies Act, 1867, made no difference. See *supra*, p. 69.

26.—**Re Panama Mail Co. (1870)**, 5 Ch. 318: deciding that a charge on a company's undertaking by way of floating security is effective. See *supra*, p. 311.

27.—**Parker v. McKenna (1875)**, 10 Ch. 118: deciding that a director cannot make any profit out of his agency without the knowledge and consent of his principal—the company. See *supra*, p. 193.

28.—**Peek v. Derry (1889)**, 14 App. Cas. 337: which decided that, in an action of deceit against directors, it was necessary to prove fraud. See *supra*, p. 358.

29.—**Peel's case (1867)**, 2 Ch. 674: which decided that the registrar's certificate of incorporation of a company was conclusive (see *supra*, p. 51), and that subscribers for shares are to be taken to have read the memorandum and articles of association.

30.—**Peel v. London and North Western Railway Co. (No. 1), (1907)** 1 Ch. 5: deciding that a company may legitimately do and pay for out of its assets all such things as are reasonably necessary for procuring members to express their views upon any questions affecting the management of the company's affairs, *e.g.*, sending stamped proxy forms, overruling *Studdert* v. *Grosvenor*, 33 Ch. D. 528. See *supra*, p. 67.

31.—**Pell's case (1869)**, 5 Ch. 11: which decided that where shares have been issued as paid-up shares upon the footing that certain specified property shall be accepted by the company as the consideration for such shares, the Court will not, *whilst the contract stands*, inquire into the value of the consideration, even at the instance of a creditor. See *supra*, p. 117.

32.—**Re Reese River Silver Mining Co. (1867)**, L. R. 2 Ch. 609: deciding that an innocent misrepresentation in a prospectus may be a ground for rescission. See *supra*, p. 355.

33.—**Royal British Bank v. Turquand (1857)**, 6 E. & B. 327: which decided that those who deal with a company are not concerned with the indoor management. See further, *supra*, p. 45.

34.—**Ruben v. Great Fingall Consolidated, (1906)** A. C. 439: deciding that a company is not liable on share certificates to which the secretary has forged the names of the directors. See *supra*, p. 136.

35.—**Salomon v. Salomon & Son, (1897)** A. C. 22: which decided that one-man companies are legal. See *supra*, pp. 56, 371.

36.—**Spargo's case (1873)**, 8 Ch. 407: which decided that shares might, within the meaning of sect. 25 of the Companies Act, 1867, be paid up in cash by setting off by agreement a debt presently due to the shareholder from the company against the amount due on the shares. See further, *supra*, p. 122.

37.—**Standard Manufacturing Co., Re, (1891)** 1 Ch. 627: deciding that debentures and trust deeds do not require to be registered under the Bills of Sale Acts. See *supra*, p. 315.

38.—**Trevor v. Whitworth (1887)**, 12 App. Cas. 409: which decided that it was illegal for a company to buy its own shares. See *supra*, p. 66.

39.—**Twycross v. Grant (1877)**, 2 C. P. D. 469: as to the construction of sect. 38 of the Companies Act, 1867. See *supra*, p. 320.

40.—**Walker v. London Tramways Co. (1879)**, 12 C. D. 705: which decided that a company cannot by a clause in its articles deprive its shareholders of the statutory power of altering its regulations contained in sect. 50 of the Companies Act, 1862. See *supra*, p. 47.

41.—**Welton v. Saffery, (1897)** A. C. 299: which decided that shares issued at a discount must, even as between the members in a winding-up, be treated as imposing a liability to pay up the discount in cash. See *supra*, p. 69.

42.—**Weston's case (1870)**, 4 Ch. 20: which decided that the right of transfer of shares in a company under the Act of 1862 is *primâ facie* free. See *supra*, p. 130.

43.—**Will v. United Lankat Plantations, (1914)** A. C. 11, deciding that preference shares are not *primâ facie* entitled to receive any dividend beyond the fixed preferential dividend. See *supra*, p. 85.

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COMPANIES (CONSOLIDATION) ACT, 1908.

8 Edw. 7, c. 69.

An Act to consolidate the Companies Act, 1862, and the Acts amending it. [21st December, 1908.]

[*Came into operation 1st April*, 1909. *See sect.* 296.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

Constitution and Incorporation.

Prohibition of Large Partnerships.

S. 4 of 1862. Prohibition of partnerships exceeding certain number. p. 386

1.—(1.) No company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent.

(2.) No company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the Court exercising the stannaries jurisdiction.

Memorandum of Association.

Ss. 6 *et seq.* of 1862. Mode of forming incorporated company. pp. 21, 26

2. Any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

(i) A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or

(ii) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or

(iii) A company not having any limit on the liability of its members (in this Act termed an unlimited company).

S. 8 of 1862. Memorandum of company limited by shares. pp. 26, 32

3. In the case of a company limited by shares—

(1.) The memorandum must state—

(i) The name of the company, with "Limited" as the last word in its name;

(ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;

(iii) The objects of the company;

(iv) That the liability of the members is limited;

(v) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount:

(2.) No subscriber of the memorandum may take less than one share;

(3.) Each subscriber must write opposite to his name the number of shares he takes.

S. 9 of 1862. Memorandum of company limited by guarantee. p. 378

4. In the case of a company limited by guarantee—

1.) The memorandum must state—

(i) The name of the company, with "Limited" as the last word in its name;

(ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;

(iii) The objects of the company;

(iv) That the liability of the members is limited;

(v) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(2.) If the company has a share capital—

(i) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(ii) No subscriber of the memorandum may take less than one share;

(iii) Each subscriber must write opposite to his name the number of shares he takes.

S. 10 of 1862. Memorandum of unlimited company. p. 381

5. In the case of an unlimited company—

(1.) The memorandum must state—

(i) The name of the company;

(ii) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;

(iii) The objects of the company.

(2.) If the company has a share capital—

(i) No subscriber of the memorandum may take less than one share;

(ii) Each subscriber must write opposite to his name the number of shares he takes.

S. 11 of 1862. Stamp and signature of memorandum. p. 22

6. The memorandum must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

S. 12 of 1862. Restriction on alteration of memorandum. pp. 77, 81, 88

7. A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act.

Ss. 13, 20 of 1862 Name of company and change of name. p. 249

8.—(1.) A company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2.) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3.) Any company may, by special resolution and with the approval of the Board of Trade signified in writing, change its name.

(4.) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(5.) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

Ss. 1, 2 of 1890.

Alteration of objects of company.

p. 77

9.—(1.) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum.

(2.) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court.

(3.) Before confirming the alteration the Court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4.) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(5.) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

(6.) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the Registrar of Companies, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

The Court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the Court may think proper.

(7.) If a company makes default in delivering to the Registrar of Companies any document required by this section to be delivered to him, the company shall be liable to a fine not exceeding ten pounds for every day during which it is in default.

Articles of Association.

S. 14 of 1862 Registration of articles.

pp. 21, 22, 37

10.—(1.) There may, in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2.) Articles of association may adopt all or any of the regulations contained in Table A. in the First Schedule to this Act.

(3.) In the case of an unlimited company or a company limited by guarantee the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.

(4.) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

S. 15 of 1862. Application of Table A. pp. 22, 37

11. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A. in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Ss. 14, 16 of 1862. Form, stamp, and signature of articles. p. 37

12. Articles must—

(a) be printed;

(b) be divided into paragraphs numbered consecutively;

(c) bear the same stamp as if they were contained in a deed: and

(d) be signed by each subscriber of the memorandum of association in the presence of at least one witness, who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England and Ireland.

Ss. 50, 176 of 1862. Alteration of articles by special resolution. p. 46

13.—(1.) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2.) The power of altering articles under this section shall, in the case of an unlimited company formed and registered under the Joint Stock Companies Acts, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

General Provisions.

S. 11 of 1862. Effect of memorandum and articles.

14.—(1.) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2.) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be of the nature of a specialty debt.

S. 17 of 1862. Registration of memorandum and articles.

15. The memorandum and the articles (if any) shall be delivered to the Registrar of Companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Effect of registration. p. 51

16.—(1.) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

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

S. 18 of 1862 and s. 1 of 1880. Conclusiveness of certificate of incorporation. p. 51

17.—(1.) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act.

(2.) A statutory declaration by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

S. 19 of 1862. Copies of memorandum and articles to be given to members.

18.—(1.) Every company shall send to every member, at his request, and on payment of one shilling or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

(2.) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding one pound.

Associations not for Profit.

S. 21 of 1862. Restriction on charitable and other companies holding land.

19. A company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land; but the Board may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as the Board think fit.

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S. 23 of 1867. Power to dispense with "Limited" in name of charitable and other companies.

20.—(1.) Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2.) A licence by the Board of Trade under this section may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations shall be binding on the association, and shall, if the Board so direct, be inserted in the memorandum and articles, or in one of those documents.

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(3.) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members and directors and managers to the Registrar of Companies.

(4.) A licence under this section may at any time be revoked by the Board of Trade, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that before a licence is so revoked the Board shall give to the association notice in writing of their intention, and shall afford the association an opportunity of being heard in opposition to the revocation.

Companies limited by Guarantee.

S. 27 of 1900. Provision as to companies limited by guarantee.

21.—(1.) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of January, nineteen hundred and one, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2.) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of January, nineteen hundred and one, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

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PART II.

DISTRIBUTION AND REDUCTION OF SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS

Distribution of Share Capital.

S. 22 of 1862. Nature of shares.

22.—(1.) The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate.

(2.) Each share in a company having a share capital shall be distinguished by its appropriate number.

S. 23 of 1862. Certificate of shares or stock. p. **142**

23. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *primâ facie* evidence of the title of the member to the shares or stock.

S. 24 of 1862. Definition of member. pp. **101, 103**

24.—(1.) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2.) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

S. 25 of 1862. Register of members. p. **124**

25.—(1.) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(i) The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) The date at which each person was entered in the register as a member;

(iii) The date at which any person ceased to be a member.

(2.) If a company fails to comply with this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

S. 26 of 1862. Annual list of members and summary. p. **123**

26.—(1.) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return of the incorporation of the company.

(2.) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(a) The amount of the share capital of the company, and the number of the shares into which it is divided;

(b) The number of shares taken from the commencement of the company up to the date of the return;

(c) The amount called up on each share;

(d) The total amount of calls received;

(e) The total amount of calls unpaid;

(f) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return;

(g) The total number of shares forfeited;

(h) The total amount of shares or stock for which share warrants are outstanding at the date of the return;

(i) The total amount of share warrants issued and surrendered respectively since the date of the last return;

(k) The number of shares or amount of stock comprised in each share warrant;

(l) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and

(m) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.

(3.) The summary must also (except where the company is a private company include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss.

(4.) The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.

(5.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

S. 30 of 1862. Trusts not to be entered on register. p. 158

27. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland.

S. 28 of 1867. Registration of transfer at request of transferor.

28. On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

S. 24 of 1862. Transfer by personal representative. p. 139

29. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

S. 32 of 1862. Inspection of register of members. p. 124

30.—(1.) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one shilling or such less sum as the company may prescribe, for each inspection.

(2.) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of sixpence, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.

(3.) If any inspection or copy required under this section is refused, the company shall be liable for each refusal to a fine not exceeding two pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director and manager of the company who knowingly authorizes or permits the refusal shall be liable to the like penalty; and, as respects companies registered in England or Ireland, any judge of the High Court, or the judge of the Court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the register.

S. 33 of 1862. Power to close register.

31. A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year.

S. 35 of 1862. Power of Court to rectify register.

32.—(1.) If—

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2.) The application may be made, as respects companies registered in England or Ireland, by motion in the High Court, or by application to a judge of the High Court sitting in chambers, or by application to the judge of the Court exercising the summaries jurisdiction in the case of companies subject to that jurisdiction, and, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may respectively direct; and the Court may either refuse the application, or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

(3.) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4.) In the case of a company required by this Act to send a list of its members to the registrar of companies, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.

S. 37 of 1862. Register to be evidence. p. 125

33. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein.

S. 2 of 1883. Power for company to keep colonial register. p. 129

34.—(1.) A company having a share capital, whose objects comprise the transaction of business in a colony, may, if so authorized by its articles, cause to be kept in any colony in which it transacts business a branch register of members resident in that colony (in this Act called a colonial register).

(2.) The company shall give to the registrar of companies notice of the situation of the office where any colonial register is kept, and of any change in its situation, and of the discontinuance of the office in the event of its being discontinued.

(3.) For the purpose of the provisions of this Act relating to colonial registers the term "colony" includes British India and the Commonwealth of Australia.

S. 3 of 1883. Regulations as to colonial register. p. 129

35.—(1.) A colonial register shall be deemed to be part of the company's register of members (in this and the next following section called the principal register).

(2.) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the district wherein the colonial register is kept, and that any competent Court in the colony may exercise the same jurisdiction of rectifying the register as is under this Act exercisable by the High Court, and that the offences of refusing inspection or copies of a colonial register, and of authorizing or permitting the refusal may be prosecuted summarily before any tribunal in the colony having summary criminal jurisdiction.

(3.) The company shall transmit to its registered office a copy of every entry in its colonial register as soon as may be after the entry is made; and shall cause to be kept at its registered office, duly entered up from time to time, a duplicate of its colonial register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4.) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a colonial register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a colonial register shall, during the continuance of that registration, be registered in any other register.

(5.) The company may discontinue to keep any colonial register, and thereupon all entries in that register shall be transferred to some other colonial register kept by the company in the same colony, or to the principal register.

(6.) Subject to the provisions of this Act, any company may, by its articles, make such provisions as it may think fit respecting the keeping of colonial registers.

S. 3 of 1882. Stamp duties in case of shares registered in

36. In relation to stamp duties the following provisions shall have effect:—

(a) An instrument of transfer of a share registered in a colonial register shall be deemed to be a transfer of property situate out of the United Kingdom, and, unless executed in any part of the United Kingdom, shall be exempt from British stamp duty:

(b) On the death of a member registered in a colonial register, the shares of the deceased member shall, if he died domiciled in the United Kingdom, but not otherwise, be deemed, so far as relates to British duties, to be part of his estate and effects situate in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted, or whereof an inventory is to be exhibited and recorded, in like manner as if he were registered in the principal register. Colonial registers.

37.—(1.) A company limited by shares, if so authorized by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share warrant. S. 27 of 1867. Issue and effect of share warrants to bearer.

(2.) A share warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant. p. 141

(3.) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

(4.) The bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles: except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company in cases where such a qualification is required by the articles.

(5.) On the issue of a share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

(i) The fact of the issue of the warrant;

(ii) A statement of the shares or stock included in the warrant, distinguishing each share by its number; and

(iii) The date of the issue of the warrant.

(6.) Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender must be entered as if it were the date at which a person ceased to be a member.

38.—(1.) If any person— S. 34 of 1867. Forgery, personation, unlawfully engraving plates, &c.

(i) with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act; or by means of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, demands or endeavours to obtain or receive any share or interest in any company under this Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon, or document to be forged or altered; or

(ii) falsely and deceitfully personates any owner of any share or interest in any company, or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner,

he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years.

(2.) If any person without lawful authority or excuse, proof whereof shall lie on him, engraves or makes on any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company in pursuance of this Act, or to be a blank share warrant or coupon so issued or made, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing of any such share warrant or coupon, or of any such blank share warrant or coupon, or

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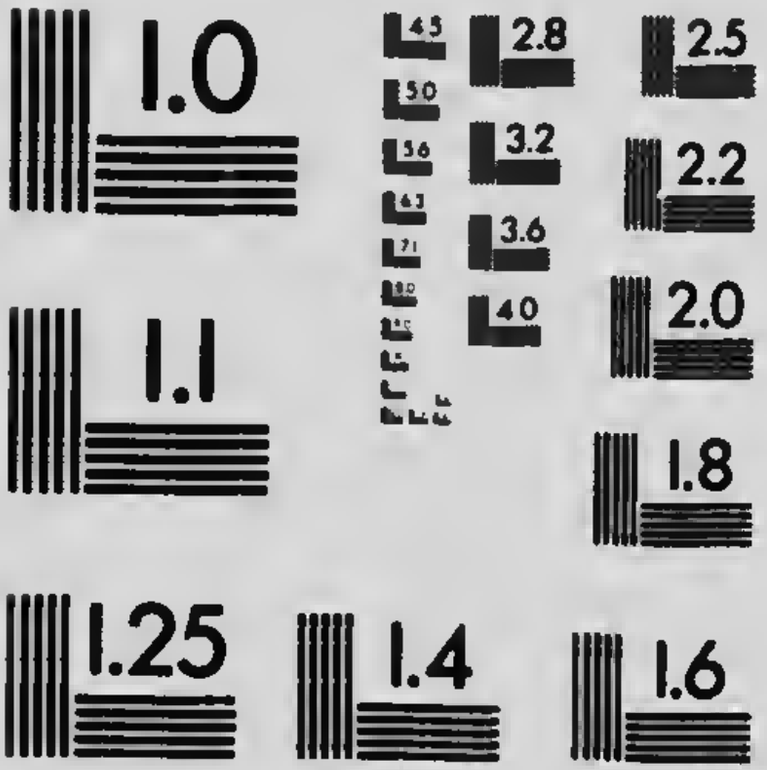

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any part thereof respectively, or knowingly has in his custody or possession any such plate, wood, stone, or other material, he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years.

S. 24 of 1867. Power of company to arrange for different amounts being paid on shares.

39. A company, if so authorized by its articles, may do any one or more of the following things; namely,—

(1.) Make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares:

(2.) Accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up:

(3.) Pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

S. 3 of 1880. Power to return accumulated profits in reduction of paid-up share capital. p. 93

40.—(1.) When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount.

(2.) The resolution shall not take effect until a memorandum, showing the particulars required by this Act in the case of a reduction of share capital, has been produced to and registered by the registrar of companies, but the other provisions of this Act with respect to reduction of share capital shall not apply to a reduction of paid-up share capital under this section.

(3.) On a reduction of paid-up capital in pursuance of this section any shareholder, or any one or more of several joint shareholders, may within one month after the passing of the resolution for the reduction, require the company to retain, and the company shall retain accordingly, the whole of the money actually paid on the shares held by him either alone or jointly with any other person, which, in consequence of the reduction, would otherwise be returned to him or them, and thereupon those shares shall, as regards the payment of dividend, be deemed to be paid up to the same extent only as the shares on which payment has been accepted by the shareholders in reduction of paid-up capital, and the company shall invest and keep invested the money so retained in such securities authorized for investment by trustees as the company may determine, and on the money so invested or on so much thereof as from time to time exceeds the amount of calls subsequently made on the shares in respect of which it has been retained, the company shall pay the interest received from time to time on the securities.

(4.) The amount retained and invested shall be held to represent the future calls which may be made to replace the share capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made produces more or less than the amount of the call.

(5.) On a reduction of paid-up share capital in pursuance of this section, the powers vested in the directors of making calls on shareholders in respect of the amount unpaid on their shares shall extend to the amount of the unpaid share capital as augmented by the reduction.

(6.) After any reduction of share capital under this section the company shall specify in the annual list of members required by this Act the amounts retained at the request of any of the shareholders in pursuance of this section, and shall specify in the statements of account laid before any general meeting of the company the amount of undivided profits returned in reduction of paid-up share capital under this section.

S. 12 of 1862, s. 21 of 1867. Power of company limited by shares to alter its share capital. pp. 86, 88, 89

41.—(1.) A company limited by shares, if so authorized by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient:

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2.) The powers conferred by this section with respect to sub-division of shares must be exercised by special resolution.

(3.) Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

If a company makes default in complying with this provision it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(4.) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

S. 28 of 1862. Notice to registrar of consolidation of share capital conversion of shares into stock, &c.

42. Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares, or converted any of its shares into stock, or reconverted stock into shares, it shall give notice to the registrar of companies of the consolidation, division, conversion, or reconversion specifying the shares consolidated, divided, or converted, or the stock reconverted.

S. 29 of 1862. Effect of conversion of shares into stock.

43. Where a company having a share capital has converted any of its shares into stock, and given notice of the conversion to the registrar of companies, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock; and the register of members of the company, and the list of members to be forwarded to the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

S. 34 of 1862. Notice of increase of share capital or of members.

44.—(1.) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall give to the registrar of companies, in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution the confirmation, of the resolution authorizing the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

(2.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

S. 39 of 1907. Reorganisation of share capital. p. 100

45.—(1.) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

(2.) Where an order is made under this section an office copy thereof shall be filed with the registrar of companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of Share Capital.

S. 9 of 1867, s. 3 of 1897. Special resolution for reduction of share capital. p. 91

46.—(1.) Subject to confirmation by the Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way and in particular (without prejudice to the generality of the foregoing power) may—

(a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2.) A special resolution under this section is in this Act called a resolution for reducing share capital.

S. 11 of 1867. Application to Court for confirming order. p. 98

47. Where a company has passed and confirmed a resolution for reducing share capital it may apply by petition to the Court for an order confirming the reduction.

S. 10 of 1867. Addition to name of company of "and reduced." p. 99

48. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."

S. 13 of 1867. Objections by creditors, and settlement of list of objecting creditors.

49.—(1.) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2.) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(3.) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount; (that is to say,)—

(i) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

S. 11 of 1867. Order confirming reduction. p. 98

50. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

S. 9 of 1867. Registration of order and minute of reduction. p. 99

51.—(1.) The registrar of companies on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court), showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided, and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2.) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3.) Notice of the registration shall be published in such manner as the Court may direct.

(4.) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute. p. 99

S. 16 of 1867. Minute to form part of memorandum.

52.—(1.) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein: and must be embodied in every copy of the memorandum issued after its registration.

(2.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

S. 16 of 1867. Liability of members in respect of reduced shares.

53. A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(ii) if the company is wound up, the Court, on the application of any such creditor, and proof of his ignorance as aforesaid may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

Nothing in this section shall affect the rights of the contributories among themselves.

S. 19 of 1867. Penalty on concealment of name of creditor.

54. If any director, manager, or officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of a misdemeanour.

S. 4 of 1877. Publication of reasons for reduction.

55. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

S. 27 of 1900. Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

56. A company limited by guarantee and registered on or after the first day of January nineteen hundred and one, may, if it has a share capital, and is so authorized by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

Registration of Unlimited Company as Limited.

S. 4 of 1879. Registration of unlimited company as limited.

57.—(1.) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited, or any company already registered as a limited company, may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of the company before the registration, and those debts, liabilities, obligations, and contracts may be enforced in manner provided by Part VII. of this Act in the case of a company registered in pursuance of that Part. p. 385

(2.) On registration in pursuance of this section the registrar shall close the former registration of the company, and may dispense with the delivery to him of

copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company.

S. 5 of 1879. Power of unlimited company to provide for reserve share capital on re-registration.

58. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

(a) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up;

(b) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

S. 5 of 1879. Reserve liability of limited company. p. 271

59. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Unlimited Liability of Directors.

Ss. 4, 7 of 1867. Limited company may have directors with unlimited liability.

60.—(1.) In a limited company the liability of the directors or managers, or the managing director, may, if so provided by the memorandum, be unlimited.

(2.) In a limited company in which the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes a person for election or appointment to the office of director or manager, shall add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary (if any) of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3.) If any director, manager, or proposer makes default in adding such a statement, or if any promoter, director, manager, or secretary makes default in giving such a notice, he shall be liable to a fine not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

S. 8 of 1867. Special resolution of limited company making liability of directors unlimited.

61.—(1.) A limited company, if so authorized by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors, or managers, or of any managing director.

(2.) Upon the confirmation of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum; and a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution.

(3.) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made; and every director or manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

PART III.

MANAGEMENT AND ADMINISTRATION.

Office and Name.

S. 39 of 1862. Registered

62.—(1.) Every company shall have a registered office, to which all communications and notices may be addressed.

(2.) Notice of the situation of the registered office, and of any change therein, shall be given to the registrar of companies, who shall record the same. office of company.

(3.) If a company carries on business without complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which it so carries on business. p. 243

63.—(1.) Every limited company— S. 41 of 1862. Publication of name by a limited company.

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible:

(b) shall have its name engraven in legible characters on its seal:

(c) shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company and in all bills of parcels, invoices, receipts, and letters of credit of the company. p. 243

(2.) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding five pounds for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(3.) If any director, manager, or officer of a limited company, or any person on its behalf, uses or authorizes 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 authorizes the issue of any notice, advertisement, or other official publication of the company, or signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, 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.

Meetings and Proceedings.

64.—(1.) A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director, manager, secretary, and other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds. S. 24 of 1907. Annual general meeting.

(2.) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company. p. 163

65.—(1.) Every company limited by shares and registered on or after the first day of January nineteen hundred and one shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which shall be called the statutory meeting. S. 12 of 1900. First statutory meeting of company.

(2.) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it. pp. 161—163

(3.) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(c) an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a

date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;

(d) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company; and

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.

(4.) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5.) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the registrar of companies forthwith after the sending thereof to the members of the company.

(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8.) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9.) If a petition is presented to the Court in manner provided by Part IV. of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10.) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company.

S. 13 of 1900. **Convening of extraordinary general meeting on requisition.** pp. 163, 164

66.—(1.) Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

(2.) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3.) If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of the deposit.

(4.) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

(5.) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

S. 52 c. 1862. **Provisions as to meetings and votes.**

67. In default of, and subject to, any regulations in the articles—

(i) A meeting of a company may be called by seven days' notice in writing, served on every member in manner in which notices are required to be served by Table A. in the First Schedule to this Act:

(ii) Five members may call a meeting:

(iii) Any person elected by the members present at a meeting may be chairman thereof:

(iv) Every member shall have one vote.

S. 24 of 1907. Representation of companies at meetings of other companies of which they are members.

68. A company which is a member of another company may, by resolution of the directors, authorize any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorized shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

Ss. 51, 129 of 1862. Definitions of extraordinary and special resolution. pp. 236, 237

69.—(1.) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2.) A resolution shall be a special resolution when it has been—

(a) passed in manner required for the passing of an extraordinary resolution; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

p. 239

(4.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a poll may be demanded, if demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5.) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(6.) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles.

S. 53 of 1862. Registration and copies of special resolutions. p. 240

70.—(1.) A copy of every special and extraordinary resolution shall within fifteen days from the confirmation of the special resolution, or from the passing of the extraordinary resolution, as the case may be, be printed and forwarded to the registrar of companies, who shall record the same.

(2.) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the confirmation of the resolution.

(3.) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one shilling or such less sum as the company may direct.

(4.) If a company makes default in printing or forwarding a copy of a special or extraordinary resolution to the registrar it shall be liable to a fine not exceeding two pounds for every day during which the default continues.

(5.) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(6.) Every director and manager of a company who knowingly and wilfully authorizes or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

S. 67 of 1862. Minutes of proceedings of meetings and directors. p. 244

71.—(1.) Every company shall cause minutes of all proceedings of general meetings and (where there are directors or managers) of its directors or managers to be entered in books kept for that purpose.

(2.) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3.) Until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.

Appointment, Qualification, &c. of Directors.

S. 2 of 1900. Restrictions on appointment or advertisement of director.
p. 181

72.—(1.) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company, or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorized in writing—

(i) Signed and filed with the registrar of companies a consent in writing to act as such director; and

(ii) Either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2.) On the application for registration of the memorandum and articles of a company the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds.

(3.) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

S. 3 of 1900. Qualification of director.
pp. 182—185

73.—(1.) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

(2.) The office of director of a company shall be vacated, if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(3.) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

S. 67 of 1862. Validity of acts of directors.
p. 189

74. The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

S. 45 of 1862. List of directors to be sent to registrar.

75.—(1.) Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and send to the Registrar of Companies a copy thereof, and from time to time notify to the registrar any change among its directors or managers.

(2.) If default is made in compliance with this section, the company shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penal-

Contracts, &c.

S. 37 of 1867. Form of contracts.
p. 267 *et seq.*

76.—(1.) Contracts on behalf of a company may be made as follows (that is to say):—

(i) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under

the common seal of the company, and may in the same manner be varied or discharged:

(ii) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

(iii) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2.) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators as the case may be.

(3.) Any deed to which a company is a party shall be held to be validly executed in Scotland on behalf of the company if it is executed in terms of the provisions of this Act or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding whether attested by witnesses or not.

S. 47 of 1862. Bills of exchange and promissory notes.

77. A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

S. 55 of 1862. Execution of deeds abroad. p. 259

78. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall bind the company, and have the same effect as if it were under its common seal.

Act of 1862. Power for company to have official seal for use abroad. p. 259

79.—(1.) A company whose objects require or comprise the transaction of business in foreign countries may, if authorized by its articles, have for use in any territory, district, or place not situate in the United Kingdom, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

(2.) A company having such an official seal may, by writing under its common seal, authorize any person appointed for the purpose in any territory, district, or place not situate in the United Kingdom, to affix the same to any deed or other document to which the company is party in that territory, district, or place.

(3.) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4.) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5.) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

Prospectus

S. 3 of 1900 s. 3 of 1907. Filing prospectus. p. 343

80.—(1.) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2.) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorized in writing, shall be filed for registration with the registrar of companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3.) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5.) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

8. 10 of 1900, s. 2 of 1907.

Specific requirements as to particulars of prospectus.

p. 343 *et seq.*

81.—(1.) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

(a) The contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

(b) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(c) the names, descriptions, and addresses of the directors or proposed directors, and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share, and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and

(g) the amount (if any) paid or payable as purchase-money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(h) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(i) the amount or estimated amount of preliminary expenses; and

(j) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(k) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and

(l) the names and addresses of the auditors (if any) of the company; and

(m) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company; and

(n) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by several classes of shares respectively.

(2.) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus; or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(c) the contract depends for its validity or fulfilment on the result of that issue.

(3.) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4.) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5.) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6.) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(a) as regards any matter not disclosed, he was not cognizant thereof; or

(b) the non-compliance arose from an honest mistake of fact on his part;

Provided that in the event of non-compliance with the requirements contained in paragraph (m) of sub-section (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7.) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8.) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9.) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

S. 1 of 1907. Obligations of companies where no prospectus is issued. p. 363

82.—(1.) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

S. 11 of 1900, s. 1 of 1907. Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus. p. 364

83. A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the statutory meeting.

S. 3 of 1900, s. 33 of 1907. Liability for

84.—(1.) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the

statements in prospectus.

faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) With respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and

(b) With respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

(c) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document:

or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith give reasonable public notice that it was issued without his knowledge or consent; or

(iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2.) Where a company existing on the eighteenth day of August one thousand eight hundred and ninety, has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorized the issue of the prospectus, or has adopted or ratified it.

(3.) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4.) Every person who by reason of his being a director, or named as a director, or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5.) For the purposes of this section—

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Allotment.

85.—(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:— S. 4 of 1900. Restriction as to allotment. p. 105

(a) the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

(3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6.) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription. p. 106

(7.) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say):—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(b) if no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This sub-section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight. p. 106

86.—(1.) An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up. S. 5 of 1900. Effect of irregular allotment. p. 107

(2.) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the provisions of the last foregoing section with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

87.—(1.) A company shall not commence any business or exercise any borrowing powers unless S. 6 of 1900. Restrictions on commencement of business. p. 58

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and

(c) there has been filed with the registrar of companies a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with: and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar of companies a statement in lieu of prospectus.

(2.) The registrar of companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a private company, or to a company registered before the first day of January nineteen hundred and one, or to a company registered before the first day of July nineteen hundred and eight which does not issue a prospectus inviting the public to subscribe for its shares.

S. 7 of 1900. Return as to allotments. p. 118

88.—(1.) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the registrar of companies—

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2.) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the registrar of companies the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

54 & 55 Vict. c. 39.

(3.) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in filing with the registrar of companies within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper.

Commissions and Discounts.

S. 8 of 1900, s. 8 of 1907.

Power to pay certain commissions, and prohibition of payment of all other commissions, discounts, &c.

p. 340

89.—(1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorized by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

(a) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

(b) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3.) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

S. 7 of 1907.

Statement in balance sheet as to commissions and discounts.

90. Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

Payment of Interest out of Capital.

S. 9 of 1907.

Power of company to pay interest out of capital in certain cases.

p. 221

91. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that—

(1.) No such payment shall be made unless the same is authorized by the articles or by special resolution:

(2.) No such payment, whether authorized by the articles or by special resolution, shall be made without the previous sanction of the Board of Trade:

(3.) Before sanctioning any such payment the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry:

(4.) The payment shall be made only for such period as may be determined by the Board of Trade; and such period shall in no case extend beyond the close of the half year next after the half year during which the works or buildings have been actually completed or the plant provided:

(5.) The rate of interest shall in no case exceed four per cent. per annum or such lower rate as may for the time being be prescribed by Order in Council:

(6.) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:

(7.) The accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate:

(8.) Nothing in this section shall affect any company to which the Indian Railways Act, 1894, as amended by any subsequent enactment, applies.

57 & 58 Vict. c. 12.

Certificates of Shares, &c.

S. 5 of 1907. Limitation of time for issue of certificates.

p. 142

92.—(1.) Every company shall, within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the registration of the transfer of any such shares, debentures, or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

(2.) If default is made in complying with the requirements of this section, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding five pounds for every day during which the default continues.

Information as to Mortgages, Charges, &c.

S. 14 of 1900, s. 10 of 1907. Registration of mortgages and charges in England and Ireland.

p. 277

93.—(1.) Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

(a) a mortgage or charge for the purpose of securing any issue of debentures; or

(b) a mortgage or charge on uncalled share capital of the company; or

(c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(d) a mortgage or charge on any land, wherever situate, or any interest therein; or

(e) a mortgage or charge on any book debts of the company; or

(f) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

Provided that—

(i) in the case of a mortgage or charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar; and

(ii) where the mortgage or charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to

make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2.) The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the first day of July nineteen hundred and eight and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3.) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

(a) the total amount secured by the whole series; and

(b) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

(c) a general description of the property charged; and

(d) the names of the trustees, if any, for the debenture holders;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4.) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5.) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6.) The company shall cause a copy of every certificate of registration given under this section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7.) It shall be the duty of the company to send to the registrar for registration the particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(8.) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(9.) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

S. 11 of 1907. Registration of enforcement of security.

94.—(1.) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall within seven days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the registrar of companies, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2.) If any person makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 41 of 1907. Filing of accounts of receivers and managers.

95.—(1.) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar of companies an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

(2.) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding fifty pounds.

S. 15 of 1907. Rectification of register of mortgages.

96. A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified.

S. 16 of 1900. Entry of satisfaction.

97. The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

S. 17 of 1900. Index to register of mortgages and charges.

98. The registrar of companies shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

S. 18 of 1900. Penalties.

99.—(1.) If any company makes default in sending to the registrar of companies for registration the particulars of any mortgage or charge created by the company, and of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds for every day during which the default continues.

(2.) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company and every director, manager, and other officer of the company, who knowingly and wilfully authorized or permitted the default shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

(3.) If any person knowingly and wilfully authorizes or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other

liability, be liable on summary conviction to a fine not exceeding one hundred pounds.

S. 43 of 1862. Company's register of mortgages. p. 276

100.—(1.) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2.) If any director, manager, or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

S. 10 of 1907. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

101.—(1.) The copies of instruments creating any mortgage or charge requiring registration under this Act with the registrar of companies, and the register of mortgages kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2.) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorizing or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues; and, in addition to the above penalty as respects companies registered in England or Ireland, any judge of the High Court sitting in chambers, or the judge of the Court exercising the summaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the copies or register.

S. 18 of 1907. Right of debenture holders to inspect the register of debenture holders and to have copies of trust deed.

102.—(1.) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of sixpence for every one hundred words required to be copied.

(2.) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of sixpence for every one hundred words required to be copied.

(3.) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding five pounds, and to a further fine not exceeding two pounds for every day during which the refusal continues, and every director, manager, secretary, or other officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty.

Debentures and Floating Charges.

S. 14 of 1907. Perpetual debentures. p. 313

103. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

S. 15 of 1907. Power to re-issue redeemed debentures in certain cases. p. 288

104.—(1.) Where either before or after the passing of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place,

and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2.) Where with the object of keeping debentures alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3.) Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4.) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5.) Nothing in this section shall prejudice—

(a) the operation of any judgment or order of a Court of competent jurisdiction pronounced or made before the seventh day of March nineteen hundred and seven as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

S. 16 of 1907. Specific performance of debenture contract.

105. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

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S. 36 of 1907. Validity of debentures to bearer in Scotland.

106. Notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, debentures to bearer issued in Scotland are declared to be valid and binding according to their terms.

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

107.—(1.) Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2.) The periods of time mentioned in the said provisions of Part IV. of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3.) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

[The above section represents the Preferential Payments in Bankruptcy Act, 1897 (60 & 61 Vict. c. 3).]

Statement to be published by Banking and certain other Companies.

S. 44 of 1862. Certain companies to publish statement in schedule.

108.—(1.) Every company being a limited banking company or an insurance company or a deposit, provident, or benefit society shall, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form marked C. in the First Schedule to this Act, or as near thereto as circumstances will admit.

(2.) A copy of the statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3.) Every member and every creditor of the company shall be entitled to a copy of the statement, on payment of a sum not exceeding sixpence.

(4.) If default is made in compliance with this section, the company shall be liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

(5.) For the purposes of this Act a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company.

(6.) This section shall not apply to any life assurance company nor any other assurance company to which the provisions of the Life Assurance Companies Acts, 1870 to 1872, as to the annual statements to be made by such a company, apply with or without modifications, if the company complies with those provisions. 33 & 34 Vict. c. 61. 34 & 35 Vict. c. 58. 35 & 36 Vict. c. 41.

Inspection and Audit

S. 56 of 1862. Investigation of affairs of company by Board of Trade inspectors.

109.—(1.) The Board of Trade may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct—

(i) In the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued:

(ii) In the case of any other company having a share capital, on the application of members holding not less than one tenth of the shares issued:

(iii) In the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.

(2.) The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring, the investigation; and the Board of Trade may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

(3.) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4.) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5.) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding five pounds in respect of each offence.

(6.) On the conclusion of the investigation the inspectors shall report their opinion to the Board of Trade, and a copy of the report shall be forwarded by the Board to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

The report shall be written or printed, as the Board direct.

(7.) All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the Board of Trade direct the same to be paid by the company, which the Board is hereby authorized to do.

S. 60 of 1862. Power of company to appoint inspectors.

110.—(1.) A company may by special resolution appoint inspectors to investigate its affairs.

(2.) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board, they shall report in such manner and to such persons as the company in general meeting may direct.

(3.) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Board of Trade.

S. 61 of 1862. Report of inspectors to be evidence.

111. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

S. 19 of 1907. Appointment and remuneration of auditors. p. 227

112.—(1.) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2.) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3.) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4.) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting.

(5.) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.

(6.) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(7.) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

S. 19 of 1907. Powers and duties of auditors. p. 225

113.—(1.) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2.) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3.) The balance sheet shall be signed on behalf of the board by two of the directors of the company or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words.

(4.) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

(5.) In the case of a banking company registered after the fifteenth day of August eighteen hundred and seventy-nine—

(a) if the company has branch banks beyond the limits of Europe, it shall be

sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and

(b) the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

S. 23 of 1907. Rights of preference shareholders, &c. as to receipt and inspection of reports, &c.

114.—(1.) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2.) This section shall not apply to a private company, nor to a company registered before the first day of July nineteen hundred and eight.

Carrying on Business with less than the legal Minimum of Members.

S. 48 of 1862. Prohibition of carrying on business with fewer than seven or, in the case of a private company, two members.

115. If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months, and is cognisant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same, without joinder in the action of any other member.

Service and Authentication of Documents.

S. 62 of 1862. Service of documents on company.

116. A document may be served on a company by leaving it at or sending it by post to the registered office of the company.

S. 64 of 1862. Authentication of documents.

117. A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal.

Tables and Forms.

S. 71 of 1862. Application and alteration of tables and forms.

118.—(1.) The forms in the Third Schedule to this Act or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2.) The Board of Trade may alter any of the tables and forms in the First Schedule to this Act, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and may alter or add to the forms in the said Third Schedule.

(3.) Any such table or form, when altered, shall be published in the London Gazette, and thenceforth shall have the same force as if it were included in one of the Schedules to this Act, but no alteration made by the Board of Trade in Table A. in the said First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that Table.

Arbitrations.

S. 72 of 1862. Arbitration between companies and others. 22 & 23 Vict. c. 59.

119.—(1.) A company may by writing under its common seal agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859, any existing or future difference between itself and any other company or person.

(2.) Companies parties to the arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3.) All the provisions of the Railway Companies Arbitration Act, 1859, shall apply to arbitrations between companies and persons in pursuance of this Act; and for the construction of those provisions "the companies" shall include companies to which this Act.

Power to Compromise.

S. 2 of 1870. Power to compromise with creditors and members. p. 430

120.—(1.) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2.) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3.) In this section the expression "company" means any company liable to be wound up under this Act.

Meaning of "Private Company."

S. 37 of 1907. Meaning of "private company." p. 366

121.—(1.) For the purposes of this Act the expression "private company" means a company which by its articles—

(a) restricts the right to transfer its shares; and

(b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2.) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3.) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member.

PART IV.

WINDING UP.

Preliminary.

Modes of winding up. p. 368

122.—(1.) The winding up of a company may be either—

(i) by the Court; or

(ii) voluntary; or

(iii) subject to the supervision of the Court.

(2.) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of those modes.

Contributories.

S. 38 of 1862. Liability as contributories of present and past members. p. 404

123.—(1.) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):—

(i) A past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up:

(ii) A past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member:

(iii) A past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

(iv) 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:

(v) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up.

(vi) Nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract:

(vii) A sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

(2.) In the winding-up of a limited company, any director or manager, whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding-up a member of an unlimited company: Provided that—

(i) A past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding-up:

(ii) A past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office:

(iii) Subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up.

(3.) In the winding-up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

S. 74 of 1862. Definition of contributory.

124. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

S. 75 of 1862. Nature of liability of contributory.

125. The liability of a contributory shall create a debt (in England and Ireland of the nature of a specialty) accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

S. 76 of 1862. Contributories in case of death of member.

126.—(1.) If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees, shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2. Where the personal representatives are placed on the list of contributories, the heirs or devisees need not be added, but, except in the case of heirs or devisees of any such real estate in England, they may be added as and when the Court thinks fit.

(3.) If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, or either of them, and of compelling payment thereout of the money due.

S. 75 of 1862. Contributories in case of bankruptcy of member.

127. If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories, then—

(1.) his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on

to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company; and

(2.) there may be proved against the estate of the bankrupt the estimated value of his liability to future calls as well as calls already made.

S. 78 of 1862. Provision as to married women. 45 & 46 Vict. c. 15. 44 & 45 Vict. c. 21.

128.—(1.) The husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881, as the case may be, shall, during the continuance of the marriage, be liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be a contributory accordingly.

(2.) Subject as aforesaid, nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881.

Winding up by Court.

S. 79 of 1862. Circumstances in which company may be wound up by Court.

129. A company may be wound up by the Court—

(i) if the company has by special resolution resolved that the company be wound up by the Court:

(ii) if default is made in filing the statutory report or in holding the statutory meeting:

(iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(iv) if the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven:

(v) if the company is unable to pay its debts:

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

S. 80 of 1862. Company when deemed unable to pay its debts.

p. 391

130. A company shall be deemed to be unable to pay its debts—

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

(ii) if, in England or Ireland, execution or other process issued on a judgment decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

iii) if, in Scotland, the induciæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made; or

(iv) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

S. 1 of 1890. Jurisdiction to wind up companies in England.

131.—(1.) The Courts having jurisdiction to wind up companies registered in England shall be the High Court, the Chancery Courts of the counties palatine of Lancaster and Durham, and the County Courts.

(2.) Where the amount of the share capital of a company paid up or credited as paid up exceeds ten thousand pounds, a petition to wind up the company shall be presented to the High Court, or, in the case of a company whose registered office is situate within the jurisdiction of either of the palatine courts aforesaid, either to the High Court or to the palatine court having jurisdiction.

(3.) Where the amount of the share capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situated within the jurisdiction of a County Court having jurisdiction under this Act, a petition to wind up the company shall be presented to that County Court.

(4.) Where a company is formed for working mines within the stannaries and is not shown to be actually working mines beyond the limits of the stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into

a contract for such working or undertaking, a petition to wind up the company shall be presented to the Court exercising the summaries jurisdiction whatever may be the amount of the capital of the company and wherever the registered office of the company is situate.

(5.) The Lord Chancellor may by order exclude a County Court from having jurisdiction under this Act, and for the purposes of that jurisdiction may attach its district, or any part thereof, to the High Court or any other County Court, and may revoke or vary any such order or any like order made under the Companies (Winding Up) Act, 1890.

In exercising his powers under this section the Lord Chancellor shall provide that a County Court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy. 53 & 54 Vict. c. 63.

An order made under this provision shall not affect any jurisdiction or powers vested in any County Court under or by virtue of the Summaries Jurisdiction (Abolition) Act, 1896.

(6.) Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company. 59 & 60 Vict. c. 45.

(7.) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

(8.) For the purposes of this section the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

132. Subject to general rules and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and the Acts amending it, the jurisdiction to wind up companies of the High Court in England under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court. S. 2 of 1890. Conduct of winding-up business in High Court in England.

133.—(1.) The winding up of a company by the Court in England or any proceedings in the winding up may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one Court to another Court, or may be retained in the Court in which the proceedings were commenced, although it may not be the Court in which they ought to have been commenced. 36 & 37 Vict. c. 66. S. 3 of 1890. Transfer of proceedings.

(2.) The powers of transfer given by the foregoing provisions of this section may, subject to and in accordance with general rules, be exercised by the Lord Chancellor or by any judge of the High Court having jurisdiction under this Act, or, as regards any case within the jurisdiction of any other Court, by the judge of that Court.

(3.) If any question arises in any winding up proceeding in a County Court which all the parties to the proceeding, or which one of them and the judge of the Court, desire to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

134. The Court having jurisdiction to wind up companies registered in Ireland shall be the High Court: S. 81 of 1862. Jurisdiction to wind up companies in Ireland.

Provided that where the High Court in Ireland makes an order for winding up a company it may, if it thinks fit, direct that all subsequent proceedings in the winding up be had in the Court of bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon those proceedings shall be taken in that Court of bankruptcy accordingly, and that Court shall, for the purposes of the winding up, have all the powers of the High Court in Ireland.

135. The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the bills. S. 81 of 1862. Jurisdiction to wind up companies in Scotland.

S. 6 of 1886. Power in Scotland to remit winding up to Lord Ordinary.

136. Where the Court in Scotland makes a winding-up order, it may, if it thinks fit, at any time direct all subsequent proceedings in the winding up to be taken before one of the permanent Lords Ordinary, and remit the winding up to him accordingly, and thereupon that Lord Ordinary shall, for the purposes of the winding up, have all the powers and jurisdiction of the Court:

Provided that the Lord Ordinary may report to the division of the Court any matter which may arise in the course of the winding up.

S. 82 of 1862. Provisions as to applications for winding up.

p. 391

137.—(1.) An application to the Court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately: Provided that

(a) A contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or

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

(b) A petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting, shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held; and

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

(2.) Where a company is being wound up voluntarily or subject to supervision in England, a petition may be presented by the official receiver attached to the Court, as well as by any other person authorized in that behalf under the other provisions of this section, but the Court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up or winding up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories.

(3.) Where under the provisions of this Part of this Act any person as being the husband of a female contributory is himself a contributory, and a share has during the whole or any part of the six months been held by or registered in the name of the wife, or by or in the name of a trustee for the wife or for the husband, the share shall, for the purposes of this section, be deemed to have been held by and registered in the name of the husband.

S. 82 of 1862. Effect of winding-up order.

p. 399

138. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

S 84 of 1862. Commencement of winding-up by Court.

139. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

S 85 of 1862. Power to stay or restrain proceedings against company.

140. At any time after the presentation of a petition for winding up, and before a winding-up order has been made, the company, or any creditor or contributory, may—

(a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Ireland, apply to the Court in which the action or proceeding is pending for a stay of proceedings therein; and

(b) where any other action or proceeding is pending against the company, apply to the Court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

S. 86 of 1862. Powers of Court on hearing petition.

p. 398

141.—(1.) On hearing the petition, the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been

mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

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

S. 87 of 1862. Actions stayed on winding-up order. p. 413

142. When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

S. 88 of 1862. Copy of order to be forwarded to registrar.

143. On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company to the registrar of companies, who shall make a minute thereof in his books relating to the company.

S. 89 of 1862. Power of Court to stay winding-up.

144. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

S. 91 of 1862. Court may have regard to wishes of creditors or contributories.

145. The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Official Receiver.

S. 4 of 1890. Definition of official receiver.

146.—(1.) For the purposes of this Act so far as it relates to the winding up of companies by the Court in England, the term "official receiver" shall mean the official receiver, if any, attached to the Court for bankruptcy purposes, or, if there is more than one such official receiver, then such one of them as the Board of Trade may appoint, or, if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade.

(2.) Any such officer shall for the purpose of his duties under this Act be styled the official receiver.

S. 7 of 1890. Statement of company's affairs to be submitted to official receiver.

147.—(1.) Where the Court in England has made a winding-up order, there shall be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and showing the particulars of its assets, debts, and liabilities, the names, residences, and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

(2.) The statement shall be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company, or having taken part in the formation of the company at any time within one year before the winding-up order, as the official receiver, subject to the direction of the Court, may require to submit and verify the same.

(3.) The statement shall be submitted within fourteen days from the date of the order, or within such extended time as the official receiver or the Court may for special reasons appoint.

(4.) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official receiver, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official receiver may consider reasonable, subject to an appeal to the Court.

(5.) If any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding ten pounds for every day during which the default continues.

(6.) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court and shall be punishable accordingly on the application of the liquidator or of the official receiver.

S. 8 of 1890. Report by

148.—(1.) Where the Court in England has made a winding-up order, the

official receiver.

official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

(b) if the company has failed, as to the causes of the failure; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

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

Liquidators.

S. 92 of 1862. Appointment, remuneration, and title of liquidators.

149.—(1.) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.

(2.) The Court may make such an appointment provisionally at any time after the presentation of a petition and before (where the proceedings are in England) the making of an order for winding up, or (where the proceedings are in Scotland or Ireland) the first appointment or liquidators.

(3.) Where the proceedings are in England—

(a) If a provisional liquidator is appointed before the making of a winding-up order, the official receiver or any other fit person may be appointed:

(b) On a winding-up order being made the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such:

(c) When a person other than the official receiver is appointed liquidator he shall not be capable of acting as liquidator until he has notified his appointment to the registrar of companies and given security in the prescribed manner to the satisfaction of the Board of Trade.

(4.) If more than one liquidator is appointed by the Court, the Court shall declare whether any act by this Act required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.

(5.) In a winding-up in Scotland or Ireland the Court may determine whether any and what security is to be given by a liquidator on his appointment.

(6.) A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court.

(7.) A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court.

In a winding-up in England the official receiver shall by virtue of his office be the liquidator during the vacancy.

(8.) Where a person other than the official receiver is appointed liquidator, he shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct; and, if more such persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs.

(9.) A liquidator shall be described as follows (that is to say):—

(a) in a winding-up in England, where a person other than the official receiver is liquidator, by the style of the liquidator, and, where the official receiver is liquidator, by the style of the official receiver and liquidator, and

(b) in a winding-up in Scotland or Ireland, by the style of the official liquidator,

of the particular company in respect of which he is appointed, and not by his individual name.

(10.) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

S. 92 of 1862. Custody of company's property.

150.—(1.) In a winding-up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled.

(2.) In a winding-up by the Court in Scotland or Ireland, if and so long as there is no liquidator, all the property of the company shall be deemed to be in the custody of the Court.

S. 95 of 1862. Powers of liquidator.

151.—(1.) The liquidator in a winding-up by the Court shall have power, in the case of a winding-up in England with the sanction either of the Court or of the committee of inspection, and in the case of a winding-up in Scotland or Ireland with the sanction of the Court—

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company:

(b) to carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof:

(c) in the case of a winding-up in England, to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in cases of urgency, and in those cases it must be shown that no undue delay took place in obtaining the sanction:

(d) in the case of a winding-up in Scotland or Ireland, to appoint a solicitor or law agent to assist him in the performance of his duties.

(2.) The liquidator in a winding-up by the Court shall have power, but (subject to the provisions of this section) in the case of a winding-up in Scotland or Ireland only with the sanction of the Court—

(a) To sell the real and personal property, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels:

(b) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

(c) To prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors:

(d) To draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the company in the course of its business:

(e) To raise on the security of the assets of the company any money requisite:

(f) To take out in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself:

(g) To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(3.) The exercise by the liquidator in a winding-up by the Court in England of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(4.) In the case of a winding-up in Scotland or Ireland the Court may provide by any order that the liquidator may exercise any of the above powers, except the power to appoint a solicitor or law agent, without the sanction or intervention of the Court.

(5.) Where a liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him.

(6.) In a winding-up by the Court in Scotland the liquidator shall, subject to rules made under this Act, have the same powers as a trustee on a bankrupt estate.

S. 6 of 1890. Meetings of creditors and contributories in English winding-up.

152.—(1.) When a winding-up order has been made by the Court in England, the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of—

(a) determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver; and

(h) determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed.

(2.) The Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters mentioned in the foregoing provisions of this section, the Court shall decide the difference and make such order thereon as the Court may think fit.

(3.) In case a liquidator is not appointed by the Court the official receiver shall be the liquidator of the company.

S. 4 of 1890. Liquidator to give information to official receiver.

153. Where in the winding-up of a company by the Court in England a person other than the official receiver is appointed liquidator he shall give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

S. 11 of 1890. Payments of liquidator in English winding-up into bank.

154.—(1.) Every liquidator of a company which is being wound up by the Court in England shall in such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, pay the money received by him to the Companies Liquidation Account at the Bank of England, and the Board shall furnish him with a certificate of receipt of the money so paid:

Provided that, if the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Board shall, on the application of the committee of inspection, authorize the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments shall be made in the prescribed manner.

(2.) If any such liquidator at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum, and shall be liable to disallowance of all or such part of his remuneration as the Board may think just, and to be removed from his office by the Board, and shall be liable to pay any expenses occasioned by reason of his default.

(3.) A liquidator of a company which is being wound up by the Court in England shall not pay any sums received by him as liquidator into his private banking account.

S. 20 of 1890. Audit of liquidator's accounts in English winding-up.

155.—(1.) Every liquidator of a company which is being wound up by the Court in England shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as liquidatur.

(2.) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form.

(3.) The Board shall cause the account to be audited and for the purpose of the audit the liquidator shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the liquidator.

(4.) When the account has been audited, one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of any person interested.

(5.) The Board shall cause the account when audited or a summary thereof to be printed, and shall send a printed copy of the account or summary by post to every creditor and contributory.

S. 21 of 1890. Books to be kept by liquidator in English winding-up.

156. Every liquidator of a company which is being wound up by the Court in England shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

S. 22 of 1890. Release of liquidators in England.

157.—(1.) When the liquidator of a company which is being wound up by the Court in England has realised all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, or has resigned, or has been removed from his office, the Board of

Trade shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor, or contributory, or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

(2.) Where the release of a liquidator is withheld the Court may, on the application of any creditor, or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty.

(3.) An order of the Board of Trade releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(4.) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal of him from his office.

Ss. 23, 24 of 1890.
Exercise and control of liquidator's powers in England.

158.—(1.) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court in England shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2.) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one tenth in value of the creditors or contributories as the case may be.

(3.) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding-up.

(4.) Subject to the provisions of this Act, the liquidator shall use his own discretion in the management of the estate and its distribution among the creditors.

(5.) If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

S. 25 of 1890.
Control of Board of Trade over liquidators in England.

159.—(1.) The Board of Trade shall take cognizance of the conduct of liquidators of companies which are being wound up by the Court in England, and, if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules, or otherwise with respect to the performance of his duties, or if any complaint is made to the Board by any creditor or contributory in regard thereto, the Board shall inquire into the matter, and take such action thereon as they may think expedient.

(2.) The Board may at any time require any liquidator of a company which is being wound up by the Court in England to answer any inquiry in relation to any winding-up in which he is engaged, and may, if the Board think fit, apply to the Court to examine him or any other person on oath concerning the winding-up.

(3.) The Board may also direct a local investigation to be made of the books and vouchers of the liquidator.

Committee of Inspection, Special Manager, Receiver.

S. 9 of 1890.
Committee of inspection in English winding-up.

160.—(1.) A committee of inspection appointed in pursuance of this Act shall consist of creditors and contributories of the company or persons holding general powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(2.) The committee shall meet at such times as they from time to time appoint, and, failing such appointment, at least once a month; and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(4.) Any member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(5.) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(6.) Any member of the committee may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors), or of contributories (if he represents contributories) of which seven days' notice has been given, stating the object of the meeting.

(7.) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(8.) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

(9.) If there is no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the liquidator.

S. 5 of 1890. Power in England to appoint special manager.

161.—(1.) Where the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court to, and the Court may on such application, appoint a special manager thereof to act during such time as the Court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the Court.

(2.) The special manager shall give such security and account in such manner as the Board of Trade direct.

(3.) The special manager shall receive such remuneration as may be fixed by the Court.

s. 4 (6) of 1890. Power in England to appoint official receiver as receiver for debenture holders or creditors.

162. Where an application is made to the Court to appoint a receiver on behalf of the debenture holders or other creditors of a company which is being wound up by the Court in England, the official receiver may be so appointed.

Ordinary Powers of Court.

S. 98 of 1862. Settlement of list of contributories and application of assets.

163.—(1.) As soon as may be after making a winding-up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities.

(2.) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable to the debts of others.

S. 100 of 1862. Power to require delivery of property.

164. The Court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *prima facie* entitled.

S. 101 of 1862. Power to order payment of debts by contributory.

165.—(1.) The Court may, at any time after making a winding-up order, make order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2.) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the

estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director or manager whose liability is unlimited or to his estate the like allowance.

(3.) But in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

S. 102 of 1862. Power of Court to make calls.

166.—(1.) The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2.) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

S. 103 of 1862. Power to order payment into bank.

167.—(1.) The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.

(2.) All moneys and securities paid or delivered into the Bank of England or any branch thereof in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.

S. 106 of 1862. Order on contributory conclusive evidence.

168.—(1.) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2.) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased contributory, in which case the order shall be only *primâ facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

S. 107 of 1862. Power to exclude creditors not proving in time.

169.—The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

S. 109 of 1862. Adjustment of rights of contributories.

170. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

S. 110 of 1862. Power to order costs.

171. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the Court thinks just.

S. 111 of 1862. Dissolution of company.

172.—(1.) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2.) The order shall be reported by the liquidator to the registrar of companies who shall make in his books a minute of the dissolution of the company.

(3.) If the liquidator makes default in complying with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which he is in default.

S. 13 of 1890. Delegation to liquidator of certain powers of Court in England.

173. General rules may be made for enabling or requiring all or any of the powers and duties conferred and imposed on the Court in England by this Act, in respect of the matters following, to be exercised or performed by the liquidator as an officer of the Court, and subject to the control of the Court; that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories;
(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;
(c) requiring delivery of property or documents to the liquidator;
(d) making calls;
(e) fixing a time within which debts and claims must be proved;

Provided that the liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection.

Extraordinary Powers of Court.

S. 115 of 1862. **Power to summon persons suspected of having property of company.**

174.—(1.) The Court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company.

(2.) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3.) The Court may require him to produce any books and papers in his custody or power relating to the company; but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien.

(4.) If any person so summoned after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended, and brought before the Court for examination.

S. 8 of 1890. **Power in England to order public examination of promoters, directors, &c.**

175.—(1.) When an order has been made in England for winding up a company by the Court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the Court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(3.) The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel.

(4.) The Court may put such questions to the person examined as the Court thinks fit.

(5.) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6.) A person ordered to be examined under this section shall at his own cost, before his examination, be furnished with a copy of the official receiver's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

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

(8.) The Court may, if it thinks fit, adjourn the examination from time to time.

(9.) An examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of County Courts, or before any officer of the Supreme Court, being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court

before a registrar of that Court, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

S. 118 of 1862. **Power to arrest absconding contributory.**

176. The Court, at any time either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the United Kingdom, or otherwise to abscond, or to remove or conceal any of his property for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested, and his books and papers and movable personal property to be seized, and him and them to be safely kept until such time as the Court may order.

S. 119 of 1862. **Powers of Court cumulative.**

177. Any powers by this Act conferred on the Court shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

Enforcement of and Appeal from Orders.

S. 120 of 1862. **Power to enforce orders.**

178.—(1.) Orders made by the High Court in England or Ireland under this Act may be enforced in the same manner as orders made in any action pending therein.

(2.) For the purposes of this Part of this Act the Court exercising the stannaries jurisdiction shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the High Court in England has in relation to matters within its jurisdiction; and, for the last-mentioned purposes, the jurisdiction of the judge of the Court exercising the stannaries jurisdiction shall be deemed to be co-extensive in local limits with the jurisdiction of the High Court in England.

S. 121 of 1862. **Order for calls on contributories in Scotland.**

179. Where an order, interlocutor, or decree has been made in Scotland for winding-up a company by the Court, it shall be competent to the Court, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls, and of the amount due by each contributory, and of the date when the same became due, to pronounce forthwith a decree against those contributories for payment of the sums so certified to be due, with interest from the said date till payment, at the rate of five per cent. per annum in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay those calls and interest; and the decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the Court.

S. 122 of 1862. **Enforcement of orders throughout United Kingdom.**

180.—(1.) Any order made by the Court in England for or in the course of winding-up a company shall be enforced in Scotland and Ireland in the Courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland, and in the same manner in all respects as if the order had been made by those Courts.

(2.) In like manner orders, interlocutors, and decrees made by the Court in Scotland for or in the course of winding-up a company shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding-up a company shall be enforced in England and Scotland, by the Courts which would respectively have jurisdiction in respect of that company if registered in that part of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if the order had been made by those Courts.

(3.) Where any order, interlocutor, or decree made by one Court is required to be enforced by another Court, an office copy of the order, interlocutor, or decree shall be produced to the proper officer of the Court required to enforce the same, and the production of an office copy shall be sufficient evidence of the order, interlocutor, or decree, and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, interlocutor, or decree, in the same manner as if it had been made by that Court.

S. 124 of 1862. **Appeals from order.**

181.—(1.) Subject to rules of Court, an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

(3.) Provided, in regard to orders or judgments pronounced in Scotland by the Lord Ordinary on the Bills in vacation, that—

(i) No order or judgment under the provisions of this Act specified in the First Part of the Fourth Schedule to this Act shall be subject to review, reduction, suspension, or stay of execution; and

(ii) Every other order or judgment (except as hereinafter mentioned) shall be subject to review only by reclaiming note, in common form, presented within fourteen days from the date of the order or judgment:

Provided that orders or judgments under the provisions of this Act specified in the Second Part of the Fourth Schedule to this Act shall, from the dates of those orders or judgments, and notwithstanding any reclaiming note against them, be carried out and receive effect until the reclaiming note is disposed of by the Court.

(3.) Provided also, in regard to orders or judgments pronounced in Scotland by a permanent Lord Ordinary to whom a winding-up has been remitted, that any such order or judgment shall be subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or judgment, but, should a reclaiming note not be presented and moved during session, the provisions of this section in regard to orders or judgments pronounced by the Lord Ordinary on the Bills in vacation shall apply to the order or judgment.

(4.) Nothing in this section shall affect the provisions of this Act in reference to decrees in Scotland for payment of calls in the winding-up of companies, whether voluntarily or by or subject to the supervision of the Court.

Voluntary Winding Up.

S. 129 of 1862. Circumstances in which company may be wound up voluntarily.

182. A company may be wound up voluntarily—

(1.) When the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:

(2.) If the company resolves by special resolution that the company be wound up voluntarily:

(3.) If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

S. 130 of 1862. Commencement of voluntary winding-up.

183. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.

S. 131 of 1862. Effect of voluntary winding-up on status of company.

184. When a company is wound up voluntarily the company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

S. 132 of 1862. Notice of resolution to wind up voluntarily.

185. When a company has resolved by special or extraordinary resolution to wind up voluntarily, it shall give notice of the resolution by advertisement in the Gazette.

S. 133 of 1862. Consequences of voluntary winding-up.

186. The following consequences shall ensue on the voluntary winding-up of a company:—

(i) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company:

(ii) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them:

(iii) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof:

(iv) The liquidator may, without the sanction of the Court, exercise all powers by this Act given to the liquidator in a winding up by the Court:

(v) The liquidator may exercise the powers of the Court under this Act of settling a list of contributories, and of making calls, and shall pay the

debts of the company, and adjust the rights of the contributories among themselves:

(vi) The list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories:

(vii) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two:

(viii) If from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator:

(ix) The Court may, on cause shown, remove a liquidator, and appoint another liquidator.

S. 26 of 1907. Notice by liquidator of his appointment.

187.—(1.) The liquidator in a voluntary winding-up shall, within twenty-one days after his appointment, file with the registrar of companies a notice of his appointment in the form prescribed by the Board of Trade.

(2.) If the liquidator fails to comply with the requirements of this section he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 27 of 1907. Rights of creditors in a voluntary winding-up.

188.—(1.) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate.

(2.) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting.

(3.) On any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.

(4.) No appeal shall lie from any order of the Court upon an application under this section.

(5.) The Court shall make such order as to the costs of the application as it may think fit, and if it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant.

S. 140 of 1862. Power to fill vacancy in office of liquidator.

189.—(1.) If a vacancy occurs by death, resignation, or otherwise in the office of liquidator appointed by the company in a voluntary winding up, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2.) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3.) The meeting shall be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

S. 135 of 1862. Delegation of authority to appoint liquidators.

190.—(1.) A company about to be or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among the liquidators, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised.

(2.) Any act done by creditors in pursuance of any such delegated power shall have the same effect as if it had been done by the company.

S. 136 of 1862. **Arrangement when binding on creditors.**

191.—(1.) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall, subject to any right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2.) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement.

S. 161 of 1862. **Power of liquidator to accept shares, &c. as consideration for sale of property of company.**

192.—(1.) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2.) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3.) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section.

(4.) If the liquidator elects to purchase the member's interest the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5.) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but, if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

8 & 9 Vict. c. 16. 8 & 9 Vict. c. 17.

(6.) For the purposes of an arbitration under this section the provisions of the Companies Clauses Consolidation Act, 1845, or, in the case of a winding-up in Scotland, the Companies Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of those provisions this Act shall be deemed to be the special Act, and "the company" shall mean the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators.

S. 138 of 1862. **Power to apply to Court.**

193.—(1.) Where a company is being wound up voluntarily the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2.) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just.

S. 139 of 1862. **Power of liquidator to call general meeting.**

194.—(1.) Where a company is being wound up voluntarily, the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit.

(2.) In the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding-up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meeting an

account of his acts and dealings and of the conduct of the winding-up during the preceding year.

S. 142 of 1862. Final meeting and dissolution.

195.—(1.) In the case of every voluntary winding-up, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding-up, showing how the winding-up has been conducted and the property of the company has been disposed of; and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2.) The meeting shall be called by advertisement in the Gazette, specifying the time, place, and object thereof, and published one month at least before the meeting.

(3.) Within one week after the meeting, the liquidator shall make a return to the registrar of companies of the holding of the meeting, and of its date, and in default of so doing shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(4.) The registrar, on receiving the return, shall forthwith register it, and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5.) It shall be the duty of the person on whose application an order of the Court under this section is made, within seven days after the making of the order, to file with the registrar an office copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 144 of 1862. Costs of voluntary liquidation.

196. All costs, charges, and expenses properly incurred in the voluntary winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

S. 145 of 1862. Saving for rights of creditors and contributories.

197. The voluntary winding-up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, if the Court is of opinion, in the case of an application by a creditor, that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributories will be prejudiced by a voluntary winding-up.

S. 146 of 1862. Power of Court to adopt proceedings of voluntary winding-up.

198. Where a company is being wound up voluntarily, and an order is made for winding-up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding-up.

Winding Up subject to Supervision of Court.

S. 147 of 1862. Power to order winding-up subject to supervision.

199. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

S. 148 of 1862. Effect of petition for winding-up subject to supervision.

200. A petition for the continuance of a voluntary winding-up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over actions, be deemed to be a petition for winding-up by the Court.

S. 149 of 1862. Court may have regard to wishes of creditors and contributories.

201. The Court may, in deciding between a winding-up by the Court and a winding-up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

S. 150 of 1862. Power for Court to appoint or remove liquidators.

202.—(1.) Where an order is made for a winding-up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2.) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3.) The Court may remove any liquidator so appointed by the Court, or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

S. 151 of 1862 Effect of supervision order.

203.—(1.) Where an order is made for a winding-up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his

powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2.) A winding-up subject to the supervision of the Court is not a winding-up by the Court for the purpose of the following provisions of this Act, namely, those contained in sections one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, except sub-section (10), one hundred and fifty-two, one hundred and fifty-three, one hundred and fifty-four, one hundred and fifty-five, one hundred and fifty-six, one hundred and fifty-seven, one hundred and fifty-eight, one hundred and fifty-nine, one hundred and sixty, one hundred and sixty-one, one hundred and sixty-two, one hundred and seventy-three, and one hundred and seventy-five, but, subject as aforesaid, an order for a winding-up subject to supervision, shall for all purposes, including the staying of actions and other proceedings, the making and enforcement of calls, the power in Scotland to remit the winding-up to a permanent Lord Ordinary, and the exercise of all other powers, be deemed to be an order for winding-up by the Court.

S. 152 of 1862. Appointment of voluntary liquidator as liquidator in winding-up by Court in Scotland or Ireland.

204. Where an order has been made in Scotland or Ireland for winding up a company subject to supervision, and an order is afterwards made for winding-up by the Court, the Court may by the last-mentioned or by any subsequent order appoint any person who is then liquidator, either provisionally or permanently, and either with or without any other person, to be liquidator in the winding-up by the Court.

Supplemental Provisions.

Ss. 131—153 of 1862. Avoidance of transfers, &c. after commencement of winding-up.

205.—(1.) In the case of voluntary winding-up, every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding-up, shall be void.

(2.) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.

S. 158 of 1862. Debts of all descriptions to be proved.

206. In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to contingency or sound only in damages, or for some other reason do not bear a certain value.

Judicature Act, 1875, s. 10. Application of bankruptcy rules in winding-up of insolvent English and Irish companies.

207. In the winding-up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section.

S. 4 of 1886. Ranking of claims in Scotland. 19 & 20 Vict. c. 79.

208. In the winding-up of a company registered in Scotland, the general and special rules in regard to voting and ranking for payment of dividends provided by sections forty-nine to sixty-six of the Bankruptcy (Scotland) Act, 1856, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as is consistent with this Act, apply to creditors of the company voting in matters relating to the winding-up, and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean winding up, trustee to mean liquidator, and sheriff to mean the Court.

S. 1 of 51 & 52 Vict. c. 62. Preferential payments.

209.—(1.) In a winding-up there shall be paid in priority to all other debts—

(a) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment;

(b) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds; and

(c) All wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the said date; and

(d) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date, subject nevertheless to the provisions of section five of that Act. 6 Edw. 7, c. 58.

(2.) The foregoing debts shall—

(a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3.) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4.) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5.) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and

(b) in any other case, the date of the commencement of the winding-up.

S. 164 of 1862. Fraudulent preference.

210.—(1.) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2.) For the purposes of this section the presentation of a petition for winding-up in the case of a winding-up by or subject to the supervision of the Court, and a resolution for winding-up in the case of a voluntary winding-up, shall be deemed to correspond with the act of bankruptcy in the case of an individual.

(3.) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.

S. 163 of 1862. Avoidance of certain attachments, executions, &c. in case of company registered in England or Ireland.

211. Where any company (being a company registered in England or Ireland) is being wound up by or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.

S. 13 of 1907. Effect of floating charge. *Columbian Fire Proofing Co., In re*, (1910) 2 Ch. 120.

212. Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding-up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in con-

sideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

S. 3 of 1886. Effect in case of company registered in Scotland of diligence within 60 days of winding-up by or subject to supervision of Court.

213. In the winding-up, by or subject to the supervision of the Court, of a company registered in Scotland, the following provisions shall have effect:—

(1.) The winding-up shall, in the case of a winding-up by the Court as at its commencement, and in the case of a winding-up subject to supervision as at the date of the presentation of the petition on which the supervision order is pronounced, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding-up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual; and those funds or effects, or the proceeds of those effects, if sold, shall be made forthcoming to the liquidator: Provided that any arrester or poinder before the date of the winding-up, or of the petition, as the case may be, who is thus deprived of the benefit of his diligence, shall have preference out of those funds or effects for the expense *bonâ fide* incurred by him in such diligence:

(2.) The winding-up shall, as at the respective dates aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said dates respectively, subject to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable, and the right to poind the ground hereinafter provided:

(3.) The provisions of sections one hundred and twelve to one hundred and seventeen, and of section one hundred and twenty, of the Bankruptcy (Scotland) Act, 1856, shall, so far as is consistent with this Act, apply to the realization of heritable estates affected by such heritable rights and securities as aforesaid; and for the purposes of this Act the words "sequestration" and "trustee" occurring in those sections shall mean respectively "winding up" and "liquidator"; and the expression "the Lord Ordinary or the Court" shall mean "the Court" as defined by this Act with respect to Scotland:

19 & 20 Vict. c. 79.

(4.) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid shall, except to the extent hereinafter provided, be available in any question with the liquidator: Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but that poinding shall in competition with the liquidator be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of that term.

S. 159 of 1862. General scheme of liquidation may be sanctioned.

214.—(1.) The liquidator may, with the sanction following (that is to say)—

(a) in the case of a winding-up by the Court in England with the sanction either of the Court or of the committee of inspection;

(b) in the case of a winding-up by the Court in Scotland or Ireland, and in the case of any winding-up subject to supervision, with the sanction of the Court; and

(c) in the case of a voluntary winding-up, with the sanction of an extraordinary resolution of the company,

do the following things or any of them:—

(i) Pay any classes of creditors in full;

(ii) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(iii) Compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding-up of the company, on such terms as may be agreed, and take any

security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2.) In the case of a winding-up by the Court in England the exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

S. 165 of 1862. Power of Court to assess damages against delinquent directors, &c.

215.—(1.) Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

(2.) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

(3.) Where in the case of a winding-up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (*g*) of sub-section (1) of section four of the Bankruptcy Act, 1883.

46 & 47 Vict. c. 52.

(4.) So much of this section as refers to promoters, and to property of a company other than money, shall not apply to a winding-up in Scotland or Ireland.

S. 166 of 1862. Penalty for falsification of books.

216. If any director, officer, or contributory of any company being wound up destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company with intent to defraud or deceive any person, he shall be guilty of a misdemeanour, and be liable to imprisonment for any term not exceeding two years, with or without hard labour.

S. 167 of 1862. Prosecution of delinquent directors, &c.

217.—(1.) If it appears to the Court in the course of a winding-up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may on the application of any person interested in the winding-up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company.

(2.) If it appears to the liquidator in the course of a voluntary winding-up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities.

S. 169 of 1862. Penalty on perjury.

218. If any person, on examination on oath authorized under this Act, or in any affidavit or deposition in or about the winding up of any company or otherwise in or about any matter arising under this Act, wilfully and corruptly gives false evidence, he shall be liable to the penalties for wilful perjury.

Ss. 91, 149 of 1862. Meetings to ascertain wishes of creditors or contributories.

219.—(1.) Where by this Act the Court is authorized, in relation to winding-up, to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2.) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3.) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by the articles.

S. 154 of 1862. Books of company to be evidence.

220. Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded.

S. 156 of 1862. Inspection of books.

221. After an order for a winding-up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of 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 by creditors or contributories accordingly, but not further or otherwise.

S. 155 of 1862. Disposal of books and papers of company.

222.—(1.) When a company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of as follows (that is to say):—

(a) In the case of a winding-up by or subject to the supervision of the Court in such way as the Court directs;

(b) In the case of a voluntary winding-up in such way as the company by extraordinary resolution directs.

(2.) After five years from the dissolution of the company no responsibility shall rest on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

S. 31 of 1907. Power of Court to declare dissolution of company void.

223.—(1.) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2.) It shall be the duty of the person on whose application the order was made, within seven days after the making of the order, to file with the registrar of companies an office copy of the order, and if that person fails so to do he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

S. 15 of 1890. Information as to pending liquidations in England.

224.—(1.) Where a company is being wound up in England, if the winding-up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the registrar of companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

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

(3.) If a liquidator fails to comply with the requirements of this section he shall be liable to a fine not exceeding fifty pounds for each day during which the default continues.

(4.) If it appears from any such statement or otherwise that a liquidator has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England, and shall be entitled to the prescribed certificate of receipt for the money so paid, and that certificate shall be an effectual discharge to him in respect thereof.

(5.) For the purpose of ascertaining and getting in any money payable into the Bank of England in pursuance of this section, the like powers may be exercised, and by the like authority, as are exerciseable under section one hundred and sixty-two of the Bankruptcy Act, 1883, for the purpose of ascertaining and getting in the sums, funds, and dividends referred to in that section.

46 & 47 Vict. c. 52.

(6.) Any person claiming to be entitled to any money paid into the Bank of England in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due.

(7.) Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court.

S. 125 of 1862. Judicial notice of signature of officers.

225. In all proceedings under this Part of this Act, all Courts, judges, and persons judicially acting, and all officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the High Court in England or Ireland, or of the Court of Session in Scotland, or of the registrar of the Court exercising the stannaries jurisdiction, and also of the official seal or stamp of the several offices of the High Court in England or Ireland, Court of Session, or Court exercising the stannaries juris-

diction, appended to or impressed on any document made, issued, or signed under the provisions of this Part of this Act, or any official copy thereof.

S. 126 of 1862. Special commission for receiving evidence.

226.—(1.) The judges of the County Courts in England who sit at places more than twenty miles from the General Post Office, and the judge exercising the bankruptcy jurisdiction of the High Court in Ireland and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act, where a company is wound up in any part of the United Kingdom, and the Court may refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner, although he is out of the jurisdiction of the Court that made the winding-up order.

(2.) Every commissioner shall, in addition to any powers which he might lawfully exercise as a judge of a county court, judge of the High Court, assistant barrister or recorder, or sheriff, have in the matter so referred to him all the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the Court which made the winding-up order.

(3.) The examination so taken shall be returned or reported to the Court which made the order in such manner as that Court directs.

S. 127 of 1862. Court may order examination of persons in Scotland.

227.—(1.) The Court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the trade, dealings, affairs, or property of any company in course of being wound up, or of any person being a contributory of the company, so far as the company may be interested therein by reason of his being a contributory; and the order or commission to take the examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time: and the sheriff shall summon that person to appear before him at a time and place to be specified in the summons for examination on oath as a witness or as a haver, and to produce any books or papers called for which are in his possession or power.

(2.) The sheriff may take the examination either orally or on written interrogatories, and shall report the same in writing in the usual form to the Court; and shall transmit with the report the books and papers produced, if the originals thereof are required and specified by the order or commission, or otherwise copies thereof or extracts therefrom authenticated by the sheriff.

(3.) If any person so summoned fails to appear at the time and place specified, or refuses to be examined or to make the production required, the sheriff shall proceed against him as a witness or haver duly cited and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland.

(4.) The sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the Court of Session and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland.

(5.) If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required, or on any other ground, the sheriff may, if he thinks fit, report the objection to the Court, and suspend the examination of the witness until it has been disposed of by the Court.

S. 128 of 1862. Affidavits, &c. in United Kingdom and Colonies.

228.—(1.) Any affidavit required to be sworn under the provisions or for the purposes of this Part of this Act may be sworn in Great Britain or Ireland, or elsewhere within the dominions of His Majesty, before any Court, judge, or person lawfully authorized to take and receive affidavits or before any of His Majesty's consuls or vice-consuls in any place outside His Majesty's dominions.

(2.) All Courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, or to any other document to be used for the purposes of this Part of this Act.

S. 11 of 1890. Companies Liquidation Account defined.

229.—(1.) An account, called the Companies Liquidation Account, shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board in respect of proceedings under this Act in connexion with the winding up of companies in England shall be paid to that account.

(2.) All payments out of money standing to the credit of the Board of Trade in the Companies Liquidation Account shall be made by the Bank of England in the prescribed manner.

S. 16 of 1890. Investment

230.—(1.) Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which in the opinion of the Board

of surplus funds on general account.

of Trade is required for the time being to answer demands in respect of companies' estates, the Board shall notify the excess to the Treasury, and shall pay over the whole or any part of that excess as the Treasury may require, to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the sums paid over, or any part thereof, in Government securities, to be placed to the credit of the said account.

(2.) Where any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of companies' estates, the Board shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3.) The dividends on investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of proceedings in the winding up of companies in England.

Ss. 17, 18 of 1890.
Separate accounts of particular estates.

231.—(1.) An account shall be kept by the Board of Trade of the receipts and payments in the winding up of each company in England, and, when the cash balance standing to the credit of the account of any company is in excess of the amount which, in the opinion of the committee of inspection, is required for the time being to answer demands in respect of that company's estate, the Board shall, on the request of the committee, invest the amount not so required in Government securities, to be placed to the credit of the said account for the benefit of the company.

(2.) When any part of the money so invested is, in the opinion of the committee of inspection, required to answer any demands in respect of the estate of the company, the Board of Trade shall, on the request of the committee, raise such sum as may be required by the sale of such part of the said securities as may be necessary.

(3.) The dividends on investments under this section shall be paid to the credit of the company.

(4.) When the balance at the credit of any company's account in the hands of the Board of Trade exceeds two thousand pounds, and the liquidator gives notice to the Board that the excess is not required for the purposes of the liquidation, the company shall be entitled to interest on the excess at the rate of two per cent. per annum.

S. 19 of 1890.
Certain receipts and fees to be applied in aid of expenditure.

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

Officers and remuneration.

233.—(1.) The Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution as respects England of this Part of this Act, and may remove any person so appointed.

(2.) The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board performing any duties under this Part of this Act in relation to the winding up of companies in England, and may vary, increase, or diminish that remuneration as they think fit.

(3.) The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act in relation to the winding up of companies in England, and may vary, increase, or diminish that remuneration as he thinks fit.

S. 28 of 1890.
Annual accounts of English winding-up.
38 & 39 Vict. c. 77.

234.—(1.) The Treasury shall annually cause to be prepared and laid before both Houses of Parliament an account for the year ending with the thirty-first day of March, showing the receipts and expenditure during that year in respect of proceedings under this Act in relation to the winding up of companies in England, and the provisions of section twenty-eight of the Supreme Court of Judicature Act, 1875, shall apply to the account as if the account had been required by that section.

(2.) The accounts of the Board of Trade under this Act in relation to the winding up of companies in England shall be audited in such manner as the

Treasury direct, and, for the purpose of the account to be laid before Parliament, the Board shall make such returns and give such information as the Treasury direct.

S. 29 of 1890. Returns by officers in English winding-up.

235. The officers of the Courts acting in the winding up of companies in England shall make to the Board of Trade such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from those returns the Board shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

S. 30 of 1890. Proceedings of Board of Trade.

236.—(1.) All documents purporting to be orders or certificates made or issued by the Board of Trade for the purposes of this Act and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board, shall be conclusive evidence of the fact so certified.

Rules and Fees.

S. 26 of 1890. Rules and fees for winding up in England.

237.—(1.) The Lord Chancellor may, with the concurrence of the President of the Board of Trade, make general rules for carrying into effect the objects of this Act so far as relates to the winding up of companies in England.

(2.) All general rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and, if Parliament is not sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3.) There shall be paid in respect of proceedings under this Act in relation to the winding up of companies in England such fees as the Lord Chancellor may, with the sanction of the Treasury, direct, and the Treasury may direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid.

(4.) All rules made and directions given by the Lord Chancellor under this section shall be adopted by the authority for the time being empowered to make rules for regulating the practice or procedure in the Chancery Court of the county palatine of Lancaster, but as so adopted shall have effect with the substitution of the words "vice-chancellor" for the word "judge," and of the word "registrar" for the word "master," and of the words "chambers of the registrar" for the words "chambers of the judge" and "judge's chambers," and any directions as to the remuneration to be allowed to officers of that Court in respect of proceedings under this Act shall be subject to the sanction of the Chancellor of the Duchy and County Palatine of Lancaster.

(5.) The authority having power to make rules or give directions under this section may, by any such rules or directions, repeal, alter, or amend any rules made and directions given by the like authority under the Companies (Winding-Up) Act, 1890, which are in force at the commencement of this Act. 53 & 54 Vict. c. 63.

S. 171 of 1862. Powers to make rules of procedure.

238.—(1.) Subject to the provisions of this Act with respect to rules and fees in relation to the winding up of companies in England, rules of procedure for the purposes of this Act, including rules as to costs and fees, may be made—

(a) As regards the High Court in England, by the authority having power to make rules for the Supreme Court in England:

(b) As regards the Court of Session, by act of sederunt:

(c) As regards the High Court in Ireland, by the authority having power to make rules for the Supreme Court in Ireland:

(d) As regards the Court exercising the stannaries jurisdiction, by the authority having power to make rules for County Courts in England.

(2.) The authority having power to make rules under this section may by any such rules repeal, alter, or amend any rules made by the like authority under the Companies Act, 1862, or any Act amending the same, which are in force at the commencement of this Act. 25 & 26 Vict. c. 89.

Special Provisions as to Stannaries.

S. 34 of 32 & 33 Vict. c. 19, s. 34.

Attachment of debt due to contributory on winding up in stannaries Court.

239. When several companies are in course of liquidation by or under the superintendence of the Court exercising the stannaries jurisdiction and acting under that jurisdiction, if it appears to the judge that a person who is a contributory of one of the companies is also a creditor claiming a debt against one of the other companies, the judge may (if after inquiry he thinks fit) direct that the debt, when allowed, shall be attached, and payment thereof to the creditor suspended for a time certain as a security for payment of any calls that are or may in course of liquidation become due from him to the company of which he is a contributory; and the amount thereof shall be applied to such payment in due course:

Provided that such an order of attachment shall not prejudice any claim which the company so indebted to the creditor may have against him by way of set off, counterclaim, or otherwise, or any lawful claim of lien or specific charge on the debt in favour of any third person.

S. 2 of 50 & 51 Vict. c. 43.

Preferential payments in stannaries cases.

240. In the application to companies within the stannaries of the provisions of this Act with respect to preferential payments, the following modifications shall be made:—

(1.) In the case of a clerk or servant of such a company, the priority with respect to wages and salary given by this Act shall be given to the extent of three months only, instead of four months, and shall not extend to the principal agent, manager, purser, or secretary:

(2.) All wages in relation to the mine of a miner, artizan, or labourer employed in or about the mine, including all earnings by a miner arising from any description of piece or other work, or as a tributer or otherwise, but not exceeding an amount equal to three months' wages, shall be included amongst the payments which are, under this Act, to be made in priority to other debts:

6 Edw. 7, c. 58.

(3.) Wages of any miner, artizan, or labourer unpaid at the commencement of the winding-up, and, subject to the provisions of section five of the Workmen's Compensation Act, 1906, all amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under that Act payable to a miner or the dependants of a miner the liability wherefor accrued before the commencement of the winding-up, shall, to the extent aforesaid, be paid by the liquidator forthwith in priority to all costs, except (in the case of a winding-up by the Court) such costs of and incidental to the making of the winding-up order as in the opinion of the Court have been properly incurred, and to all claims by mortgagees, execution creditors, or any other persons, except the claims of clerks and servants in respect of their wages or salary, and, subject as aforesaid, the Court may, by order, charge [illegible] old or any part of the assets of the company, in priority to all [illegible] to all existing mortgages or charges thereon, with the payment of a sum sufficient to discharge the said wages and amounts due in respect of compensation, with interest at a rate not exceeding five per cent. per annum, and this charge may be made in favour of any person who is willing to advance the requisite amount or any part thereof; and as soon as the said sum has been so advanced, the said wages and amounts due in respect of compensation shall be paid without delay so far as the amount advanced extends, and in such order of payment as the Court directs.

Provisions as to mine club funds.

241.—(1.) On the winding-up of a company within the stannaries, contributions of the miners, artizans, or labourers for the purpose of a mine club, or accident, or sick, or benefit fund shall not be deemed to be, or be applied as, part of the assets of the company in liquidation of the debts of the company or otherwise, but shall be accounted for by the purser or any other person in possession of the fund to the liquidator, and shall be recoverable by him, and be applied in accordance with the rules of the club.

(2.) Where the company is being wound up voluntarily, the liquidator or any person claiming to be entitled to any such contributions or fund may apply to the Court for directions, or to determine any question arising in the matter in the same manner as if the company were being wound up by the Court.

Removal of Defunct Companies from Register.

S. 26 of 1900. Registrar may strike defunct company off register.

242.—(1.) Where the registrar of companies has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.

(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4.) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5.) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6.) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on the application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the r[illegible]ter, order the name of the company to be restored to the register, and thereup[illegible]he company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7.) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director or officer of the company, or, if there is no director or officer of the company whose name and address are known to the registrar of companies, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

PART V.

REGISTRATION OFFICE AND FEES.

S. 174 of 1862. Registration offices in England, Scotland, and Ireland.

243.—(1.) For the purposes of the registration of companies under this Act, there shall be offices in England, Scotland, and Ireland, at such places as the Board of Trade think fit.

(2.) The Board of Trade may appoint such registrars, assistant registrars, clerks, and servants as the Board think necessary for the registration of companies under this Act, and may make regulations with respect to their duties; and may remove any persons so appointed.

(3.) The salaries of the persons appointed under this section shall be fixed by the Board of Trade with the concurrence of the Treasury, and shall be paid out of money provided by Parliament.

(4.) The Board of Trade may require that the office of the registrar of the Court exercising in respect of the winding up of companies the stannaries jurisdiction shall be one of the offices for the registration of companies within that jurisdiction.

(5.) The Board may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(6.) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar, on payment for the certificate, certified copy, or extract, of such fees as the Board of Trade may appoint, not exceeding five shillings for a certificate of incorporation, and not exceeding sixpence for each folio of a certified copy or extract, or in Scotland for each sheet of two hundred words.

(7.) A copy of or extract from any document kept and registered at any of the offices for the registration of companies in England, Scotland, or Ireland, certified to be a true copy under the hand of the registrar or an assistant registrar (whose official position it shall not be necessary to prove) shall in all legal proceedings be admissible in evidence as of equal validity with the original document.

(8.) Whenever any act is by this Act directed to be done to or by the registrar of companies, it shall, until the Board of Trade otherwise directs, be done in England to or by the existing registrar of joint stock companies, or in his absence to or by such person as the Board may for the time being authorize; in Scotland to or by the existing registrar of joint stock companies in Scotland; and in Ireland to or by the existing assistant registrar of joint stock companies for Ireland, or to or by such person as the Board may for the time being authorize in Scotland or Ireland, in the absence of the registrar or assistant registrar; but, in the event of the Board altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Board may appoint.

S. 17 of 1862. **Fees.**

244.—(1.) There shall be paid to the registrar in respect of the several matters mentioned in Table B. in the First Schedule to this Act the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct.

(2.) All fees paid to the registrar in pursuance of this Act shall be paid into the Exchequer.

PART VI.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

S. 176 of 1862. **Application of Act to companies formed under former Companies Acts.**

245. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts, or under the Companies Act, 1862, as the case may be.

Application of Act to companies registered under former Companies Acts.

246. This Act shall apply to every company registered but not formed under the Joint Stock Companies Acts, or the Companies Act, 1862, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts, or the Companies Act, 1862, as the case may be.

247. This Act shall apply to every unlimited company registered in pursuance of the Companies Act, 1879, as a limited company, in the same manner as it applies to an unlimited company registered in pursuance of this Act as a limited company: Provided that references, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered as a limited company under the Companies Act, 1879. S. 286 of 1908. Application of Act to companies re-registered under Companies Act, 1879. 42 & 43 Vict. c. 76.

248. A company registered under the Joint Stock Companies Acts may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct. S. 179 of 1862. Mode of transferring shares.

PART VII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT

249.—(1.) With the exceptions and subject to the provisions mentioned and contained in this section,— S. 179 of 1864. Companies capable of being registered.

(i) any company consisting of seven or more members, which was in existence on the second day of November eighteen hundred and sixty-two, including any company registered under the Joint Stock Companies Acts; and

(ii) any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company within the stannaries, or being otherwise duly constituted by law, and consisting of seven or more members,

may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up.

2.) Provided as follows:—

(a) A company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company as hereinafter defined, shall not register in pursuance of this section:

(b) A company having the liability of its members limited by Act of Parliament or letters patent shall not register in pursuance of this section as an unlimited company, or as a company limited by guarantee:

(c) A company that is not a joint stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares:

(d) A company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the regulations of the company), at a general meeting summoned for the purpose:

(e) Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting:

(f) Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

3.) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

4.) A company registered under the Companies Act, 1862, shall not be registered in pursuance of this section.

250. For the purposes of this Part of this Act, as far as relates to registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or S. 181 of 1862. Definition of joint stock company.

divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under this Act shall be deemed to be a company limited by shares.

S. 6 of 1879. Liability of bank of issue unlimited in respect of notes.

251.—(1.) A bank of issue registered under this Act as a limited company shall not be entitled to limited liability in respect of its notes; and the members thereof shall be liable in respect of its notes in the same manner as if it had been registered as unlimited; but if, in the event of the company being wound up, the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets.

(2.) For the purposes of this section the expression "the general assets" means the funds available for payment of the general creditor as well as the note-holder.

(3.) Any bank of issue registered under this Act as a limited company may state on its notes that the limited liability does not extend to its notes, and that the members of the company are liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

S. 183 of 1862. Requirements for registration by joint stock companies.

252. Before the registration in pursuance of this Part of this Act of a joint stock company there shall be delivered to the registrar the following documents (that is to say):—

(1.) A list showing the names, addresses, and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;

(2.) A copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company; and

(3.) If the company is intended to be registered as a limited company, a statement specifying the following particulars; (that is to say):—

(a) The nominal share capital of the company and the number of shares into which it is divided, or the amount of stock of which it consists;

(b) The number of shares taken and the amount paid on each share;

(c) The name of the company, with the addition of the word "limited" as the last word thereof; and

(d) In the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

S. 184 of 1862. Requirements for registration by other than joint stock companies.

253. Before the registration in pursuance of this Part of this Act of any company not being a joint stock company, there shall be delivered to the registrar—

(1.) A list showing the names, addresses, and occupations of the directors or other managers (if any) of the company; and

(2.) A copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company; and

(3.) In the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

S. 186 of 1862. Authentication of statements of existing companies.

254. The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be verified by a statutory declaration of any two or more directors or other principal officers of the company.

S. 187 of 1862. Registrar may require evidence as to nature of company.

255. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint stock company as hereinbefore defined.

S. 188 of 1862. On registration of banking company with limited liability, notice to be given to customers.

256.—(1.) Where a banking company which was in existence on the seventh day of August eighteen hundred and sixty-two proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2.) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the

account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

S. 189 of 1862. Exemption of certain companies from payment of fees.

257. No fees shall be charged in respect of the registration in pursuance of this Part of this Act of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some other Act of Parliament or by letters patent.

S. 190 of 1862. Addition of "limited" to name.

258. When a company registers in pursuance of this Part of this Act with limited liability, the word "limited" shall form and be registered as part of its name.

S. 191 of 1862. Certificate of registration of existing companies.

259. On compliance with the requirements of this Part of this Act with respect to registration, and on payment of such fees, if any, as are payable under Table B. in the first schedule to this Act, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company, that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in Scotland so incorporated shall be deemed to be a bank incorporated, constituted, or established by or under Act of Parliament.

S. 193 of 1862. Vesting of property on registration.

260. All property, real and personal (including things in action), belonging to or vested in the company at the date of its registration in pursuance of this Part of this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

S. 194 of 1862. Saving for existing liabilities.

261. Registration of a company in pursuance of this part of this Act shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, the company before registration.

S. 195 of 1862. Continuation of existing actions.

262. All actions and other legal proceedings which at the time of the registration of a company in pursuance of this Part of this Act are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any judgment, decree, or order obtained in any such action or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the judgment, decree, or order, an order may be obtained for winding up the company.

S. 196 of 1862. Effect of registration under Act.

263. When a company is registered in pursuance of this Part of this Act—

(i) All provisions contained in any Act of Parliament, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles:

(ii) All the provisions of this Act shall apply to the company, and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say):—

(a) The regulations in Table A. in the First Schedule to this Act shall not apply unless adopted by special resolution:

(b) The provisions of this Act relating to the numbering of shares shall not apply to any joint stock company whose shares are not numbered;

(c) Subject to the provisions of this section the company shall not have power to alter any provision contained in any Act of Parliament relating to the company;

(d) Subject to the provisions of this section the company shall not have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company;

(e) The company shall not have power to alter any provision contained in a royal charter or letters patent with respect to the objects of the company;

(f) In the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs and expenses of winding-up the company, so far as relates to such debts or liabilities as aforesaid: and every contributory shall be liable to contribute to the assets of the company, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid; and, in the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, shall apply:

(iii) The provisions of this Act with respect to—

(a) the registration of an unlimited company as limited;

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up;

shall apply notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company:

(iv) Nothing in this section shall authorize the company to alter any such provisions contained in any deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorized to be altered by this Act:

(v) Nothing in this Act shall derogate from any power of altering its constitution or regulations which may by virtue of any Act of Parliament, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company, be vested in the company.

S. 1 of 1890. **Power to substitute memorandum and articles for deed of settlement.**

264.—(1.) Subject to the provisions of this section, a company registered in pursuance of this Part of this Act may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2.) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall so far as applicable apply to an alteration under this section with the following modifications:—

(a) There shall be substituted for the printed copy of the memorandum required to be delivered to the registrar of companies a printed copy of the substituted memorandum and articles; and

(b) On the registration of the alteration being certified by the registrar the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3.) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4.) In this section the expression "deed of settlement" includes any contract of copartnery or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters patent.

S. 197 of 1862. **Power of Court to stay or restrain proceedings.**

265. The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of a company registered in pursuance of this Part of this Act, where the application

to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company.

S. 198 of 1862. Actions stayed on winding-up order.

266. Where an order has been made for winding-up a company registered in pursuance of this Part of this Act no action or proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

PART VIII.

WINDING-UP OF UNREGISTERED COMPANIES.

S. 199 of 1862. Meaning of unregistered company. 13 & 14 Vict. c. 83. 32 & 33 Vict. c. 114. 26 & 27 Vict. c. 87.

267. For the purposes of this Part of this Act the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament (except in so far as is provided by the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and any Acts amending them), nor a company registered under the Joint Stock Companies Acts, or under the Companies Act, 1862, or under this Act, but, save as aforesaid, shall include any partnership, association, or company consisting of more than seven members, and any trustee savings bank certified under the Trustees Savings Banks Act, 1863, and any limited partnership.

S. 199 of 1862. Winding-up of unregistered companies.

268.—(1.) Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions:

(i) An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; and the principal place of business situate in that part of the United Kingdom in which proceedings are being instituted, shall, for all the purposes of the winding-up, be deemed to be the registered office of the company:

(ii) No unregistered company shall be wound up under this Act voluntarily or subject to supervision:

(iii) The circumstances in which an unregistered company may be wound up are as follows; (that is to say,)

(a) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

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

(c) If the Court is of opinion that it is just and equitable that the company should be wound up:

(iv) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts:—

(a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary or some director, manager, or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor:

(b) If any action or other proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the action or proceeding having been served on the company by leaving the same at its principal place of business, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured, or compounded for the

debt or demand, or procured the action or proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the action or proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

(c) If in England or Ireland execution or other process issued on a judgment, decree, or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied;

(d) If in Scotland the induciæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

(e) If it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts:

(v) The Court having jurisdiction to wind up a railway company under the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and the Acts amending them, shall be the High Court in England or Ireland, or the Court of Session in Scotland according as the railway was authorized to be made in England, Ireland, or Scotland, and the special provisions of those Acts shall apply to the winding-up with the substitution of references to this Act for references to the Companies Acts, 1862 and 1867:

Provided that, subject to general rules and to orders of transfer made, as respects England, under the authority of the Supreme Court of Judicature Act, 1873, and, as respects Ireland, under the authority of the Supreme Court of Judicature (Ireland) Act, 1877, the jurisdiction of the High Court in England or Ireland under this provision shall be exercised by the Chancery Division of that Court:

36 & 37 Vict. c. 66.
40 & 41 Vict. c. 57.

(vi) A petition for winding up a trustee savings bank may be presented by the National Debt Commissioners, or by a commissioner appointed under the Trustee Savings Banks Act, 1887, as well as by any person authorized under the other provisions of this Act to present a petition for winding up a company:

50 & 51 Vict. c. 47.

(vii) In the case of a limited partnership the provisions of this Act with respect to winding up shall apply with such modifications (if any) as may be provided by rules made by the Lord Chancellor with the concurrence of the President of the Board of Trade, and with the substitution of general partners for directors.

(2.) Nothing in this Part of this Act shall affect the operation of any enactment which provides for any partnership, association, or company, being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

S. 200 of 1862. Contributories in winding-up of unregistered company.

269.—(1.) In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding-up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid:

Provided that, in the case of an unregistered company within the stannaries, a past member shall not be liable to contribute to the assets of the company if he has ceased to be a member for two years or more either before the mine ceased to be worked or before the date of the winding-up order.

(2.) In the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, shall apply.

S. 201 of 1862. Power of Court to stay or restrain proceedings.

270. The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of

an unregistered company, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company.

S. 202 of 1862. Actions stayed on winding-up order.

271. Where an order has been made for winding-up an unregistered company, no action or proceeding shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

S. 203 of 1862. Directions as to property in certain cases.

272. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the winding-up order, or by any subsequent order, direct that all or any part of the property, real and personal (including things in action), belonging to the company, or to trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

S. 204 of 1862. Provisions of Part of Act cumulative.

273. The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act.

PART IX.

COMPANIES ESTABLISHED OUTSIDE THE UNITED KINGDOM.

S. 35 of 1907. Requirements as to companies established outside the United Kingdom. p. 437

274.—(1.) Every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom shall within one month from the establishment of the place of business file with the registrar of companies—

(a) a certified copy of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(b) a list of the directors of the company;

(c) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid, the company shall within the prescribed time file with the registrar a notice of the alteration.

(2.) Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3.) Every company to which this section applies shall in every year file with the registrar such a statement in the form of a balance sheet as would, if it were a company formed and registered under this Act and having a share capital, be required under this Act to be included in the annual summary.

(4.) Every company to which this section applies, and which uses the word "Limited" as part of its name, shall—

(a) in every prospectus inviting subscriptions for its shares or debentures in the United Kingdom state the country in which the company is incorporated; and

(b) conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which the company is incorporated; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company,

(5.) If any company to which this section applies fails to comply with any of the requirements of this section the company, and every officer or agent of the company, shall be liable to a fine not exceeding fifty pounds, or, in the case of a continuing offence, five pounds for every day during which the default continues.

(6.) For the purposes of this section—

The expression "certified" means certified in the prescribed manner to be a true copy or a correct translation;

The expression "place of business" includes a share transfer or share registration office;

The expression "director" includes any person occupying the position of director, by whatever name called: and

The expression "prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(7.) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five shillings or such smaller fee as may be prescribed.

Cap. 12 of 8 Edw. 7. Power of companies incorporated in British possessions to hold lands.

275. A company incorporated in a British possession which has filed with the registrar of companies the documents and particulars specified in paragraphs (a), (b), and (c) of sub-section (1) of the last foregoing section shall have the same power to hold lands in the United Kingdom as if it were a company incorporated under this Act.

PART X.

SUPPLEMENTAL.

Legal Proceedings, Offences, &c.

S. 49 of 1907. Prosecution of offences.

276.—(1.) All offences under this Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts.

(2.) In Scotland all prosecutions for offences or fines under the provisions of this Act relating to—

(a) the appointment of directors;
(b) the restrictions on commencement of business by a company;
(c) returns as to allotments;
(d) false statements in respect of which a penalty is provided by this Part of this Act;
(e) the filing of copies of a prospectus, an order revoking the dissolution, or an order sanctioning the reorganisation of the share capital of a company;
(f) the filing of notice of appointment of a liquidator or of the accounts of a receiver or manager;
(g) general meetings;
(h) companies established outside the United Kingdom;
(i) the issue of debentures and certificates of shares and debenture stock;
(j) the issue, circulation, and publication of balance sheets;
(k) unqualified persons acting as directors;
(l) the inspection of registers of debenture holders and the furnishing of copies of trust deeds;

shall be at the instance of the Lord Advocate or a procurator fiscal as the Lord Advocate may direct.

S. 66 of 1862. Applications of fines.

277. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person on whose information or at whose suit the fine is recovered, and subject to any such direction all fines under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer.

S. 69 of 1862. Costs in actions by certain limited companies.

278 Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

S. 32 of 1907. Power of

279. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court

hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper. Court to grant relief in certain cases.

280.—(1.) In the case of a company subject to the stannaries jurisdiction, the Court exercising the stannaries jurisdiction shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, as the Court of the vice-warden of the stannaries possessed before the commencement of the Stannaries Court (Abolition) Act, 1896, by custom, usage, or statute in the case of unincorporated companies, but only so far as is consistent with the provisions of this Act and with the constitution of companies as prescribed or required by this Act. S. 68 of 1862. Jurisdiction of Stannaries Court. 59 & 60 Vict. c. 45.

(2.) For the purpose of giving fuller effect to that jurisdiction, all process issuing out of the said Court, and all orders, rules, demands, notices, warrants, and summonses required or authorized by the practice of the Court to be served on any company, whether registered or not registered, or on any member or contributory thereof, or on any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the judge for that purpose, or by such special order may be served in any part of the British Islands, on such terms and conditions as the Court may think fit:

Provided that no such service of process out of the limits of the stannaries in any suit or plaint on the common law side of the Court shall be effected without the special order of the judge made on a statement of the nature and object of the suit or plaint.

(3.) All decrees, orders, and judgments of the said Court may be enforced in the same manner in which decrees, orders, and judgments of the Court of the vice-warden of the stannaries could before its abolition have been by law enforced, whether within or beyond the stannaries.

281. If any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of any of the provisions of this Act specified in the Fifth Schedule hereto, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid: S. 28 of 1900. Penalty for false statement.

Provided that the fine imposed on summary conviction shall not exceed one hundred pounds.

282. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding five pounds for every day upon which that name or title has been used. S. 48 of 1907. Penalty for improper use of word "Limited."

Report by Board of Trade.

283. The Board of Trade shall cause a general annual report of matters within this Act to be prepared and laid before both Houses of Parliament. S. 47 of 1907. Annual report by Board of Trade.

Authentication of Documents issued by Board of Trade.

284. Any approval, sanction, or licence, or revocation of licence, which under this Act may be given or made by the Board of Trade may be under the hand of a secretary or assistant secretary of the Board, or of any person authorized in that behalf by the President of the Board. S. 46 of 1907. Authentication of documents issued by Board of Trade.

Interpretation, &c.

285. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):— Ss. 129, 199 of 1862. Interpretation.

"Existing company" means a company formed and registered under the Joint Stock Companies Acts, or under the Companies Act, 1862;

"Company" means a company formed and registered under this Act or an existing company;

"Articles" means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A. in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of that Act, or in Table A. in the First Schedule to this Act;

19 & 20 Vict. c. 47.

"Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of the provisions of this Act;

"Document" includes summons, notice, order, and other legal process, and registers;

"Share" means share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied;

"Debenture" includes debenture stock;

"Books and papers" and "books or papers" include accounts, deeds, writings, and documents;

"The registrar of companies," or, when used in relation to registration of companies, "the registrar," means the registrar or other officer performing under this Act the duty of registration of companies in England, Scotland, or Ireland, or in the stannaries, as the case requires;

"The Court" used in relation to a company means the Court having jurisdiction to wind up the company;

"Joint Stock Companies Acts" means the Joint Stock Companies Act, 1856, the Joint Stock Companies Acts, 1856, 1857, the Joint Stock Banking Companies Act, 1857, and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts, as the case may require; but does not include the Act passed in the eighth year of the reign of Her Majesty Queen Victoria, chapter one hundred and ten, intituled An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies;

"The Gazette" means, as respects companies registered in England, the London Gazette; as respects companies registered in Scotland, the Edinburgh Gazette; and, as respects companies registered in Ireland, the Dublin Gazette;

"Real and personal," as respects Scotland, means heritable and moveable;

"General rules" means general rules made under this Act, and includes forms;

"Prescribed" means, as respects the provisions of this Act relating to the winding-up of companies, prescribed by general rules, and as respects the other provisions of this Act, prescribed by the Board of Trade;

"Company within the stannaries" means a company engaged in or formed for working mines within the stannaries;

"The Court exercising the stannaries jurisdiction" used in relation to any proceedings means the County Court in which the jurisdiction formerly exercised by the Court of the vice-warden of the stannaries in respect of those proceedings is for the time being vested;

"Director" includes any person occupying the position of director by whatever name called;

"Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company.

Repeal of Acts and Transitional Provisions.

Repeal of Acts and savings.

286.—(1.) The Acts mentioned in the First Part of the Sixth Schedule to this Act are hereby repealed to the extent specified in the third column of that Part:

Provided that the repeal shall not affect—

(a) The incorporation of any company registered under any enactment hereby repealed; nor

(b) Table B. in the Schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

(c) Table A. in the First Schedule annexed to the Companies Act, 1862, or any part thereof (either as originally contained in that Schedule or as altered in pursuance of section seventy-one of that Act) so far as the same applies to any company existing at the commencement of this Act; nor

(d) The continuance in force of the enactments set out in the Second Part of the Sixth Schedule to this Act, being the enactments continued in force by section two hundred and five of the Companies Act, 1862.

(2.) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section thirty-eight of the Interpretation Act, 1889, with regard to the effect of repeals. 52 & 53 Vict. c. 63.

Saving of pending proceedings for winding up.

287. The provisions of this Act with respect to winding up shall not apply to any company of which the winding-up has commenced before the commencement of this Act, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not passed, and, for the purposes of the winding up, the Act or Acts under which the winding-up commenced shall be deemed to remain in full force.

S. 208 of 1862. Saving of deeds.

288. Every conveyance, mortgage, or other deed, made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not passed, and for the purposes of that deed the repealed enactment shall be deemed to remain in full force.

S. 174 of 1862. Former registration offices, registers, official receivers, &c. continued.

289.—(1.) The offices existing at the commencement of this Act in England, Scotland, and Ireland for registration of joint stock companies shall be continued as if they had been established under this Act.

(2.) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

(3.) The existing registrars, assistant registrars, officers, clerks, and servants in those offices shall during the pleasure of the Board of Trade hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Board of Trade with regard to the execution of their duties.

(4.) The existing official receivers and officers of the Board of Trade appointed for the execution of the Companies (Winding Up) Act, 1890, shall during the pleasure of the Board of Trade hold the offices and receive the salaries or remuneration hitherto held and received by them.

(5.) Persons, other than officers of the Board of Trade, performing any duties under the Companies (Winding Up) Act, 1890, and receiving therefor any salary or remuneration by the direction of the Lord Chancellor, shall during his pleasure receive the salaries or remuneration hitherto received by them.

(6.) The Companies Liquidation Account under this Act shall be deemed to be in continuation of the Companies Liquidation Account under the Companies (Winding Up) Act, 1890.

Saving for existing rules of procedure, &c.

290. Until revoked and except as varied under the powers of this Act, the general rules and orders, and scales of fees, under the Companies (Winding Up) Act, 1890, in force at the commencement of this Act, and the rules of Court in force at the commencement of this Act in England, Scotland, and Ireland respectively with respect to the procedure for reduction of capital, and to winding up companies, and the practice and procedure for winding up companies in England, Scotland, and Ireland respectively in force at the commencement of this Act, shall, so far as they are not inconsistent with this Act, continue in force.

Substitution of provisions of this Act for provisions of repealed Acts.

291. Where any enactment repealed by this Act is mentioned or referred to in any document, that document shall be read as if the corresponding provision (if any) of this Act were therein mentioned or referred to and substituted for the repealed enactment.

Saving for 28 & 29 Vict. c. 78, s. 3.

292. Nothing in this Act shall affect the power of a company to alter its memorandum under the provisions of section three of the Mortgage Debenture Act, 1865.

Saving for Life Assurance Companies Acts. 33 & 34 Vict. c. 61. 34 & 35 Vict. c. 58. 35 & 36 Vict. c. 41.

293. Nothing in this Act shall affect the provisions of the Life Assurance Companies Acts, 1870 to 1872, except that references in those Acts to any provision of the Companies Act, 1862, shall be read as references to the corresponding provision of this Act.

Saving for 34 & 35 Vict. c. 31, s. 5.

294. Nothing in this Act shall affect the provisions of section five of the Trade Union Act, 1871, except that the reference in that section to the Companies Acts, 1862 and 1867, shall be read as a reference to this Act.

Short title.
295. This Act may be cited as the Companies (Consolidation) Act, 1908.

Commencement of Act.
296. This Act shall come into operation on the first day of April nineteen hundred and nine.

SCHEDULES.

FIRST SCHEDULE.

Sections 10, 11, 67, 263, 285.

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TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Companies (Consolidation) Act, 1908, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versâ*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section eighty-seven of the Companies (Consolidation) Act, 1908, if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections eighty-five and eighty-eight of the Companies (Consolidation) Act, 1908, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. No part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists, is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or bankruptcy to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

13. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of nonpayment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and Transmission of Shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain

a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, A.B., of , in consideration of the sum of £ paid to me by C. D. of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share [*or* shares] numbered in the undertaking called the Company Limited, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said transferee, do hereby agree to take the said share [*or* shares] subject to the conditions aforesaid. As witness our hands, this day of .

Witness to the signatures of, &c.

20. The directors may decline to register any transfer of shares, not being fully-paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognize any instrument of transfer unless—

(a) a fee not exceeding two shillings and sixpence is paid to the company in respect thereof, and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the company as having any title to his share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognized by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share, or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

23. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of Shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

29. A statutory declaration in writing, that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of Shares into Stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction reconvert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share warrants) as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stock-holder."

Share Warrants.

35. The company may issue share warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence, if any, as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate, if any, of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons, or otherwise for the payment of dividends, or other moneys, on the shares included in the warrant.

36. A share warrant shall entitle the bearer to the shares included in it, and the shares shall be transferred by the delivery of the share warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognized as depositor of the share warrant. The company shall, on two days' written notice, return the deposited share warrant to the depositor.

39. Subject as herein otherwise expressly provided no person shall, as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share warrant or coupon may be issued by way of renewal in case of defacement, loss, or destruction.

Alteration of Capital.

41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and, after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital.

44. The company may, by special resolution—

(a) Consolidate and divide its share capital into shares of larger amount than its existing shares:

(b) By subdivision of its existing shares, or any of them, divide the whole, or any part, of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section forty-one of the Companies (Consolidation) Act, 1908:

(c) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person:

(d) Reduce its share capital in any manner and with, and subject to, any incident authorized, and consent required, by law.

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section sixty-five of the Companies (Consolidation) Act, 1908.

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's

incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section sixty-six of the Companies (Consolidation) Act, 1908. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Proceedings at General Meeting.

49. Seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

57. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

61. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis* appointed by that Court, and any such committee, *curator bonis*, or other person may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorized. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

66. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

"—— Company, Limited.

"I, ——, of ——, in the county of ——, being a member of the —— Company, Limited, hereby appoint ——, of ——, as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company to be held on the —— day of ——, and at any adjournment thereof.

"Signed this —— day of ——."

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section seventy-three of the Companies (Consolidation) Act, 1908.

Powers and Duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Companies (Consolida-

tion) Act, 1908, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company, or created by it, and to keeping a register of the directors, and to sending to the registrar of companies an annual list of members, and a summary of particulars relating thereto, and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions, and a copy of the register of directors and notifications of any changes therein.

75. The directors shall cause minutes to be made in books provided for the purpose—

(a) of all appointments of officers made by the directors;
(b) of the names of the directors present at each meeting of the directors and of any committee of the directors;
(c) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors,

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated, if the director—

(a) ceases to be a director by virtue of section seventy-three of the Companies (Consolidation) Act, 1908; or
(b) holds any other office of profit under the company except that of managing director or manager; or
(c) becomes bankrupt; or
(d) is found lunatic or becomes of unsound mind; or
(e) is concerned or participates in the profits of any contract with the company:

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director: but a director shall not vote in respect of any such contract or work, and if he does so vote his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjoined meeting.

83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividend shall be paid otherwise than out of profits.

98. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint holders of any share any one of them may give effectual receipts for any dividend payable on the share.

161. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause true account[illegible] be kept—

Of the sums of money received and exp[illegible]ed by the company and the matter in respect of which such receipt and [illegible]penditure takes place, and

Of the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorized by the directors or by the company in general meeting.

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting.

107. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such

meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount, if any, which they propose to carry to a reserve fund.

108. A copy of the balance-sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereinunder.

Audit.

109. Auditors shall be appointed and their duties regulated in accordance with sections one hundred and twelve and one hundred and thirteen of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force.

Notices.

110. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him.

Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

111. If a member has no registered address in the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company, shall be deemed to be duly given to him on the day on which the advertisement appears.

112. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

113. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, in the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

114. Notice of every general meeting shall be given in some manner hereinbefore authorized to (a) every member of the company (including bearers of share warrants) except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

TABLE B.

Sections 244, 259.

TABLE OF FEES to be paid to the REGISTRAR OF COMPANIES.

I.—*By a Company having a Share Capital.*

	£	s.	d.
For registration of a company whose nominal share capital does not exceed 2,000*l.*	2	0	0
For registration of a company whose nominal share capital exceeds 2,000*l.*, the following fees, regulated according to the amount of nominal share capital (that is to say);			
For every 1,000*l.* of nominal share capital, or part of 1,000*l.*, up to 5,000*l.*	1	0	0

	£	s.	d.	£	s.	d.
For every 1,000*l.* of nominal share capital, or part of 1,000*l.*, after the first 5,000*l.*, up to 100,000*l.*	0	5	0			
For every 1,000*l.* of nominal share capital, or part of 1,000*l.*, after the first 100,000*l.*	0	1	0			
For registration of any increase of share capital made after the first registration of the company, the same fees per 1,000*l.*, or part of a 1,000*l.*, as would have been payable if the increased share capital had formed part of the original share capital at the time of registration:						
Provided that no company shall be liable to pay in respect of nominal share capital, on registration or afterwards, any greater amount of fees than 50*l.*, taking into account in the case of fees payable on an increase of share capital after registration the fees paid on registration.						
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.						
For registering any document by this Act required or authorized to be registered, other than the memorandum or the abstract required to be filed with the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England				0	5	0
For making a record of any fact by this Act required or authorized to be recorded by the registrar				0	5	0

II.—*By a Company not having a Share Capital.*

	£	s.	d.
For registration of a company whose number of members, as stated in the articles, does not exceed 20	2	0	0
For registration of a company whose number of members, as stated in the articles, exceeds 20, but does not exceed 100	5	0	0
For registration of a company whose number of members, as stated in the articles, exceeds 100, but is not stated to be unlimited, the above fee of 5*l.*, with an additional 5*s.* 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 to be unlimited	20	0	0
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 that increase	0	5	0
Provided that no company shall be liable to pay on the whole a greater fee than 20*l.* in respect of its number of members, taking into account the fee paid on the first registration of the company.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document by this Act required or authorized to be registered, other than the memorandum or the abstract required to be filed with the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England	0	5	0
For making a record of any fact by this Act required or authorized to be recorded by the registrar	0	5	0

Section 108.

FORM C.

FORM OF STATEMENT to be published by BANKING and INSURANCE COMPANIES, and DEPOSIT, PROVIDENT, or BENEFIT SOCIETIES.

* The share capital of the company is ——, divided into —— shares of —— each.
The number of shares issued is ——.
Calls to the amount of —— pounds per share have been made, under which the sum of —— pounds has been received.
The liabilities of the company on the first day of January (*or* July) were—
Debts owing to sundry persons by the company.
On judgment, ——*l.*
On specialty, ——*l.*
On notes or bills, ——*l.*
On simple contracts, ——*l.*
On estimated liabilities, ——*l.*
The assets of the company on that day were—
Government securities [*stating them*].
Bills of exchange and promissory notes, ——*l.*
Cash at the bankers, ——*l.*
Other securities, ——*l.*

* If the company has no share capital, the portion of the statement relating to capital and shares must be omitted.

Section 82.
p. 471

SECOND SCHEDULE.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

STATEMENT IN LIEU OF PROSPECTUS
filed by

LIMITED

pursuant to section eighty-two of the Companies (Consolidation) Act, 1908.

Presented for filing by

THE COMPANIES (CONSOLIDATION) ACT, 1908.

——, Limited.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company ..	£——.
Divided into	Shares of £—— each. ,, ,, ,, ,, ,, ,,
Names, descriptions, and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash. The consideration for the intended issue of those shares and debentures.	1. —— shares of £—— fully paid. 2. —— shares upon which £—— per share credited as paid. 3. —— debenture —— £——. 4. Consideration.

Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the company. Amount (in cash, shares, or debentures) payable to each separate vendor.	(*a*) For definition of vendo *see* Section 81 (2) of the Compan'es (Consolidation) Act, 19 8. (*b*) *See* Section 81 (3) of the Companies (Consolidation) Act, 1908.
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price ..£—— Cash .....£—— Shares .....£—— Debentures .....£—— Goodwill .....£——
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or Rate of the commission	Amount paid. ,, payable. Rate per cent.
Estimated amount of preliminary expenses ..	£——.
Amount paid or intended to be paid to any promoter. Consideration for the payment.	Name of promoter. Amount £——. Consideration :—
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.	Nature of the provisions.

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorized in writing.)

——.
——.
——.

THIRD SCHEDULE.

FORM A.

Section 118.

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 England.

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 object."

4th. The liability of the members is limited.

5th. The share capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds 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
"6. Andrew Brown, of ——, in the county of —.....	5
"7. Cæsar White, of ——, in the county of —.....	10
Total shares taken.....	325

Dated the —— day of —— 19—.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, London.

FORM B.

MEMORANDUM and ARTICLES of ASSOCIATION of a Company limited by Guarantee, and not having a Share Capital.

Memorandum of Association.

1st. The name of the company is "The Mutual London Marine Association, Limited."

2nd. The registered office of the company will be situate in England.

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 object."

4th. The liability of the members is limited.

5th. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding ten pounds.

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 ——.
"6. Andrew Brown, of ——, in the county of ——.
"7. Cæsar White, of ——, in the county of ——.

Dated the —— day of —— 19—.

Witness to the above signatures,
A. B., No. 13, Hare Street, Clerkenwell, London.

ARTICLES of ASSOCIATION to accompany preceding MEMORANDUM of ASSOCIATION.

Number of Members.

1. The company, for the purpose of registration, is declared to consist of five hundred members.

2. The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition 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 less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, convene an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to convene a general meeting; if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members, may themselves convene a meeting.

Proceedings at General Meetings.

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 the business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

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 and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

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 the business. The quorum shall be ascertained as follows (that is to say), if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

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 of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution.

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 the poll shal be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member be a lunatic or idiot he may vote by his committee, *curator bonis*, or other legal 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. On a poll votes may be given either personally or by proxy. 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 act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

—— Company, Limited.

——, of ——, in the county of ——, being a member of the —— Company, Limited, hereby appoint ——, of ——, as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company, to be held on the —— day of ——, and at any adjournment thereof.

Signed this —— day of ——.

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 the Companies (Consolidation) Act, 1908, 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 by the Companies (Consolidation) Act, 1908, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Election of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

[*Here insert Rules as to mode in which business of Insurance is to be conducted.*]

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections one hundred and twelve and one hundred and thirteen of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

30. A notice may be given by the company to any member either personally, or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been delivered at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones, of ——, in the
"2. John Smith, of ——, in the
"3. Thomas Green, of ——, in the
"4. John Thompson, of ——, in the
"5. Caleb White, of ——, in the
"6. Andrew Brown, of ——, in the
"7. Cæsar White, of ——, in the county of —

Dated the —— day of ——, 19—.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, London.

FORM C.

MEMORANDUM and ARTICLES of ASSOCIATION of a Company limited by Guarantee, and having a Share Capital.

Memorandum of Association.

1st. The name of the company is "The Highland Hotel Company, Limited."

2nd. The registered office of the company will be situate in Scotland.

3rd. The objects for which the company is established are "the facilitating travelling in the Highlands of Scotland by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted

before he ceases to be a member, and the costs, charges, and expenses of winding-up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding twenty pounds.

6th. The share capital of the company shall consist of five hundred thousand pounds, divided into five thousand shares of one hundred pounds 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 Description 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
"6. Andrew Brown, of ——, in the county of ——	5
"7. Cæsar White, of ——, in the county of ——	10
Total shares taken	325

Dated the —— day of ——, 19—.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, London.

Articles of Association to accompany preceding Memorandum of Association.

1. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

2 The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

3. All the articles of Table A. of the Companies (Consolidation) Act, 1908, shall be deemed to be incorporated with these articles, and to apply to the company.

Names, Addresses, and Description 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 ——.
"6. Andrew Brown, of ——, in the county of ——.
"7. Cæsar White, of ——, in the county of ——.

Dated the —— day of ——, 19—.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, London.

FORM D.

MEMORANDUM and ARTICLES of ASSOCIATION of an unlimited Company having a Share Capital.

Memorandum of Association.

1st. The name of the company is "The Patent Stereotype Company."

2nd. The registered office of the company will be situate in England.

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 London, is the sole patentee."

WE, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Description of Subscribers.	Number of Shares taken by each Subscriber.
"1. John Jones, of ——, in the county of ——	3
"2. John Smith, of ——, in the county of ——	2
"3. Thomas Green, of ——, in the county of ——	1
"4. John Thompson, of ——, in the county of ——	2
"5. Caleb White, of ——, in the county of ——	2
"6. Andrew Brown, of ——, in the county of ——	1
"7. Abel Brown, of ——, in the county of ——	1
Total shares taken.....	12

Dated the —— day of ——, 19—.

Witness to the above signatures,

A. B., No. 20, Bond Street, London.

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is two thousand pounds, divided into twenty shares of one hundred pounds each.

2. All the articles of Table A. of the Companies (Consolidation) Act, 1908 shall be deemed to be incorporated with these articles, and to apply to the company.

Names, Addresses, and Description 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 ——.
"6. Andrew Brown, of ——, in the county of ——.
"7. Abel Brown, of ——, in the county of ——.

Dated the —— day of ——, 19—.

Witness to the above signatures,

A. B., No. 20, Bond Street, London.

Section 26. **FORM E. as required by Part II. of the Act.**

SUMMARY of SHARE CAPITAL and SHARES of the —— COMPANY, LIMITED, made up to the —— day of ——, 19— (being the fourteenth day after the date of the first ordinary general meeting in 19—).

Nominal share capital £—— divided into (*a*) { shares of £—— each. / shares of £—— each.

Total number of shares taken up (*a*) to the —— day of ——, 19— (which number must agree with the total shown in the list as held by existing members) ——.

Number of shares issued subject to payment wholly in cash ——.

Number of shares issued as fully paid up otherwise than in cash ——.

Number of shares issued as partly paid up to the extent of —— per share otherwise than in cash ——.

(*b*) There has been called up on each of —— shares £——.

There has been called up on each of —— shares £——.

(*b*) There has been called up on each of —— shares £——.

(*c*) Total amount of calls received, including payments on application and allotment £——.

Total amount (if any) agreed to be considered as paid on —— shares which have been issued as fully paid up otherwise than in cash £——.

Total amount (if any) agreed to be considered as paid on —— shares which have been issued as partly paid up to the extent of —— per share £——.

Total amount of calls unpaid £——.

Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary £——.

Total amount (if any) paid on (*d*) —— shares forfeited £——.

Total amount of shares and stock for which share warrants are outstanding £——.

Total amount of share warrants issued and surrendered respectively since date of last summary £——.

Number of shares or amount of stock comprised in each share warrant ——.

Total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies, or which would require registration if created after the first day of July nineteen hundred and eight £——.

STATEMENT in the form of a balance sheet made up to the —— day of ——, 19—, containing the particulars of the capital, liabilities, and assets of the company.

(*a*) When there are shares of different kinds or amounts (*e.g.*, Preference and Ordinary, or 10*l.* or 5*l.*) state the numbers and nominal values separately.

(*b*) Where various amounts have been called or there are shares of different kinds state them separately.

(*c*) Include what has been received on forfeited as well as on existing shares.

(*d*) State the aggregate number of shares forfeited (if any).

The Return must be signed at the end by the manager or secretary of the company.

Presented for filing by ——.

LIST of persons holding shares in the —— Company, Limited, on the —— day of ——, 19—, and of persons who have held shares therein at any time since the date of the last return, showing their Names and Addresses, and an Account of the Shares so held.

Folio in Register Ledger containing particulars.	NAMES, ADDRESSES, AND OCCUPATIONS.				ACCOUNT OF SHARES.					Remarks.
	Surname.	Christian Name.	Address.	Occupation.	*Number of Shares held by existing Members at date of Return.	‡Particulars of Shares transferred since the date of the last Return by Persons who are still Members.		‡Particulars of Shares transferred since the date of the last Return by Persons who have ceased to be Members.		
						Number.†	Date of Registration of Transfer.	Number.†	Date of Registration of Transfer.	

* The aggregate number of shares held, and not the distinctive numbers, must be stated, and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

† When the shares are of different classes these columns may be subdivided so that the number of each class held or transferred may be shown separately.

‡ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the "Remarks" column immediately opposite the particulars of each transfer.

NAMES and Addresses of the persons who are the Directors of the —— Limited on the —— day of —— 19—.

Names.	Addresses.

NOTE.—Banking companies must add a list of all their places of business.

Signature ——.

(State whether manager or secretary) ——.

FORM F.

LICENCE to hold LANDS.

Section 20.

The Board of Trade hereby license the —— to hold the lands hereunder described (*insert description of lands*) [*or* to hold lands not exceeding in the whole —— acres]. The conditions of this licence are [*insert conditions, if any*].

Section 181.

FOURTH SCHEDULE.

PART I.

ORDERS PRONOUNCED IN VACATION IN SCOTLAND WHICH ARE TO BE FINAL.

Orders:—

s. 169. As to time for proving claims.

s. 174. As to the attendance of, and production of documents by, persons indebted to, or having property of, or information as to the affairs or property of, a company.

s. 219. As to meetings for ascertaining wishes of creditors or contributories.

s. 120. As to summoning meetings of creditors or contributories where a compromise is proposed.

s. 227. As to the examination of witnesses in regard to the property or affairs of a company.

PART II.

ORDERS PRONOUNCED IN VACATION IN SCOTLAND WHICH ARE TO TAKE EFFECT UNTIL RECLAIMING NOTE DISPOSED OF.

Orders:—

ss. 140, 142, 144, 266, 270, 271. Restraining or permitting commencement or continuance of legal proceedings.

ss. 149, 186, 202. Appointing an official liquidator to fill a vacancy, or appointing (except to fill a vacancy caused by the removal of a liquidator by the Court) a liquidator for a winding up voluntarily or under supervision.

s. 151. Sanctioning the exercise of any power by an official liquidator other than the power to appoint a law agent or to sell property.

s. 164. Requiring the delivery of property or documents to the official liquidator.

s. 176. As to the arrest and detention of an absconding contributory and his property.

s. 151 (5). Limiting the powers of provisional official liquidators.

s. 199 For continuance of winding-up under supervision.

FIFTH SCHEDULE.

Section 281.

PROVISIONS REFERRED TO IN SECTION 281 OF THE ACT.

Provisions relating to—

s. 17. The conclusiveness of certificates of incorporation;

s. 72. Restrictions on appointments or advertisement of directors

s. 87. Restrictions on commencement of business;

s. 88 Returns as to allotments;

s. 65. Statutory meetings:

s. 26. The particulars as to directors and mortgage debt and the statement in the form of a balance sheet in the annual summary;

ss. 112, 113. The appointment and remuneration, and powers and duties, of auditors:

s. 82. Obligations of companies where no prospectus is issued;

s. 93. Registration of mortgages and charges in England and Ireland:

s. 95. Filing of accounts of receiver and manager;

s. 187. Notice by liquidator in voluntary winding-up of his appointment;

s. 188. Rights of creditors in a voluntary winding-up;

s. 274. Requirements as to companies established outside the United Kingdom; and

s. 283. Annual report by Board of Trade.

SIXTH SCHEDULE.

PART I.

ENACTMENTS REPEALED. Section 286.

Session and Chapter.	Short Title of Act.	Extent of Repeal.
25 & 26 Vict. c. 89.	The Companies Act, 1862..	The whole Act.
27 Vict. c. 19.	The Companies Seals Act, 1864.	The whole Act.
30 & 31 Vict. c. 131.	The Companies Act, 1867..	The whole Act.
32 & 33 Vict. c. 19.	The Stannaries Act, 1869..	Sections twenty-five, twenty-six, and thirty-four.
33 & 34 Vict. c. 104.	The Joint Stock Companies Arrangement Act, 1870.	The whole Act.
37 & 38 Vict. c. 94.	Conveyancing (Scotland) Act, 1874.	Section fifty-six.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section ten, so far as relates to the winding up of companies.
40 & 41 Vict. c. 26.	The Companies Act, 1877..	The whole Act.
40 & 41 Vict. c. 57.	The Supreme Court of Judicature (Ireland) Act, 1877.	Sub-section (1) of section twenty-eight, so far as relates to the winding up of companies.
42 & 43 Vict. c. 76.	The Companies Act, 1879..	The whole Act.
43 Vict. c. 19.	The Companies Act, 1880..	The whole Act.
46 & 47 Vict. c. 30.	The Companies (Colonial Registers) Act, 1883.	The whole Act.
49 Vict. c. 23.	The Companies Act, 1886..	The whole Act.
50 & 51 Vict. c. 43.	The Stannaries Act, 1887..	Sections nine and ten; section thirteen from "Upon the winding up" to the end of the section (being paragraph (2)); and section thirty-one.
50 & 51 Vict. c. 47.	The Trustee Savings Banks Act, 1887.	Section three.
51 & 52 Vict. c. 62.	The Preferential Payments in Bankruptcy Act, 1888.	Sections one, two, and three, so far as they relate to companies.

Session and Chapter.	Short Title of Act.	Extent of Repeal.
52 & 53 Vict. c. 42.	The Revenue Act, 1889 ..	Section eighteen.
52 & 53 Vict. c. 60.	The Preferential Payments in Bankruptcy (Ireland) Act, 1889.	Section four, so far as relates to companies.
53 & 54 Vict. c. 62.	The Companies (Memorandum of Association) Act, 1890.	The whole Act.
53 & 54 Vict. c. 63.	The Companies (Winding-up) Act, 1890.	The whole Act.
53 & 54 Vict. c. 64.	The Directors Liability Act, 1890.	The whole Act.
56 & 57 Vict. c. 58.	The Companies (Winding-up) Act, 1893.	The whole Act.
60 & 61 Vict. c. 19.	The Preferential Payments in Bankruptcy Amendment Act, 1897.	The whole Act.
61 & 62 Vict. c. 26.	The Companies Act, 1898..	The whole Act.
63 & 64 Vict. c. 48.	The Companies Act, 1900..	The whole Act.
7 Edw. 7, c. 24.	The Limited Partnerships Act, 1907.	Sub-section (4) of section six.
7 Edw. 7, c. 50.	The Companies Act, 1907..	The whole Act.
8 Edw. 7, c. 12.	The Companies Act, 1908 ..	The whole Act.

PART II.

Section 286. AN ACT TO REGULATE JOINT STOCK BANKS IN ENGLAND (7 & 8 VICT. C. 113), S. 47.

Existing companies to have the powers of suing and being sued.

Every company of more than six persons established on the sixth day of May one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the Act passed in the session of the seventh and eighth years of Queen Victoria, chapter one hundred and thirteen, intituled "An Act to regulate Joint Stock Banks in England," shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff, petitioner, or defendant on behalf of such co-partnership; and all judgments, decrees, and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England

exceeding the distance of sixty-five miles from London under the provisions of the Country Bankers Act, 1826, provided that such first-mentioned company shall make out and deliver from time to time to the Commissioners of Inland Revenue the several accounts or returns required by the last-mentioned Act, and all the provisions of the last-recited Act as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first-mentioned companies as if they had been originally included in the provisions of the last-recited Act.

THE JOINT STOCK BANKING COMPANIES ACT, 1857.

PART OF S. 12.

Power to form banking partnerships of ten persons.

Notwithstanding anything contained in any Act passed in the Session holden in the seventh and eighth years of Queen Victoria, chapter one hundred and thirteen, and intituled "An Act to regulate Joint Stock Banks in England," or in any other Act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of the Joint Stock Banking Companies Act, 1857, have carried on such business.

NOTE ON CAPITAL DUTY.

By sect. 112 of the Stamp Act, 1891, a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the registrar of joint stock companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an *ad valorem* stamp duty of 2*s.* for every 100*l.*, and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital or increase of capital as the case may be.

By the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7, 5*s.* is substituted for 2*s.* as the *ad valorem* stamp duty by sects. 112 and 113 of the Stamp Act, 1891.

Sect. 12 of the Finance Act, 1896 (59 & 60 Vict. c. 28), extends the provisions of sect. 113 of the Stamp Act, 1891, to certain other corporations and companies.

The Revenue Act, 1903 (3 Edw. 7. c. 46), s. 5, provides that the statement of the amount of any increase of registered capital of any company registered under the Companies Acts, 1862 to 1900, which is required by sect. 112 of the Stamp Act, 1891, to be delivered to the registrar of joint stock companies, shall be delivered, duly stamped with the duty charged thereon, within fourteen days after the passing of the resolution by which the registered capital is increased.

In *Att.-Gen.* v. *Anglo-Argentine Tramways Co., Ltd.*, (1909) 1 K. B. 677, the company had passed a special resolution authorizing the directors to increase the capital by a sum not exceeding 5,000,000*l.* by the creation and issue from time to time of new ordinary shares of 5*l.* each, and it was held that the whole of such 5,000,000*l.* was chargeable with *ad valorem* duty as an increase of registered capital, though in fact the directors had, pursuant to the resolution, only created and issued capital to the amount of 2,000,000*l.* The grounds on which the learned judge (Channell, J.) arrived at this conclusion appear to be based on a complete misapprehension of the scheme of operation of the Companies Act, 1862, in regard to a company's capital. The learned judge appears to have thought that the capital of a company was not a mass of shares created and existing, but merely a figure denoting the maximum beyond which the company might not go. It is submitted that this is not the correct view, and that a company's capital is not increased until it is brought into actual existence, and that a mere authority to increase does not operate as an increase until that authority is exercised. See *Campbell's Case*, 9 Ch. 1.

COMPANIES ACT, 1913.

3 & 4 GEO. 5, c. 25.

An Act to amend the provisions of the Companies (Consolidation) Act, 1908, with respect to private Companies.

[15th August, 1913.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendment of the law relating to private companies.
8 Edw. 7, c. 69.

1.—(1) Where the articles of a company include the provisions which, by section one hundred and twenty-one of the Companies (Consolidation) Act, 1908, as amended by this Act, are required to be included therein in order to constitute the company a private company for the purposes of that Act, and default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions of that Act mentioned in the Schedule to this Act, and thereupon the said provisions shall apply to the company as if it were not a private company:

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.

(2) In sub-section (1) of the said section one hundred and twenty-one of the Companies (Consolidation) Act, 1908, for paragraph (b) the following paragraph shall be substituted:—

"(b) limits the number of its members (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company, were while in such employment and have continued after the determination of such employment to be members of the company) to fifty; and"

(3) Every private company shall send with the annual list of members and summary required to be sent under section twenty-six of the Companies (Consolidation) Act, 1908, a certificate signed by a director or the secretary that the company has not, since the date of the last return, or in the case of a first return since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company; and, where the list of members discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that such excess consists wholly of persons who under section one hundred and twenty-one of that Act, as amended by this section, are to be excluded in reckoning the number of fifty.

Short title and construction.

This Act may be cited as the Companies Act, 1913, and shall be construed as one with the Companies (Consolidation) Act, 1908, and that Act and this Act may be cited together as the Companies Acts, 1908 and 1913.

SCHEDULE.

Section 1.

PROVISIONS OF THE COMPANIES (CONSOLIDATION) ACT, 1908.

Sub-section (3) of section twenty-six (which relates to the making of an annual return in the form of a balance sheet).

Section one hundred and fourteen (which relates to the right of preference shareholders and debenture holders to receive and inspect balance sheets and reports).

Section one hundred and fifteen (which relates to the minimum number of members with which a company may continue to carry on business).

Paragraph (iv) of section one hundred and twenty-nine (which makes the reduction of the number of members of a company below the minimum a ground for the winding up of the company).

THE ASSURANCE COMPANIES ACT, 1909.

9 EDW. 7, c. 49.

An Act to consolidate and amend and extend to other Companies carrying on Assurance or Insurance business the Law relating to Life Assurance Companies, and for other purposes connected therewith.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Companies to which Act applies.

S. 2 of Assurance Act, 1870. Companies to which Act applies.

1. This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes:—

(a) Life assurance business: that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life;

(b) Fire insurance business: that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire;

(c) Accident insurance business; that is to say, the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease, or sickness, or any class of personal accidents, disease, or sickness;

(d) Employers' liability insurance business: that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment;

(e) Bond investment business; that is to say, the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bondholder a sum at a future date, and not being life assurance business as hereinbefore defined;

subject as respects any class of assurance business to the special provisions of this Act relating to business of that class:

A company registered under the Companies Acts which transacts assurance business of any such class as aforesaid in any part of the world shall for the purposes of this provision be deemed to be a company transacting such business within the United Kingdom.

General.

S. 2 of 1870. Deposit.

2.—(1) Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds.

(2) The sum so deposited shall be invested by the Paymaster-General in such of the securities usually accepted by the Court for the investment of funds placed under its administration as the company may select, and the interest accruing due on any such securities shall be paid to the company.

(3) The deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and, upon the incorporation of the company, shall be deemed to have been made by, and to be part of the assets of, the company, and the registrar shall not issue a certificate of incorporation of the company until the deposit has been made.

(4) Where a company carries on, or intends to carry on, assurance business of more

than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund.

(5) The Paymaster-General shall not accept a deposit except on a warrant of the Board of Trade.

(6) The Board of Trade may make rules with respect to applications for warrants, the payment of deposits, and the investment thereof or dealing therewith, the deposit of stocks or other securities in lieu of money, the payment of the interest or dividends from time to time accruing due on any securities in which deposits are for the time being invested, and the withdrawal and transfer of deposits, and the rules so made shall have effect as if they were enacted in this Act, and shall be laid before Parliament as soon as may be after they are made.

(7) This section shall apply to an assurance company registered or having its head office in Ireland, subject to the following modifications:—

References to the Supreme Court shall be construed as references to the Supreme Court of Judicature in Ireland, and references to the Paymaster-General shall be construed as references to the Accountant-General of the last-mentioned Court.

S. 4 of 1870. Separation of funds.

3.—(1) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name:

Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

(2) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.

S. 5 of 1870. Accounts and balance sheets.

4. Every assurance company shall, at the expiration of each financial year of the company, prepare—

(a) A revenue account for the year in the form or forms set forth in the First Schedule to this Act and applicable to the class or classes of assurance business carried on by the company;

(b) A profit and loss account in the form set forth in the Second Schedule to this Act, except where the company carries on assurance business of one class only and no other business;

(c) A balance sheet in the form set forth in the Third Schedule to this Act.

S. 70 of 1870. Actuarial report and abstract.

5.—(1) Every assurance company shall, once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or byelaws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form or forms set forth in the Fourth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company.

(2) The foregoing provisions of this section shall also apply whenever at any other time an investigation into the financial condition of an assurance company is made with a view to the distribution of profits, or the results of which are made public.

S. 8 of 1870. Statement of assurance business.

6. Every assurance company shall prepare a statement of its assurance business at the date to which the accounts of the company are made up for the purposes of any such investigation as aforesaid in the form or forms set forth in the Fifth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company: Provided that, if the investigation is made annually by any company, the company may prepare such a statement at any time, so that it be made at least once in every five years.

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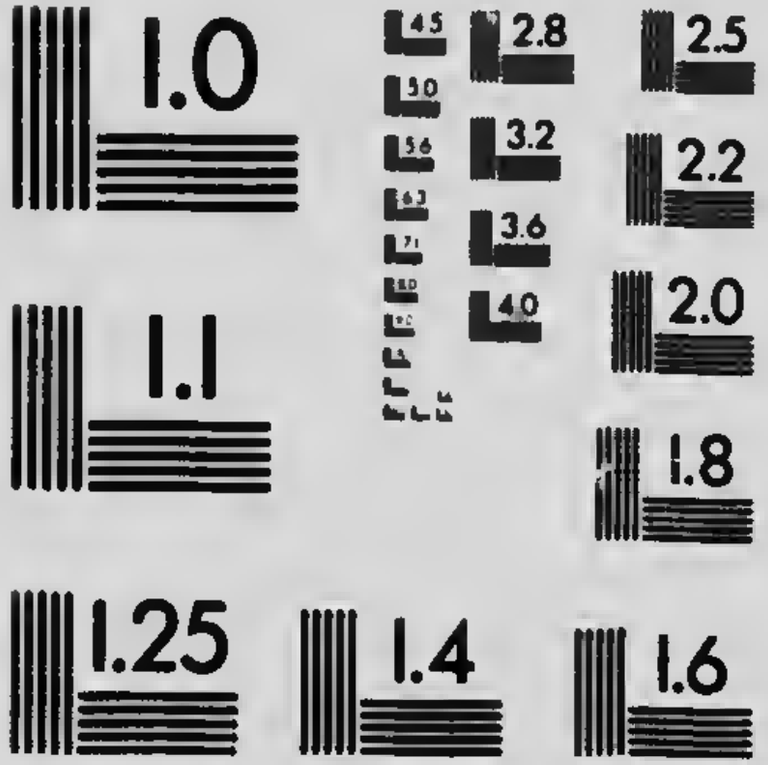

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(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

S. 5 of 1870. Deposit of accounts, &c. with Board of Trade.

7.—(1) Every account, balance sheet, abstract, or statement hereinbefore required to be made shall be printed, and four copies thereof, one of which shall be signed by the chairman and two directors of the company and by the principal officer of the company and, if the company has a managing director, by the managing director, shall be deposited at the Board of Trade within six months after the close of the period to which the account, balance sheet, abstract, or statement relates: Provided that, if in any case it is made to appear to the Board of Trade that the circumstances are such that a longer period than six months should be allowed, the Board may extend that period by such period not exceeding three months as they think fit.

(2) The Board of Trade shall consider the accounts, balance sheets, abstracts, and statements so deposited, and, if any such account, balance sheet, abstract, or statement appears to the Board to be inaccurate or incomplete in any respect, the Board shall communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiencies.

(3) There shall be deposited with every revenue account and balance sheet of a company any report on the affairs of the company submitted to the shareholders or policy holders of the company in respect of the financial year to which the account and balance sheet relates.

(4) Where an assurance company registered under the Companies Acts in any year deposits its accounts and balance sheet in accordance with the provisions of this section, the company may, at the same time, send to the registrar a copy of such accounts and balance sheet; and, where such copy is so sent, it shall not be necessary for the company to send to the registrar a statement in the form of a balance sheet as required by sub-section (3) of section twenty-six of the Companies (Consolidation) Act, 1908, and the copy of the accounts and balance sheet so sent shall be dealt with in all respects as if it were a statement sent in accordance with that sub-section.

8 Edw. 7, c. 69.

S. 6 of 1870. Right of shareholders, &c. to copies of accounts, &c.

8. A printed copy of the last-deposited accounts, balance sheet, abstract, or statement, shall on the application of any shareholder or policy holder of the company be forwarded to him by the company by post or otherwise.

Audit of accounts. 8 & 9 Vict. c. 16.

9. Where the accounts of an assurance company are not subject to audit in accordance with the provisions of the Companies (Consolidation) Act, 1908, or the Companies Clauses Consolidation Act, 1845, relating to audit, the accounts of the company shall be audited annually in such manner as the Board of Trade may prescribe, and the regulations made for the purpose may apply to any such company the provisions of the Companies (Consolidation) Act, 1908, relating to audit, subject to such adaptations and modifications as may appear necessary or expedient.

S. 7 of 1870. List of shareholders.

10. Every assurance company which is not registered under the Companies Acts, or which has not incorporated in its deed of settlement section ten of the Companies Clauses Consolidation Act, 1845, shall keep a "Shareholders' Address Book," in accordance with the provisions of that section, and shall, on the application of any shareholder or policy holder of the company, furnish to him a copy of such book, on payment of a sum not exceeding sixpence for every hundred words required to be copied.

S. 13 of 1870. Deed of settlement.

11. Every assurance company which is not registered under the Companies Acts shall cause a sufficient number of copies of its deed of settlement or other instrument constituting the company to be printed, and shall, on the application of any shareholder or policy holder of the company, furnish to him a copy of such deed of settlement or other instrument on payment of a sum not exceeding one shilling.

Publication of authorized, subscribed, and paid up capital.

12. Where any notice, advertisement, or other official publication of an assurance company contains a statement of the amount of the authorized capital of the company, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

S. 14 of 1870. Amalgamation or transfer.

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13.—(1) Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.

(2) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

(3) Before any such application is made to the Court—

(a) notice of the intention to make the application shall be published in the *Gazette*; and

(b) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, shall, unless the Court otherwise directs, be transmitted to each policy holder of each company in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally: Provided that it shall not be necessary to transmit such statement and other documents to policy holders other than life, endowment, sinking fund, or bond investment policy holders, nor in the case of a transfer to such policy holders if the business transferred is not life assurance business or bond investment business; and

(c) the agreement or deed under which the amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the offices of the companies for a period of fifteen days after the publication of the notice in the Gazette.

(4) No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section.

S. 15 of 1870. Statements in case of amalgamation or transfer.

14. Where an amalgamation takes place between any assurance companies, or where any assurance business of one such company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade—

(a) certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer; and

(b) a certified copy of the agreement or deed under which the amalgamation or transfer is effected; and

(c) certified copies of the actuarial or other reports upon which that agreement or deed is founded; and

(d) a declaration under the hand of the chairman of each company, and the principal officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the amalgamation or transfer.

S. 21 of 1870. Special provisions as to winding up of assurance companies.

15. The Court may order the winding up of an assurance company, in accordance with the Companies (Consolidation) Act, 1908, and the provisions of that Act shall apply accordingly, subject, however, to the following modification:—

The company may be ordered to be wound up on the petition of ten or more policy holders owning policies of an aggregate value of not less than ten thousand pounds:

Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a *prima facie* case has been established to the satisfaction of the Court, and until security for costs for such amount as the Court may think reasonable has been given.

S. 4 of 1872. Winding up of subsidiary companies.

16.—(1) Where the assurance business or any part of the assurance business of an assurance company has been transferred to another company under an arrangement in pursuance of which the first-mentioned company (in this section called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section called the principal company), then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the subsidiary company.

(3) In adjusting the rights and liabilities of the members of the several companies between themselves, the Court shall have regard to the constitution of the companies, and to the arrangements entered into between the companies, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company, or as near thereto as circumstances admit.

(4) Where any company alleged to be subsidiary is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct the subsidiary company to be wound up unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is subsidiary to the principal company, and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, the principal or subsidiary company.

(6) Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section.

S. 5 of 1872. Valuation of annuities and policies.

17.—(1) Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act.

(2) The rules in the Sixth and Seventh Schedules to this Act shall be of the same force, and may be repealed, altered, or amended, as if they were rules made in pursuance of section two hundred and thirty-eight of the Companies (Consolidation) Act, 1908, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of assurance companies.

S. 22 of 1870. Power to Court to reduce contracts.

18. The Court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order.

Extension of 8 Edw. 7, c. 69, s. 274, to all assurance companies established outside the United Kingdom.

19. Section two hundred and seventy-four of the Companies (Consolidation) Act, 1908 (which contains provisions as to companies incorporated outside the United Kingdom) shall apply to every assurance company constituted outside the United Kingdom which carries on assurance business within the United Kingdom, whether incorporated or not.

S. 22 of 1870. Custody and inspection of documents deposited with Board of Trade.

20. The Board of Trade may direct any documents deposited with them under this Act, or certified copies thereof, to be kept by the registrar or by any other officer of the Board of Trade; and any such documents and copies shall be open to inspection, and copies thereof may be procured by any person on payment of such fees as the Board of Trade may direct.

S. 17 of 1870. Evidence of documents.

21.—(1) Every document deposited under this Act with the Board of Trade, and certified by the registrar or by any person appointed in that behalf by the President of the Board of Trade to be a document so deposited, shall be deemed to be a document so deposited.

(2) Every document purporting to be certified by the registrar, or by any person appointed in that behalf by the President of the Board of Trade, to be a copy of a document so deposited shall be deemed to be a copy of that document, and shall be received in evidence as if it were the original document, unless some variation between it and the original document be proved.

S. 9 of 1870. Alteration of forms.

22. The Board of Trade may, on the application or with the consent of an assurance company, alter the forms contained in the schedules to this Act as respects that company, for the purpose of adapting them to the circumstances of that company.

S. 18 of 1870. Penalty for non-compliance with Act.

23. Any assurance company which makes default in complying with any of the requirements of this Act shall be liable to a penalty not exceeding one hundred pounds, or, in the case of a continuing default, to a penalty not exceeding fifty pounds for every day during which the default continues, and every director, manager, or secretary, or other officer or agent of the company who is knowingly a party to the default shall be liable to a like penalty; and, if default continue for a period of three months after notice of default by the Board of Trade (which notice shall be published in one or more newspapers as the Board of Trade may, upon the application of one or more policy holders or shareholders, direct), the default shall be a ground on which the Court may order the winding up of the company, in accordance with the Companies (Consolidation) Act, 1908.

S. 19 of 1870. Penalty for falsifying statements, &c.

24. If any account, balance sheet, abstract, statement, or other document required by this Act is false in any particular to the knowledge of any person who signs it, that person shall be guilty of a misdemeanour and shall be liable on conviction on indictment to fine and imprisonment, or on summary conviction to a fine not exceeding fifty pounds.

S. 20 of 1870. Recovery and application of penalties.

25. Every penalty imposed by this Act shall be recovered and applied in the same manner as penalties imposed by the Companies (Consolidation) Act, 1908, are recoverable and applicable.

Service of notices.

26. Any notice which is by this Act required to be sent to any policy holder may be addressed and sent to the person to whom notices respecting such policy are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy:

Provided that where any person claiming to be interested in a policy has given to the company notice in writing of his interest, any notice which is by this Act required to be sent to policy holders shall also be sent to such person at the address specified by him in his notice.

S. 24 of 1870. Accounts, &c. to be laid before Parliament.

27. The Board of Trade shall lay annually before Parliament the accounts, balance sheets, abstracts, statements, and other documents under this Act, or purporting to be under this Act, deposited with them during the preceding year, except reports on the affairs of assurance companies submitted to the shareholders or policy holders thereof, and may append to such accounts, balance sheets, abstracts, statements, or other documents any note of the Board of Trade thereon, and any correspondence in relation thereto.

Savings.

28.—(1) This Act shall not affect the National Debt Commissioners or the Postmaster-General, acting under the authorities vested in them respectively by the Government Annuities Acts, 1829 to 1888, and the Post Office Savings Bank Acts, 1861 to 1908.

(2) This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the Eighth Schedule to this Act, and applicable to business of that class.

(3) Save as otherwise expressly provided by this Act, nothing in this Act shall apply to assurance business of any class other than one of the classes specified in section one of this Act, and a policy shall not be deemed to be a policy of fire insurance by reason only that fire is one of the various risks covered by the policy.

S. 2 of 1870. Interpretation.

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

The expression "chairman" means the person for the time being presiding over the board of directors or other governing body of the assurance company;

The expression "annuities on human life" does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade, or employment, or of the dependants of such persons;

The expression "policy holder" means the person who for the time being is the legal holder of the policy for securing the contract with the assurance company;

The expression "underwriter" includes any person named in a policy or other contract of insurance as liable to pay or contribute towards the payment of the sum secured by such policy or contract;

The expression "financial year" means a period of twelve months at the end of which the balance of the accounts of the assurance company is struck, or, if no such balance is struck, then the calendar year;

The expression "Court" means the High Court of Justice in England, except that in the case of an assurance company registered or having its head office in Ireland it means, in the provisions of this Act, the High Court of Justice in Ireland, and in the case of an assurance company registered or having its head office in Scotland it means, in the provisions of this Act other than those relating to deposits, the Court of Session, in either division thereof;

The expression "Companies Acts" includes the Companies (Consolidation) Act, 1908, and any enactment repealed by that Act;

The expression "registrar" means the Registrar of Joint Stock Companies;

The expression "actuary" means an actuary possessing such qualifications as may be prescribed by rules made by the Board of Trade;

The expression "Gazette" means the London, Edinburgh, or Dublin Gazette, as the case may be.

Application to Special Classes of Business.

Application to life assurance companies.

30. Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications:—

(a) "Policy on human life" shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life;

(b) Where the company grant annuities upon human life, "policy" shall include the instrument evidencing the contract to pay such an annuity, and "policy holder" includes annuitant;

(c) The obligation to deposit and keep deposited the sum of twenty thousand pounds shall apply notwithstanding that the company has previously made and withdrawn its deposit, or been exempted from making any deposit under any enactment hereby repealed;

(d) Where the company intends to amalgamate with or to transfer its life assurance business to another assurance company, the Court shall not sanction the amalgamation or transfer in any case in which it appears to the Court that the life policy holders representing one-tenth or more of the total amount assured in the company dissent from the amalgamation or transfer;

(e) Nothing in this Act providing that the life assurance fund shall not be liable for any contracts for which it would not have been liable had the business of the company been only that of life assurance shall affect the liability of that fund, in the case of a company established before the ninth day of August eighteen hundred and seventy, for contracts entered into by the company before that date;

(f) In the case of a company carrying on life assurance business and established before the ninth day of August eighteen hundred and seventy, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears, such of the provisions of this Act as require the separation of funds, and exempt the life assurance fund from liability for contracts to which it would not have been liable had the business of the company been only that of life assurance, shall not apply;

(g) Any business carried on by an assurance company which under the provisions of any special Act relating to that company is to be treated as life assurance business shall continue to be so treated, and shall not be deemed to be other business or a separate class of assurance business within the meaning of this Act;

(h) In the case of a mutual company whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the report of the actuary on the financial condition of the company, prepared in

accordance with the Fourth Schedule to this Act, may, notwithstanding anything in section 5 of this Act, be made and returned at intervals not exceeding five years, provided that, where such return is not made annually, it shall include particulars as to the rates of abatement of premiums applicable to different classes or series of assurances allowed in each year during the period which has elapsed since the previous return under the Fourth Schedule.

Application to fire insurance companies.

31. Where a company carries on fire insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

(a) It shall not be necessary for the company to prepare any statement of its fire insurance business in accordance with the Fourth and Fifth Schedules to this Act:

(b) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the fire insurance business carried on by the company if the company has commenced to carry on that business within the United Kingdom before the passing of this Act:

(c) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply where the company is an association of owners or occupiers of buildings or other property which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against damage by or incidental to fire caused to the houses or other property owned or occupied by them:

(d) It shall not be necessary to make a deposit in respect of fire insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of fire insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business:

(e) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects fire insurance business:

(f) The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance business carried on by both of the companies are fire insurance business, or fire insurance business and accident insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to fire insurance business.

Application to accident insurance companies.

32. Where a company carries on accident insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

(a) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted:—

"The company shall annually prepare a statement of its accident insurance business in the form set forth in the Fourth Schedule to this Act and applicable to accident insurance business, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act":

(b) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the accident insurance business carried on by the company if the company has commenced to carry on that business in the United Kingdom before the passing of this Act:

(c) It shall not be necessary to make or keep a deposit in respect of accident insurance business where the company has made a deposit in respect of any other class of assurance business, and, where a company, having made a deposit in respect of accident insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business:

(d) So much of this Act as requires an assurance company transacting other business besides assurance business, or more than one class of assurance business, to keep separate funds into which all receipts in respect of the assurance business or of each class of assurance business are to be paid shall not apply as respects accident insurance business:

(e) The provisions of this Act with respect to the amalgamation of companies shall not apply where the only classes of assurance business carried on by both of the companies are accident insurance business, or accident insurance business and fire insurance business, and the provisions of this Act with respect to the transfer of assurance business from one company to another shall not apply to accident insurance business:

(f) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which a liability may accrue:

(g) Where a sum is due, or a weekly or other periodical payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly or other periodical payment payable.

Application to employers' liability insurance companies.

33.—(1) Where a company carries on employers' liability insurance business, this Act shall apply with respect to that business, subject to the following modifications:—

(a) This Act shall not apply where the company is an association of employers which satisfies the Board of Trade that it is carrying on, or is about to carry on, business wholly or mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen employed by them, either alone or in conjunction with insurance against any other risk incident to their trade or industry:

(b) This Act shall not apply where the company carries on the employers' liability insurance business as incidental only to the business of marine insurance by issuing marine policies, or policies in the form of marine policies, covering liability to pay compensation or damages to workmen as well as losses incident to marine adventure or adventure analogous thereto:

(c) In lieu of the provisions of sections five and six of this Act the following provisions shall be substituted:—

"The company shall annually prepare a statement of its employers' liability insurance business in the form set forth in the Fourth Schedule to this Act and applicable to employers' liability insurance business, and shall cause an investigation of its estimated liabilities to be made by an actuary so far as may be necessary to enable the provisions of that form to be complied with, and the statement shall be printed, signed, and deposited at the Board of Trade in accordance with section seven of this Act":

(d) Such of the provisions of this Act as relate to deposits to be made under this Act shall not apply with respect to the employers' liability insurance business carried on by a company where the company had commenced to carry on that business within the United Kingdom before the twenty-eighth day of August nineteen hundred and seven:

(e) As soon as the employers' liability fund set apart and secured for the satisfaction of the claims of policy holders of that class amounts to forty thousand pounds, the Paymaster General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its employers' liability insurance business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of assurance business is kept deposited:

(f) Where money is paid into a County Court under the provisions of the Eighth Schedule to this Act, the Court shall (unless the Court for special reason sees fit to direct otherwise) order the lump sum to be invested or applied in the purchase of an annuity or otherwise, in such manner that the duration of the benefit thereof may, as far as possible, correspond with the probable duration of the incapacity:

(g) The expression "policy" includes any policy under which there is for the time being an existing liability already accrued, or under which any liability may accrue:

(h) Where any sum is due, or a weekly payment is payable, under any policy, the expression "policy holder" includes the person to whom the sum is due or the weekly payment payable:

(i) If the company carries on employers' liability insurance business outside the United Kingdom, that business shall not be treated as part of the employers' liability insurance business carried on by the company for the purposes of this Act.

(2) In the application of this section to Scotland the expression "County Court" means Sheriff Court.

Application to bond investment companies.

34. Where a company carries on bond investment business, this Act shall apply with respect to that business, subject to the following modifications:—

(a) The expression "policy" includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the expression "policy holder" means the person who for the time being is the legal holder of such instrument:

(b) Such of the provisions of this Act as relate to deposits shall not apply with respect to the bond investment business carried on by the company, if the company has commenced to carry on that business in the United Kingdom before the passing of this Act:

(c) As soon as the bond investment fund set apart and secured for the satisfaction of the claims of the policy holders of that class amounts to forty thousand pounds, the Paymaster-General shall, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its bond investment business, and it shall not thereafter be necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of business is kept deposited:

(d) The first statement of the bond investment business of the company shall be deposited at the Board of Trade on or before the thirtieth day of June nineteen hundred and eleven:

(e) The company shall not give the holder of any policy issued after the passing of this Act any advantage dependent on lot or chance, but this provision shall not be construed as in any wise prejudicing any question as to the application to any such transaction, whether in respect of a policy issued before or after the passing of this Act, of the law relating to lotteries.

Power of Board of Trade to exempt unregistered trade unions and friendly societies.

35. The Board of Trade may, on the application of any unregistered trade union originally established more than twenty years before the commencement of this Act, extend to the trade union the exemption conferred by this Act on registered trade unions, and may, on the application of an unregistered friendly society, extend to the society the exemption conferred by this Act on registered friendly societies if it appears to the Board, after consulting the Chief Registrar of Friendly Societies, that the society is one to which it is inexpedient that the provisions of this Act should apply.

Provisions as to Collecting Societies and Industrial Assurance Companies.

Provisions as to collecting societies and industrial assurance companies.

36. (1) Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister.

(2) No policy effected before the passing of this Act with a collecting society or industrial assurance company shall be deemed to be void by reason only that the person effecting the policy had not, at the time the policy was effected, an insurable interest in the life of the person assured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a *bond fide* expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses, and any such policy shall enure for the benefit of the person for whose benefit it was effected or his assigns.

(3) Any collecting society or industrial insurance company which, after the passing of this Act, issues policies of insurance which are not within the legal

powers of such society or company shall be held to have made default in complying with the requirements of this Act; and the provisions of this Act with respect to such default shall apply to collecting societies, industrial insurance companies, and their officers, in like manner as they apply to assurance companies and their officers.

59 & 60 Vict. c. 25.

(4) Without prejudice to the powe[illegible]nferred by section seventy-one of the Friendly Societies Act, 1896, the committee of management or other governing body of a collecting society having more than one hundred thousand members may petition the Court to make an order for the conversion of the society into a mutual company under the Companies (Consolidation) Act, 1908, and the Court may make such an order if, after hearing the committee of management, or other governing body, and other persons whom the Court considers entitled to be heard on the petition, the Court is satisfied, on a poll being taken, that fifty-five per cent. at least of the n[illegible]bers of the society over sixteen years of age agree to the conversion; and the Court may give such directions as it thinks fit for settling a proper memorandum and articles of association of t[illegible] company; but, before any such petition is presented to the Court, notice of intention to present the petition shall be published in the Gazette, and in such newspapers as the Court may direct.

When a collecting society converts itself into a company in accordance with the provisions of this sub-section, sub-section (3) of section seventy-one of the Friendly Societies Act, 1896, shall apply in like manner as if the conversion were effected under that section.

59 & 60 Vict. c. 26.

(5) In this section the expressions "collecting society" and "industrial assurance company" have the same meanings as in the Collecting Societies and Industrial Assurance Companies Act, 1896.

Supplemental.

Repeal.

37. The enactments mentioned in the Ninth Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that nothing in this repeal shall affect any investigation made, or any statement, abstract, or other document deposited, under any enactment hereby repealed, but every such investigation shall be deemed to have been made and every such document prepared and deposited under this Act.

Short title and commencement.

38.—(1) This Act may be cited as the Assurance Companies Act, 1909.

(2) This Act shall come into operation on the first day of July nineteen hundred and ten, except that as respects section thirty-six it shall come into operation on the passing thereof.

SCHEDULES.

FIRST SCHEDULE.

N.B.—Where marine insurance business or sinking fund or capital redemption insurance business is carried on, the income and expenditure thereof to be stated in like manner in separate accounts. Any additional businesses (including employers' liability insurance business transacted out of the United Kingdom) to be shown in a separate inclusive general account.

(A.)—*Form applicable to Life Assurance Business.*

Revenue Account of the —— for the Year ending —— in respect of Life Assurance Business.

	Business within the United Kingdom.	Business out of the United Kingdom.	Total.
	£ s. d.	£ s. d.	£ s. d.
Amount of life assurance fund at the beginning of the year	..	..	
Premiums:—			
Consideration for annuities granted			
Interests, dividends, and rents £ s. d.			
Less income tax thereon			
	..	..	
Other receipts (accounts to be specified)	..	..	
£			

	Business within the United Kingdom	Business out of the United Kingdom.	Total.
	£ s. d.	£ s. d.	£ s. d.
Claims under policies paid and outstanding:—			
By death			
By maturity			
Surrenders, including surrenders of bonus			
Annuities			
Bonuses in cash			
Bonuses in reduction of premiums			
Commission			
Expenses of management	..	..	
Other payments (accounts to be specified)	..	..	
Amount of life assurance fund at the end of the year, as per Third Schedule	..	..	
£			

NOTE 1.—Companies having separate accounts for annuities to return the particulars of their annuity business in a separate statement.

NOTE 2.—Companies having both Ordinary and Industrial Branches to return the particulars of the business in each department separately.

NOTE 3.—Items in this Account to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the Company's risks.

NOTE 4.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

NOTE 5.—Particulars of the new life assurances effected during the year of account to be appended to the above Account showing separately, as respects business within and business out of the United Kingdom, the number of policies, the total sums assured, the amount received by way of single premiums, and the amount of the yearly renewal premium income, the items to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks. The particulars as to yearly renewal premium income need not be furnished in respect of Industrial business.

NOTE 6.—The columns headed "Business out of the United Kingdom," in the case of companies having their head office in the United Kingdom, apply only to business secured through Branch Offices or Agencies out of the United Kingdom.

(B.)—*Form applicable to Fire Insurance Business.*

Revenue Account of the —— for the Year ending —— 19—, in respect of Fire Insurance Business.

	£ s. d.	£ s. d.		£ s. d.
Amount of fire insurance fund at the beginning of the year:—			Claims under policies paid and outstanding	
Reserve for unexpired risks.....			Commission	
Additional reserve (if any)			Expenses of management	
			Contributions to fire brigades	
Premiums			Other payments (accounts to be specified)	
	£ s. d.			£ s. d.
Interest, dividends, and rents.....			Amount of fire insurance fund at the end of the year as per Third Schedule:—	
Less income tax thereon			Reserve for unexpired risks being per cent. of premium income for the year	
Other receipts (accounts to be specified)			Additional reserve (if any)	
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

(C.)—*Form applicable to Accident Insurance Business.*

Revenue Account of the —— for the Year ending ——, 19—, in respect of Accident Insurance Business.

	£ s. d.	£ s. d.		£ s. d.
Amount of accident insurance fund at the beginning of the year:—			Payments under policies, including medical and legal expenses in connection therewith	
Reserve for unexpired risks			Commission	
Total estimated liability in respect of outstanding claims			Expenses of management	
Additional reserve (if any)			Other payments (accounts to be specified)	
Premiums—			Amount of accident insurance fund at the end of the year as per Third Schedule:—	£ s. d.
Interest, dividends, and rents	£ s. d.		Reserve for unexpired risks, being —— per cent. of premium income for the year	
Less income tax thereon			Total estimated liability in respect of outstanding claims as per Fourth Schedule (C)	
Other receipts (accounts to be specified)			Additional reserve (if any)	
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

(D.)—*Form applicable to Employers' Liability Insurance Business.*

Revenue Account of the —— for the Year ending ——, 19—, in respect of Employers' Liability Insurance Business transacted within the United Kingdom.

	£ s. d.	£ s. d.		£ s. d.
Amount of employers' liability insurance fund at the beginning of the year:—			Payments under policies, including medical and legal expenses in connection therewith	
Reserve for unexpired risks			Commission	
Total estimated liability in respect of outstanding claims			Expenses of management	
Additional reserve (if any).....			Other payments (accounts to be specified)	
			Amount of employers' liability insurance fund at the end of the year, as per Third Schedule:—	£ s. d.
Premiums	£ s. d.		Reserved for unexpired risks, being —— per cent. of premium income for the year	
Interests, dividends, and rents			Total estimated liability in respect of outstanding claims, as per Fourth Schedule (D)	
Less income tax thereon.....			Additional reserve (if any).....	
Other receipts accounts to be specified)				
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

(E.)—*Form applicable to Bond Investment Business.*

Revenue Account of the —— for the Year ending ——, 19—, in respect of Bond Investment and Endowment Certificate Business.

	£ s. d.	£ s. d.		£ s. d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the year			Claims under bonds and certificates, paid and outstanding	
Additional reserve (if any)			Commission	
Premiums			Expenses of management	
Interest, dividends, and rents.....	£ s. d.		Other payments (accounts to be specified).....	
Less income tax thereon			Amount of Bond Investment and Endowment Certificate Fund at the end of the year as per Third Schedule	£ s. d.
Other receipts (accounts to be specified)			Additional reserve (if any)	
	£			£

NOTE 1.—Items in this Account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the Company's risks.

NOTE 2.—If any sum has been deducted from the Expenses of management account, and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Account.

Section 4.

SECOND SCHEDULE.

PROFIT AND LOSS ACCOUNT OF THE FOR THE YEAR ENDING 19

	£ s. d.		£ s. d.
Balance of last year's account		Dividends and bonuses to shareholders	
Interest and dividends not carried to other accounts £ s. d.		Expenses not charged to other accounts	
Less income tax thereon		Loss realized (accounts to be specified)	
Profit realized (accounts to be specified)		Other payments (accounts to be specified)	
Other receipts (accounts to be specified)		Balance as per Third Schedule	
£		£	

THIRD SCHEDULE.

BALANCE SHEET of the —— on the ——, 19—.

LIABILITIES.	£ s. d.	ASSETS.	£ s. d.
Shareholders' capital paid up (if any) ..... £		Mortgages on property within the United Kingdom	
Life assurance funds*:—		Do. do. out of the United Kingdom	
Ordinary branch		Loans on parochial and other public rates	
Industrial do.		Do. Life interests	
Annuity fund		Do. Reversions	
Fire insurance fund		Do. Stocks and shares	
Accident insurance fund		Do. Company's policies within their surrender values	
Employers' liability insurance fund		Do. Personal security	
Bond investment and endowment certificate fund		Investments:	
Marine insurance fund		Deposit with the High Court (securities to be specified)	
Sinking fund and capital redemption fund		British Government securities	
Profit and loss account		Municipal and county securities, United Kingdom	
Other funds (if any) to be specified		Indian and Colonial Government securities	
		Do. provincial securities	
Claims admitted or intimated but not paid† ..... £		Do. municipal do.	
Life assurance		Foreign Government securities	
Fire insurance		Do. provincial securities	
Bond investment		Do. municipal do.	
		Railway and other debentures and debenture stocks—Home and Foreign	
Annuities due and unpaid†		Do. preference and guaranteed stocks	
Other sums owing by the company† (to be stated separately under each class of business).		Railway ordinary stocks	
		Rent charges	
		Freehold ground rents	
		Leasehold do.	
		House property	
		Life interests	
		Reversions	
		Agents' balances	
		Outstanding premiums†	
		Do. interest, dividends, and rents†	
		Interest accrued but not payable†	
		Bills receivable	
		Cash:	
		On deposit	
		In hand and on current account	
		Other assets (to be specified)	
£		£	

* Life companies having separate annuity fund to show amount thereof separately.

† These items are or have been included in the corresponding items in the First Schedule.

NOTE 1.—When part of the assets of the company are specifically deposited, under local laws, in various places out of the United Kingdom, as security to holders of policies there issued, each such place and the amount compulsorily lodged therein must be specified in respect of each class of business, except that, in the case of fire, accident, or employers' liability insurance business, it shall be sufficient to state the fact that a part of the assets has been so deposited.

NOTE 2.—A Balance Sheet in the above form must be rendered in respect of each separate fund for which separate investments are made.

NOTE 3.—The Balance Sheet must state how the values of the Stock Exchange securities are arrived at, and a certificate must be appended, signed by the same persons as sign the Balance Sheet, to the effect that in their belief the assets set forth in the Balance Sheet are in the aggregate fully of the value stated therein, less any investment reserve fund taken into account. In the case of a company transacting life assurance business or bond investment business, this certificate is to be given on the occasions only when a statement respecting valuation under the Fourth Schedule is made.

NOTE 4.—In the case of a company required to keep separate funds under section 3 of this Act a certificate must be appended, signed by the same persons as signed the balance sheet and by the auditor, to the effect that no part of any such fund has been applied, directly or indirectly, for any purpose other than the class of business to which it is applicable.

FOURTH SCHEDULE.

Sections 5, 30, 32 and 33.

N.B.—Where sinking fund or capital redemption insurance business is carried on, a separate statement signed by the actuary must be furnished, showing the total number of policies valued, the total sums assured, and the total office yearly premiums, and also showing the total net liability in respect of such business and the basis on which such liability is calculated.

(A.)—*Form applicable to Life Assurance Business.*

STATEMENT respecting the VALUATION of the LIABILITIES under LIFE POLICIES and ANNUITIES of the , to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.

2. The general principles adopted in the valuation, and the method followed in the valuation of particular classes of assurances, including a statement of the method by which the net premiums have been arrived at, and whether these principles were determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise; together with a statement of the manner in which policies on under average lives are dealt with.

3. The table or tables of mortality used in the valuation. In cases where the tables employed are not published, specimen policy values are to be given, at the rate of interest employed in the valuation, in respect of whole-life assurance policies effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years, and upwards at intervals of five years respectively; with similar specimen policy values in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

4. The rate or rates of interest assumed in the calculations.

5. The actual proportion of the annual premium income, if any, reserved as a provision for future expenses and profits, separately specified in respect of assurances with immediate profits, with deferred profits, and without profits. (If none, state how this provision is made.)

6. The consolidated revenue account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where a statement under this schedule is deposited annually.)

7. The liabilities of the company under life policies and annuities at the date of the valuation, showing the number of policies, the amount assured, and the amount of premiums payable annually under each class of policies, both with and without participation in profits; and also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns to be made in the forms annexed.)

8. The principles upon which the distribution of profits among the shareholders and policy holders is made, and whether these principles were determined by the instrument constituting the company or by its regulations or byelaws or how otherwise, and the number of years' premiums to be paid before a bonus (a) is allotted, and (b) vests.

9. The results of the valuation, showing—

(1) The total amount of profit made by the company, allocated as follows:—

(a) Among the policy holders, with immediate participation, and the number and amount of the policies which participated;

(b) Among policy holders with deferred participation, and the number and amount of the policies which participated;

(c) Among the shareholders;

(d) To reserve funds, or other accounts;

(e) Carried forward unappropriated.

(2) Specimens of bonuses allotted to whole-life assurance policies for 100*l.* effected at the respective ages of 20, 30, 40, and 50, and having been respectively in force for five years, ten years and upwards, at intervals of five years respectively, together with the amounts apportioned under the various modes in which the bonus might be received with; similar specimen bonuses and particulars in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

NOTE.—Separate statements to be furnished throughout in respect of Ordinary and Industrial business respectively, the basis of the division being stated.

(FORM referred to under heading No. 6 in Fourth Schedule (A).)

CONSOLIDATED REVENUE ACCOUNT of the —— for —— years, commencing —— and ending ——.

	£ s. d.	£ s. d.		£ s. d.	£ s. d.
Amount of life assurance fund at the beginning of the period			Claims under policies paid and outstanding		
Premiums			By death		
Consideration for annuities granted			By maturity		
Interest, dividends, and rents			Surrenders		
Less income tax thereon			Annuities		
Other receipts (accounts to be specified)			Bonuses in cash		
			,, reduction of premiums		
			Commission		
			Expenses of management		
			Other payments (accounts to be specified)		
			Amount of life assurance fund at the end of the period as per Third Schedule		
	£			£	

NOTE.—If any sum has been deducted from the expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Statement.

37 (2)

(FORM referred to under heading No. 7 in Fourth Schedule (A).)

SUMMARY and VALUATION of the POLICIES of the —— as at ——, 19—.

Description of Transactions.	Particulars of the Policies for Valuation.				Valuation. Value by the —— Table, Interest — per cent.			
	Number of policies.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums.	Net liability.
ASSURANCES.								
I. *With immediate participation in profits.*								
For whole term of life								
Other classes (to be specified)								
Extra premiums payable								
II. *With deferred participation in profits.*								
For whole term of life								
Other classes (to be specified)								
Extra premiums payable								
Total assurances with profits								
III. *Without participation in profits.*								
For whole term of life								
Other classes (to be specified)								
Extra premiums payable								
Total assurances without profits								
Total assurances								
Deduct re-assurances (to be specified according to class in a separate statement)								
Net amount of assurances								
Adjustments, if any (to be separately specified)								
ANNUITIES ON LIVES.								
Immediate								
Other classes (to be specified)								
Total of the results								

NOTE 1.—The term "extra premium" in this Act shall be taken to mean the charge for any risk not provided for in the minimum contract premium. If policies are issued in or for any country at rates of premium deduced from tables other than the European mortality tables adopted by the company, separate schedules similar in form to the above must be furnished.

NOTE 2.—Separate returns and valuation results must be furnished in respect of classes of policies valued by different tables of mortality, or at different rates of interest, also for business at other than European rates.

NOTE 3.—In cases also where separate valuations of any portion of the business are required under local laws in places outside the United Kingdom, a summary statement must be furnished in respect of the business issued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place, with a statement as to such bases respectively.

(FORM referred to under heading No. 7, in Fourth Schedule (A).)

VALUATION BALANCE SHEET of —— as at ——, 19—.

Dr.	£	Cr.	£
To net liability under life assurance and annuity transactions (as per summary statement provided in Fourth Schedule (A))		By life assurance and annuity funds (as per balance sheet under Schedule 3)	
To surplus (if any)		By deficiency (if any)	
			£

(C.)—*Form applicable to Accident Insurance Business.*

STATEMENT of the ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising in the year of Account, and in the preceding year or years: computed as at the end of the year in which the claims arose, and as at the end of the year of Account; with particulars as to the number and amount of the claims actually paid in the intervening period.

I. Claims arising during the year of Account ending ——, 19—.

(a) Particulars as to Claims arising, and settled, during the year of Account:—

Class of Claim.	No. of Claims.	Total amount paid.	
		By Sums insured.	By Weekly Allowance.
(1)	(2)	(3)	(4)
(i) Fatal claims			
(ii) Non-fatal claims			
Totals			

(b) Particulars as to Claims arising during and outstanding at the end of the year of Account:—

Class of Claim.	No. of Claims.	Amount paid during Year of Account	Estimated Liability.
(1)	(2)	(3)	(4)
(i) Fatal claims			
(ii) Non-fatal claims, involving payment of sums insured.			
(iii) Non-fatal claims, involving payment of temporary weekly allowances:—			
With maximum duration, not exceeding 26 weeks.			
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.			
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.			
(iv) Non fatal claims, involving payment of yearly allowances during permanent total disablement.			
Totals			

the above must be furnished.

NOTE 2.—S parate returns and valuation results must be furnished in respect of classes of policies valued by different bases or methods.

also for business at other than European rates.

NOTE 3.—In cas s also where separate valuation of any portion of the business is required under local laws in places outside the United Kingdom, a summary statement must be furnished in respect of the business [illegible] held in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases [illegible] to mortality and interest adopted in each such place, with a statement as to such bases respectively.

II.—OUTSTANDING CLAIMS which arose during the *first year* preceding the year of account, ending ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims Outstanding as at the above Date.		Claims paid during the Period of One Year between the above Date and the End of Year of Account.				Estimated Liability in respect of Claims Out-tanding as at the End of Year of Account.		Totals of Columns (3), (4), and (5).	
			Terminated within such Period.		Not terminated within such Period.					
(1)	(2)		(3)		(4)		(5)		(6)	
	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.
(i) Fatal claims.....										
(ii) Non-fatal claims, involving payment of sums insured.										
(iii) Non-fatal claims, involving payment of temporary weekly allowances:—										
With maximum duration not exceeding 26 weeks.										
With maximum duration exceeding 26 weeks, but not exceeding 52 weeks.										
And so on, at intervals of 26 weeks, up to the longest period over which temporary weekly allowances are granted.										
(iv) Non-fatal claims, involving payment of yearly allowances during permauent total disablement.										
Totals.....										

NOTE.—If temporary weekly allowances are granted by the company for periods exceeding 52 weeks, particulars are to be furnished, in a form or forms similar to II. above, showing, in respect of claims involving such exteuded allowances, the estimated liability as at the end of the year in which such claims arose, and as at the end of the year of account: and the number and amount of such actual claims paid during the intervening period of two (or more) years distinguishing claims terminated, and not terminated, withiu such period.

III. SUMMARY of ESTIMATED LIABILITY, in respect of CLAIMS OUTSTANDING at the end of the Year of Account:—

As per column (4) of Statement I. (5) ..... £
" " (5) " II..... .....
" " (5) of further schedules in the form of Statement II. (if required).

In respect of yearly allowances during permanent total disablement, outstanding at the end of the year of account, but not included in the above Statements ....

Total estimated liability, in respect of outstanding claims as at the end of the year of account, as per First Schedule (C.) ..... £

(D.)—*Form applicable to Employers' Liability Insurance Business.*

STATEMENT of the ESTIMATED LIABILITY in respect of OUTSTANDING CLAIMS arising during each of the Five Years preceding the Year of Account, and in such Year; computed as at the end of the Year in which the Claims arose, and as at the end of the Year of Account; with Particulars as to the Number and Amount of the Claims actually paid in the intervening Period.

I.—Claims arising during the year of account, ending ——, 19—.

(a) Particulars as to claims arising and settled during the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid. (3) £
Fatal claims		
Non-fatal claims		
Total		

(b) Particulars as to claims arising during, and outstanding at end of, the year of account:—

Class of Claim. (1)	Number. (2)	Amount paid during year of account. (3) £	Estimated Liability. (4) £
Fatal claims.....			
Non-fatal claims			
Total			

II.—Outstanding claims which arose during the first year preceding the year of account, ending ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 1 year between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
(1)	(2)		(3)		(4)		(5)	
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated					—	—		
Not terminated								
Total								

III.—Outstanding claims which arose during the second year preceding the year of account, ending the ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 2 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
(1)	(2)		(3)		(4)		(5)	
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated					—	—		
Not terminated....								
Total.....								

IV.—Outstanding claims which arose during the third year preceding the year of account, ending the ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 3 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
(1)	(2)		(3)		(4)		(5)	
	Number.	Amount.	Number.	Amount.	Number.	Amount.	Number	Amount.
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated					—	—		
Not terminated....								
Total.....								

V.—Outstanding claims which arose during the fourth year preceding the year of account, ending the ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 4 years between the above date and the end of the year of Account.		Estimated Liability in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
(1)	(2)		(3)		(4)		(5)	
	Number.	Amount	Number.	Amount.	Number.	Amount.	Number.	Amount.
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated					—	—		
Not terminated....								
Total.....								

VI.—Outstanding claims which arose during the fifth year preceding the year of Account, ending the ——, 19—.

Particulars of Claims.	Estimated Liability in respect of Claims outstanding as at the above date.		Claims paid during the period of 5 years between the above date and the end of the year of Account.		Estimated Liability (included in Statement VII. and valued by the method there specified) in respect of Claims outstanding as at the end of the year of Account.		Total of Columns (3) and (4).	
(1)	(2)		(3)		(4)		(5)	
	Number.	Amount.	Number.	Amount.	Number	Amount.	Number.	Amount.
		£		£		£		£
Fatal claims								
Non-fatal claims—								
Terminated					—	—		
Not terminated								
Total								

NOTE.—In cases where the date at which the estimated liability required under column (2) in Forms IV. V. and VI. above would fall in any year prior to 1908, such estimated liability is to be returned as at the end of the year of account terminated in 1908, and the claims paid, required under column (3) of such forms, are to be in respect of the period between the end of the year of account terminated in 1908 and the end of the year of account rendered.

VII.—Statement respecting Claims of five years' duration and upwards outstanding as at the end of the year of Account. (To be made and signed by an Actuary.)

(1) The number of claims incumbent and having durations of five years and upwards as at the end of the year of account, including those separately returned under Form VI. above; and the amount of the weekly payment, and of the annual payment, due in respect of such claims; separately stated in respect of each year of life of the workmen, from the youngest to the oldest. (These particulars to be returned under columns (1) to (4) of the tabular statement given below.)

(2) The estimated liability in respect of the claims specified above, computed, as at the end of the year of account, on the basis of the amount which would be required to purchase from the National Debt Commissioners, through the Post Office Savings Bank, an immediate life annuity for the workmen equal to 75 per cent. of the value of the weekly payment, according to the sex and true age of the workmen. (These particulars to be returned under column (5) of the tabular statement given below, in respect of each year of life of the workmen, from the youngest to the oldest.)

(3) If the estimated liability, as reserved under the First Schedule in respect of the claims specified above, is computed on any basis other than that specified under Heading No. (2) above, the whole of the particulars required under Headings (1

and (2) above are to be returned in columns (1) to (5) of the tabular statement given below, together with the following additional particulars:—

(I) If the estimated liability is determined on the basis of the value of an immediate life annuity:—

(a) The table of mortality upon which such life annuity values are based;

(b) The rate of interest at which such life annuity values are computed;

(c) Whether such life annuity values are discriminated according to the sex of the workers;

(d) The proportion of such life annuity values representing the estimated liability;

(e) The modifications (if any) made in the true ages of the workmen, in deducing the estimated liability;

(f) The amount of the estimated liability. (To be returned, in respect of each year of life, in column (6) of the tabular statement given below.)

(II) If the estimated liability is not determined on the basis of the value of an immediate life annuity, full particulars are to be specified as to the precise method adopted in deducing such estimated liability, and the total amount of estimated liability is to be returned under column (6) of the tabular statement given below.

Number of Claims. (1)	Ages of the Workmen as at the end of the Year of Account. (2)	Amount of Weekly Payment. (3)	Amount of Annual Payment. (4)	Estimated Liability computed on Basis of 75 per Cent. of Value of Life Annuity purchased through the Post Office. (5)	Estimated Liability if computed on Basis other than that specified in Column 5. (6)

NOTE.—Separate particulars to be furnished in respect of male and female workers.

Summary of estimated liability in respect of outstanding claims as at the end of the year of account—

	£
As per column (4) of Statement I (*b*)	
,, ,, (4) ,, II	
,, ,, (4) ,, III	
,, ,, (4) ,, IV	
,, ,, (4) ,, V	
,, ,,(5) or (6) ,, VII	
Total estimated liability in respect of outstanding claims as at the end of the year of account as per First Schedule (D)	£

(E.)—*Form applicable to Bond Investment Business.*

STATEMENT respecting the VALUATION of the LIABILITY under BONDS and ENDOWMENT CERTIFICATES of the , to be made and signed by the ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.

2. The principles adopted in the valuation of the liabilities under bond investment policies and endowment certificates, and whether these principles were determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise.

3. The rate or rates of interest assumed in the calculations.

4. The actual proportion of the annual income from contributions, if any, reserved as a provision for future expenses and profits. (If none, state how this provision is made.)

5. The consolidated revenue account since the last valuation, or, in the case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where the valuation is made annually.)

6. The liabilities of the company under bond investment policies and endowment certificates at the date of the valuation, showing the number of policies or certificates, the amounts assured, the amount of contribution payable annually, and the provision for future expenses and profits; also the net liabilities and assets of the company, with the amount of surplus or deficiency. (These returns should be made in the forms annexed.)

7. The principles upon which the distribution of profits among the bond and certificate holders and shareholders is made, and whether these principles are determined by the instrument constituting the company, or by its regulations or byelaws, or how otherwise, and the time during which a bond investment policy or endowment certificate must be in force to entitle it to share in the profits.

8. The results of the valuation, showing—

(1) The total amount of profit made by the company, allocated as follows:—
  (a) among participating bond or certificate holders, with the number so participating and the total amount of their bonds or certificates;
  (b) among the shareholders;
  (c) to reserve funds, or other accounts;
  (d) carried forward unappropriated.

(2) Specimens of profit allotted to policies or certificates for 100*l.* effected for different periods, and having been in force for different durations.

(FORM referred to under Heading No. 5 in Fourth Schedule (E).)

CONSOLIDATED REVENUE ACCOUNT of the —— for —— Years commencing ——, 19—, and ending ——, 19—.

	£ s. d.	£ s. d.		£ s. d.
Amount of Bond Investment and Endowment Certificate Fund at the beginning of the period			Claims under bonds and certificates	
Additional reserve (if any)			Commission	
Premiums			Expenses of management	
Interest, dividends, and rents	£ s. d.		Other payments (accounts to be specified)	
Less income tax thereon			Amount of Bond Investment and Endowment Certificate Fund at the end of the period, as per Third Schedule	
Other receipts (accounts to be specified)				
	£			£

NOTE.—If any sum has been deducted for the Expenses of management account and taken credit for in the Balance Sheet as an asset, the sum so deducted to be separately shown in the above Statement.

(FORMS referred to under Heading No. 6 in Fourth Schedule (E).)

SUMMARY and VALUATION of the BOND INVESTMENT POLICIES or ENDOWMENT CERTIFICATES of the —— as at ——, 19—.

Description of Transactions.	Particulars of the Policies or Certificates for Valuation.			Valuation (Interest at — per cent.).			
	No. of Policies	Sums Assured and Bonuses (if any).	Full Yearly Premiums.	Value of Sums Assured and Bonuses (if any).	Value of Full Yearly Premiums.	Provisions for future Expenses and Profits.	Net Liability.
With participation in profits							
Without participatiou in profits ...							
Totals							
Deduct re-assurances (to be specified according to class).							
Net Totals							
Adjustments (if any)							
Total of the results							

(FORM referred to under Heading No. 6 in Fourth Schedule (E).)

VALUATION BALANCE SHEET of the —— as at ——, 19—.

Dr.	£	Cr.	£
To net liability under bond investment and endowment certificate transactions (as per summary statement provided in Fourth Schedule (E))		By Bond Investment and Endowment Certificate Fund (as per balance sheet under Schedule 3)	
To surplus (if any)		By deficiency (if any)	
	£		£

FIFTH SCHEDULE.

Section 6.

—Where sinking fund or capital redemption business is carried on, a separate statement, signed by the actuary, must be furnished showing the total sums assured maturing in each calendar year and the corresponding office premiums.

(A.)—*Form applicable to Life Assurance Business.*

STATEMENT of the LIFE ASSURANCE and ANNUITY BUSINESS of the —— on the ——, 19—, to be signed by the Actuary.

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurances corresponding to the statements in respect of assurances are to be given throughout.) Separate statements are to be furnished in the replies to all the headings under this schedule for business at other than European rates. Separate statements are to be also furnished throughout in respect of ordinary and industrial business respectively.

1. The published table or tables of premiums for assurances for the whole term of life and for endowment assurances which are in use at the date above mentioned.

2. The total amount assured on lives for the whole term of life which are in existence at the date above mentioned, distinguishing the portions assured with immediate profits, with deferred profits, and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages, the basis of division as to immediate and deferred profits being stated.

3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses, in respect of the respective assurances mentioned under heading No. 2, distinguishing ordinary from extra premiums. A separate statement is to be given of premiums payable for a limited number of years, classified according to the number of years' payments remaining to be made.

4. The total amount assured under endowment assurances, specifying sums assured and office premiums separately in respect of each year in which such assurances will mature for payment. The reversionary bonuses must also be separately specified, and the sums assured with immediate profits, with deferred profits, and without profits, separately returned.

5. The total amount assured under classes of assurance business, other than assurances dealt with under Questions 2 and 4, distinguishing the sums assured under each class, and stating separately the amount assured with immediate profits, with deferred profits, and without profits, and the total amount of reversionary bonuses.

6. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under heading No. 5, distinguishing ordinary from extra premiums.

7. The total amount of premiums which has been received from the commencement upon pure endowment policies which are in force at the date above mentioned.

8. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life, and distinguishing male and female lives.

9. The amount of all annuities on lives other than those specified under heading No. 8, distinguishing the amount of annuities payable under each class, and the amount of premiums annually receivable.

10. The average rate of interest yielded by the assets, whether invested or uninvested, constituting the life assurance fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

It must be stated whether or not the mean fund upon which the average rate of interest is calculated includes reversionary investments.

11. A table of minimum values, if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of the application of such method to policies of different standing and taken out at various interval ages from the youngest to the oldest. In the case of industrial policies, where free or paid up policies are granted in lieu of surrender values, the conditions under which such policies are granted must be stated, with specimens as prescribed for surrender values.

(E.)—*Form applicable to Bond Investment Business.*

STATEMENT of the BOND INVESTMENT BUSINESS of the —— on the ——, 19—. (To be signed by the Actuary.)

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-insurances, corresponding to the statements in respect of insurances, are throughout to be given.)

1. The published table or tables of rates of contribution for bond investment policies and endowment certificates which are in use at the date above-mentioned, with full particulars as to the terms and conditions on which advances are made under such policies or certificates, whether on security of house property or land, or otherwise.

2. The total amounts assured under policies or certificates which are in existence at the date above-mentioned, distinguishing the portions insured with and without profits, stating separately the total additions by way of bonus, and specifying such sums insured and bonuses respectively according to the number of complete years unexpired at such date.

3. The amount of premiums receivable annually, in respect of the respective insurances mentioned under Heading No. 2, separately specified according to the number of complete years unexpired at the date above mentioned.

4. The total amount of premiums which have been received from the commencement upon all policies or certificates mentioned under Headings Nos. 2 and 3, separately specified according to the number of complete years unexpired at the date above mentioned.

5. The average rate of interest realised by the assets, whether invested or uninvested, constituting the bond investment and endowment certificate fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax.

6. Full particulars as to the terms and conditions upon which surrenders of policies and certificates are granted, with specimens of the values allowed in respect of different durations, and different unexpired terms at the date of surrender.

7. Full particulars as to the terms and conditions upon which allowances are made on the death of a policy or certificate holder, with specimen values as required under Heading No. 6.

8. Full particulars as to the terms and conditions upon which transfers of the interest in a policy or certificate are granted, whether on the death of the policy or certificate holder, or during his lifetime.

9. Full particulars as to the terms and conditions upon which redemption advances is granted, with specimens of redemption values in respect of bonds or certificates of different durations, and having different unexpired terms, at the date of redemption.

10. A tabular statement in respect of policies or certificates lapsed during the period since the last investigation, showing the number, the amount insured, the yearly premiums, and the total premiums received from the commencement, classified according to the year in which such policies or certificates were effected and lapsed, respectively; with a similar tabular statement in respect of policies or certificates surrendered during the period: Provided that policies or certificates which have lapsed and been revived shall not be entered as lapses.

11. A statement of the total number of advances made under policies or certificates to the holders thereof, whether on the security of house property or land or otherwise, and the total amount of such advances outstanding at the date above mentioned, distinguishing the advances on first mortgage and those on second or subsequent mortgage.

SIXTH SCHEDULE.

Section 17.

RULES FOR VALUING POLICIES AND LIABILITIES.

(A.)—*As respects Life Policies and Annuities.*

Rule for Valuing an Annuity.

An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and, where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to such rate of interest and table of mortality as the Court may direct.

Rule for Valuing a Policy.

The value of the policy is to be the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition thereto made before the commencement of the winding-up, and the present value of the future annual premiums.

In calculating such present values interest is to be assumed at such rate, and the rate of mortality according to such tables, as the Court may direct.

The premium to be calculated is to be such premium as according to the said rate of interest and rate of mortality is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

(B.)—*As respects Fire Policies.*

Rule for Valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(C.)—*As respects Accident Policies.*

Rule for Valuing a Periodical Payment.

The present value of a periodical payment shall, in the case of total permanent incapacity, be such an amount as would, if invested in the purchase of a life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity equal to seventy-five per centum of the annual value of the periodical payment, and, in any other case, shall be such proportion of such amount as may, under the circumstances of the case, be proper.

Rule for Valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

(D.)—*As respects Employers' Liability Policies.*

Rule for Valuing a Weekly Payment.

The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper.

Rule for Valuing a Policy.

The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment.

(E.)—*As respects Bonds or Certificates.*

Rule for Valuing a Policy or Certificate.

The value of a policy or certificate is to be the difference between the present value of the sum assured according to the date at which it is payable, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums.

In calculating such present values, interest is to be assumed at such rate as the Court may direct.

The premium to be calculated is to be such premium as, according to the said rate of interest, is sufficient to provide for the sum assured by the policy or certificate, exclusive of any addition thereto for office expenses and other charges.

Section 17.

SEVENTH SCHEDULE.

Where an assurance company is being wound up by the Court or subject to the supervision of the Court, the liquidator in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, is to ascertain the value of the liability of the company to each such person, and give notice of such value to such persons in such manner as the Court may direct, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court.

Sections 28 and 33.

EIGHTH SCHEDULE.

REQUIREMENTS TO BE COMPLIED WITH BY UNDERWRITERS BEING MEMBERS OF LLOYD'S OR OF ANY OTHER ASSOCIATION OF UNDERWRITERS APPROVED BY THE BOARD OF TRADE.

(A.)—*As respects Life Assurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the life assurance business effected by him.

(B.) and (C.)—*As respects Fire and Accident Insurance Business.*

1. Except as hereinafter provided, every underwriter shall comply with the following requirements:—

(a) He shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds in respect of each class of business. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

(b) He shall furnish every year to the Board of Trade a statement, in such form as may be prescribed by the Board, showing the extent and character of the fire or accident insurance business effected by him

2. An underwriter who carries on fire insurance or accident insurance business may, in lieu of complying with the above requirements, elect to comply with the under-mentioned conditions:—

(a) All premiums received by or on behalf of the underwriter in respect of fire and accident insurance or re-insurance business carried on by him, either alone or in conjunction with any other insurance business for which special requirements are not laid down in this schedule, shall without any apportionment be placed in a trust fund in accordance with the provisions of a trust deed approved by the Board of Trade:

(b) He shall also furnish security to the satisfaction of the Board of Trade (or, if the Board so direct, to the satisfaction of the committee of the association), which shall be available solely to meet claims under policies issued by him in connection with fire and accident business and any other non-marine business carried on by him for which special requirements are not laid down in this schedule.

The security may be furnished in the form of either a deposit or a guarantee, or partly in the one form and partly in the other.

The amount of the security to be furnished shall never be less than the aggregate of the premiums received or receivable by the underwriter in the last preceding year in connection with such fire and accident and other non-marine business:

(c) The accounts of every underwriter shall be audited annually by an accountant approved by the committee of the association, who shall furnish a certificate to the committee of the association and to the Board of Trade in a form prescribed by the Board of Trade:

(d) For the purpose of these requirements "non-marine insurance business" means the business of issuing policies upon subject-matters of insurance other than the following, namely:—

Vessels of any description, including barges and dredgers, cargoes, freights, and other interests which may be legally insured by, in, or in relation to vessels, cargoes, and freights, goods, wares, merchandise, and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit.

(D)—*As respects Employers' Liability Insurance Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. Where the person insured by any policy issued by an underwriter is liable to make a weekly payment to any workman during the incapacity of the workman, and the weekly payment has continued for more than six months, the liability therefor shall before the expiration of twelve months from the commencement of the incapacity be redeemed by the payment of a lump sum in accordance with paragraph (17) of the First Schedule to the Workmen's Compensation Act, 1906, and the underwriter shall pay the lump sum into the County Court, and shall inform the Court that the redemption has been effected in pursuance of the provisions of this schedule.

3. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the employers' liability business effected by him.

4. For the purposes of this schedule "policy" means a policy insuring any employer against liability to pay compensation or damages to workmen in his employment.

(E)—*As respects Bond Investment Business.*

1. Every underwriter shall deposit and keep deposited in such manner as the Board of Trade may direct a sum of two thousand pounds. The Board of Trade may make rules as to the payment, repayment, investment of, and dealing with, a deposit, the payment of interest and dividends from any such investment, and for any other matters in respect of which they may make rules under section 2 (6) of this Act in relation to deposits made by assurance companies. The sum so deposited shall, so long as any liability under any policy issued by the underwriter remains unsatisfied, be available solely to meet claims under such policies.

2. The underwriter shall furnish every year to the Board of Trade a statement in such form as may be prescribed by the Board showing the extent and character of the bond investment business effected by him.

NINTH SCHEDULE.

ENACTMENTS REPEALED. Section 37.

Session and Chapter.	Short Title.	Extent of Repeal.
33 & 34 Vict. c. 61	The Life Assurance Companies Act, 1870....	The whole Act.
34 & 35 Vict. c. 58	The Life Assurance Companies Act, 1871....	The whole Act.
35 & 36 Vict. c. 41	The Life Assurance Companies Act, 1872....	The whole Act.
39 & 40 Vict. c. 22	The Trade Union Act Amendment Act, 1876..	Section seven.
7 Edw. 7, c. 46 ..	The Employers' Liability Insurance Companies Act, 1907.	The whole Act.

GENERAL ORDERS.

3 *May*, 1909.

REDUCTION OF CAPITAL.

PROCEDURE ON APPLICATIONS FOR CONFIRMATION BY THE COURT OF THE REDUCTION OF THE CAPITAL OF COMPANIES UNDER THE COMPANIES (CONSOLIDATION) ACT, 1908.

Preliminary.

Commencement of order.

1. This order shall take effect and come into operation on the 1st day of April, 1909, and shall apply to all proceedings in the High Court of Justice with relation to the confirmation by the Court of the reduction of the capital of companies whether commenced before or after that day, but every such proceeding taken before that day shall have the same validity as it would have had if this order had not been made.

Revocation of former orders.

2. The general orders of the Court of Chancery of the 21st day of March, 1863, and the 2nd day of March, 1869, and the forms thereby prescribed are hereby revoked and annulled provided that such revocation and annulment shall not prejudice or affect anything done or suffered before the date on which this order comes into operation under any order or rule which is hereby revoked and annulled.

Interpretation.

3. In this order—

"The Act" means the Companies (Consolidation) Act, 1908, and sects. 46 to 56 thereof are particularly referred to.

"The Court" includes any judge of the High Court of Justice having for the time being jurisdiction to confirm the reduction of the capital of companies.

"Judge" means any judge of the High Court having for the time being jurisdiction to confirm the reduction of the capital of companies, and includes any registrar, master, or other officer exercising the powers of any such judge.

"The petition" means the petition presented by the company for the confirmation by the Court of the reduction of the capital of the company.

"The company" means the company which presents the petition for reduction of its capital.

Application of rules of Supreme Court.

4. The rules of the Supreme Court for the time being in force, and the general practice of that Court, including the course of procedure and practice in chambers, shall apply as regards all proceedings in relation to the confirmation of any reduction of capital by the Court so far as may be practicable, except if and so far as by the Act or this order otherwise provided. In particular, if and when the Court is for the time being a judge of the Chancery Division, the provisions of Ord. V, rule 9 (A), shall apply to all such proceedings as being business assigned within the meaning of that rule.

Title of petition.

5. The petition and all notices, affidavits and other proceedings under the petition shall be intituled in the matter of the company, and in the matter of "The Companies (Consolidation) Act, 1908."

Summons for directions.

6.—(1.) When the petition has been presented, an application shall, in every case, be made, *ex parte*, by summons in chambers, to the judge, for directions as to the proceedings to be taken preliminary to the hearing of the petition or otherwise with reference thereto.

(2.) Upon the hearing of the summons, or upon any adjourned hearing or hearings thereof, or any subsequent application, the judge may make such order or orders, and give such directions as he may think fit as to all the proceedings to be taken on and with reference to the petition, and more particularly with respect to the following matters, that is to say—

(a) The publication of notice of the presentation of the petition;

(b) In cases within sect. 49 (1) of the Act, the proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction; fixing the date with reference to which the list of such creditors is to be made out, pursuant to that section; and generally fixing a time for and giving directions as to all other necessary or proper steps in the matter of the petition, whether expressly mentioned in any of the rules of this order or not.

(3.) In cases within sect. 49 (4) of the Act, the first insertion in a newspaper of the notice of presentation of the petition and fixing the date with reference to which the list of creditors is to be made out, shall be directed to be made at such time before the date so fixed as the judge shall think fit, not being, unless for special reasons shown to the satisfaction of the judge, less than one calendar month before the date so fixed, and in such cases the first order upon the summons for directions may be in the Form No. 1 in the Schedule hereto, with such variations as the circumstances of the case may require.

Advertisement of petition.

7. Notice of the presentation of the petition shall be published at such times, and in such newspapers as the judge shall direct, and may be in the Form No. 2 in the Schedule hereto, with such variations as the circumstances of the case may require.

Affidavit as to creditors.

8. In cases within sect. 49 (1) of the Act the company shall, within such time as the judge shall direct, file in the central office of the High Court of Justice an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing so far as possible the names and addresses of the creditors of the company as defined by that section at the date fixed as mentioned in Rule 6 (2) (b) of this order, and the amounts due to them respectively, or in the case of any debt payable on a contingency or not ascertained or any claim admissible to proof in a winding-up of the company the value, so far as can be justly estimated of such debt or claim, and leave the said list and an office copy of such affidavit at the chambers of the judge.

Form of affidavit.

9. The person making such affidavit shall state therein his belief that such list is correct, and that there was not at the date so fixed as aforesaid 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, except the debts and claims set forth in such list, and shall state his means of knowledge of the matters deposed to in such affidavit. Such affidavit may be in the Form No. 3 in the schedule hereto, with such variations as the circumstances of the case may require.

Inspection of list of creditors.

10. Copies of such list containing the names and addresses of the creditors, and the total amount due to them (including the value of any debts or claims estimated as aforesaid), but omitting the amounts due to them respectively, or (as the judge shall think fit) complete copies of such list, shall be kept at the registered office of the company and at the offices of their solicitors and London agents (if any) and any person desirous of inspecting the same may at any time during the ordinary hours of business inspect and take extracts from the same on payment of the sum of one shilling.

Notice to creditors.

11. The company shall, within seven days after the filing of such affidavit, or such further or other time as the judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital, and the amount or estimated value of the debt or the contingent debt or claim or both for which such creditor is entered in the said list, and the time (such time to be fixed by the judge) within which, if he claims to be a

creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitor (if any) to the solicitor of the company; and such notice shall be sent through the post in a prepaid letter addressed to each creditor at his last known address or place of abode, and may be in the form or to the effect of the Form No. 4 set forth in the schedule hereto, with such variations as the circumstances of the case may require.

Advertisement as to list of creditors.

12. Notice of the list of creditors shall, after the filing of the affidavit mentioned in Rule 8 of this order, be published at such times, and in such newspapers, as the judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company who are not entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company; and such notice may be in the Form No. 5 set forth in the schedule hereto, with such variations as the circumstances of the case may require.

Affidavit as to result of Rules 11 and 12.

13. The company shall, within such time as the judge shall direct, file in the Central Office of the High Court of Justice an affidavit made by the person to whom the particulars of debts or claims are, by such notices as are mentioned in Rules 11 and 12 of this order, required to be sent in, stating the result of such notices respectively, and verifying a list containing the names and addresses of the persons (if any) who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the company shall join in such affidavit, and shall in such list distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the company, and which (if any) of such debts and claims are wholly, or as to any and what part thereof, disputed by the company. Such affidavit may be in the Form No. 6 in the schedule hereto, with such variations as the circumstances of the case may require; and such list and an office copy of such affidavit shall, within such time as the judge shall direct be left at the chambers of the judge.

Proceedings where claim not admitted.

14. If any debt or claim, the particulars of which are so sent in, shall not be admitted by the company at its full amount, then and in every such case, unless the company are willing to appropriate in such manner as the judge shall direct the full amount of such debt or claim, the company shall, if the judge think fit so to direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the judge for adjudicating upon such debts and claims, and such notice shall be sent in the manner mentioned in Rule 11 of this order, and may be in the Form No. 7 in the schedule hereto, with such variations as the circumstances of the case may require.

Costs of proof.

15. Such creditors as come in to prove their debts or claims in pursuance of any such notice as is mentioned in Rule 14 of this order shall be allowed their costs of proof against the company, and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under an administration judgment.

Certificate as to creditors.

16. The result of the settlement of the list of creditors shall be stated in a certificate by the Master in the case of an application to the Chancery Division or by the Registrar in the case of an application to the judge in companies winding-up, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company are willing to appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by sect. 49 (3) of the Act, and this order, and the debts or claims (if any) the full amount of which is not admitted by the company, nor such as the company are willing to appropriate and the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall show which of the creditors have consented to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by sect. 49 (3) of the Act and the persons to or by whom the same are due or claimed; but it shall not be necessary to show in such certificate the several amounts of the debts or claims

of any persons who have consented to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid.

Evidence of consent of creditor.

17. The consent of any creditor, whether in respect of a debt due or presently due or a debt payable on a contingency or not ascertained or a claim admissible to proof in a winding-up of the company, may be evidenced in any manner which the judge shall think reasonably sufficient having regard both to the amount of his debt or claim and all the circumstances of the case.

Certificate before hearing of petition.

18. In any case within sect. 49 (1) of the Act, the petition shall not be heard until the expiration of at least eight clear days from the filing of such certificate as is mentioned in Rule 16 of this order.

Advertisement of hearing.

19. Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the judge shall direct. Such notices may be in the Form No. 8 in the schedule hereto, with such variations as the circumstances of the case may require.

Who may appear.

20. Any creditor settled on the said list whose debt or claim has not, before the hearing of the petition, been discharged or determined, or been secured in manner provided by sect. 49 (3) of the Act, and who has not before the hearing consented to the proposed reduction of capital, may, if he think fit, upon giving two clear days' notice to the solicitor of the company of his intention so to do, appear at the hearing of the petition and oppose the application.

Costs of appearance.

21. Where a creditor who appears at the hearing under the last preceding rule is a creditor the full amount of whose debt or claim is not admitted by the company, and the validity of such debt or claim has not been inquired into and adjudicated upon under sect. 49 (3) of the Act, the costs of and occasioned by his appearance shall be dealt with as to the Court shall seem just, but in all other cases a creditor appearing under the last preceding rule shall be entitled to the costs of such appearance, unless the Court shall be of opinion that in the circumstances of the particular case his costs ought not to be allowed.

Directions at the hearing.

22. When the petition comes on to be heard the Court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in sect. 49 (3) of the Act, the payment of the debts or claims of any creditors who do not consent to the proposed reduction; and the further hearing of the petition may, if the Court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims.

Order confirming reduction.

23. Where the Court makes an order confirming a reduction, such order shall give directions in what manner, and in what newspapers, and at what times, notice of the registration of the order and of such minute as mentioned in sect. 51 of the Act is to be published; and (unless it shall have dispensed altogether with the addition of the words "and Reduced" or shall then dispense with any further use thereof) shall fix the date until which the words "and Reduced" are to be deemed part of the name of the company as mentioned in sect. 48 of the Act.

FEES.

Solicitors' fees.

24. Solicitors shall be entitled to charge and be allowed for duties performed under the Act in relation to matters dealt with by this order the same fees as they have heretofore been entitled to charge and be allowed for the like duties performed under the Companies Acts, 1862 to 1907, unless the Court or judge shall otherwise specially direct.

Court fees.

25. The same fees of Court shall be paid in relation to proceedings dealt with by this order as have heretofore been paid in relation to like proceedings dealt with by the General Orders of the 21st day of March, 1868, and the 2nd day of March, 1869, and such fees shall be collected by stamps in the like manner as the same have heretofore been collected or in such other manner as may from time to time be directed by the Lords Commissioners of His Majesty's Treasury in pursuance of the powers vested in them by the Public Officers' Fees Act, 1879.

THE SCHEDULE.

Form 1. **No. 1. FORM OF ORDER. [RULE 6 (3).]**

In the High Court of Justice,
Chancery Division.
Mr. Justice
or
Companies Winding-Up,
Mr. Justice .

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

Upon the application of the petitioners by summons dated , and upon hearing the solicitor for the petitioners, and on reading the petition presented to the High Court of Justice, it is ordered, that an inquiry be made what are the debts, claims, and liabilities of or affecting the said company on the day of 19 , and that notice of the presentation of the said petition be inserted in [the newspapers] on the day of , and [other times of insertion], and that a list of the persons who are creditors of the company on the said day of , and an office copy of the affidavit verifying the same be left at the chambers of the judge [or in the case of a petition to the judge in companies winding-up with the registrar] on or before the day of .

Form 2. **No. 2. [*See* RULE 7.]**

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

Notice is hereby given that a petition for confirming a resolution reducing the capital of the above company from £ to £ was on the day of presented to the High Court of Justice, and is now pending; and that the list of creditors of the company is to be made out as for the day of 19 .

C. & D., of ,
[Agents for A. & B., of]
Solicitors to the Company.

Form 3. **No. 3. AFFIDAVIT VERIFYING LIST OF CREDITORS. [RULE 9.]**

(Title of Court as in Form 1.)

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

I, A. B., of , make oath and say as follows:—

1. The paper writing now produced and shown to me, and marked with the letter A, contains a list of the creditors of and persons having claims upon the said company on the day of 19 (the date fixed by the order in this matter dated), together with their respective addresses, and the nature and amount of their respective debts or claims, and such list is, to the best of my knowledge, information, and belief, a true and accurate list of such creditors and persons having claims on the day aforesaid.

2. To the best of my knowledge and belief there was not, at the date aforesaid, any debt, claim, or liability which, if such date were the commencement of the winding-up of the said company, would be admissible in proof against the said company other than and except the debts and claims set forth in the said list. I am enabled to make this statement from facts within my knowledge as the of the said company, and from information derived upon investigation of the affairs and the books, documents, and papers of the said company.

Sworn, &c.

List of Creditors referred to in the last Form.

A.

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

This list of creditors marked A was produced and shown to A. B., and is the same list of creditors as is referred to in his affidavit sworn before me this day of 19 .

X. Y., &c.

Names, Addresses, and Descriptions of the Creditors.	Nature of Debt or Claim.	Amount or estimated Value of Debt or Claim.

No. 4. [*See* RULE 11.] Form 4.

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

To Mr. .

You are requested to take notice that a petition has been presented to the High Court of Justice, to confirm a special resolution of the above company for reducing its capital to £ , and that in the list of persons admitted by the company to have been on the day of creditors of the company, your name is entered as a creditor [*here state the amount of the debt or nature of the claim*].

If you claim to have been on the last-mentioned day a creditor to a larger amount than is stated above, you must on or before the day of send the particulars of your claim and the name and address of your solicitor (if any) to the undersigned at . In default of your so doing the above entry in the list of creditors will in all the proceedings under the above application to reduce the capital of the company be treated as correct.

Dated this day of 19 .

A. B.,
Solicitor for the said company.

No. 5. [*See* RULE 12.] Form 5.

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

Notice is hereby given that a petition has been presented to the High Court of Justice for confirming a resolution of the above company for reducing its capital from £ to £ . A list of the persons admitted to have been creditors of the company on the day of 19 , may be inspected at the offices of the company at , or at the office of , at any time during usual business hours, on payment of the charge of one shilling.

Any person who claims to have been on the last-mentioned day and still to be a creditor of the company, and who is not entered on the said list and claims to be so

entered, must on or before the day of send in his name and address, and the particulars of his claim, and the name and address of his solicitor (if any) to the undersigned at , or in default thereof he will be precluded from objecting to the proposed reduction of capital.

Dated this day of 19 .

A. B.,
Solicitor for the said company.

Form 6.

No. 6. [RULE 13.]

(Title of Court as in Form 1.)

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

We, C. D., &c. [the secretary of the said company], E. F., of, &c. [the solicitor of the said company], and A. B., of, &c. [the managing director of the said company], severally make oath and say as follows:—

[Rule 11.] I, the said C. D., for myself say as follows:—

1. I did, on the day of 19 , in the manner hereinafter mentioned, serve a true copy of the notice now produced and shown to me and marked B, upon each of the respective persons whose names, addresses, and descriptions appear in the first column of the list of creditors, marked A, referred to in the affidavit of filed on the day of 19 .

2. I served the said respective copies of the said notice by putting such copies respectively duly addressed to such persons respectively, according to their respective names and addresses appearing in the said list (being the last known addresses or places of abode of such persons respectively), and with the proper postage stamps affixed thereto as prepaid letters, into the post office receiving house, No. , in Street, in the county of , between the hours of and of the clock, in the noon of the said day of .

And I, the said E. F., for myself say as follows:—

If notice is issued under Rule 12. 3. A true copy of the notice now produced and shown to me, and marked C, has appeared in the of the day of 19 , the of the day of 19 , &c.

[Rule 13.] 4. I have, in the paper writing now produced and shown to me, and marked D, set forth a list of all claims, the particulars of which have been sent in to me pursuant to the said notice B, now produced and shown to me by persons claiming to be creditors of the said company for larger amounts than are stated in the list of creditors, marked A, referred to in the affidavit of , filed on the day of 19 .

If notice is issued under Rule 12. 5. I have, in the paper writing now produced and shown to me, marked E, set forth a list of all claims, the particulars of which have been sent in to me pursuant to the notice referred to in the third paragraph of this affidavit by persons claiming to be creditors of the said company on the day of 19 , not appearing on the said list of creditors marked A, and who claimed to be entered thereon.

And we, C. D. and A. B., for ourselves say as follows:—

[Rule 13.] 6. We have, in the first part of the said paper writing marked D (now produced and shown to us), and also in the first part of the said paper writing, marked E (also produced and shown to us), respectively set forth such of the said debts and claims as are admitted by the said company to be due wholly or in part, and how much is admitted to be due in respect of such of the same debts and claims respectively as are not wholly admitted.

[Rule 13.] 7. We have, in the second part of each of the said paper writings, marked D. and E., set forth such of the said debts and claims as are wholly disputed by the said company.

8. In the said exhibits D. and E. are distinguished such of the debts the full amounts whereof are proposed to be appropriated in such manner as the Judge shall direct.

Sworn, &c.

Exhibit D., referred to in the last Affidavit.

D.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to by persons claiming to be creditors of the said company for larger amounts than are stated in list of creditors made out by the company.

This paper writing, marked D., was produced and shown to C. D., E. F., and A. B. respectively, and is the same as is referred to in their affidavit sworn before me this day of 19 .

X. Y. &c.

FIRST PART.

Debts and Claims wholly or partly admitted by the Company.

Names, Addresses, and Descriptions of Creditors.	Particulars of Debt or Claim.	Amount claimed.	Amount admitted by the Company to be owing to Creditor.	Debts proposed to be appropriated in full, although disputed.

SECOND PART.

Debts and Claims wholly disputed by the Company.

Names, Addresses, and Descriptions of Claimants.	Particulars of Claim.	Amount claimed.	Debts proposed to be appropriated in full although disputed.

Exhibit E., referred to in the last Affidavit.

E.

In the Matter, &c.

List of debts and claims of which the particulars have been sent in to Mr. by persons claiming to be creditors of the company, and to be entered on the list of the creditors made out by the company.

This paper writing marked E. was produced and shown to C. D., E. F., and A. B. respectively, and is the same as is referred to in their affidavit sworn before me this day of 19 .

X. Y. &c.

FIRST PART.

[*Same as in Exhibit D.*]

SECOND PART.

[*Same as in Exhibit D.*]

NOTE.—The names are to be inserted alphabetically.

Form 7.

No. 7. [*See* RULE 14.]

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

To Mr. .

You are hereby required to come in and prove the debt claimed by you against the above company, by filing your affidavit and giving notice thereof to Mr. , the solicitor of the company, on or before the day of next; and you are to attend by your solicitor at the chambers of Mr. Justice , Room No. , Royal Courts of Justice, Strand, in the County of London (or at the chambers of the Registrar at) on the day of , 19 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim, and produce any securities or documents relating to your claim.

In default of your complying with the above directions, you will [be precluded from objecting to the proposed reduction of the capital of the company] *or* [in all proceedings relative to the proposed reduction of the capital of the company be treated as a creditor for such amount only as is set against your name in the list of creditors].

Dated this day of , 19 .

A. B.,
Solicitor for the said Company.

No. 8. [*See* RULE 19.]

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies (Consolidation) Act, 1908."

Notice is hereby given, that a petition presented to the High Court of Justice on the day of , for confirming a resolution reducing the capital of the above company from £ to £ , is directed to be heard before Mr. Justice on the day of , 19 .

C. & D., of ,
[Agents for E. & F., of],
Solicitors for the Company.

3*rd May*, 1909.

THE COMPANIES (WINDING-UP) RULES, 1909.

DATED 29TH MARCH, 1909, MADE PURSUANT TO THE COMPANIES (CONSOLIDATION) ACT, 1908 (8 ED. VII. c. 69), AND THE JUDICATURE ACT, 1881 (44 & 45 VICT. c. 68).

PRELIMINARY.

Application of Rules.

1. Subject to the limitation hereinafter mentioned these Rules shall apply to the proceedings in every winding-up under the Act of a company, which shall commence on and after the date on which these Rules come into operation, and they shall also, so far as practicable, and subject to any general or special order of the Court, apply to all proceedings which shall be taken or instituted after the said date, in the winding-up of a company which commenced on or after the first day of January, 1891. Rules which from their nature and subject-matter are, or which by the head lines above the group in which they are contained or by their terms are made applicable only to the proceedings in a winding-up by the Court, shall not apply to the proceedings in a voluntary winding-up, or winding-up under the supervision of the Court.

Interpretation of terms.

2. In these Rules, unless the context or subject-matter otherwise requires:—

"The Act" means the Companies (Consolidation) Act, 1908.

"The company" means a company which is being wound up, or against which proceedings to have it wound up have been commenced.

"Court" means the Court which has jurisdiction to wind up the company.

"Creditor" includes a corporation, and a firm of creditors in partnership.

"Gazetted" means published in the *London Gazette*.

"Judge" means in the High Court [illegible] who for the time being exercises the jurisdiction of the High [illegible] wind up companies, and in any Court the judge thereof, or [illegible] exercises the powers of the judge thereof.

"Liquidator" includes an official receiver when acting as liquidator.

"Official Receiver" includes any officer appointed by the Board of Trade to discharge the duties of official receiver under the Act.

"Palatine Court" means one of the Chancery Courts of the counties Palatine of Lancaster and Durham.

"Proceedings" means the proceedings in the winding-up of a company under the Act.

"Registrar" means in the High Court any of the registrars in bankruptcy of the High Court, and any person who shall be appointed to fill the office of registrar under these Rules, and where a winding-up of a company is in the district registry of Liverpool or Manchester means the district registrar; and in a County Court, where there are joint registrars means either of such registrars, or a deputy registrar, and in any Court other than the High Court, means the officer of the Court whose duty it is to exercise in relation to a winding-up the functions which in the High Court are exercised by a registrar or master.

"The Rules" means these Rules, and includes the prescribed forms.

"Sealed" means sealed with the seal of the Court.

"Taxing Officer" means the officer of the Court whose duty it is to tax costs in the proceedings of the Court under its ordinary jurisdiction.

Words importing the masculine gender shall include females.

Words in the singular shall include the plural and words in the plural shall include the singular.

The expression "person" shall include any body of persons corporate or unincorporate.

Expressions referring to writing shall include printing, lithography, photography, and other methods of representing or reproducing words in a visible form.

Use of forms in Appendix.

3.—(1.) The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct.

(2.) Provided that the Board of Trade may from time to time alter any forms which relate to matters of an administrative and not of a judicial character, or substitute new forms in lieu thereof. Where the Board of Trade alters any form, or substitutes any new form in lieu of a form prescribed by these Rules, such altered or substituted form shall be published in the *London Gazette*.

COURT AND CHAMBERS.

Office of registrar in High Court.

4.—(1.) All proceedings in the winding-up of companies in the High Court shall from time to time be attached to one or more of the registrars, who shall, together with the necessary clerks and officers, and subject to the Act and Rules, act under the general or special directions of the judge.

(2.) Every other registrar may act for and in place of such registrar as above mentioned in all proceedings under the Acts and Rules, including the holding of public examinations, and when so acting such other registrar shall be deemed to be the registrar for the purposes of the Act and Rules.

(3.) In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act, or by transfer, or otherwise, the registrar shall, in addition to his powers and duties under the Rules, have all the powers and duties of a master, registrar, or taxing master.

Matters in High Court to be heard in Court and Chambers.

5.—(1.) The following matters and applications in the High Court shall be heard before the judge in open Court:—

(a) Petitions.
(b) Appeals to the High Court from the Board of Trade and from the official receiver when acting as official receiver and not as liquidator.
(c) Applications under section 223 of the Act.
(d) Applications by the Board of Trade under section 224 of the Act.
(e) Applications for the committal of any person to prison for contempt.
(f) Such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open Court.

(2.) Examinations of persons summoned before the High Court under section 174 of the Act, shall be held in Court or in Chambers as the Court shall direct.

(3.) Every other matter or application in the High Court under the Act to which the Rules apply may be heard and determined in Chambers.

Proceedings in Courts other than High Court.

6.—(1.) In Courts other than the High Court the following matters and applications to the Court shall be heard in open Court:—

(a) Petitions.
(b) Public examinations.
(c) Applications under sub-section 1 of section 217 of the Act.
(d) Applications to rectify the register.
(e) Appeals from the official receiver and Board of Trade.
(f) Appeals from any decision or act of the liquidator.
(g) Applications relating to the admission or rejection of proofs.
(h) Proceedings under section 215 of the Act.
(i) Applications under section 223 of the Act.
(j) Applications for the committal of any person to prison for contempt.
(k) Such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open Court.

(2.) Any other matter or application may be heard and determined in Chambers.

Applications in Chambers.

7. Subject to the provisions of the Act and Rules in every Court:—

(1.) The registrar may under the general or special directions of the judge hear and determine any application or matter which under the Act and Rules may be heard and determined in Chambers.

(2.) Any matter or application before the registrar may at any time be adjourned by him to be heard before the judge either in Chambers or in Court.

(3.) Any matter or application may, if the judge or as the case may be, the registrar, thinks fit be adjourned from Chambers to Court, or from Court to Chambers.

Motions and summonses. Form 3.

8.—(1.) Every application in Court other than a petition, shall be made by motion, notice of which shall be served on every person against whom an order is sought, not less than two clear days before the day named in the notice for hearing the motion, which day must be one of the days appointed for the sittings of the Court.

(2.) Every application in Chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.

Place of sitting of County Court.

9. Subject to the orders of the Lord Chancellor the place of sitting of each County Court having jurisdiction under the Act shall for the purposes of such jurisdiction, be the town and place in which the Court holds its sittings for the general business of the Court, under the County Courts Acts.

Times for holding Courts other than the High Court.

10. Subject to the provisions of the Act, the times of the sitting of each Court, other than the High Court in matters of the winding-up of companies shall be those which are appointed for the transaction of the general business of the Court, unless the judge of any such Court shall otherwise order.

PROCEEDINGS.

Title of proceedings. Forms 1 and 2

11.—(1.) Every proceeding in a winding-up matter shall be dated, and shall with any necessary additions, be intituled as follows:—

IN THE COURT
COMPANIES (WINDING-UP)
In the Matter of the Companies (Consolidation) Act, 1908.

with the name of the matter to which it relates. Numbers and dates may be denoted by figures.

(2.) The first proceeding in every winding-up matter shall have a distinctive number assigned to it in the office of the registrar, and all proceedings in any matter subsequent to the first proceeding shall bear the same number as the first proceeding.

Written or printed proceedings.

12. All proceedings shall be written or printed, or partly written or partly printed on paper of the size of 13 in. in length and 8 in. in breadth, or thereabouts, and must have a stitching margin; but no objection shall be allowed to any proof or affidavit on account only of its being written or printed on paper of other size.

Process to be sealed.

13. All orders, summonses, petitions, warrants, process of any kind (including notices when issued by the Court) and office copies in any winding-up matter shall be sealed.

Issue of summonses.

14. Every summons in a winding-up matter in the High Court shall be prepared by the applicant or his solicitor, and issued from the office of the registrar. A summons, when sealed, shall be deemed to be issued. The person obtaining the summons shall leave in the registrar's office a duplicate which shall be stamped with the prescribed stamp and filed.

Orders.

15. Every order, whether made in Court or in Chambers in the winding-up of a company shall be drawn up by the registrar, unless in any proceeding, or classes of proceedings, the judge or registrar who makes the order shall direct that no order need be drawn up. Where a direction is given that no order need be drawn up, the note or memorandum of the order, signed or initialled by the judge or the registrar making the order, shall be sufficient evidence of the order having been made.

File of proceedings in office of registrar (High Court).

16. All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs, and other proceedings in the High Court in a winding-up matter shall be kept and remain of record in the office of the registrar and, subject to the directions of the Court, shall be placed in one continuous file, and no proceeding in any winding-up matter shall be filed in the Central Office.

File of proceedings in Courts other than High Court.

17. In Courts other than the High Court a file of proceedings in every winding-up matter shall be kept on which, subject to the directions of the Court, all petitions, affidavits, summonses, orders, proofs, notices, depositions, and other proceedings in the matter shall be placed and remain of record as far as possible in continuous order.

Office copies.

18. In every Court all office copies of petitions, affidavits, depositions, papers and writings, or any parts thereof, required by the official receiver or any liquidator,

contributory, creditor, officer of a company, or other person entitled thereto, shall be provided by the registrar, and shall, except as to figures, be fairly written out at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken.

Inspection of file.

19. Every person who has been a director or officer of a company which is being wound up, and every duly authorised officer of the Board of Trade, shall be entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, shall be entitled on payment of a fee of one shilling for each hour or part of an hour occupied, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or to be furnished with such copies or extracts at a rate not exceeding fourpence per folio of seventy-two words.

Use of file by Board of Trade and official receiver.

20. Where, in the exercise of their functions under the Act or Rules, the Board of Trade or the official receiver requires to inspect or use the file of proceedings the registrar shall (unless the file is at the time required for use in Court or by him) on request, transmit the file of proceedings to the Board of Trade or official receiver, as the case may be.

Defacement of stamps.

21. Every officer of a Court who shall receive any document to which an adhesive stamp shall be affixed, shall immediately upon receipt of the document deface the stamp thereon, in the High Court in such manner as the Commissioners of Inland Revenue may from time to time direct, and in any other Court by writing partly on the stamp and partly on the document the name of the matter, or in such other manner as the Commissioners of Inland Revenue may from time to time direct, and no such document shall be filed or delivered until the stamp thereon shall have been defaced in manner aforesaid; and it shall be the duty of the party presenting or receiving such document to see that the defacement hereby prescribed has been duly made.

SERVICE AND EXECUTION OF PROCESS AND ENFORCEMENT OF ORDERS.

Duties of bailiff in County Court.

22.—(1.) It shall be the duty of the high bailiff of a County Court to serve such orders, summonses, petitions and notices as the Court may require him to serve; to execute warrants and other process; to attend any sittings of the Court (but not sittings in Chambers); and to do and perform all such things as may be required of him by the Court.

(2.) But this rule shall not be construed to require any order, summons, petition, or notice to be served by a bailiff or officer of the Court which is not specially by the Act or Rules required to be so served, unless the Court in any particular proceeding by order specially so directs.

Service.

23.—(1.) All notices, summonses, and other documents other than those of which personal service is required, may be sent by prepaid post letter to the last known address of the person to be served therewith; and the notice, summons, or document shall be considered as served at the time that the same ought to be delivered in the due course of post by the post office, and notwithstanding the same may be returned by the post office.

(2.) No service shall be deemed invalid by reason that the name, or any of the names other than the surname of the person to be served, has been omitted from the document containing the person's name, provided that the Court is satisfied that in other respects the service of the document has been sufficient.

Enforcement of orders.

24.—(1.) Every order of a Court having jurisdiction to wind up a company, made in the exercise of the powers conferred by the Acts and Rules, may be enforced by such Court as if it were a judgment or order of the Court made in the exercise of its ordinary jurisdiction.

(2.) Every such order of a County Court, and every process issued therein may be enforced, executed and dealt with not only by such Court, but by any County Court, whether such County Court has or has not jurisdiction to wind up a company, as if such order or process were made or issued for the enforcement of a judgment or order made by such last-mentioned Court in the exercise of its ordinary jurisdiction.

PETITION.

Form of petition.
Forms 4 and 5.

25. Every petition for the winding-up of a company by the Court, or subject to the supervision of the Court, shall be in the Forms Nos. 4 and 5 in the Appendix, with such variations as circumstances may require.

Presentation of petition.

26. A petition shall be presented at the office or chambers of the registrar, who shall appoint the time and place at which the petition is to be heard. Notice of the time and place appointed for hearing the petition shall be written on the petition and sealed copies thereof, and the registrar may at any time before the petition has been advertised, alter the time appointed, and fix another time.

Advertisement of petition.

27. Every petition shall be advertised seven clear days before the hearing, as follows:—

Form 6.

(1.) In the case of a company whose registered office, or if there shall be no such office, then whose principal or last known principal place of business is or was situate within ten miles of the principal entrance of the Royal Courts of Justice, once in the *London Gazette*, and once at least in one London daily morning newspaper, or in such other newspaper as the Court directs.

(2.) In the case of any other company, once in the *London Gazette*, and once at least in one local newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the Court.

(3.) The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any), and shall contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitors or London agent, within the time and manner prescribed by Rule 33, and an advertisement of a petition for the winding-up of a company by the Court which does not contain such a note shall be deemed irregular.

And if the petitioner or his solicitor does not within the time hereby prescribed or within such extended time as the registrar may allow duly advertise the petition in the manner prescribed by the said Rule the appointment of the time and place at which the petition is to be heard shall be cancelled by the registrar and the petition shall be removed from the file in the Companies (Winding-up) Office unless the judge or the registrar shall otherwise direct.

Service of petition.

Forms 7 and 8.

28. Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member or members of the company as the Court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding-up the affairs of the company.

Verification of petition.

Form 9.

29. Every petition for the winding-up of a company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *primâ facie* evidence of the statements in the petition.

Copy of petition to be furnished to creditor or contributory.

30. Every contributory or creditor of the company shall be entitled to be furnished, by the solicitor of the petitioner, with a copy of the petition, within 24 hours after requiring same, on paying the rate of 4*d.* per folio of 72 words for such copy.

OFFICIAL RECEIVER AS PROVISIONAL LIQUIDATOR.

Appointment of provisional liquidator.

31.—(1.) After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient grounds for the appointment of the official receiver as provisional liquidator, the Court, if it thinks fit, and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment.

Form 10.

(2.) The order appointing the official receiver to be provisional liquidator shall bear the number of the petition, and shall state the nature and a short description of the property of which the official receiver is ordered to take possession, and the duties to be performed by the official receiver.

(3.) Subject to any order of the Court, if no order for the winding-up of the company is made upon the petition, or if an order for the winding-up of the

company on the petition is rescinded, or if all proceedings on the petition are stayed, or if an order is made continuing the voluntary winding-up of the company subject to the supervision of the Court, the official receiver as provisional liquidator shall be entitled to be paid, out of the property of the company, all the costs, charges, and expenses properly incurred by him as provisional liquidator, including the fees payable to the Board of Trade under the scale of fees in force for the time being, and may retain out of such property the amounts of such costs, charges, expenses, and fees.

HEARING OF PETITIONS AND ORDERS MADE THEREON.

Attendance before hearing to show compliance with rules.

32. After a petition has been presented, the petitioner, or his solicitor, shall, on a day to be appointed by the registrar, attend before the registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein, and the affidavit of service (if any) have been duly filed, and that the provisions of the rules as to petitions for winding-up companies have been duly complied with by the petitioner. No order for the winding-up of a company shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the registrar at the time appointed, and satisfied him in manner required by this rule.

Notice by persons who intend to appear.

Form 11.

33. Every person who intends to appear on the hearing of a petition shall serve on, or send by post to, the petitioner, or his solicitor or London agent, at the address stated in the advertisement of the petition, notice of his intention. The notice shall contain the address of such person and shall be signed by him or by his solicitor or London agent, and shall be served, or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than six o'clock in the afternoon of the day previous to the day appointed for the hearing of the petition. The notice may be in Form 11 with such variations as circumstances may require. A person who has failed to comply with this rule shall not, without the special leave of the Court, be allowed to appear on the hearing of the petition.

List of names and addresses of persons who appear on the petition.

Form 12.

34. The petitioner, or his solicitor or London agent, shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear on the hearing of the petition, and of their respective solicitors, which shall be in Form 12. On the day appointed for hearing the petition a fair copy of the list (or if no notice of intention to appear has been given a statement in writing to that effect) shall be handed by the petitioner, or his solicitor or London agent, to the Court prior to the hearing of the petition.

Affidavits in opposition and reply.

35.—(1.) Affidavits in opposition to a petition that a company may be wound up under the order or subject to the supervision of the Court shall be filed within seven days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every affidavit in opposition to such a petition shall be given to the petitioner or the solicitor or London agent of the petitioner, on the day on which the affidavit is filed.

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

Substitution of creditor or contributory for withdrawing petitioner.

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

ORDER TO WIND UP A COMPANY.

Notice that winding-up order has been pronounced to be given to official receiver.

Forms 13 and 14.

37. When an order for the winding-up of a company, or for the appointment of the official receiver as provisional liquidator prior to the making of an order for the winding-up of the company, has been pronounced in Court, the registrar shall, on the same day, send to the official receiver a notice informing him that the order has been pronounced.

The notice may be in Forms 13 and 14 respectively, with such variations as circumstances may require.

Documents for drawing up order to be left with registrar.

38. It shall be the duty of the petitioner, or his solicitor or London agent, and of all other persons who have appeared on the hearing of the petition, at latest on the day following the day on which an order for the winding-up of a company is

pronounced in Court, to leave at the registrar's office all the documents required for the purpose of enabling the registrar to complete the order forthwith.

No appointment for settling order.

39. It shall not be necessary for the registrar to make an appointment to settle the order, unless in any particular case the special circumstances make an appointment necessary.

Contents of winding-up order.

Form 15.

40. An order to wind up a company shall contain at the foot thereof a notice stating that it will be the duty of the person who is at the time secretary or chief officer of the company, and of such of the persons who are liable to make out or concur in making out the company's statement of affairs as the official receiver may require, to attend on the official receiver forthwith or the service of the order at the place mentioned therein.

Transmission and advertisement of winding-up order.

41.—(1.) When an order that a company be wound up, or for the appointment of the official receiver as provisional liquidator has been made:—

(a) Three copies of the order sealed with the seal of the Court shall forthwith be sent by post or otherwise by the registrar to the official receiver.

(b) The official receiver shall cause a sealed copy of the order to be served upon the secretary or other chief officer of the company at the registered office of the company (if any), or upon such other person or persons, or in such other manner as the Court may direct, and if the order is that the company be wound up by the Court, shall forward to the Registrar of Companies the copy of the order which by section 113 of the Act is directed to be so forwarded by the company.

(c) The official receiver shall forthwith give notice of the order to the Board of Trade, who shall forthwith cause the notice to be gazetted.

(d) The official receiver shall forthwith send notice of the order to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select. Form 17.

(2.) An order for the winding-up of a company, subject to the supervision of the Court, shall before the expiration of twelve days from the date thereof be advertised by the petitioner, once in the *London Gazette*, and shall be served on such persons (if any) and in such manner as the Court shall direct. Form 16.

TRANSFERS OF ACTIONS AND PROCEEDINGS.

Transfer of actions.

42.—(1.) Where an order has been made in the High Court for the winding-up of a company the judge shall have power, without further consent, to order the transfer to him of any action, cause or matter pending in any other Court or Division brought or continued by or against the company, and any action or proceeding by a mortgagee or debenture holder of the company against the company for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the company's assets or property which is pending in the High Court or before any judge thereof, shall without further order be transferred to the judge of the High Court. In the case of applications in Chambers in actions so transferred where the practice in winding-up is different from the practice in the Chancery Division the practice in winding-up shall prevail.

(2.) Where any action brought by or against a company against which a winding-up order has been made is transferred to the judge of the High Court, the registrar may, under the general or special directions of the judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in Chambers. These provisions shall apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the Chamber proceedings are directed to be dealt with by the registrar.

Transfer of proceedings by judge of High Court.

Form 18.

43. The judge of the High Court may at any time, for good cause shown, order the proceedings in any Court other than the High Court to be transferred to the High Court, or any proceedings in the High Court to be transferred from the High Court to any other Court.

Transfer of proceedings by judge of Court other than High Court or Palatine Court.

Form 18.

44. The judge of any Court, other than the High Court or a Palatine Court, may at any time, for good cause shown, order any proceedings which have been commenced or are pending in his Court to be transferred to any Court which has jurisdiction to order the winding-up of a company, not being the High Court or a Palatine Court.

Notice of application to official receiver.

45. In a winding-up by the Court, notice of an application for a transfer of proceedings shall before the hearing thereof, be served by the applicant on the official receiver of the Court in which the proceedings are pending and on the official receiver of the Court to which the proceedings are sought to be transferred.

Procedure where proceedings transferred. Form 19.

46. When an order for the transfer of proceedings has been made:—

(1.) The person on whose application the transfer has been made shall lodge with the registrar of the Court to which the proceedings are transferred a sealed copy of the order of transfer.

(2.) In a winding-up by the Court the official receiver of the Court to which the proceedings are transferred shall become the official receiver in the proceedings.

(3.) The records of the proceedings shall be transmitted to the registrar of the Court to which the proceedings are transferred, and in a winding-up by the Court such registrar, as soon as he has received the records, shall give notice of the transfer to the official receiver of his Court, who shall give notice of the transfer to the Board of Trade.

(4.) proceedings shall receive a new distinctive number.

Transfer of jurisdiction of County Court.

47. Whenever the Lord Chancellor, by order under his hand, shall exclude any County Court from having jurisdiction under the Act, or shall attach the district or any part of the district of a County Court to the High Court, or any other County Court, or shall detach the district or any part of the district of any County Court from the district and jurisdiction of the High Court, any winding-up matters pending in the Court or district to which the order relates shall become transferred to such Court as shall be mentioned for the purpose in the order; and, thereupon, the rules as to transfer of proceedings shall apply to the transfer of such pending proceedings in all respects as if the proceedings had been transferred by order of a Court having power to transfer proceedings.

SPECIAL MANAGER.

Appointment of special manager.

48.—(1.) An application by the official receiver for the appointment of a special manager shall be supported by a report of the official receiver, which shall be placed on the file of proceedings, and in which shall be stated the amount of remuneration which, in the opinion of the official receiver, ought to be allowed to the special manager. No affidavit by the official receiver in support of the application shall be required.

(2.) The remuneration of the special manager shall, unless the Court otherwise in any special case directs, be stated in the order appointing him, but the Court may at any subsequent time for good cause shewn make an order for payment to the special manager of further remuneration.

(3.) A copy of the order appointing a special manager shall be transmitted to the Board of Trade by the official receiver.

Accounting by special manager. Form 20.

49. Every special manager shall account to the official receiver, and the special manager's accounts shall be verified by affidavit, and, when approved by the official receiver, the totals of the receipts and payments shall be added by the official receiver to his accounts.

STATEMENT OF AFFAIRS.

Preparation of statement of affairs. Form 26.

50.—(1.) Every person who under section 147 of the Act has been required by the official receiver to submit and verify a statement as to the affairs of the company, shall be furnished by the official receiver with forms and instructions for the preparation of the statement. The statement shall be made out in duplicate, one copy of which shall be verified by affidavit. The official receiver shall cause to be filed with the registrar the verified statement of affairs.

(2.) The official receiver may from time to time hold personal interviews with every such person for the purpose of investigating the company's affairs, and it shall be the duty of every such person to attend on the official receiver at such time and place as the official receiver may appoint and give the official receiver all information that he may require.

Extension of time for submitting statement of affairs.

51. When any person requires any extension of time for submitting the statement of affairs, he shall apply to the official receiver, who may, if he thinks fit, give a written certificate extending the time, which certificate shall be filed with the proceedings in the winding-up and shall render an application to the Court unnecessary.

Information subsequent to statement of affairs.

52. After the statement of affairs of a company has been submitted to the official receiver it shall be the duty of each person who has made or concurred in making it, if and when required, to attend on the official receiver and answer all such questions as may be put to him, and give all such further information as may be required of him by the official receiver in relation to the statement of affairs.

Default.

53. Any default in complying with the requirements of section 147 of the Act may be reported by the official receiver to the Court.

Expenses of statement of affairs.

54. A person who is required to make or concur in making any statement of affairs of a company shall, before incurring any costs or expenses in and about the preparation and making of the statement, apply to the official receiver for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur; and except by order of the Court no person shall be allowed out of the assets of the company any costs or expenses which have not before being incurred been sanctioned by the official receiver.

APPOINTMENT OF LIQUIDATOR IN A WINDING-UP BY THE COURT.

Appointment of liquidator on report of meetings of creditors and contributories.

Form 27.

55.—(1.) As soon as possible after the first meetings of creditors and contributories have been held the official receiver, or the chairman of the meeting, as the case may be, shall report the result of each meeting to the Court.

(2.) Upon the result of the meetings of creditors and contributories being reported to the Court, the Court may, if the meeting of creditors and the meeting of contributories have each passed the same resolutions, or if the resolutions passed at the two meetings are identical in effect, upon the application of the official receiver, forthwith make the appointments necessary for giving effect to such resolutions. In any other case the Court shall, on the application of the official receiver, fix a time and place for considering the resolutions and determinations (if any) of the meetings, deciding differences (if any), and making such order as shall be necessary.

(3.) When a time and place have been fixed for the consideration of the resolutions and determinations of the meetings, such time and place shall be advertised by the official receiver in such manner as the Court shall direct, but so that the first or only advertisement shall be published not less than seven days before the time so fixed.

(4.) Upon the consideration of the resolutions and determinations of the meetings the Court shall hear the official receiver and any creditor or contributory.

Forms 28 and 103 7).

(5.) If a liquidator is appointed a copy of the order appointing him shall be transmitted to the Board of Trade by the official receiver, and the Board of Trade shall, as soon as the liquidator has given security, cause notice of the appointment to be gazetted. The expense of gazetting the notice of the appointment shall be paid by the liquidator, but may be charged by him on the assets of the company.

Form 30.

(6.) Every appointment of a liquidator or committee of inspection shall be advertised by the liquidator in such manner as the Court directs immediately after the appointment has been made, and the liquidator has given the required security.

(7.) If a liquidator in a winding-up by the Court shall die, or resign, or be removed, another liquidator may be appointed in his place in the same manner as in the case of a first appointment, and the official receiver shall, on the request of not less than one-tenth in value of the creditors or contributories summon meetings for the purpose of determining whether or not the vacancy shall be filled; but none of the provisions of this rule shall apply where the liquidator is released under section 157 of the Act in which case the official receiver shall remain liquidator.

Style of official receiver when he is liquidator.

56. When the official receiver is liquidator of a company he shall be styled "official receiver and liquidator."

SECURITY BY LIQUIDATOR OR SPECIAL MANAGER IN A WINDING-UP BY THE COURT.

Standing security to Board of Trade.

57. In the case of a special manager or a liquidator other than the official receiver, the following provisions as to security shall have effect, namely:—

(1.) The security shall be given to such officers or persons and in such manner as the Board of Trade may from time to time direct.

(2.) It shall not be necessary that security shall be given in each separate winding-up; but security may be given either specially in a particular winding-up, or generally, to be available for any winding-up in which the person giving security may be appointed, either as liquidator or special manager.

(3.) The Board of Trade shall fix the amount and nature of such security, and may from time to time, as they think fit, either increase or diminish the amount of special or general security which any person has given.

Form 29.

(4.) The certificate of the Board of Trade that a liquidator or special manager has given security to their satisfaction shall be filed with the registrar.

(5.) The cost of furnishing the required security by a liquidator or special manager, including any premiums which he may pay to a guarantee society, shall be borne by him personally, and shall not be charged against the assets of the company as an expense incurred in the winding-up.

Failure to give or keep up security.

58.—(1.) If a liquidator or special manager fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the official receiver shall report such failure to the Court, who may thereupon rescind the order appointing the liquidator or special manager.

(2.) If a liquidator or special manager fails to keep up his security, the official receiver shall report such failure to the Court, who may thereupon remove the liquidator or special manager, and make such order as to costs as the Court shall think fit.

(3.) Where an order is made under this rule rescinding an order for the appointment of or removing a liquidator, the Court may direct that another liquidator is to be appointed, and thereupon the same meetings shall be summoned and the same proceedings may be taken as in the case of a first appointment of a liquidator.

PUBLIC EXAMINATION.

Report of official receiver to be filed.

59. A report made by the official receiver pursuant to section 148 of the Act shall state, in a narrative form, the facts and matters which the official receiver desires to bring to the notice of the Court, and his opinion as required by the said section.

Appointment of time for consideration of report.

60. The official receiver may apply to the Court to fix a day for the consideration of the report, and on such application the Court shall appoint a day on which the report shall be considered.

Consideration of report.

61. The consideration of the report shall be before the judge of the Court personally in Chambers, and the official receiver shall personally, or by counsel or solicitor, attend the consideration of the report, and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require.

Procedure consequent on order for public examination.

Form 31.

62. Where the judge makes an order under section 175 of the Act, directing any person or persons to attend for public examination:—

(a) The examination shall be held before the judge. Provided that in the High Court the judge may direct that the whole or any part of the examination of any such person or persons be held before the registrar, or before any of the persons mentioned in sub-section 9 of the said section.

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

(c) Where on an examination held before the registrar, or one of the persons mentioned in sub-section 9 of the said section, he is of opinion that such examination is being unduly or unnecessarily protracted, or for any other sufficient cause, he may adjourn the examination of any person, or any part of the examination, to be held before the judge.

Application for day for holding examination.

63. Upon an order directing a person to attend for public examination being made, the official receiver shall apply for the appointment of a day on which the public examination is to be held.

Appointment of time and place for public examination.

Forms 32 and 33.

64. A day and place shall be appointed for holding the public examination, and notice of the day and place so appointed shall be given by the official receiver to the person who is to be examined by sending such notice in a registered letter addressed to his usual or last known address.

Notice of public examination to creditors and contributories

65.—(1.) The official receiver shall give notice of the time and place appointed for holding a public examination to the creditors and contributories by advertisement in such newspapers as the Board of Trade from time to time direct, or in default of any such direction as the official receiver thinks fit, and shall also forward notice of the appointment to the Board of Trade to be gazetted.

(2.) Where an adjournment of the public examination has been directed, notice of the adjournment shall not, unless otherwise directed by the Court, be advertised in any newspaper, but it shall be sufficient to publish in the *Gazette* a notice of the time and place fixed for the adjourned examination.

Default in attending. Form 40

66.—(1.) If any person who has been directed by the Court to attend for public examination fails to attend at the time and place appointed for holding or proceeding with the same, and no good cause is shown by him for such failure, or if before the day appointed for the examination the official receiver satisfies the Court that such person has absconded, or that there is reason for believing that he is about to abscond with the view of avoiding examination, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that notice of the order and of the time and place appointed for attendance at the public examination was duly served, without any further notice, to issue a warrant for the arrest of the person required to attend, or to make such other order as the Court shall think just.

Warrants of arrest

(2.) A warrant of arrest issued by the High Court under this rule shall be issued in the Central Office of the Supreme Court pursuant to an order of the Court directing such issue.

Notes of examination to be filed.

Forms 36 and 37

67. The notes of every public examination shall, after being signed as required by section 175 (7) of the Act, be filed with the registrar.

PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS.

Application against delinquent directors, officers, and promoters

68.—(1.) An application under section 215 of the Act shall in any Court other than the High Court be made by motion to the Court. In the High Court the application shall be made by a summons returnable in the first instance in Chambers, in which summons shall be stated the nature of the declaration or order for which application is made, and the grounds of the application, and which summons, unless otherwise ordered by the Court, shall be served in the manner in which an originating summons is required by the Rules of the Supreme Court to be served on every person against whom an order is sought, not less than eight days before the day named in the summons for hearing the application. Where the application is made by the official receiver or liquidator he may make a report to the Court stating any facts and information on which he proceeds which are verified by affidavit, or derived from sworn evidence in the proceedings. Where the application is made by any other person it shall be supported by affidavit to be filed by him.

(2.) On the return of the summons the Court may give such directions as it shall think fit for the hearing of the summons before the judge in Court, the taking of evidence wholly or in part by affidavit or orally, and the cross-examination either before the judge on the hearing in Court or in Chambers of any deponents to affidavits in support of or in opposition to the application.

Notice of application.

69. Where the application is made by motion, notice of the intended motion shall be served on every person against whom an order is sought, not less than eight days before the day named in the notice for hearing the motion. A copy of every report and affidavit intended to be used in support of the motion shall be served on every person to whom notice of motion is given not less than four days before the hearing of the motion.

Use of depositions taken at public examinations.

70. Where in the course of the proceedings in a winding-up by the Court an order has been made for the public examination of persons named in the order pursuant to section 175 of the Act, and it appears from the examination that the persons examined, or some of them, have misapplied, or retained, or become liable, or accountable for moneys or property of the company, or been guilty of misfeasance or breach of trust in relation to the company, then in any proceedings subsequently instituted under section 215 of the Act, for the purpose of examining into the conduct of the said persons, or any of them, and compelling repayment or restoration to the company of any moneys or property, or contribution by way of compensation

to the assets of the company by such persons or any of them, the verified notes of the examination of each person who was examined under the order shall, subject as hereinafter mentioned, and to any order or directions of the Court as to the manner and extent in and to which the notes shall be used, and subject to all just exceptions to the admissibility in evidence against any particular person or persons of any of the statements contained in the notes of the examinations, be admissible in evidence against any of the persons against whom the application is made who, under section 175 of the Act, and the order for the public examination, was or had the opportunity of being present at and taking part in the examination. Provided that before any such notes of a public examination shall be used on any such application, the person intending to use the same shall, not less than fifteen days before the day appointed for hearing the application, give notice of such intention to each person against whom it is intended to use such notes, or any of them, specifying the notes or parts of the notes which it is intended to read against him, and furnish him with copies of such notes, or parts of notes (except notes of the person's own depositions), and provided also that every person against whom the application is made shall be at liberty to cross-examine or re-examine (as the case may be) any person the notes of whose examination are read, in all respects as if such person had made an affidavit on the application.

WITNESSES AND DEPOSITIONS.

Shorthand notes.
Forms 34 and 35.

71. If the Court or the officer of the Court before whom any examination under the Act and Rules is directed to be held shall in any case, and at any stage of the proceedings, be of opinion that it would be desirable that a person (other than the person before whom an examination is taken) should be appointed to take down the evidence of any person examined in shorthand or otherwise, it shall be competent for the Court or officer aforesaid to make such appointment. The person at whose instance the examination is taken shall nominate a person for the purpose, and the person so nominated shall be appointed, unless the Court or officer holding the examination shall otherwise order. Every person so appointed shall be paid a sum not exceeding one guinea a day, and a sum not exceeding 8*d.* per folio of 90 words for any transcript of the evidence that may be required, and such sums shall be paid by the party at whose instance the appointment was made, or out of the assets of the company as may be directed by the Court.

Committal of contumacious witness.
Form 38.

72.—(1.) If a person examined before a registrar or other officer of the Court who has no power to commit for contempt of Court, refuses to answer to the satisfaction of the registrar or officer any question which he may allow to be put, the registrar or officer shall report such refusal to the judge, and upon such report being made the person in default shall be in the same position, and be dealt with in the same manner as if he had made default in answering before the judge.

(2.) The report shall be in writing, but without affidavit and shall set forth the question put, and the answer (if any) given by the person examined.

(3.) The registrar or other officer shall, before the conclusion of the examination at which the default in answering is made, name the time when and the place where the default will be reported to the judge, and upon receiving the report the judge may take such action thereon as he shall think fit. If the judge is sitting at the time when the default in answering is made, such default may be reported immediately.

Depositions at private examinations.

73.—(1.) The official receiver may attend in person, or by an assistant official receiver, any examination of a witness under section 174 of the Act, on whosesoever application the same has been ordered, and may take notes of the examination for his own use, and put such questions to the persons examined as the Court may allow.

(2.) The notes of the depositions of a person examined under section 174 of the Act, or under any order of the Court before the Court, or before any officer of the Court, or person appointed to take such an examination (other than the notes of the depositions of a person examined at a public examination under section 175 of the Act), shall not be filed, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the Court shall so direct, and the Court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom.

ARRANGEMENTS WITH CREDITORS AND CONTRIBUTORIES IN A WINDING-UP BY THE COURT.

Report by official receiver on arrangements and compromises.

74. In a winding-up by the Court if application is made to the Court to sanction any compromise or arrangement the Court may, before giving its sanction thereto, hear a report by the official receiver as to the terms of the scheme, and as to the conduct of the directors and other officers of the company, and as to any other matters which, in the opinion of the official receiver or the Board of Trade, ought to be brought to the attention of the Court. The report shall not be placed upon the file, unless and until the Court shall direct it to be filed.

COLLECTION AND DISTRIBUTION OF ASSETS IN A WINDING-UP BY THE COURT.

Collection and distribution of company's assets by liquidator.

75.—(1.) The duties imposed on the Court by section 163 (1) of the Act, in a winding-up by the Court with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the liquidator as an officer of the Court subject to the control of the Court.

(2.) For the purpose of the discharge by the liquidator of the duties imposed by section 163 (1) of the Act, and Sub-Rule 1 of this Rule, the liquidator in a winding-up by the Court shall for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly.

Power of liquidator to require delivery of property.

76. The powers conferred on the Court by section 164 of the Act shall be exercised by the liquidator. Any contributory for the time being on the list of contributories, trustee, receiver, banker or agent or officer of a company which is being wound up under order of the Court shall, on notice from the liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender or transfer to or into the hands of the liquidator any sum of money or balance, books, papers, estate or effects which happen to be in his hands for the time being and to which the company is *primâ facie* entitled.

LIST OF CONTRIBUTORIES IN A WINDING-UP BY THE COURT.

Liquidator to settle list of contributories. Form 42.

77. The liquidator shall with all convenient speed after his appointment settle a list of contributories of the company, and shall appoint a time and place for that purpose. The list of contributories shall contain a statement of the address of, and the number of shares or extent of interest to be attributed to each contributory, and shall distinguish the several classes of contributories. As regards representative contributories the liquidator shall so far as practicable observe the requirements of section 163 (2) of the Act.

Appointment of time and place for settlement of list. Forms 43 and 44.

78. The liquidator shall give notice in writing of the time and place appointed for the settlement of the list of contributories to every person whom he proposes to include in the list, and shall state in the notice to each person in what character and for what number of shares or interest he proposes to include such person in the list.

Settlement of list of contributories. Form 45.

79. On the day appointed for settlement of the list of contributories the liquidator shall hear any person who objects to being settled as a contributory, and after such hearing shall finally settle the list, which when so settled shall be the list of contributories of the company.

Notice to contributories. Form 46.

80. The liquidator shall forthwith give notice to every person whom he has finally placed on the list of contributories stating in what character and for what number of shares or interest he has been placed on the list, and in the notice inform such person that any application for the removal of his name from the list, or for a variation of the list, must be made to the Court by summons within 21 days from the date of the service on the contributory or alleged contributory of notice of the fact that his name is settled on the list of contributories.

Application to the Court to vary the list. Form 49.

81.—(1.) Subject to the power of the Court to extend the time or to allow an application to be made notwithstanding the expiration of the time limited for that purpose, no application to the Court by any person who objects to the list of contributories as finally settled by the liquidator shall be entertained after the expiration

of 21 days from the date of the service on such person of notice of the settlement of the list.

(2.) The official receiver shall not in any case be personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories of a company.

Variation of or addition to list of contributories.
Form 47.

82. The liquidator may from time to time vary or add to the list of contributories, but any such variation or addition shall be made in the same manner in all respects as the settlement of the original list.

CALLS.

Calls by liquidator.

83. The powers and duties of the Court in relation to making calls upon contributories conferred by section 166 of the Act, shall and may be exercised, in a winding-up by the Court, by the liquidator as an officer of the Court subject to the proviso to section 173 of the Act, and to the following regulations:—

Form 50.

(1.) Where the liquidator desires to make any call on the contributories, or any of them for any purpose authorised by the Act, if there is a committee of inspection he may summon a meeting of such committee for the purpose of obtaining their sanction to the intended call.

Form 51.

(2.) The notice of the meeting shall be sent to each member of the committee of inspection in sufficient time to reach him not less than seven days before the day appointed for holding the meeting, and shall contain a statement of the proposed amount of the call, and the purpose for which it is intended. Notice of the intended call and the intended meeting of the committee of inspection shall also be advertised once at least in a London newspaper, or, where the winding-up is not in the High Court, in a newspaper circulating in the district of the Court in which the proceedings are pending. The advertisement shall state the time and place of the intended meeting of the committee of inspection, and that each contributory may either attend the said meeting and be heard, or make any communication in writing to the liquidator or members of the committee of inspection to be laid before the meeting, in reference to the said intended call.

(3.) At the meeting of the committee of inspection any statements or representations made either to the meeting personally or addressed in writing to the liquidator or members of the committee by any contributory shall be considered before the intended call is sanctioned.

Form 52.

(4.) The sanction of the committee shall be given by resolution, which shall be passed by a majority of the members present.

(5.) Where there is no committee of inspection, the liquidator shall not make a call without obtaining the leave of the Court.

Application to the Court for leave to make a call.
Form to 57.

84. In a winding-up by the Court an application to the Court for leave to make any call on the contributories of a company, or any of them, for any purpose authorised by the Acts, shall be made by summons stating the proposed amount of such call, which summons shall be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in such call; or if the Court so directs, notice of such intended call may be given by advertisement, without a separate notice to each contributory.

Document making the call.
Form 58.

85. When the liquidator is authorised by resolution or order to make a call on the contributories he shall file with the registrar a document in the Form 58 with such variations as circumstances may require making the call.

Service of notice of a call.
Forms 52, 53 and 59.

86. When a call has been made by the liquidator in a winding-up by the Court, a copy of the resolution of the committee of inspection or order of the Court (if any), as the case may be, shall forthwith after the call has been made be served upon each of the contributories included in such call, together with a notice from the liquidator specifying the amount or balance due from such contributory in respect of such call, but such resolution or order need not be advertised unless for any special reason the Court so directs.

Enforcement of call.
Forms 60, 61 and 62.

87. The payment of the amount due from each contributory on a call may be enforced by order of the Court, to be made in Chambers on summons by the liquidator.

PROOFS.

Proof of debt.

88. In a winding-up by the Court every creditor shall prove his debt unless the judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

Mode of proof.

89. A debt may be proved in any winding-up by delivering or sending through the post an affidavit verifying the debt. In a winding-up by the Court the affidavit shall be so sent to the official receiver or, if a liquidator has been appointed, to the liquidator; and in any other winding-up the affidavit may be so sent to the liquidator.

Verification of proof.

90. An affidavit proving a debt may be made by the creditor himself or by some person authorised by or on behalf of the creditor. If made by a person so authorised, it shall state his authority and means of knowledge.

Contents of proof. Form 63.

91. An affidavit proving a debt shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The official receiver or liquidator to whom the proof is sent may at any time call for the production of the vouchers.

Statement of security.

92. An affidavit proving a debt shall state whether the creditor is or is not a secured creditor.

Proof before whom sworn.

93. An affidavit proving a debt may in a winding-up by the Court be sworn before an official receiver, or assistant official receiver, or any officer of the Board of Trade or any clerk of an official receiver duly authorised in writing by the Court or the Board of Trade in that behalf.

Costs of proof.

94. A creditor shall bear the cost of proving his debt unless the Court otherwise orders.

Discount.

95. A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

Periodical payments.

96. When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of those periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding-up order or resolution as if the rent or payment grew due from day to day. Provided that where the liquidator remains in occupation of premises demised to a company which is being wound up, nothing herein contained shall prejudice or affect the right of the landlord of such premises to claim payment by the company, or the liquidator, of rent during the period of the company's or the liquidator's occupation.

Interest.

97. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding-up order or resolution, the creditor may prove for interest at a rate not exceeding four per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

Proof for debt payable at a future time.

98. A creditor may prove for a debt not payable at the date of the winding-up order or resolution, as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Workmen's wages. Form 64.

99. In any case in which it appears that there are numerous claims for wages by workmen and others employed by the company, it shall be sufficient if one proof for all such claims is made either by a foreman or by some other person on behalf of all such creditors. Such proof shall have annexed thereto as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.

Production of bills of exchange and promissory notes.

100. Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the company is liable, such bill of exchange, note, instrument, or security must, subject to any special order of the Court made to the contrary, be produced to the official receiver, chairman of a meeting or liquidator, as the case may be, and be marked by him before the proof can be admitted either for voting or for any purpose.

Transmission of proofs to liquidator.

101. Where a liquidator is appointed in a winding-up by the Court, all proofs of debts that have been received by the official receiver shall be handed over to the liquidator, but the official receiver shall first make a list of such proofs, and take a receipt thereon from the liquidator for such proofs.

ADMISSION AND REJECTION OF PROOFS, AND APPEAL TO THE COURT.

Notice to creditors to prove.

102. Subject to the provisions of the Act, and unless otherwise ordered by the Court, the liquidator in any winding-up may from time to time fix a certain day, which shall be not less than fourteen days from the date of the notice, on or before which the creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved, and the liquidator shall give notice in writing of the day so fixed by advertisement in such newspaper as he shall consider convenient, and in a winding-up by the Court to every person mentioned in the Statement of Affairs as a creditor, and who has not proved his debt, and in any other winding-up to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the company and whose claim has not been admitted.

Examination of proof.
Form 65.

103. The liquidator shall examine every proof of debt lodged with him, and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

Appeal by creditor.

104. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but, subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding-up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection.

Expunging at instance of liquidator.

105. If the liquidator thinks that a proof has been improperly admitted, the Court may, on the application of the liquidator, after notice to the creditor who made the proof expunge the proof or reduce its amount.

Expunging at instance of creditor.

106. The Court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter.

Oaths.

107. For the purpose of any of his duties in relation to proofs, the liquidator, in a winding-up by the Court, may administer oaths and take affidavits.

Official receiver's powers.

108. In a winding-up by the Court the official receiver, before the appointment of a liquidator, shall have all the powers of a liquidator with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal.

Filing proofs by official receiver.

109. In a winding-up by the Court the official receiver, where no other liquidator is appointed, shall, before payment of a dividend, file all proofs tendered in the winding-up, with a list thereof, distinguishing in such list the proofs which were wholly or partly admitted, and the proofs which were wholly or partly rejected.

Proofs to be filed.
Form 68.

110. Every liquidator in a winding-up by the Court other than the official receiver shall on the first day of every month, file with the registrar a certified list of all proofs, if any, received by him during the month next preceding, distinguishing in such lists the proofs admitted, those rejected, and such as stand over for further consideration; and, in the case of proofs admitted or rejected, he shall cause the proofs to be filed with the registrar.

Procedure where creditor appeals.

111. The liquidator in a winding-up by the Court, including the official receiver when he is liquidator, shall, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof with the registrar, with a memorandum thereon of his disallowance thereof.

Time for dealing with proofs by official receiver.

112. Subject to the power of the Court to extend the time in a winding-up by the Court, the official receiver as liquidator, not later than fourteen days from the latest date specified in the notice of his intention to declare a dividend as the time within which such proofs must be lodged, shall in writing either admit or reject wholly, or in part, every proof lodged with him, or require further evidence in support of it.

113. Subject to the power of the Court to extend the time, the liquidator in a winding-up by the Court, other than the official receiver, within twenty-eight days after receiving a proof, which has not previously been dealt with, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it. Provided that where the liquidator has given notice of his intention to declare a dividend, he shall within fourteen days after the date mentioned in the notice as the latest date up to which proofs must be lodged, examine, and in writing admit or reject, or require further evidence in support of, every proof which has not been already dealt with, and shall give notice of his decision, rejecting a proof wholly or in part, to the creditors affected thereby. Where a creditor's proof has been admitted the notice of dividend shall be a sufficient notification of the admission. Time for dealing with proofs by liquidator.

114. The official receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part. Cost of appeals from decisions as to proofs.

GENERAL MEETINGS OF CREDITORS AND CONTRIBUTORIES IN RELATION TO A WINDING-UP BY THE COURT.

115. The meetings of creditors and contributories under section 152 of the Act (hereinafter referred to as the first meetings of creditors and contributories) shall be held within twenty-one days, or if a special manager has been appointed then within one month after the date of the winding-up order or within such further time as the Court may approve. The dates of such meetings shall be fixed and they shall be summoned by the official receiver. First meetings of creditors and contributories.

116. The official receiver shall forthwith give notice of the days fixed by him for the first meetings of creditors and contributories to the Board of Trade, who shall gazette the same. Notice of first meetings to Board of Trade.

117. The first meetings of creditors and contributories shall be summoned as hereinafter provided. Summoning of first meetings.

118. The notices of first meetings of creditors and contributories may be in Forms 21 and 22 appended hereto, and the notices to creditors shall state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting. Form of notices of first meetings. Forms 21 and 22.

119. The official receiver shall also give to each of the directors and other officers of the company who in his opinion ought to attend the first meetings of creditors and contributories seven days' notice of the time and place appointed for each meeting. The notice may either be delivered personally or sent by prepaid post letter, as may be convenient. It shall be the duty of every director or officer who receives notice of such meeting to attend if so required by the official receiver. Notice of first meetings to officers of company. Form 23.

120. The official receiver shall also, as soon as practicable, send to each creditor mentioned in the company's statement of affairs, and to each person appearing from the company's books or otherwise to be a contributory of the company a summary of the company's statement of affairs, including the causes of its failure, and any observations thereon which the official receiver may think fit to make. The proceedings at a meeting shall not be invalidated by reason of any summary or notice required by these Rules not having been sent or received before the meeting. Summary of statement of affairs.

121. In addition to the first meetings of creditors and contributories and in addition also to meetings of creditors and contributories directed to be held by the Court under section 219 of the Act (hereinafter referred to as Court meetings of creditors and contributories), the liquidator may himself from time to time subject to the provisions of the Act and the control of the Court summon, hold and conduct meetings of the creditors or contributories (hereinafter referred to as liquidator's meetings of creditors and contributories) for the purpose of ascertaining their wishes in all matters relating to the winding-up. Liquidator's meetings of creditors and contributories.

122. Except where and so far as the nature of the subject-matter or the context may otherwise require the succeeding Rules as to meetings hereinafter set out are intended to apply to first meetings, Court meetings and liquidator's meetings of creditors and contributories, but so nevertheless that the said Rules shall take effect as to first meetings subject and without prejudice to any express provisions of the Act and as to Court meetings subject and without prejudice to any express directions of the Court. Application of rules as to meetings.

123. The official receiver or liquidator shall summon all meetings of creditors and contributories by giving not less than seven days' notice of the time and place Summoning of meetings.

thereof in the *London Gazette* and in a local paper; and shall not less than seven days before the day appointed for the meeting send by post to every person appearing by the company's books to be a creditor of the company notice of the meeting of creditors, and to every person appearing by the company's books or otherwise to be a contributory of the company notice of the meeting of contributories.

The notice to each creditor shall be sent to the address given in his proof, or if he has not proved to the address given in the statement of affairs of the company, or to such other address as may be known to the person summoning the meeting. The notice to each contributory shall be sent to the address mentioned in the company's books as the address of such contributory, or to such other address as may be known to the person summoning the meeting.

Proof of notice. Forms 76 and 77.

124. A certificate by the official receiver or other officer of the Court, or by the clerk of any such person, or an affidavit by the liquidator, or his solicitor, or the clerk of either of such persons, that the notice of any meeting has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

Place of meetings.

125. The meetings shall be held at such place as is in the opinion of the official receiver or liquidator most convenient for the majority of the creditors or contributories or both. Different times or places or both may if thought expedient be named for the meetings of creditors and for the meetings of contributories.

Costs of calling meeting.

126. The costs of summoning a meeting of creditors or contributories at the instance of any person other than the official receiver or liquidator, shall be paid by the person at whose instance it is summoned, who shall before the meeting is summoned deposit with the official receiver or liquidator (as the case may be) such sum as may be required by the official receiver or liquidator as security for the payment of such costs. The costs of summoning such meeting of creditors or contributories, including all disbursements for printing, stationery, postage, and the hire of room, shall be calculated at the following rate for each creditor or contributory to whom notice is required to be sent, namely, two shillings per creditor or contributory for the first twenty creditors or contributories, one shilling per creditor or contributory for the next thirty creditors or contributories, sixpence per creditor or contributory for any number of creditors or contributories after the first fifty. The said costs shall be repaid out of the assets of the company if the Court shall by order, or if the creditors or contributories (as the case may be) shall by resolution so direct.

Chairman of meeting. Form 79.

127. Where a meeting is summoned by the official receiver or the liquidator, he, or someone nominated by him, shall be chairman of the meeting. At every other meeting of creditors and contributories the chairman shall be such person as the meeting by resolution shall appoint.

Ordinary resolution of creditors and contributories.

128. At a meeting of creditors a resolution shall be deemed to be passed when a majority in number and value of the creditors present, personally or by proxy, and voting on the resolution, have voted in favour of the resolution, and at a meeting of the contributories a resolution shall be deemed to be passed when a majority in number and value of the contributories present, personally or by proxy, and voting on the resolution, have voted in favour of the resolution, the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the company.

Copy of resolution to be filed.

129. The official receiver, or, as the case may be, the liquidator, shall file with the registrar, a copy, certified by him, of every resolution of a meeting of creditors or contributories.

Non-reception of notice by a creditor.

130. Where a meeting of creditors or contributories is summoned by notice, the proceedings and resolutions at the meeting shall, unless the Court otherwise orders, be valid, notwithstanding that some creditors or contributories may not have received the notice sent to them.

Adjournment. Form 78.

131. The chairman may with the consent of the meeting adjourn it from time to time and from place to place, but the adjourned meeting shall be held at the same place as the original place of meeting unless in the resolution for adjournment another place is specified or unless the Court otherwise orders.

Quorum.

132.—(1) A meeting may not act for any purpose except the election of a chairman, the proving of debts and the adjournment of the meeting unless there are present or represented thereat at least three creditors entitled to vote or three contributories or all the creditors entitled to vote or all the contributories if the number of the creditors entitled to vote or the contributories as the case may be shall not exceed three.

(2.) If within half an hour from the time appointed for the meeting a quorum of creditors or contributories is not present or represented the meeting shall be adjourned to the same day in the following week at the same time and place or to such other day as the chairman may appoint not being less than seven or more than twenty-one days.

Creditors entitled to vote.

133. In the case of a first meeting of creditors or of an adjournment thereof a person shall not be entitled to vote as a creditor unless he has duly lodged with the official receiver not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting a proof of the debt which he claims to be due to him from the company. In the case of a Court meeting or liquidator's meeting of creditors a person shall not be entitled to vote as a creditor unless he has lodged with the official receiver or liquidator a proof of the debt which he claims to be due to him from the company and such proof has been admitted wholly or in part before the date on which the meeting is held. Provided that this and the next four following rules shall not apply to a Court meeting of creditors held prior to the first meeting of creditors.

Cases in which creditors may not vote.

134. A creditor shall not vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained, nor shall a creditor vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the company, and against whom a receiving order in bankruptcy has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

Votes of secured creditors.

135. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

Creditor required to give up security.

136. The official receiver or liquidator may within twenty-eight days after a proof estimating the value of a security as aforesaid has been used in voting at a meeting require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated with an addition thereto of twenty per cent. Provided that where a creditor has valued his security he may at any time before being required to give it up correct the valuation by a new proof and deduct the new value from his debt, but in that case the said addition of twenty per cent. shall not be made if the security is required to be given up.

Admission and rejection of proofs for purpose of voting.

137. The chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Minutes of meeting.

138. The chairman shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

PROXIES IN RELATION TO A WINDING-UP BY THE COURT.

Proxies.

139. A creditor or a contributory may vote either in person or by proxy. The succeeding rules as to proxies shall not (unless otherwise directed by the Court) apply to a Court meeting of creditors or contributories prior to the first meeting.

Form of proxies. Forms 80 and 81.

140 Every instrument of proxy shall be in accordance with the form in the Appendix and every written part thereof shall be in the handwriting of the person giving the proxy or of any manager or clerk or other person in his regular employment or of a commissioner to administer oaths in the Supreme Court.

Forms of proxy to be sent with notices.

141. General and special forms of proxy shall be sent to the creditors and contributories with the notice summoning the meeting, and neither the name nor description of the official receiver or liquidator or any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent.

General proxies to managers or clerks.

142. A creditor or a contributory may give a general proxy to his manager or clerk or any other person in his regular employment. In any such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor or contributory.

Special proxies.

143. A creditor or a contributory may give a special proxy to any person to vote at any specified meeting or adjournment thereof:—

(a) for or against the appointment or continuance in office of any specified person as liquidator or member of the committee of inspection, and;

(b) on all questions relating to any matter other than those above referred to and arising at the meeting or an adjournment thereof.

Solicitation by liquidator to obtain proxies.

144. Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a liquidator in obtaining proxies or in procuring his appointment as liquidator except by the direction of a meeting of creditors or contributories, the Court if it thinks fit may order that no remuneration be allowed to the person by whom or on whose behalf the solicitation was exercised notwithstanding any resolution of the committee of inspection or of the creditors or contributories to the contrary.

Proxies to official receiver or liquidator.

145. A creditor or a contributory may appoint the official receiver or liquidator to act as his general or special proxy.

Holder of proxy not to vote on matter in which he is financially interested.

146. No person acting either under a general or a special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer in a position to receive any remuneration out of the estate of the company otherwise than as creditor rateably with the other creditors of the company. Provided that where any person holds special proxies to vote for an application to the Court in favour of the appointment of himself as liquidator he may use the said proxies and vote accordingly.

Proxies.

Forms 80 and 81.

147.—(1.) A proxy intended to be used at the first meeting of creditors or contributories, or an adjournment thereof, shall be lodged with the official receiver not later than the time mentioned for that purpose in the notice convening the meeting or the adjourned meeting, which time shall be not earlier than twelve o'clock at noon of the day but one before, nor later than twelve o'clock at noon of the day before the day appointed for such meeting, unless the Court otherwise directs.

(2.) In every other case a proxy shall be lodged with the official receiver or liquidator not later than four o'clock in the afternoon of the day before the meeting or adjourned meeting at which it is to be used.

(3.) No person shall be appointed a general or special proxy who is a minor.

(4.) Where a limited company is a creditor, any person who is duly authorised under the seal of the creditor company to act generally on behalf of the creditor company at meetings of creditors and contributories and to appoint himself or any other person to be the creditor company's proxy, may fill in and sign the form of proxy on the creditor company's behalf and appoint himself to be the creditor company's proxy, and a proxy so filled in and signed by such a person shall be received and dealt with as the proxy of the creditor company.

Use of proxies by deputy.

148. Where an official receiver who holds any proxies cannot attend the meeting for which they are given, he may, in writing, depute some person under his official control to use the proxies on his behalf, and in such manner as he may direct.

Filling in where creditor blind or incapable.

149. The proxy of a creditor blind or incapable of writing may be accepted, if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence; provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark.

DIVIDENDS IN A WINDING-UP BY THE COURT.

Dividends to creditors.

Form 67.

150.—(1.) Not more than two months before declaring a dividend the liquidator in a winding-up by the Court, shall give notice of his intention to do so to the Board of Trade in order that the same may be gazetted, and at the same time to such of the creditors mentioned in the statement of affairs as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged, which shall not be less than fourteen days from the date of such notice.

(2.) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date up to which proofs may be lodged, appeals against the decision of the liquidator rejecting a proof, notice of appeal shall, subject to the power of the Court to extend the time in special cases, be given within seven days from the date of the notice of the decision against which the appeal is made, and the liquidator may in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no notice of appeal has been given within the time specified in this rule, the liquidator shall exclude all proofs which have been rejected from participation in the dividend.

(3.) Immediately after the expiration of the time fixed by this rule for appealing against the decision of the liquidator he shall proceed to declare a dividend, and shall give notice to the Board of Trade (in order that the same may be gazetted), and shall also send a notice of dividend to each creditor whose proof has been admitted. Form 71.

(4.) If it becomes necessary, in the opinion of the liquidator and the committee of inspection, to postpone the declaration of the dividend beyond the limit of two months, the liquidator shall give a fresh notice of his intention to declare a dividend to the Board of Trade in order that the same may be gazetted; but it shall not be necessary for the liquidator to give a fresh notice to such of the creditors mentioned in the statement of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice.

(5.) Upon the declaration of a dividend the liquidator shall forthwith transmit to the Board of Trade a list of the proofs filed with the registrar under R. 110, which list shall be in the Form 68 or 69 in the Appendix as the case may be. If the winding-up is in a Court other than the High Court the list shall, on payment of the prescribed fee, be examined by the registrar, with the proofs tendered for filing and if found correct shall be certified by the registrar. If the winding-up is in the High Court the liquidator shall, if so required by the Board of Trade, transmit to the Board of Trade, office copies of all lists of proofs filed by him up to the date of the declaration of the dividend. Forms 68 and 69.

(6.) Dividends may at the request and risk of the person to whom they are payable be transmitted to him by post.

(7.) If a person to whom dividends are payable desires that they shall be paid to some other person he may lodge with the liquidator a document in the Form 72 which shall be a sufficient authority for payment of the dividend to the person therein named. Form 72.

151. Every order by which the liquidator in a winding-up by the Court is authorised to make a return to contributories of the company, shall, unless the Court shall otherwise direct, contain or have appended thereto a schedule or list (which the liquidator shall prepare) setting out in a tabular form the full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made or the variations in the list of contributories which have arisen since the date of the settlement of the list of contributories. The schedule or list shall be in the Form 74 with such variations as circumstances shall require. Return of capital to contributories. Forms 73 and 74.

ATTENDANCE AND APPEARANCE OF PARTIES.

152.—(1.) Every person for the time being on the list of contributories of the company, and every person whose proof has been admitted shall be at liberty, at his own expense, to attend proceedings, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the Court shall be of opinion that the attendance of any such person upon any proceedings has occasioned any additional costs which ought not to be borne by the funds of the company, it may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same. Attendance at proceedings.

(2.) The Court may from time to time appoint any one or more of the creditors or contributories to represent before the Court, at the expense of the company, all or any class of the creditors or contributories, upon any question or in relation to any proceedings before the Court, and may remove the person so appointed. If

more than one person is appointed under this rule to represent one class, the persons appointed shall employ the same solicitor to represent them.

(3.) No creditor or contributory shall be entitled to attend any proceedings in Chambers unless and until he has entered in a book, to be kept by the registrar for that purpose, his name and address, and the name and address of his solicitor (if any) and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor.

Attendance of liquidator's solicitor.

153. Where the attendance of the liquidator's solicitor is required on any proceeding in Court or Chambers, the liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the Court directs him to attend.

LIQUIDATOR AND COMMITTEE OF INSPECTION IN A WINDING-UP BY THE COURT.

Remuneration of liquidator.

154.—(1.) The remuneration of a liquidator, unless the Court shall otherwise order, shall be fixed by the committee of inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend.

(2.) If the Board of Trade is of opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the Board of Trade may apply to the Court, and thereupon the Court shall fix the amount of the remuneration of the liquidator.

(3.) If there is no committee of inspection the remuneration of the liquidator shall, unless the Court shall otherwise order, be fixed by the scale of fees and percentages for the time being payable on realizations and distributions by the official receiver as liquidator.

Limit of remuneration.

155. Except as provided by the Act or the Rules, a liquidator shall not under any circumstances whatever, make any arrangement for, or accept from any solicitor, auctioneer, or any other person connected with the company of which he is liquidator, or who is employed in or in connection with the winding-up of the company, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the Rules he is entitled as liquidator, nor shall he make any arrangement for giving up, or give up any part of such remuneration to any such solicitor, auctioneer, or other person.

Dealings with assets.

156. Neither the liquidator nor any member of the committee of inspection of a company shall, while acting as liquidator or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the company's assets. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor or contributory, and the Court may make such order as to costs as the Court shall think fit.

Restriction on purchase of goods by liquidator.

157. Where the liquidator carries on the business of the company, he shall not, without the express sanction of the Court, purchase goods for the carrying on of such business from any person whose connection with the liquidator is of such a nature as would result in the liquidator obtaining any portion of the profit (if any) arising out of the transaction.

Committee of inspection not to make profit.

158. No member of a committee of inspection shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding-up, or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the liquidator for or on account of the company. If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this rule, they may disallow such payment or recover such profit, as the case may be, on the audit of the liquidator's accounts.

Costs of obtaining sanction of Court.

159. In any case in which the sanction of the Court is obtained under the two last preceding rules, the cost of obtaining such sanction shall be borne by the person in whose interest such sanction is obtained, and shall not be payable out of the company's assets.

Sanction of payments to committee.

160. Where the sanction of the Court to a payment to a member of a committee of inspection for services rendered by him in connection with the administration of the company's assets is obtained, the order of the Court shall specify the nature of the services, and such sanction shall only be given where the service performed is of a special nature. Except by the express sanction of the Court no remuneration shall, under any circumstances, be paid to a member of a committee for services rendered by him in the discharge of the duties attaching to his office as a member of such committee.

Discharge of costs before assets handed to liquidator.

161.—(1.) Where a liquidator is appointed by the Court, and has notified his appointment to the registrar of joint stock companies, and given security to the Board of Trade, the official receiver shall forthwith put the liquidator into possession of all property of the company of which the official receiver may have custody; provided that such liquidator shall have, before the assets are handed over to him by the official receiver, discharged any balance due to the official receiver on account of fees, costs, and charges properly incurred by him, and on account of any advances properly made by him in respect of the company, together with interest on such advances at the rate of four pounds per centum per annum; and the liquidator shall pay all fees, costs, and charges of the official receiver which may not have been discharged by the liquidator before being put into possession of the property of the company, and whether incurred before or after he has been put into such possession.

(2.) The official receiver shall be deemed to have a lien upon the company's assets until such balance shall have been paid and the other liabilities shall have been discharged.

(3.) It shall be the duty of the official receiver, if so requested by the liquidator, to communicate to the liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the duties of the liquidator.

Resignation of liquidator.

162. A liquidator who desires to resign his office shall summon separate meetings of the creditors and contributories of the company to decide whether or not the resignation shall be accepted. If the creditors and contributories by ordinary resolutions both agree to accept the resignation of the liquidator, he shall file with the registrar a memorandum of his resignation, and shall send notice thereof to the official receiver, and the resignation shall thereupon take effect. In any other case the liquidator shall report to the Court the result of the meetings and shall send a report to the official receiver and thereupon the Court may, upon the application of the liquidator or the official receiver, determine whether or not the resignation of the liquidator shall be accepted, and may give such directions and make such orders as in the opinion of the Court shall be necessary.

Office of liquidator vacated by his insolvency.

163. If a receiving order in bankruptcy is made against the liquidator, he shall thereby vacate his office, and for the purposes of the application of the Act and rules shall be deemed to have been removed.

PAYMENTS INTO AND OUT OF A BANK.

Payments out of Bank of England.

164. All payments out of the companies liquidation account shall be made in such manner as the Board of Trade may from time to time direct.

Special bank account.

Forms 82 and 83.

165.—(1.) Where the liquidator in a winding-up by the Court is authorized to have a special bank account, he shall forthwith pay all moneys received by him into that account to the credit of the liquidator of the company. All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the company, and shall be signed by the liquidator, and shall be countersigned by at least one member of the committee of inspection, and by such other person, if any, as the committee of inspection may appoint.

(2.) Where application is made to the Board of Trade to authorize the liquidator in a winding-up by the Court to make his payments into and out of a special bank account, the Board of Trade may grant such authorization for such time and on such terms as they may think fit, and may at any time order the account to be closed if they are of opinion that the account is no longer required for the purposes mentioned in the application.

BOOKS.

Record book.

166. The official receiver, until a liquidator is appointed by the Court, and thereafter the liquidator, shall keep a book to be called the "Record Book" in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the company's affairs, but he shall not be bound to insert in the "Record Book" any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors or contributories), nor need he exhibit such document to any person other than a member of the committee of inspection, or the official receiver, or the Board of Trade.

Cash book.

167.—(1.) The official receiver, until a liquidator is appointed by the Court, and thereafter the liquidator, shall keep a book to be called the "Cash Book" (which shall be in such form as the Board of Trade may from time to time direct), in which he shall (subject to the provisions of the rules as to trading accounts) enter from day to day the receipts and payments made by him.

(2.) The liquidator shall submit the record book and cash book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months.

INVESTMENT OF FUNDS.

Investment of assets in securities, and realisation of securities.

Forms 84 and 85.

168.—(1.) Where the committee of inspection are of opinion that any part of the cash balance standing to the credit of the account of the company should be invested, they shall sign a certificate and request, and the liquidator shall transmit such certificate and request to the Board of Trade.

(2.) Where the committee of inspection are of opinion that it is advisable to sell any of the securities in which the moneys of the company's assets are invested, they shall sign a certificate and request to that effect, and the liquidator shall transmit such certificate and request to the Board of Trade.

(3.) Where in a winding-up by the Court in which there is no committee of inspection, or in a voluntary winding-up, or winding-up under the supervision of the Court, a case has in the opinion of the liquidator arisen under section 231 of the Act for an investment of funds of the company or a sale of securities in which the company's funds have been invested, the liquidator shall sign and transmit to the Board of Trade a certificate of the facts on which his opinion is founded, and a request to the Board of Trade to make the investment mentioned in the certificate, and the Board of Trade may thereupon, if it thinks fit, invest or sell the whole or any part of the said funds or securities, as provided in the said section, and the said certificate and request shall be a sufficient authority to the Board of Trade for the said investment or sale.

ACCOUNTS AND AUDIT IN A WINDING-UP BY THE COURT.

Audit of cash book

Form 86.

169. The committee of inspection shall not less than once every three months audit the liquidator's cash book and certify therein under their hands the day on which the said book was audited.

Board of Trade audit of liquidator's accounts.

170.—(1.) The liquidator shall, at the expiration of six months from the date of the winding-up order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a copy of the cash book for such period in duplicate, together with the necessary vouchers and copies of the certificates of audit by the committee of inspection. He shall also forward with the first accounts a summary of the company's statement of affairs, showing thereon in red ink the amounts realized, and explaining the cause of the non-realization of such assets as may be unrealized. The liquidator shall also at the end of every six months forward to the Board of Trade, with his accounts, a report upon the position of the liquidation of the company in such form as the Board of Trade may direct.

(2.) When the assets of the company have been fully realized and distributed, the liquidator shall forthwith send in his accounts to the Board of Trade, although the six months may not have expired.

Form 87.

(3.) The accounts sent in by the liquidator shall be verified by him by affidavit.

Liquidator carrying on business.

171.—(1.) Where the liquidator carries on the business of the company, he shall keep a distinct account of the trading, and shall incorporate in the cash book the total weekly amount of the receipts and payments on such trading account.

Form as to and audit.

(2.) The trading account shall from time to time, and not less than once in every month, be verified by affidavit, and the liquidator shall thereupon submit such account to the committee of inspection (if any), or such member thereof as may be appointed by the committee for that purpose, who shall examine and certify the same.

Copy of accounts to be filed.

172. When the liquidator's account has been audited, the Board of Trade shall certify the fact upon the account, and thereupon the duplicate copy, bearing a like certificate, shall be filed with the registrar.

Summary of accounts.

173.—(1.) The liquidator shall transmit to the Board of Trade with his accounts a summary of such accounts in such form as the Board of Trade may from time to time direct, and, on the approval of such summary by the Board of Trade, shall forthwith obtain, prepare, and transmit to the Board of Trade so many printed copies thereof, duly stamped for transmission by post, and addressed to the creditors and contributories, as may be required for transmitting such summary to each creditor and contributory.

(2.) The cost of printing and posting such copies shall be a charge upon the assets of the company.

Affidavit of no receipts.

174. Where a liquidator has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the assets of the company, he shall, at the time when he is required to transmit his accounts to the Board of Trade, forward to the Board of Trade an affidavit of no receipts or payments.

Proceedings on resignation &c. of liquidator.

175.—(1.) Upon a liquidator resigning, or being released or removed from his office, he shall deliver over to the official receiver, or, as the case may be, to the new liquidator, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of liquidator. The release of a liquidator shall not take effect unless and until he has delivered over to the official receiver, or as the case may be to the new liquidator, all the books, papers, documents, and accounts which he is by this rule required to deliver on his release.

Disposal of books.

(2.) The Board of Trade may, at any time during the progress of the liquidation, on the application of the liquidator or the official receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of the liquidation, may be sold, destroyed, or otherwise disposed of.

Expenses of sales.

176. Where property forming part of a company's assets is sold by the liquidator through an auctioneer or other agent, the gross proceeds of the sale shall be paid over by such auctioneer or agent, and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent, on the production of the necessary certificate of the taxing officer. Every liquidator, by whom such auctioneer or agent is employed, shall, unless the Court otherwise orders, be accountable for the proceeds of every such sale.

TAXATION OF COSTS.

Taxation of costs payable by or to official receiver or liquidator or by company.

177. Every solicitor, manager, accountant, auctioneer, broker or other person employed by an official receiver or liquidator in a winding-up by the Court shall on request by the official receiver or liquidator (to be made a sufficient time before the declaration of a dividend) deliver his bill of costs or charges to the official receiver or liquidator for the purpose of taxation; and if he fails to do so within the time stated in the request, or such extended time as the Court may allow, the liquidator shall declare and distribute the dividend without regard to such person's claim, and subject to any order of the Court the claim shall be forfeited. The request by the official receiver or liquidator shall be in the Form No. 89.

Form 89.

Notice of appointment.

178. Where a bill of costs or charges in any winding-up has been lodged with the taxing officer, he shall give notice of an appointment to tax the same, in a winding-up by the Court to the official receiver, and in every winding-up to the liquidator, and to the person to or by whom the bill or charges is or are to be paid (as the case may be).

Lodgment of bill.

179. The bill or charges, if incurred in a winding-up by the Court prior to the appointment of a liquidator, shall be lodged with the official receiver, and if incurred after the appointment of a liquidator, shall be lodged with the liquidator. The official receiver or the liquidator, as the case may be, shall lodge the bill or charges with the proper taxing officer.

Copy of the bill to be furnished.

180. Every person whose bill or charges in a winding-up by the Court is or are to be taxed shall, on application either of the official receiver or the liquidator, furnish a copy of his bill or charges so to be taxed, on payment at the rate of 4*d.* per folio, which payment shall be charged on the assets of the company. The official receiver shall call the attention of the liquidator to any items which, in his opinion, ought to be disallowed or reduced, and may attend or be represented on the taxation.

Applications for costs.

181. Where any party to, or person affected by, any proceeding desires to make an application for an order that he be allowed his costs, or any part of them, incident to such proceeding, and such application is not made at the time of the proceeding:—

(1.) Such party or person shall serve notice of his intended application on the official receiver in a winding-up by the Court and in every winding-up on the liquidator.

(2.) The official receiver (if any) and liquidator may appear on such application and object thereto.

(3.) No costs of or incident to such application shall be allowed to the applicant, unless the Court is satisfied that the application could not have been made at the time of the proceeding.

Certificate of taxation. Form 90.

182. Upon the taxation of any bill of costs, charges, or expenses being completed, the taxing officer shall issue to the person presenting such bill for taxation his allowance or certificate of taxation. The bill of costs, charges, and expenses, together with the allowance or certificate, shall be filed with the registrar.

Certificate of employment.

183. Where the bill or charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an official receiver or liquidator, is or are payable out of the assets of the company, a certificate in writing, signed by the official receiver or liquidator, as the case may be, shall on the taxation be produced to the taxing officer setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment.

Scale of costs in a County Court, and taxation.

184. In a County Court all costs properly incurred in a winding-up by the Court shall be allowed on the lower scale in Appendix N. to the Rules of the Supreme Court, and costs shall be taxed by the registrar in person.

Review of taxation at instance of Board of Trade.

185.—(1.) Where any bill of costs, charges, fees or disbursements which are payable out of the assets of the company to any solicitor, manager, accountant, auctioneer, broker or other person has been taxed by a registrar of a Court other than the High Court, the Board of Trade may require the taxation to be reviewed by the taxing officer of the High Court.

(2.) In any case in which the Board of Trade require such a review of taxation as is above mentioned they shall give notice to the person whose bill has been taxed, and shall apply to the taxing officer of the High Court to appoint a time for the review of such taxation and thereupon such taxing officer shall appoint a time for the review of, and shall review, such taxation and certify the result thereof. The Board of Trade shall give to the person whose bill of costs is to be reviewed notice of the time appointed for the review.

(3.) Where any such review of taxation as is above mentioned is required to be made by the taxing officer of the High Court, the registrar whose taxation is to be reviewed shall forward to the said taxing officer the bill which is required to be reviewed.

(4.) The Board of Trade may appear upon the review of the taxation; and if, upon the review of the taxation, the bill is allowed at a lower sum than the sum allowed on the original taxation, the amount disallowed shall (if the bill has been paid) be repaid to the official receiver or the liquidator, or other person entitled thereto. The certificate of the taxing officer shall in every case of a review by him under this rule be a sufficient authority to entitle the person to whom the amount disallowed ought to be repaid to demand such amount from the person liable to repay the same.

(5.) The costs of and incidental to the review shall be paid out of the assets of the company or otherwise as the taxing officer or the Court may direct; provided that the cost of the attendance of a principal shall not be allowed if in the opinion of the taxing officer he could have been sufficiently represented by his London agent.

COSTS AND EXPENSES PAYABLE OUT OF THE ASSETS OF THE COMPANY.

Liquidator's charges.

186.—(1.) Where a liquidator or special manager in a winding-up by the Court receives remuneration for his services as such, no payment shall be allowed on his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself.

(2.) Where a liquidator is a solicitor he may contract that the remuneration for his services as liquidator shall include all professional services.

Costs payable out of the assets.

187.—(1.) The assets of a company in a winding-up by the Court, remaining after payment of the fees and actual expenses incurred in realizing or getting in the assets, shall, subject to any order of the Court, and, as regards a winding-up to which the provisions of the Stannaries Act, 1887,* apply, subject to that Act as modified by the Act, be liable to the following payments, which shall be made in the following order of priority, namely:—

First. The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court.

Next. The remuneration of the special manager (if any).

,, The costs and expenses of any person who makes, or concurs in making, the company's statement of affairs.

,, The taxed charges of any shorthand writer appointed to take an examination. Provided that where the shorthand writer is appointed at the instance of the official receiver the cost of the shorthand notes shall be deemed to be an expense incurred by the official receiver in getting in and realising the assets of the company.

,, The liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for.

,, The costs of any person properly employed by the liquidator.

,, The remuneration of the liquidator.

,, The actual out-of-pocket expenses necessarily incurred by the committee of inspection, subject to the approval of the Board of Trade.

Costs.

(2.) No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons, other than payments for costs and expenses incurred and sanctioned under Rule 54, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the registrar. The taxing officer shall satisfy himself before passing such bills or charges that the employment of the solicitor or other person in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the official receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person other than a solicitor employed by him where such costs and charges are within the scale usually allowed by the Court and do not exceed the sum of 2*l.*: provided always that the Board of Trade may require such costs or charges to be taxed by the taxing officer.

(3.) Nothing contained in this rule shall apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the Court, are ordered by the Court in which such proceedings are pending or a judge thereof to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable.

STATEMENTS BY LIQUIDATOR TO THE REGISTRAR OF JOINT STOCK COMPANIES.

Conclusion of winding-up.

188. The winding-up of a company shall, for the purposes of section 224 of the Act, be deemed to be concluded:—

(a) In the case of a company wound up by order of the Court, at the date on which the order dissolving the company has been reported by the liquidator to the Registrar of Companies, or at the date of the order of the Board of Trade releasing the liquidator pursuant to section 157 of the Act.

* 50 & 51 Vict. c. 43.

(b) In the case of a company wound up voluntarily, or under the supervision of the Court, at the date of the dissolution of the company, unless at such date any funds or assets of the company remain unclaimed or undistributed in the hands or under the control of the liquidator, or any person who has acted as liquidator, in which case the winding-up shall not be deemed to be concluded until such funds or assets have either been distributed or paid into the companies liquidation account at the Bank of England.

Times for sending liquidator's statements, and regulations applicable thereto.

189. The statements with respect to the proceedings in and position of a liquidation of a company, the winding-up of which is not concluded within a year after its commencement, shall be sent to the Registrar of Companies twice in every year as follows:—

(1.) The first statement, commencing at the date when a liquidator was first appointed and brought down to the end of twelve months from the commencement of the winding-up, shall be sent within thirty days from the expiration of such twelve months, or within such extended period as the Board of Trade may sanction, and the subsequent statements shall be sent at intervals of half a year, each statement being brought down to the end of the half year for which it is sent.

Form 92.

(2.) Subject to the next succeeding rule, Form No. 92, with such variations as circumstances may require, shall be used, and the directions specified in the Form shall (unless the Board of Trade otherwise direct) be observed in reference to every statement.

Form 93.

(3.) Every statement shall be sent in duplicate, and shall be verified by an affidavit in the Form No. 93, with such variations as circumstances may require.

Affidavit of no receipts or payments.

Forms 92 and 93.

190. Where a liquidator has not during any period for which a statement has to be sent received or paid any money on account of the company, he shall at the period when he is required to transmit his statement, send to the registrar of companies the prescribed statement in the Form No. 92, in duplicate containing the particulars therein required with respect to the proceedings in and position of the liquidation, and with such statement shall also send an affidavit of no receipts or payments in the Form No. 93.

UNCLAIMED FUNDS AND UNDISTRIBUTED ASSETS IN THE HANDS OF A LIQUIDATOR.

Payment of undistributed and unclaimed money into companies liquidation account.

191.—(1.) All money in the hands or under the control of a liquidator of a company representing unclaimed dividends, which for six months from the date when the dividend became payable have remained in the hands or under the control of the liquidator, shall forthwith, on the expiration of the six months, be paid into the companies liquidation account.

(2.) All other money in the hands or under the control of a liquidator of a company, representing unclaimed or undistributed assets, which under subsection 4 of section 221 of the Act, the liquidator is to pay into the companies liquidation account, shall be ascertained as on the date to which the statement of receipts and payments sent in to the Registrar of Companies is brought down, and the amount to be paid to the companies liquidation account shall be the minimum balance of such money which the liquidator has had in his hands or under his control during the six months immediately preceding the date to which the statement is brought down, less such part (if any) thereof as the Board of Trade may authorize him to retain for the immediate purposes of the liquidation. Such amount shall be paid into the companies liquidation account within fourteen days from the date to which the statement of account is brought down.

(3.) Notwithstanding anything in this rule, any moneys representing unclaimed or undistributed assets or dividends in the hands of the liquidator at the date of the dissolution of the company shall forthwith be paid by him into the companies liquidation account.

(4.) A liquidator whose duty it is to pay into the companies liquidation account at the Bank of England, money representing unclaimed or undistributed assets of the company shall apply in such manner as the Board of Trade shall direct to the Board of Trade for a paying-in order, which paying-in order shall be an authority to the Bank of England to receive the payment.

(5.) Money at the credit of the account of the official liquidator of a company with the Bank of England shall be deemed to be money under the control of

such official liquidator, and when such money has remained unclaimed or undistributed for six months after the date of receipt it shall be transferred to the companies liquidation account, and the official liquidator and master of the Chancery Division of the High Court attached to the judge in whose chambers the winding-up is proceeding shall draw and sign such cheques or orders as may be necessary for the transfer of the money. An application to the Board of Trade for payment out of moneys so transferred shall be signed by the official liquidator and countersigned by the said master.

(6.) Money invested or deposited at interest by a liquidator shall be deemed to be money under his control, and when such money forms part of the minimum balance payable into the companies liquidation account pursuant to clause 2 of this rule, the liquidator shall realize the investment or withdraw the deposit, and shall pay the proceeds into the companies liquidation account, provided that where the money is invested in Government securities, such securities may, with the permission of the Board of Trade, be transferred to the control of the Board of Trade instead of being forthwith realized and the proceeds thereof paid into the companies liquidation account. In the latter case, if and when the money represented by the securities is required wholly or in part for the purposes of the liquidation, the Board of Trade may realize the securities wholly or in part and pay the proceeds of realization into the companies liquidation account and deal with the same in the same way as other moneys paid into the said account may be dealt with.

Liquidator to furnish information to Board of Trade.

192. Every person who has acted as liquidator of any company, whether the liquidation has been concluded or not, shall furnish to the Board of Trade particulars of any money in his hands or under his control representing unclaimed or undistributed assets of the company and such other particulars as the Board of Trade may require for the purpose of ascertaining or getting in any money payable into the companies liquidation account at the Bank of England. The Board of Trade may require such particulars to be verified by affidavit.

Form 97.

Board of Trade may call for verified accounts.

193.—(1.) The Board of Trade may at any time order any such person to submit to them an account verified by affidavit of the sums received and paid by him as liquidator of the company, and may direct and enforce an audit of the account.

(2.) For the purposes of section 224 of the Act and the rules, the Court shall have, and, at the instance of the Board of Trade, may exercise all the powers conferred by the Bankruptcy Act, 1883,* with respect to the discovery and realization of the property of a debtor, and the provisions of Part I. of that Act with respect thereto shall, with any necessary modification, apply to proceedings under section 224 of the Act.

Forms 92 and 93.

Application to the Court for enforcing an account, and getting in money.

194. An application by the Board of Trade for the purpose of ascertaining and getting in money payable into the Bank of England pursuant to section 224 of the Act, shall be made by motion, and where the winding-up is by or under the supervision of the Court shall be made to and dealt with by the judge, and in a voluntary winding-up shall be made to and dealt with by the judge of the High Court.

Application for payment out by person entitled.

195. An application by a person claiming to be entitled to any money paid into the Bank of England in pursuance of section 224 of the Act, shall be made in such form and manner as the Board of Trade may from time to time direct, and shall, unless the Board of Trade otherwise directs, be accompanied by the certificate of the liquidator that the person claiming is entitled, and such further evidence as the Board of Trade may direct.

Application by liquidator for payment out.

196. A liquidator who requires to make payments out of money paid into the Bank of England in pursuance of section 224 of the Act, either by way of distribution or in respect of the cost and expenses of the proceedings, shall apply in such form and manner as the Board of Trade may direct, and the Board of Trade may thereupon either make an order for payment to the liquidator of the sum required by him for the purposes aforesaid, or may direct cheques to be issued to the liquidator for transmission to the persons to whom the payments are to be made.

* 46 & 47 Vict. c. 52.

RELEASE OF LIQUIDATOR IN A WINDING-UP BY THE COURT.

Proceedings for release of liquidator. Forms 98, 99, and 100.

197.—(1.) A liquidator in a winding-up by the Court before making application to the Board of Trade for his release, shall give notice of his intention so to do to all the creditors who have proved their debts and to all the contributories, and shall send with the notice a summary of his receipts and payments as liquidator.

(2.) When the Board of Trade have granted to a liquidator his release, a notice of the order granting the release shall be gazetted. The liquidator shall provide the requisite stamp fee for the *Gazette*, which he may charge against the company's assets.

OFFICIAL RECEIVERS AND BOARD OF TRADE.

Appointment.

198.—(1.) Judicial notice shall be taken of the appointment of the official receivers appointed by the Board of Trade.

(2.) When the Board of Trade appoints any officer to act as deputy for or in the place of an official receiver, notice thereof shall be given by letter to the Court to which such official receiver is or was attached. The letter shall specify the duration of such acting appointment.

(3.) Any person so appointed shall, during his tenure of office, have all the status, rights, and powers, and be subject to all the liabilities of an official receiver.

Removal.

199. Where an official receiver is removed from his office by the Board of Trade, notice of the order removing him shall be communicated by letter to the Court to which the official receiver was attached.

Personal performance of duties.

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

Assistant official receivers.

201. An assistant official receiver, appointed by the Board of Trade, shall be an officer of the Court, like the official receiver to whom he is assistant, and, subject to the directions of the Board of Trade, he may represent the official receiver in all proceedings in Court, or in any administrative or other matter. Judicial notice shall be taken of the appointment of an assistant official receiver, and he may be removed in the same manner as is provided in the case of an official receiver.

Power of officers of Board of Trade and official receivers' clerks in certain cases to act for official receivers.

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

Duties where no assets.

203. Where a company against which a winding-up order has been made has no available assets, the official receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade.

Accounting by official receiver.

204.—(1.) Where a liquidator is appointed by the Court in a winding-up by the Court, the official receiver shall account to the liquidator.

(2.) If the liquidator is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient.

(3.) The provisions of these rules as to liquidators and their accounts shall not apply to the official receiver when he is liquidator, but he shall account in such manner as the Board of Trade may from time to time direct.

Official receiver to act for Board of Trade where no committee of inspection.

205. Where there is no committee of inspection any functions of the committee of inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver.

Appeals from Board of Trade and official receiver.

206. An appeal in the High Court against a decision of the Board of Trade, or an appeal to the Court from an act or decision of the official receiver, acting otherwise than as liquidator of a company, shall be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made.

Applications under sect. 159 (2) of the Act.

207.—(1.) An application by the Board of Trade to the Court to examine on oath the liquidator or any other person pursuant to section 159 of the Act, shall be made *ex parte*, and shall be supported by a report to the Court filed with the registrar, stating the circumstances in which the application is made.

(2.) The report may be signed by any person duly authorized to sign documents on behalf of the Board of Trade; and shall for the purposes of such application be *primâ facie* evidence of the statements therein contained.

BOOKS TO BE KEPT, AND RETURNS MADE, BY OFFICERS OF COURTS.

Books to be kept by officers of Courts. Forms 101 and 102.

208.—(1.) In the High Court the registrar and in the district registries of the High Court at Liverpool and Manchester respectively the district registrars of the High Court, and in a Court other than the High Court, the registrar shall keep books according to the forms in the Appendix, and the particulars given under the different heads in such books shall be entered forthwith after each proceeding has been concluded.

(2.) The officers of the Courts whose duty it is to keep the books prescribed by these rules shall make and transmit to the Board of Trade such extracts from their books, and shall furnish the Board of Trade with such information and returns as the Board of Trade may from time to time require.

GAZETTING IN A WINDING-UP BY THE COURT.

Gazetting notices. Form 103.

209.—(1.) All notices subsequent to the making by the Court of a winding-up order in pursuance of the Act or the Rules requiring publication in the *London Gazette* shall be gazetted by the Board of Trade.

(2.) Where any winding-up order is amended, and also in any case in which any matter which has been gazetted has been amended or altered, or in which a matter has been wrongly or inaccurately gazetted, the Board of Trade shall re-gazette such order or matter with the necessary amendments and alterations in the prescribed form, at the expense of the company's assets, or otherwise as the Board of Trade may direct.

Filing memorandum of *Gazette* notices. Form 104.

210.—(1.) Whenever the *London Gazette* contains any advertisement relating to any winding-up proceedings the official receiver or liquidator as the case may be shall file with the proceedings a memorandum referring to and giving the date of the advertisement.

(2.) In the case of an advertisement in a local paper, the official receiver or liquidator as the case may be shall keep a copy of the paper, and a memorandum referring to and giving the date of the advertisement shall be placed on the file.

(3.) For this purpose one copy of each local paper in which any advertisement relating to any winding-up proceeding in the Court is inserted, shall be left with the official receiver or liquidator as the case may be by the person who inserts the advertisement.

(4.) A memorandum under this rule shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or newspaper mentioned in it.

ARRESTS AND COMMITMENTS.

To whom warrants may be addressed.

211. A warrant of arrest, or any other warrant issued under the provisions of the Act and Rules, may be addressed to such officer of the Court, or to such high bailiff or officer of any County Court, whether such County Court has jurisdiction to wind up a company or not, as the Court may in each case direct.

Prison to which person arrested on warrant is to be taken.

212. Where the Court issues a warrant for the arrest of a person under any of the provisions of the Act or Rules, the prison (to be named in the warrant of arrest) to which the person shall be committed shall, unless the Court shall otherwise order, be the prison used by the Court in cases of orders of commitment made in the exercise by the Court of its ordinary jurisdiction.

Execution of warrants of arrest outside ordinary jurisdiction of Court. Forms 105 and 106.

213. Where a warrant for the arrest of a person has been issued by a Court other than the High Court under any of the provisions of the Act and Rules, the high bailiff of the Court, or other officer of the Court to whom the warrant is addressed, may send the warrant of arrest to the registrar of any other Court (other than the High Court) within the ordinary jurisdiction or district of which such person shall then be or be believed to be, with a warrant annexed thereto under the

hand of the high bailiff or officer and seal of the Court from which the warrant originally issued, requiring execution of the warrant by the Court to which it is so sent; and the registrar of the last-mentioned Court shall seal or stamp the warrant with the seal of his Court, and issue the same to the high bailiff or other proper officer of his Court, with an endorsement thereon in the Form 106; and thereupon such last-mentioned high bailiff or officer may, and shall in all respects execute the said warrant according to the requirements thereof, and all constables and peace officers shall aid and assist within their respective districts in the execution of such warrant.

Prison to which a person arrested is to be conveyed, and production and custody of persons arrested.

214.—(1.) Where a person is arrested under a warrant of commitment issued under any of the provisions of the Act and Rules, other than sections 174 and 176 of the Act, and Rule 66 of the Rules, he shall be forthwith conveyed in custody of the bailiff or officer apprehending him to the prison of the Court within the ordinary jurisdiction of which he is apprehended, and kept therein for the time mentioned in the warrant of commitment, unless sooner discharged by the order of the Court which originally issued the warrant of commitment, or otherwise by law.

(2.) Where a person is arrested under a warrant issued under section 174 or section 176 of the Act, or under Rule 66 of the Rules, he shall be forthwith conveyed in custody of the bailiff or officer apprehending him to the prison of the Court within the ordinary jurisdiction of which he is apprehended; and the governor or keeper of such prison shall produce such person before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order, or such person shall be otherwise discharged by law. Provided that where any such person is conveyed to a prison other than the prison used by the Court which originally issued the warrant in cases of orders of commitment made by such Court in the exercise of its ordinary jurisdiction, the Court may by order direct such person to be transferred to such last-mentioned prison; and on receipt of such order the governor or keeper of the prison to which such person has been conveyed, shall cause such person to be conveyed in proper custody to the prison mentioned in such order, and the governor or keeper of such last-mentioned prison shall, on production of such order and of the warrant of arrest, receive such person, and shall produce him before the Court, as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order, or such person shall be otherwise discharged by law.

MISCELLANEOUS MATTERS.

Board of Trade orders.

215. The Board of Trade may from time to time issue general orders or regulations for the purpose of regulating any matters under the Act or the Rules which are of an administrative and not of a judicial character. Judicial notice shall be taken of any general orders or regulations which are printed by the King's printers, and purport to be issued under the authority of the Board of Trade.

Enlargement or abridgment of time.

216 The Court may, in any case in which it shall see fit, extend or abridge the time appointed by the Rules or fixed by any order of the Court for doing any act or taking any proceeding.

Formal defect not to invalidate proceedings.

217.—(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

(2.) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

Application of existing procedure.

218. In all proceedings in or before the Court, or any judge registrar or officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure, and regulations shall, unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a Palatine Court and County Court in accordance, as far as practicable, with the existing Rules and practice of the Court in proceedings for the administration of assets by the Court.

Petitions in Liverpool and Manchester District Registries.

219. The provisions of Rule 2 of the Rules of the Supreme Court, 1887,* relating to petitions in the district registries of Liverpool and Manchester, shall apply to petitions presented in those registries under the Act and Rules.

Annulment.

220. The Companies (Winding-up) Rules, 1903, and the forms thereby prescribed are hereby revoked and annulled, provided that such revocation and annulment shall not prejudice or affect anything done or suffered before the date on which these rules come into operation under any rule or order which is hereby revoked and annulled and that no rule or practice which was annulled or repealed by the said rules and orders shall be revived by reason of the revocation and annulment hereby effected.

Short title and commencement

221. These rules may be cited as the Companies (Winding-up) Rules, 1909. They shall come into operation on the 1st day of April, 1909.

LOREBURN, C.

I concur,

WINSTON S. CHURCHILL,
President of the Board of Trade.

The 29th day of March, 1909.

* Rules of the Supreme Court, May, 1887, printed in Statutory Rules and Orders, Revised (1st Edition), Vol. 7, p. 333.

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No. 36.—Notes of public examination where a shorthand writer is appointed.

No. 37.—Notes of public examination where a shorthand writer is not appointed.

No. 38.—Report to the Court where person examined refuses to answer to satisfaction of registrar or officer.

No. 39.—Order on persons to attend at Chambers to be examined.

No. 40.—Warrant against person who fails to attend examination.

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No. 42.—Provisional list of contributories to be made out by liquidator.

No. 43.—Notice to contributories of appointment to settle list of contributories.

No. 44.—Affidavit of postage of notices of appointment to settle list of contributories.

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No. 46.—Notice to contributory of final settlement of list of contributories, and that his name is included.

No. 47.—Supplemental list of contributories.

No. 48.—Affidavit of service of notice to contributory.

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No. 51.—Advertisement of meeting of committee of inspection to sanction proposed call.

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No. 53.—Notice of call sanctioned by committee of inspection to be sent to contributory.

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No. 55.—Affidavit of liquidator in support of proposal to call.

No. 56.—Advertisement of intended call.

No. 57.—Order giving leave to make a call.

No. 58.—Document making a call.

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No. 63.—Proof of debt (general form).

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No. 67.—Notice to creditor of intention to declare dividend.

No. 68.—Certified list of proofs under R. 150 (5) Companies (Winding-up) Rules, and application for issue of cheques for dividend on companies liquidation account.

No. 69.—Certified list of proofs filed under R. 150 (5) Companies (Winding-up) Rules, special bank case.

No. 70.—Notice to persons claiming to be creditors of intention to declare final dividend.

No. 71.—Notice of dividend.

No. 72.—Authority to liquidator to pay dividends to another person.

No. 73.—Notice of return to contributories.

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No. 75.—Notice of meeting (general form).

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No. 80.—General proxy.

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No. 92.—Statement of receipts and payments, and general directions as to statements.

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No. 105.—Warrant to registrar of Court in whose district a person against whom a warrant of arrest has been issued is believed to be.

No. 106.—Indorsement of warrant of arrest issued by a Court to which the same has been sent for execution by the Court which originally issued it.

SPECIAL PROVISIONS RELATING TO COMPANIES DURING THE WAR.

(See generally Pulling's Manual of Emergency Legislation, with Supplements, where all these provisions are fully dealt with.)

TRADING WITH THE ENEMY.

The Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), declares, sect. 1 (2), that any person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy:

Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy.

Sect. 1 (3). Where a company has entered into a transaction or has done any act which is an offence under this section, every director, manager, secretary, or other officer of the company who is knowingly a party to the transaction or act shall also be deemed guilty of the offence.

By sect. 2 (2) of the same Act, where it appears to the Board of Trade—

(b) in the case of a company, that one-third or more of the issued share capital or of the directorate of the company immediately before or at any time since the commencement of the present war was held by or on behalf of or consisted of persons who were subjects of, or resident or carrying on business in, a State for the time being at war with His Majesty; or

(c) in the case of a person, firm or company, that the person was or is, or the firm or company were or are, acting as agent for any person, firm, or company trading or carrying on business in a State for the time being at war with His Majesty;

the Board of Trade may, if they think it expedient for the purpose of satisfying themselves that the person, firm or company are not trading with the enemy, by written order, give to a person appointed by them, without any warrant from a justice, authority to inspect all books and documents belonging to or under the control of the person, firm or company, and to require any person able to give information with respect to the business or trade of that person, firm or company, to give that information.

For the purposes of this sub-section, any person authorised in that behalf by the Board of Trade may inspect the register of members of a company at any time, and any shares in a company for which share warrants to bearer have been issued shall not be reckoned as part of the issued share capital of the company.

(3) If any person having the custody of any book or document which a person is authorised to inspect under this section refuses or wilfully neglects to produce it for inspection, or if any person who is able to give any information which may be required to be given under this section refuses or wilfully neglects when required to give that information, that person shall on conviction under the Summary Jurisdiction Acts be liable to imprisonment with or without hard labour for a term not exceeding six months, or to a fine not exceeding fifty pounds, or to both such imprisonment and fine.

See also, as to the extension of the restrictions under these Acts, the Trading with the Enemy (Extension of Powers) Act, 1915 (5 & 6 Geo. 5, c. 98).

By the Trading with the Enemy Amendment Act, 1916, s. 1 (5 & 6 Geo. 5, c. 105), the Board of Trade may prohibit a company from carrying on business or require its business to be wound up where the business is, by reason of the enemy nationality

or enemy association of the company or of its members or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects.

(2) The Board may appoint a controller to conduct the winding-up and exercise the powers of a liquidator.

(3) Assets due to enemies are to be paid to the Custodian.

(7) Where such an order has been made, no steps can be taken to wind up the company without the consent of the Board of Trade. The Board may present a winding-up petition.

Sect. 10.—(1) The Registrar may refuse to register a company where any subscriber of the memorandum or any director is an enemy subject.

(2) No allotment or transfer of any share, stock, debenture, &c. made after the 27th January, 1916, to or for the benefit of an enemy subject shall, unless made with the consent of the Board of Trade, confer any rights, and the company shall not act on any such transfer, &c. (subject to penalties).

(3) A power to nominate directors is not to be exercised by an enemy subject.

Sect. 11. The Board of Trade may present a petition for winding up any company which through its agents or branches has traded with the enemy abroad.

Sect. 15. Enemy subject includes a company incorporated in an enemy State.

PAYMENT OF DIVIDENDS.

By the Trading with the Enemy Amendment Act, 1914, s. 1 (1), the Board of Trade shall appoint a person to act as Custodian of enemy property (hereinafter referred to as "the Custodian") for England and Wales, for Scotland, and for Ireland respectively, for the purpose of receiving, holding, preserving, and dealing with such property as may be paid to or vested in him in pursuance of this Act, and if any question arises as to which Custodian any money is to be paid to under this Act, the question shall be determined by the Board of Trade.

(2) The Public Trustee shall be appointed to be the Custodian for England and Wales, and shall, in relation to all property held by him in his capacity of Custodian, have the like status, and his accounts shall be subject to the like audit, as if the same were held by him in his capacity of Public Trustee, and the Public Trustee Act, 1906, shall apply accordingly.

Payment of dividends, &c. payable to enemy.

By sect. 2 (1), any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the Custodian to hold subject to the provisions of this Act and any Order in Council made thereunder, and the payment shall be accompanied by such particulars as the Board of Trade may prescribe, or as the Custodian, if so authorised by the Board of Trade, may require.

Any payment required to be made under this sub-section to the Custodian shall be made—

(a) within fourteen days after the passing of this Act, if the sum, had a state of war not existed, would have been paid before the passing of of this Act; and

(b) in any other case within fourteen days after it would have been paid.

(3) If any person fails to make or require the making of any payment or to furnish the prescribed particulars within the time mentioned in this section, he shall, on conviction under the Summary Jurisdiction Acts, be liable to a fine not exceeding one hundred pounds or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both such fine and imprisonment, and in addition to a further fine not exceeding fifty pounds for every day during which the default continues, and every director, manager, secretary or officer of a company, or any other person who is knowingly a party to the default shall, on the like conviction, be liable to the like penalty.

(5) For the purposes of this Act the expression "dividends, interest or share of profits" means any dividends, bonus or interest in respect of any shares, stock, debentures, debenture stock or other obligations of any company, any interest in respect of any loan to a firm or person carrying on business for the

purposes of that business, and any profits or share of profits of such a business, and, where a person is carrying on any business on behalf of an enemy, any sum which, had a state of war not existed, would have been transmissible by a person in the enemy by way of profits from that business shall be deemed to be a sum which would have been payable and paid to that enemy.

Duty to Notify the Custodian.

By sect. 3 (2) of the same Act, every company incorporated in the United Kingdom and every company which, though not incorporated in the United Kingdom, has a share transfer or share registration office in the United Kingdom shall, within one month after the passing of this Act, by notice in writing communicate to the Custodian full particulars of all shares, stock, debentures, and debenture stock and other obligations of the company which are held by or for the benefit of an enemy; and every partner of every firm, one or more partners of which on the commencement of the war became enemies or to which money had been lent for the purpose of the business of the firm by a person who so became an enemy, shall, within one month after the commencement of this Act, by notice in writing communicate to the Custodian full particulars as to any share of profits and interest due to such enemies or enemy; and if any company or partner fails to comply with the provisions of this section the company shall, on conviction under the Summary Jurisdiction Acts be liable to a fine not exceeding one hundred pounds, and in addition to a further fine not exceeding fifty pounds for every day during which the default continues, and the partner and every director, manager, secretary or officer of the company who is knowingly a party to the default shall on the like conviction be liable to the like fine, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both such imprisonment and fine.

Power of Custodian to Vote.

The Custodian may vote and do other acts in the character of a shareholder. *Re R. Pharaon et Fils*, (1916) 1 Ch. 1.

REGISTRATION OF NEW COMPANIES.

By the Trading with the Enemy Amendment Act, 1914, s. 9 (1), during the continuance of the present war a certificate of incorporation of a company shall not be given by the Registrar of Joint Stock Companies until there has been filed with him either—

(a) a statutory declaration by a solicitor of the Supreme Court, or, in Scotland, by an enrolled law agent, engaged in the formation of the company, that the company is not formed for the purpose or with the intention of acquiring the whole or any part of the undertaking of a person, firm or company the books and documents of which are liable to inspection under sub-section (2) of section two (see p. 633, *ante*) of the principal Act; or

(b) a licence from the Board of Trade authorising the acquisition by the company of such an undertaking.

(2) Where such a statutory declaration has been filed it shall not be lawful for the company, during the continuance of the present war, without the licence of the Board of Trade, to acquire the whole or any part of any such undertaking, and if it does so the company shall, without prejudice to any other liability, be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default shall on the like conviction be liable to the like fine or to imprisonment, with or without hard labour, for a term not exceeding six months.

NEW ISSUES OF CAPITAL.

TREASURY ANNOUNCEMENT APPEARING IN THE PRESS, FRIDAY, JANUARY 19TH, 1915.

In connection with the re-opening of the Stock Exchanges the Treasury have had under consideration the general conditions under which new issues of capital in the United Kingdom can be permitted during the continuance of the war.

It appears to the Treasury that in the present crisis all other considerations must be subordinated to the paramount necessity of husbanding the financial resources of the country with a view to the successful prosecution of the war. Accordingly they wish it to be understood that until further notice they feel it imperative in the national interest that fresh issues of capital shall be approved by the Treasury before they are made.

Treasury approval will be governed by the following general conditions:—

(1) Issues for undertakings carried on or to be carried on in the United Kingdom shall only be allowed where it is shown to the satisfaction of the Treasury that they are advisable in the national interest.

(2) Issues or participations in issues for undertakings carried on or to be carried on in the British Empire Over-Seas shall only be allowed where it is shown to the satisfaction of the Treasury that urgent necessity and special circumstances exist.

(3) Issues or participations in issues for undertakings carried on or to be carried on outside the British Empire shall not be allowed.

(4) The Treasury will not in ordinary cases insist upon the above restrictions where issues are required for the renewal of Treasury bills or other short instruments held here and falling due of foreign or colonial Governments or municipal corporations or railways or other undertakings.

All applications should be made in the first instance to the Treasury.

The Treasury will not be prepared to approve under paragraph 4 [illegible] of the Temporary Regulations for the Re-opening of the Stock Exchange [illegible] dealings in new issues which have not been approved by the Treasury before they are made.

NOTICE ISSUED BY THE TREASURY.

(1) The restriction must be taken, for the present at any rate, as applying to the issue of all capital, including that of private companies and that of the nature of reconstruction of existing capital.

(2) The approval of the Treasury should be obtained for all fresh issues of capital of whatever nature, whether made on behalf of a Government, municipality, or other public body, or any company, whether public or private. Treasury approval is not required for calls or instalments on shares, stock, debentures or bonds already issued.

(3) All applications for approval of fresh issues should be addressed to the Treasury, the envelope being marked "Capital Issues." In order to save delay and reduce correspondence to a minimum, it is desirable that the fullest particulars should be given in each case.

These regulations have apparently no direct legal force, see Sol. J. Vol. 59, p. 556: but in conjunction with the Stock Exchange Rules and the reluctance of Government officials to permit any evasion of them, they do place serious practical difficulties in the way of fresh issues of capital.

RESTRICTIONS ON ENFORCEMENT OF JUDGMENTS AND SECURITIES.

COURTS (EMERGENCY POWERS) ACT, 1914.

4 & 5 GEO. 5, c. 78.

Power of courts to defer execution, &c.

1.—(1) From and after the passing of this Act no person shall—

(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act; or

(b) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act.

This sub-section shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August nineteen hundred and fourteen.

This sub-section applies to life or endowment policies for an amount not exceeding twenty-five pounds, or payments equivalent thereto, the premiums in respect of which are payable at not longer than monthly intervals, and have been paid for at least the two years preceding the fourth day of August nineteen hundred and fourteen.

(2) If, on any such application, the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, stay execution or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the Court thinks fit.

It has been held that no application need be made under this Act before commencing proceedings for foreclosure or the appointment of a receiver by the Court. *Re Farnol, Eades & Co.*, (1915) 1 Ch. 22.

There is some doubt whether the appointment of a receiver by a debenture holder under a power in the debentures is a taking of possession within the Act, where the debenture provides that the receiver is to be the agent of the company. In such a case it has always been considered that the debenture holder is not technically in possession; but it is understood that more than one learned judge has decided in Chambers that the Act applies.

As to the effect of the Act on a winding-up petition, see *supra*, pp. 393 and 396.

As to the position under the Act of a mortgagee in possession of debentures, see *Ziman* v. *Komata Reefs Gold Mining Co., Ltd.*, (1915) 2 K. B. 163.

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[Numbers in Black Type refer to the Act and Rules in the Appendix.]

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