COMPANY LAW

A CONCISE MANUAL

OF

THE LAW AND PRACTICE CONNECTED WITH THE ORGANIZATION, MANAGEMENT AND WINDING UP OF COMPANIES

BY

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PREFACE.

Recent legislation of a far-reaching nature has rendered necessary a new Canadian work on the subject of Company Law.

The authors offer this work not as a treatise on the subject, but as a hand-book for office practice.

Theoretical discussions have been avoided as far as possible, and the attempt has been made to furnish a work which will be practical and easy of reference.

W. R. P. P.
G. M. C.

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ERRATA.

Chapter 10, page 133, should be Chapter 6.
Chapter 11, page 145, should be Chapter 7.
Chapter 12, page 153, should be Chapter 8.
Chapter 13, page 159, should be Chapter 9.
Chapter 14, page 173, should be Chapter 10.
Chapter 15, page 196, should be Chapter 11.
Chapter 16, page 236, should be Chapter 12.
Chapter 17, page 266, should be Chapter 13.
Chapter 18, page 296, should be Chapter 14.
Chapter 19, page 303, should be Chapter 15.
Chapter 20, page 311, should be Chapter 16.
Chapter 21, page 325, should be Chapter 17.
Chapter 22, page 332, should be Chapter 18.

"Provincial," headline, page 207, should be "Provisional."

COMPANY LAW.

CHAPTER I.

INCORPORATION.

1. This Act may be cited as the Ontario Companies Act. R.S.O., c. 191, s. 1.

2. (*a*) The word "corporation" in this Act includes all companies, whether with or without capital, and whether the capital thereof is divided into shares or not.

(*b*) The word "company" in this Act means only a company having a capital divided into shares.

A corporation is an artificial person created by law. It owes its existence to the sovereign power which created it and can only act within the sphere granted it by that sovereign power. It is an association of persons, but is, from a legal point of view, entirely distinct from the persons composing it. The persons composing it are called shareholders and any of them may contract with it. (*Dunstan* v. *Imperial*, 3 B. & Ad. 125, p. 132.) It is defined by Marshall, C.J., in *Dartmouth College* v. *Woodward*, 4 Wheat (U.S.) 518, as, "an artificial being invisible, intangible and existing only in contemplation of law. Being the mere creation of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."

A shareholder in a company has only the right to his share of the profits of the company, and his interest as a shareholder is not an interest in the property of the company. *Hindustan* v. *Allison*, L.R. 6 C.P., p. 73. The assets of the company are its own property and not the property of the shareholders. *Newman & Co.*, 1 Ch. 685; *Reg.* v. *Arnand*, 9 Q.B. 817. The creditors of a company are not *ipso facto* the creditors of its shareholders. *Flitcroft's Case*, 21 Ch. 533.

Advantages of Incorporation.

The following are a few of the advantages derived from converting a business into a company:—

1. By incorporation a limited liability is obtained by the shareholders of the company. Where a business is carried on by a person, either alone or in partnership with others he or they become personally liable for all the debts of the business. The creditors of the firm are the creditors of the individuals comprising it. Where a business has been turned into a company the shareholders in that company are only liable to the amount of stock held by them and which they have not paid for. Other than this they are not personally liable for any of the debts of the company.

By incorporation a business can be carried on without the individual members becoming liable, in case of failure, for any of the debts of that business.

Under the Limited Partnerships Act a partner may limit his liability in a business carried on in partnership with other persons but must not take any active part in the operations, whereas a shareholder of a company may take an active part and still incur no liability other than for the amount unpaid on the shares held by him.

2. A company is not dissolved by the death, lunacy or bankruptcy of any of its shareholders, whereas in the case of a partnership, where one of the members of the partnership dies the firm is dissolved and the assets of the firm are divided so that the estate of the deceased partner may realize its share. The goodwill of the business is lost to the deceased partner's estate. In the case of death of a shareholder of a company the only interest which he had in the company, namely, his shares, can be sold without any change in the operations of the company.

In the case of the bankruptcy of a partner, in the case of his being declared to be a person of unsound mind, the same result follows as the partnership is dissolved, whereas no change takes place in the company, other than perhaps the sale and transfer of the party's interest.

3. The powers of the management of a company are restricted by statute and by the wishes of the shareholders, the board of management being given only such powers as are conferred upon them by the Act of incorporation, and the by-laws of the company.

On the other hand, in the case of a partnership there is no restriction of the powers of any of the partners in relation to the business and dire results may befall a partnership business through the acts or contracts of one or two of the partners on account of this inherent limited power. In the case of a partnership each partner is the agent of the partnership within the scope of the business and in everything connected therewith and he may bind the partnership firm by any act or contract, he may make which is within the scope of that partnership.

4. The company has greater facility for borrowing money through the power to issue bonds, debentures or preference stock.

5. The capital of a company being divided into shares, these shares may be more readily disposed of than a man's interest in a business or in a partnership concern.

6. A company may readily increase its capital by the issuing of new shares as provided by the Companies Act.

Provincial Powers.

Companies may either be incorporated under Dominion or Provincial charter. The respective powers of the Dominion Parliament and of the Provincial Legislature with respect to incorporation of companies are found in section 91 and 92 of the British North America Act. The power of the Provincial Parliament is specified by section 92, sub-sections 10 and 11.

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

"55. The Dominion Parliament can alone incorporate companies with powers to carry on business throughout the Dominion and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any province otherwise than subject to and

consistently with the laws of that province (unless the business is such that power to make laws in relation to it is exclusively in the Dominion Parliament, under one of the enumerated heads of section 91 of the British North America Act).

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

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

The provisions of the Provincial Railway Act, 44 Vict. ch. 22 (O.), as to packing frogs does not affect a Dominion railway within clause 10 (*a*) of section 91 of the B.N.A. Act, being a work for the general advantage of Canada, such provincial Act referring only to such railway companies in respect of which the Provincial Legislature had authority to enact such provisions. *Monkhouse* v. *Grand Trunk Railway,* 8 A.R. 637.

The Provincial Legislature has power to incorporate a company to erect a boom in a navigable river, but it cannot give power to obstruct navigation. *Oneddy River Driving Boom Co.* v. *Davidson,* 10 S.C.R. 222.

The provisions of section 2, sub-section 2, of chapter 87, Con. Ord. N.W.T. (1898), as amended by the N.W.T. Ordinances, chapter 25 (1st Sess.), and chapter 30 (2nd Sess.), of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute railway legislation strictly so called and as such are beyond the competence of the Legislature of the North-West Territories. *C.P.R.* v. *The King,* 39 S.C.R. 476.

Lord Watson, in the Judicial Committee, stated as follows:—

"The British North America Act, whilst it gives the legisla-

tive control of the appellants' railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall in other respects, be exempted from the jurisdiction of the Provincial Legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive rights to prescribe regulations for the construction, repair and alteration of the railway and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in contemplation of the Act of 1867 that the railway legislation strictly so-called, applicable to those lines which are placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether prescribed as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers." *C.P.R.* v. *Notre Dame de Bonsecours* (1899), A.C., pp. 372-373.

See also *European and North American Ry. Co.* v. *Thomas*, 2 Cart. 335; *Hamilton Powder Co.* v. *Lambe*, 1 Q.B. 460; *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1899), A.C. 626.

A company incorporated under the authority of a Provincial Legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits. *Can. Pac. Ry. Co.* v. *Ottawa Fire Insurance Co.*, 39 S.C.R. 405. This case defines the meaning of "provincial objects" as used in sub-section 11, of section 92, of the British North America Act, and overrules the territorial view of the provinces' powers. Maclennan, J., at page 457, states: "I think the expression provincial objects is used in contradistinction to Dominion objects and means no more than this: that just as Parliament in incorporating companies must confine itself to

Dominion objects as between the Dominion and other countries, so each province not only as between itself and other countries, but between itself and the provinces must confine itself to provincial objects." Duff, J., at page 470: "If the company is one formed for gain, then the 'objects of the company' is only another expression for the business of the company—the business by means of which the company, under its constitution, is permitted to acquire that gain; and the question, are such and such objects, regarded as the objects of a 'company' as these words are used in sub-section 11, 'provincial objects'? is another form of the question, would the business of a company constituted with such objects, regarded as a whole, fairly come within the description 'provincial'? If, taken as a whole, a given undertaking would fall within the description 'provincial,' I do not know on what ground one could challenge the competence of the Legislature to constitute a company having such an undertaking, or to invest its creature with such capacities and faculties as it should see fit—not, of course, incompatible with the character of its undertaking as a provincial undertaking.

"There is, I think, a very real distinction between a company whose undertaking is limited in the manner I have indicated and a Dominion company having power to establish itself and conduct its business to any extent in any one or more of the provinces it may select. And the distinction is important in two aspects. It affects not only the company and the shareholders or corporators of it. The constitution and powers of such a corporation might well be regarded as constituting a single subject of Dominion concern which would be fitly reserved as a subject of legislation to the Dominion. It may well too have been thought that the legislative control of Canadian companies having authority without restriction to carry on business abroad, should, for the same reason be a single control vested in the Dominion. Not only is the undertaking of such a company outside the description "provincial" in the territorial sense, but I find it difficult to fasten upon any characteristic of such a com-

pany appertaining to its corporate capacity which permits the application of that description.

"On the other hand, the constitution and powers of a corporation restricted as to its residence or places of business to one province are mainly the concern of that province; and it seems impossible to find any ground upon which to deny the character 'provincial' to such a company, confined in its administration and as to its residence to the province of its origin; elsewhere always a foreigner and a non-resident foreigner; whose business in fact originates in that province and as an organization must always be in substance a 'provincial' undertaking—and such a company seems, consequently, to satisfy the description 'company with provincial objects.'

As to the power of incorporation see also *Boyle* v. *Victoria-Yukon Trading Co.*, 9 B.C. Rep. 213; *Cushing* v. *Dupuy*, 5 A.C. 409; *Scoolbred* v. *Clark* (1890) S.C.R. 265; *Clarkson* v. *Ontario Bank*, 15 App. Rep. 166; *Atty.-Gen. Ont.* v. *Atty.-Gen. Dom.* (1894), A.C. 189; *Citizens* v. *Parsons*, 7 A.C. 96; *Colonial Bldg.* v. *Atty.-Gen. Que.*, 9 A.C. 57; *Bank of Toronto* v. *Lamb*, 12 A.C. 575; *Tennant* v. *Union Bank* (1894), A.C. 31.

Companies may be incorporated in Canada or in Ontario in two ways, by special Act or by Letters Patent. In Canada the incorporation of general companies is governed by the Companies Act, R.S.C., c. 79, and in Ontario by the Ontario Companies Act, 7 Edw. VII., c. 34. This latter Act refers to and prescribes the method of incorporation for all companies which may be incorporated by the Provincial Legislature except insurance, telegraph, railway, loan corporations, corporations for the construction of roads and other works and immigration aid societies.

3. The Lieutenant-Governor may, by Letters Patent, grant a charter to any number of persons, not less than five, of the age of twenty-one years, who petition therefor, constituting such persons and any others who have or may thereafter become subscribers to the memorandum or agreement hereafter referred to, a body corporate and politic with or without capital divided into shares, for any of the purposes to which the authority of the Legislature of Ontario extends, except the construction or working of railways for public use within Ontario, the business of insurance, and of loan corporations within the meaning of the Loan Corporations Act. R.S.O., c. 191, s. 9, amended.

4.—(1) The applicants for incorporation of a company with capital divided into shares, may petition the Lieutenant-Governor, through the Provincial Secretary, for the grant of Letters Patent. The petition of the applicants shall shew:

(*a*) The proposed corporate name of the company;

(*b*) The objects for which the company is to be incorporated;

(*c*) The place within Ontario where the head office of the company is to be situated;

(*d*) The amount of the capital of the company, the number of shares, and the amount of each share;

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

(*f*) The names of the applicants, not less than three, who are to be the provisional directors of the company.

(2) The petition may be in the form or to the effect set out in Schedule "A" to this Act, and shall be accompanied by a memorandum of agreement, executed in duplicate in the form or to the effect set out in Schedule "B" to this Act.

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

(4) The petition may ask to have embodied in the Letters Patent any provision which, under this Act might be embodied in any by-law of the company when incorporated. R.S.O., c. 191, s. 10, amended.

Procedure for Incorporation.

Ontario.

(*a*) In the case of a company or a corporation with or without share capital.

Under the Dominion and Ontario Companies Act no notice need be given by the applicants of their intention to apply for Letters Patent. Under the Ontario Act notice of the issue of Letters Patent creating a company is caused to be inserted by the provincial secretary in the *Ontario Gazette*. R.S.O., c. 191, s. 16.

Under the Dominion Companies Act notice of the issue of Letters Patent incorporating a company is inserted in the *Canadian Gazette* by the Secretary of State by two insertions and a copy of said notice must be inserted by the company in at least one newspaper on four separate occasions

in the county, city or place where the head office or chief agency of the company is established.

(*b*) In the case of a company,

1. No less than five persons may apply for Letters Patent of incorporation.

2. There must be a memorandum of agreement and stock book filed in duplicate in the form according to the Schedule B of the Act.

3. There must be a petition in the form of Schedule A to the Act and containing,

(*a*) Proposed corporate name of the company;

(*b*) The objects for which the company is to be incorporated;

(*c*) The place within Ontario where the head office of the company is to be situated;

(*d*) The amount of the capital of the company, the number of shares and the amount of each share;

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

(*f*) The names of the applicants not less than three who are to be the provisional directors of the company;

(*g*) The amount of stock subscribed by each applicant in the memorandum of agreement and stock book;

(*h*) That the proposed name of the company is unobjectionable;

(*i*) That no public or private interest will be prejudicially affected by the incorporation;

(*k*) The petition must be signed on the page containing the prayer of the petition by at least two of the applicants.

4. Affidavits of execution should be attached to the memorandum of agreement and stock book and to the petition.

5. To the petition must be annexed or the petition must be accompanied by an affidavit verifying it.

(To be executed in duplicate; one duplicate to be deposited in the office of the Provincial Secretary.)

The Company of (Limited).

MEMORANDUM OF AGREEMENT AND STOCK BOOK.

We the undersigned do hereby severally covenant and agree each with the other to become incorporated as a Company under the provisions of the Ontario Companies Act under the name of The Company of (Limited), or such other name as the Lieutenant-Governor may give to the Company with a capital of dollars, divided into shares of dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said Company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such Company to the said amounts.

In witness whereof we have signed.

Name of Subscriber.	Seal.	Amount of Subscription.	Date.	Place.	Residence of Subscriber.	Name of Witness.

It is sufficient if the incorporators subscribe for one share of stock each.

The duplicate originals must both be forwarded to the Provincial Secretary.

Where the incorporators are more or less scattered it is frequently convenient to have them execute powers of attorney.

If executed under power of attorney, the power of attorney must be filed together with an affidavit of execution of same.

The signature of the subscribers must be proved by affidavits of witnesses.

At least two signatures must be on the page containing the Memorandum of Agreement.

PETITION.

To His Honour etc., etc., etc., Lieutenant-Governor of the Province of Ontario:

The Petition of (write in full the names, places of residence, and occupations of the petitioners (who must not be less than five)).

Humbly sheweth as follows:—

1. Your petitioners are desirous of obtaining by Letters Patent, under the Great Seal, a charter, under the provisions of the Ontario Companies' Act, constituting your petitioners and such others as may become shareholders in the Company thereby created, a body corporate and politic under the name of The Company (Limited), or such other name as shall appear to your Honour to be proper in the premises.

2. Your petitioners have satisfied themselves and are assured that the corporate name under which incorporation is sought is not on any public ground objectionable, and that it is not that of any known Company, incorporated or unincorporated, or of any partnership or individual, or any name on which any known business is being carried on, or so nearly resembling the same as to deceive, [add, when required, as provided by section 28 of the Act (except the name , and your petitioners have received the necessary consent to the use of the said name herein applied for as provided by section 28 of the said Act)].

3. Your petitioners have satisfied themselves and are assured that no public or private interest will be prejudicially affected by the incorporation of your petitioners as aforesaid.

4. Your petitioners are of the full age of twenty-one years.

5. The object for which incorporated as aforesaid is sought by your petitioners is to . State objects—incidental powers are given by section 17 of the Act.

6. The head office of the Company will be at .

7. The amount of the capital stock of the Company is to be dollars.

8. The said stock is to be divided into shares of dollars each.

9. The said (There must be at least three directors and they must be applicants and shareholders holding stock absolutely in their own right) are to be provisional directors of the Company.

10. By subscribing therefor in a Memorandum of Agreement, duly executed in duplicate, with a view to the incorporation of the Company, your petitioners have taken the amount of stock set opposite their respective names, as follows:—

Petitioners.	Amount of stock subscribed for.
.....	$.....
.....	$.....
.....	$.....

Your petitioners, therefore, pray that your Honour may be pleased by Letters Patent under the Great Seal to grant a charter to your petitioners constituting your petitioners and such others as have or may become subscribers to the Memorandum of Agreement, and stock book of the Company thereof created, a body corporate and politic for the due carrying out of the undertaking aforesaid.

And your petitioners, as in duty bound, will ever pray.

Signatures of witnesses.	Signatures of petitioners.
.....	.....
.....	.....
.....	.....
.....	.....

Dated at this day of 19 .

NOTE.—If it is desired to hold meetings of the shareholders and directors out of Ontario, this should be stated in the petition. See section 44 of the Ontario Act.

NOTE.—The date of petition should be the same as or subsequent to the latest date of the Memorandum of Agreement or stock book.

NOTE.—If petition be executed under power of attorney the power of attorney must be filed and must be a specific power, and accompanied by an affidavit of execution.

It would be advisable to include in the petition, the number of directors the Company intends to have.

AFFIDAVIT OF EXECUTION.

Province of Ontario
County of
To Wit:

In the matter of the herein application for the incorporation by the grant of Letters Patent of

I, of the of in the City of , make oath and say:—

1. That I did see the annexed petition for incorporation duly signed and sealed by

2. That the said petition was so signed at the aforesaid.

3. That the name , subscribed as a witness to the said petition is the proper handwriting of me this deponent.

Sworn before me at the of
in the of
this day of 19 .

AFFIDAVIT VERIFYING PETITION.

Province of Ontario
County of
To Wit:

In the matter of the herein application for the incorporation by the grant of Letters Patent of

I, (one of the applicants for incorporation) make oath and say:—

1. That I am one of the applicants herein.

2. That I have a knowledge of the matter and that the allegations in the within petition contained are to the best of my knowledge and belief, true in substance and in fact.

3. That I am informed and verily believe that each petitioner is of the full age of twenty-one years.

4. That the proposed corporate name of the Company is not on any public ground objectionable and that it is not that of any known Company incorporated or unincorporated, or of any partnership or individual or any name under which any known business is being carried on or so nearly resembling the same as to deceive.

NOTE.—If the name be similar to that of a subsisting corporation association, partnership, individual or person, the consent to the use of the

name is required by section 28, and the affidavit, in such case may be added to as follows:—"Except the name of and it is elsewhere shewn that your petitioners have received the necessary consent to the use of the name applied for.

5. That I have satisfied myself and am assured that no public or private interest will be prejudicially affected by the incorporation of the Company aforesaid.

Sworn before me at the of
in the of
this day of 19 .

CONSENTS.

Consent where the name to be used is the name under which one of the applicants has heretofore carried on business.

Province of Ontario
County of
To Wit:

In the matter of the herein application for the incorporation by the grant of Letters Patent of

I, (the party consenting to the use of the name).

1. That I am one of the applicants herein.

2. That I am now and have been for some time carrying on business at the of in the County of under the firm, name and style of .

3. That I desire that the name should be given to the Company.

4. That I hereby consent to the same being given.

Sworn before me at the of
in the of
this day of 19 .

CONSENT TO USE OF NAME.

In the matter of the herein application for the incorporation by the grant of Letters Patent of .

We, (or I) of in the of carrying on business at the of under the firm, name and style of hereby consent that the name Company (Limited), be granted to the Company, incorporation of which is now being applied for by .

Witness our hands at Toronto this day of 19 .

AFFIDAVIT.

In the matter of the herein application for the incorporation by the grant of Letters Patent of .

I, of the of make oath and say:—

1. That I was personally present and did see sign the above Consent at the .

2. That I know the said parties.

Sworn before me at the of
in the of
this day of 19 .

CONSENT.

In the matter of the herein application for the incorporation by the grant of Letters Patent of .

The Company (Limited), hereby consent to the use by the applicants herein of the name Company (Limited).

Dated at this day of .

Witness }
{

President.
Secretary.

(Signatures should be verified by affidavit as in the preceding form.)

POWER OF ATTORNEY TO SIGN PETITION AND STOCK BOOK.

Know all men by these presents that I of the of in the Province of do hereby nominate, constitute and appoint of in the province of my true and lawful attorney for me and in my name, place and stead and for my sole use and benefit to sign and execute a petition of and others to His Honour the Lieutenant-Governor, for the incorporation by Letters Patent under the Great Seal of the Province of of Company (Limited), (objects and capitalization) and to sign and execute all such papers and documents as are requisite and necessary for procuring such incorporation, including the stock book and for me and on my behalf to subscribe therein for shares of $ each and generally to do for me and in my name and place and stead and as my acts all lawful acts requisite and necessary for obtaining such incorporation, I hereby ratifying, confirming and agreeing to ratify and confirm all that my said attorney shall do or cause to be done in the premises.

5.—(1) The applicants for the incorporation of a corporation not having share capital may petition the Lieutenant-Governor through the Provincial Secretary for the grant of Letters Patent. The petition of the applicants shall shew:—

(*a*) The proposed corporate name of the corporation;

(*b*) The objects for which the corporation is to be incorporated;

(*c*) The place within Ontario where its objects are to be carried out;

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

(2) The petition may be in the form or to the effect set out in Schedule "C" to this Act.

(3) The petition shall be accompanied by a memorandum of agreement signed by the petitioners setting out such regulations as may be deemed expedient—(1) for the selection of members, trustees, directors and officers; (2) for the holding of meetings of members, trustees and directors; (3) for the establishment of branches; (4) for the payment of directors, trustees, officers and employees; (5) for the control and management of

the affairs of the corporation. The memorandum shall be expressed in separate paragraphs numbered consecutively, and may be in the form or to the effect set out in Schedule "D" to this Act, and the petitioners may adopt all or any of its provisions or substitute others in lieu thereof. New.

IN THE CASE OF CORPORATIONS NOT HAVING SHARE CAPITAL.

1. No less than five persons may apply for Letters Patent of incorporation.

2. There must be a memorandum of agreement in the form as set out in Schedule D to the said Act.

3. There must be a petition in the form of Schedule C to the Act, and containing,

(*a*) The proposed corporate name of the corporation;

(*b*) The objects for which the corporation is to be incorporated;

(*c*) The place within Ontario where its objects are to be carried out;

(*d*) The name in full and place of residence and the calling of each of the applicants;

(*e*) The names of the provisional directors, who must be applicants;

(*f*) That the proposed name of the corporation is unobjectionable;

(*g*) That no public or private interest shall be prejudically affected by the incorporation;

(*h*) That the parties have subscribed to the memorandum of agreement.

4. To the petition must be annexed or the petition must be accompanied with affidavit verifying it.

5. Affidavits of execution should be attached to both the memorandum of agreement and stock book and to the petition.

PETITION.

To His Honour , etc., etc., etc.

The petition of Humbly sheweth as follows:—

1. Your petitioners are desirous of obtaining by Letters Patent, under the Great Seal, a charter, under the provisions of the Ontario Companies'

Act, constituting your petitioners and such others as may become members of the corporation thereby created, a body corporate and politic without share capital under the name of or such other name as shall appear to your Honour to be proper in the premises.

2. Your petitioners have satisfied themselves and are assured that the corporate name under which incorporation is sought is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive (except the name and your petitioners have received the necessary consent to the use of the said name herein applied for as hereinafter appears).

3. Your petitioners have satisfied themselves and are assured that no public or private interest will be prejudicially affected by the incorporation of your petitioners as aforesaid.

4. Your petitioners are of the full age of twenty-one years.

5. The object for which incorporation as aforesaid is sought by your petitioners is to .

6. That the undertaking of the Company will be carried on in which is within the Province of Ontario, and its post office address will be .

7. The said are to be the provisional directors of the Corporation.

8. Your petitioners have subscribed to a Memorandum of Agreement in duplicate, setting out the purposes and objects of incorporation and provisions for administering the affairs of the Corporation, and have undertaken that the said Corporation shall be carried on without the purpose of gain for its members, and that any profits or other accretions to the Corporation shall be used in promoting its objects.

Your petitioners, therefore pray that your Honour may be pleased by Letters Patent under the Great Seal to grant a charter to your petitioners constituting your petitioners and such others as have or may become subscribers to the Memorandum of Agreement of the Corporation thereby created, a body corporate and politic for the due carrying out of the undertaking aforesaid.

And your petitioners, as in duty bound, will ever pray.

Signature.

AFFIDAVIT OF EXECUTION.

Province of Ontario
County of
To Wit:

In the matter of the herein application for the incorporation by the grant of Letters Patent of

I, of the of in the County of , make oath and say:—

1. That I did see the annexed petition for incorporation duly signed and sealed by .

2. That the said petition was so signed at the aforesaid.

3. That the name , subscribed as a witness to the said petition is the proper handwriting of me this deponent.

Sworn before me at the of in the of this day of 19 .

AFFIDAVIT VERIFYING PETITION.

Province of Ontario
County of
To Wit:

In the matter of the herein application for the incorporation by the grant of Letters Patent of

I, (one of the applicants for incorporation) make oath and say:—

1. That I am one of the applicants herein.

2. That I have a knowledge of the matter and that the allegations in the within petition contained are to the best of my knowledge and belief, true in substance and in fact.

3. That I am informed and verily believe that each petitioner is of the full age of twenty-one years.

4. That the proposed corporate name of the Company is not on any public ground objectionable and that it is not that of any known Company incorporated or unincorporated, or of any partnership or individual or any name under which any known business is being carried on or so nearly resembling the same as to deceive.

NOTE.—If the name be similar to that of a subsisting corporation association, partnership, individual or person, the consent to the use of the name is required by section 28, and the affidavit, in such case may be added to as follows:—"except the name of and it is elsewhere shewn that your petitioners have received the necessary consent to the use of the name applied for.

5. That I have satisfied myself and am assured that no public or private interest will be prejudicially affected by the incorporation of the Company aforesaid.

Sworn before me at the of in the of this day of 19 .

Signature of witnesses.	Signature of petitioners.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Dated at..... this..... day of ..... 19 .

MEMORANDUM OF AGREEMENT.

Memorandums of Agreement of the
Association, made and entered into this day of 1906.

(1) We the undersigned do hereby severally covenant and agree each with the other to become incorporated under the provisions of the Ontario Companies' Act as a corporation without share capital for the purposes and objects following:—

(2) The subscribers shall be the first members, and it shall rest with the directors to determine the terms and conditions on which subsequent members shall from time to time be admitted.

(3) The following shall be the first directors of the corporation:—

(4) Any member may transfer his interest in the corporation by instrument in writing, signed both by the transferor and transferee and duly registered with the corporation.

(5) The first general meeting shall be held at such time, not being more than two months after the incorporation of the corporation, and at such place as the directors may determine.

(6) Subsequent general meetings shall be held at such time and place as may be prescribed by the corporation in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the fourth Wednesday in January in every year, at such place as may be determined by the directors.

(7) The directors may, whenever they think fit, and they shall upon a requisition made in writing by any five or more members, convene a general meeting.

(8) Any requisition made by the members shall express the object of the meeting proposed to be called and shall be left at the office of the corporation.

(9) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists or any other five members may themselves convene a meeting.

(10) Ten days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business shall be given to the members in the manners hereinafter mentioned, or in such other manner, if any, as may be prescribed by the corporation in general meeting, but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(11) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened upon the requisition of the members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the following week, at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

(12) The chairman (if any) of the directors shall preside as chairman at every general meeting of the corporation.

If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman at such meeting.

(13) The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(14) At any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the minutes of proceedings of the corporation, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(15) If a poll is demanded, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the corporation in general meeting.

(16) With the consent in writing of all members, a general meeting may be convened on shorter notice than seven days, and in any manner which such members think fit.

(17) The quorum of a general meeting shall be members present in person.

(18) Until otherwise determined by special resolution, every member shall have one vote.

(19) Votes may be given either personally or by proxy. The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under its common seal, and shall be attested by one or more witness or witnesses; no person shall be appointed a proxy who is not a member of the corporation.

(20) A resolution signed by all the directors shall be as valid and effectual as if it had been passed at a general meeting of the directors duly called and constituted.

(20) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the corporation in general meeting.

(21) The affairs of the corporation shall be managed by the directors, who may pay all expenses incurred in incorporating the corporation, and may exercise all such powers of the corporation as are not by the foregoing Act, or by these articles, required to be exercised by the corporation in general meeting, subject, nevertheless, to any regulations of this memorandum, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the corporation in general meeting; but no regulation made by the corporation in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made. The continuing directors may act notwithstanding any vacancy in their body.

(22) The office of director shall be vacated:—

(*a*) If he holds any other office or place of profit under the corporation;

(*b*) If he is concerned in or participates in the profits of any contract with the corporation.

But the above rules shall be subject to the following exceptions:—that no director shall vacate his office by reason of his being a shareholder of any corporation which has entered into contracts with or done any work for the corporation of which he is a director; nevertheless, he shall not vote in respect of such contract of work, and if he does so vote his vote shall not be counted, and in addition thereto, a director shall vacate his office if and when he is requested by the corporation in general meeting to resign.

(23) A retiring director shall be re-eligible.

The corporation at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(24) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

(25) The corporation may, from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation of any such increased or reduced number is to go out of office.

(26) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(27) The corporation in general meeting may, by a special resolution, remove any director before the expiration of his period of office, and may, by an ordinary resolution, appoint another person in his stead; the person so appointed shall hold office during such time only as the director in whose place he was appointed would have held the same if he had not been removed.

(28) The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

(29) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

(30) 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 their powers so delegated, conform to any regulations that may be imposed on them by the directors.

(31) A committee may elect a chairman of their meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

(32) 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.

(33) 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, but it shall not be necessary to give notice of a meeting of the directors to a director who is not within the province.

In testimony whereof we have hereunto set our hands and affixed our seals.

NOTE.—These provisions may be altered, added to or others substituted as advised by the applicants. Section 5.

SCHEDULE E.

OF ACTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
Revised Statutes of Ontario, c. 191.	The Ontario Companies Act.	The whole Act.
The Revised Statutes of Ontario, c. 194.	The Timber Slides Companies Act.	Sec. 1-17, 20-35 and 60, 62, 63, 64.
Revised Statutes of Ontario, c. 195.	An Act respecting Joint Stock Companies for the construction of Piers, Wharfs, Dry Docks and Harbours.	Sec. 1-7, 12-14.
Revised Statutes of Ontario, c. 196.	An Act respecting Joint Stock Companies for the erection of Exhibition Buildings.	Sec. 1-3, 5-7.
Revised Statutes of Ontario, c. 197.	The Mining Companies Incorporation Act.	The whole Act.
Revised Statutes of Ontario, c. 199.	An Act respecting Joint Stock Companies for supplying Cities, Towns and Villages with Gas and Water.	Sec. 1-11, 14-17 20-43, 55-58.
Revised Statutes of Ontario, c. 200.	An Act respecting Companies for supplying Steam, Heat, Electricity or Natural Gas for Heat, Light or Power.	Sec. 1-3, 5-8.

SCHEDULE E.—*Continued.*

OF ACTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
Revised Statutes of Ontario, c. 201.	An Act respecting Cheese and Butter Manufacturing Associations and Companies.	The whole Act.
Revised Statutes of Ontario, c. 202.	An Act respecting Co-operative Associations.	The whole Act.
Revised Statutes of Ontario, c. 206.	The Ontario Trust Companies Act.	The whole Act.
Revised Statutes of Ontario, c. 211.	An Act respecting Benevolent, Provident and other Societies.	The whole Act.
Revised Statutes of Ontario, c. 213.	An Act respecting Cemetery Companies.	Sec. 1-2, s.s. 1-3 14-20, 25, 26 30.
Revised Statutes of Ontario, c. 215.	An Act respecting the changing of the names of Incorporated Companies.	The whole Act.
Revised Statutes of Ontario, c. 216.	The Directors' Liability Act.	The whole Act.
Revised Statutes of Ontario, c. 217.	An Act to prevent fraudulent statements by Companies and others.	The whole Act.
Revised Statutes of Ontario, c. 218.	An Act respecting Fees payable by Incorporated Companies and other Bodies.	The whole Act.
Revised Statutes of Ontario, c. 219.	An Act respecting returns required from Incorporated Companies.	The whole Act.
Revised Statutes of Ontario, c. 221.	An Act respecting Investments by Corporations.	The whole Act.
Revised Statutes of Ontario, c. 222.	The Joint Stock Companies Winding-up Act.	The whole Act.
61 Vict., c. 19.	An Act to amend the Ontario Companies Act.	The whole Act.
61 Vict., c. 20.	An Act to amend the Timber Slides Companies Act.	The whole Act.
62 Vict. (2), c. 11.	An Act to amend the Statute Law.	Sec. 19, 20 and 21
63 Vict., c. 23.	An Act to amend the Ontario Companies Act.	The whole Act.
63 Vict., c. 26.	An Act to provide for the incorporation of Co-operative Cold Storage Associations.	Sec. 1-16 Schedule A.
1 Edw. VII., c. 18.	An Act to amend the Ontario Companies Act.	The whole Act.
2 Edw. VII., c. 24.	An Act to amend the Ontario Companies Act.	The whole Act.
3 Edw. VII., c. 7.	The Statute Law Amendment Act, 1903.	Sec. 34, 35, 36.
4 Edw. VII., c. 11.	The Statute Law Amendment Act, 1904.	Sec. 45, 46, 47, 48.

LOAN CORPORATIONS.

DECLARATION.

Under section 3 (4, 5) of the Loan Corporations Act, constituting a Provisional Loan Corporation to be known (if so incorporated) as the Company.

We the undersigned promoters do severally declare as follows:—

1. That we have under our respective hands and seals subscribed hereto each his true name, address and calling.

2. That a general meeting of promoters called for the purpose of considering the question of constituting a Provisional Loan Corporation was held at on the day of 18 , and was attended by (1) persons all of full age.

3. That of the said general meeting was the chairman; and was the secretary.

4. That we the undersigned declarants being present at the said general meeting did then and there agree to constitute ourselves a Provisional Loan Corporation by the name of or such other name as shall appear to the Lieutenant-Governor of Ontario in Council to be proper in the premises, having its head office at in the of under the laws of the province in that behalf and under the proposed by-laws then and there by us adopted, (subject to such amendments thereof as may be directed or required under the Loan Corporations Act) of which proposed by-laws a duplicate original marked as "Exhibit A" is to this our Declaration annexed.

5. That at the said general meeting the following persons six in number were elected Provisional Directors:—

NAME.	ADDRESS.	CALLING.

6. That, by subscribing therefor in a stock-book duly executed in duplicate with a view to the incorporation of the said company, we the said several Declarants have taken the amounts of (2) stock set opposite our respective names, the total of the said amounts being $; that we are each of us the said Declarants *sui juris*, and the beneficial and absolute holder of the stock by us severally subscribed for: also that of the said stock-book a duplicate original marked as "Exhibit B" is to this our Declaration annexed.

(2) "Permanent" or "Terminating" as the case may be.

Given under our respective hands and seals pursuant to the Loan Corporations Act:—

(3) NAME.	ADDRESS.	CALLING.	SEAL.

(1) State number of persons, which should be not less than twenty-five.

NOTE.—At least twenty-five declarants must sign this Declaration.

LOAN CORPORATION.

PETITION FOR INCORPORATION.

To His Honour,

The Lieutenant-Governor of the Province of Ontario in Council.

The petition of (1)
all of your said petitioners being shareholders and directors of the (2)
a provisional (3) Company.

Respectfully sheweth:

1. That for the purpose of constituting a (3) Company under the Loan Corporations Act a general meeting of promoters was held at the of in the of on the day of A.D. 18 , and that at the said general meeting (3a). promoters were personally present.

2. That of the promoters so present at the said general meeting (3b) , being a majority, did there and then adopt and duly execute under their respective hands and seals a Declaration agreeing to constitute themselves a provisional (4) Company by the name of (5) or such other name as shall appear to your Honour to be proper in the premises, having its head office at the of in the of pursuant to the law of the province in that behalf and to the by-laws by the said general meeting adopted and annexed to the said Declaration.

3. That, by subscribing therefor in a stock-book duly executed in duplicate with a view to the incorporation of the Company, the said several Declarants have taken the amounts of (6) stock set opposite their respective names, the total of the said amounts being $: and that each of the said Declarants is *sui juris*, and is the beneficial and absolute holder of the stock by him subscribed for.

4. That duplicates of the said original Declaration, by-laws and stock-book have been deposited with the registrar of loan corporations pursuant to the law in that behalf.

5. That, as set forth in the said Declaration, your petitioners were at the said general meeting duly elected provisional directors.

6. That the said Company is proposed to be constituted as a continuing and permanent corporation with a permanent capital of $ if so authorized by your Honour: and that the said stock is to be divided into shares of $ each.

7. That the said permanent capital is to be raised by (7)

8. That of the said authorized permanent capital $ is to be subscribed, and is to be actually paid thereon before the Company applies to be registered for the transaction of business.

(If the company is to be constituted with terminating or withdrawable capital stock, then add the following paragraph.)

9. "That the company is proposed to be constituted also with terminating capital by means of terminating stock or shares issued and withdrawable under the law of the province in that behalf and the by-laws of the Company made thereunder."

Your petitioners therefore pray that your Honour may be pleased by Letters Patent, under the Great Seal to grant a charter constituting your petitioners and such others as have or shall become shareholders in the Company thereby created a body corporate and politic for the carrying out of the undertaking aforesaid, under the name of or such other name as shall appear to your Honour to be proper in the premises.

And your petitioners as in duty bound will ever pray.

[WITNESS:] [ACTUAL SIGNATURES:]

(1) Insert the full names, additions, descriptions and residences of the six provisional directors (L.C. Act, s. 3(5)).

(2) Proposed name of corporation.

(3) "Loan" or "Loaning Land," as the case may be.

(3a) Fill in with the number of promoters personally present.

(3b) Fill in with the number of promoters who adopted and executed the Declaration.

(4) "Loan" or "Loaning Land" as the case may be.

(5) Proposed corporate name.

(6) "Permanent" or "Terminating" as the case may be.

(7) "By single payments, or by fixed periodical payments on the subscribed stock," *or* "By calls or assessments from time to time made upon the subscribed stock": *or, as the case may be.*

SPECIAL ACTS.

FORM OF PETITION.

To the Honourable the Legislative Assembly of the Province of Ontario, in Parliament assembled.

The petition of the undersigned, of the

Humbly sheweth: That (*here state the object of the petitioners in soliciting the Act, briefly setting forth the reasons therefor*):

Wherefore your petitioners humbly pray that your Honourable House may be pleased to pass an Act (*for the purposes above mentioned*), and, as in duty bound, your petitioners will ever pray.

(*Signatures.*)

Signature of Mayor and Clerk, Reeve and Clerk, Township Clerk or other Municipal Officer, or President and Secretary of other Corporations.

Seal in the case of existing petitioning corporation.

(Three signatures at least *must be* upon the page containing the prayer of petitions, except in the case of a single petitioner.)

(Date.)

Extracts from Rules of the Legislative Assembly of Ontario.

Relating to Private Bills.

51. No petition for any Private Bill is received by the House after the first ten days of each Session; nor may any Private Bill be presented to the House after the first seventeen days of each Session; nor may any report of any standing or select committee upon a Private Bill be received after the first thirty days of each Session. And no motion for the general suspension or modification of this rule shall be entertained by the House, unless after reference made thereof, at a previous sitting of the House, to the several standing committees charged with consideration of Private Bills, or upon report submitted by two or more of such committees.

53. All applications for Private Bills properly the subject of legislation by the Legislative Assembly of Ontario, within the purview of the British North America Act, 1867, whether for the erection of a bridge, the making of a railroad, turnpike road or telegraph line; the construction or improvement of a harbour, canal, lock, dam or slide, or other like work; the granting of a right of ferry; the incorporation of any particular trade or calling, or of any joint stock company; or otherwise for granting to any individual or individuals any exclusive or particular rights or privileges whatever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or relate to any particular class of the community; or for making any amendments of a like nature to any former Act,—shall require a notice, clearly and distinctly specifying the nature and object of the application, and, where the application refers to any proposed work, indicating generally the location of the work, and signed by or on behalf of the applicants,—such notice to be published as follows, *viz.*:—

A notice inserted in the "*Ontario Gazette*," and in one newspaper published in the county, or union of counties, affected, or if there be no newspaper published therein, then in a newspaper in the next nearest county in which a newspaper is published.

Such notice shall be continued in each case for a period of *at least six*

weeks, during the interval of time between the close of the next preceding Session, and the consideration of the petition.

And *within two weeks* from the first appearance of such notice in the "*Ontario Gazette*," the Bill, with the sum of one hundred dollars, and the petitions, shall be placed by the applicant in the hands of the Clerk of the House, whose duty it shall be to direct the Bill to be printed.

If the application is for authority to issue debentures to a municipal corporation, the notice *shall set out the particulars of the municipality's existing debenture debt and the reasons for requiring a further issue of debentures.*

54. Before any petition praying for leave to bring in a Private Bill for the erection of a toll bridge is received by the House, the person or persons intending to petition for such Bill shall, upon giving the notice required by the preceding rule, also at the same time and in the same manner, give notice of the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a drawbridge or not, and the dimensions of the same.

55. Before any petition praying for leave to bring in a Bill for the construction of railways, tramways, or canals, is received by the House, the person or persons petitioning for such Bill shall deposit with the clerk of committees the following documents:—

(1) A map or plan upon a scale of not less than half an inch to the mile, shewing the location upon which it is intended to construct the proposed work, and shewing also the lines of existing or authorized works of a similar character within, or in any way affecting the district or any part thereof which the proposed work is intended to serve. Such map or plan to be signed by the engineer or other party making the same.

(2) A book of reference, in which shall be clearly set out the following information, in separate schedules namely:—

Schedule A.—The name of each municipality within which the proposed works, or any part thereof, are intended to be constructed; the population of each such municipality, as returned by the next preceding census; the ratable value of the property within each such municipality, as returned by the next preceding assessment rolls thereof; and this schedule may contain in a separate statement similar information as to the adjoining districts intended to be served by the proposed work.

Schedule B.—A general description of the nature, extent and proposed character of the contemplated works, and an estimate of the probable cost thereof, distinguishing the general items of construction, and the cost thereof respectively, as well as the nature, extent and probable cost of all engines and car stock, or other outfit or equipment necessary to the use and operation of the proposed undertaking, such schedule to be signed by the engineer, or other person preparing the same.

Schedule C.—An exhibit shewing the total amount of capital proposed to be raised for the purposes of the undertaking, and the manner in which it is proposed to raise the same, whether by ordinary shares, bonds, debentures or other securities, and the amount of each respectively.

Schedule D.—An estimate of the probable revenues of the proposed undertaking, shewing the sources whence the same are expected to be derived; the annual earnings thereof respectively; the probable annual cost of operation or working expenditure; and the annual net revenue applicable to the payment of interest on the proposed investments. Such schedules to be signed by the person preparing the same.

58. All Private Bills are introduced on petition and presented to the House upon motion for leave, and after such petition has been favorably reported on by the committee on standing orders.

59. When any Bill for confirming by Letters Patent, or agreement, is presented to the House, the copy of such Letters Patent, or agreement, shall be attached to it.

60. The expenses and costs attending on Private Bills giving any exclusive privilege, or for any object of profit, or private, corporate or individual advantages; or for amending, extending or enlarging any former Acts, in such manner as to confer additional powers, ought not to fall on the public; accordingly the parties seeking to obtain any such Bills shall be required to pay the sum of one hundred dollars, as provided by rule 53. And in case of any Bill incorporating a Company, or increasing the capital stock of a company already incorporated, there shall be paid to the Clerk of the House, by or on behalf of the applicant, before the same is reported to the House, the same fee as would be payable to the provincial secretary, in the case of an incorporation or increase of capital under the provisions of the Ontario Companies Act, less the sum of $100 already paid to the Clerk of the House under the said rule No. 53.

The following are the fees thus ordered to be paid:—

When the proposed capital of the applicant Company is $40,000 or less, the fee to be $100.

When it is more than $40,000, but does not exceed $100,000, the fee to be $100, and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When it is over $100,000, but does not exceed $1,000,000, the fee to be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When it is $1,000,000, the fee to be $385 and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

Where the capital of a company is increased, the fee to be according to the above list, but on the increase only.

Where the capital is not increased, the fee to be $100.

61. Every Private Bill, when read a first time, shall, unless it be an Estate Bill, or a Bill providing for the consolidation of a floating debt or

for the consolidation or renewal of debentures (other than local improvement debentures) of a municipal corporation, stand referred to the proper standing committee, and all petitions before the House, for or against the Bill, are considered as referred to such committee.

61a. Every Private Bill, in so far as it provides for the consolidation of a floating debt or for the consolidation or renewal of debentures (other than local improvement debentures) of a municipal corporation, when the Bill has been read a first time, shall without special reference stand referred to the Ontario Railway and Municipal Board for their report; and a copy of such Bill and of the petition on which the same is founded shall be forthwith transmitted by the Clerk of the House to the Board in order that the Board may, after an enquiry into the allegations set out in the Bill, and into any other matters which the Board may deem necessary in connection therewith, report to the House whether or not it is reasonable that such Bill or the part thereof relating to the matters aforesaid, should be passed, and what alterations, if any, should be made in the same, and the Board shall make such enquiry accordingly and shall sign the same; and the said report, bill and petition shall be transmitted to the clerk and the report shall be read by the clerk at the table and shall be entered on the journals of the House, and the Bill together with the report shall stand referred to the standing committee on Private Bills.

And it shall be the duty of the law clerk to report to the Clerk of the House as to whether any such Private Bill does so provide as aforesaid.

62. Every Estate Bill, when read a first time, shall, without special reference, stand referred to the Commissioners of Estate Bills for their report; and a copy of such Bill, and of the petition on which the same is founded, shall be forthwith transmitted by the Clerk of the House to the said Commissioners, or one of them, in order that they, or any two of them, may, after perusing the Bill, without requiring any proof of the allegations thereof, report to the House their opinion thereon under their hands; and whether, presuming the allegations contained in the preamble to be proved to the satisfaction of the House, it is reasonable that such Bill do pass into a law; and whether the provisions thereof are proper for carrying its purposes into effect; and what alterations or amendments, if any, are necessary in the same; and in the event of their approving the said Bill, they are to sign the same; and the said report, with the said Bill and petition, are to be transmitted by the said Commissioners to the clerk; and the report shall be read by the clerk at the table, and shall be be entered on the journals of the House; and the Bill together with the report, shall stand referred to the standing committee on Private Bills, which is not to consider the said Bill, before the delivery of the said report, bill and petition to the chairman of the said committee.

63. In the event of the Commissioners of Estate Bills reporting that, in their opinion, it is not reasonable that the Bill submitted to them shall pass into law, such Bill shall not be further considered.

64. No committee on any Private Bill, of which notice is required to

be given, is to consider the same until such Bill has been printed and distributed to members, and five days' clear notice of the sitting of such committee has been affixed in the lobby.

65. A copy of the Bill containing the amendments proposed to be submitted to the standing committee, shall be deposited in the Private Bill Office two clear days before the meeting of the committee thereon.

66. All persons whose interest or property may be affected by any Private Bill shall, when required so to do, appear before the standing committee touching their consent, or may send such consent in writing, proof of which may be demanded by such committee. And in every case the committee upon any bill for incorporating a Company may require proof that the persons whose names appear in the Bill, as composing the Company, are of full age, and in a position to effect the objects contemplated, and have consented to become incorporated.

76. Every parliamentary agent conducting proceedings before the House shall be personally responsible to the House and to the Speaker, for the observance of the rules, orders, and practice of Parliament, and rules prescribed by the Speaker, and also for the payment of all fees and charges; and he shall not act as parliamentary agent until he shall have received the express sanction and authority of the Speaker, who may revoke the same at pleasure.

77. Any agent who shall wilfully act in violation of the rules and practice of Parliament, or any rules prescribed by the Speaker, or who shall wilfully misconduct himself in prosecuting any proceedings before the House, shall be liable to an absolute or temporary prohibition to practice as a parliamentary agent, at the pleasure of the Speaker.

NOTE.—1. Make all cheques payable to "The Treasurer of Ontario."

2. Send to the Clerk of the House the proposed Bill—the name of the member promoting—the cheque for $100, and the petitions upon which Bill is to be founded—one addressed to the Legislature and one addressed to his Honour the Lieutenant-Governor.

3. See that the petitions are signed as directed on the first page hereof and sealed with the seal of corporations, municipal or otherwise.

4. No petition is to be signed by a solicitor for the petitioners where they are in the province.

5. There shall be three signatures, at least, upon the page of the petition containing the prayer, except in the case of corporations signing by their officials and in the case of a single petitioner.

6. Observe the rules with regard to advertising and not to delay in so doing.

7. Send to the Clerk of the House a statutory declaration stating that the advertisement annexed to the declaration has appeared the full length of time in the *"Gazette"* and in all the local sheets in which it was inserted, or, marked copies of the papers.

Tariff of Fees Under Ontario Acts.

See Orders in Council, dated 25th November, A.D. 1899; 27th December, 1899, and 3rd March, 1905.

For Letters Patent.

When the proposed capital of the applicant company is $40,000 or less, the fee to be $100.

When it is more than $40,000, but does not exceed $100,000, the fee to be $100 and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When it is over $100,000, but does not exceed $1,000,000, the fee to be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When it is $1,000,000, the fee to be $385 and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

For incorporation of a cheese or butter company, the fee is to be $10.

When the charter is for an educational institution not carried on for the purpose or object of gain, the fee is to be $10.

For the incorporation of a cemetery company not to be carried on for gain, or which shall undertake to use in the improvement of its property any gain derived by the company, the fee is to be $10.

When the charter is for an athletic club composed of amateurs, and has for its object the encouragement and promotion of lawful games and exercises, and such club is not to be carried on for gain, or shall undertake to distribute in the improvement of its property and facilities as such club any gain derived by the club, the fee is to be $50.

For Supplementary Letters Patent.

When the capital of a company is increased, the fee to be according to the above list, but on the increase only.

If an increase of capital be not desired, the fee is $100.

For Licenses.

The amount of fee to be charged for a license is determined as each case arises. The following are illustrations of the fees.

Fees for licenses to corporations coming within Classes VII. or VIII., as described in 63 V., c. 24.

If the capital stock of the company does not exceed the sum of one hundred thousand dollars, the fee to be twenty-five dollars.

If the capital stock of the company exceeds the said sum of one hundred thousand dollars, the fee to be fifty dollars.

Fees for licenses to corporations coming within Class IX., or 63 V., c. 34.

The fees payable shall be the same as the fees now payable upon the incorporation of a company by Letters Patent under the Ontario Companies Act, viz.:—

When the proposed capital of the applicant company is $40,000 or less, the fee to be $100.

When it is more than $40,000, but does not exceed $100,000, the fee to be $100 and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When it is over $100,000, but does not exceed $1,000,000, the fee to be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When it is $1,000,000, the fee to be $385 and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

For Orders in Council, Etc.

Order in Council changing the name of a company, $25.

Order in Council accepting the surrender of a charter, $20.

1. Filing the annual statement required under the Ontario Act, of a company having a capital stock of $50,000 or under $2.00
2. Filing the annual statement of a company having a capital stock exceeding $50,000, but not exceeding $100,000. ..... 3.00

3. Filing the annual statement of a company having a capital stock exceeding $100,000..... 5.00
4. Filing by-law for sale of mining company's stock at a discount..... 5.00
5. Filing by-law increasing or decreasing number of directors, or changing company's chief place of business..... 2.00
6. Filing any other by-law or document..... 2.00

Cheques, post office orders and drafts should be payable to the order of the Provincial Treasurer.

CANADA.

Procedure for Incorporation.

1. No less than five persons may apply for Letters Patent of Incorporation and each of the said applicants must be of the full age of twenty-one years.

2. There must be a memorandum of agreement and stock book filed in duplicate in the form according to Schedule "B" of the Act. (R.S.C., c. 79.)

3. There must be an application in the form of Schedule "A" to the Act and containing:—

(*a*) The proposed corporate name of the company—which shall not be that of any other known company, incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable;

(*b*) The purposes for which its incorporation is sought;

(*c*) The place within Canada which is to be its chief place of business;

(*d*) The proposed amount of its capital stock;

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

(*f*) The names in full and the address and calling of each of the applicants, with special mention of the names of not more than fifteen and not less than three of their number, who are to be the first or provisional directors of the company;

(*g*) The amount of stock taken by each applicant, the amount, if any, paid in upon the stock of each applicant and

the manner in which the same has been paid, and is held for the company. 2 Edw. VII., c. 15, s. 6.

4. To the petition, memorandum of agreement and stock book must be annexed affidavits of execution.

5. To the petition must be annexed an affidavit establishing the sufficiency of the petition and of the memorandum of agreement and stock book, and the truth and sufficiency of the facts therein stated. Also that the proposed corporate name of the company is not that of any other known incorporated or unincorporated company (section 10).

6. Notice of the granting of the Letters Patent must be inserted forthwith by the company in four separate occasions in at least one newspaper in the county, city, or place where the head office or chief agency of the company is established.

PETITION.

To the Honourable the Secretary of State of Canada:

The application of (names, addresses and occupation of each of the applicants) respectfully sheweth as follows:—

The undersigned applicants are desirous of obtaining Letters Patent under the provisions of the first part of the Companies Act (chapter 79 of the Revised Statutes of Canada, 1906,) constituting your applicants and such others as may become shareholders in the Company, thereby created a body corporate and politic under the name of "Limited," or such other name as shall appear to you to be proper in the premises.

The undersigned have satisfied themselves and are assured that the proposed corporate name of the Company under which corporation is sought is not the corporate name of any other known Company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable.

Your applicants are of the full age of 21 years.

The purposes for which incorporation is sought by the applicants are

The operations of the Company to be carried on throughout the Dominion of Canada and elsewhere.

The chief place of business of the proposed Company within Canada will be at the of in the county of in the Province

The amount of the capital stock of the Company is to be $

The said stock is to be divided into shares of $ each.

The following are the names in full and the address and calling of

each of the applicants with the amount of stock taken by each applicant respectively.

APPLICANT.	Amount of Stock Subscribed.
.....	.....
.....	.....
.....	.....
.....	.....

The said will be the first or provisional directors of the Company.

A stock book has been opened and a memorandum of agreement by the applicants under seal in accordance with the statute has been executed in duplicate—one of the duplicates being transmitted herewith.

The undersigned therefore request that a charter may be granted constituting them and such other persons as hereafter become shareholders in the Company, a body corporate politic for the purposes above set forth.

SIGNATURES OF WITNESSES.	SIGNATURES OF APPLICANTS.

Dated at , this day of 190 .

NOTE.—If any cash has been paid in on stock or if any property is intended to be accepted on account of stock it should be here stated.

The petition must be signed by each of the applicants in person and in presence of a witness. However the applicants may sign by an attorney, but the original power of attorney or a duly authenticated notarial copy thereof must be produced. Each signature should be verified by an affidavit or statutory declaration made by the witness thereof.

(To be executed in duplicate; one duplicate to be transmitted with the application.)

The (Limited).

MEMORANDUM OF AGREEMENT AND STOCK BOOK.

We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a Company under the provisions of

the first part of the Companies Act, (chapter 79 of the Revised Statutes of Canada, 1906), under the name of (Limited), or such other name as the Secretary of State may give to the Company, with a capital of dollars, divided into shares of dollars each.

And we do hereby severally, and not one by the other, subscribe for and agree to take the respective amounts of the capital stock of the said Company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

In witness whereof we have signed.

Name of Subscriber.	Seal.	Amount of Subscription.	Date and Place of Subscription.		Residence of Subscriber	Name of Witness.
			Date.	Place.		

AFFIDAVIT OF EXECUTION.

CANADA:
Province of
County of
To Wit:

In the matter of the application of and others for incorporation under the first part of the Companies Act (chapter 79, of the Revised Statutes of Canada, 1906) under the name of

I, , of the City of , in the County of make oath and say that:—

1. I was personally present and did see the within petition and memorandum of agreement and stock book duly signed and executed by the parties thereto.

2. The said petition and memorandum of agreement and stock book were executed at the City of aforesaid.

3. I know the said parties.

4. I am a subscribing witness to the said petition and memorandum of agreement and stock book.

Sworn before me at the City of in the County of this day of A.D. 19 .

AFFIDAVIT VERIFYING PETITION.

Province of
County of
To Wit:

In the matter of the application of and others for incorporation under the first part of the Companies Act (chapter 79, of the Revised Statutes of Canada, 1906) as under the name of

I, of the City of in the County of Province of do solemnly declare:—

1. That I am one of the applicants herein.

2. That I have a knowledge of the matter, and that the allegations in the within petition contained are, to the best of my knowledge and belief, true in substance and fact.

3. That I am informed and believe that each petitioner signing the said petition is of the full age of twenty-one years, and that his name and description have been accurately set out in the preamble thereto.

4. That the proposed corporate name of the Company is not on any public ground objectionable and that it is not that of any known Company, incorporated or unincorporated, or of any partnership or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive.

5. That I have satisfied myself and am assured that no public or private interest will be prejudicially affected by the incorporation of the Company aforesaid.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.

Declared before me at
of in the County of
this day of
A.D. .

A Commissioner, etc.

NOTICE.

Public notice is hereby given that under the first part of the Companies Act Letters Patent have been issued under the seal of the Secretary of State, bearing date the day of incorporating (names and addresses and occupation of each applicant) for the purpose of (state the undertaking of the Company as set forth in the Letters Patent) with a total capital stock of dollars divided into shares dollars each.

Dated at the office of the Secretary of State for Canada, this day of 190 .

Secretary.

NOTE.—By s. 13 R.S.C. (1906), c. 79, copy of this notice must be inserted forthwith on four separate occasions in at least one newspaper in the county, city or place where the head office or chief agency of the Company is established.

FEES UNDER DOMINION ACT.

No steps shall be taken in the Department of the Secretary of State towards the issue of any Letters Patent or supplementary

Letters Patent under the Companies Act, 1902, until after all fees therefor are duly paid.

The following is the tariff of fees payable under section 17 of the Act:—

Where the proposed capital stock of the company is $20,000 or less than $20,000	$ 50.00
Where the proposed capital stock of the company is more than $20,000 and less than $50,000	150.00
Where the proposed capital stock of the company is $50,000 or upwards and less than $100,000	200.00
Where the proposed capital stock of the company is $100,000 or upwards and less than $150,000	225.00
Where the proposed capital stock of the company is $200,000 or upwards and less than $300,000	300.00
Where the proposed capital stock of the company is $300,000 or upwards and less than $400,000	325.00
Where the proposed capital stock of the company is $400,000 or upwards and less than $500,000	350.00
Where the proposed capital stock of the company is $500,000 or upwards and less than $600,000	375.00
Where the proposed capital stock of the company is $600,000 or upwards and less than $700,000	400.00
Where the proposed capital stock of the company is $700,000 or upwards and less than $800,000	425.00
Where the proposed capital stock of the company is $800,000 or upwards and less than $900,000	450.00
Where the proposed capital stock of the company is $900,000 or upwards and less than $1,000,000	475.00
Where the proposed capital stock of the company is $1,000,000	500.00
For every additional million dollars of capital stock or fractional part thereof	100.00
For supplementary Letters Patent to increase the capital stock of a company, the fee to be according to the above tariff, but on the increase only.	
For supplementary Letters Patent for any purpose other than an increase of capital a fee of	100.00

All fees must be paid in cash or by an accepted cheque made payable to the order of the Honourable the Secretary of State and should be transmitted to him by registered letter.

SPECIAL ACTS.

CANADA.

RULES OF THE HOUSE OF COMMONS RESPECTING PRIVATE BILLS.

87. Petitions for private bills shall only be received by the House within the first six weeks of the session, and every private bill shall be presented to the House within two weeks after the petition therefor has been favourably reported upon by the examiner or by the Committee on Standing Orders, and no motion for the suspension of this Rule shall be entertained unless a report has been first made by the Committee on Standing Orders recommending such suspension and giving their reasons therefor.

DEPOSIT OF BILLS AND FEES.

88. (1) Any person desiring to obtain any private bill, shall deposit with the clerk of the House, at least eight days before the meeting of the House, a copy of such bill in the English or French language, with a sum sufficient to pay for translating and printing the same; the translation to be done by the officers of the House, and the printing by the Department of Public Printing, and if such bill is not deposited by the time above specified the applicant shall, in addition to the charges for printing and translation pay the sum of five dollars for each and every day which intervenes between the said eighth day before the meeting of the House and the date of the filing of the bill; but such additional charge shall not exceed in the aggregate in any one case the sum of two hundred dollars.

(2) After the second reading of a bill, and before its consideration by the committee to which it is referred, the applicant shall in every case pay the cost of printing the Act in the statutes, and fee of two hundred dollars.

ADDITIONAL CHARGES.

(3) The following charges shall also be levied and paid in addition to the foregoing, viz.:—

(*a*) When any Rule of the House is suspended in reference to a bill or the petition therefor, for each such suspension $100.00

(*b*) When a bill is presented in the House after the eighth week of the session and before the end of the twelfth week 100.00

(*c*) When a bill is presented in the House after the twelfth week of the session 200.00

(*d*) When the proposed capital stock of a company is over $250,000 and does not exceed $500,000..... 100.00

(*e*) When the proposed capital stock of a company is over $500,000 and does not exceed $750,000..... 150.00

(*f*) When the proposed capital stock of a company is over $750,000 and does not exceed $1,000,000..... 200.00

(*g*) When the proposed capital stock of a company is over $1,000,000 and does not exceed $1,500,000..... 300.00

(*h*) When the proposed capital stock of a company is over $1,500,000 and does not exceed $2,000,000..... 400.00

(*i*) For every additional million dollars or fractional part thereof 100.00

(4) When a bill is for the purpose of increasing the capital stock of a company, the additional charge shall be according to the above tariff, but shall be charged upon the amount of the increase only.

(5) When a bill is for the purpose of increasing the borrowing powers of a company without any increase in the capital stock, the additional charge shall be $300.00.

(6) If any change in the amount of the proposed capital stock of a company, or of any increase thereto, be made at any stage of a bill, the said bill shall not be advanced to the next stage until a certificate has been filed with the proper officer to the effect that the payment of the charges consequent upon such change has been duly made.

(7) In this rule the term "proposed capital stock" includes any increase thereto provided for in the bill.

(8) The additional charges provided for in section 3 of this Rule shall also apply to private bills originating in the Senate; provided, however, that if a petition for any such bill has been received by this House within the first six weeks of the session, the additional charges made under sub-section (*b*) and (*c*) of section 3 shall not be levied thereon.

Publication of Notices.

90. All applications to Parliament for private bills, of any nature whatsoever, shall be advertised by a notice published in the Canada Gazette; such notice shall clearly and distinctly state the nature and objects of the application, and shall be signed by or on behalf of the applicants, with the address of the party signing the same; and when the application is for an Act of incorporation, the name of the proposed company shall be stated in the notice. If the works of any company (incorporated, or to be incorporated) are to be declared to be for the general advantage of Canada, such intention shall be specifically mentioned in the notice; and the applicants shall cause a copy of such notice to be sent by registered letter to the clerk of each county or municipality which may be specially affected by the construction or operation of such works, and also to the secretary of the province in which such words are, or may be located; and proof of compliance with this requirement by the applicants shall be established by statutory declaration.

In addition to the notice in the Canada Gazette aforesaid, a similar notice shall also be published in some leading newspaper, as follows:—

(*a*) When the application is for an Act to incorporate:—

1. A railway or canal company—in the principal city, town or village in each county or district, through which the proposed railway or canal is to be constructed.

2. A telegraph or telephone company—in the principal city

or town in each province or territory in which the company proposes to operate.

3. A company for the construction of any works which in their construction or operation might specially affect the particular locality; or for obtaining any exclusive rights or privileges; or for doing any matter or thing which in its operation would affect the rights or property of others—in the particular locality or localities which may be affected by the proposed Act.

4. A banking company; an insurance company; a trust company; a loan company; or an industrial company without any exclusive powers—in the Canada Gazette only.

(*b*) When the application is for the purpose of amending an existing Act:—

1. For an extension of any line of railway, or of a canal; or for the construction of branches thereto—in the principal city, town or village in each county or district through which such extension or branch is to be constructed.

2. For the continuation of a charter or an extension of the time for the construction or completion of any line of railway, or of any canal, or of any telegraph or telephone line or of any other works already authorized; or for an extension of the powers of a company (when not involving the granting of any exclusive rights); or for the increase or reduction of the capital stock of any company; or for increasing or altering its bonding or other borrowing powers; or for an amendment which would in any way affect the rights or interests of the shareholders or bondholders or creditors of the company—in the place where the head office of the company is situated or authorized to be.

(*c*) When the application is for the purpose of obtaining for any person or existing corporation any exclusive rights or privileges or the power to do any matter or thing which in its operation would affect the rights or property of others—in the particular locality or localities which may be affected by the proposed Act.

All such notices whether inserted in the Canada Gazette or in a newspaper, shall be published at least once a week; for a period of five consecutive weeks; and when published in the Provinces of Quebec and Manitoba, shall be in both the English and French languages; and if there be no newspaper in a locality where a notice is required to be given, such notice shall be given in the next nearest locality wherein a newspaper is published; any proof of the due publication of notice shall be established in each case by statutory declaration; and all such declarations shall be sent to the clerk of the House endorsed "Private Bill Notice."

(*d*) Every such notice by registered letter shall be mailed in time to reach the secretary of the province and the clerk of such county council and municipal corporation not less than two weeks before the consideration of the petition by the examiner or the Committee on Standing Orders, and a statutory declaration establishing the fact of such mailing shall be sent to the clerk of the House.

(*e*) All private bills, for Acts of incorporation shall be so framed as to incorporate by reference to the clauses of the General Acts relating to the details to be provided for by such bills;—special grounds shall be established for any proposed departure from this principle, or for the introduction of other provisions as to such details, and a note shall be appended to the bill indicating the provisions thereof in which the General Act is proposed to be departed from. Bills which are not framed in accordance with this rule, shall be recast by the promoters, and reprinted at their expense, before any committee passes upon the clauses.

Model Bill.

91. All private bills for Acts of incorporation of, or in amendment of Acts, where a form of a model bill has been adopted, shall be drawn in accordance with the model bill, copies of which may be obtained from the clerk of the House.

(*a*) The provisions contained in any bill which are not in accord with the model bill, shall be inserted between brackets,

and when revised by the proper officer shall be so printed, and bills which are not in accordance with this Rule shall be returned to the promoters to be recast before being revised and printed;

(*b*) Any sections of existing Acts which are proposed to be amended shall be reprinted in full with the amendments inserted in their proper places and between brackets;

(*c*) Any exceptional provisions that it may be proposed to insert in any bill shall be clearly specified in the notice of application for the same.

Map or Plan, With Petition.

92. No petition praying for the incorporation of a railway company, or of a canal company, or for an extension of the line of any existing or authorized railway or canal, shall be considered by the examiner or by the Standing Orders Committee, until there has been filed with that committee a map or plan, shewing the proposed location of the works, and each county, township, municipality or district through which the proposed railway or canal, or any branch or extension thereof, is to be constructed.

Maps, Plans and Exhibits, with Bills.

93. No bill for the incorporation of a railway or canal company or for changing the route of the railway or of the canal of any company already incorporated shall be considered by the Railway Committee until there has been filed with the committee, at least one week before the consideration of the bill:—

(*a*) A map or plan drawn upon a scale of not less than half an inch to the mile, shewing the location upon which it is intended to construct the proposed work, and shewing also the lines of existing or authorized works of a similar character within, or in any way affecting the district, or any part thereof, which the proposed work is intended to serve; and such map or plan shall be signed by the engineer or other person making the same;

(*b*) An exhibit shewing the total amount of capital proposed to be raised for the purpose of the undertaking, and the manner in which it is proposed to raise the same, whether by ordinary shares, bonds, debentures or other securities, and the amount of each, respectively.

Toll Bridge.

94. Before any petition praying for leave to bring in a private bill for the erection of a toll bridge, is presented to the House the person or persons intending to petition for such bill, shall, upon giving the notice prescribed by Rule 90, also, at the same time and in the same manner, give notice of the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers, for the passage of rafts and vessels, and mentioning also whether they intend to erect a drawbridge or not, and the dimensions of the same.

Rules of the Senate Respecting Private Bills.

Senate.

106. The clerk of the Senate shall, during each recess of Parliament, publish weekly in the Canada Gazette, the following rules respecting notices of intended applications for private bills and the substance thereof in the Official Gazette of each province. The clerk shall also announce, by notices affixed in the committee rooms and lobbies of the Senate, by the first day of every session, the times limited for receiving petitions for private bills, and private bills, and reports thereon.

107. All applications to Parliament for private bills of any nature whatsoever, shall be advertised by notice published in the Canada Gazette. Such notice shall clearly and distinctly state the nature and objects of the application, and shall be signed by or on behalf of the applicants, with the address of the party signing the same; and, when the application is for an Act of incorporation the name of the proposed company shall be stated in the notice.

In addition to the notice in the Canada Gazette aforesaid, a similar notice shall be given as follows:—

(*a*) When the application is for an Act to incorporate,

1. A railway or canal company,—in some leading newspaper published in the principal city, town or village in each county or district through which the proposed railway or canal is to be constructed.

2. A telegraph or telephone company,—in a leading newspaper in the principal city or town in each province or territory in which the company proposed to operate.

3. A company for the construction of any works which in their construction or operation might specially affect a particular locality, or for obtaining any exclusive rights or privileges, or for doing any matter or thing which in its operation would affect the rights or property of others,—in a leading newspaper in the particular locality or localities which may be affected by the proposed Act.

4. A banking company; an insurance company; a trust company; a loan company, or an industrial company without any exclusive powers,—in the Canada Gazette only.

5. And, if the works of any company (incorporated or to be incorporated) are to be declared to be for the general advantage of Canada, such intention shall be specifically mentioned in the notice; and the applicants shall cause a copy of such notice to be sent by registered letter to the clerk of each county council and of each municipal corporation which may be specially affected by the construction or operation of such works, and also to the secretary of the province in which such works are, or may be located; and proof of compliance with this requirement by the applicants shall be established by statutory declaration.

(*b*) When the application is for the purpose of amending an existing Act,

1. For an extension of any line of railway, or of any canal; or for the construction of branches thereto,—the same *mutatis*

mutandis as for an Act to incorporate a railway or canal company.

2. For an extension of the time for the construction or completion of any line of railway, or of any canal, or of any telegraph or telephone line, or of any other works already authorized,—in a principal newspaper in the place where the head office of the company is, or is authorized to be.

3. For the extension of the powers of a company (when not involving the granting of any exclusive rights) or for the increase or reduction of the capital stock of any company; or for increasing or altering its bonding or other borrowing powers; or for any amendment which would in any way affect the rights or interests of the shareholders or bondholders or creditors of the company,—in a principal newspaper in the place where the head office of the company is situated.

(c) All such notices, whether inserted in the Canada Gazette or in a newspaper, shall be published at least once a week for a period of five consecutive weeks; and when published in the Province of Quebec and Manitoba shall be in both the English and French languages; and marked copies of each issue of all newspapers containing any such notice shall be sent to the clerk of the Senate, endorsed "Private Bill Notice"; or, a statutory declaration as to due publication may be sent in lieu thereof.

Every notice by registered letter shall be mailed in time to reach the secretary of the province and the clerk of each county council and municipal corporation not less than five weeks before the consideration of the petition of the Committee on Standing Orders; and a statutory declaration establishing the fact of such mailing shall be sent to the clerk of the Senate.

108. No petition praying for the incorporation of a railway company, or of a canal company, or for an extension of the line of any existing or authorized railway or canal, shall be considered by the Standing Orders Committee, until there has been filed with the committee a map or plan, shewing the proposed location of the works, and each county, township, district or

municipality through which the proposed railway or canal, or any branch or extension thereof, is to be constructed.

109. Before any petition praying for leave to bring in a private bill for the erection of a toll bridge is presented to the Senate, the person or persons intending to petition for such bill shall, upon giving the notice prescribed by the preceding rules, at the same time and in the same manner, give notice of the rates which they intend to ask, the extent of the privilege, the height of the arches, and the intervals between the abutments or piers for the passage of rafts and vessels; and shall also mention whether they intend to erect a drawbridge or not, and the dimensions of the same.

110. No petition for any private bill is received by the Senate after the first three weeks of each session; nor may any private bill be presented to the Senate after the first four weeks of each session; nor may any report of any standing or special committee upon a private bill be received after the first six weeks of each session.

111. Petitions for private bills, when received by the Senate, are to be taken into consideration without special reference, by the Committee on Standing Orders. The committee is to report in each case, whether the rules with regard to notice have been complied with; and in every case where the notice shall prove to have been insufficient, either as regards the petition as a whole, or any matter therein which ought to have been specially referred to in the notice, the committee is to recommend the course to be taken in consequence of such insufficiency of notice.

112. No motion for the suspension of the rules upon any petition for a private bill is in order, unless such suspension has been recommended by the Committee on Standing Orders.

Introduction of Private Bills.

113. Every private bill is introduced on petition, and presented to the Senate after the petition has been favourably reported on by the Committee on Standing Orders.

114. Any person seeking to obtain a private bill shall deposit with the clerk of the Senate, eight days before the meeting of

Parliament, if it is intended that the bill should originate in the Senate, a copy of such bill in the English or French language, with a sum sufficient to pay for the translation of same by the officers of the Senate, and the printing of 600 copies in English and 200 in French. The applicant shall also pay the clerk of the Senate, immediately after the second reading and before the consideration of the bill by the committee to which it is referred, a sum of $200, with the cost of printing the Act in the statutes, and lodge the receipt for the same with the clerk of such committee.

The fee payable on the second reading of any private bill is paid only in the House in which it is introduced.

Unprovided Cases.

132. Except as herein otherwise provided, the rules relating to public bills apply to private bills.

PETITION.

To the Honourable { The Senate / The House of Commons } Of Canada.

The Petition of the undersigned all of the City of in the City of and Province of .

Humbly Sheweth.

That your Petitioners desire to be incorporated under the name with power to effect contracts of Life Insurance with any persons and to grant, sell or purchase life annuities, grant endowments upon the contingencies of human life and generally to carry on the business of Life Insurance in all its branches and forms.

That your Petitioners desire the capital of the Company to be One Million Dollars divided into shares of $100 each and the Head Office of the Company to be in the City of Toronto in the Province of Ontario.

Wherefore, your Petitioners humbly pray that your Honourable House may be pleased to pass an Act for the purposes above mentioned.

And as in duty bound your Petitioners will ever pray.

Dated at Toronto in the Province of Ontario, this day of A.D. 19 .

MODEL RAILWAY BILL.

No. .] BILL. [1906.

An Act to incorporate the Railway Company.

Whereas a petition has been presented praying that it be enacted as

hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. [*Insert names of those applying for incorporation*], together with such persons as become shareholders in the company, are incorporated under the name of [*insert name of company*] hereinafter called "the Company."

2. The persons named in section 1 of this Act are constituted provisional directors of the Company.

3. The capital stock of the Company shall be dollars. No one call thereon shall exceed ten per cent. on the shares subscribed.

4. The Head Office of the Company shall be in the .

5. The annual meeting of the shareholders shall be held on the first in .

6. The number of directors shall be not less than five, nor more than nine, one or more of whom may be paid directors.

7. The Company may lay out, construct and operate a railway of the gauge of four feet eight and one-half inches from [*insert and define clearly the route of the proposed railway, and specify the principal points along the route*].

8. The securities issued by the Company shall not exceed thousand dollars per mile of the railway, and may be issued only in proportion to the length of railway constructed or under contract to be constructed.

9. Subject to the provisions of sections 281 to 283, both inclusive, of the Railway Act, 1903, the Company may enter into agreements with all or any of the companies hereinafter named for any of the purposes specified in the said section 281, such companies being the [*name the companies it is proposed to make agreements with*].

MODEL INSURANCE BILL.

An Act to incorporate

Whereas a Petition has been presented praying that it may be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said Petition; Therefore, His Majesty by and with the advice and consent of the Senate and the House of Commons of Canada enacts as follows:—

1. (Names of incorporators), all of the City of Toronto in the County of York, in the Province of Ontario, together with such persons as become shareholders in the Company are incorporated under the name of hereinafter called the "Company."

2. The persons named in section 1 of this Act, together with such persons, not exceeding nine, as they associate with them, shall be the Provisional Directors of the Company, a majority of whom shall be a quorum,

and they may forthwith open stock books, procure subscriptions of stock for the undertaking, make calls on stock subscribed, and receive payments thereon, and shall deposit in a Chartered Bank in Canada all moneys received by them on account of stock subscribed, or otherwise received by them on account of the Company, and shall withdraw the same for the purposes only of the Company, and may do generally what is necessary to organize the Company.

3. The capital stock of the Company shall be dollars, divided into shares of dollars each.

4. The Head Office of the Company shall be in the of , in the of .

(7) The directors may, from time to time, establish branches, advisory boards or agencies, either within Canada or elsewhere.

5. As soon as dollars of the capital stock of the Company have been subscribed, and ten per cent. of that amount paid into some Chartered Bank in Canada, the provisional directors shall call a general meeting of the shareholders of the Company at some place to be named in the of , at which meeting the shareholders present or represented by proxy, who have paid not less than ten per cent. on the amount of shares subscribed for by them shall elect not more than nine directors, hereinafter called "shareholders' directors."

(2) No person shall be a shareholders' director unless he holds in his own name and for his own use at least shares of the capital stock of the Company and has paid all calls due thereon and all liabilities incurred by him to the Company.

(3) In addition to the shareholders' directors there shall be elected by the policyholders at the first annual meeting after the commencement of business, and at each subsequent annual meeting, directors, hereinafter called "policyholders' directors" if there be policyholders qualified as hereinafter mentioned and willing to act as such directors; but no shareholder shall be eligible as a policy-holder's director.

(4) A participating policyholder who is a male of the age of twenty-one years, whose policy or policies in force on his own life amount to five thousand dollars or upwards, exclusive of bonus additions or profits, and who has paid all premiums then due thereon, shall be eligible for election as a policyholders' director.

(5) At all meetings of the directors a majority thereof shall be a quorum for the transaction of business.

6. The directors shall elect from among themselves a president of the Company and one or more vice-presidents.

7. The shares of the capital stock subscribed for shall be paid by such instalment and at such times and places as the directors appoint; the first instalment shall not exceed twenty-five per cent. and no subsequent instalment shall exceed ten per cent., and not less than thirty days' notice

of any call shall be given: Provided that the Company shall not commence the business of insurance until dollars of the capital stock have been paid in cash into the funds of the Company, to be appropriated only for the purposes of the Company under this Act; provided further that the amount so paid in by any shareholder shall not be less than ten per cent. of the amount subscribed by such shareholder.

8. A general meeting of the Company shall be called once in each year after the organization of the Company and commencement of business at its Head Office, and at such meeting a statement of the affairs of the Company shall be submitted.

9. Notice of the annual meeting shall be given by publication in two issues of the Canada Gazette at least fifteen days prior thereto, and also in six consecutive issues of a daily newspaper published at the place where the Head Office of the Company is situate, and such notice shall intimate that participating policyholders may, in accordance with the provisions of this Act, vote for and elect six directors.

10. At all general meetings of the Company, each shareholder present or represented by proxy who has paid all calls due upon his shares in the capital stock of the Company shall have one vote for each share held by him. Every proxy must be himself a shareholder and entitled to vote.

11. The Company may effect contracts of life insurance with any persons, and may grant, sell or purchase life annuities, grant endowments, depending upon the contingency of human life, and generally carry on the business of life insurance in all its branches and forms.

12. The Company may acquire and dispose of any real property required in part or wholly for the use and accommodation of the Company; but the annual value of such property held in any province of Canada, shall not exceed dollars except in the of , (province where Head Office is situated) where it shall not exceed dollars.

13. The directors may, from time to time, set apart such portion of the net profits as they deem safe and proper for the distribution as dividends or bonuses to shareholders and holders of participating policies, ascertaining the part thereof which has been derived from participating policies, and distinguishing such parts from the profits derived from other sources and the holders of participating policies shall be entitled to share in that portion of the profits so set apart which has been so distinguished as having been derived from participating policies to the extent of not less than ninety per cent. thereof; but no dividend or bonus shall at any time be declared or paid out of estimated profits and the portion of such profits which remains undivided upon the declaration of a participating policy dividend shall never be less than one-fifth of the dividend declared.

14. All persons who are actual holders of policies from the Company on their own lives for one thousand dollars or upwards, whether such per-

sons are shareholders of the Company or not, and who are by the terms of their policies entitled to participate in profits, and are referred to in this Act as holders of participating policies, shall be members of the Company and be entitled to attend and vote in person or by proxy at all general meetings of the Company and every holder of a participating policy of the Company for the sum of not less than one thousand dollars shall be entitled to one vote for each one thousand dollars in his policy; but policyholders, as such, shall not be entitled to vote for the election of shareholders' directors.

2. A person holding a participating policy of one thousand dollars and upwards on his life, whether for the benefit of himself or of others, shall be deemed a member of the Company.

15. Whenever any holder of a policy other than a term or natural premium policy has paid three or more annual premiums thereon and fails to pay any further premium, or desires to surrender the policy the premiums paid shall not be forfeited but he shall be entitled to receive a paid-up and commuted policy for such sum as the directors ascertain and determine, or to be paid in cash such sum as the directors fix as the surrender value of the policy, such sum in either case to be ascertained upon principles to be adopted by by-law applicable generally to all such cases as may occur: Provided that if such paid-up and commuted policy is in force or within twelve months after default has been made in payment of a premium thereon, the Company shall without any demand therefor, either issue such paid-up and commuted policy, or pay to or place to the credit of the policyholder such cash surrender value.

16. The Companies Clauses Act, except sections 7, 18, 39 and 41 thereof, shall apply to the Company in so far as the said Act is not inconsistent with any provisions of this Act or of the Insurance Act: Provided, however, that the Company may make loans to its shareholders or policyholders, not being shareholders' directors, on the securities mentioned in the Insurance Act.

17. This Act and the Company, and the exercise of the powers hereby conferred, shall be subject to the provisions of the Insurance Act.

INCORPORATION—POWER OF ATTORNEY TO SIGN PETITION AND STOCK BOOK UPON INCORPORATION.

Know all men by these presents that I of the of in the Province of Ontario, do hereby nominate, constitute and appoint of the of in the Province of Ontario, my true and lawful attorney for me and in my stead to execute and sign a Petition to His Honour the Lieutenant-Governor in Council for the Incorporation by Letters Patent of the Company, Limited, with an authorized capital of $ divided into shares of $ each, and with objects among others to and for me and on my behalf to subscribe

for shares of the total par value of $ and to do for me such acts as may be necessary and requisite for procuring such incorporation.

In witness whereof

(Note) This power of attorney must be accompanied by an affidavit of execution.

16. Notice of the granting of Letters Patent or Supplementary Letters Patent, shall be given forthwith by the Provincial Secretary in the *Ontario Gazette*, and the corporation shall be deemed to be existing from the date of the Letters Patent incorporating the same. R.S.O., c. 191, s. 15, amended.

Prior to the present amendment it had been held that a company comes into existence as a body corporate and politic on the date of its Letters Patent. The acceptance of the Letters Patent by the company is unnecessary. *Baldwin Iron Works* v. *Dominion Carbide Co.*, 2 O.W.R. 6.

CHAPTER II.

PROMOTERS.

Promoters are those who form or float a company. Subordinates employed by them are not to be regarded as promoters. The typical promoter starts the scheme of forming a company; negotiates with the vendors, if any; gets together a board of directors; retains brokers, bankers and solicitors for the company; drafts prospectus and obtains Letters Patent; in short, he undertakes 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. See Palmer's Company Law, 5th ed., p. 283.

Any one who assists in the promotion as by obtaining a director or agreeing to place shares or otherwise for a consideration payable if the company floats is liable to be deemed a promoter. *Ibid.*

For decisions as to what constitutes a promoter see the following cases. *Gluckstein* v. *Barnes* (1900), A.C. 240; *Leeds and Hanley Theatre of Varieties* (1902), 2 Ch. 809; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 2 Ch. 393; *Lydney* v. *Wigpool Co.*, 33 Ch. D. 85; *Twycross* v. *Grant*, 2 C.P.D. 469; *Whaley Bridge* v. *Green*, 5 Q.B.D. 109.

Circumstances Constituting Promoter.

The purchase of property for the purpose of re-sale to the company does not constitute the man a promoter unless he takes an active part in the formation of a company. *Erlanger* v. *New Sombrero Phosphate Company, supra.*

Where a promoter formed an intermediate company to which he sold certain property to be sold at a higher price to the real company, the intermediate company was held to be the agent of the vendor. *Glasier* v. *Rolls*, 42 C.D. 436. This case must now be read in the light of the case of *Salomon* v. *Salomon*, 12 A.C. 22.

Negotiating an agreement between vendor and a proposed company or trustee for a proposed company is sufficient. *Bagnall* v. *Carlton*, 6 C.D. 371.

It is clear that from the time when promoters apply to the public to join them, they make themselves trustees for the company. *Bagnall* v. *Carlton, supra.*

The solicitor of a company who merely transacts the legal business in connection with floating it, is not a promoter. *Re Great Wheat Polgooth*, 49 L.T. 20.

How Far Co-partners.

Promoters are not *primâ facie* partners and are not liable for the acts of each other unless authorization express or implied can be shewn. *Reynell* v. *Lewis*, 15 M. & W. 517. And each promoter is only liable for that portion of the preliminary expenses or other liabilities incurred which he has sanctioned. *Hamilton* v. *Smith*, 7 Jurns. 32; *Howard Stove* v. *Dingman*, 10 O.W.R. 127.

Promoters are not necessarily agents for each other, but if one is expressly or impliedly authorized to act on behalf of others the ordinary responsibility of a principal attaches. *Wilson* v. *Hotchkiss*, 2 O.L.R. 261. And the company may be liable to the promoter. Thus where a promoter was employed by one of the provisional directors of the company to advertise and promote its undertaking and the Board of Directors were fully cognizant of what he did, the right and authority to transact the business of the company, it was held that he was entitled to recover from the company the value of his work, even although it was done without any specific instructions from his co-directors at formal meetings of the Board, everything being done in the most informal manner. *Allen* v. *Ontario & Rainy River Ry. Co.*, 29 O.R. 510; *Patterson* v. *Brown*, 6 O.W.R. 204; *Evendin* v. *Standard Art Co.*, 8 O.W.R. 392.

See *Mahoney* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Wood* v. *Ontario & Quebec Ry. Co.*, 24 C.P. 334. See also the following cases: *Thomson* v. *Feeley*, 41 U.C.R. 224; *Gilpin* v.

Greene, 7 U.C.R. 586. See also *Simpson* v. *Carr*, 5 U.C.R. 326; *Johnson* v. *Hamilton*, 13 U.C.R. 211.

Promoters who employ an agent to solicit subscriptions for stock were held liable to one induced to subscribe by false representations though they were not aware of them and did not authorize them. *Milburn* v. *Wilson*, 31 S.C.R. 481.

A promoter borrowing money for the purpose of a company is personally liable to repay it and the company when it comes into existence is not bound and is not a debtor to the lender. *Clergue* v. *Humphrey*, 31 S.C.R. 66.

All the preliminary expenses must, however, be borne by some one or more of the promoters in the first instance. *Nockels* v. *Crosby*, 3 B. & C. 814. And if a promoter is compelled to pay in full, he is entitled to an indemnity from the others which have sanctioned the expenditure. *Boulton* v. *Peplow*, 9 C.B. 493.

It is sometimes stated in the prospectus that a person has consented to become a director if elected at the organization meeting, or that he will remain on the Board after allotment. This will not protect him from liability as a promoter, although it may protect him from liability as a director. *Glasier* v. *Rolls*, 42 C.D. 436.

All questions of contribution between promoters in respect of preliminary expenses resolve themselves into two simple questions. First, did the alleged contributory make or authorize to be made the contract in respect of which he is called on to contribute on his account jointly with others; or, second, if any one or more entered into the contract on his own or their behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of the contract.

Bright v. *Hutton*, 3 H.L.C., p. 341*n*; *Carrick's Case*, 1 Sim. N.S. 505. See also *Cox* v. *Hickman*, 8 H.L.C. 268; *Moelwo Marsh Co.* v. *Court of Wards*, L.R. 4 P.C. 419; *Badeley* v. *Consolidated Bank*, 38 Ch. Div. 238; *Seiffert* v. *Irving*, 15 O.R. 173; *Gildersleeve* v. *Balfour*, 15 P.R. 293; *Thames Navigation Co.* v. *Reid*, 13 A.R. 303.

The whole body of proposed corporators are not necessarily liable as partners in the case of the prosecution of business prior

to the incorporation for the whole concern is not a partnership in that sense. But it is a *quasi* partnership in this sense that all those who take a practical part in the prosecution of the business or who sanction or ratify the conduct of the affairs become liable as partners. The extent or proportion of liability between themselves depends upon the extent of their interest as manifested in their subscription for shares. On this footing the profits and losses would be proportioned among them. The practical difference as to evidence is that in the case of partners all would be liable without notice of the obligation incurred; in the other case some evidence must be given to shew knowledge or notice and assent on the part of each person to be charged.

The contribution should be without reference to what has been paid on each share. *Sandusky Coal Co.* v. *Walker*, 27 O.R. 677; *Sylvester* v. *McCuaig*, 28 C.P. 443; *Thompson* v. *Williamson*, 7 Bli. N.B. 432.

Preliminary Expenses.

A clause in the charter of the company authorizing the payment of preliminary expenses does not constitute a contract with the promoters, merely giving the directors an authority in their discretion to pay same. *Re Hereford Wagon Co.*, 2 C.D. 621, and a solicitor has no claim against a company for costs connected with its incorporation in the absence of an agreement on the part of the company after incorporation. *Re Rotherham Alum Co.*, 32 W.R. 131. It was contended that the solicitor had an indemnity against the company which had the benefit of his labour, but the doctrine was negatived in this case.

On the other hand where services are rendered after the incorporation, a valid claim against the company is created. *Re Hereford Wagon Co., supra.*

Payment of preliminary expenses out of the company's funds is *ultra vires* unless express power is given in the Letters Patent. *Re Anglo-French Society*, 21 C.D. 492.

The mere fact that the company when formed takes the benefit of services rendered before incorporation, will not render it liable. *Re English Produce Co.* (1906), 2 Ch. 435.

Secret Profits.

Those who accept and assume the extensive powers of promoters cannot disregard the interest of the corporation altogether, and they stand in regard to the company when formed in a fiduciary relation. A promoter accordingly may not make directly or indirectly any profit at the expense of the company unless with the consent of the company after full disclosure and the company can compel a promoter to account for secret profits. For examples of this case see *Ruethel Mining Co.* v. *Thorpe*, 9 O.W.R. 942; *Gluckstein* v. *Barnes* (1900), A.C. 240; *Mann* v. *Edinburgh Northern Trams Co.* (1893), A.C. 69; *Emma Mining Co.* v. *Grant*, 11 C.D. 918; *Erlanger* v. *New Sombrero Phosphate Company*, 3 A.C. 1236. See notes to section 123 of Dominion Winding-up Act, *infra*.

In connection with disclosure to the incorporators of a company, it has been said that disclosure is not an appropriate word to use when a person who plays the part of a promoter and of a shareholder, possibly of a director and vendor also 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. See *Gluckstein* v. *Barnes* (1900), A.C. 240.

Disclosure must be full and it is not sufficient for a promoter to give such facts as will put the company on notice as to the profits made. *Re Olympia* (1898), 2 Ch. 168; *O'Sullivan* v. *Clarkson*, 9 O.W.R. 46. (See title Directors.)

No trustee or agent can make a secret profit at the expense of his principal and promoters cannot make secret profit at the expense of the company. *Phosphate Sewage Co.* v. *Harmont*, 5 C.D. 394.

A secret commission given by a vendor to the agent or purchasing company is a bribe to betray the interests of the purchasing company. *Re Hereford Wagon Co.*, 2 C.D. 621; *Ladywell Mining Co.* v. *Brookes*, 35 C.D. 400.

The fact that a person who buys property contemplates forming a company to purchase it from him does not make him a

promoter unless he takes some active steps in connection with the formation of the company. *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1362.

As to the time when a vendor becomes a promoter, *Gover's Case* is instructive. It is there held that the date of a provisional contract of sale to a company was the moment when the vendor became a promoter and acquired a fiduciary relationship to the company. 46 L.J. Ch. 89.

The estate of a deceased promoter is liable to an action by the company. *Phillips* v. *Homfray*, 24 C.D. 439; but the cause of action does not survive if the estate has not benefited. *Peek* v. *Gurney*, L.R. 6 H.L. 377.

It has been laid down that solicitors who are acting for a vendor should not at the same time act for the purchasing company until the sale is completed. *Bagnall* v. *Carlton*, 6 C.D. 371.

In seeking to make promoters liable for profits obtained by re-sale of their property to the company it must be shewn that at the time the purchase was made by the promoters they stood in such a position that they cannot claim to have bought the property for themselves. In other words that they were not in a position to sell it to the company when afterwards formed because the company came into existence with the right to say that the purchase was made by the promoters for it and not for themselves. This is generally a task of some difficulty at all events where the property has not been expressly purchased for the purpose of being transferred to the intended company or where it is not made to appear at or before the time when the purchase was made the purchasers had invited the public to come in and join the prospective company. *Re Hess Manufacturing Co.*, 21 A.R. 66, S.C.R. 644; *Highway Advertising Co.* v. *Ellis*, 7 O.L.R. 504.

It was held by the Ontario Court of Appeal that the president of a company cannot, unless with the unanimous consent of all the shareholders, make a profit by selling to the company that which he knows the company requires and which he buys with that knowledge and with the express purpose of

selling to it. The Court laid down that under such circumstances it was the duty of the president to acquire it for the company and not to purchase for himself, and that he could not make a profit out of the transaction unless by the unanimous consent of all the shareholders given after full explanation of all the circumstances and full knowledge of the position. Ratification by a majority of the shareholders is apparently not sufficient. *Earle* v. *Burland*, 27 A.R., p. 561.

The Privy Council, however, held that whether or not the company was entitled to a rescission of the contract of re-sale it was not entitled to affirm it and at the same time treat the director as the trustee of the profit made. They said that there was no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his own mind to re-sell it to the company, but it was an intention which he was at liberty to carry out or abandon at his own will. It might be that a person with a strict regard for the company would have been disposed to give the company the benefit of his purchase, but the sole question was whether he was under any legal obligation to do so. *Burland* v. *Earle* (1902), A.C., p. 98.

It is well to note in connection with this case that the president of the company neither disclosed to the company that he was making a secret profit on the transaction nor did he secure a unanimous vote of the shareholders to ratify it.

The company has a right to the services of its directors especially when they are remunerated. It has a right to their entire services and to the voice of every director as well as their advice and giving their opinion upon matters which are brought before the Board for consideration, and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance. See *Benson* v. *Heathorn*, 1 Y. & C. Ch. 326; *Imperial Mercantile*

Credit Ass'n. v. *Coleman*, L.R. 6 Ch. 558; *Cavendish Bentwick* v. *Fenn*, 12 A.C. 652; *York* v. *North Midland Railway Co.* v. *Hudson*, 16 Beav. 485; *Aberdeen Railway Co.* v. *Blakie*, 1 Macq. 461.

Where the owner of a patent arranged with a syndicate to give them an interest in the patent upon the understanding that they would jointly undertake to co-operate and build up a successful business, and the syndicate subsequently formed a company and received shares in proportion to their holdings or interest in the patent, it was held that they were not bound to account to the company for the value of the interests received by them, notwithstanding that actual transfers of their interests in the patent had not been executed. And apparently the fact that the interests had been acquired by the syndicate without consideration would make no difference unless they were acquired for the company. *Highway Advertising Co.* v. *Ellis*, 7 O.L.R. 504. See also *Hopper* v. *Hoctor*, 35 S.C.R. 645; *Wade* v. *Kendrick*, 37 S.C.R. 32.

AGREEMENT TO CONTRIBUTE TO A PRELIMINARY EXPENSE FUND.

An agreement made the day of , between A., of (hereinafter called "the trustee," of the one part, and B., of , and the several other persons who shall sign their names and affix their seals hereto (hereinafter called "the subscribers"), of the other part:

Whereas it is proposed very shortly to incorporate a Company to be called "the Company, Limited" (hereinafter referred to as "the Company"):

And whereas it is desired to provide a fund in the manner and for the purposes hereinafter set forth.

Now therefore each of the subscribers hereby agrees with the said A., as trustees for the subscribers, as follows:—

1. A fund shall be established to consist of the contributions of the subscribers pursuant to this agreement.

2. The fund shall be placed in the hands of the trustee and he shall apply the same under the direction of the committee in paying the costs of obtaining the engineer's report, which is to be set out in the prospectus of the Company, and in paying the expenses of the experiments referred to in the schedule hereto, and in paying the general expenses of forming and promoting the Company, and any other expenses which the said

trustee, with the sanction of the committee, shall think it expedient to pay.

3. There shall be a committee of subscribers for the purpose of this agreement, and the first members of such committee shall be C., D. and E.

4. The committee may fill up any vacancy in their body which shall arise from death, resignation, or otherwise, and the members for the time being of the committee may act notwithstanding any vacancies in their body. The decision of the majority of the members of the committee for the time being shall be regarded as the decision of the committee.

5. The trustee may from time to time, with the sanction of the committee, make such calls on the subscribers as he shall think fit; but every such call shall be made on the subscribers pari passu, and three days' notice at least of every such call shall be given to the subscribers, and no subscriber shall be liable to pay in the aggregate more than $150 under this agreement.

6. If any subscriber makes default in payment of a call made on him hereunder, he shall pay interest at the rate of ten per cent. on the amount in arrear until actual payment; and if the default continues for more than seven days, the trustee may draw a bill of exchange on the defaulting subscriber for the amount, and may authorize any persons to accept the sums on behalf of such defaulting subscriber, and such acceptance shall be effective, and such bill of exchange may be made payable on demand.

7. The trustee and the committee are to subscribe the memorandum of agreement and stock book of the Company for the whole of the founders' shares on the Company's capital, and are in due course to distribute the same amongst the subscribers rateably in proportion to their contributions hereunder.

8. Any notices for the purposes hereof may be given to any subscriber by sending the same through the post, addressed to such subscriber at his address below mentioned; and any notice so sent shall be deemed to be served at the expiration of two days after it is posted.

9. If any subscriber makes default in payment of any call made pursuant hereto, the trustee may, with the sanction of the committee, declare the interest of such subscriber under this agreement to be forfeited; and thereupon such subscriber shall cease to have any rights under this agreement, and any contribution paid by him shall be considered forfeited for the benefit of the other subscribers hereto.

10. The majority of the subscribers hereto may, at any time, by writing under their hands, remove the trustee for the time being hereof and appoint another trustee or trustees in his place; and they may also appoint a new trustee or trustees to fill up any vacancies in the trusteeship howsoever caused.

As witness the hands and seals of the parties hereto.

Signed, Sealed and Delivered
by, etc.

AGREEMENT FOR CONVERSION OF PARTNERSHIP INTO COMPANY.

An agreement, etc., between A. of and B. of and C. of .

Whereas the said A., B. & C. have for many years past carried on business in partnership together at under the firm or style of .

And whereas the said A., B. & C. are desirous of converting their said business into a company, and with a view thereto have determined to enter into this agreement.

Now, therefore, it is declared as follows:—

1. A Company shall forthwith be incorporated under the Ontario Companies Act, for the acquisition and carrying on of the said business.

2. The Letters Patent of the Company shall fix the capital at divided into shares of $ each and each of the parties hereto shall subscribe in the said memorandum for one such share, and the other subscribers, who shall each subscribe for one such share, shall be selected by the parties hereto.

3. The said A., B. & C. shall be appointed permanent directors, etc., etc.

4. The parties hereto shall enter into an agreement (hereinafter called the sale agreement) with the Company for the sale and transfer to the Company of the business aforesaid and all the assets thereof, as from the day of in consideration of fully paid up shares in the capital of the Company, and of the Company undertaking to pay and satisfy all the debts and liabilities of the parties hereto in connection with the said business, and such shares shall be allotted to the parties hereto as follows, viz., to the said A. shares, to the said B. shares and to the said C. shares.

5. The expenses of and incidental to this agreement, and the formation of the Company and the conversion of the said business, shall be borne by the parties hereto in proportion to the shares to which they are to be entitled as aforesaid.

6. The sale agreement and the said memorandum and articles shall be prepared by Messrs. M. & Co., of , solicitors, on behalf of the parties hereto, and if any of the parties hereto shall have any difference as to the terms of the sale agreement and memorandum and articles aforesaid, such difference shall be referred to the arbitration of R., of , barrister-at-law.

As witness, etc.

OPTION AGREEMENT (SHORT FORM).

The undersigned hereby agree in consideration of one dollar and other good and valuable consideration to sell to or his assigns, as a going concern, the business carried on by the undersigned, including

the property, machinery, materials, supplies used in connection with the business, and also the good-will, trade rights, trade marks, brands, patents, inventions, formulæ, receipts, trade names and patterns owned or controlled by the undersigned, excepting only money in bank and bills and accounts receivable, which are to be and remain the property of the undersigned. All said property to be at the time of such sale free and clear of all liens, charges, encumbrances, taxes and assessments. The consideration for the said sale to be $ in addition to inventory value of stock on hand at the time of transfer.

This option shall expire on the day of , unless the said or his assigns, shall before that time give notice in writing of his acceptance thereof, in which case the transaction is to be completed and the property delivered within four months thereafter, or earlier at the option of .

It is understood and agreed that in accepting this option assumes no responsibility or liability to purchase the said property unless , or his assigns, shall elect so to do by written notice, and that in case of assignment that this instrument and all of its parts and provisions shall inure to the benefit and run in favour of, and be obligatory upon such transferee, and shall be free from liability therein and thereunder to the same purport and effect as though such transferee had originally been made the purchaser hereto.

Witness our hands and seals this day of .

OPTION AGREEMENT ON ALL ASSETS OF A COMPANY—PAYABLE IN SHARES OF NEW COMPANY.

This agreement witnesseth that for and in consideration of one dollar in hand paid by the purchaser:—

1. The vendor hereby sells to the purchaser the sole option until the day of of purchasing for the sum of dollars the entire good-will, plans, patents, trade marks, and all visible and tangible real and personal property of said Company, not including cash and bills and accounts receivable.

2. If said option is exercised, the sale may be completed on or before the day of (hereinafter called the time of transfer) but the directors for the time being of the Company may extend said last named date to a further period, not exceeding one month, and said sale shall take effect as from the date hereof, and no dividend shall be paid or declared, or any property whatsoever withdrawn from the Company, save in the ordinary course of business, between said date and the time of transfer.

3. The real and personal property, assets and business of the Company shall, at the time of transfer, be free and clear of all liens, mortgages, executions, debts and other liabilities whatsoever, except engagements under current and ordinary business, contracts taken over by the purchasers, and the vendor and the stockholders may retain the cash on

hand or in bank book accounts and bills receivable of the Company as they shall exist on the date hereof, for the satisfaction of any such encumbrance as aforesaid, and after that for their own use.

The purchasers shall, however, have the right to retain and hold from the purchase consideration such part thereof as in their judgment shall be necessary to discharge any such liens, mortgages, judgments, debts or other such liabilities as may exist at the time of the transfer.

4. The vendor and stockholders shall, upon ten days' notice in writing given by the purchasers to the vendor, deliver to such responsible trust Company in the City of (hereinafter referred to as the Trust Company) as shall be named by the purchasers, the certificates for the number of shares of stock in the company set opposite the names of the stock holders at the foot hereof, together with transfers thereof duly executed or signed in blank, and also an abstract or abstracts and searches of title to all the real property of the Company wheresoever situate, duly searched to date and shewing all encumbrances, by solicitors of responsibility and standing, and full and sufficient deeds, bills of sale, assignments, and all such other conveyances, as shall be usual, necessary or proper for the conveying and assuring to the purchasers, or their assigns, all the assets of the Company set forth in the schedule hereto numbered "A" executed by the proper officers of the Company, and certificates affixed in such form as to entitle such of them as are usually recorded to be recorded in the usual and proper offices, and all such conveyances shall contain the usual covenants that the property so conveyed is free from incumbrances as herein provided.

All the foregoing are to be held by the Trust Company until the time of transfer or the expiration unaccepted of this option, and the Trust Company shall deliver separate receipts for said stock and for said abstracts and conveyances, and while the said abstracts remain on deposit with the Trust Company, no transfer of the real property of the Company, or any part thereof, shall be made by it.

5. At the time of transfer the search and certificate thereof above mentioned shall be continued by the vendor to such time, and thereupon the purchase consideration may be paid by the purchasers to the vendor at the office of the Trust Company, and such payment shall be in full of the purchase obligations of the purchasers hereunder. And upon said payment the said certificates of stock and blank transfers, abstracts and certificates of search or such of them as the purchasers may elect, shall be forthwith handed over to the purchasers by the Trust Company, and the vendor and stockholders hereby jointly and severally covenant to do anything further which may be necessary on their part to complete the sale and to execute such legal covenants for ten years, and in such form as the purchasers may require, and not to engage in any way in the manufacture of or other like articles within ten years from date hereof without the consent of the purchasers.

6. If the purchasers fail to exercise the option, the Trust Company shall return to the vendor the said certificates and blank transfers and abstracts and instruments, and the purchasers shall pay all the charges of the Trust Company in connection with the matters aforesaid, and such Trust Company shall have no claim or lien whatsoever upon said certificates or abstracts or instruments or upon the vendor for any of its said charge.

7. If said option is exercised, the vendor shall take and accept in full payment for the property hereby agreed to be conveyed.

In preferred stock of C. D. Company $.

In common stock of C. D. Company $.

It is, however, distinctly understood that in case the purchasers shall accept the stock so deposited, the cash in hand credits and other property retained and not covered by this option, as well as the consideration above named, shall inure to the benefit of the shareholders so depositing their stock, and not to the purchasers or their agents; subject, however, to the payment of all liabilities.

8. We, the undersigned shareholders, owning respectively the number of shares of stock of said Company set opposite our several signatures, and no other, do hereby consent to and approve, ratify and confirm the proposed sale of the property, business and good-will of said Company no the terms and conditions above set forth.

In witness whereof, etc.

AGREEMENT BY PROMOTER TO PAY PRELIMINARY EXPENSES IN CONSIDERATION OF SHARES IN COMPANY.

This agreement, etc.

Witnesseth, as follows, that is to say:—

1. The said (promoter) will pay all preliminary costs of and attendant upon the incorporation of the Company down to the day on which the Company is entitled to commence business including therein the expenses incurred:—

(*a*) In the preparation and execution of any preliminary agreements.

(*b*) In obtaining the incorporation of the Company.

(*c*) In advertising the prospectus and allotting shares and

(*d*) In obtaining a certificate that the Company is entitled to commence business.

2. In consideration of the premises the Company shall allot to the said (promoter) or as he shall direct (ordinary) shares of $ each numbered to in the capital of the Company credited as fully paid-up.

3. In the event of the Company failing to obtain a certificate that it is entitled to commence business on or before the day of the said (promoter) shall not be entitled to any remuneration or satisfaction for the payments to be made by him as aforesaid.

In witness, etc.

(Seal of Company and signature and seal of promoter.)

POWER OF ATTORNEY TO ACCEPT STOCK.

Know all men by these presents that of do make, constitute and appoint true and lawful attorney (with power of substitution) for me in name, and on behalf, to accept the transfer or transfers made unto of shares in the capital stock of the Company, Limited, and generally to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that said attorney shall do therein by virtue hereof.

In witness whereof I have hereunto set my hand and seal at this day of in the year of our Lord one thousand nine hundred and .

Signed and sealed in the presence of }
}

(Seal.)

CHAPTER III.

THE PROSPECTUS.

Rules in Framing Prospectus.

The public who are invited by a prospectus to join in a new venture ought to have the same opportunity of judging of everything which has a material bearing on the true character of the venture as the promoters themselves possessed. The utmost candour ought to characterize their public statements. *Central Ry. of Venezuela* v. *Kisch*, L.R. 2 H.L. 123.

The above rule was in a measure modified by subsequent cases on the point of non-disclosure. There must be some active mis-statement of fact or such a fragmentary statement of fact that the withholding of that which is not stated renders that which is stated false. Even in the case of an action of rescission proof of the non-disclosure of material facts will entitle the plaintiff to succeed. *McKeown* v. *Boudard*, 74 L.T. 712; *Derry* v. *Peek*, 14 A.C. 359; *Aaron's Reef* v. *Twiss* (1896), A.C. 273.

To place the responsibility upon a company for statements in a prospectus, it must be shewn that the prospectus was issued with the authority of the company express or implied. If, however, shares are allotted by a company with the knowledge that they have been subscribed for on the basis of a prospectus, the company must be taken to assume responsibility for the prospectus. *Ross* v. *Estates Investment Co.*, 3 Ch. 682; *National Exchange Bank* v. *Drew*, 2 Macq. 124.

Misrepresentations.

Prior to the passing of the Directors Liability Act in 1890, it had been held by the House of Lords in *Derry* v. *Peek*, 14 A.C. 337, that in an action of deceit the plaintiff must prove actual fraud. A false statement made through carelessness and with-

out reasonable ground for believing it to be true might be evidence of fraud, but did not necessarily amount to fraud. Such a statement if made in the honest belief that it was true was not regarded as fraudulent and did not render the person making it liable in an action of deceit.

The Directors Liability Act of 1890 (R.S.O., 1897, c. 216) provided that where an untrue statement was contained in a prospectus every person who was a director of the company and every one named as a director or as having agreed to become a director and every promoter of the company, should be liable to pay to persons subscribing on the strength of such prospectus, damages sustained by reason of such untrue statement. The directors or other persons made liable might escape liability by shewing reasonable ground for the belief on their part that the statement was true and in respect of an untrue statement purporting to be a copy of or extract from a report of an expert it was sufficient to shew that the expert's report was fairly summarized or represented.

The new Act has deprived the director or other person liable of these defences and the only defence which can be raised by him now is that had he withdrawn his consent to act before the issue of the prospectus or that it was issued without his authority or consent or knowledge, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was so issued without his knowledge or consent. The new Act also renders the director liable to certain penalties.

Concealment.

An untrue statement includes concealment of what is true as well as a statement of that which is false, provided that the result is to leave a false impression in the mind. If that is the result of the statements as a whole, it is immaterial that there was no specific allegation which is false. *Aaron's Reef* v. *Twiss* (1896), A.C. 273. The Courts will have regard to the omission from the prospectus and will consider the probable consequence of such omission on the minds of one reading the prospectus. *Arnison* v. *Smith*, 41 C.D. 348.

Where after a prospectus for the sale of shares in a company has been issued a mortgage was made to secure an indebtedness existing at the time of the issue of the prospectus and the existence of the mortgage was not communicated to a purchaser of shares, this was held to be no such concealment or misrepresentation as would entitle him to succeed in an action for rescission. The Court held that the mortgage having been given after the prospectus was issued it could not have been mentioned in the prospectus and, moreover, that the shareholders were not damnified by it as the new company would have been equally liable for the debt if the mortgage had not been given. *Petrie* v. *Guelph Lumber Co.*, 11 S.C.R. 450.

But where a prospectus stated that a certain expert of great ability was to be chairman and at the date of allotment the directors knew he was about to retire, applicants were allowed to rescind. *Re Kent Gas Co.*, 95 L.T. 756.

Examples of Misrepresentation.

A company in its prospectus made the representation that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land" in the said territories "comprising 2,000,000 acres for the purpose of settlement free from the use of intoxicating liquors." The defendant on the faith of these representations entered into two agreements with the company agreeing "to purchase land" and paid certain instalments thereon. It was proved that the company never had and could not obtain the *choice compact tract* stated or any special privileges as to the exclusion of liquors; and it was held that these were material misrepresentations; and the defendant having been induced to enter into the agreement thereby was therefore entitled to have them rescinded and to recover back the money paid by him. *Temperance Colonization Co.* v. *Fairfield*, 16 O.R. 544.

A mis-statement of the names of the directors has been held to be a material mis-statement. *Re Scottish Petroleum Co.*, 23 C.D. 413. So also a statement that stock has been subscribed

when in reality it has been or is to be allowed in paid-up shares to a promoter or vendor. *Arnison* v. *Smith*, 41 C.D. 348.

If the effect of a document is stated and is also stated that it may be inspected at a certain place the subscriber is entitled to accept the statement as to the effect of the document. He is not bound to go and examine the documents for himself. *Redgrave* v. *Hurd*, 20 C.D. 1; *Smith* v. *Chadwick*, 9 A.C. 187.

A statement of intention or words to the effect that something will be done, is not regarded as a statement of fact. *Edgington* v. *FitzMaurice*, 29 C.D. 459.

Where the statement is ambiguous the applicant is entitled to put any reasonable construction on it, and the company will be bound by such construction. *Arkwright* v. *Newbold*, 17 C.D. 301. A statement that the company's process is a commercial success is regarded as a statement of fact and not an expression of opinion. *Stirling* v. *Passburg Grains*, 8 T.L.R. 71; *Greenwood* v. *Leather Shod Wheel Co.* (1900), 1 Ch. 421. For further cases illustrating the principles see *London and Staffordshire Ins. Co.*, 24 C.D. 149; *Ross* v. *Estates Investment Co.*, 3 Ch. 682; *Alderson* v. *Smith*, 41 C.D. 348.

It will probably be contended that the omission to state in the prospectus facts required by the new law to be stated gives rise to a substantive action for damages against the company and its directors. Where, however, such omission does not falsify what is expressly stated, it would appear more than doubtful if there was such relief. See notes to section 100, *infra*.

The question has apparently not yet arisen as to the right of one who reads the prospectus and subsequently buys shares on an exchange or from a shareholder to a relief. The correct view would appear to be that the prospectus is addressed only to those who buy shares from the company or its agents in response to the prospectus. See *Ex parte Worth*, 4 Drew 529; *Andrews* v. *Mockford* (1896), 1 Q.B. 372.

Rescission of Contract.

A contract induced by misrepresentation may be rescinded at the option of the deceived party. This rule applies whether the

misrepresentation is an innocent one or not. A subscriber for stock, speaking generally, may cancel his subscription before allotment; after allotment he is not bound unless he has received a copy of the statutory prospectus. (See section 97, subsection 3.) If the purchase money for the shares has been paid to the company and there has been misrepresentation, he may bring an action of rescission. *Re London & Staffordshire Co.*, 24 C.D. 149.

He must, however, act promptly upon the discovery of the misrepresentation and a short delay has been held to be sufficient to deprive him of the right to rescind. *Petrie* v. *Guelph Lumber Co.*, 11 S.C.R. 450; *Re Scottish Petroleum Co.*, 23 C.D. 413; *Beatty* v. *Nealon*, 12 A.R. 50. And means of knowledge as distinguished from actual knowledge, may be sufficient to debar him. *Ashley's Case*, 9 Eq. 263. He may also lose his right of rescission by conduct such as attending or voting at a meeting of shareholders. *Sharpeley* v. *Louth*, 2 C.D. 664, or by attempting to dispose of his shares or executing a transfer of same. *Crawley's Case*, 4 Ch. 322, or by making a payment on account of the stock. *Shearman's Case*, 66 L.J. Ch. 25. See also *Nelles* v. *Ontario Investment Association*, 17 O.R. 129.

The fact that a plaintiff has sold a part of his shares will not debar him from obtaining rescission as to the remainder. *Nelles* v. *Ontario Investment Association, supra.*

The payment of money on account of shares, the act of participating in the affairs of the company, the knowingly allowing the name to appear as a shareholder or director and the like have always been considered as important, but not conclusive evidence. Each case must depend upon and be governed by its own circumstances. *Bank of Hamilton* v. *Johnston*, 7 O.W.R. 111, and *McCallam* v. *Sun Savings & Loan Co.*, 1 O.W.R. 226.

Where a shareholder in an action for calls has put in a counterclaim for rescission, he is entitled to raise all the defences in the winding up that he could have raised in such action. *Re Pakenham*, 6 O.L.R. 582.

96.—(1) Upon any offer of shares to the public for subscription, 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 and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the Letters Patent or Supplementary Letters Patent and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized.

(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. Imp. 1900, s. 8.

An offer of shares to the public within the meaning of the section means an offer by the company and not by an individual. And where a prospectus marked "private and confidential" was sent by a director to certain friends without the authority of the company it was held not to be an offer to the public. *Sherwell* v. *Combined Incandescent Syndicate*, 23 T.L.R. 482.

The Act refers to an offer of shares to the public, but does not define in any way what is meant by public. It is not, however, necessary to advertise in the public press to make the offer a public one. *Burrows* v. *Matabele Gold Reefs* (1901), 2 Ch. 23. A person who is an existing shareholder or debenture holder, is expressly excluded by a subsequent clause. The provisions must, however, be read in the light of the provisions of section 96, providing that a company shall file a prospectus where a number of its shareholders is increased to a number greater by ten than the number of applicants for incorporation or which has its bonds or other securities held by more than one person.

It is probably not necessary to circulate the prospectus through the public press in order to make the issue public. In many cases stock subscriptions are procured by means of letters, circulars and other material marked "private." It has been said in regard to the Act that the word "public" means strangers to the promoters. When an issue is to be turned over to existing shareholders or debenture holders as well as to the public, the section will, of course, apply. See *Booth* v. *New Africander Gold Mining Co.* (1903), 1 Ch. 295.

It would appear that the offer to the public must be made by means of a prospectus. This section goes further than the mere authorization of the payment of a brokerage or underwriting commission. It allows the payment of a commission to any person in consideration of his subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions.

It must apparently be an offer to all persons who may choose to come in and take shares. *Sherwell* v. *Combined Incandescent*, 23 T.L.R. 482.

The payment of commission must be expressly authorized by the Letters Patent of the company as well as disclosed in the prospectus. It is probably advisable to provide for the insertion in the Letters Patent of a clause authorizing the company to pay a commission not exceeding a specified amount, such as 10% or 20%. From the wording of the statute the payment of a lesser amount than that named in the Letters Patent would appear to be sufficiently authorized in this way.

"*Directly or indirectly.*"—Where a company enters into an agreement of purchase knowing that the vendor has arranged to pay for underwriting and has fixed the price on this basis, the company may be said to be indirectly paying for such underwriting. See *Great West Central Ry.* v. *Charlebois* (1898), A.C. 114; *Mann* v. *Edinburgh Tramways* (1893), A.C. 69.

"*Such brokerage.*"—The Courts will probably approve of what would be a reasonable brokerage under the circumstances. See *Metropolitan Coal Association* v. *Scrimgeour* (1895), 2 Q.B.

604, and *Keatinge* v. *Paringa Consolidated Mines*, W. N. (1902) 15.

What is a reasonable amount depends on the circumstances and where the uncontradicted testimony was that the amount was not unreasonable a commission was allowed by the Court. *Re Co-operative Cycle Co.*, 1 O.W.R. 778.

Sale of Shares—Commission.

An ordinary case is that of a small private syndicate where a memo is drawn up and shewn by a promoter to a circle comprising chiefly his friends and acquaintances. Some of the persons invited to join the syndicate may have friends of theirs to whom they wish the invitation extended, and these latter parties would probably be unknown to him. It is obvious that it is very difficult to see where a private issue ends and where an offer of shares to the public begins.

Since this section was passed, it has been held that a company cannot give underwriters or subscribers in consideration of underwriting or subscribing a call upon further shares of the company at par. *Burrows* v. *Matabele Gold Reefs* (1901), 2 Ch. 23; *Dexter* v. *United Gold Coast Properties*, 17 T.L.R. 677, 708. The latter case, however, went to the House of Lords, who held the practice free from objection. *Hilder* v. *Dexter* (1902), A.C. 474.

Where a company agreed to pay a commission of 40% upon the sale of shares, such commission to be payable in paid-up shares of the company, and the agent allowed a purchaser of stock 25% out of 40%, and the company issued a certificate to the shareholder for fully paid-up shares to this extent, it was held that no value had been received by the company and that the shares were bonus shares and the holder of them must be placed on the list of contributories. *Kydd's Case*, 6 O.W.R. 491.

It may be a difficult matter to state in the prospectus fairly what the amount of commission is. For example it may consist of the right to call for the allotment at some other figure of shares of the company within a specified time.

"In consideration of his subscribing," etc.—This probably means the ordinary application to the company for shares to be paid in some other way after allotment. *Arnison* v. *Smith*, 41 C.D. 348. If certain shares are offered to the public, it appears that commission may be paid for subscribing for other shares in the company not offered to the public.

"Conditionally."—The word "conditionally" would appear to apply specially to the case of an underwriter. The section in effect permits the issue of shares at a discount. For example, a share of $100 may be offered on the basis that the company is to pay the subscriber $25 or allow him that amount as a consideration for such subscription.

97.—(1) Every company heretofore or thereafter incorporated under any general or special Act, the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation or which has its debentures or other securities held by more than ten persons, and every company incorporated otherwise than as above set out which has more than ten shareholders or holders of debentures or other securities within Ontario, shall file a prospectus in the manner hereafter set out.

(2) All purchases, subscriptions or other acquisitions of shares, debentures or other securities of any company required in the manner above provided to fyle a prospectus, shall be deemed as against the company or the signatories to the prospectus to be induced by such prospectus, and any term, proviso or condition of such prospectus to the contrary shall be void.

(3) No subscription for stock, debentures or other securities, induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus.

Effect of Legislation Regarding Prospectuses.

Every company incorporated in Ontario must now file a prospectus if it has ten shareholders over and above those who signed the petition for incorporation, or if its debentures or other securities are held by more than ten persons. Every foreign corporation which has more than ten shareholders or holders of debentures or other securities within Ontario must also file a prospectus. These provisions are most sweeping in their nature, affecting as they do practically all corporations, foreign or

domestic, having their shares listed on any exchange in Ontario. They would also appear to apply to many of the companies whose shares are dealt in on the New York Stock Exchange, as transactions in these stocks in Ontario are probably more numerous than in shares of local companies. The penalty for non-compliance with these provisions is $200, and every provisional director, director or other person responsible for the issue of such prospectus is liable for such penalty.

No subscription for stock is binding unless the subscriber first received a copy of the prospectus. Furthermore all purchases of shares or securities shall be deemed to be induced by the prospectus.

The prospectus must be signed by every one named as a director, and filed with the provincial secretary, on or before the date of its publication.

The hardships inflicted by the provisions of section 97 may be illustrated by taking the case of the Canadian Pacific Railway. This corporation, created by Acts of the Dominion Parliament, and having more than ten shareholders in the Province of Ontario, is bound by this section to file a prospectus, and each of the directors residing within the Province of Ontario and subject to the jurisdiction of its Courts is made liable to the penalty by the provisions of section 100. Reading this in the light of the subsequent provisions among others, that the prospectus must contain the date of and the parties to every material contract entered into within these years, and a time and place at which a material contract or a copy thereof may be inspected, a situation would appear to be created which the draughtsman had not contemplated. Of course these hardships are, in a measure, modified by subsequent sections.

Under the English Act, a broker can purchase from the company privately a large block of stock on his own terms or any terms and sell it on his own behalf to the public and is under no obligation to file a prospectus. This cannot be done under the Ontario Act if the broker is or has been engaged or interested in the formation or promotion of the company. Nor can it be done

in relation to an "intended company" apparently by any person whatsoever. It would appear, however, that an incorporated company could sell privately a portion of its stock to a broker, who is in no sense a promoter of the company, and that he may offer his stock for sale to the public, but the moment that the company has allotted stock to more than ten shareholders, it would under the provisions of section 97 be bound to file a prospectus. The broker would then be limited still further under these provisions, and could not cause his stock to be transferred to those who purchased it from him until he had completed his flotation.

99.—(1) Every prospectus issued by or on behalf of a company or in relation to any intended company or by or on behalf of any person who is or has been engaged or interested in the formation or promotion of the company, shall state:—

(*a*) The names, descriptions and addresses of the original incorporators, and the number of shares subscribed for by them respectively;

(*b*) The number of shares, if any, fixed as the qualification of a director, and any provision in the by-laws of the company as to the renumeration of the directors;

This probably must be limited to the by-laws in force at the date of the prospectus.

(*c*) The names, descriptions and addresses of the directors or proposed directors;

(*d*) The minimum subscription on which the directors may proceed to allotment, and the amount payable on 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, and the amount actually allotted;

There does not appear to be any provision requiring a minimum subscription in the case of debentures or debenture stock.

(*e*) The time or times at which under the by-laws of the company a further call or calls may be made upon shares subscribed for;

(*f*) The number and amount of shares 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 the number and amount of bonds, debentures or other securities issued or to be issued and allotted to any person;

It will be sufficient if the general nature of the consideration is stated. *Re S. Frost & Co.* (1899), 2 Ch. 207.

(*g*) 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 publication of the prospectus and the amount payable in cash, shares, bonds, debentures or other securities 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;

This section must be read in conjunction with sub-section 2 defining the word "vendor." The object of this section is to disclose the real vendor.

Where the property belongs to the vendor absolutely, it has been held that the prospectus need not disclose the amount paid by him for the property. *Brookes* v. *Hansen* (1906), 2 Ch. 129.

(*h*) The amount (if any) paid or payable as purchase money in cash, shares or debentures of any such property as aforesaid, specifying the amount payable for good-will;

This sub-section would appear to make it necessary to specify in a contract turning over a business to a company, a separate amount for the goodwill of the business. And the goodwill thus being singled out for scrutiny it would be advisable to have the price put upon it supported by the valuations of accountants.

(*i*) The amount (if any) paid or payable as commission for subscribing, or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares in the company, or for underwriting or procuring underwriting of any securities issued or to be issued by the company or the rate of any such commission;

(*j*) The amount or estimated amount of preliminary expenses;

(*k*) The amount paid or intended to be paid in cash shares or debentures to any promoter and the consideration for any such payment;

(*l*) 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 three years before the date of publication of the prospectus;

A material contract must be one in which it would be important for the proposed subscriber to consider in reaching a conclusion as to whether or no he would subscribe. In a case of a large corporation, this section would generally impose a heavy burden, even although such contracts as are entered into in the ordinary course of business need not be referred to. As the question of materiality is one of fact, it is obvious that by inserting a mass of information under this heading and referring to a large number of contracts all more or less material, those which it might be vital for the subscriber to know, might easily be overlooked by him.

Every material contract which might probably influence the judgment of an intending subscriber should be specified. *Cackett* v. *Keswick* (1902), 2 Ch. 456; *Broome* v. *Speake* (1903), 1 Ch. 586. If there is knowledge on the part of a director of the existence of the material contract, he cannot escape liability by claiming ignorance of the contents of such contract. *Shepheard* v. *Broome* (1904), A.C. 342. There is no distinction made between verbal and written contracts. *Arkwright* v. *Newbold*, 17 C.D. 301.

(*m*) The names and addresses of the auditors (if any) of the company;

(*n*) 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, with a statement of all sums paid or agreed to be paid to him in cash or shares by any person either to qualify him as a director or otherwise for services rendered by him in connection with the formation of the company.

It should be observed that this sub-section requires disclosure in regard to transactions which may be entirely immaterial. In this as in other cases, it may prove easy by inserting a large number of particulars to nullify the objects of the Act. On the other hand, directors who endeavour to conscientiously act in accordance with the requirements may find themselves in a position of considerable embarrassment. In England the difficulties of compliance have been found so great that the practice has been more or less resorted to of effecting a private sale of the

shares or securities of the company to brokers. These brokers not being engaged or interested in the formation of the company may proceed to sell the shares or securities without the issue or filing of a prospectus. In Ontario, however, it will be necessary to file a prospectus as soon as allotment has been made to ten shareholders in addition to those who formed the original incorporators.

(2) For the purposes of this section the word "vendor" shall extend to and include 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 publication 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 such 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 rent, and the expression "sub-purchaser" included a sub-lessee.

(4) This section shall not apply to a circular or notice inviting existing shareholders or debenture holders of a company to subscribe for further shares or debentures; 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; provided that—

(*a*) The requirements as to the original incorporators 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 published more than one year after the date of the first general meeting, and

(*b*) In the case of a prospectus published more than one year after the date of such meeting, the obligation to disclose all material contracts shall be limited to a period of two years immediately preceding the publication of the prospectus.

(5) 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.

(6) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary to specify

the names of original incorporators and the number of shares subscribed for by them. Imp. Act, 1900, 10.

100.—(1) Every provisional director, director or other person responsible for the issue and publication of such prospectus shall for every violation of the provisions of the next preceding three sections be liable on summary conviction to a penalty not exceeding $200 and costs, provided that no provisional director, director or other person shall incur any liability by reason of non-compliance with the said sections:—

(*a*) As regards any matter not disclosed, if he was not cognizant thereof; or

This clause does not compel a director to make an investigation as to the facts not within his own knowledge.

(*b*) If the non-compliance arose from an honest mistake of fact on his part,

And provided that in the event of non-compliance with the requirements contained in paragraph (*n*) of sub-section (1) of section 5, no director or other person shall incur any liability in respect of such non-compliance unless it is proved that he had knowledge of the matters not disclosed.

The fact that the directors have taken the advice of counsel on any point and have acted on such advice would afford reasonable evidence of their honesty in the matter. See also *Nash* v. *Calthorpe* (1905), 2 Ch. 237.

(2) Nothing in this section or the said preceding three sections shall limit or diminish any liability which any person may incur under the general law apart from this Act. Imp. Act, 1900, 10(7).

The question arises as to the civil liability of a director for failure to comply with the provisions of sections 97, 98 and 99. Having regard to the penalty imposed by section 100 and to the wording of sub-section 2, it would appear that individuals prejudiced by failure to comply with sections 97, 98 and 99 would have no right of action. In determining whether a person prejudiced by the non-performance of a statutory duty is entitled to bring an action for damages, regard must be had to the purview of the act in question and the language employed therein. The creation of a penalty would afford evidence that it was not intended to give a right of action. See *Atkinson* v. *New Castle Co.*, 2 Ex. D. 441; *Johnston* v. *Consumers Gas Co.* (1898), A.C. 447.

102.—(1) Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in, or debentures or debenture stock or other security of, a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures or debenture stock or other security on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal and of the reason therefor to be given. Imp. Act, 1896, s. 3(1).

(2) A promoter in this section means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting solely in a professional capacity for persons engaged in procuring the formation of the company. Imp. Act, 1890, s. 3(2).

The provisions of this section are taken from section 4 of the Directors Liability Act as contained in chapter 216, R.S.O., 1897. The new section makes it much more onerous for a director than heretofore. Where an untrue statement appears in a prospectus a director now may only set up the following defences: (1) That having consented to become a director, he may withdraw his consent before the issue of the prospectus, or (2) that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue he gave reasonable public notice of such fact, or (3) that after the issue of the prospectus he on becoming aware of any untrue statement withdrew his consent and gave reasonable notice of such withdrawal.

Under the former Act, it was sufficient for a director to shew that he had reasonable ground to believe, and did believe, that

the statement was true; in case of the statements purporting to be a copy of or extract from the report of an expert it was sufficient that it fairly represented the statement of the expert.

ADVERTISEMENT IN NEWSPAPER CALLING ATTENTION TO ISSUE OF PROSPECTUS.

THE COMPANY, LIMITED.

Office.

Capital $ Preference $ Ordinary $

Pending issue of per cent., cumulative preference share of $ each, and ordinary shares of $ each.

Payable $ on application $ on allotment and the balance by calls not exceeding at intervals of not less than months.

The prospectus dated the day of relating to the above issue, to which prospectus intending applicants for shares are referred has been duly filed with the Provincial Secretary.

The Directors of the Company are:—

The Company has been formed to purchase the business of etc.

It appears from the valuation of Messrs. referred to in the prospectus, that the business has been carried on for years past and has shewn a steady increasing profit, and should, in their opinion, pay a dividend of at least per cent. on the common shares.

The Securities, Limited, who are the promoters of the Company and pay all expenses up to allotment have underwritten the present issue.

Copies of the prospectus may be obtained at the office of the Company on applying in person or by letter to the Secretary, Mr. , and also at the Company's brokers, Messrs. of , etc., their auditors, Messrs. of , etc., and their solicitors, Messrs. of , etc.

The said prospectus gives the particulars required by the Ontario Companies Act, and mentions other particulars relating to the Company.

On the basis thereof only applications to take shares from the public are invited, this advertisement not being intended to be a prospectus within the meaning of the Ontario Companies Act.

First prospectus, issued within one year after Company is entitled to commence business, offering preference and ordinary shares.

This prospectus has been filed with the Provincial Secretary.

The subscription books will be opened on the day of and will close on day the day of

Applications will be received by, and prospectuses and forms of application can be obtained at, the Bank of or any of its branches.

PROSPECTUS ON ISSUE OF SHARES.

THE COMPANY, LIMITED.

Incorporated under the Ontario Companies Act capital divided into per cent. preference shares of $ each and ordinary shares of $ each.

The dividend of per cent. on the preference shares is cumulative and the preference shares are preferential as to capital as well as dividends.

Issue of preference shares of $ each, of which per share is payable on application per share on allotment and the residue months after allotment.

ordinary shares of $ each of which per share is payable on application and per share on allotment.

Directors.

(Names, addresses and descriptions of all the directors and proposed directors.)

Bankers.

(Name and address of bankers.)

Brokers.

(Name and address.)

Solicitors.

(Name and address.)

Auditors.

(Name and address.)

Secretary.

(Name of Secretary.)

Head Office.

(Address of Head Office of Company.)

PROSPECTUS.

This Company has been formed to purchase as a going concern, as from the day of the well-known business of carried on for many years by Mr. A. and Mr. B. under the firm name of A. B. & Co., together with all the freehold and leasehold premises belonging thereto, and situate at and all the business assets of the firm, and the goodwill of the business and the benefit of all subsisting contracts and book debts.

The immediate vendors to and promoters of the Company are the Securities, Limited.

Messrs. C. & Co., chartered accountants, have investigated the books of the firm of A.B. & Co., for the last years, and have certified that the profits of the firm during such period have been as follows:—

Messrs. D. and E., valuators, have recently valued the properties to be acquired by the Company, and have made the following report thereon:—

The following contracts have been entered into:

(*a*) Contract dated the day of between (original vendors) of, etc., the owners of the properties and the Securities Company, for the sale of the business to a Company to be formed and floated by the Securities Company.

The purchase price payable to the owners under such contract is as follows:—

Name.	Cash.	Preference shares.	Common shares.	Total.
To Mr.				
To Mr.				
To Mr.				
Total.				

Total purchase price payable to owners $.

Of the above sum of $ the amount payable for goodwill is $.

(*b*) Contract dated the day of between Securities Company and the Company whereby the Company agreed to purchase and the Securities Company agreed to procure that the vendors should sell the property acquired in the above mentioned contract, and to procure the underwriting of the issue at the rate of $ per cent. and in consideration of the said sale to pay all expenses of and incidental to the incorporation of the Company up to and including allotment of this issue, for the sum of $ payable as follows:—

Cash $.

Ordinary shares.

Preference shares.

Cash or ordinary shares at the option of the Company.

Out of the shares to which the Securities Company is entitled under this agreement, the shares to be allotted to the owners, and the shares to which the underwriters have the right under the agreement next hereinafter mentioned will be provided.

(*c*) Contract dated the day of between the Securities Company and Messrs. L. & Co., whereby the latter firm undertook, in consideration of (ordinary) shares in the Company to be allotted to them fully paid up to underwrite this issue, and to indemnify the Securities Company against their liability to the Company so to do under the last mentioned contract.

The following are the provisions of the Company's by-laws relative to the share qualification and remuneration of directors.

(Set out by-law or summary of same relating thereto.)

The amount fixed as the minimum subscription of this issue is shares, but as already stated the whole issue has been underwritten.

The Ontario Companies Act requires a minimum subscription to be fixed. Such subscription has accordingly been fixed by the articles at the

nominal amount of ten shares. The directors, however, will not proceed to allotment unless they are of the opinion that the amount of capital subscribed is enough to carry on the Company's business.

Except as already stated no shares are issued or agreed to be issued otherwise than for cash, and no debentures are issued or agreed to be issued.

The rate (or amount) which the Company may pay as commission, for subscribing or agreeing to subscribe or procuring or agreeing to procure subscribers for any shares in the Company is, as provided by the Letters Patent is as follows:—

(Set out clause.)

As already stated, the present issue has been underwritten by the Securities Company at the rate of per cent.

As appears by reference to the second of the above contracts, the preliminary expenses will be borne by the Securities Company, and none will therefore be payable by the Company, and except the profit of the Securities Company under the above agreement, and the amount to be paid by them to Mr. as below mentioned, no promotion money has been or will be paid. The preliminary expenses as estimated at $.

Of the directors, Mr. A. is interested in the promotion of the Company as vendor to the extent already stated.

The qualification shares of Mr. M. will be found for him by Mr. A. to whom they will be transferred on Mr. M.'s retirement.

Mr. will be paid the sum of $ by the Corporation for his services in promoting the Company and negotiating the underwriting contract with Messrs.

Copies of the above mentioned contracts and of the Company's memorandum and articles may be inspected at the (offices of the solicitors of the Company) during usual business hours.

Applications for shares should be made on the form inclosed and forwarded, with a remittance of $ per cent. of the amount applied for, to the Company's brokers. Where no allotment is made the deposit will be returned in full.

Prospectuses and forms of application can be obtained at the offices of the Company, or from the Company's bankers, brokers, auditors, or solicitors.

(Signatures of directors.)

Dated this day of .

(Set out names, descriptions and addresses of the signatories, and the number of shares subscribed for by them respectively.)

NOTICE TO SHAREHOLDERS OFFERING FURTHER SHARES CONDITIONALLY ALLOTTED.

THE COMPANY, LIMITED.

Sir (or Madam),—

It will be within your recollection that at a meeting of the shareholders of the Company held on the day of it was resolved

that the capital of the Company should be increased by the sum of $ consisting of shares of $ each, and that all necessary steps should be taken to this end, and that such shares should be offered in the first instance to the existing shareholders of the Company in proportion to the amount of shares held by them, and that any shares not applied for, or any shares which would have to be split into fractions, were allotment to take place strictly in proportion to the shares held by the existing shareholders, should be allotted at the discretion of the directors.

By virtue of the said resolution, you are entitled to shares of the new issue, which the directors have allotted you, conditionally, however upon your signing and returning before the , day of next, the enclosed form of acceptance, together with a cheque for $ being per cent. of the nominal value of the shares which by the resolution of the board has been determined to be payable on allotment. The balance will be called upon as occasion may require, but no call will be made before the day of next. You are at liberty to accept any number of the shares so conditionally allotted to you that you may wish.

Should you desire to renounce your rights to all or any of the said shares in favour of a nominee, you will be good enough to fill up the form provided for that purpose instead of or in addition to the one already referred to. The letters of renunciation must be countersigned by the nominee. The directors reserve the right to reject the nominee.

I have also been requested to ask you whether you are willing to subscribe for any surplus shares which may be at the directors' disposal for either of the reasons above stated. Should you not before the date mentioned yourself apply for the shares or renounce them in favour of a nominee, the directors will assume that you have declined them, and will dispose of them elsewhere.

Yours truly,

Secretary.

Note: As to the rights of existing shareholders to participate in a new issue of stock, see *Martin* v. *Gibson*, 10 O.W.R. 66.

RESOLUTION OF BOARD TO RETURN DEPOSITS PAID ON APPLICATION WHERE MINIMUM SUBSCRIPTION NOT REACHED.

That all the deposits paid on applications for shares be returned to the applicants paying the same respectively, and that the Secretary be directed to inform the applicants respectively that the minimum subscription required by the Company's by-laws has not been reached.

OFFICIAL FORM OF RETURN OF ALLOTMENTS TO BE FILED WITH THE PROVINCIAL SECRETARY.

ONTARIO COMPANIES ACT.

Return of allotments from the of to the of the Limited.

Made pursuant to s. 110 of the Ontario Companies Act (to be filed with the Provincial Secretary within one month after the allotment is made.)

Number of the shares allotted payable in cash ———
Number of the shares allotted payable in cash ———
Nominal amount of the shares so allotted ———
Nominal amount of the shares so allotted ———
Amount paid or due and payable on each such share ———
Amount paid or due and payable on each such share ———
Number of shares allotted for a consideration other than cash ———
Nominal amount of the shares so allotted.
Amount to be treated as paid on each such share.
The consideration for which such shares have been allotted is as follows:—

Presented for filing by ———.

Names, addresses and descriptions of the allottees.				Number of shares allotted.	
Surname.	Christian name.	Address.	Description.	Preference.	Ordinary.

(Signature.)

[Penalty of $50 per day for failure to file above returns and contract. Section 110, ss. (2).]

ACCEPTANCE OF OFFER TO SUBSCRIBE FOR SHARES WHERE COMMISSION IS TO BE SATISFIED BY ALLOTMENT OF SHARES.

THE COMPANY, LIMITED.

Date.

Sir,—

I beg to acknowledge the receipt of your letter dated containing an offer to subscribe for shares in the above Company. Such offer has been accepted by the Board, who have allotted to you the said shares. My Board have determined that your commission shall be paid in shares, and have allotted shares to you accordingly. The amount payable on allotment of the shares agreed to be subscribed for by you is $ for which I shall be glad to receive a cheque.

Yours, etc.,

Secretary.

CHAPTER IV.

POWERS.

Powers of Company.

Under section 17 of the Act of 1907 very broad ancillary powers are conferred on all companies having a share capital. These clauses will render it unnecessary to insert more than a brief statement of the proposed powers of the company in a petition for incorporation. A company may, for example, now carry on any business other than that for which it is incorporated, which may seem to the company capable of being conveniently carried on in connection with its business. A joint stock company may even lend money to or guarantee the contracts of its customers or any person or company with which the company may enter into partnership or a profit-sharing arrangement. In connection with this power of lending money regard must be had, however, to the provisions of the Loan Corporation Act.

If it is desired to limit the ancillary powers specified in the Act this may be accomplished by inserting a clause asking for such limitation in the petition for incorporation, and such powers may then be withheld by the Letters Patent or supplementary Letters Patent.*

A company incorporated under the authority of a Provincial Legislature to carry on business is not inherently incapable of entering into a valid contract outside of the boundaries of its province of origin relating to properties also outside this limit. *C.P.R.* v. *Ottawa Fire Insurance Co.*, 39 S.C.R. 405; *Kerlin Bros.* v. *Ontario Pipe Line Co.*, 11 O.W.R. 797. See title Incorporation, *supra*.

A company possesses only limited powers resting upon the provisions of the statute creating it. Reading together the

*See titles Borrowing and Contracts for a discussion of powers respecting these matters.

Letters Patent of the company and the ancillary powers vested in it by virtue of section 17 of the Act, the limits of the powers of the company may be defined. Nothing may be done by the company beyond such powers and no attempt shall be made to use the corporate existence for any other purpose than that so specified. See *Baroness Wenlock* v. *River Dee Co.*, 36 C.D. 675.

Contracts in regard to objects and purposes foreign to or inconsistent with the powers of the company so defined are *ultra vires* the company. The inability of companies to make such contracts rests on an original limitation of their powers by the law to the purposes of their incorporation rather than depends on some express or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do. *Ibid.*

It has been further laid down by the Courts that whatever may be fairly regarded as incidental to or consequential upon the specified objects of a company should not be held to be *ultra vires*. *Attorney-General* v. *Great Eastern Ry. Co.*, 5 A.C. 473; *Lock* v. *Queensland Mortgage Co.* (1896), A.C. 461.

The capital of a company can only be applied in carrying out its authorized objects. The capital may no doubt be diminished by expenditure reasonably incidental to the corporate objects, a part of it may be lost in carrying on the business, but the company has a right to rely on the capital remaining undiminished by any expenditure outside of the company's objects.

Doctrine of Ultra Vires.

When acts are spoken of as being *ultra vires* it is not meant that they are prohibited but merely such as are not within the powers directly or indirectly conferred upon the corporation. It would accordingly be unjust if a corporation were allowed to avail itself of the doctrine of *ultra vires* as against a party seeking to enforce a contract which has been performed by him and has resulted in a corresponding benefit to the shareholders. *Clarke* v. *Sarnia Street Railway Co.*, 42 U.C.R., p. 45; *Taylor* v. *Chichester and Midhurst Railway Co.*, L.R. 2 Ex. 356; *Ex parte*

Chippendale, 4 DeG. G. & M. 19; *Bank of Australasia* v. *Breillat*, 6 Moore P.C. 152; *MacDonald* v. *Upper Canada Mining Company*, 15 Gr. 179.

In such a case the company has received the profits resulting from compliance of the creditor with the contract. These profits have gone to swell the dividends or assets of the shareholders of the company and it would be unjust for the company to escape performance on its part of the contract by which these profits have been realized.

A corporation has all the capacities necessary for engaging in transactions which are expressly given it by the constating instrument and by reasonable implication from the language of the constating instrument. It also has all the powers or capacities for management which are given it by its constating instruments, either expressly or by reasonable inference therefrom.

Corporations have no capacities or powers other than those indicated in the previous propositions, and they cannot legally or validly engage in other transactions.

Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. As long as the transaction remains executory it cannot be enforced. But if it be executed the corporation must account for benefits received.

Statutory provisions prescribing certain formalities are generally not imperative, but merely directory, and therefore the absence of them can be set up only against those persons who are cognizant of the defect.

Franchises and special privileges or powers in the nature of franchises cannot be delegated. Every capacity of a corporation which can be styled "special" or a "privilege" is given to it for itself for its own purposes, and to be used by itself directly. Any transfer, direct or indirect, to others is void. *Attorney-General* v. *Niagara Falls Bridge Co.*, 20 Gr. 34; *M. C. Ry.* v. *Wealleans*, 24 S.C.R. 309; *Hinckley* v. *Gildersleeve*, 19 Gr. 212.

Any party to an *ultra vires* transaction may be set up the defence thereof, and any one corporator may call upon the

Courts to restrain the corporation from engaging therein. See Brice on Ultra Vires, ed., p.

As to when defendant in a suit by a company may be debarred from setting up a defence of *ultra vires* on the part of a company see *Northern Railway Company* v. *Lister*, 27 U.L.C.R. 57. See also *Charlebois* v. *Delap*, 26 S.C.R. 221.

Assent of all Shareholders.

Where a company acts in a matter which is *ultra vires* of the powers contained in its charter or reasonably incidental thereof the unanimous assent of all the shareholders to the act will not validate it. *Charlebois* v. *DeLap*, 26 S.C.R. 221; *Ashbury Railway Carriage Co.* v. *Riche*, L.R. 7 H.L. 653. See also *Adams* v. *Bank of Montreal*, 32 S.C.R. 719; *Attorney-General* v. *Great Eastern Railway Co.*, 5 A.C. 473; *Wenlock* v. *River Dee Company*, 10 A.C. 354.

No approval by those who may happen to be directors of the company or those who may happen at that time to be all the shareholders in the company can possibly give validity to an *ultra vires* act because it is something which the company itself cannot do and which it cannot be authorized to do either by its then directors or by its then shareholders. *Mann* v. *Edinburgh Northern Tramway Co.* (1893), A.C. 69.

Ultra Vires Contract: Consent Judgment.

In the case of *Charlebois* v. *DeLap* it was held that a judgment obtained on consent on an *ultra vires* contract had no greater validity than the contract itself because the company could not validly give the consent to treat as valid what was *ultra vires*.

The Privy Council laid down that it was quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. Such a judgment cannot be of more validity than the invalid contract on which it is founded. *Great North-West Central Railway* v. *Charlebois* (1899), A.C., p. 124.

It may be added that the question of *ultra vires* cannot be made to depend upon the further question whether a certain contract was or was not beneficial to the company. Benefit or no benefit has really no bearing upon the question of *ultra vires*. The circumstance that a contract may require for its full or maximum performance, an increased plant on the part of the company is not in itself sufficient to render the contract *ultra vires*. It would be different if such increased plant had been required to carry on a new or different business from that then being carried on by the company. *National Malleable Castings Co.* v. *Smith's Falls*, 14 O.L.R. 22.

Companies may also so far develop and extend their operations as to engage in matters not primarily contemplated by their founders, provided these matters are incidental to their proper business or *bonâ fide* conducive to their prosperous development. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O.W.R. 434.

Illustrations of Ultra Vires Acts.

Apart from special enabling provisions the following Acts are *ultra vires*.

Issuing shares at a discount. *Welton* v. *Saffrey* (1897), A.C. 299; *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33. Purchasing the shares of the company itself. *Trevor* v. *Whitworth*, 12 A.C. 409. Such a purchase operates as a reduction of the capital of the company, which can only be effected in a way provided by the Act.

The payment of dividends out of the capital of the company or the issuing of bonus shares are *ultra vires*. *Re Eddystone Co.* (1893), 3 Ch. 9. Entering into partnership or amalgamation or taking over the business of another company. *Re British National Life*, 8 C.D. 704; *Ernest* v. *Nicholls*, 6 H.L.C. 401. Subscriptions by a company to charitable objects. *Tomkinson* v. *South Eastern Ry.*, 35 C.D. 675. The following are not regarded as *ultra vires:* Payment to a broker of a reasonable commission on the sale of shares. *Metropolitan Coal Co.* v. *Scrimgeour* (1895), 2 Q.B. 604. Compromise in good faith of a dispute or

law suit. *Bath's Case*, 8 C.D. 334. The payment of a gratuity to the company's officers. *Hampson* v. *Price's Patent Candle Co.*, 24 W.R. 754. Advertising expenses. *Lyndley* v. *Bird*, 33 C.D. 85. Mining company acquiring freehold of land, being operated under lease. *Johns* v. *Balfour*, 5 T.L.R. 389. (See also title Borrowing and Contracts.)

Under the Ontario Act a company cannot use any of its funds for the purchase of shares of another company unless a by-law has been passed and ratified by two-thirds of the shareholders. See section 79.

Similarly no loan may be made by a company to a shareholder and if such a loan is made all directors and officers of the company making same or assenting, shall be jointly and severally liable.

The giving of a guarantee by a company to answer for the debt of a person who does work for them if not within the general or special powers of the company may be justified on the ground that it is incidental to the main purpose and that there was a potential necessity for entering into the guarantee and that, therefore there is a reasonable implication or power to do it. *Williams* v. *Crawford Tug Co.*, 11 O.W.R. 321.

Commencement of Business.

A private company may commence business immediately upon incorporation, that is to say upon the date of the Letters Patent. Where there is an invitation to the public to subscribe for shares, the company cannot commence business until certain conditions have been complied with. See section 108. In the meantime all moneys received by the company or by a promoter, director, officer or agent are to be held in trust until the same are deposited in a chartered bank to the credit of the company. If the conditions of section 108 have been complied with the provincial secretary may certify that the company is entitled to commence business and his certificate is conclusive evidence that the company is so entitled, unless it is shewn that such certificate was obtained by means of fraud.

A contract made by a company requiring a certificate of this kind before it is entitled to commence business is provisional only and not binding on the company. Every person who is responsible for a contravention of the section is liable to a penalty of $50 per day by virtue of the statute and would also be liable as in case of a *ultra vires* act. See *Re Otto Electrical Co.* (1906), 2 Ch. 390; *Struthers* v. *Mackenzie*, 28 O.R. 381.

Holding Lands.

Under the provisions of section 19 of the Ontario Act a corporation can not hold any land not required for actual use and occupation or held by way of security or not within any city or town or within one mile of the limits of any city or town for more than seven years or after it has ceased to be required for the ordinary purposes of the corporation. Forfeiture to the Crown is the penalty of non-compliance.

Any *bonâ fide* agreement to sell land is sufficient to prevent a forfeiture where the sale has not been carried out owing to the default of the purchaser. *London and Canadian Loan Co.* v. *Graham*, 6 O.R. 329.

As a conveyance of land to a corporation not empowered by statute to hold lands is voidable only and not void under the Statute of Mortmain, the lands can be forfeited by the Crown only. And where a corporation is empowered by statute to hold lands for a definite period without a provision as to reverter and holds beyond that period, only the Crown can take advantage of it, and the company can convey their defeasible title. *Beecher* v. *Woods*, 16 C.P. 20. And it is not a defence in an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by statute. *McDiarmid* v. *Hughes*, 16 O.R. 570.

Mortmain—Dominion License.

It would seem that the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion and a

Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. *McDiarmid* v. *Hughes*, 16 O.R. 570. See *ante* page 5 as to power of provincial company to do business outside of province. See also *Western Assurance Co.* v. *Taylor*, 9 Gr. 471.

As to the power of a foreign corporation to hold land see title Extra Provincial Corporations.

Examples of Implied Powers.

The implication is made having regard to the entire constating instruments, so where a company by its act of incorporation was directed to deposit moneys received from stock subscriptions in a bank to be withdrawn by the provisional directors for the purposes only of the company, it was said that the power of withdrawal given did not extend to the general purposes of the company, but only to such purposes as were necessary in the work of organizing the company. *Monarch Life* v. *Brophy*, 9 O.W.R. 151.

A company is bound to exercise its powers reasonably so as to avoid doing any unnecessary injury to neighbouring proprietors. *Moore* v. *Grand River Navigation Co.*, 13 Gr. 560.

The action of *Ritchie* v. *Vermilion Mining Co.*, 1 O.W.R. 627, was an action by a shareholder to restrain the company from parting with all their mining lands on the principle that it involved a termination of the business, which was an *ultra vires* act. The Court took the view that there was nothing to prevent the business being continued by the purchase of other mines, or mining lands afterwards, and it was for the company to determine what shall be done afterwards. See also *Wilson* v. *Miers*, 10 C.B.N.S. 348, and *Hovey* v. *Whiting*, 13 A.R. 7 and 14 S.C.R. 515.

The Court seemed to consider that if upon the face of the Letters Patent it plainly appeared that the main purpose of the company was the acquisition of and working the mines upon the properties in question, and that this purpose formed the foundation of the company, it might be held that it was not within the

power of the company to put an end to that purpose by a sale of the properties without the consent of all the shareholders.

Corporations must have a power of compromise as an incident to their existence. No compromise can have any effect upon the rights of creditors of the company antecedent to the deed of compromise. *Fuches* v. *Hamilton Tribune*, 10 O.R. 497; *Dickson* v. *Evans*, L.R. 5 H.L. 606.

It is not *ultra vires* of a mining company or its directors to grant a partnership interest in a mine to an explorer who has made known his location to the company under an agreement that he should be compensated for the communication, that being the usual mode of compensation in such cases. *McDonald* v. *Upper Canada Mining Co.*, 15 Gr. 179.

Where a company has power to acquire land it has the implied power to give a mortgage for and to bind itself by covenant to pay the purchase money. The powers of a corporation created for certain specified purposes depends on what those purposes are and except so far as it has express powers given to it would 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. *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 305; *The Queen* v. *St. Charles Reed*, 5 Q.B.D. 483; *Western Assurance Co.* v. *Taylor*, 9 Gr. 471.

Where by the statute incorporating it, the corporation was forbidden to buy on credit, it was held that a vendor of goods could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability. *Struthers* v. *Mackenzie*, 28 O.R. 381.

In the absence of statutory prohibition, the holding of shares by one trading corporation in another trading corporation is not *ultra vires*. *Canada Life Assurance Co.* v. *Peel General Manufacturing Co.*, 26 Gr. 477.

As to lease by railway company see *Hinckley* v. *Gildersleeve*, 19 Gr. 212, and *Michigan Central R.W. Co.* v. *Wealleans*, 24

S.C.R. 309; *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Gr. 34.

A company authorized to borrow may validly give a mortgage. *Hope* v. *Glass*, 23 U.C.R. 86; *Bickford* v. *Grand Junction Railway*, 1 S.C.R. 696; *Farrell* v. *Caribou Gold Mining Co.*, 30 N.S.R. 199. And to pay a higher rate than the legal rate of interest. *McDougall* v. *Montreal Warehousing Co.*, 3 L.N. 64.

A purchase by one company of the goodwill and assets of another is a transaction in which no company would be justified in engaging, because it certainly cannot be said to be within the ordinary scope of the object of any company to purchase the goodwill of another, but if authorized by the charter of the company, it would be valid. *Ernest* v. *Nicholls* (1857), 6 H.L.C. 401. See, however, section 17 (*b*).

Majority.

The will of the majority of the shareholders is the will of the company and whatever the company has power to do a majority of the shareholders may cause to be done against the will of a minority. *Australian, etc., Co.* v. *Mounsey* (1858), 4 K. & J. 733, at p. 740; *Re Horbury Bridge, etc., Co.* (1879), 11 Ch. D. 109, unless, of course, there is some express provision to the contrary which is applicable to the particular company. *Davidson* v. *Grange* (1854), 4 Gr. 377. The majority must proceed regularly and with *bonâ fides*. *Harben* v. *Phillips* (1882), 23 Ch. D. 14, and see *Burland* v. *Earle* (1902), A.C. 83. See also title Meetings.

Irregularities.

In *Mahoney* v. *East Holyford Mining Company* (1875), L.R. 7 H.L. 869, Lord Hatherley said: "When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company. That no person dealing with them has a right

to suppose that has been or can be done, that is not permitted by the articles of association or by-laws. They are entitled to presume that of which only they can have knowledge, viz.: external acts are rightly done when those external acts purport to be performed in the mode in which they ought to be performed, for instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course the case is open to any observation arising from gross negligence or fraud."

An outsider must be taken to have notice of all the provisions of the Companies Act under which the company is incorporated, and it may be also that he must be taken to have notice of the contents of the Letters Patent as he can become acquainted with their contents by searching in the proper office. Further than this, however, he cannot, however, be expected to go. *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *MacEdwards* v. *Ogilvie*, 4 Man. 6; *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 305; *McKain* v. *Canadian Birkbeck*, 7 O.L.R. 241; *Trust and Guarantee Company* v. *Abbott Mitchell Co.*, 11 O.L.R. 403.

The Court will not interfere to prevent the doing of an act by a company which would be legal if sanctioned by a majority of the shareholders, if that sanction can be afterwards obtained. *Purdom* v. *Ontario Loan and Debenture Co.* (1892), 22 O.R. 597.

Acts of Agents.

The doctrine of *ultra vires* cannot be taken advantage of to protect a company from liability for the acts of its agents, where such agents have been guilty of negligence or fraud. A company will be liable for the acts of its agents under circumstances which would render an individual liable. *Ranger* v. *Great West Ry.*, 2 H.L.C. 72; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank*, 5 A.C. 317.

See title Proceedings against Company.

Implied Power of Managing Director.

In the case of *National Malleable Co.* v. *Smith's Falls*, 14 O.L.R. 22, the validity of a contract entered into by the managing director of a company was considered. In that case no by-law had been passed defining the general powers of the Board of Directors or of the managing director except as to borrowing for the purposes of the company. The managing director without consulting the Board and without any subsequent ratification by the Board signed a letter agreeing to furnish the plaintiffs in the action with a special line of goods. He knew that in order to carry out his contract a substantial extension of the company's plant and premises would be necessary and the plaintiffs also knew this. It was held in the absence of bad faith or notice that the plaintiffs were entitled to assume that the managing director was authorized to enter into the agreement, it being an agreement in regard to which the Board would have power to bind the company. The Court of Appeal said that the contract being one which the Board of Directors could have entered into, they could have authorized the manager of the company to do so on behalf of the company. Accordingly in the total absence of bad faith or notice, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question.

Manager.

When the by-laws of the company authorized the general manager to compromise claims and to do other acts which would occasionally require legal advice it was held to be a reasonable inference that the general manager had implied authority to retain the solicitor whenever it was in his own judgment prudent to do so. *Clarke* v. *Union Fire Insurance Company*, 10 P.R., p. 342.

See also *Tierman* v. *People's Life Insurance Co.*, 26 O.R. 596, 23 A.R. 342; *Laberge* v. *Equitable Life Insurance Society*, 24 S.C.R. 595; *Galloway* v. *Stobart & Sons & Co.*, 35 S.C.R. 301;

Canada Central Ry. Co. v. *Murray* (1882), 8 S.C.R. 314; *Hamilton, etc., Ry. Co.* v. *Gorebank* (1873), 20 Gr. 190.

Notwithstanding the rule as to "holding out" it would be advisable in contracting with an officer of a company for the first time to examine the by-laws of the company and see the general scope of his authority.

President and Secretary.

The president of a company has no more power apart from that conferred in the by-laws and merely by virtue of his office than an ordinary director of the company. See *Almon* v. *Law* (1894), 26 N.S. 340; *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

Parties dealing with the president of a company must take notice that he has but a limited authority. *Balfour* v. *Ernest* (1859), 5 C.B.N.S. 601. See *Ellis* v. *Midland Railway Co.*, 7 A.R. 462; *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O.R. 327, 23 A.R. 66, 26 S.C.R. 443; *Hereford Railway Co.* v. *The Queen*, 24 S.C.R. 1.

As to secretary see *Hamilton and Port Dover R.W. Co.* v. *Gore Bank*, 20 Gr. 190.

See also the following cases: *Great North-West Central Railway* v. *Charlebois* (1899), A.C. 114; *Thornton* v. *Sandwich Plank Road Co.*, 25 U.C.R. 591; *Real Estate Co.* v. *Metropolitan Building Society*, 3 O.R. 476; *Great Western Ry.* v. *Preston*, 17 U.C.R. 477; *Fairchild* v. *Ferguson*, 21 S.C.R. 484; *McCausland* v. *Hill*, 23 A.R. 738; *Walmsley* v. *Rent Guarantee Co.*, 29 Gr. 484.

Power Clauses in Letters Patent.

In view of the very full and ample ancillary powers given to all Ontario companies having a share capital it would no longer appear necessary to specify in minute detail the objects of the company, including those actually contemplated and those which it might by any possibility be necessary or expedient for the company to possess. In view of this fact it will be sufficient for the purposes of this work to insert only a few object or power

clauses for Letters Patent. For object clauses of companies to be incorporated under other acts, the very exhaustive forms of Mr. Palmer are recommended.

It would be well to insert in the petition in practically every case clauses similar to the following giving power to pay preliminary expenses and commission on the sale of shares.

PRELIMINARY EXPENSES.

To pay out of the funds of the Company all costs and expenses of and incidental to the incorporation and organization of the Company.

COMMISSION ON SHARES.

To pay out of the funds of the Company on the sale of shares a commission not to exceed twenty-five per cent. of the cash proceeds of such shares.

Examples of Draft Power Clauses.

ACCOUNTANTS.

To carry on the business of public accountants and auditors; to collect information of general, financial and commercial interest and promulgate and distribute the same.

ADVERTISING.

To carry on a general publicity and advertising business in all its branches both as principals and agents.

APARTMENT HOUSE.

To purchase, lease or otherwise acquire any lands, and to sell, lease, exchange, mortgage or otherwise dispose of the whole or any portion of the said lands, and all or any of the buildings, or structures that are now, or may hereafter be erected thereon, and to take, and hold mortgages for any unpaid balance of the purchase money on any of the lands, buildings or structures so sold, and to otherwise improve, alter and manage the said lands and buildings.

AUTOMOBILE.

To buy, sell, trade and carry on the business of manufacturers of and dealers in automobiles, cycles, motors, engines, carriages, and conveyances of all kinds and in all articles used in the construction thereof.

BISCUITS.

To manufacture, sell and deal in biscuits, cakes, breads and confectionery.

BOOKSELLERS.

To carry on the business of publishers, booksellers, stationers, printers and lithographers and to acquire, possess and dispose of copyrights.

BROKERS.

To buy, sell and deal in either as principals or agents, debentures, bonds, stocks and other securities of any government or of any municipal corporation or school corporation or of any chartered bank or of any incorporated company.

BUILDING.

To erect buildings of all kinds, and deal in lands, and building material; to take or hold mortgages for any unpaid balance of the purchase money or any of the lands, buildings, or structures so sold, and to sell mortgage or otherwise dispose of said mortgages.

BREWERY.

To manufacture, sell and deal in ale, beer and porter, and the by-products of same, to manufacture, grow, sell, and deal in malt and hops.

CEMENT.

To manufacture, sell and deal in Portland cement and all kinds of natural and other cement, lime, limestone, calcined and other plasters and artificial stone.

ELECTRIC.

To carry on the business of electricians, mechanical engineers and manufacturers.

FARM AND DAIRY PRODUCTS.

To manufacture, sell and otherwise deal in condensed, preserved and evaporated milk, and all other manufactured forms of milk; to produce, purchase and sell fresh milk and all the products of milk; to manufacture, purchase and sell all food products; to raise, purchase and sell all garden, farm, and dairy products; to raise, purchase, sell and otherwise deal in cattle and all other live stock.

FISHERIES.

To acquire, purchase, run, hold, sell and rent fishing licenses for pound nets, traps, weirs, set nets, fish wheels and other fixed appliances and purse nets; drag seines and other seines and movable applicances for catching or retaining fish.

To acquire, hold, sell, lease and rent and dispose of locations upon which to construct and maintain pound nets, traps, weirs, set nets, fish wheels, and other appliances whether fixed or movable, for catching or retaining fish.

To acquire, purchase, catch, take, buy, hold, store, pack, preserve, sell, export, dispose of and distribute fish of all kinds; and to engage in the propagation of salmon and of other food fishes.

To engage generally in the fish business in the waters of Ontario and the St. Lawrence River.

FLOUR.

To purchase and sell grain and cereals of every kind and to manufacture, buy and sell flour and feed and other food articles manufactured from grain or cereals.

GRAIN ELEVATOR.

To buy and lease lands, and to erect buildings thereon and machinery for the purpose of receiving, warehousing and delivering grain and other merchandise.

IRON.

To buy, sell, deal in and deal with iron and iron ore and the by-products thereof, and all like or kindred products.

PAPER.

To carry on the business of importers of, dealers in and manufacturers of paper, paper materials and paper substitutes of all kinds and of the raw substances, pulps, preparations, mixtures, solvents, and combination thereof for any purpose whatsoever; and articles and substances made from any kind of paper, pulp, mixture, combination, solvent, preparation or material used in the manufacture or treatment of paper or paper substitutes.

PLUMBERS' SUPPLIES.

To carry on the trade or business of manufacturing, producing, adapting, preparing, buying and selling and otherwise dealing in any and all kinds of plumbing and sanitary fixtures and supplies; including lead pipes, traps, sheet lead and solder and plumbers' wares in iron, lead, brass, wood, marble, earthenware or other material.

POTTERY.

To manufacture, buy, sell, trade and deal in any and every kind or class of pottery or earthen products or articles composed in whole or in part of kaolin, clay or earthy matter.

REAL ESTATE.

(a) To purchase, lease, take in exchange or otherwise acquire lands or interests therein together with any buildings or structures that may be on the said lands or any of them, and to sell, lease, exchange, mortgage or otherwise dispose of the whole or any portion of the lands and all or

any of the buildings or structures that are now or may hereafter be erected thereon, and to take such security therefor as may be deemed necessary; (b) To erect buildings and deal in building material; (c) To take or hold mortgages for any unpaid balance of the purchase money on any of the lands, buildings or structures so sold, and to sell, mortgage or otherwise dispose of said mortgages; (d) To improve, alter and manage the said lands and buildings, and (e) To guarantee and otherwise assist in the performance of contracts or mortgages of persons, firms or corporations with whom the Company may have dealings and to assume and take over such mortgages or contracts on default; Provided, however, that except as to taking and holding mortgages as aforesaid, nothing herein contained shall be deemed to empower the Company to make loans whether for building purposes or not upon lands not the property of the Company or upon lands which though once the property of the Company have by any deed, conveyance, transfer or alienation become the property of another, and further provided that it shall not be lawful for the Company hereby incorporated:—

(1) To issue, constitute or make any withdrawable or terminating stock, fund or shares under any name or contrivance whatsoever; or to issue, constitute or make any stock or shares whatsoever other than the capital stock and shares which are hereinafter mentioned and which shall be fixed, permanent and non-withdrawable capital stock and shares:

(2) To take from or levy upon any stockholder, shareholder, member, contractholder or person any deposit (bearing interest or not bearing interest) or any subscriptions, periodical dues, assessments or contributions, or to take subscriptions or payments or make calls upon any stock or shares (howsoever designated) other than lawful subscriptions, payments and calls upon the said fixed, permanent and non-drawable capital stock or shares:

(3) To use or raise, maintain or have, a fund for making a loan or advance to a purchaser (including intending purchaser) of property, whether such loan or advance in the form of money or money's worth is paid directly to the purchaser or is paid by the Company to the vendor to be repaid in any form or manner by the purchaser to the Company:

(4) To enter into or undertake any contract whereby the benefit is or is make dependent in any manner or degree upon the collection of sums levied upon or to be received from persons holding similar contracts, or upon or from members of the Company:

(5) To transact or undertake the business provided for by the Acts which respectively are numbered as Chapters 202 to 206 (inclusive) and as Chapter 211 of the Revised Statutes of Ontario, 1897, or by any of the enactments which are by the said Acts consolidated or repealed.

TOBACCO PLANT.

To grow and cure leaf tobacco and to buy, manufacture and sell tobacco in any and all its forms; to establish, maintain and operate factories,

warehourses, agencies and depots for the storing, preparation, cure and manufacture of tobacco and for its sale and distribution.

WAREHOUSE.

To carry on the business of cold storage and warehousing; and to further carry on the business of general warehousing in all its several branches.

CHAPTER V.

SHARES.

The capital of a company is divided into a definite number of equal parts or shares. In general each share is of the same character and possessed of the same attributes and entitles its holder to the same rights as are possessed by the holders of other shares. *Birch* v. *Cropper*, 14 App. Cas. 525. Shares which are not allotted are spoken of as unissued or treasury shares. The latter shares belong to the company and the directors must account to the company for them. The paid-up shares theoretically correspond in value to the cash and other assets of the company, such value being estimated either on the market value of the assets or their earning value as in case of franchises. Shares may be sold for money or money's worth in services or goods. Where shares have been issued as fully paid up for a consideration other than cash, the Courts will not inquire into the value of the consideration unless the agreement under which the shares were issued is impeached for fraud or misrepresentation. *Re Hess Manufacturing Co.; Sloan's Case*, 23 S.C.R. 644, and see *Wade* v. *Kendrick*, 37 S.C.R. 32. If, however, the consideration is grossly inadequate the directors may be personally liable for misfeasance and the issue of paid-up shares without consideration is a distinct breach of trust on the part of the directors. *Re Manes Tailoring Co.*, 14 O.L.R. 89; *Hirsche* v. *Sims* (1894), App. Cas. 654. The holders of such shares will be liable unless they are *bonâ fide* holders for value without notice. *Re Hall & Co., Ltd.*, 37 Ch. D. 712, in which case neither the transferee or the former holder can be held liable. *Re Wiarton Beet Sugar Co.; Freeman's Case*, 12 O.L.R. 149.

Subscription and Allotment.

In a company as defined by the Ontario Companies Act, every member is a shareholder and every shareholder is a member. Persons may become shareholders in various ways.

(1) Those who subscribe to the memorandum of agreement filed on incorporation become shareholders by virtue of section 3 of the Act.

(2) By applying to the company for shares and receiving notice of allotment after such allotment has been made or something amounting to notice of the acceptance of the application.

(3) By taking a transfer of shares from a shareholder and being registered in respect of such shares in the stock register of the company.

(4) By registration in succession to a deceased or insolvent shareholder.

(5) By estoppel, as by receiving and retaining a certificate of shares and attending meetings or receiving dividends in respect of same; by allowing one's name to appear on the register of shareholders or by acting as a director of the company without the necessary qualifying shares. See *Ross* v. *Machar*, 8 O.R. 417.

Several persons may be joint holders of shares and where the shares are held by a firm, the individual members should be entered on the register as joint owners. A corporation may hold shares in another corporation provided that its powers express or implied authorize it so to do. An infant may be a shareholder of a company, but he can repudiate his shares while he is an infant or on coming of age. *Cooper's Case*, 3 Ch. 458. An infant who is a shareholder when a winding up commences may repudiate his shares forthwith, or even after a delay of some months. Where an infant held shares in a company and the company was put into liquidation three or four months previous to her coming of age and where she did not apply to have her name struck off the list of contributories until a year after the winding up had commenced it was held that she was not liable as a contributory. *Central Bank* v. *Hogg*, 19 O.R. 7.

If he does repudiate his shares and has derived no advantage from them, he may recover what he paid for them. Lindley, 6th ed., 55. He cannot, however, hold his shares and decline to pay the calls in respect to them. *London & N.W. Ry. Co.* v. *MacMichael*, 5 Ex. 114. He cannot be held liable as a contributory in a winding up. *Central Bank* v. *Hogg*, 19 O.R. 7.

There is nothing to prevent an alien not an enemy from holding shares in a company. Lindley, 6th ed., 52. Local shares are dealt in on foreign exchanges and it is common for companies incorporated in foreign jurisdiction to own shares in Ontario companies.

Subscriber to Memorandum.

The Letters Patent under section 3 have the effect of constituting those who petition and any others who have or may thereafter become subscribers to the memorandum a body corporate. Every subscriber to the memorandum or stock book becomes a shareholder on the incorporation of the company. *Nichol's Case*, 29 Ch. D. 421; *Evan's Case*, L.R. 2 Ch. 427, and no allotment is necessary to them or entry on the register of members. *Patterson* v. *Turner*, 3 O.L.R. 373; *In re London Speaker Printing Co.*, 16 A.R. 508; *In re Haggert Bros. Manufacturing Co., Peaker & Runions' Case*, 19 A.R. 582; *Alexander* v. *Automatic Co.* (1900), 2 Ch. 56; *Re London and Provincial Co.*, 5 Ch. D. 525. A transfer of fully paid-up shares from another shareholder will not extinguish the obligation, though the allotment of all the shares to others will be a release. *Mackley's Case*, 1 C.D. 247. And where a company is being incorporated to take over a going business, it is advisable to have the incorporators subscribe only for a nominal amount of shares. A subscriber cannot, it has been held, repudiate his subscription on the ground of misrepresentation. *Metal Constituents Co.* (1902), 1 Ch. 707. See as to the statutory provision prior to 1907. *Tilsonburg Agricultural Mfg. Co.* v. *Goodrich*, 8 O.R. 565; *Magog Textile & Print Co.* v. *Price*, 14 S.C.R. 664.

As to vesting of shares in a shareholder without allotment or notice under the terms of a special Act see *Union Fire Insurance Co.* v. *Lyman*, 46 U.C.R. 453.

A material alteration after the signature is procured as in the capitalization will operate as a release. *Stevens* v. *London Steel Works*, 15 O.R. 75.

Application for Shares.

There is no difference between a contract to take shares and any other contract. *Nichol's Case*, 29 C.D. 421. In order to impute to a person an agreement to take shares something like a contract must be established or something shewn which prevents it being said there is not a contract. *Higginbotham's Case*, 12 O.L.R. 112. Speaking generally, there must be an application for shares and allotment by the directors of the company followed by notice of allotment to the applicant. An application is an offer and may be verbal. *Levita's Case*, L.R. 3 Ch. 36, and such offer may be withdrawn at any time before the notice of allotment is posted or delivered. *Henthorn* v. *Fraser* (1892), 2 Ch. 27. If the offer or application be under seal it cannot be revoked. The ordinary rule of proposal and acceptance does not apply to promises made by deed. The promise so made is at once operative without regard to the other party's acceptance. A subscriber cannot get rid of the obligation of his deed by a mere notice of repudiation or notice of withdrawal. *Nelson Coke Co.* v. *Pellatt*, 4 O.L.R. 481. *Re Provincial Grocers*, 10 O.L.R. 705. If the withdrawal is mailed, it must reach the company before the notice of allotment is mailed. *Byrne* v. *Van Tienhoven*, 5 C.P.D. 344.

Where a subscription for preferred stock has been received, though no preference stock has ever been validly created by the company and where the allotment is irregular, the holder is not necessarily precluded by a payment on account of the stock and by attendance at meetings from setting up that he is not a shareholder. If he had not notice at the time of the irregularities in the creation of the preference stock or in connection with the allotment, these defences will be open to him. *Higginbotham's Case*, 12 O.L.R. 112.

As to the distinction between an application for shares and what amounts to an offer by the company to sell which may be accepted by the applicant so that such offer and acceptance closes the bargain see *McDowell* v. *Macklem*, 4 O.W.R. 482.

If the application is not accepted in a reasonable time, the

applicant may repudiate the allotment when made. The repudiation should be prompt, otherwise the shareholder may be bound. *Boyle's Case,* 33 W.R. 450; *Crawley's Case.*

Subscriptions of stock obtained by surprise, fraud and false statements of the affairs of the company made by its officers and directors are null and void, and the shareholders thus deceived may recover what they have paid on their shares. *Provincial Insurance Co.* v. *Brown et al.,* 9 U.C.C.P. 286.

Where a company's Act of incorporation provided that no subscription for stock should be legal or valid until ten per cent. had been paid thereon, it was held that persons who had subscribed, but paid nothing, were improperly made contributories. *Re Standard Fire Insurance Co., Kelly's Case,* 12 A.R. 486, 12 S.C.R. 644.

A *bonâ fide* subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who had requested such stock to be subscribed for is valid. *Davidson* v. *Grange,* 4 Gr. 377. See also *Cote* v. *Stadacona Insurance Co.,* 6 S.C.R. 193; *Chisholm's Case,* 7 O.R. 448.

Conditional Application.

If the application for shares is conditional upon the company doing something on its part, the allotment cannot disregard the condition. *Roger's Case,* L.R. 3 Ch. 633, though the condition may be waived. A distinction exists between the case of an application for stock upon condition and a collateral agreement made at the time of the application. In case of such an agreement, the shareholder becomes absolutely liable, and his only remedy is by way of action to enforce his collateral agreement. *Caston's Case,* 10 P.R. 339; *Sherrington's Case,* 31 Ch. D. 120; *Bridger's Case,* L.R. 5 Ch. 305. Where a subscriber for shares stipulates that they are not to be paid for in cash, but in goods, services, etc., this must be regarded as a collateral arrangement and will not prevent them being held liable to pay the shares up in cash in a winding up. *Standard Fire Ins. Co., Copp, Clark & Co.'s Case, Caston's Case,* 7 O.R. 448. See *Freeman's Case,* 12

O.L.R. 149; *McNeill's Case,* 10 O.L.R. 219; *Bank of Hamilton* v. *Johnston,* 7 O.W.R. 111. Where, however, the agreement or subscription is subject to a condition which is not fulfilled, the applicant is released from liability. *Caston's Case, supra.*

And where contemporaneously with a written agreement, there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. *Wallis* v. *Littell* (1861), 11 C.B.N.S. 369, applied and followed. *Ontario Ladies' College* v. *Kendry,* 10 O.L.R. 324.

It has been held in England where one applies for and takes an allotment of shares in a company, believing it to be a certain other company, he may be entitled to repudiate if he acts promptly. *Baillie's Case* (1898), 1 Ch. 110.

A stipulation that the applicant was to be a director has been held such a condition. *Turner's Case,* 7 O.R. 448; *Barber's Case,* 7 O.R. 448. An agreement that the applicant was to be solicitor for the company and that he was to render services for his stock and not pay in cash was held a collateral agreement as to payment, he having been duly appointed solicitor. *Caston's Case,* 7 O.R. 448, 12 A.R. 486, 12 S.C.R. 644.

Allotment.

Allotment means an unequivocal appropriation to an applicant by a resolution of the directors or otherwise of a certain number of shares in response to an application.

Note.—See also title Public Companies—Allotment.

A conditional resolution or a resolution in favour of one who has not applied is in reality only an offer of shares. In general, a valid allotment can only be made by a duly elected Board of Directors, but this rule may be modified by the rule in *Royal British Bank* v. *Turquand, Re Homer District,* 39 C.D. 546; *Re Owen & Ashworth's Claim* (1900), 2 Ch. 272.

A director who has taken part in an allotment to himself cannot set up the invalidity of the allotment. *York Tramways Co.* v. *Willows* (1882), 8 C.B.D. 685.

The directors of a company cannot delegate to a subordinate officer their duties in regard to allotments. *Packenham Pork Packing Co., Galloway's Case,* 12 O.L.R. 100.

Notice of Allotment.

Lord Cairns has laid down 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. The acceptance may be communicated either verbally or by writing or by conduct. *Gunn's Case,* L.R. 3 Ch. 40.

An agent to apply for shares has *primâ facie* no authority to receive notice of allotment. *Robinson's Case,* L.R. 4 Ch. 322. A notice should be given to the applicant himself unless he expressly authorizes the giving of it to his agent. *De Rosaz's Case* (1889), 21 L.T. 10, though notice of allotment may be waived. *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256.

Where a company offers an individual a specific number of shares and he accepts them, no further notice of allotment is necessary. *Gunn's Case,* L.R. 3 Ch. 40.

An application before incorporation may be accepted after incorporation. *Lorraine's Case,* 2 Ch. 412.

In general, notice of allotment is complete when the notice is posted. *Harris' Case,* 7 Ch. 587; *Household Fire Ins. Co.* v. *Grant,* 4 Ex. D. 216.

The onus of proving notice of allotment is on the company. *Reidpath's Case,* 11 Eq. 86.

If the shareholder knew of the allotment and assented to it or through his agent can be taken to have assented to it, formal notice is not necessary. *Richards* v. *Home Assurance Asso.,* L.R. 6 C.P. 591; *Crawley's Case,* 4 Ch. 322. As where the shareholder is present at a board meeting at which the allotment in pursuance of his application is resolved upon. *Ex parte Smedley & Fletcher* W.N. (1867), 259. See also *Standard Bank* v. *Stephens,* 11 O.W.R. 582.

CONSTRUCTIVE ALLOTMENT.

As to what facts will amount to acceptance of an application see also *Re Provincial Grocers, Calderwood's Case,* 10 O.L.R. 705. In that case passing a draft for part payment, recording the name in the register coupled with a general resolution "alloting all stock now subscribed for" was held not sufficient to constitute the applicant a shareholder. And where a subscriber for a share in a company was debited in the company's stock ledger with one share, was placed on the "shareholder's list" and was drawn upon for the first payment of ten per cent. and paid the draft, but there was no formal allotment to him it was held that what had been done must be taken to have been done by authority of the directors and to be a mode of allotment "ordained" by them within the meaning of the Companies Act. *Re Provincial Grocers, Hill's Case,* 10 O.L.R. 501. See also *Re Canadian Tin Plate Co.,* 8 O.W.R. 531; *Fischer* v. *Borland,* 8 O.W.R. 579. It should be noted that the provision in the Ontario Act as to the manner in which stock may be alloted, viz., as the directors by by-law or otherwise ordain, is repealed. See section 27(*a*). This would appear to allow a considerable extension of the principle of *Hill's Case.*

In *Galloway's Case* it was not proved that the applicant actually received notice of any allotment. Furthermore, the secretary assumed to deal with the applications and accept the terms offered without reference to the Board of Directors, and as there was never any authority to him to act in such a case it was held that there never was an agreement for shares concluded between Galloway and the company. 12 O.L.R. 100.

Where a subscription had been received and the Board of Directors passed a resolution that the subscribed stock be called up in full and that the treasurer notify all subscribers of such payment and this was followed by letter from the treasurer asking for payment of the call, it was held that the resolution and letter constituted a sufficient issue and allotment of the shares. *Nelson Coal & Coke* v. *Pellatt,* 4 O.L.R. 481.

See also *Re Henderson Roller Bearing Co.,* 11 O.W.R. 526.

It is doubtful if a mere notice of a call can be regarded as equivalent to a notice of allotment. *Re Canadian Tin Plate Co., supra.*

Specific Peformance.

The Courts will specifically enforce as against the company or the subscriber a contract to take or to allot shares. *New Brunswick Co.* v. *Muggeridge*, 1 Dr. & Sm. 363.

Underwriting.

Underwriting may be regarded as a species of insurance. An underwriter may be regarded as guaranteeing that an issue of stock offered the public will be subscribed. On default of sufficient subscriptions being received, he is liable or makes himself liable to take up his *pro rata* share of the unsubscribed balance.

The underwriter addresses a letter to the company or to a promoter offering to underwrite a certain portion of the stock or bond issue on conditions such as:—

(1) He is to be paid a certain commission on the amount underwritten by him, either in cash or shares; and

(2) He is only liable for his *pro rata* share of the amount not subscribed by the public.

The letter also usually authorizes some one on behalf of the company to subscribe for his *pro rata* amount of stock if he makes default in applying for same when called on to do so.

Such a letter must be regarded as an offer only and not as a contract, even though it purports to be an agreement, and it has been held that it must be accepted by notice of acceptance given to bind the underwriter. *Re Consort Company* (1897), 1 Ch. 575. Such an acceptance, however, may be verbal. *Re North Charterland Co.*, 18 T.L.R. 80; *Hemp Cordage Co.* (1896), 2 Ch. 121.

The authority given in an underwriting letter to apply for stock on behalf of the underwriter is irrevocable upon acceptance and is a sufficient authorization to bind the underwriter and ren-

der him liable for the shares upon allotment. *Re Hannan's Mining Co.* (1896), 2 Ch. 643.

Where a contract or letter contains a condition such as that in case of default of the underwriter to subscribe for the stock, an application may be made on his behalf for stock, it has been held that the authority to apply for the shares is conditional upon such default. *Ormerod's Case* (1894), 2 Ch. 474.

An underwriting agreement must be distinguished from an agreement to sell or place shares. In the latter case there is no liability to subscribe and pay for the shares unplaced.

It is advisable to prepare underwriting contracts with great care as in the event of an unsuccessful flotation individual underwriters being liable to take up large blocks of stock are apt to take advantage of every technicality to obtain a release from their obligations.

For example, it may be claimed that the prospectus contains a misrepresentation. *Karberg's Case* (1892), 3 Ch. 1. Or an underwriter may take advantage of the fact that if the company is driven to bring an action against him it will be injuriously affected by publicity and delay. If the underwriting contract is in respect of debentures specific performance will not be decreed and usually no substantial damages would be allowed. See *South African Territory* v. *Wallington* (1898), A.C. 309. Where an underwriting contract provides that the underwriter shall take up the shares if called on, he will have a good defence if he has never been properly called on. *Ormerod's Case* (1894), 2 Ch. 474. Furthermore the underwriter may make his application for shares and subsequently cancel it. *Karberg's Case, supra.*

The offer must be accepted within the specified time or a reasonable time if none is specified. *Crawley's Case,* 4 Ch. 322. An underwriting contract must be read in the light of section 108, sub-section 3, of the Act, which renders all contracts provisional only until the company is entitled to commence business.

It is advisable to make it one of the terms of the agreement that if the underwriter makes default some stated person on

behalf of the company may make application for shares, and to further provide that such authority shall be irrevocable. Such an authority, where there is valuable consideration, cannot be terminated by the underwriter. *Carmichael's Case* (1896), 2 Ch. 643.

It is well to note the difference between an underwriting of debentures and of shares. Where an underwriter becomes a subscriber for shares and they are allotted to him, the company can recover the amount due upon them from him. On the other hand, he subscribes for or underwrites debentures, an action will not lie for the amount of his subscription. The only right of action is for damages and the damages awarded would probably be nominal in most cases. *South African Territory* v. *Wallington* (1898), A.C. 309.

Debenture stock would probably fall within the principles governing debentures in this respect.

Payment of Commission.

As to what constitutes an offer of shares to the public, the Act is not clear. It must, apparently, be an offer of shares to any persons who may choose to come in and take them. *Sherwell* v. *Combined Incandescent Co.*, 23 T.L.R. 482. See also section 97.

The word pay does not necessarily mean a payment of money and this section probably authorizes payment in shares of the company. It is a common practice in England to give the underwriters a call or option upon the shares of the company at a certain figure exercisable on or before a certain date and this has been held to be free from objection under the present Act. *Hilder* v. *Dexter* (1902), A.C. 474.

It would seem clear from the wording of the present Act that where shares are not offered to the public no commissions can be paid for subscription underwriting or placing, unless such commission is paid out of the premium on the stock or out of some fund other than the capital of the company.

Sub-section 3 probably applies to such reasonable commission as has been allowed in cases determined before the Act came into force. *Metropolitan Coal Co.* v. *Scrimgeour* (1895), 2 Q.B.D. 605. *Re Co-operative Cycle Co.*, 1 O.W.R. 778. And see title Prospectus.

Liability on Shares.

68. Each shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, but not beyond the amount so unpaid on his said shares, shall be the amount recoverable with costs, against such shareholder. R.S.O., c. 191, s. 37, s.-s. 1.

69. Any shareholder may plead by way of defence in whole or in part, any set-off which he could set up against the company, except a claim for unpaid dividend, or a salary or allowance as a president or a director of the company. R.S.O., c. 191, s. 37, s.-s. 2.

70. The shareholders shall not, as such, be held responsible for any act, default or liability whatsoever, of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the company, beyond the unpaid amount on their respective shares. R.S.O., c. 191, s. 37, s.-s. 3.

71. No person holding shares as executor, administrator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate or the minor, ward, or person, interested in the trust fund, would be, if living and competent to act and holding such shares. R.S.O., c. 191, s. 38.

72. No person holding shares as collateral security shall, prior to foreclosure, be personally subject to liability as a shareholder, but the person transferring such shares as collateral security shall, until foreclosed, be considered as holding the same, and shall be liable as a shareholder in respect thereof. R.S.O., c. 191, s. 39, amended.

Shares may be paid for in money or in money's worth, and if a valid contract be made for the acceptance by the company of the property or services of substantial value in payment or part payment of shares, the Courts will not where the contract stands, inquire into the value of the consideration even at the instance of the liquidator. *Pell's Case*, 5 Ch. 11; *Sloan's Case*,

23 S.C.R. 644; *Wragg Limited* (1897), 1 Ch. 807; *Re Theatrical Trust* (1895), 1 Ch. 771; *Innes Co.* (1903), 2 Ch. 254; *Re North Bay Supply Co.*, 6 O.W.R. 85.

Liability may in most cases be terminated by a valid transfer registered on the books of the company. Thus it has been held that a former holder of bonus shares, who before a winding up, transferred them to persons entitled to hold them as fully paid up is not liable to be placed on the list of contributories in respect to them. It would seem, however, that such a shareholder, if a director commits a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his transferees to the prejudice of the company as fully paid-up shares; and such a case is a proper one for an order under section 83 of the Winding-up Act for contribution by him by way of compensation in respect of such breach of trust. *In re Wiarton Beet Sugar Co.; Freeman's Case*, 12 O.L.R. 149.

As to liability on shares held as collateral security see *Re Perrin Plow Co.*, 11 O.W.R. 186.

In the first place, it is elementary law that no joint stock company can issue stock below par unless expressly authorized to do so by the governing statute, as in the case of mining companies. The dominant and cardinal principle is that the shareholder purchases immunity from liability beyond a certain limit on the terms that there shall be a liability up to that limit. See *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33; *McCracken* v. *McIntyre*, 1 S.C.R. 479.

The fact that a shareholder holds a certificate for stock which upon its face value states that he is the holder of so much stock paid in full while evidence of the statement is not conclusive evidence of it apart from the operation of the doctrine of estoppel. The latter doctrine will apply in favour of a purchaser for value from a shareholder, the certificate being marked "paid up" and the purchaser having no notice to the contrary. *The North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33. On the other hand any person who takes shares of the company knowing that they have never been issued at all, but come direct from the

company's treasury to him would be liable to pay the shares up in full. *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33.

The fact that a company's charter is varied by statute does not affect the obligation on the part of a shareholder to complete his payments upon stock. The Amending Act is binding on all shareholders whether they assented to the application for it or not. *Canada Car & Manufacturing Co.* v. *Harris*, 24 C.P. 380, and see generally *Mackenzie* v. *Kittridge*, 27 C.P. 67, 4 S.C.R. 368; *Page* v. *Austin*, 30 C.P. 108; *Caston's Case*, 7 O.R. 448.

As to set-off by shareholder in proceedings brought by a creditor of a company see *Benner* v. *Currie*, 36 U.C. 411; *Field* v. *Galloway*, 5 O.R. 502. See also Winding-up Act, section 51 and notes *infra*.

Preference Stock.

73. The directors of a corporation may make by-laws:—

(*a*) For borrowing money;

(*b*) For issuing bonds, debentures, or other securities.

And the directors of companies with share capital may make by-laws:—

(1) For creating and issuing any part of the capital as preference shares;

(2) For creating and issuing debenture stock;

(3) For the conversion of preference shares into common shares or debentures or debenture stock, debentures into debenture stock or preference shares, or any class of shares or securities into any other class. R.S.O., c. 191, s. 49, amended.

74. No by-law referred to in the last preceding section shall take effect until it has been confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company, duly called for considering the same, by notice specifying the terms of the law to be confirmed or unanimously sanctioned in writing by the shareholders of the company. New.

75. A by-law for the creation and issue of preference shares or for the conversion of debentures or debenture stock into preference shares may provide that the holders of such shares shall have such preference as regards dividends and repayment on dissolution or winding-up as may be therein set out; may have the right to select a certain stated proportion of the board of directors, or such other control over the affairs of the company as may be considered expedient; or may limit the right of the holders thereof to specific dividends or control of the affairs of the company or otherwise,

not contrary to law or to this Act, and may provide for the purchase or redemption of such shares by the company as therein set out; provided, however, that any term or provision of such by-law, whereby the rights of holders of such shares are limited or restricted, shall be fully set out in the certificate of such shares, and in the event of such limitations and restrictions not being so set out they shall not be deemed to quality the rights of holders thereof. New.

76. Unless preference shares, debenture stock, debentures or bonds are issued subject to redemption or conversion, the same shall not be subject to redemption or conversion without the consent of the holders thereof. New.

77. No such by-law which has the effect of increasing or decreasing the capital of the company or otherwise varying any term or provision of the special Act or Letters Patent of the company shall be valid or acted upon until confirmed by Supplementary Letters Patent. New.

The shares of companies having a share stock capital are frequently divided into two or more classes, having definite rights attached to them. The above sections of the Ontario Companies Act provide for the creation of preference shares and for the conversion of preference shares into common shares, debentures or debenture stock and for the conversion of debentures into debenture stock or preference shares and generally for the conversion of any class of shares or securities into any other class.

While preferred shares are usually created by by-law of the company under this section advantage may be taken of the provisions of section 4, sub-section 4, whereby provisions may be inserted in the petition for incorporation, looking to the creation by the letters patent of the preference stock. Where the rights of a class of shareholders are defined in this way in the letters patent their position is somewhat stronger for rights which attach unconditionally to the particular class of shares by virtue of letters patent cannot be altered or infringed. See *Ashbury* v. *Watson*, 30 C.D. 376.

The preference ordinarily given is limited to a priority in respect to dividends and in respect to the return of capital in the winding up of the company, but by virtue of section 75 of the Ontario Act, preferred stock may confer upon its holders the right to select a stated proportion of the Board of Directors or

to give such other control over the affairs of the company as may be considered expedient. Reference may be had to the forms set out below, which illustrate a variety of preferences which may be given.

Where there is any such limitation, it must be fully set out in the stock certificate failing which the restriction shall not be deemed to qualify the rights of preferred shareholders.

It is not uncommon to provide that in addition to the fixed dividend of the preference stock a bonus shall be paid after the common stock has received a certain specified dividend.

Primâ facie a preferential dividend is cumulative. *Wedd* v. *Earle*, 20 Eq. 556. But it is preferable to insert the word "cumulative" so that there may be no doubt about the matter. If the dividend is to be non-cumulative, the language of the by-law or clause in the letters patent should obviously be so clear as to rebut this presumption. See *Staples* v. *Eastman* (1896), 2 Ch. 303.

A preferred shareholder has no claim to priority as to capital in a winding up unless this is expressly conferred. *Re London India Rubber Co.*, 5 Eq. 519.

Conversion of Preference into Common Shares.

Where the capital of a company is reduced, the loss of stock must be borne *pari passu* by the preferred and ordinary shareholders, if they rank equally as regards capital in a winding up. *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 C.D. 287. But where the preference stock is preferred as to capital then the first loss would be thrown on the holders of common stock. *Re American Pastoral*, 62 L.T. 625.

A company cannot, of course, agree to pay interest on its shares irrespective of whether there are profits or not, nor can it guarantee to pay a specific dividend. *Long* v. *Guelph Lumber Co.*, 31 C.P. 129; *Petrie* v. *Guelph Lumber Co.*, 11 S.C.R. 450.

Founders' Shares.

It is a common practice in England to issue what are called founders' or deferred shares. These confer on the holders the

right to a specific percentage of the surplus profits of the company for each year after providing for the dividend on the other issued shares. They have been commonly used in England to provide a bonus to attract subscribers for preferred or common shares.

COMMON STOCK CERTIFICATE.

No. shares.

Co., Limited, incorporated under the Companies Act.

This is to certify that of the of is the owner of shares of the capital stock of Company, Limited, upon which $ has been paid (or fully paid). The said shares are transferable only on the books of the Company, in person, or by attorney (on surrender of this certificate).

In witness whereof the said Company has caused this certificate to be signed by its duly authorized officers and sealed with the corporate seal at this day of .

Secretary.

President.

PROVISIONAL CERTIFICATE WHEN NOT FULLY PAID UP.

Co., Limited, incorporated, etc.

No. shares.

This is to certify that is the holder of shares of $ each, numbered to inclusive in the Co., Limited, upon which the sum of $ per share has been paid.

The remaining instalments are due as follows:—

In witness, etc.

PREFERENCE STOCK WHEN COUNTERSIGNED BY TRANSFER AGENT.

THE COMPANY, LIMITED.

No. shares.

Authorized capital stock $ divided into shares of preference stock shares of common stock.

This certifies that is the owner of fully paid shares of $ each in the capital stock of Co., Limited, which shares are transferable only on the books of the Company by the owner in person or by attorney on surrender of this certificate.

This certificate shall not be valid until countersigned by the Trusts Company, transfer agent and registrar of shares.

In witness whereof the Company has caused this certificate to be signed, etc.

ENDORSEMENT ON MARGIN.

Countersigned and registered on the day of
Trusts Company, transfer agent and registrar.

POWER OF ATTORNEY TO TRANSFER STOCK.

Know all men by these presents that I do make, constitute and appoint of my true and lawful attorney, for me and in my name, and on my behalf, to sell, assign and transfer shares in the capital of Co., Limited, belonging to me and to receive the consideration money and to give a receipt or receipts for the same, and for the time being and generally to do all lawful acts requisite for affecting the premises, hereby ratifying and confirming all that my said attorney shall do therein.

In witness whereof I have hereunto set my hand and seal at this day of in the year of our Lord one thousand nine hundred and

Signed, sealed and }
in the presence of }

(Seal.)

PROVISIONAL CERTIFICATE.

THE COMPANY, LIMITED.

No. No. of shares.

Issue of common shares of $ each .

This is to certify that is the holder of common shares of $ each, numbered to inclusive in the Co., Limited, upon which the sum of $ per share has been paid.

The remaining instalments are due as follows:—

On the first of January, 1908.
On the first of July, 1908.
On the first of January, 1909.

Given under the seal of the Company this day of

Director.

Secretary.

THE COMPANY, LIMITED.

No. shares.

SHARE WARRANT.

This is to certify that the bearer of this warrant is entitled to fully paid-up shares of $ each, in the above named Company, num-

bered to inclusive, subject to the by-laws of the Company, and to the conditions indorsed hereon. See supra, 579.

Given, etc.

BY-LAW CREATING EMPLOYEES' PREFERENCE SHARES.

Be it enacted, etc.

1. One hundred shares of fifty dollars each shall be called "employees' preference shares."

2. The directors may allot the employees' shares, or any of them from time to time, to such employees of the Company as they think fit.

3. Each of the employees' shares shall, whilst it is held by an employee of the Company, rank for dividend as it were an ordinary share of fully paid up; and whilst not held by an employee of the Company it shall not carry the right to any dividend. An employees' share shall not confer the right to vote, or to attend at general meetings.

4. An employees' share shall not be transferable except as provided by paragraph 5 of this clause.

5. Whenever an employees' share is allotted, or, pursuant to this clause, is transferred to any employee of the Company, such employee shall be entitled to retain and hold the same so long as he remains an employee of the Company; and if by death, resignation, withdrawal, dismissal or otherwise, he cease to be an employee of the Company, he or his executors or administrators shall be bound, upon the request in writing of the directors, to transfer such share to such person as the directors may nominate; and if such person is not an employee of the Company, such person shall at any time, on the request of the directors, transfer such share to any employee of the Company.

6. If any person, who ought in conformity with the last preceding paragraph of this clause, to transfer any shares, makes default in transferring the same, the directors may, by writing under the common seal, appoint any person to make the transfer on behalf of the person in default, and a transfer by such appointee shall be as effective as if it were duly executed by the person so in default. A certificate under the corporate seal that such power of appointment has arisen shall be conclusive for all purposes.

7. In this clause employee of the Company means and includes any manager, departmental manager, foreman, clerk, or workman, but the term does not include directors or auditors.

PROFIT SHARING SCHEME.

1. From and after the of , the surplus (if any) of the clear profits of the Company's business beyond such definite sum as is for the time being sufficient to pay a dividend of per cent. on the paid-up issued stock of the Company, shall be divided into two equal parts, whereof one is to be divided gratuitiously as a bonus among the

employees in the manner defined by these rules, and to other to be retained by the Company. Provided always that the employees shall not be entitled to a total amount exceeding in all per cent. of the issued paid-up capital of the Company.

2. The accounts of the business will be audited each year by a chartered accountant, who will certify the bonus (if any) to which the employees are entitled.

3. The employees entitled to share in the profits for any financial year are to be such only as were employed at the commencement of such year. The acceptance of the terms herein offered is not to be in any way a condition of employment or of promotion.

4. The scheme is to continue in force only until the firm give notice to the employees putting an end thereto, but such notice unless given during some month of January will not take effect until the end of the financial current year at the time it is given.

5. The employees' share of profits accruing in each financial year is (subject as after mentioned) to be distributed among them in proportion to their respective salaries or wages at the commencement of such year, taken for one week, exclusive of premiums, overtime, or other variable allowances.

6. Each employee's bonus shall, within two months of the end of the financial year be paid into his account at some savings bank, and will then become his absolute property.

7. The employees are not to have either the rights or be under the liabilities of shareholders, and accordingly they are not to intermeddle in the management, or be entitled to investigate or discovery of the accounts of the business.

8. Alterations or modifications of these rules which experience may suggest as desirable may from time to time be made by the Company, but such changes unless made during some month of January are not to take effect until the end of the financial year current at the time they are made.

AGREEMENT BY SHAREHOLDERS TO POOL THEIR SHARES AND HAVE THEM SOLD BY TRUSTEES.

An agreement made, etc., between of and the several other persons named in the first schedule hereto, of the first or one part, and the Trust Company, Limited (hereinafter called the trustees), of the second or other part:

Whereas the several persons named in the first schedule hereto are collectively entitled to fully paid-up shares of $ each in the capital of the Company, Limited (numbered to inclusive), and the number held by each of them is set opposite his name in the said schedule: and whereas the said several persons have lately transferred their respective shares aforesaid into the names of divers other persons as nominees of the trustees: Now these presents witness that it is hereby agreed as follows:—

1. The said shares (hereinafter called the pooled shares) and the proceeds of sale hereof, and all income therefrom, shall constitute a joint stock fund (hereinafter called the pool) to be dealt with as hereinafter provided.

2. The trustees shall hold the pooled shares upon trust to sell the same as and when they, in their absolute discretion, think fit, and upon such terms and in such manner as they in their absolute discretion may consider expedient, and the trustees shall receive any dividends payable in respect of such of the said shares as shall for the time being remain unsold.

4. Each holder of any share in the pool shall be entitled to a certificate of title to his share or shares therein, framed in accordance with the form set forth in the second schedule hereto. Such certificate shall be under the seal of the Trust Company.

5. Every holder of a share in the pool may transfer the same by instrument in writing in the usual common form, which shall be signed both by the transferor and by the transferee. Until the registration of the transfer the transferor shall be deemed to remain the holder of the share.

6. The registered holder of any share in the pool shall be recognized and treated as the absolute owner thereof, and in the case of the death of any one or two or more joint registered holders, the company will only recognize the survivor or survivors as the absolute owner or owners thereof, and the receipt of any such person so recognized as absolute owner or owners aforesaid in respect of any moneys payable by the trustees in respect of such share shall be a good discharge to the trustees, notwithstanding any notice, express or otherwise they may have as to claims under any trust or otherwise.

7. The pool shall be closed at the expiration of one year from the date hereof, but the holders of two thirds of the shares in the pool may at any time previously, by notice in writing to the trustees, close the pool, and the same shall be closed accordingly. When the pool is closed as aforesaid, such of the pooled shares as have not been sold, and also any cash in the hands of the trustees and available for distribution, shall be distributed among the holders of shares in the pool as nearly as may be rateably in proportion to the shares in the pool held by them respectively.

8. The trustees shall be entitled (as remuneration) for their trouble in executing the trusts hereof to be remunerated at the rate of the sum of $\$$ per annum.

[A committee is frequently constituted to control sales, etc.]

Each shareholder sometimes fixes his own minimum price, in such a case insert the following clause:—

The committee shall sell the pooled shares as and when they in their absolute discretion may consider expedient, but not at less prices respectively than those specified in the respective columns of the schedule hereto, such prices having been fixed by the several persons and companies as those at which they are willing to sell the same.

FORM OF POOLED STOCK CERTIFICATE.

Pool of shares in the Company, Limited.

Certificate No. For shares in the pool.

This is to certify that of is the registered holder of shares, numbered to inclusive, in the pool constituted by a trust deed, dated the day of , and made between and others, of the one part, and the Trust Company.

Given, etc.

UNDERWRITING AGREEMENT.

To

In consideration of your agreeing to pay me a commission of per cent. in cash on the amount of stock hereby underwritten, I hereby agree to underwrite $ of the Preference Stock of the Company, Limited, to be incorporated with a capital of $, of which $ shall be Preferred and $ shall be Common Stock upon and subject to the following conditions:

1. All subscriptions up to the time fixed by the prospectus for the closing of the subscription lists and accepted by the Company are to be applied *pro rata* in reduction of the amount so underwritten by myself, and all other underwriters, for the said Preference Stock, and if such subscriptions amount to $ no allotment is to be made to me hereunder.

2. The said commission is to be payable within days after the closing of the subscription lists, provided I comply with this agreement.

3. The offer is irrevocable, provided that the public issue is made within days from the date hereof. If I should attempt to revoke it, or if the full amount of $ be not subscribed by the public to your satisfaction, you may hand in my application and deposit to the Company, or you may sign my name to the Company's Form of Application for the shares for which, after the reduction stipulated for in Clause 1, I am liable to subscribe, and I will accept any allotment made me, and will pay the application and allotment money on receipt of notice of allotment, and will repay you on demand any part of such monies as you may have paid for me.

4. Any prospectus handed to me may be modified or altered as Directors of said Company may think fit, providing the capital and working capital is unaltered, and the name of the Company may be altered, if it be found that it cannot be incorporated under the present proposed name; and no error or misstatement in said prospectus is to violate this contract or entitle me to repudiate the allotment to me, if any.

Dated at , this day of 19 .

Witness: Signature.

SUB-UNDERWRITING AGREEMENT.

An agreement made the day of between (underwriter) of, etc. (hereinafter called the underwriter), of the one part and

(sub-underwriter) of, etc. (hereinafter called the sub-underwriter) of the other part.

Whereas the underwriter has agreed to underwrite shares of $ each in the capital of Company, Limited, on the terms of an agreement dated the day of and made between (parties).

And whereas the sub-underwriter has agreed to take over the said underwriting agreement to the extent of (one-fifth) of the shares thereby agreed to be underwritten upon the terms hereinafter contained.

Now it is hereby agreed as follows:—

1. The sub-underwriter shall subscribe for or procure the subscription of (one-fifth) of the said shares which the underwriter has agreed to underwrite.

2. The underwriter shall pay the sub-underwriter a commission of $ being at the rate of per cent. on the nominal value of the shares to be sub-underwritten.

3. As security for the payment of the said commission the underwriter hereby assigns to the sub-underwriter all moneys payable by the said Company to him under the said agreement of the day of .

4. The sub-underwriter shall as between himself and the underwriter be bound by all the provisions of the said agreement of the day of so far as the same are not inconsistent with this agreement as though the same had been set out in full herein.

As witness, etc.

(Signatures of both parties.)

OFFER TO SUBSCRIBE FOR SHARES IN CONSIDERATION OF A COMMISSION PAYABLE IN CASH OR SHARES AT THE OPTION OF THE COMPANY.

Date

To the directors of the Company, Limited.

Gentlemen,—

I hereby agree to subscribe for shares in your Company of $ each, but not for any less number on the following terms:—

You are to pay me a commission of $ per share, such commission is to be payable on the day of and may, at your option, take the form of fully paid shares of the Company, or if you determine to pay the same in cash, I am to be at liberty to set off against the same any sum equivalent in amount due from me to you in respect of the said shares, whether the amount thereof has or has not been called, I am to notify you within days after you express to me your determination to pay my said commission in cash, whether or not I desire to make use of the above right to set off. In default of my so doing, it is to be assumed that such set-off is not to take place. I enclose cheque for $ being per cent. due on application.

Signed.

RESOLUTION OF BOARD TO ISSUE SHARE WARRANTS TO BEARER.

That share warrants to be bearer be issued in respect of all the fully paid-up shares of the Company, and that the Secretary be directed to cause share warrants to be prepared accordingly (in the form a draft of which has been submitted to this meeting) and to issue the same to the shareholders in exchange for their share certificates.

FRACTIONAL CERTIFICATE.

THE COMPANY, LIMITED.

Capital $ divided into per cent. cumulative preference shares of $ each and ordinary shares of $ each.

Fractional share certificate No.

This is to certify that of is entitled to a (one-fifth) part of one fully paid (ordinary) share of $ numbered in the above Company subject to the by-laws of the above Company.

Given under the common seal of the Company this day of

(Seal.) Secretary.

SHARE WARRANT TO BEARER.

THE COMPANY, LIMITED.

This is to certify that the bearer of this warrant is entitled to (ordinary) shares of $ each numbered to in the Company, Limited, subject to the by-laws of the Company and that such shares are fully paid up.

Given under the common seal of the Company this day of

(Seal.) Directors.
Secretary.

INDEMNITY TO COMPANY ON ISSUE OF NEW SHARE CERTIFICATE OR WARRANT.

Date

To the Directors of the Company, Limited.

Gentlemen,—

In consideration of a fresh certificate (or warrant) for (fully paid) shares of $ each in the above Company numbered to having this day been issued to me in the place of the certificate (or warrant) for the same shares previously issued, which has been lost, (or accidently destroyed) by me, I hereby undertake to refund to the above Company and to indemnify the Company against all costs and expenses and all loss which may be incurred by the Company in consequence of the two certificates (or warrants) for the same shares being outstanding at the same time.

Yours, etc.,
(Signature of shareholder.)

CHAPTER X.

CALLS.

The common practice on the sale of shares of stock of the company is to make a portion of the purchase price payable on application and a further portion on allotment. The balance may either be made payable in instalments or "as called by the directors." In the latter event, unless some limitation is inserted as to the frequency of the calls, the entire balance unpaid may be called by the directors at any time. In order to give the shareholder some reasonable assurance that he will not be inconvenienced by having to pay up a large portion of his stock on short notice, it is sometimes provided in the application that no call shall exceed a certain percentage and that calls can only be made at fixed intervals. In cases of certain companies such as life insurance companies it is usual to pay only a small percentage on the stock and similarly in cases of fire insurance companies. Business considerations might suggest in the latter instance that having in view the possibility of a large loss arising from some conflagration and the possible necessity of calling up even the entire uncalled capital of the company and of raising that amount within the period of two or three months, that it would be wise to leave the frequency and the amount of the calls entirely in the discretion of the directors.

In most mercantile companies of an industrial nature, if there be any prevailing practice, it might perhaps be said to be usual to have the stock all paid up in as short a time as possible. In many of such companies paid up shares are issued to the vendor of a going business and where certain parties are the holders of fully paid up stock in the company, it is undesirable for obvious reasons such as that of voting strength that there should be a class of partly paid shareholders. Calls cannot, of course, be made on shares regularly issued as paid up otherwise than for cash, nor upon shares regularly issued as partly paid up in excess of the amount not credited as paid up.

The directors are given power by the Act to make calls at such times and places and in such instalments as the Letters Patent or the Act or the by-laws of the company may require. It is the common practice for the by-laws to contain the governing clauses regarding calls upon stock and forfeiture for non-payment of calls (see forms of by-laws, *infra*). In all cases a reasonable notice is required and further the notice must state definitely the amount of the call and the time and place of payment and the name of the party to whom the payment is to be made. The directors in making a call may act by resolution or by-law (see form of resolution or by-law *infra*). (See also cases under the heading Shareholders' Liability, and for continuation of the subject see heading Forfeiture.)

It has been held that it is not necessary that calls should be made by by-law and that a resolution is sufficient. *Union Fire Ins. Co.* v. *O'Gara*, 4 O.R. 359.

But in view of the wording of section 55 of the Ontario Companies Act, it would appear advisable that if the general by-laws of the company do not contain clauses respecting the time, place and instalments of calls, to be made, a by-law rather than a resolution should be passed making the same.

In view of the fact that what might seem comparatively trifling irregularities in connection with the making of a call had been held sufficient to render the call invalid, it would appear advisable where possible to have the shareholders sign a waiver of notice of call. (See form *infra*.)

Directors can only make calls at such times after such notice and for such amounts as are prescribed in the charter and by-laws. *Re Pyle Works* (1890), 44 Ch. D. 534.

Where the Act of incorporation required thirty days' notice to be given of the calls for the payment of each instalment of the capital stock, it was held that it was not sufficient in one notice, to call for payments of several instalments at intervals of less than thirty days. *St. John Bridge Co.* v. *Woodward* (1840), 3 N.B. 1 Kerr. 29.

An agreement that a shareholder shall not be liable for calls is *ultra vires*. *Ex parte Clarke* (1869), L.R. 7 Eq. 550; *Bunns' Case* (1860), 2 DeG. F. & J. 275.

It was held under 12 V., c. 166, s. 9 (Can.), that a first call might be made by a quorum of the directors, though the other calls were required to be made by a majority. *Ontario Ins. Co.* v. *Ireland* (1855), 5 C.P. 139.

Where a company's Act of incorporation does not allow it to commence operations until certain stock has been subscribed, etc., the words "commence operations" are not intended to prevent calls being made. *North Sydney Mining and Transportation Company* v. *Greener* (1898), 31 N.S. 41.

The power to make calls is a trust and must be exercised as such and in a fair and impartial manner.

Where directors were empowered in making an assessment to restrict it to half the stock, it was held that this would not justify excluding part of the stock altogether, but at most allowed them to make an equal assessment on all the stock to that extent. *European and N.A. Ry. Co.* v. *McLeod* (1875), 16 N.B. 3.

But where the subscriptions of two shareholders had been reduced on the subscription book it was held that though the calls were made on this basis, they were not necessarily illegal, partial or unjust. *National Insurance Co.* v. *Hatton* (1879), 2 L.N. 238, 24 L.C.J. Q.B. 26.

For a case in which it was held upon the facts that there had been no such preference or discrimination between classes of shareholders as would invalidate a call. See *Provincial Insurance Co.* v. *Cameron*, 31 C.P. 523.

Where a call is made upon all shareholders without discrimination or partiality the Court will not interfere to determine whether the call was necessary or expedient, but if calls are made in such a way as to favour one set of stockholders and impose an unequal burden upon others, the Court may intervene. *Christopher* v. *Noxon*, 4 O.R. 672.

No call can be made upon the shareholders of any company for any purposes not warranted by the constitution of that com-

pany, but the Court will not interfere with the discretion of directors in making a call, on the ground that the money is not required for the purposes of the company or on any other ground except *mala fides*. *Odessa Tramways Co.* v. *Mendel* (1877), 8 Ch. D. 235.

The power to make calls being discretionary cannot be delegated. *Provident Life Assurance Co.* v. *Wilson* (1866), 25 U.C.R. 53; *Howard's Case* (1866), L.R. 1 Ch. 561.

Irregularities.

In making a call, it is essential that the directors should be duly appointed and duly qualified. The meeting should be regular in all respects with a quorum in attendance and convened by a proper notice. The resolution should specify the amount of the call, the time and place of payment and the party to whom it is payable and all these matters should be set out properly in the minutes.

It will not, however, invalidate the call if the time and place of payment and the party to whom the call is to be paid are not determined in the resolution. If they are determined by the directors, it will be sufficient to state them in the notice. It will not be sufficient for the officer sending out the call to determine them. *Newry Ry. Co.* v. *Edmonds*, 2 Eq. 118; *Union Fire Ins. Co.* v. *Wilson*, 4 O.R. 359; *Provident Life Assurance Co.* v. *Wilson*, 25 U.C.R. 53. But see *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch. D. 687.

But it is the resolution of the directors and not the notice that makes the call. *Provincial Insurance Co.* v. *Worts*, 9 A.R. 56.

For the view that it is not the resolution of the directors making a call upon the stockholders which constitutes the call, but rather the notice, see *Gas Company* v. *Russell*, 6 U.C.R. 657.

The provision contained in the various Companies Acts that ten per cent. upon the allotted stock shall be called in and made payable within one year from the incorporation of the company is merely directory. It is no doubt the duty of the directors to

call in the ten per cent. within one year, but this neglect of duty cannot make that a call which is not a call, nor can it render a shareholder liable to pay this ten per cent. without a call made in the ordinary way. The neglect of directors to make a call as provided in the Act has not the effect of making shareholders in arrear for the ten per cent. so as to prevent their transferring their shares. *Ontario Investment Co.* v. *Sippi*, 20 O.R. 440.

Where there is a variation in the days of payment between the resolution of the directors making the call and notice of the call there is such an irregularity as to invalidate the call. *Provincial Insurance Co.* v. *Worts*, 9 A.R. 56.

But where a shareholder has made payment upon a call which is invalid owing to a variation in the day of payment between the resolution and the notice of the call such shareholder cannot raise the question of invalidity. *Provincial Insurance Co.* v. *Cameron*, 31 C.P. 523.

Regularity of Calls.

As to the right of a company to call all its unpaid stock at one time see *Lake Superior Navigation Co.* v. *Morrison*, 22 C.P. 217.

As to sufficiency of declarations for calls see *Marmora Foundry Co.* v. *Murnery*, 1 C.P. 1; *Marmora Foundry Co.* v. *Dougall*, *ib.* 194.

If a call be made by a proper authority for a proper purpose it is not every trifling irregularity that will vitiate the call. *British Sugar Refining Co.* (1857), 3 K & J. 408.

A contract providing for payment of a share by instalments is determined by the winding up, and the liquidator is entitled, notwithstanding the contract to make an immediate call for the amount unpaid. *Cordova Union Gold Co.* (1891), 2 Ch. 580; *London Provident Society* v. *Morgan* (1893), 2 Q.B. 266-272; and provisions of Winding-up Acts.

Where an Act specifies that no instalment shall be called for except after the lapse of one calendar month from the time that the last instalment was called for it would seem that calls made

for the 1st of May, June, July and August would be illegally made. *Gas Company* v. *Russell*, 6 U.C.R. 567.

Three persons were appointed "joint assignees" of a company for the purpose of winding up under 41 V., c. 21 (Dom.). Two of the assignees met and made two calls at 10% each on the stock of the company. Held, that the assignees must all join in making calls and that these calls were therefore invalid and that a subsequent meeting of the three joint assignees after the notice of these calls had been mailed purporting to confirm the action of the two assignees in making the calls had not that effect. *Ross* v. *Machar*, 8 O.R. 417.

Where the company's Act of incorporation provided that successive calls should be made at intervals of not less than two months between such calls and that no call should exceed ten per cent. and that thirty days' notice should be given of every call, and a resolution was passed by which a call was made of ten per cent. payable on the 1st of March and a further call of ten per cent. on the 1st of September, this was held clearly not to be a call of twenty per cent., but two calls of ten per cent. each and the fact of the second call being illegal did not invalidate the first call because it was contained in the same resolution. *Union Fire Insurance Co.* v. *O'Gara*, 4 O.R. 359.

Where it is provided that calls shall be made at certain intervals, several calls cannot all be legally made at one time. In computing the interval the time must be reckoned exclusively of the day on which the previous call was payable. *Bank of Nova Scotia* v. *Forbes* (1883), 16 N.S. 4 Russ. & Geld. 295; and where no call could be made at a less interval than two months from the previous call, it was held that calls made on the 1st of September, 1st of November, 1st of January were bad. *Buffalo, Brantford and Goderich Ry. Co.* v. *Parke* (1855), 12 U.C.R. 607. See also *Port Dover and Lake Huron Ry. Co.* v. *Grey* (1875), 36 U.C.R. 425.

As to when interest will be allowed, see *Provincial Insurance Co.* v. *Cameron*, 31 C.P., p. 550.

Where the notice published specifies different days than those mentioned in the resolution fixing calls, the calls must be re-

garded as illegal being unauthorized by the resolution and the fact that a shareholder has written to the company inclosing his note for a portion of the calls and promising to send his note for the balance and stating that on account of absence from the country he had no knowledge of any of the calls is not sufficient to estop him from disputing them. *London Gas* v. *Campbell*, 14 U.C.R. 143.

Where thirty days' notice of the call is required to be given, the call being payable on the 6th of September and notice of the call being deposited in the post office on the 5th of August; this was held sufficient notice, although the notice was not actually received until the 8th of August. *Union Fire Ins. Co.* v. *O'Gara*, 4 O.R. 359.

Where it was provided that no instalment call shall exceed ten per cent. or be called for or become payable in less than thirty days after public notice in one or more newspapers, it was held that the times fixed for payment of instalment need not be thirty days apart, but that instalments might be made at any time provided that no call exceeded ten per cent. and thirty days intervened between the day of notice of the call and the day on which it was payable. *Provincial Ins. Co.* v. *Worts*, 9 A.R. 56.

Where not less than thirty days' notice of a call is required the mailing of a notice on the 27th of June requiring a call to be met on the 27th of July was held not to be sufficient notice. *National Insurance Company* v. *Egleson*, 29 Gr. 406.

A provision that notice of a call must be given in each district in which stock may be held will invalidate a call as to any person living in a district in which notice has not been given, but the call will be valid as against persons living in a district where a notice has been given. *Provincial Insurance Company* v. *Cameron*, 31 C.P. 523.

To prove a call on March 15th, a *Gazette* of the 28th May was put in, in which the notice bore the date on the 15th of March. This was held insufficient as the paper could not be taken as evidence of any notice prior to its own date. *Buffalo, Brantford & Goderich Ry. Co.* v. *Parke* (1855), 12 U.C.R. 607.

In the absence of special provision to the contrary, the fact that a notice of call has been posted to the shareholder's address will be sufficient evidence of the call having been made. *Ross* v. *Converse* (1883), 27 L.C.J. 143, 16 L.N. 67; and see also *Bank of Liverpool* v. *Bigelow* (1880), 12 N.S. 3 Russ. & Ches. 236.

In the case of a sundry body of shareholders it may be assumed that all parties look on the Post Office as the understood medium for notices of any kind. The only intelligible course must be to hold that if the notice is duly deposited thirty days before the time appointed for payment it is sufficient. The Post Office must be regarded as the common agent of both the company and the shareholder. See *Union Fire Ins. Co.* v. *Fitzsimmons*, 32 C.P. 602; *Household Fire Insurance Co.* v. *Grant*, L.R. 4 Ex D. 218; *Dunlop* v. *Higgins*, 1 H.L.C. 381; *Newry & Inniskillen R.W. Co.* v. *Edmunds*, 2 Ex. 118.

Where the Act of incorporation provided that one month's notice of calls "shall be given," O'Connor, J., was of opinion that in the absence of any provision as to the manner in which notice should be given, it must be given as required by common law, that is in such a manner that the fact of the delivery to or receipt by the person to be notified may be proved. *Ross* v. *Machar*, 8 O.R., at p. 432.

Where shares are held by a firm a notice of a call may be sufficiently given by mailing the notice to one partner. Notice to one partner is in a partnership transaction treated as notice to the other and this obtains after dissolution as to matters which are thereafter to be completed, and after dissolution so far as the company is concerned the members of the firm are liable to pay just as before and the same notice as would suffice before should be enough after dissolution. *National Insurance Co.* v. *Egleson*, 29 Gr. 406.

The better opinion appears to be that notice to one of two joint proprietors of stock of a call would be imputed to the other and that notice to one would be sufficient to justify the inference in the absence of other evidence that information of it reached the other. *National Insurance Co.* v. *Egleson*, 29 Gr. 406.

Payment of Calls.

A transferee of stock upon becoming a shareholder of the company is subjected to all the liabilities incident thereto. He is liable to pay all calls made after he becomes a shareholder. Where the call has been made prior to the transfer, but is payable after the date of the transfer reference must be made to the contract between the parties or to the surrounding circumstances to determine upon whom as between themselves the ultimate liability must rest. *Schenectady and Saratoga Road Co.* v. *Fletcher*, 11 N.Y. 102; *West Philadelphia Canal Co.* v. *Innes*, 3 Whart. (Pa.) 198. Until registration of the transfer in the books of the company, both the transferor and transferee are jointly and severally liable to the company. Section 52. And a person ceasing to be a shareholder after a call, *e.g.*, by transfer of his shares, remains liable for the amount of the call. *Montreal Mining Co.* v. *Cuthbertson* (1852), 9 U.C.R. 78.

A corporation's by-laws sometimes contain a clause empowering directors to receive from any member money in advance of calls on the footing that interest is to be paid thereon whilst in advance. It is in the nature of a trust and not to be exercised by the directors to benefit themselves. *Poole, Jackson and Whyte Cases* (1878), 9 Ch. D. 322; *In re Pyle Works* (1890), 44 Ch. D. 534.

And where directors 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 ineffective and that the directors remained liable on their shares. *Sykes' Case* (1871), L.R. 13 Eq. 255.

As to the rights of the parties making such advances in the event of the winding-up: See *Wakefield Co.* (1892), 3 Ch. 165.

A company may take a note from a shareholder for the amount of a call if the Act of incorporation contains no provision to the contrary. *St. Stephen Branch Ry. Co.* v. *Black* (1870), 13 N.B. 139.

Enforcing Payment of Calls.

An action for calls should be brought in the name of the company. If the calls are payable by virtue of a statute or by deed they are not, of course, barred by the lapse of less than twenty years. *Cork & Bandon Ry. Co.* v. *Goode*, 13 C.B. 1826.

A provision that in case of non-payment of calls, the shares shall be forfeited and sold does not restrict the company to the remedy by forfeiture, but it may sue the shareholder for the calls. *Marmora Foundry Co.* v. *Jackson*, 9 U.C.R. 509.

The directors when a call is made should compel every shareholder to pay to the company the amount due from him in respect to 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* (1868), L.R. 3 H.L. 171.

A mandamus will issue at the instance of a creditor who is also a shareholder, compelling directors to make calls to discharge the indebtedness of the company. *Harris* v. *Dry Dock Co.* (1869), 7 Gr. 450.

An action by a creditor of a company against a shareholder does not depend upon a call having been made by the directors. *Cockburn* v. *Starnes* (1857), 2 L.C.J. 114.

An agreement by a company with its agent that calls on shares taken by the agent shall be debited in the agency account alone is *ultra vires*. *Re London and Colonial* (1869), L.R. 7 Eq. 550.

The usual grounds of defence to an action for calls are summarized as follows in Lindley, 6th ed., p. 596:—

1. A denial that the defendant is a person liable to pay the call. The *cestui que trust* or principal of a shareholder is not liable to such an action. But a married woman may be sued for calls on shares standing in her own name.

2. A denial of the making of the call in point of fact.

3. A denial that the call, admitted to have been made in point of fact, was authorized, was made by competent persons or in the proper manner, or for proper purposes.

4. A denial of any notice of the call.

5. A denial of such notice as the defendant was entitled to receive.

6. Set-off.

7. Infancy.

8. Fraud.

9. Failure to comply with statutory requirements as to prospectus.

Where the defendant had subscribed for shares in a company, which against the defendant's wish subsequently applied for and had its powers increased by a Dominion Act, it was held no defence in an action for calls, as the new Act was binding upon the shareholders, whether assenting or not to the application for it. *Canada Car & Manufacturing Co.* v. *Harris* (1874), 24 C.P. 380.

As to the effect of disorganization of the company making calls see *Garden Gully United Quartz Mining Co.* v. *McLister* (1875), 1 App. Cas. 39; *Alma Spinning Co., Bottomley's Case* (1880), 16 Ch. D. 681; *Howbeach Co.* v. *Teague* (1860), 5 H. & N. 151; *Austin's Case* (1871), 24 L.T. 932.

A company was not authorized to carry on business until $10,000 of its stock had been subscribed and $30,000 paid thereon within six months of incorporation, but began business after the six months by virtue of a fictitious subscription to its capital. It was held that these facts constituted a good defence to an action against a subscriber for calls. *Brown* v. *Dominion Salvage & Wrecking Co.* (1891), 20 R.L. 557, 20 S.C.R. 203.

In a proceeding by a receiver of an insurance company for calls the objection that the company's license has been revoked is not tenable. *Union Fire Insurance Co.* v. *Fitzsimmons,* 32 C.P. 602.

The Statute of Limitations does not commence to run against the company until a call is made and notice given. *Re Haggart Brothers Mfg. Co., Peaker & Runion's Case,* 19 A.R. 582.

As to what acts shew intent to transfer shares of directors with the intention of defeating liability for calls see *Thompson* v. *Canada Fire Insurance Company,* 9 O.R. 284, and see *McGregor* v. *Currie,* 26 C.P. 55.

BY-LAW MAKING CALL.

Whereas, etc.

Now be it enacted that a call of $ per share be and the same is hereby made on the shareholders of this Company for the purpose of, etc., and said call is hereby levied upon each and every share of the subscribed capital stock, payable on or before, etc., to the treasurer of this Company at the Head Office of the Company in the City of

If the Company has no general by-laws governing calls, add the following:—Two weeks' notice of this call shall be given to each holder of partly paid stock of the Company and if the call be not paid on the day appointed for payment thereof, the holder for the time being of the shares in respect to which the call shall have been made, shall pay interest from the day appointed for the payment thereof to the time of the actual payment at the rate of 5 per cent. per annum.

The secretary is hereby authorized and directed to give all notices required by this resolution and the provisions of the statutes and by-laws governing this Company.

NOTICE OF CALL.

Notice is hereby given that resolution (or by-law) of the Company passed on the 16th day of April, 1904, a call of ten per cent. on the subscribed capital stock of the above named Company was made, to be paid to the treasurer at the Head Office of the Company, No. Street, on or before the day of . All cheques should be made payable to .

Secretary.

WAIVER OF NOTICE OF CALL.

We, the undersigned subscribers to the capital stock of the Company, hereby waive all the requirements of law as to notice of calls upon shares of stock of said Company subscribed by us and each of us respectively, and as to the time and place of payment of any such calls, and we hereby agree to pay to the treasurer all or any part of the amount to be paid upon our subscriptions in such amounts and at such times and places as may be prescribed by the Board of Directors of said Corporation.

(Signed.)

CHAPTER XI.

FORFEITURE.

53. If, after a demand therefor, a call is not paid within the time and in the manner provided by the Special Act or Letters Patent or by-laws, the directors by resolution to that effect, reciting the facts and duly recorded in their minutes may summarily forfeit any shares whereupon such payment is not made; and the same shall thereupon become the property of the company and may be disposed of, as by by-law or otherwise the company may ordain; provided that such forfeiture shall not relieve any shareholder of any liability to the company or any creditor. R.S.O., c. 191, s. 35, amended.

The power of forfeiture for non-payment of calls is one which must be expressly conferred, and is a power that is intended to be exercised only when circumstances render its exercise expedient in the interests of the company; it is not a power to be exercised for the benefit of a shareholder. The duty of the directors when a call is made is to compel every shareholder to pay the amount due to the company from him in respect to that call; and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to. The power must be exercised *bonâ fide* for the good of the company and not to relieve a shareholder from liability. The proviso added to section 56, however, would appear to render it practically impossible to relieve a shareholder of liability by forfeiture.

Accordingly where a resolution is passed which is in reality for the benefit of the shareholder and not for the benefit of the company or its creditors the proceedings by way of forfeiture may be regarded as entirely nugatory and notwithstanding resolutions or other acts the shareholder does not cease to be a shareholder. *Common* v. *McArthur*, 29 S.C.R. 239. *Re Esparto Trading Co.*, 12 Ch. D. 191. Nor can it be exercised surreptitiously for the purpose of expelling a shareholder or for any indirect purpose. *Blisset* v. *Daniel*, 19 Hare 493; *Allen* v. *Gold-*

reefs, Ltd. (1900), 1 Ch. 656; *Spackman* v. *Evans*, L.R. 3 H.L. 186.

Forfeiture is strictly treated by the Courts and it is essential that all formalities be exactly observed. *Clarke* v. *Hart*, 6 H.L.C. 633. A slight irregularity may be fatal. See *Nellis* v. *Second Mutual Building Society of Ottawa*, 29 Gr. 399; *Garden Mining Co.* v. *MacLister*, 1 App. Cas. 39; *Johnson* v. *Lyttles' Iron Agency*, 5 Ch. D. 687.

The call must have been regularly made and the notice of forfeiture must be free from any mistake as to the amount of the call or interest. *Garden Mining Co.* v. *MacLister, supra; Faure Electric Accumulator Co.* v. *Phillipart*, 58 L.T. 525, and where the Board of Directors are not regularly constituted, a resolution by them forfeiting the stock is invalid. *Christopher* v. *Noxon*, 4 O.R. 672.

It has been held in the United States that the resolution must shew the individual shareholder that it is proposed to forfeit his stock and a resolution forfeiting all stock in arrears has been considered invalid. *Johnson* v. *Albany, etc., R. Co.*, 40 How. P.R. (N.Y.) 193, but see *Gilman* v. *Royal Canadian Ins. Co.* (1884), 7 L.N. 352, and 1 M.L.R.S.C. 1. If a shareholder is insolvent, the notice must still be given him. *Graham* v. *Van Dieman's Land Co.*, 26 L.J. Ex. 73, but if he is dead, it is essential that a personal representative should be appointed, and the notice given to him. *Glass* v. *Hope* (1869), 16 Gr. 420.

See further as to notice of forfeiture *Provincial Insurance Company* v. *Cameron* (1880), 31 C.P. 523; *Gilman* v. *Robertson* (1884), 7 L.N. 353 and 1 M.L.R. S.C. 5; *Robertson* v. *Hochelaga Bank* (1881), 4 L.N. 315 S.C.

When forfeited shares are sold, the purchaser is liable to a fresh call in respect of capital comprised in the prior unpaid calls. *New Balkis Eesterling* v. *Randt Gold Mining Co.* (1904), A.C. 163. Subsequent payments, however, by former holders of the shares should be credited to the purchaser. *Re Randt Gold Mining Co.* (1904), 2 Ch. 468.

Quære as to whether in the event of a sale by the company. the proceeds should be credited in a proceeding against the

former holder. A purchaser of forfeited shares has been held not entitled to vote in respect to them so long as the calls remained unpaid which were due at the time of forfeiture. *Randt Gold Mining Co.* v. *Wainwright*, (1901) 1 Ch. 184.

Forfeited shares would not appear to be a very desirable purchase in view of the above and the possibility of the forfeiture being set aside for some irregularity.

A forfeiture to be effective must be carried into effect and must be more than a declaration of intention to forfeit. *Biggs' Case*, 1 Eq. 309. But if after such a declaration the shares are treated as forfeited both by the company and the shareholder, the company shall be estopped from alleging that no forfeiture took place. *Knight's Case*, 2 Ch. 321.

After a share forfeiture the shareholder ceases to be a shareholder of the company, and though liable for the prior calls does not appear to be liable for calls made subsequent to the forfeiture. Lindley, 6th ed., 728.

The provisions of section 56 that forfeiture shall not relieve a shareholder "of any liability" are probably not intended to leave the former shareholder liable for the full amount unpaid.

An illegal or irregular forfeiture of shares may be restrained by injunction, and in such a case the company may be a proper party. See *Christopher* v. *Noxon*, 4 O.R. 672; *Moore* v. *New Jersey Co.* (1889), 23 N.Y. St. Rep. 213; *Watson* v. *Eales*, 23 Beav. 294.

The Court has also restrained a forfeiture where the amount due is in dispute. *Naylor* v. *South Devon Ry. Co.*, 1 DeG. & S. 32, and if shares have been improperly forfeited, the forfeiture may be set aside and the shareholder restored to his former position. *Norman* v. *Mitchell*, 5 DeG. M. & G. 648. And where there has been a wrongful forfeiture, it would seem just that an action for damages should lie as well.

A proceeding by a company to forfeit shares of a deceased shareholder in the absence of a personal representative is illegal and when administration or probate is taken out the personal representative will be entitled to relief and the lapse of time

between the attempted forfeiture and the appointment of a personal representative will be no answer to the claim. *Glass* v. *Hope*, 14 Gr. 484, 16 Gr. 420.

Surrender of Shares.

It is elementary law that a shareholder cannot without statutory authority surrender unpaid shares to a company and thereby get rid of his liability as a shareholder. *Common* v. *McArthur*, 29 S.C.R. 239.

No such power is given by the Ontario Companies Act and the surrender of shares only partly paid is a diminution of the capital of the company and can only be justified under circumstances which would justify a forfeiture of shares and as a more convenient substitute for that procedure. *Bellerby* v. *Rowland & Barwood's Steamship Co., Ltd.* (1902), 2 Ch. 14; *Trevor* v. *Whitworth*, 12 A.C. 409.

The power to cancel shares must also be given by express words. What is meant by this power is the capacity after the shares are allotted or accepted, where no dispute exists as to the liability of the shareholder to cancel such shares and determine the liability thereon. This must not be confused with the closely allied proceedings of compromising disputes between the shareholder of the company and the rescission of what has been wrongly done by inadvertence. These two latter are proceedings which every corporation may engage in without express authority. This must be so in the nature of things if the contract is voidable at the election of the subscriber. It becomes void when he so elects and it would indeed be anomalous if the directors had not power to cancel the shares which the subscribers had the power to hand back and to which all liability has ceased to exist; so where a shareholder subscribed upon the faith of a statement which subsequently proved to be incorrect and threatened legal proceedings to compel the cancellation of the stock it was held that a by-law passed by the shareholders cancelling the stock was valid. *Wheeler* v. *Wilson*, 6 O.R. 421.

Companies have then power to compromise claims made by a shareholder to be relieved of his shares, either by reason of fraud

or misrepresentation or any other cause which would enable the Court to decree such relief, but as the Court, if the shareholder were to make a claim against the company for compensation and damages in respect of some matter not in any way related to the validity of the shares held by him, could not decree the cancellation *pro tanto* of those shares so the company itself cannot validly compromise a claim for damages against it by accepting the surrender of and by cancelling the shares of its capital stock held by the claimant. *Livingston* v. *Temperance Colonization Society*, 17 A.R. 379; *Bath's Case*, 8 Ch. Div. 334; *Dickson* v. *Evans*, L.R. 5 H.L. 606.

It is only where the dispute between the shareholder and the company concerns the validity of the contract to take shares or the validity of the holding, that shares may be cancelled by way of compromise when it would otherwise be illegal if the surrender or cancellation of shares did not come within the ordinary powers of the company. They cannot be surrendered or cancelled as part of an agreement for the compromise of a dispute not concerning the subscription or the right to or the validity of the shares themselves, but about some other matter.

Directors may make compromises just as they may make other agreements, but in doing so they may not introduce any illegal element. They may not do anything *ultra vires* in making an agreement of compromise any more than in making any other agreement. Where there is a dispute whether a man is a shareholder or whether shares have been allotted and accepted the dispute must be settled somehow and the directors have power to settle it, but unless by charter or statute they have power to cancel, or take a surrender of shares, undisputed shares cannot be so dealt with incidentally in a dispute about some other matter. *Livingston* v. *Temperance Colonization Society*, 17 A.R., p. 383.

No cancellation can affect a past liability. *Marshall* v. *Glamorgan Iron & Steel Co.*, L.R. 7 Equity, p. 138; *Fuches* v. *Hamilton Tribune Co.*, 10 O.R., p. 503.

Where power was given by the Act of incorporation to any shareholder of the company to surrender his stock by notice in

writing within a certain time and a shareholder desiring to surrender his stock transferred it within the time by an ordinary assignment to the president "in trust," both intending the transfer to operate as a surrender, it was held a valid surrender. *Harte* v. *Ontario Express and Transportation Co.; Kirk and Marling's Case,* 24 O.R. 340.

It was further held in winding-up proceedings, that those who had thus surrendered their shares were not liable as contributories even to the extent of the ten per cent. which they ought to have paid at the time of subscription but had not. *In re Ontario Express & Transportation Co.* (1893), 24 O.R. 216.

Expulsion from "Benefit Societies."

A corporation, organized for the advancement of the interests of a class or calling, unless restrained by a provision contained in the statutes of the state or the articles of corporation, has implied power to expel a member for a violation of rules regularly adopted or for an act the result of which is to bring upon the corporation discredit and disgrace. It is essential, however, that the rules for the violation of which expulsion proceedings are brought be reasonable; and the proceedings, in order to their validity must be fairly and honestly conducted. Where a member has been wrongfully expelled, either because the proceedings are inherently wrong or because they were improperly conducted, mandamus will lie to compel the restoration of the party expelled. A Court will not review expulsion proceedings of such corporation when clearly within the chartered powers, the fairness of the proceedings being admitted. A Court may, however, review the action of a corporation in order to ascertain whether the action was in fact within its powers as determined by its articles. In such case, a finding of irregularity may be allowed by a decree for re-instatement. Helliwell on "Stockholders," sec. 93.

A member of a corporation should be given notice of the intention to expel him and of the grounds of the expulsion. He

should also be given an opportunity to be heard in answer to the charges. *Delacy* v. *Neuse River Navigation Co.*, 8 N.C. 274.

Where a person became a member of a friendly society incorporated under the Friendly Societies Act (Ont.), the objects of which were of a friendly and provident nature, and an amendment to their by-laws was subsequently passed which was unreasonable and in restraint of trade for failure to comply with which the member was expelled from the Association, it was held that the by-law was illegal and that the member's expulsion was invalid and that he was entitled to an injunction in damages. *Parker* v. *Toronto Musical Protective Assn.*, 32 O.R. 305; and see *Cuthbert* v. *Commercial Travellers' Association*, 39 U.C.R. 578; *Chamberlin's Wharf, Limited* v. *Smith* (1900), 2 Chy. 605; *Rigby* v. *Connol*, 14 C.D. 482; *Mineral Water Bottle Society* v. *Booth*, 36 C.D. 465; *Swaine* v. *Wilson*, 24 Q.B.D. 252.

Procedure in Case of Forfeiture.

Where default has been made in payment of calls a resolution similar to the following may be passed.

RESOLUTION TO GIVE NOTICE.

That notice of forfeiture be given in accordance with the provisions of the by-laws relating thereto to those shareholders who have made default for more than days in payment of the call payable on the day of .

A notice should then be given by the secretary specifying the time and place when payment must be made in accordance with the by-laws. If default is made in complying with the notice and payment is not made, a resolution should be passed forfeiting the shares.

NOTICE PRIOR TO FORFEITURE.

THE COMPANY, LIMITED.

Sir,—

In my letter of the day of I gave you notice that at a meeting, etc.

I am now instructed to inform you that the directors require you on or before the day of to pay the said sum of

together with interest thereon at the rate of per cent. from the said day of up to the day of payment, and that in the event of non-payment of the said call and interest, on or before the said day of at the place aforesaid, the shares in respect of which such call was made will be liable to be forfeited.

I am,

Secretary.

To .

RESOLUTION FORFEITING SHARES.

Be it hereby resolved that by virtue of the powers vested in this Company by the statute the undermentioned shares be and they are hereby forfeited for non-payment of calls, viz.:— shares numbered to standing in the name of and so on.

ORDER RESTRAINING FORFEITURE.

Upon motion, etc., that the defendants, Company, Limited, and their agents be restrained until the trial of this action from taking proceedings as against the plaintiff under the notice of the day of 190 , to enforce the call of $ per share of which the defendants required payment on the day of and from forfeiting the plaintiffs' shares for non-payment of such call and until due notice has been given of such call, and until such notices shall have expired, and from acting as against the plaintiffs in any way upon the notices bearing date the day of 190 .

CHAPTER XII.

DIVIDENDS.

91. The directors of the company shall not declare or pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent, or diminishes the capital thereof; but if any director present when such dividend is declared, forthwith, or if any director then absent, within twenty-four hours after he has become aware thereof, and able so to do, enters his written protest against the same, and within eight days thereafter causes such protest to be notified, by registered letter, to the Provincial Secretary, such director may thereby, and not otherwise, exonerate himself from liability. R.S.O., c. 191, s. 83.

92. For the amount of any dividend which the directors may lawfully declare payable in money, they may declare a stock dividend and issue therefor shares of the company as fully paid or partly paid, as the case may be, or may credit the amount of such dividend on the shares of the company already issued but not fully paid and the liability of the holders of all shares mentioned in this section shall be reduced by the amount of such dividend. New.

A dividend is a share of the profits set apart to be divided among the holders of shares in the company. See *Webb* v. *Earle*, 21 Eq. 556.

In the absence of a special provision in the Act governing a company or its by-laws, dividends should be declared by shareholders. Under the Ontario Companies Act, however, section 87, sub-section (*b*), it is provided that the directors may make by-laws respecting the declaration and payment of dividends of the company, and the common practice is for the directors to declare dividends.

It is a common practice to pay a bonus in addition to dividends and a bonus is a sum payable from the profit and loss fund accumulated during several fiscal years, and which for any reason it may not be desirable to treat as a dividend. For instance, in a case of companies whose shares are listed on a public stock exchange, it is regarded desirable to maintain the dividend at a certain figure, and obviously it would be undesirable to pay a

dividend of 6% one year and the following year 12% and subsequently to revert to the 6% basis, and in this and other cases, it is common practice to declare the ordinary dividend with a bonus added. See *Hollis* v. *Allan*, 14 W.R. 980.

It is frequently provided in the by-laws of the company that a declaration of the directors as to what are profits should be final and in such a case, the Court will not interfere with the declaration of directors. *Lambert* v. *Neuchatel Asphalte Co.*, 30 W.R. 913.

In general, the Court will not interfere with the directors in the matter of paying dividends, so long as they are not acting *ultra vires* the company. *Lever* v. *Land Security Co.*, 8 T.R. 94.

A guarantee of dividends by a company does not constitute the holder of the stock a creditor of the company to the extent of dividends not declared. *Re Stewart's Trust*, 4 C.D. 213, and see *Petrie* v. *Guelph Lumber Co.*, 11 S.C.R. 450.

But where the company has placed funds in the hands of a trustee to provide for such guaranteed dividends, it is held that the liquidator could not claim the money. *Re Gelly Deg. Colliery Co.*, 38 L.T.R. 440, and see further *Ex parte Jegon*, 12 C.D. 503.

Where promoters of a company guarantee certain minimum net profits for a period of years, this fund is distributable to the shareholders in the form of dividends and the company or a shareholder cannot claim it to make good losses on revenue account. *Richardson* v. *English Crown Spelter Co.* W.N. (1885), 31.

And where a vendor guarantees to the company a certain dividend, a company may claim it, even though it discontinues business. *Brown* v. *Brown*, 36 L.T.R. 272; *Rhodes* v. *Forwood*, 1 A.C. 256, but see *Clifford* v. *Imperial Brazilian Ry. Co.*, 60 L.T.R. 60.

Sometimes promoters enter into an agreement to postpone dividends on their stock until after all other shareholders have received a fixed rate of dividend. Such an agreement has been held binding on them, and all persons claiming under them. *Ashton Vale Iron Co.* v. *Abbott*, W.N. (1876), 119.

Ascertainment of Profits.

The proper fund for the payment of dividends is the profits of the company. In all jurisdictions, the payment of dividends out of capital is prohibited. See Ontario Companies Act, section 91.

To arrive at net profits, the directors must put a value on the assets of the company and deduct therefrom all the liabilities including the amount of paid-up capital. The surplus, if any, then remaining will be net profits. *Binney* v. *Ince Hall Coal Co.*, 35 L.J. Ch. 363.

Kekewich, J., has defined net profits as the sum divisible among the shareholders, after discharging or making provision for every outgoing, properly chargeable against the period, whether a year or less, for which the profits are calculated. *Glasier* v. *Rolls*, 42 C.D. 436.

As to the propriety of writing up the assets of the company in order to shew a profit and declare a dividend see *Bolton* v. *Natal Land Co.* (1892), 2 Ch. 124; *Salisbury* v. *Metropolitan Ry. Co.*, 22 L.T.R. 839; *Foster* v. *New Trindad Lake Asphalte Co.* (1901), 1 Ch. 208. See also *Lubbock* v. *British Bank of South America* (1892), 2 Ch. 198.

No questions are likely to arise as to the propriety of the directors paying a dividend which renders the company insolvent, but in regard to the provision that the directors shall not declare or pay a dividend, which diminishes the capital of the company, there is more room for controversy. It would seem, however, that the word "capital" means the money subscribed by the shareholders or what is represented by that money. Neither premium on stock or reserve funds can be properly within the prohibition of the Act. Accretions to capital may be realized and turned into money which may be divided among the shareholders. *Verner* v. *General and Commercial Investment Trust* (1894), 2 Ch. p. 265.

The question of what is profit available for dividends depends upon the result of the whole accounts taken fairly for the year, the capital as well as profit and loss.

The law, however, does not prevent a company from paying dividends unless its paid-up capital is intact. In case of a loss, the capital must be applied to meet it, and the payment of all future dividends need not be suspended until all the capital so paid out is made good.

A prudent man of business would replace a large loss of capital by degrees and would reduce the dividends, but not stop them entirely.

On the other hand, it is obvious that all debts incurred in carrying on a business cannot be properly primarily charged to capital and the excess of receipts over other out-goings, dividends and profits, as if there had been no previous loss. What losses can be properly chargeable to capital and what to income is a matter for business men to determine, and it is often a matter in which the opinions of honest and competent men will differ. *Re National Bank of Wales, Ltd.* (1899), 2 Ch. 675.

For the contrary view see *Re Ebbw Vale Steel Iron Co.*, 4 C.D. 827; *Coltness Iron Co.* v. *Black*, 6 App. Cas. 329.

In the absence of special provisions in the by-laws or charter of the company, a company has no power to pay dividends in proportion to the amount paid up on each share. All shareholders are entitled to participate equally in the dividends without regard to the amount paid up. *Oak Vale Oil Co.* v. *Crum*, 8 App. Cas. 65, and see *Andrews* v. *Gas Metre Co.* (1897), 1 Ch. 361.

It is obvious that by-laws should provide for such a case either by charging interest on unpaid called capital or providing for the proportionate payment of dividends. Where a dividend is declared after a sale of shares before the completion of and transfer, it belongs to the purchaser. *Black* v. *Homersham*, 4 Ex. D. 24.

See also the provisions of the Companies Act as to reduction of capital.

Reserve Fund.

It was held by the Ontario Court of Appeal that in the case of a manufacturing company, there is no principle of law or

morality to justify the retention of a large amount of undrawn profits, and it was said that in such a case, an action will lie by a minority of shareholders to have the accumulated funds distributed as dividends. *Earle* v. *Burland*, 27 A.R., p. 556.

This judgment was reversed by the Privy Council, and it was laid down that the matter was one to be decided by the directors of the company and that the Court would not interfere. *Burland* v. *Earle* (1902), A.C. 83.

There is no principle which compels a joint stock company, while a going concern, to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided or what portion should be divided and what portion retained are questions of internal management which the shareholders must decide for themselves and the Court has no jurisdiction to control or review their decision or to say what is a fair and reasonable sum to retain undivided or what reserve fund may be properly required. They further laid down that it makes no difference whether the undivided balance is retained to the credit of the profit and loss account or carried to the credit of a rest or reserve fund or appropriated to any other use of the company. These are questions for the shareholders to decide subject to any restrictions or directions contained in the charter or by-laws of the company. And if the company may have a reserve fund or retain a balance of undivided profits it would seem to follow that it has power to invest the moneys so retained. It is not necessary that the company should employ such fund only in its own business. If it were so the objects for which a reserve fund is needed would in most cases be defeated. It cannot be contended that a company is confined in respect of such fund to investments such as trustees are authorized to make and the fund may lawfully be invested in such securities as the directors may select subject to the control of a general meeting. *Ibid.*

Shareholders in a loan company in answer to a proposal from the company paid, towards the reserve fund, dividends paid to them by the company, and various other sums of money, with a view to increase the reserve fund to the same amount as the

paid-up stock. In winding-up proceedings it was held that such shareholders were not entitled to rank as creditors upon the assets of the company, with the other creditors, depositors and debenture holders, and that any claim that they had against the company and its reserve fund was subject to the payment of the debts of the company. *Re Atlas Loan Co.*, 9 O.L.R. 468.

As between a tenant for life and remainderman claiming under a settlement of shares, it has been held that their respective rights are determined by the time at which the profits were made divisible among the shareholders by the declaration of a dividend, irrespective of the time or times, at which such profits were earned. *Re Bouch*, 22 C.D. 659.

If dividends are unclaimed for a period of six years the shareholders' right to them is barred. *Re Severn Ry. Co.* (1896), 1 Ch. 559.

There is nothing to prevent the company from paying dividends properly declared before it pays its ordinary current debts. *Stevens* v. *South Devon Ry. Co.*, 9 Ha. 313.

As to restraining payment of dividends on the ground that the company's reports are misleading see *Montreal Street Ry.* v. *Ritchie*, 16 S.C.R. 622.

RESOLUTION DECLARING DIVIDEND.

Whereas the balance sheet of the Company shews a net earnings for the current half-year to be $ and there is in all the profit and loss account of the Company $

Now be it resolved and it is hereby resolved that a dividend of per cent. upon the paid-up issued capital stock of the Company be, and the same is hereby declared payable from the profit and loss account.

Be it further resolved that in lieu of paying out such dividends in cash that the dividend be paid and satisfied by the issue to the shareholders of fully paid-up shares of the Company for the proper amount, all fractional amounts to be adjusted by payment in cash.

CHAPTER XIII.

TRANSFERS.

52. No transfer of shares unless made by sale under execution, or under the order or judgment of some competent Court in that behalf, shall, until entry thereof has been duly made, be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto toward each other, and as rendering the transferee liable, *ad interim*, jointly and severally with the transferor, to the company and its creditors, until entry thereof has been duly made in the books of the company. R.S.O., c. 191, s. 29.

To make an effectual transfer for all purposes registration is required by the Act, and a form of transfer is commonly provided by the by-laws. In such a case the form must be strictly followed and the directors may decline to register a transfer which does not follow the form prescribed. *Marino's Case*, 2 Ch. 596.

The usual method of transferring shares is by filling up the assignment endorsed on the back of the certificate. The ordinary form includes along with the assignment the power of attorney to complete the transfer in the stock register of the company. Where this certificate is presented at the office of the company, or at the office of the registrar of stock for the company, the old certificate is cancelled and a new one issued in its place in the name of the transferee. It frequently happens that the form of assignment is executed before a witness with the name of the transferee left blank and passes from hand to hand without registration until the certificate finally comes into the hands of the transferee, who desires to be registered as a shareholder. This practice is, of course, confined chiefly to shares dealt in actively on the stock exchanges and of a more or less speculative nature. Where the genuineness of the signature is guaranteed by a member of the exchange, it is usual to accept delivery of such certificates.

The transfer in blank, however, confers on the holder of the certificate, for the time being, authority to fill in the name of

the transferee, and each successive holder passes on this authority when he delivers the certificate to his immediate transferee. In general, the holder for the time being takes not the property of the shares, but a title, legal and equitable, which enables the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner. *Smith* v. *Rogers* (1899), 30 O.R. 256; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.

And where brokers improperly deposited a certificate transferred in blank as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights, it was held that the bank was entitled to hold the shares as against the owner. *France* v. *Clark*, 26 Ch. D. 257, distinguished. *Smith* v. *Rogers, supra.* And see *Re Central Bank, Baines' Case*, 16 A.R. 237.

A *bonâ fide* assignment or pledge for value of shares is valid between the assignor and assignee notwithstanding that no entry of the assignment or transfer is made in the books of the company; and as only the debtor's interest in the property seized can be sold under execution, the rights of a *bonâ fide* assignee cannot be cut out by the seizure and sale of the shares under execution against the assignor after the assignment. *Morton* v. *Cowan*, 25 O.R. 529.

As to the operative effect of unregistered transfers see also *Hamilton* v. *Grant*, 30 S.C.R. 566; *Brock* v. *Ruttan*, 1 C.P. 218; *Crawford* v. *Provincial Insurance Co.*, 8 C.P. 263. It is usual for the transferee to sign a formal acceptance of shares upon receipt of the certificates, but this is not necessary to render him liable. *Ross* v. *Machar*, 8 O.R. 417; *Woodruff* v. *Harris*, 11 U.C.R. 490.

As to transfers to a man of straw see *Re Peterboro Cold Storage Co.*, 9 O.W.R. 850. See also title "Directors." Directors must make good to the company as damages any sums which on winding up may be required, and which cannot be made good by the ostensible transferees who are to be called upon in the first instance. *Re Peterboro Cold Storage Co.*, 9 O.W.R. 850.

A transfer of shares in a company to a person to hold as a trustee for such company is illegal, the company having no power to sell its own stock, the trustee in such a case would be personally liable. As to the liability of the transferor, it has been considered that this depended on his knowledge or ignorance of the illegal trust. *McCord's Case* (1891), 21 O.R. 264; *Addison's Case* (1870), L.R. 5 Ch. 294. See also *Paton's Case*, 5 O.L.R. 392.

Forged Transfers.

The registration of a forged transfer does not defeat the title of the rightful owner of the stock who is entitled to have the register rectified. *Barton* v. *London & North Western Ry. Co.*, 38 Ch. D. 149. If a new certificate is issued and a second transfer takes place, the purchaser is entitled to damages as against the company. Under these circumstances, it is a prudent practice to write to the transferor notifying him of the proposed transfer and asking for immediate reply, failing which the transfer will be registered. See *Re Bahia and San Fransisco Co.*, L.R. 3 Q.B. 584; *Ottos Kopje Diamond Mine* (1893), 1 Ch. 618. It is a common practice on stock exchanges to insist on the signature of the transferor being guaranteed by a member of the exchange. It is also frequently proved by declaration taken before a notary public.

If no innocent holder has intervened the company he is entitled to remove the name of the fraudulent transferee from the register. *Simm* v. *Anglo-American Co.*, 5 Q.B.D. 188. Concurrent proceedings by way of injunction to restrain the fraudulent transferee from dealing with the certificate would be advisable. See also *Re Ruben* v. *Great Fingall Consolidated* (1904), 2 K.B. 712.

If the company be held liable in damages in such case the fraudulent transferee is bound to indemnify it even though he personally acted in good faith. *Corporation of Sheffield* v. *Barclay* (1905), App. Cas. 392, and see also *Bank of England* v. *Cutter*. (1907), 1 K.B. 889.

Transfers by infants can only be made in pursuance of a order of the High Court and similarly in case of shares held by a lunatic.

Dividends.

A sale of shares in the absence of any special arrangement carries with it any accruing or accrued dividend. *Black* v. *Homersham*, 4 Ex. D. 24.

After a winding-up order is made all transfers of shares except transfers made to or with the sanction of the liquidator under the authority of the Court are void. See Winding-up Act, *infra*.

Restrictions on Transfers.

48. The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the special Act, the Letters Patent or by-laws of the company may be prescribed. R.S.O., c. 191, s. 27.

If a purchaser of stock has no notice of special restrictions upon transfers contained in its by-laws he is, upon compliance with the necessary formalities, entitled to be registered as a transferee. He is not affected with notice of the contents of the company's by-laws. *Re McKain* v. *Birkbeck Co.*, 7 O.L.R. 341.

The directors of a company have no discretion to refuse to transfer fully paid shares, and cannot refuse to transfer shares not fully paid to a purchaser of apparently sufficient means unless a by-law has been passed restricting transfers. *Re Panton & Cramp Steel Co.*, 9 O.L.R. 3.

Such a by-law, however, cannot go the length of authorizing the directors to refuse to make any transfer of paid up shares. *Re Imperial Starch Co.*, 10 O.L.R. 22.

In this case the Court said that the power of the directors does not extend beyond refusing to transfer stock which has not been fully paid up. This seems to be scarcely in accord, however, with previous decisions.

And a resolution of directors closing the transfer books at the time of the annual meeting will not prevent a shareholder from obtaining a mandatory order compelling the transfer to be recorded. *Ibid.*

The directors may, however, after passing a by-law declaring a dividend close the transfer books for a period of two weeks immediately preceding the payment of the dividend. See section 51.

It has been held in the United States that such restrictions in order to possess binding force must be reasonable and that a corporation has not any power to prevent transfers from being made or to determine to whom the owner shall sell or on what terms. Helliwell on Stockholders, par. 164. And a by-law which requires the consent of all shareholders to a proposed transfer has been held invalid as against public policy and in restraint of trade. Having regard to the wording of the Ontario Act, it might seem that so long as the directors do not act in bad faith or oppressively, the Courts should not interfere. See *Shepherd's Case*, L.R. 2 Eq. 564. But the company cannot refuse to allow a transfer of shares without assigning a sufficient reason therefor. *In re Smith* v. *Canada Car Co.*, 6 P.R. 107.

Where registration is refused the transferor is a trustee for the transferee and must account to him for all dividends. *Stevenson* v. *Wilson* (1907), S.C. 445 (Ct. of Sess.).

One who purchases his shares in good faith without any notice of an infirmity in the title of his vendor is entitled to a mandatory order for the transfer of the stock on the books of the company. *Re Dominion Oil Co.*, 2 O.W.R. 826.

Delivery of Certificates.

Shares must be delivered by a vendor to his purchaser within a reasonable time. *De Waal* v. *Adler*, 12 App. Cas. 141.

Registration.

The vendor is not bound to procure the registration of the transfer in the absence of express agreement. It is sufficient

that he deliver to the purchaser a duly executed transfer together with the stock certificate. *Stray* v. *Russell*, 1 E. & E. 888; *London Founders Asso.* v. *Clarke*, 20 Q.B.D. 576; *Skinner* v. *City of London, etc., Co.*, 14 Q.B.D. 882. But should the vendor place an impediment in the way of the transfer he may be liable in damages. *Hooper* v. *Herts* (1906), 1 Ch. 549. And the fact that the delay takes place as a result of an injunction in proceedings commenced by the vendors does not alter the principle. *Boultbee* v. *Wills*, 15 O.L.R. 227. The measure of damages in such a case is the difference between the value of the shares when the purchaser ultimately got dominion over them and their value if he had them in proper time. *Hooper* v. *Herts*, *supra*.

The company is given reasonable time to make inquiries before registering a transfer. *Société Générale* v. *Walker*, 11 App. Cas. 41, but if there is no objection to the transfer, it should be registered within a period reasonable under the circumstances. See *Nelles* v. *Windsor Ry. Co.*, 11 O.W.R. 463.

Delay on the part of the company in registering the transfer will not, however, release the transferee from being placed on the list of contributories where a transfer had actually been registered before the winding up. *Sichell's Case* (1867), L.R. 3 Ch. 119, distinguished; *Re Cole and The Canada Fire and Marine Insurance Co., Close's Case* (1885), 8 O.R. 92.

Where a company had no stock book in which could be executed a regular transfer of stock, but a shareholder's name was erased from the list of shareholders and his transferee substituted, it was held that there was an entry in the books sufficient to constitute a due entry within the meaning of the act. *Hudson's Case*, 6 O.W.R. 574.

Where certain parties to whom share certificates had not been issued transferred their stock, it was held that the transferee had an immediate right to the possession of the unissued certificate and that on presentation of the assignment to him, he was entitled to a transfer of the stock into his name. The secretary could not require, before transferring the stock to a purchaser that

each person after he had assigned his stock must come in person and demand his stock certificate and when obtained hand it over to the purchaser. The assignment is in itself a transfer by the stock holder of his certificate then in the hands of the secretary. *Meyers* v. *Lucknow Elevator Co.*, 6 O.W.R. 291.

A shareholder is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. *Page* v. *Austin* (1882) 10 S.C.R. 132.

A company is estopped from denying that the person to whom a share certificate has been granted is the registered shareholder entitled to the specific shares included in the certificate; and in the case of a *bonâ fide* transferee, without notice to the contrary, that the amount certified to be paid has been paid, and this even against creditors of the company. *McCracken* v. *McIntyre* (1877) 1 S.C.R. 479.

Transmission of Shares.

In case of the death of a shareholder, his shares vest in his personal representatives. If there be more than one executor, both or all must join in a transfer and probate or administration must first be granted. See *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458; *Re Attorney-General* v. *New York Breweries* (1898), 2 Q.B. 205.

Priority.

Where two different parties claim registration of transfers from the registered holder priority of title will govern unless the latter transferee has acquired the full status of a shareholder or has had all formalities complied with before the company had notice of the prior transfer. *Moore* v. *N.W. Bank* (1891), 2 Ch. 599.

A company issued a certificate stating that a shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The certificate contained the words "transferable only on the books of the company in person or by attorney

on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment endorsed thereon. The plaintiff gave no notice to the company and did not apply to be registered as a shareholder until several months had elapsed. In the meantime, the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate. Under these circumstances, it was held that the transfer to the plaintiff conferred upon him a more equitable title which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares. *Smith* v. *Walkerville Malleable Iron Co.*, 23 A.R. 95.

Rectification of Register.

Section 116 of the Ontario Companies Act provides a summary means of redress in case of wrongful entries in or omissions from the stock register of the company and the Judge may under that section decide any question relating to the title of any person to have his name entered or omitted from such register. See *Re Panton & Cramp Steel Co.*, 9 O.L.R. 3; *Re Imperial Starch Co.*, 10 O.L.R. 22. Section 115 renders the person who knowingly makes an untrue entry in the books of the company liable in damages for any loss sustained thereby.

Apart from the relief thus afforded a mandamus will lie to compel the company to make the transfer on its books. *Smith* v. *Canada Car Co.*, 6 P.R. 107; *McDonald* v. *Mail Printing Co.*, 6 P.R. 309; *Goodwin* v. *Ottawa Ry. Co.*, 22 U.C.R. 186; *Guillot* v. *Sandwich Road Co.*, 26 U.C.R. 246. See *Nelles* v. *Windsor Ry. Co.*, 11 O.W.R., p. 467.

A distinct refusal to register the transfer is necessary before mandamus will lie, but a refusal in effect though not in direct terms would be sufficient. See also *Boulton* v. *Hugel*, 35 U.C.R. 402.

On an application for a mandatory order the applicant must shew a demand and refusal to register. Such demand may be served upon the secretary of the company. *Re Goodwin and Ottawa Ry. Co.*, 13 C.P. 254.

In case of a wrongful refusal to register, a suit in equity would lie for a decree compelling the company to register the transfer. Such decree, however, would not be made in the face of superior opposing equities nor where there has been laches nor at the instance of the donee. *Smith* v. *Bank of Nova Scotia*, 8 S.C.R. 558. A transferee may also claim damages against the company. *MacMurrich* v. *Bond Head Harbour Co.*, 9 U.C.R. 333.

MORTGAGES OF SHARES.

See provisions of section 72, *infra*.

72. No person holding shares as collateral security shall, prior to foreclosure, be personally subject to liability as a shareholder, but the person transferring such shares as collateral security shall, until foreclosed, be considered as holding the same, and shall be liable as a shareholder in respect thereof. R.S.O., c. 191, s. 39, amended.

Mortgages of shares may be made in several ways.

The shares may be transferred into the name of the mortgagee at the time of the advance and an agreement executed by which the shareholder promises to pay the mortgage money and interest and the mortgagee agrees to re-transfer on payment. Power should be given to sell in certain events. This method may be regarded as the most satisfactory for the lender. The mortgagee is not under the Ontario Act personally liable as a shareholder prior to foreclosure (section 72). And the fact that the transfer to the mortgagee is absolute in form and entered in the books of the company as an absolute transfer does not estop him from proving that the transfer was by way of mortgage. *Page* v. *Austin*, 7 A.R. 1, 10 S.C.R. 132.

The mortgagor, however, may wish to remain the apparent owner of the shares and exercise the right of voting, etc. Under these circumstances, the shareholder may deposit with the mortgagee the certificates transferred in blank together with a letter stating that the shares are charged with the payment of the

loan and interest, and that in certain events the lender may sell and fill up the transfers. This mode is more general and convenient, but does not afford absolute protection to the lender.

If the mortgagor is so disposed, he might transfer the shares to a purchaser for value without notice of the mortgage, who would acquire a good title. Further, where the shares are not fully paid up, there will be a possibility of forfeiture if the calls are not paid by the mortgagor. And the company would not have to give notice of these proceedings to the mortgagee.

If the company's by-laws create a lien on the shares for indebtedness to the company, the mortgagee may find that the company has priority. On the other hand, it is possible that there is in existence a prior transferee who may come forward and claim the shares.

As to the duty of the mortgagee to take proceedings against purchaser of stock sold by him at auction to complete the purchase. See *Daniels* v. *Noxon,* 17 A.R. 206.

LIEN.

In view of the restrictions upon transfers authorized by section 48, it would have appeared to be possible for a company by by-law to create a lien upon shares of those shareholders who are indebted to the company, by providing that no transfer shall be made until such debt should be discharged. *Bradford* v. *Briggs* (1886), 12 App. Cas. 29. But see *Re Imperial Starch Co., supra.* And see *Walkerton Binder Twine Co.* v. *Higgins,* 1 O.W.R. 403.

It was held in an early case that there was no common law lien, and the company was not justified in refusing to register a transfer of shares when the shareholder was indebted to the company. *McMurrich* v. *Bondhead Harbour Co.* (1852), 9 U.C.R. 333.

Where the shareholder has mortgaged or sold his shares nice questions may arise between the company and the mortgagee or purchaser, as to priority. (See title Transfers.)

See further as to lien *Re London and Brazilian Bank* v. *Brocklebank; Hopkinson* v. *Rolt,* 9 H.L.C. 514; *Borland's Trus-*

tees v. *Steel Bros. & Co.* (1901), 1 Ch. 279; *Everitt* v. *Automatic Co.* (1892), 3 Ch. 506.

Hints to Purchasers of Shares.

A solicitor is frequently called upon to act for a client who is buying a controlling interest in or a large block of stock in a private company. To one called upon to act in such capacity, the following hints may be of service. After the auditor's report as to the financial condition of the company has been received, the title to the real estate of the company should be examined and this is especially important in cases of mining companies. Searches as to executions, bills of sale and chattel mortgages should be made and a search at the Provincial Secretary's Department to ascertain if there is any registration of debentures or a floating charge.

The Letters Patent of the company, should, of course, be examined as well as the by-laws and any amendments to same, having special regard to the powers of the company, and the restrictions, if any, on the freedom of transfers. If the by-laws purport to create a lien for indebtedness to the company, proof should be obtained that there is no existing indebtedness by the owner of the shares to the company. If the stock is not fully paid stock, satisfactory proof should be obtained from the company as to the amount unpaid and as to the arrears of calls if any. The best evidence is to have the amount paid credited on the share certificates. If the certificates of stock are marked "fully paid" the purchaser may, if he wish, rely upon his legal right in such a case which estops the company from alleging as against him that the shares are not in reality fully paid. It is perhaps more prudent to ascertain the real state of affairs before the consideration passes. If the shares have been issued as paid up for a consideration other than cash, it may become necessary to examine the organization minutes of the company and any special agreements respecting the issue and to see that everything is regular in this respect.

Having satisfied himself about these matters and the transfer being duly executed in the form, if any, required by the by-

laws of the company, the transaction might well be closed at the head office of the company in the presence of the secretary and after being advised by him that the company had no notice of any previous transfers. Upon closing, the certificates should be lodged with the secretary with a request for new certificates in the name of the transferee.

BY-LAW RESTRICTING TRANSFERS.

1. A share may be transferred by a shareholder or other person entitled to transfer to any other shareholder selected by the transferor; but save as aforesaid and save as provided by clause 8 hereof, no share shall be transferable to a person who is not a shareholder so long as any shareholder is willing to purchase the same at the fair value.

2. Except where the transfer is made pursuant to clauses 1 and 8 hereof, the person proposing to transfer any shares (hereinafter called the proposing transferor) shall give notice in writing (hereafter called the transfer notice) to the Company that he desires to transfer same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the share to any member of the Company (or person selected as aforesaid) at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles. The transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

3. If the Company shall, within the space of thirty days after being served with such notice, find a shareholder willing to purchase the shares (hereinafter called the purchasing shareholder) and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the fair value to transfer the share to the purchasing shareholder.

4. In case any difference arises between the proposing transferor and the purchasing shareholder as to the fair value of a share, the auditor shall, on the application of either party certify in writing the sum which, in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert, and not as an arbitrator.

5. If in any case, the proposing transferor after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money, and shall thereupon cause the name of the purchasing shareholder to be entered in the register as the holder of the share, and shall hold the purchase money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing shareholder, and after his name has been

entered in the register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person.

6. If the Company shall not, within the space of thirty days after being served with the transfer notice find a shareholder willing to purchase the shares, and give notice in manner aforesaid, the proposing transferor shall at any time within three calendar months afterwards be at liberty, subject to clause 9 hereof, to sell and transfer the shares (or those not placed) to any person and at any price.

7. The Company in general meeting may make and from time to time vary the rules as to the mode in which any shares specified in any notice served on the Company pursuant to clause 2 hereof shall be offered to the shareholders, and as to their rights in regard to the purchase thereof, and in particular may give any shareholders or class of shareholders a preferential right to purchase the same. Until otherwise determined, every such share shall be offered to the members in such order as shall be determined by lots drawn in regard thereto, and the lots shall be drawn in such manner as the directors think fit.

8. Any share may be transferred by a shareholder to any other shareholder, or to any son, daughter, grandson, granddaughter, or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, wife or husband, of a member and any share of a deceased shareholder may be transferred by his executors or administrators to any son, daughter, grandson, granddaughter, or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, brother-in-law, widow or widower of such deceased shareholder (to whom such deceased shareholder may have specifically bequeathed the same) and the shares standing in the name of the trustees of the will of any deceased shareholder may be transferred upon any change of trustees to the trustees for the time being of such will, and clause one hereof shall not apply to any transfer authorized by this clause.

ANOTHER SHORT FORM.

No shareholder shall be allowed to transfer his stock until it is fully paid up unless by authority of the Board of Directors and all stock shall be transferable upon and subject to the following conditions:—

(a) If a shareholder, or in case of death, a shareholder's personal representative, hereinafter called the vendor, shall be desirous of transferring his stock or any portion of it in the Company, he shall notify the secretary of the Company stating the number of shares which he proposes to sell and the price which has been offered to him for same, or if no price has been offered, what price he is prepared to take.

(*b*) The secretary of the Company shall forthwith notify all shareholders of record at that time, giving full particulars, and no transfer of said stock or any portion of it shall be authorized by the directors or registered until after two weeks from the date of such notices being given.

(*c*) All shareholders of record at such date shall have the option of purchasing the shares so offered and the one offering in writing the highest cash price for same shall become the purchaser provided that no offer shall be received after two weeks from the date of sending out said notices.

(*d*) All offers for said shares shall be forwarded in writing to the secretary of the Company.

(*e*) If none of the shareholders of the Company offer as above provided a price equal to or greater than that stated by the vendor as his selling price, then the vendor may sell to one not a shareholder, and the directors are authorized to register a transfer of said block of stock to one not already a shareholder of record in the Company.

(*f*) Provided, however, that if it appears that the sale of shares has in reality been made to one outside the Company, at a less price than that mentioned by the vendor in his notification to the secretary, the directors shall not register the transfer of said block of stock.

ANOTHER SHORTER FORM.

No shareholder shall have the right to sell or transfer any of his stock in the Company or to have a transfer of same recorded without first giving notice to all of the directors in writing of his desire to sell same, whereupon they shall have the right within two weeks from giving such notice to purchase the said shares in the Company at the par value thereof plus the proportionate part of the undivided profits, if any, shewn by the last preceding balance sheet or less the proportionate part of the depreciation of the capital stock, if any, shewn by such balance sheet as the case may be. And in such case if more than one director is desirous of purchasing, all the said directors desirous of purchasing shall be entitled to purchase portions of said stock pro rata according to the amount of their holdings of paid up stock in the Company at such date.

This provision shall apply in case of death of a shareholder, to the personal representative of such shareholder.

FORM OF TRANSFER OF STOCK FOR BACK OF CERTIFICATE.

For value received hereby sell assign and transfer unto shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated 19 .

In presence of

NOTICE.—The signature to the assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

CHAPTER XIV.

MEETINGS.

34.—(1) The provisional directors of a company not offering shares for public subscription, shall call a general meeting of the company to be held at a convenient place within two months from the date of the Letters Patent for the purpose of electing directors, appointing auditors, sanctioning the by-laws of the company, and transacting such other business as may be necessary to enable the company to carry on its undertaking, and shall, at least ten days before the day on which such meeting is held, give notice of such meeting by registered letter addressed to each shareholder, setting out in detail the business to be transacted and matters to be considered thereat.

(2) The provisional directors shall report to such meeting the number of shares subscribed or underwritten; the names of the subscribers or underwriters; the amount paid thereon; all contracts entered into by or on behalf of the company; the amount of the preliminary expenses and a financial statement of the affairs of the company signed by the auditors (if any). New.

(3) If the said meeting is not called by the provisional directors as aforesaid, any three or more shareholders of the company may call the meeting. R.S.O., c. 191, s. 16, amended.

44. All meetings of the shareholders and directors shall be held at the place of the head office of the company, save and except when the company is authorized by the special Acts, Letters Patent or Supplementary Letters Patent, to hold meetings of shareholders or directors out of Ontario.

36.—(1) The annual meeting of the shareholders of the company shall be held at such time and place in each year as the special Act, Letters Patent, or by-laws of the company may provide, and in default of such provisions in that behalf the annual meeting shall be held at the place named in the Letters Patent as the place of the head office of the company, on the fourth Wednesday in January in every year.

(2) At such meeting the directors shall lay before the company,

(*a*) A balance sheet made up to a date not more than three months before such annual meeting;

(*b*) A statement of income and expenditure for the financial period ending upon the date of such balance sheet;

(*c*) The report of the auditor or auditors;

(*d*) Such further information respecting the company's financial position as the Letters Patent or the by-laws of the company may require;

and, on resolution affirmed by shareholders holding at least five per centum of the capital of the company, shall furnish a copy thereof to every shareholder personally present at such meeting and demanding the same.

(3) The balance sheet shall be drawn up so as to distinguish at least the following classes of assets and liabilities, namely:—

(*a*) Cash;
(*b*) Debts owing to the company from its customers;
(*c*) Debts owing to the company from its directors, officers and shareholders;
(*d*) Stock in trade;
(*e*) Expenditures made on account of future business;
(*f*) Land, buildings and plant;
(*g*) Goodwill, franchises, patents and copyrights, trade marks, leases, contracts and licenses;
(*h*) Debts owing by the company secured by mortgage or other lien upon the property of the company;
(*i*) Debts owing by the company but not secured;
(*k*) Amount received on common shares;
(*l*) Amount received on preferred shares;
(*m*) Indirect and contingent liabilities.

(New.)

37. The directors may and upon a requisition made in writing by the holders of not less than one-tenth of the subscribed shares of the company shall, convene a special general meeting of the company, to transact the business set out in the notice calling such meeting. R.S.O., c. 191, s. 52, amended.

38. Upon the receipt of such requisition, which shall set out the objects for which such meeting is proposed to be called and shall be left at the head office of the company, the directors shall forthwith proceed to convene a special general meeting. If they do not cause the same to be held within twenty-one days from date upon which the requisition was left at the head office of the company, any shareholders, holding not less than one-tenth in value of the subscribed shares of the company whether they signed the requisition or not, may themselves convene such special general meeting. R.S.O., 1897, c. 191, ss. 53, 54.

111.—(1) Every company 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 shareholders of the company, which shall be called the statutory meeting.

(2) The directors shall, at least ten days before the day on which the meeting is held, forward to every shareholder of the company a report certified by not less than two directors of the company, stating:—

(*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 and payments of the company on capital account to the date of the report, and an account or estimate of the preliminary expenses of the company;

(*d*) The names, addresses and descriptions of the directors, auditors (if any), manager (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.

(3) The 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.

(4) The directors shall cause a copy of the report, certified as by this section required, to be filed with the Provincial Secretary forthwith after the sending thereof to the members of the company.

(5) The directors shall cause a list shewing the names, descriptions and addresses of the shareholders 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 shareholder of the company during the continuance of the meeting.

(6) The shareholders 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 report, whether previous notice has been given or not, but no resolution of which notice has not been duly given may be passed.

(7) The meeting may adjourn from time to time, and at any such adjourned meeting any resolution of which notice has been duly given, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(8) If default is made in filing such report as aforesaid or in holding the statutory meeting, then at the expiration of fourteen days after the last day on which the meeting ought to have been held any shareholder may petition the Court for the winding up of the company in the manner hereinafter provided in that behalf, and, upon the hearing of the petition, the Court may either direct that the company be wound up or give directions for the report being filed or a meeting being held, or make such other order as may be just, and may order that the costs of the petition be paid by any persons who, in the opinion of the Court, are responsible for the default. Imp. Act, 1900, 12.

112. This part of this Act shall apply to all companies offering shares for public subscription and shall not apply to a company incorporated before the commencement of this Act.

The shareholders' meeting, speaking generally, may be regarded as the supreme forum of the company.

Under the Ontario Act, however, it has been held that the provisions vesting in the directors power to make by-laws respecting certain matters impliedly remove these from the control of the shareholders. *Kelly* v. *Electrical Construction Company*, 10 O.W.R. 704. See section 87.

NOTICE.

No important business should be transacted at a meeting which is not specified in the notice calling the meeting. The powers of the meeting are limited by the scope of the notice. Nor does the fact that the meeting has been adjourned authorize the transaction of any business at the adjourned meeting that could not have been transacted at the original meeting. *Christopher* v. *Noxon*, 4 O.R., at p. 685; *Waddell* v. *Ontario Canning Co.*, 18 O.R. 41; *Kaye* v. *Croydon Tramways Co.* (1898), 1 Ch. 358.

As to who are shareholders, the register, of course, must govern. Reasonable notice must be given of all meetings and two days' notice was held sufficient in this case. See *Morley Building Co.* v. *Barras* (1891), 2 Ch. 386.

The Ontario Companies Act provides that in the absence of express provisions in the Act, Letters Patent or by-laws of the company, ten days' notice must be given.

The notice must specify the place, day and hour of the meeting, and where anything, other than routine business is to be transacted, it should be specified.

Routine business at an annual meeting may be taken to be the consideration of accounts, reports, and the election of directors, but reference must be had to the by-laws in each case. *Kaye* v. *Croydon Tramways Co.* (1898), 1 Ch. 358.

Special business may, of course, be brought before the annual meeting if the notice specifies it. *Graham* v. *Van Dieman Land Co.*, 26 L.J. Ch. 73.

Notices are construed in their ordinary sense and as a business man would understand them. *Alexander* v. *Simpson*, 43 C.D. 139. The words "special business" are frequently inserted to cover matters of which it is not thought desirable to give notice, but have been held to be insufficient. *Marsh* v. *Huron College*, 27 Gr. 605; *Wills* v. *Murray*, 4 Ex. 843. Though the Courts will not construe a notice with strictness. *Torbock* v. *Lord Westbury* (1902), 2 Ch. 871; *Wright's Case*, 12 Eq. 331.

If a course of action is indicated in the notice and only a portion of it is adopted, the action at the meeting is irregular. *Clinch* v. *Financial Corporation*, 5 Eq. 450; *Re Teede and Bishop*, 84 L.T. 561; *Ashbury* v. *Rische*, L.R. 7 H.L. 653.

If it is proposed to ratify a contract in which directors are interested, attention should be called to this in the notice. *Tiessen* v. *Henderson* (1899), 1 Ch. 861.

A contingent notice is not good. *Alexander* v. *Simpson*, 43 Ch. 139.

Every shareholder is entitled to notice, and the omission to give notice invalidates the meeting. It is accordingly wise to provide in the by-laws that accidental omission to give notice will not invalidate the meeting. See *Smythe* v. *Darley*, 2 H.L.C. 789.

A meeting should be called by the Board of Directors or by the officer authorized by the by-laws to do so, otherwise it is bad, unless ratified subsequently. *Haycroft Gold Reduction Co.* (1900), 2 Ch. 230; *Harben* v. *Phillips*, 23 C.D. 14; *Hooper* v. *Kerr, Stewart Co.*, 83 L.T. 729; *British Asbestos Co.* v. *Boyd* (1903), 2 Ch. 439.

A notice of a general meeting sent out by the secretary of the company without the sanction of the directors or under the authority of the by-laws has been held bad. *Re State of Wyoming Syndicate* (1901), 2 Ch. 431. But such a notice may be validated by resolution of the directors before the meeting takes place. *Hooper* v. *Kerr, Stewart Co., supra.*

The fact that a shareholder attended a meeting called illegally and entered upon a defence of himself there, does not prevent his afterwards filing a bill impeaching the proceedings as irregular and invalid. *Marsh* v. *Huron College*, 27 Gr. 605, and see *Cannon* v. *Toronto Corn Exchange*, 5 A.R. 268.

A shareholder who has proposed a resolution that the meeting be held at a different time than that appointed, is estopped from making any objection to such meeting or to the validity of anything that transpired there on that score. Further it has been held that where several plaintiffs are objecting to the validity of an act of the company done under such circumstances and one of them is barred by his conduct the others are likewise estopped from taking the objection. *Christopher* v. *Noxon*, 4 O.R. 680.

See also *Normandy* v. *Ind.*, 24 T.L.R. 57.

Proxies.

The right to vote by proxy is a statutory right. *Harben* v. *Phillips*, 23 C.D. 32. See section 43. It is usually dealt with in the by-laws of the company and frequently the form of proxy is defined. In many cases, it is advisable to provide that proxies must be filed with the secretary of the company a stated time before the time fixed for the meeting. In other cases it is well to provide that the proxy must be himself a shareholder in the company. Where a proxy is given by a corporation, it should be under the seal of the corporation. A proxy may be signed in blank, and if the blank has been properly filled up, it must be taken as regular. *Ernest* v. *Loma Co.* (1897), 1 Ch. 1.

Where a shareholder who has given a proxy attends himself, the proxy is not nullified. If the shareholder votes before the proxy, his vote must be accepted and the proxy is, of course, nullified to this extent.

Where there has been a transfer of shares of stock which has not been registered in the books of the company a proxy from the registered owner is sufficient and a *fortiori* where both the registered and beneficial owners of the shares sign a proxy, it

cannot be questioned by the other shareholders or any of them. *Stephenson* v. *Vokes*, 27 O.R., p. 696.

The improper rejection of proxies is good ground for setting aside an election of directors. *Kelly* v. *Electrical Construction Co.*, 10 O.W.R. 704.

Quorum.

The Act is silent as to a quorum at a shareholders' meeting. If a quorum is not present, all proceedings at the meeting are invalidated, although they may be subsequently ratified at a regularly called meeting for that purpose. *Re Romford Canal Co.*, 24 C.D. 85.

In the absence of provisions in the by-laws, two shareholders may constitute a quorum, but one shareholder cannot constitute a meeting, no matter how many proxies he may hold. *Sharpe* v. *Daws*, 2 Q.B.D. 26.

Where a by-law specified that a quorum should consist of five members, representing one-third of the capital stock of the company, it was held that this must mean one-third of the subscribed and not the nominal capital. *Austin Mining Co.* v. *Gemmell* (1886), 10 O.R. 696.

Adjournment.

40. The chairman may with the consent of the meeting and subject to such conditions as the meeting may decide, adjourn any meeting from time to time and from place to place. R.S.O., c. 191, s. 60.

The chairman may, with the consent of the meeting, adjourn the meeting from time to time and place to place, and from the wording of the Act, it would seem that a discretion is vested in the chairman and he is not bound to exercise it even if a resolution is passed to that effect by the meeting. *Salisbury Gold Mining Company* v. *Hathorn* (1897), A.C. 268.

Where a chairman has adjourned the meeting, it cannot be continued by the shareholders who remain behind. *Rex* v. *Gaboriau*, 11 East 77.

If, however, a chairman makes an improper adjournment, the meeting may elect another chairman and proceed with the business. *National Dwellings Society* v. *Sykes* (1894), 3 Ch. 159.

A notice need not be given of an adjourned meeting as it is simply a continuation of the former meeting, but if it is desired to bring any new matters of business before the adjourned meeting, notice should, of course, be given. *Wills* v. *Murray*, 4 Ex. 843.

Five out of nine provisional directors of a company met at Winnipeg, four of them being a quorum, in pursuance of a valid notice under the statute and adjourned to a time and place named in Toronto where, without the notice required by the company's charter, six directors met in pursuance of such adjournment, it was held that the second meeting was not regularly constituted.

The Court was of opinion that the first meeting was a nullity and consequently the adjournment to the second meeting was a nullity and notice of the new meeting was as much a necessity as if there had been no adjournment of the first meeting. *McLaren* v. *Fisken*, 28 Gr. 352.

Ratification.

If a meeting has been called irregularly the Court will not restrain the transaction of business on account of the irregularity as a fresh meeting may be called and the matters ratified. *Foss* v. *Harbottle*, 2 Ha. 461; *Browne* v. *La Trindad*, 37 C.D. 1.

Where, in a directors' meeting certain persons protested against a transaction on the part of the officers of the company, but at a subsequent shareholders' meeting did not protest so as to call for the opinion of the shareholders, but allowed themselves to be elected as directors and concurred in the management of the company for two years after, this was held to be such ratification as to amount to an estoppel. *Thompson* v. *Canada Fire Insurance Co.*, 9 O.R., p. 284, and see *De Bussche* v. *Alt*, 8 C.D. p. 286.

To ratify a transaction of a kind which is within the corporate powers, it is not required that all the shareholders should approve; all the acts within the powers of the body are sufficiently effected by a majority. That the will of the majority should in all cases be taken as the will of the whole is an implied but essential stipulation in all joint stock companies. The company itself cannot be permitted to question the transaction afterwards, much less can a dissatisfied minority. *Christopher* v. *Noxon*, 4 O.R., p. 684.

Chairman.

39. The president of the company shall preside as chairman at every general meeting of the company; if there is no president or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the shareholders present shall choose some one of their number to be chairman. R.S.O., c. 191, ss. 58, 59.

41. At any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried and an entry to that effect in the proceedings of the company, shall be *primâ facie* evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution. R.S.O., c. 191, s. 61.

The chairman should keep order and see that the business is regularly transacted. *Wall* v. *London and Northern Assets Corporation* (1898), 2 Ch. 469.

The chairman in adjourning a meeting, must act regularly and cannot take advantage of his power to close the meeting prematurely. In a case of this kind a meeting may declare such action irregular and proceed with the business. *National Dwellings Co.* v. *Sykes* (1894), 3 Ch. 159.

At a general meeting, matters of business are generally transacted by passing resolutions. Discussion is, of course, in order on each resolution, and unless a poll is demanded, which may be done by one shareholder, the sense of the meeting is usually determined by a shew of hands. The chairman is given a casting vote by section 42 of the Ontario Companies Act, but in the absence of express provision, he has only one vote. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O.R., p. 184.

The chairman should, upon a poll being demanded, fix the time and place for taking same, which generally speaking should be forthwith. See *Chillington Iron Co.*, 29 C.D. 159.

The poll may be taken by ballot or signing the roll or otherwise, and a member coming in after a poll is demanded, but before it is taken, is entitled to vote on the question. *Campbell* v. *Maund*, 5 A. & E. 865.

The chairman is not entitled to close the poll while voters are coming in and the meeting subsists until the poll has been taken. *Regina* v. *Wimbledon*, 8 Q.B.D. 459.

The exclusion of a shareholder may be sufficient to invalidate a poll. A subsequent day may be appointed for taking a poll, but this is not an adjournment. *Regina* v. *Chester*, 1 Ad. & E. 342. See also *McMillan* v. *Le Roi* (1906), 1 Ch. 331. A proxy has no right to demand a poll. *Re Haven Mining Co.*, 20 C.D. p. 157.

Resolutions.

A declaration by the chairman that a resolution is carried and an entry in the minutes to this effect is *primâ facie* evidence that such is the case. See Ontario Companies Act. Section 41.

In view of the wording of the Act, it would seem advisable that after setting out a resolution in the minutes, words should be inserted to indicate that the chairman declared same carried or lost.

If the resolution shews on the face of it that it is not passed by the necessary majority, the chairman's declaration to the contrary will not, of course, avail. *Caratal Mines Limited* (1902), 2 Ch. 498.

Discussion.

There is only a qualified right of discussion at meetings of shareholders and the majority may resolve to vote and the chairman may apply the closure with the consent of the meeting at any time. *Wall* v. *London & Northern Assets Corporation* (1898), 2 Ch. 469.

Proceedings at a meeting of shareholders are to a certain extent privileged, and if the matters are stated which affect the general interest of the shareholders, an action for slander will not lie at the suit of a director or shareholder, even though the matter stated might have otherwise been defamatory. *Parsons* v. *Surgey*, 4 F. & F., N. P. Cases, 247.

If, however, the shareholder who publishes the defamatory matter, has brought any of the public to the meeting, or is responsible for them being there, the privilege is gone. A report given to the press of such proceedings is not privileged, although the report may be printed and distributed among the shareholders without destroying the privilege. *Laughton* v. *Bishop of Sodor*, 4 P.C. 495; *Popham* v. *Peckham*, 7 H.N. 891.

Amendments.

Where the notice calling the meeting, or the resolution proposed is in general terms, considerable latitude is allowed as to amendments, but an amendment must be relevant and must reasonably come within the scope of the notice. *Re Teede & Bishop Ltd.*, W.N. (1901), 52; *Wall* v. *London & Northern Assets Corporation* (1898), 2 Ch. 469.

It has also been held that where notice is given of a meeting to ratify any particular agreement, the agreement may be ratified with modifications provided that they do not make the agreement more onerous on the company. *Wright's Case*, 12 Eq. 331, at p. 341.

An amendment need not be seconded unless the by-laws so provide. *Re Horbury Bridge*, 11 Ch.D. 109, and, if the chairman refuses to allow a proper amendment to be put in the belief that it is out of order or *ultra vires*, the adoption of the resolution may be irregular. *Henderson* v. *Bank of Australasia*, 45 C.D. 330.

Failure to appeal from the ruling of the chairman in such a case is not a waiver of the right to question the resolution subsequently. *Ib.*

See also *Wright* v. *Incorporated Synod of the Diocese of Huron*, 29 Gr. 348, 9 A.R. 411, 11 S.C.R. 95.

Scrutineers.

Candidates for a Board of Directors should not act as scrutineers in elections, as there is a plain conflict between interest and duty, and where the scrutineers with the aid of legal advice interpreted an instrument under which a shareholder had advanced a large sum of money to start the company and which provided for further disposition of the shares of the company held by the plaintiff as security for his advance and allowed certain other persons to vote as being *cestui que trusts* of a portion of the shares, the election was set aside with costs to be paid by the directors acting as scrutineers. *Dickson* v. *Murray*, 28 Gr. 533.

Setting Aside Election.

The Court has jurisdiction to set aside an election upon proper grounds being shewn and will do so where persons voted at election who were nominally subscribers, but in reality were not *bonâ fide* subscribers. *Davidson* v. *Grange*, 4 Gr. 377.

Votes and Majority.

42. If a poll is demanded, it shall be taken in such manner as the by-laws prescribe, and in case the by-laws make no provision therefor, then as the chairman may direct. In the case of an equality of votes, at any general meeting, the chairman shall be entitled to a second or casting vote. R.S.O., c. 191, s. 62.

43. Subject to the special Act, Letters Patent or by-laws of the company, at all general meetings of the company every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy, but no shareholder being in arrear in respect of any call shall be entitled to vote at any meeting of the company. R.S.O., c. 191, ss. 63, 64, amended.

A shareholder is entitled to one vote for each share he holds, although in a case of preferred stock the Letters Patent or by-laws constituting same, may limit this right. In the case of a dispute as to the right to vote, the stock register governs. *Pender* v. *Lushington*, 6 C.D. 70.

The motive of a shareholder casting his vote will not be inquired into and a majority shareholder is free to use his votes to

ratify a transaction which is for his own benefit, and to the detriment of the company. *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589; *Burland* v. *Earle* (1902), App. Cas. 83.

A shareholder may bind himself by contract to vote or not to vote upon a given question in a certain manner. *Greenwell* v. *Porter* (1902), 1 Ch. 530.

Where, at a meeting of shareholders, the legal right of voting is impaired or denied, the Court will interfere to set aside the election. This right to the intervention of the Court may be lost by acquiescence, however, and where, after an election in which each person present was allowed one vote irrespective of the number of shares held by him, but the election had been acted upon for more than eight months, the Court refused to interfere by mandamus. *Re Moore and Port Bruce Harbour Company*, 14 U.C.R. 365.

The fact that shares of stock have been purchased with a view of increasing the voting power of a shareholder or section of the shareholders or with a view to influence the election of officers is no ground for interference by the Court, and while an election of officers obtained by trick or artifice cannot be considered a *bonâ fide* election, yet when the shares have been regularly acquired according to the formalities prescribed by statute and the by-laws of the company, the fact of their being purchased with a view to increasing the holder's voting power is immaterial. *Toronto Brewing & Malting Co.* v. *Blake*, 2 O.R. 175; *Christopher* v. *Noxon*, 4 O.R. 672.

The shareholder who is in arrears for unpaid calls is absolutely debarred from voting at a shareholders' meeting. *Christopher* v. *Noxon*, 4 O.R. 672.

Where the holder of a large number of shares of a company had been restrained by an interim injunction from voting on his shares pending the result of an action, and in the meantime, the meeting of shareholders was held and directors elected, the Court refused to set aside the election of directors. It was said that the shareholders might have applied to the Court for an injunction against the election proceeding or to have the injunc-

tion against him suspended so far as to allow him to vote for an adjournment of the meeting, but having done neither and neglected such ordinary precautions he was not entitled to have the election set aside. *Beaudry* v. *Read*, 10 O.W.R. 622.

Minutes.

Minutes of meetings are not the only admissible evidence, and a transaction may be established as against the company, although there is no record of it in the minutes. *Re Pyle Works* (1891), 1 Ch. 173, and an allotment has been allowed to be proved, although there was no record of it in the minutes. *Re Great Northern Salt Co.*, 44 C.D. 472.

The rule of *omnia rite acta præsumuntur* is applied to company minutes, and entries which, if not based on resolutions would be irregular, afford *primâ facie* evidence of the resolutions. *Re Knight*, L.R. 2 Ch. 321.

It has been held that the signature of the chairman to minutes which set out a contract may be sufficient to comply with the Statute of Frauds. *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314.

Reading and confirmation of minutes of a prior directors' meeting does not make those present responsible for what was done at such prior meeting. *Re Lands Allotment Company* (1894), 1 Ch. 616. *Re National Bank of Wales* (1899), 2 Ch. 675.

It is customary to sign the minutes of a meeting at the next succeeding meeting, but there is nothing to prevent the chairman from signing before the succeeding meeting is held. *Southampton Dock Co.* v. *Richards*, 1 M. & G. 448.

After minutes have been written up and signed no alterations should be made in them. *Re Crawley & Co.*, 42 C.D. 226.

Rights of Majority.

Speaking generally the majority of the shareholders can exercise the powers of the company and control its operation.

A two-thirds majority is required in certain cases, for example, to ratify a by-law for borrowing money.

In *Foss* v. *Harbottle*, 2 Ha. 461, it was held that the Court would not interfere at the instance of the minority in connection with matters that might be validated by the ratification of the majority.

If a matter complained of is one 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 the majority of the company are entitled to do legally there is no use having litigation about it, the ultimate end is no doubt that a meeting is to be called and then the majority gets its wishes. *Per* Mellish, L.J., in *McDougall* v. *Gardiner*, 1 C.D. 13; *Harben* v. *Phillips*, 23 C.D. 14.

The majority of the shareholders, however, cannot sanction anything that is *ultra vires* of the company. *Burland* v. *Earle* (1902), A.C. 83.

Nor is the majority entitled to commit a fraud on the minority. *Menier* v. *Hooper's Telegraph Works*, L.R. 9 Ch. 350; *Burland* v. *Earle* (1902), A.C. 83; *Allen* v. *Gold Reefs Co.* (1900), 1 Ch. 656.

AGENDA OF ANNUAL MEETING OF SHAREHOLDERS.

1. On motion, the President, Mr. takes the chair and Mr. acts as Secretary of the meeting.

2. Reading notice calling meeting by Secretary and declaration of mailing same.

3. Report of the Secretary-Treasurer as to the shareholders present or represented by proxy.

(It is sufficient for the Secretary to state the total number of shares present in person, total number represented by proxy, or he may lump them together. Secretary should have with him an alphabetical list of the shareholders of the Company.)

Number necessary to constitute quorum is shares.

4. Reading minutes of last preceding shareholders' meeting.

(The only question upon which discussion is permitted is, are the minutes correct records of what transpired.)

5. Motion that minutes as read be confirmed.

6. Confirmation of by-laws and resolutions passed by directors since last annual meeting.

(*a*) Ratify resolution of directors. Page .

(*b*) Ratify by-law number defining duties of Treasurer, etc. Page .

7. Reception of reports.

(*a*) Report of President.

(*b*) Reports of Treasurer and Auditors.

A motion is in order that the report be received and adopted. This being moved, the report is open for discussion.

8. Votes should be taken by shew of hands, unless a poll is demanded. If a poll is demanded, chairman shall prescribe the manner in which it shall be taken unless otherwise specified in the by-laws.

9. Election of Directors.

(*a*) Chairman states nominations are in order.

(*b*) Nominations made.

(*c*) Motion that Secretary deposit a ballot for those nominated.

10. Unfinished business.

11. New business.

(*a*) Election of Auditors.

NOTICE OF SHAREHOLDERS' MEETING.

Take notice that the Annual General (or Special General) Meeting of shareholders of the Industrial Company, Limited, will be held at the head office of the Company, in the City of Toronto, on Monday the day of 1908, at o'clock a.m.

Business.

The reception of report of the Secretary-Treasurer of the Company; reception of report of the President of the Company in regard to the operations of the Company for the past year; the consideration and if deemed advisable, the ratification of the agreement entered into between the Company and A.B. for the sale to and the purchase by the Company of any business at the present carried on by C.D.

The consideration and if deemed advisable the ratification of the transactions of the Board and Directors since the day of January last, since which date the Board has acted without a proper quorum.

And all such other business of a special or general nature as may be brought before the meeting and which the shareholders may be empowered by law to deal with.

Dated at Toronto the day of 1908.

Witness: } Signed.

President.

Secretary-Treasurer.

WAIVER OF NOTICE.

Know all men by these presents that I, C.D. of the City of Toronto in the Province of Ontario, Esquire, being the shareholder of shares of stock of the Industrial Company, Limited, have waived notice and by these presents do hereby waive notice of the Annual General (or Special General) Meeting of the shareholders of the Company to be held at the head office of the Company at Toronto on the day of at o'clock, for the following purposes:—

(Here set out in detail the business which the shareholder is agreeable that the Company shall transact at this meeting.) Or to any business being transacted at such meeting which the Company may have power to transact in a General Meeting of shareholders.

I, hereby ratifying and confirming anything that may be done in the premises.

Dated at the day of 1908.

Witness: } Signed.

PROXY.

Know all men by these presents that I, A.B. of the City of Toronto in the Province of Ontario, being a shareholder of shares of Industrial Company, Limited, have appointed and do hereby appoint C.D. of the City of Toronto or such person being a shareholder of such Company as he may nominate in writing, as my proxy, to vote and act for me and in my behalf at the Annual General Meeting of shareholders of the Company, or as the case may be to be held at the head office of the Company on the day of next.

As witness my hand and seal this day of 1908.

Witness: } Signed.

GENERAL WAIVER OF NOTICE.

Know all men by these presents that I., etc., hereby waive notice of all meetings of shareholders whether general or special, of (Industrial Company, Limited), which may be held at any time after this date and consent to any business being transacted thereat, which may be lawfully transacted by the shareholders in meeting assembled.

This waiver of notice shall be good until revocation of same in writing shall have been filed by me with the Secretary-Treasurer of the Company.

Dated at Toronto the day of 1908.

Witness: } Signed.

REQUISITION BY SHAREHOLDERS FOR SPECIAL MEETING.

To the Directors of Industrial Company, Limited:

Take notice that the undersigned shareholders of Industrial Company, Limited, being the holders of one-tenth of the subscribed capital of such Company, hereby require you within twenty-one days from the date upon which this requisition shall be filed at the head office of the Company, to convene a Special General Meeting of shareholders of the Company for the purpose of considering and taking action upon the following matters, viz.:

(Here set out business to be transacted.)

This notice is given pursuant to section 37 of the Ontario Companies Act.

Dated at Toronto the day of 1908.

Witness: } Signed.

NOTICE BY SHAREHOLDERS CONVENING SPECIAL GENERAL MEETING.

Take notice that we, the undersigned shareholders of Industrial Company, Limited, holding in the aggregate one-tenth of the subscribed capital stock of such Company, by virtue of the powers vested in us by section 38 of the Ontario Companies Act, hereby convene a Special General Meeting of the shareholders of such Company.

And take further notice that such meeting will be held at the head office of the Company, at Toronto on the day of 1908, at o'clock.

Business:

(Here set out the objects for which the meeting is called.) (These should be set out explicitly.)

Dated at the day of 1908.

Witness: } Signed.

ORGANIZATION MINUTES.

MINUTES OF MEETING OF PROVISIONAL DIRECTORS OF THE INDUSTRIAL COMPANY, LIMITED, HELD AT THE OFFICE OF THE COMPANY, TORONTO, ON THE DAY OF AT O'CLOCK A.M.

Under the present Ontario Companies Act, there must be three directors at least present at each meeting; none of these directors shall be dis-

qualified by interest or otherwise from voting or acting (see sections 81 and 89).

All the provisional directors of the Company being personally present, notice calling the meeting was waived. Or, the notice calling this meeting was read and the statutory declaration of as acting Secretary proving the proper mailing of same and these were directed to be filed.

Letters Patent (or Charter) of the Company were presented by the chair, with a statement that all the requirements of law with respect to obtaining same had been complied with. It was ordered that a certified copy of same be entered on the first pages of the minute book to precede the entry of any minutes.

Mr. was chosen to preside and called the meeting to order and Mr. was chosen Secretary of the meeting.

By-law number one being a by-law containing the general regulations of the Company was read and passed and the Company's seal was affixed thereto.

By-law number 2 being a by-law respecting the transfer of shares was read and passed and the Company's seal affixed thereto.

A draft agreement between A. and B. carrying on business in the City of Toronto under the firm name and style of B. & Co., as manufacturers and dealers, wholesale and retail, in all kinds of electrical supplies, and iron and other metal products, and this Company of the second part for the sale to the Company of such business and the assets and goodwill thereof was submitted to the meeting.

Mr. A. and Mr. B. being provisional directors of the Company advised the other provisional directors of their interest under the agreement and made full disclosure in regard to same and this was carefully considered. The agreement was approved by the unanimous vote of the other provisional directors, subject however to the ratification of the shareholders of the Company. Messrs. A. & B. refraining from voting.

A report was read by the chairman shewing the number of shares subscribed and underwritten; the names of the subscribers and underwriters; the amount paid thereon, the amount of preliminary expenses and a financial statement of the affairs of the Company (signed by the auditors if any). The report also dealt with the above mentioned contract and certain other contracts viz.: (insert) being all the contracts entered into up to the present time by the Company or provisional directors on behalf of the Company (see section 34 Ontario Companies Act).

Where no notice has been sent out for the shareholders' meeting, insert the following:—

Ordered that if all the shareholders attend in person or by proxy, a general meeting of shareholders of the Company be held on this day for the confirmation of by-laws this day passed; the election of the Board of Directors and the consideration of the proposed agreement with B. above referred to and especially for the consideration of Clause No. of by-law number one authorizing the directors to borrow money upon the

credit of the Company, and to issue bonds, debentures and other securities and to pledge or sell the same, and to hypothecate, mortgage or pledge the real or personal estate of the Company, and also for the transaction of such other business as may be transacted at a general meeting of the shareholders. The meeting then adjourned.

(Signed.)

Chairman.

Acting Secretary.

Note: The by-laws should be passed by the directors or provisional directors of the Company, not by the shareholders. They should, however, be ratified by the shareholders.

MINUTES OF MEETING OF SHAREHOLDERS OF THE INDUSTRIAL COMPANY, LIMITED, HELD AT THE OFFICES OF THE COMPANY THE DAY OF 1907, AT O'CLOCK A.M.

Present: A., B., C., etc.

All the proxies held by persons present were filed with the Secretary and were by him examined and found to be in due form and the signatures were found to be genuine.

The Secretary then presented a copy of the notice pursuant to which the meeting was held, together with statutory declaration proving due mailing to all the shareholders of the Company. Said notice was ordered to be spread upon the minutes and is as follows:—

(Here insert the notice.)

The original notice with declaration were directed to be filed.

(If no notice has been sent out insert:—

All the shareholders of the Company being personally present or duly represented by proxy, notice calling the meeting was waived, and the meeting was declared to be the first general meeting of shareholders of the Company for the purpose of doing all things necessary or advisable to effect the organization of the Company.)

Mr. M. acted as chairman and Mr. G. acted as Secretary of the meeting.

It was moved by and seconded by that by-laws number one and two passed by the provisional directors this day and now submitted to the meeting be ratified and approved, such by-laws being as follows:—

By-law number one being a by-law containing the general regulations of the Company.

By-law number two being a by-law respecting the transferring of shares.

The resolution on being put, was carried unanimously.

The draft agreement between A. and B. and the Company for the transfer of the business at present carried on by B. & Co., in the City of Toronto, as manufacturers and dealers, wholesale and retail, in electrical supplies

of all kinds, and iron and other metal products, was submitted to the meeting.

After careful consideration, it was decided unanimously that the said agreement be approved of and that the directors of the Company be authorized to enter into and carry out the same; to assume the liabilities referred to therein and to pay the consideration therein specified.

A ballot was then taken for the election of the directors of the Company, and the following were thereupon found to be elected directors for the ensuing year.

(Note: The number of directors provided for in the by-laws and elected at this meeting should correspond with the number of provisional directors named in the Letters Patent.)

There being no further business, the meeting adjourned.

MINUTES OF MEETING OF DIRECTORS OF THE INDUSTRIAL COMPANY, LIMITED, HELD AT THE OFFICE OF THE COMPANY, IN THE CITY OF TORONTO, ON DAY OF .

Present: Messrs. A.B., etc.

Insert clauses to notice, waiver, etc., as in minutes of provisional directors' meeting.

The election of officers of the Company was proceeded with and the following were duly elected.

President.

Vice-President.

Secretary-Treasurer.

The agreement with Messrs. A. & B. referred to in the preceding meeting of shareholders and provisional directors for the transfer by the said A. and B. to the Company of the assets and goodwill of the business carried on by the in the City of Toronto as manufacturers and dealers, wholesale and retail in electrical supplies of all kinds, and iron and other metal products, was, pursuant to the resolution passed at the shareholders' meeting held this day, executed by the proper officers of the Company.

The following transfers of stock were approved of by the Board and directed to be entered in the transfer book and in the meantime, the entry upon these minutes to stand as registration of such transfer;—

A resolution was passed pursuant to the terms of the agreement whereby 1,000 shares of stock of the Company were allotted to A. and B. jointly, and the officers of the Company were directed to issue certificates for same forthwith.

In further pursuance of the terms of the said agreement, a resolution was passed assuming the liabilities of the said business of A. & B. being in all $ and the officers of the Company were authorized, if they deemed fit, to notify the various creditors of the Company, to this effect.

The following accounts were approved and directed to be paid:—

Preliminary expenses as per statement submitted at meeting of provisional directors $

Rent, etc., $

A draft lease of a warehouse was submitted but no action was taken in connection with same.

There being no further business, the meeting adjourned.

Organization Minutes of Public Companies.

In view of the requirements of the Ontario Companies Act regarding companies offering shares for public subscription, it must be shewn at the organization meeting of the company that these requirements have been met. It would appear that the minutes should indicate, among other matters, the following:

1. Before an allotment takes place that the total subscription not less than the minimum amount mentioned in the prospectus has been received.

2. If no minimum subscription is mentioned than that the whole capital has been subscribed.

3. That the sum payable on application or if no sum is fixed then that the whole amount of the capital subscribed has been paid up.

4. That such conditions have been complied with before the expiration of 90 days from the first issue of the prospectus, unless an extension of time has been obtained from the provincial secretary.

An allotment made in contravention of the provisions of the Act is voidable, and directors making same are liable to the allottee in damages.

Directors at their meeting to consider the commencing of business should consider that the company shall not commence business or exercise borrowing powers unless:

1. The minimum subscription has been allotted.

2. The directors have paid their proper proportion.

3. A declaration filed with the provincial secretary shewing compliance with above conditions.

It would also be advisable to obtain the statutory certificate from the provincial secretary and have same produced.

The minutes should set out the above as regularly done. Contracts made by the company before they are entitled to commence business as above, are not binding on the company, and every person responsible for commencing business under such circumstances is liable to heavy penalties.

The bank book of the company should be produced shewing all monies received on account of stock to be held in a special trust account intact.

A statutory meeting is to be held within one month from the date on which the company is entitled to commence business; and the minutes should shew this to be the case.

They should also shew that a report has been forwarded to each shareholder at least ten days before this meeting, setting out the shares allotted; amount paid up on same; cash received by the company on stock; estimated amount of preliminary expenses; abstract of receipts and payments on capital account; particulars of contract to be submitted to meeting; list of directors, manager, auditors and secretary. (*Quære*: How can such payments be made if moneys held in trust.)

The minutes should shew that a copy of this report has been filed with the provincial secretary.

Also, that a list of the shareholders with the number of their shares has been produced at the commencement of the meeting.

[NOTE.—The consequences of non-compliance with the provisions of section 111 of the Ontario Companies Act are very serious, as on the expiration of fourteen days from the date on which the meeting ought to have been held, any shareholder may petition the Court for the winding up of the company.]

CHAPTER XV.

DIRECTORS.

Directors are agents of the company and trustees of its property. The company must act through its directors, and where they contract or act in its name, it is the company which is bound and not the directors. *McCollin* v. *Gilpin*, 5 Q.B.D. 390.

Lord Selborne has summed up the effect of the decisions as to a director's position in *Great Eastern Ry. Co.* v. *Turner*, 8 Ch. 149. He says directors are the mere trustees or agents of the company; trustees of the company's moneys and property; agents in the transactions which they enter into on behalf of the company.

The assets and funds of the company are, by its charter, to be used only in a certain manner and for certain purposes, and are regarded to some extent as impressed with the qualities of a trust fund. *Ernest* v. *Croysdill*, 2 D. F. & J. 175; *Ashbury* v. *Riche*, L.R. 7 H.L. 653; *Moxham* v. *Grant* (1900), 1 Q.B. 88.

In the absence of agreement it is clear that there is no duty or obligation on the part of a director to pledge his own credit for the benefit of the company and his failure to do so even when the company is in temporary difficulties and he is financially capable of obtaining the needed assistance on his own credit, cannot be regarded as a breach of duty on his part: *Christopher* v. *Noxon*, 4 O.R. p. 682.

In the matter of dealing with his shares a director is in general as free as any shareholder. He is not a trustee for the general body of shareholders so as to be unable to deal with his shares in a manner prejudicial to the interests of the shareholders. In a vast variety of circumstances he is just as free

to deal with his shares as any other person, with this exception, that he cannot deal with his qualification shares without giving up his directorship. *Thompson* v. *Canada Fire Insurance Company*, 9 O.R. 284.

It is clear that the duty of a director makes it incumbent on him to give his whole ability, business knowledge, exertion and attention to the best interests of the shareholders who place him in that position when these interests are involved, and it is incumbent upon him to assume no part which would be inconsistent with the proper, free and independent discharge of his duties in that respect. No one standing in or occupying a fiduciary relationship can be permitted to do an act on his own personal behalf which might or could be construed to be inconsistent with the fiduciary character which he holds, and a director is no exception. *Re Iron Clay Brick Manufacturing Co.*, 19 O.R., at p. 123. See also *Forest of Dean Co.*, 10 C.D. 450; *Faure Electric Co.*, 40 C.D. 141; *Masonic Co.* v. *Sharpe* (1892), 1 Ch. 154.

Directors can, however, purchase for themselves shares from the executors of a deceased shareholder. *Percival* v. *Wright* (1902), 2 Ch. 421.

Where a director purchases property under such circumstances as do not make him trustee of such property for the company, and afterwards he re-sells the same to the company at a profit, it is held that whether or not the company is entitled to a rescission of the contract of re-sale, it is not entitled to affirm it, and at the same time treat the director as trustee of the profit made. *Burland* v. *Earle* (1902), A.C. 83.

Directors were formerly held not entitled to the benefit of the Statutes of Limitation, but are now in so far as these apply to trustees. *Flitcroft's Case*, 21 C.D. 519.

Contracts by Directors with Companies.

While a director's power to contract with a company is limited owing to the fact that he is a trustee, *Albion Co.* v.

Martin, 1 C.D. 580, he may, however, subscribe for shares or debentures in the ordinary course of business. *Campbell's Case*, 4 C.D. 470.

A conflict of interest and duty may arise and the possibility in such a case of the interest of the shareholder being sacrificed is not a speculative one by any means. It has been held that the fairness or unfairness of the contract will not be regarded in considering a contract with a director. *Parker* v. *McKenna*, 10 Ch. 96; *Bray* v. *Ford* (1896), A.C. 44.

Directors' Sale to a Director.

A sale by directors to one of themselves is open to question in an action by a shareholder. Such a sale, on the other hand, may be entirely validated by resolution of the shareholders. Where an action was brought, the Court considered it proper before dismissing the action to direct that a meeting of shareholders be called for consideration of the sale and that they be asked to ratify it or express their disapproval of it. An order was made directing the calling of a meeting on a specified date, the president of the company to report fully to the registrar upon affidavit the result of such meeting. *Ellis* v. *Norwich Broom Co.*, 8 O.W.R. 25. See also *Leeds & Hanley Co.* (1902), 2 Ch. 809; *Grant* v. *United Switchback Co.*, 40 C.D. 135.

Where directors issued to themselves debentures of the company at a discount of 25% in satisfaction of their claims against the company, it was held that other debenture holders had no right of action and that the company was the only party to complain. *Bank of Toronto* v. *Coburg Ry. Co.*, 10 O.R. 376.

And a director is entitled to exercise his voting powers as shareholder in a general meeting called to ratify a contract entered into between himself and the company and which would be voidable if not so ratified. His doing so cannot be deemed oppressive by reason of his individually possessing a majority of the votes acquired in the manner authorized by the constitution of the company, even if they are acquired for the purpose

of ratifying the contract. *North-West Transportation Company* v. *Beatty*, 12 A.C. 589, reversing 6 O.R. 300 and 12 S.C.R. 598, and restoring 11 A.R. 203.

A mortgage to a director is not necessarily invalid. *Greenstreet* v. *Paris Hydraulic Co.*, 21 Gr. 229, and see *Smith* v. *Spencer*, 12 C.P. 277.

Directors being agents of the company cannot be allowed to make any profit beyond their remuneration as fixed by the by-laws. *Bray* v. *Ford* (1896), A.D. 44.

A profit or secret benefit of any kind received by a director in the course of the company's business or on account of his position, must be accounted for to the company. This applies to commissions, cash, presents of stock or gift of qualification shares. All of these are regarded as bribes. *Boston Co.* v. *Ansell*, 39 C.D. 339; *Parker* v. *Lewis*, 8 Ch. 1035.

A director cannot enforce an agreement to give him a consideration of this kind. *Harrington* v. *Victoria Dock*, 3 Q.B.D. 549, but if the bribe has not been handed over, the company may sue a vendor for any excessive price caused by the bribe. *Mayor of Salford* v. *Lever* (1891), 1 Q.B. 188; *Grant* v. *Gold Exploration Syndicate* (1900), 1 Q.B. 233.

A company may also elect to set aside the transaction. *Shipway* v. *Broadwood* (1899), 1 Q.B. 369.

Upon the appointment of a liquidator for a company being wound up, the fiduciary relations of directors to the company or its shareholders are at an end, and a sale to them by the liquidator of the company is valid. *Chatham National Bank* v. *McKeen*, 24 S.C.R. 348.

Personal Interest—Votes.

89. No director of any company shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise, and any director who may be in any way interested in any contract or arrangement proposed to be made with the company shall dis-

close the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and in case he discloses the nature of his interest, and refrains from voting, he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realized by such contract or arrangement; provided, however, that no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding shares or being a director in any other company with which a contract or arrangement is made or contemplated; provided, also, that this section shall not apply to any contract by or on behalf of a company to give the directors or any of them security by way of indemnity. 2 Edw. VII., c. 24, s. 1.

Non-compliance with this section has been said to render *ipso facto* void all contracts resting upon such voting so as to need no rescission. *Wade* v. *Kendrick*, 37 S.C.R. 58.

Section 89 of the Ontario Act, while it does not authorize the directors to enter into agreements with their company, provides that they shall not vote at a directors' meeting in respect of any such contract, and also that they shall disclose the nature of their interest at the meeting where such arrangement was determined on.

A director is not, however, disqualified by reason only of holding shares or being a director in any other company with which a contract is being made.

In view of this limitation, it is probably wise to insert in the by-laws a clause authorizing the directors to contract with the company. Circumstances may arise which may make it in the company's interest to be able to deal with one of its directors.

Number of Directors.

80. The affairs of the company shall be managed by a board of not less than three directors, who shall be elected by the shareholders in general meeting of the company. R.S.O., c. 191, s. 40, amended.

86.—(1) A company may, by by-law, vary the number of its directors, but so that the number shall be not less than three, or may change the company's head office in Ontario.

(2) No by-law for either of the said purposes shall take effect until confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a meeting of the company duly called for considering the same. A copy of the by-law certified under the seal of the company shall be forthwith filed in the office of the Provincial Secretary and published in the Ontario Gazette; and in case of the removal of the Head Office, twice in a newspaper published in each of the places where the Head Office was fixed and to where it is to be removed, or as near thereto as may be.

Under the Ontario Act there must be not less than three directors. The Act originally provided for a minimum quorum of three, but under the amendment of 1908 (8 Edw. VII., ch. 43, sec. 8) a quorum may now consist of two. The Act also provides for the creation of an executive committee in cases of companies having more than six directors and permits the directors to delegate any of their powers to this executive committee consisting of not less than three directors. See section 82. No business may be transacted at a Board meeting at which a quorum is not present and while no provisions to this effect are contained in the Act, it would appear that business cannot be transacted by the executive committee unless a quorum is present. In the absence of any provisions in the by-laws of the company, it would seem that two are sufficient to form a quorum of the executive committee. See *Re Taurine Company*, 25 C.D. 118; see *Alma Spinning Company*, 16 C.D. 681, and *Re Bank of Syria, Whitworth's Claim* (1901), 1 Ch. 115. If a quorum were not present, proceedings while irregular may, however, be valid in favour of a third party having no notice of the irregularity. *Re British Asbestos Co.* (1902), 2 Ch. 439. If the number falls below two, the Board is obviously incompetent to manage the affairs of the company. *Toronto Brewing & Malting Company* v. *Blake*, 2 O.R., p. 175. See also *First Natchez Bank* v. *Coleman*, 2 O.W.R. 358.

Powers of Directors.

The directors, speaking generally, can exercise all the powers of the company, although in regard to certain matters, they can only act in a specified manner and the ratification of a share-

holders' meeting is required. See *Re Patent File Co.*, L.R. 6 Ch. 83; *Re Anglo Danubian*, 20 Eq. 339. The powers of the directors must be exercised for the benefit of the company. *Gilbert's Case*, 5 Ch. 559; *Punt* v. *Symons & Co.* (1903), 2 Ch. 506.

The directors have unlimited powers over the property of the corporation so to deal with it as to pay the just debts of the corporation. And not only have the directors such rights, but it is their duty to take such steps as would preserve the property for the general benefit of all creditors without priority or distinction; and this, without the formal sanction of the whole body of shareholders. *Hovey* v. *Whiting*, 14 S.C.R. 515. See also *Merchants Bank* v. *Hancock*, 6 O.R. 285. They can accordingly make an assignment for the benefit of the creditors of the company. *Hovey* v. *Whiting*, *supra*.

Where individual directors enter into an engagement on behalf of the company, which is not in the ordinary course of its business, the company is not bound unless it ratifies it. *Hamilton and Port Dover Ry. Co.* v. *Gore Bank*, 20 Gr. 190, 194.

Such acts of directors may, however, be ratified expressly or by acquiescence. If the company delays after sufficient time for enquiry and deliberation, it will be taken to have acquiesced, and even slight acts referable to the contract will be deemed an adoption of it. *Conant* v. *Miall*, 17 Gr. 574, 580. See *Bridgewater Cheese Co.* v. *Murphy*, 23 A.R. 66; *Merchants Bank* v. *Hancock*, 6 O.R. 285; *Hereford Ry. Co.* v. *The Queen* (1894), 24 S.C.R. 1.

Directors must be careful not to act in excess of their authority under the by-laws. They, in such case, are not only liable to the company, but may be held liable to those with whom they are dealing. This is upon the principle that there is an implied warranty of authority. *Firbanks Executors* v. *Humphreys*, 18 Q.B.D. 54. *Oliver* v. *Bank of England* (1901), 1 Ch. 652.

The Court will not interfere with directors acting *bonâ fide* in the exercise of their discretion. *Re Gresham Life*, L.R. 8 Ch. 446.

Where a director acts without regular appointment, the company may bring an action to restrain him, and if special damages can be shewn, an action will lie for damages. *Coventry's Case*, 14 Ch.D. 660.

Under the English Companies Act, all appointments of directors are presumed valid until the contrary is proved, and this must be borne in mind in considering the effect of the English decisions. There is, of course, no such provision in the Ontario Act.

The company will be bound by the Acts of the *de facto* director. *Mahony* v. *East Holyford Co.*, L.R. 7 H.L. 869; *Re Bank of Syria* (1901), 2 Ch. 272; *British Asbestos Co.* v. *Boyd* (1903), 2 Ch. 439.

A director who has taken part in irregular proceedings is estopped from setting up the irregularity. *York Tramways* v. *Willows*, 8 Q.B.D. 685, but a person having actual notice of the invalidity of the director's election will not be protected. *Tyne Steamship Co.* v. *Brown*, 75 L.T. 483, and see, generally, *Royal British Bank* v. *Turquand*, 6 E. & B. 327.

The Board of Directors may make an assignment for the benefit of the company's creditors, though it has the effect of terminating the existence of the company and amounts to the winding-up of the company, instead of administering its affairs. *Hovey* v. *Whiting*, 14 S.C.R. p. 515. See also *Wilson* v. *Miers*, 10 C.B., N.S. 348, and *Donley* v. *Holmwood*, 30 C.P. 240, 4 A.R. 555.

If a contract is beyond the powers of the directors, but not *ultra vires* of the company, it may be ratified. *Grant* v. *United Switchback Ry. Co.*, 40 C.D. 135. See also *Ferguson* v. *Wilson*, L.R. 2 Ch. 77.

It is necessary for directors to employ other persons to act for the company, and where this is the case those persons will also have power to bind the company within the limits of their agency, and, as a rule, their authority cannot be denied unless their employment was beyond the powers of the directors or

irregularly made, and unless in the case of such irregularity, the person dealing with the employee had notice of the irregularity. *Thompson* v. *Brantford Electric Co.*, 25 A.R. 340; *Gartnell's Case*, L.R. 9 Ch. 691; *Howard's Case*, L.R. 1 Ch. 561.

EXECUTIVE COMMITTEE.

82. The shareholders of a company, having more than six directors, may at a general meeting called for that purpose, by resolution of two-thirds of the shareholders present in person or by proxy, authorize the directors to delegate any of their powers to an executive committee, consisting of not less than three, to be elected by the directors from their number. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by such resolution or by the directors. 3 Edw. VII., c. 7, s. 35; 8 Edw. VII., c. 43, s. 1, s.-s. 10.

In general, directors cannot delegate their powers or discretion to act to a committee, or to one of their number. *Hovenden's Case*, 10 P.R. 434. But this may be accomplished by the by-laws, and so far as Ontario is concerned, all doubt has been removed by section 82 of the Companies Act, providing for the creation of a committee in case of a company having a Board of six directors or more. *Re Cobb* v. *Becke*, 6 Q.B.D. 936; *Re Taurine Co.*, 25 C.D. 118.

RESOLUTION CONSTITUTING COMMITTEE.

Under the Ontario Act, it should be noted that there must be a resolution approved by two-thirds of the shareholders at a special meeting, before the directors can constitute an executive committee. Such a committee will, doubtless, be found to facilitate the regular transaction of business in a company which has a large number of directors, more especially if some of them reside in a place other than that of the head office.

RESOLUTION.

Resolution of shareholders.

Whereas, etc.

Now be it resolved, and it is hereby resolved that the directors of the Company are authorized and empowered to pass a by-law delegating to an executive committee consisting of not less than three directors, all or any of their powers as directors.

Such committee shall be elected by the directors at their first meeting held after the passage of said by-law and shall hold office until the next annual meeting of the shareholders of the Company or until their successors shall be duly appointed.

BY-LAW OF DIRECTORS.

Be it enacted and it is hereby enacted as by-law number , etc.

(1) An executive committee consisting of four directors is hereby constituted and created.

(2) Such committee shall have power to deal with all matters of routine business, and in addition thereto with the following matters;—

(3) The said committee shall meet every Monday at three o'clock p.m., at the head office of the Company, and no notice of such meeting shall be necessary.

(4) The quorum at such meeting shall be not less than three directors personally present and minutes of proceedings of such meetings shall be kept in a book provided by the Company for that purpose.

[See *Re Henderson Roller Bearing Co.*, 11 O.W.R. 526.]

If it is proposed to fix any renumeration for the members of the executive committee, it would appear necessary that this should be fixed by such by-law of the directors ratified at special meeting of the shareholders.

The fact that powers of directors have been delegated to a committee, does not prevent them from dealing with the matters delegated. *Huth* v. *Clark*, 25 Q.B.D. 391.

It has been held that where a committee is constituted and no quorum fixed, then nothing can be done unless all members of the committee are present. *Re Liverpool Household Stores Association*, 59 L.J. Ch. 624.

QUORUM.

81.—(1) Except as in this section provided no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present. Such quorum shall consist of a majority of the directors of the company.

(2) Whenever it shall happen that from any cause there is not a quorum of directors in office the requisition mentioned in section 37 of this Act may be served on such directors of the company as are still in office, and such directors, though less in number than a majority of the board, may nevertheless call a meeting under section 38 for the election of directors to fill vacancies in the board, and in default of their

doing so the requisitionists or other shareholders may call such meeting as in section 38 provided.

(3) This section shall not apply to a sole director remaining in office. If there be no directors remaining in office a meeting to elect directors may be called without service of any requisition.

(4) So long as a quorum of directors remains in office casual vacancies in the board may be filled by such directors as remain in office. New. Amended 8 Edw. VII., c. 43, s. 1, s.-s. (9).

Under the Ontario Act if there are less than a quorum in office, the only power of those remaining is to call a meeting on requisition for the election of further directors. So long as a quorum of directors remain in office, vacancies may be filled by the Board. See section 81; *Faure Electric Co.* v. *Phillipart*, 58 L.T. 525; *Sovereen Mitt Co.* v. *Whiteside*, 12 O.L.R. 638.

Where a director is disqualified from voting on a particular matter, there must be a quorum present without counting him. *Re Graymouth Pt. Elizabeth Co.* (1904), 1 Ch. 32. And see *Wade* v. *Kendrick*, 37 S.C.R. 58.

The fact that a quorum of directors may be present at a meeting will not enable the meeting to transact any business if proper notice has not been sent out, or if those absent have not duly waived notice.

Proceedings of Directors.

Directors must act in regularly constituted meetings. *Re Haycraft Gold Co.* (1900), 2 Ch. 230, and this principle is much emphasized by the wording of section 81, providing that no business shall be transacted by directors unless at a meeting.

The by-laws may, however, allow considerable latitude in this respect. Within certain limits, outsiders are entitled to assume the regularity of proceedings. *Re County of Gloucester Bank* v. *Rudry* (1895), 1 Ch. 629, but apart from the rule in *Royal British Bank* v. *Turquand*, an act done by a majority of the directors informally and privately, is not, in the absence of express authorization, binding on the company. *Butler* v. *Cornwall Iron Co.*, 22 Conn. 355. Where the secretary affixed the seal of a company to a bond after obtaining the authority of two directors privately, and the promise of a third to sign an

authorization, it was held that the bond was void. *D'Arcy* v. *Tamar, etc., Ry. Co.*, L.R. 2 Ex. 158, 14 W.R. 96; *Re County Life Association Co.*, L.R. 5 Ch. 288.

Proper minutes of all meetings and proceedings of the directors should be kept.

It is well to make the minutes explicit, although too much attention need not be paid to formality. It is sufficient to insert the substance of the resolutions or other transactions.

Where meetings are held at fixed times, notice is not generally necessary. The notice where given, must be reasonable under the circumstances. *Browne* v. *La Trindad*, 37 C.D. 1.

In general, a notice must be given of a meeting or proceedings thereat are irregular. *Harben* v. *Phillips*, 23 C.D. 34. Notice need not be given to directors who are abroad. *Halifax Sugar Co.* v. *Francklyn*, 59 L.J. Ch. 593. It has been held in a recent case that the notice of a directors' meeting need not specify the nature of the business to be transacted. *Compagnie de Mayville* v. *Whiteley* (1896), 1 Ch. 788.

Where there has been irregularity in a meeting a subsequently regularly called meeting may ratify and confirm the transactions. In such a case it is regarded as being valid *ab initio*. *Re Land Credit Co.*, 4 Ch. 473; *Re State of Wyoming Syndicate* (1901), 2 Ch. 431.

A director's vote cannot be cast by proxy at a meeting of the Board. *Craig Medicine Co.* v. *Merchants Bank*, 59 Hun. (N.Y.) 561.

One director has no power from his office as director to act on behalf of the company, unless it is expressly conferred by the by-laws. *Re Cunningham*, 58 L.T. 16.

PROVISIONAL DIRECTORS.

79. The persons named as provisional directors in the special Act or in the Letters Patent shall be the directors of the company, until replaced by the same number of others duly elected in their stead, and shall be eligible for election. R.S.O., c. 191, s. 41, amended.

In view of the duty imposed upon provisional directors to call a general meeting of the company, to be held within two

months from the date of the Letters Patent for the purpose of the organizing the company for the commencement of business, the Ontario Court of Appeal was inclined to doubt if it was intended to repose in the provisional directors absolute power to deal with such matters as the transfers of shares. *Re Wakefield Mica Co.*, 7 O.W.R. 104.

This section is very broad in its terms, and its effect is probably to confer upon the provisional directors, for the time being, all the powers properly exercisable by directors under the Act. *Johnston* v. *Wade*, 11 O.W.R. 598. See *Monarch Life* v. *Brophy*, 14 O.L.R. 1. Prior to the passing of this section in its present form, there was some difference of opinion as to whether the by-laws might fix the number of directors at a figure different from the number of provisional directors specified in the Letters Patent. It was recently held in *Manes Tailoring Co.* v. *Wilson*, 14 O.L.R. 89, that the number must be the same. The present section seems to be a not altogether satisfactory attempt to legislate in the same direction. It would have been simpler to have provided for fixing the number by the Letters Patent.

Presumably the powers of the provisional directors are of a limited nature, but regard must be had to the exact words of the governing Act in each case. *Johnston* v. *Wade*, *supra*.

Where by the Act incorporating the plaintiff company, certain persons were declared provisional directors who, it was enacted, "may forthwith open stock books, procure subscriptions of stock, make calls on the stock subscribed and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received by them on account of stock subscribed or otherwise received by them on account of the company, and shall withdraw the same for the purposes only of the company, and may do generally what is necessary to organize the company," it was held that the provisional directors had no right to enter into an arrangement by which, to induce a person to subscribe for shares, they were to advance out of the funds of the company, moneys to enable the intending subscriber to make payments on the shares, and in the absence of express provision,

provisional directors have no power to delegate their powers to committees. *Monarch Life* v. *Brophy*, 14 O.L.R. 1.

As to the powers of provisional directors of a railway company, see *Re North Simcoe Ry. Co.*, 36 U.C.R. p. 104, and see also *Michie* v. *Erie & Huron Ry. Co.*, 26 C.P. 566; *Re Wakefield Mica Co.*, 7 O.W.R. 104.

Personal Liability of Directors.

As pointed out before, directors are trustees of the assets of the company and agents on its behalf. Accordingly, as far as contracts are concerned, there is no personal liability on the part of a director where the contract is made by him on behalf of the company. If, however, the directors have no authority to make the contract, as for instance where it is *ultra vires* of the company, they may be liable to third parties on an implied warranty of authority, although not personally liable on the contract itself. *Coventry's Case* (1891), 1 Ch. 202. *Ferguson* v. *Wilson*, L.R. 2 Ch. 77.

But a representation by a director, founded on a mistaken view of the extent of his authority in point of law, will not render him liable to the person to whom it was made. *Struthers* v. *Mackenzie*, 28 O.R. 381.

As to the personal liability of directors or officers of a company on bills and notes, see *Thames Navigation Co., Ltd.*, v. *Reid*, 13 A.R. 303; *Brown* v. *Howland*, 9 O.R. 48, 15 A.R. 750; *Walmsley* v. *Rent Guarantee Co.*, 29 Gr. 484; *Madden* v. *Cox*, 5 A.R. 473.

If, however, the directors should contract in their own name, and fail to disclose that they are acting for the company, they will be personally liable on the contract. Where a contract set out that "We, the directors of the A. Company, Limited, hereby agree to, etc.," it was held that the directors were personally liable, as the contract did not purport to bind the company. *Aggs* v. *Nicholson*, 1 H. & N. 165.

The liability of a director for a tort is a broader one. A company can only commit a tort through its agent, and if the

directors are responsible for the tort, they are liable as well as the company. Pollock on Torts, 7th ed., p. 190.

A party wronged may choose against whom he will proceed, or may proceed against all parties concerned, including the company. While there is, of course, no contribution as between joint *tort feasors*, there is, apparently, such a right as between co-directors. See notes to section 123 Dominion Winding-up Act, *infra*.

However, to fix a director with personal liability, it must be shewn that he expressly or impliedly authorized the wrong. *Re Charles Denham*, 25 C.D. 752.

Directors must make good to the company as damages any sums which, on winding-up, may be required and which cannot be made good by the ostensible transferees who are to be called upon in the first instance. *Re Peterboro Cold Storage Co.*, 9 O.W.R. 850.

Directors of a company approving of the sale to the company of property at a gross over valuation are liable to account to the company whether the consideration is satisfied by cash or by shares of stock of the company. *Boyle* v. *Rothschild*, 10 O.W.R. 696.

Directors, Issue of New Shares to Themselves.

Where, under its Act of incorporation, one-third of the shareholders had certain rights and the directors of the company were desirious of obtaining sufficient shares to give them a two-thirds majority, it was contended by the minority that a new issue of stock should have been offered to existing shareholders *pro rata*. The Court said that a resolution by the shareholders that new stock should be at the disposal of the directors means that the directors shall dispose of theirs in the manner best suited to benefit their *céstuis que trustent*, that is, the whole body of the shareholders. In the present instance it was plain that the action of the directors was to benefit themselves as shareholders. The apportionment of the new shares gave them the absolute control of the corporation's affairs and removed any opposition that might arise from the minority. The Court

apparently held the allotment to be in excess of the powers of management intrusted to the directors for the benefit of the company and took the view that it ignored the just claims of many of the shareholders and amounted to a prejudicial encroachment on the voting powers of the minority and looking to a confiscation of corporate rights or privileges by a majority at the expense of the minority. *Martin* v. *Gibson*, 10 O.W.R. 66. See also *Percival* v. *Wright* (1902), 2 Ch. 421.

Judgment was given restraining the voting upon the increased capital shares and declaring that the allotment to the directors and their nominees was in excess of the powers of the directors.

PENALTIES.

Under the Ontario Act, a director is subject to the following among other penalties:—

1. Failure to file and post up returns, $20.00 per day.
2. Allowing use of bills, etc., where word "limited" not set out, $10.00 for each offence.
3. For commencing business before filing declaration with provincial secretary, $50 a day.
4. For failing to comply with prospectus clauses, $200 and costs.
5. False statement in advertisement, etc., $200 and costs.
6. "No personal liability," failing to use words, $200 and costs (mining companies).
7. Default in making return of allotments, $50 per day.
8. Failure to produce books on government investigation, $20.
9. Refusal to allow inspection of statutory books, $100.
10. Removal of statutory books from head office, $200.

CONTRACTS WITH PROMOTERS.

Directors should bear in bind when making a contract with a promoter in connection with the organization of a company, that they must be independent and not under his control or direction. *Erlanger* v. *New Sombrero Phosphate Co.*, 2 App. Cas. 1236; *Gluckstein* v. *Barnes* (1900) A.C. 240.

This is a question of fact in each case, but it is clear that if the director is under obligation to promoters or any of them, or is to be paid by them, he cannot be called independent. In view of the statement of Lord Cairns in the *Erlanger Case*, the common practice of having the organization of a company, including agreements taking over the business of a promoter, effected by "dummies" holding one share each, and in many cases clerks in the office of the solicitors incorporating the company, would appear to be a questionable one. This is the more especially so in those cases where the stock subscribed for by the incorporators or "dummies" is made fully paid up by the agreement taking over the promoter's business. The Courts will inquire to see if such directors have taken the precautions which are usually taken by a prudent man in regard to his own affairs. See *Re Hess Manufacturing Company, Sloan's Case*, 23 S.C.R. 644. Where there has been a lack of independence, subsequent shareholders can impeach the transaction.

The principles set out in the *Erlanger Case* have, however, been limited somewhat by more recent cases, and it is now settled that they do not apply in case of a private company, that is to say, a company where no appeal is intended to be made to the public to subscribe, or to issue any shares except to the then existing shareholders. *Salomon* v. *Salomon* (1897), A.C. 22; *Innes & Co.* (1903), 2 Ch. 254. As to private companies see *British Seamless Paper Box Co.*, 17 C.D. 467; see also *Ambrose Lake Co.*, 14 C.D. 369; *Felix Hadley* v. *Hadley*, 77 L.T. 131.

The company cannot retain the property sold and compel the vendors to account for the profit they have made by the transaction. Lindley, 6th ed., vol. 1, p. 518.

As to the remedies of the company see notes on section 123 Dom. Winding-up Act, *infra*.

Regard must be had also to the legislation at present in force in regard to prospectuses as applied to companies offering shares for public subscription or having more than ten shareholders. If the disclosure required by the present law is contained in the prospectus, it is hard to see how one who has purchased stock

can allege that there was any fraud on the part of the company. Where all shareholders are perfectly aware of all the circumstances attending the formation of the company, it is obvious that neither the shareholders nor the company can in any sense be said to be defrauded. *Larocque* v. *Beauchemin* (1897), A.C. 358. See also *Spargo's Case*, 8 Ch. 407.

In the latter case, it will be an inevitable inference from the circumstances of the case that every shareholder of the company must be taken to have assented to the purchase, and where the matter is *intra vires*, the company is bound by the unanimous agreement of its shareholders. *Salomon* v. *Salomon, supra.*

In this important matter, the language of Lord Lindley in a recent case probably sums up accurately the English law on the subject: "Notwithstanding all that has been said in *Erlanger* v. *New Sombrero Co.* about the duty of promoters of a company to furnish it with an independent Board of Directors, that decision does not require nor 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 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 an independent Board. After *Salomon's Case*, I think it impossible to hold that it is the duty of the promoters of the 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. *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 2 Ch. 392, and see title Promoters, *supra.*

Negligence.

If the directors act honestly for the benefit of the company which they represent, they discharge both their legal and equitable duty to the company. They will not be liable for mistakes or errors of judgment. *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 2 Ch. 392.

There must be something fraudulent or improper and not merely a default of judgment. But imprudence may be so palpable as to justify the inference that there is no *bonâ fide* exercise of discretion. See *Overned Gurney Co.* v. *Gibb*, L.R. 5 H.L. 480; *Wilson* v. *Brett*, 11 M. & W. 115.

If, however, a culpable or wilful default can be proved, directors are liable to make good to the company any loss attributable thereto. *Marzettis's Case*, 28 W.R. 541.

It is sometimes said that directors are liable only for gross negligence, but this is the same thing as "negligence with the addition of a vituperative epithet." *Per* Rolfe, B., in *Wilson* v. *Brett*, *supra*. In *Re National Bank of Wales* (1899), 2 Ch. 675. Lindley, L.J., said that the negligence of a director to render him liable must not merely be the omission to take all possible care. It must be much more than that; it must be in a business sense culpable or gross negligence.

Where frauds have been carried on by the officers of the company, the question has arisen as to the liability of a director for negligence in not having discovered them. The House of Lords said on this point: "It is obvious that if there is such a duty, it must render anything like an intelligent devolution of work impossible. 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. *Dovey* v. *Cory* (1901), A.C. 477. Directors are not bound to examine entries in the company's books. *Ibid.*; or detect mis-statements in accounts. *Prefontaine* v. *Grenier* (1907) A.C. 101.

To determine whether directors have been guilty of negligence, it is necessary to examine into the nature of the business, the internal arrangements of management as well as the knowledge and experience and opportunities for giving attention to business on the part of the directors. *Dovey* v. *Cory*, *supra*; *Re Liverpool Household Stores*, 59 L.J. Ch. 624; *Forest of Dean Coal Mining Co.*, 10 Ch. D. 450.

It has, however, been held that where a director signs cheques, there is a duty on his part to know that the cheques are being

properly issued by the company. *Joint Discount Co.* v. *Brown*, 8 Eq. 381.

For decisions on misfeasance, see notes to section 123. Dominion Winding-up Act, *infra*.

As to liability of directors in respect of dividends paid out of capital, see title Dividends.

Attendance at Board Meetings.

A director is not bound to attend every meeting of the Board or take part in every transaction which is considered at a Board meeting. *Perry's Case*, 34 L.T. 716. Neglect to attend meetings is not the same thing as negligence or omission of a duty which ought to be performed at those meetings. *Marquis of Bute's Case* (1892), 2 Ch. 101.

If, however, directors not being non-resident members of the Board or required by their duties to be absent from the place of meeting, are guilty of gross non-attendance they may be held responsible for the misfeasance of others. *Charitable Corporation* v. *Sutton*, 2 Atk. 400.

It would appear to be wise in view of the present state of the law for a director whose other interests make it impossible for him to attend Board meetings, either to resign or to see that the by-laws of the company are drawn in such a way as to excuse his non-attendance.

Loans to Shareholders.

93. No loan shall be made by the company to any shareholder, and if such loan is made all directors and other officers of the company making the same and in any wise assenting thereto, shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with legal interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof. R.S.O., c. 191, s. 84.

This section affords a necessary protection against directors permitting loans by the company to one of their number.

It has been laid down that a director acting *ultra vires* of the company who parts with the funds of the company can be com-

pelled to replace them, notwithstanding that he acted in good faith and with the approval of the majority of the shareholders. *London and Financial Association* v. *Kelk*, 26 Ch. D. 107.

Upon the same principle, if a director is responsible for *ultra vires* acts of the company, he is liable to the company in damages for the amount of the loss, if any, incurred by the transaction, while if there be any profit, in the transaction, it, of course, enures to the company. See *McDonald* v. *Macbeth*, 11 C.P. 224; *Cullen* v. *Nickerson*, 10 C.P. 549.

As to what act may constitute an adoption by the company see *Conant* v. *Miall*, 17 Gr. 574.

Liability for Wages.

94. The directors of the company shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against the directors. R.S.O., c. 191, s. 85.

A person employed as foreman of works, who hires and dismisses men, makes out pay rolls, receives and pays out money for wages and does no manual labour, and in addition to receiving pay for his own services at the rate of $5.00 per day payable fortnightly is paid for the use of machinery belonging to him and of horses hired by him, is not a labourer, servant or apprentice and cannot recover against the directors personally. *Welch* v. *Ellis*, 22 A.R. 255. Nor is the manager of a company. *Herman* v. *Wilson*, 32 O.R. 60. See also *Hunt* v. *Great Northern Ry.* (1891), 1 Q.B. 601; *Re American Tire Co.*, 2 O.W.R. 29; *Re Ritchie Hearn Co.*, 6 O.W.R. 474. And compare *Fayne* v. *Langley*, 31 O.R. 254, decided on the Ontario Wages Act, and the notes to section 70 of the Winding-up Act, *infra*.

QUALIFICATION.

83. No person shall hold office as a director unless he is a shareholder absolutely in his own right, and not in arrear in respect of any call thereon, and where any person, who is a director, ceases to be a *bonâ fide* holder of shares, he shall thereupon cease to be a director. R.S.O., c. 191, s. 42.

It would appear that no one can act as a director unless he is a shareholder of the company holding at least one share of stock. Section 83 uses the word "shares" from which it might be inferred that a director must hold more than one share, but the commonly accepted construction is that one is sufficient. Notwithstanding the use of the words "in his own right" it has been held that a director may qualify upon shares standing in his name as trustee. *Pulbrook* v. *Richmond Mining Co.*, 9 C.D. 610; *Howard* v. *Sadler* (1893), 1 Q.B. 1, but see *Sutton* v. *English Produce Co.* (1902), 2 Ch. 502; *Kiely* v. *Smyth*, 27 Gr. 220. And see *Boschoek Co.* v. *Fuke* (1906), 1 Ch. 148.

If a director does not possess the qualification called for by the statute, he is not a director *de jure*. *Jenner's Case*, 7 C.D. 132.

The by-laws commonly provide that the qualification of a director shall be the holding of a certain number of shares in the company. In such a case the director must acquire the necessary qualification, though not necessarily direct from the company, and that within a reasonable time. See *Brown's Case*, 9 Ch. 102.

A director cannot accept a present of his qualification shares from a promoter. This is regarded as a breach of trust, and he is liable to account to the company for the value of his shares. *Pearson's Case*, 5 C.D. 336; *Re Carriage Supply Association*, 27 C.D. 322; *Archer's Case* (1892), 1 Ch. 322.

A director who disposes of his qualifying shares ceases *ipso facto* to be a director and if his ceasing brings the number below that required by the statute, namely, three, the directorate then becomes incomplete and incompetent to manage the affairs of the company. *Toronto Brewing and Malting Co.* v. *Blake*, 2 O.R. 175.

As to the possibility of a company acting as director of another company, see *Re Bulawayo Market Co.* (1907), 2 Ch. 458.

Disqualification.

Even apart from special regulations in the by-laws, if a director accepts an office which is incompatible with his position as a director, it has been held that he vacates his position as a director. *Eales* v. *Cumberland Lead Co.*, 6 H. & N. 481; *Astley* v. *Tivoli* (1899), 1 Ch. 151.

Removal of Directors.

It is wise to provide in the by-laws that a director may be removed either by a simple majority or a two-thirds majority of shareholders at any time at a special general meeting called for that purpose. It is obvious that one director can give considerable trouble to the others if he be so disposed, and it is a matter of difficulty to remove a director during his term of office. It would seem, however, that the by-laws may be amended during the term of office of a director to provide for his removal by the shareholders, and after such amendment has been made he may be removed. *Imperial Hydropathic Co.* v. *Hampson*, 23 C.D. 1.

But see *Stephenson* v. *Vokes*, 27 O.R., p. 691.

A company cannot compel a director to act and specific performance of a contract to act as director will not be granted either at the instance of employer or employee. *Bainbridge* v. *Smith*, 41 C.D. 462.

A director cannot be excluded from acting by the other directors, and an injunction will be granted in such a case. *Pulbrook* v. *Richmond*, 9 C.D. 610.

Such injunction is directed against the directors and not against the company, and if the company assembled in special meeting pass a resolution against the director acting any further, the injunction will be dissolved. *Bainbridge* v. *Smith, supra.*

A director may also have a right of action for damages. If a power is given to remove a director for reasonable cause, the shareholders' meeting must be the final judge as to the reason-

ableness of the cause and the Courts will not interfere. *Inderwick* v. *Snell*, 2 M. & G. 216.

Resignation.

A director may resign at any time.

Query as to when his resignation takes effect in the absence of a provision in the by-laws. See *Re Rodney Casket Company*, 12 O.L.R. 409. *Glossop* v. *Glossop* (1906), 2 Ch. 370.

This is an important point in view of personal liability attaching to directors under the Ontario Act. See *Municipal Freehold Land Co.* v. *Pollington*, 63 L.T. 238.

He may, of course, transfer or dispose of his qualification shares and so vacate his office.

Right to Inspect Minutes.

A shareholder has no right to inspect a directors' minute book. *Reg.* v. *Mariquita Co.*, 1 E. & E. 289. Where, however, the right of inspection is given it includes the right to make extracts. *Mutter* v. *Eastern Co.*, 38 C.D. 92, and *Re Balaghat Mining Co.* (1901), 2 K.B. 665.

Directors must keep proper accounts of the receipts and payments of the company and all its transactions. *Freeman* v. *Green*, 1 J. & W. 135.

A director by reason of his office is entitled to inspect the company's accounts. *Burn* v. *London & South Wales Coal Co. W.N.* (1890), 209. But a shareholder is not in the absence of an enabling provision.

Election of Directors.

84.—(1) The election of directors shall take place at the annual meeting, all the members of the board retiring, and (if otherwise qualified) being eligible for re-election.

(2) Election of directors shall be by ballot, if demanded.

(3) The directors shall, from time to time, elect from among themselves a president of the company, and shall also appoint, and may remove at pleasure, all other officers thereof. R.S.O., c. 191, s. 43, amended.

85. If at any time an election of directors is not made, or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any general meeting of the company duly called for that purpose; and the directors shall continue in office until their successors are duly elected. R.S.O., c. 191, s. 44.

An election must be regular. If not, it can be set aside and the acts of the Board are tinged with irregularity. If it is obtained by a trick or artifice, it can, of course, be set aside. The facts that shares are purchased with a view of controlling an election does not affect its irregularity. *Toronto Brewing & Malting Co.* v. *Blake*, 2 O.R. 175. But see *Davidson* v. *Grange*, 4 Gr. 377.

In the case of an irregular election of directors as is the rule in respect of acts within the powers of the company and those capable of confirmation by the majority of the shareholders, the Court will not interfere at the instance of individual shareholders unless the individual can secure the consent of the company to sue in the company's name an action by them to test the election should be dismissed. *Kelly* v. *Electrical Construction Co.*, 10 O.W.R. 704.

See titles Meetings and Proceedings.

So long as a quorum of directors remains in office casual vacancies in the Board may be filled by them. Section 81, subsection 4. It was formerly held that the power is only exercisable in the interval between the vacancy arising and the next annual meeting, and that the Board would not apparently have power to elect a director after the date of the annual meeting. See *Kiely* v. *Kiely*, 3 A.R., p. 443. The present section could probably not be capable of such a construction.

A shareholder who has participated in the benefit of an illegal act cannot either individually or suing on behalf of the general body of creditors maintain an action against the directors of the company. *Stickney* v. *Buckel*, 6 O.W.R. 751.

Where candidates for the Board of Directors acted as scrutineers and exercised their discretion as to the right of certain

voters to vote, it was held that the duty of the scrutineers was so plainly in conflict with their interest as candidates that the election was voidable. Candidates cannot act as scrutineers and pass upon the right of other shareholders to vote. *Dickson* v. *McMurray*, 28 Gr. 553.

It was held in early cases that *quo warranto* proceedings could be taken in the case of a *quasi* public corporation, but not in the case of an ordinary trading company. *Queen* v. *Hespeler*, 11 U.C.R. 222; *Re Moore*, 14 U.C.R. 365; *Queen* v. *Bank of U.C.*, 5 U.C.R. 338.

As to mandamus see *Re Munro, supra*, and *Queen* v. *Bank of U.C., supra; Toronto Brewing Company* v. *Blake, supra.* As to a mandatory order for rectification of the register see *McKain* v. *Birkbeck Co.*, 7 O.L.R. 341.

If directors act, though irregularly elected, or disqualified, their acts are deemed valid in respect of third persons. They are in such a case directors *de facto.* See *Royal British Bank* v. *Turquand*, 6 E. & B. 327.

Remuneration.

88. No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting. 60 V., c. 28, s. 46.

A by-law for the remuneration of directors must first be passed by the Board of Dorectors, who thus take the responsibility of definitely asserting their claim to payment and fixing the amount so claimed. This by-law must then be laid before a general meeting and passed upon by the body of shareholders. *Beaudry* v. *Reid*, 10 O.W.R. 622. And where shareholders in general meeting assembled voted to certain of directors paid-up shares as remuneration for services it was held that this was invalid. *Beaudry* v. *Read, supra.*

Apart from a by-law of the company passed by the directors and ratified by shareholders, directors are not entitled to remuneration and this applies not only to their position *qua* director, but also to any emoluments which they might lay claim to as

officers of the company. *Stroud* v. *Royal Aquarium*, 89 L.T. 243; *Birney* v. *Toronto Milk Co.*, 5 O.L.R. 1; *Re Ontario Express Co.*, 25 O.R. 587; *Livingstone's Case*, 14 O.R. 211, 16 A.R. 397; *Benor* v. *Canadian Mail Order Co.*, 10 O.W.R. 899.

A director is a creditor of the company to the extent of the remuneration agreed to be paid to him and has all the rights of a creditor. *Orton* v. *Cleveland Co.*, 3 H. & C. 868; *Beckwith's Case* (1898), 1 Ch. 324.

But see *Leicester Club Co., Cannon's Case*, 30 C.D. 629.

To accept remuneration in excess of that regularly authorized, has been held to be misfeasance and all directors who are parties to the payment are jointly and severally liable for the amount. *Re George Newman* (1894), 1 Ch. 674.

It is as well to provide for a monthly payment to the directors or officers for where a stated sum is payable to the directors, there is doubt as to whether they are entitled to anything should the office be vacated during the year. *Swabey* v. *Port Darwin Co.* (1889), 1 Meg. 385; *Salton* v. *New Beeston Cycle Co.* (1899), 1 Ch. 775; *McConnell Case* (1901), 1 Ch. 728; *Shaws, Bryant & Co. W.N.* (1901), 124.

Unauthorized Remuneration.

Where the president and vice-president of a company drew for several years without proper authority, but with the acquiescence of their co-directors elected by and closely connected with the majority of the shareholders, large sums ostensibly as salaries as general manager and managing director respectively, it was held that the propriety of the payments could be enquired into at the instance of dis-satisfied shareholders, although the majority were prepared to ratify them. It must be borne in mind that there are certain exceptions to the wide powers of the majority to bind the minority and if it be found that two prominent officials are withdrawing the company's funds and applying them to their own use without legal warrant and that the same officials hold or control a majority of the shares the Court will not hesitate to protect the minority, otherwise it would be in

the power of the majority to defraud minority with impunity. *Earle* v. *Burland*, 27 A.R., p. 540, (1902), A.C., p. 101. See also *Gardner* v. *Canadian Publishing Co.*, 31 O.R. 488.

A director of a company was appointed secretary of the company at a fixed salary and subsequently resigned that office and was elected vice-president to which office no salary was prescribed by by-law or otherwise. He continued, however, to draw the same salary for a number of years as was paid to him as secretary of the company. The Court of Appeal for Ontario held that upon his ceasing to be secretary, his salary as such ceased, and as there did not appear to be any resolution of the board or shareholders giving him a salary or compensation as vice-president, and as there was no agreement between him and the company, he was held not entitled to compensation for services rendered in that capacity. They also laid down that he could not be considered as a servant of the company and as such entitled to remuneration for his labour according to its value, and he was ordered to restore to the company the money drawn out by him since ceasing to be secretary. The Privy Council held on appeal that as the directors had allowed him to draw his former salary without any observation until the commencement of the action, the inference might be fairly drawn from all the circumstances of the case that he was intended to retain his salary, although there was a shifting of the officers. *Earle* v. *Burland*, 27 A.R. 563, (1902), A.C. 101. See also *Gardner* v. *Canadian Mfg. Co.*, 31 O.R. 488.

It was formerly held that this section applied only to payment for the service of a director *qua* director as for the services of a president as presiding officer of the Board. *Re Ontario Express and Transportation Co., Director's Case*, 25 O.R. 587. See also *Victor Mutual* v. *Thompson*, 32 C.P. 476. But see *Birney* v. *Toronto Milk Co.*, 5 O.L.R. 1, in which the opposite view was taken. As to a director solicitor's right to costs: see *Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O.R. 289. See also *Benor* v. *Toronto Mail Order Co.*, 10 O.W.R. 899.

Travelling Expenses.

A director is not entitled to his travelling expenses in attending meetings of the Board unless this is expressly provided by the by-laws. *Young* v. *Naval and Military Co-operative Society* W.N. (1905), 41.

Commission.

As to the right of a director to payment of commission on sale of stock see *Stickney* v. *Buckel*, 6 O.W.R. 751. In this case a director arranged with a company of which he was a promoter to be paid 12% on all stock sold by him. He did not make any sales, but entered into an agreement with an agent by which the latter was to sell the stock on commission of 5% to be paid by the director. A large amount of stock was sold on which 5% was paid. The Court held that 5% was a fair commission and that the 7½% must be accounted for to the company by the director. *Stickney* v. *Buckel*, 6 O.W.R. 751.

Past Services.

A payment of a lump sum by a benevolent society as remuneration covering a period of thirty years for past services was supported in the case of *Bartram* v. *Birtwistle*, 11 O.W.R. 315.

Other Cases.

As to a director's profit made by lease of company's plant see *Meyers* v. *Cain*, 6 O.W.R. 297-834. It was held in this case that the company was a necessary party in an action to call upon the directors to account for their profits.

Where a director expended money on behalf of the company under the *bonâ fide* belief that he was doing so under the authority of the company lawfully given, he was held entitled to receive payment from the company. *Benor* v. *Canadian Mail Order Co.*, 10 O.W.R. 899.

By-laws.

A by-law is a rule or law adopted by a corporation or association for the regulation of its own actions or concerns, and the rights and duties of its own members among themselves. A by-law may be in the same form as a resolution and require the same solemnities to pass it, but a resolution is not necessarily a by-law.

To be valid, a by-law must operate generally, but a resolution is adopted ordinarily to reach special and individual cases. *Re Manes Tailoring Co.* v. *Wilson*, 14 O.L.R. p. 96.

It is a general common law principle that a by-law must not be unreasonable or work unequally towards members of any one class of shareholders affected by it; and so where a by-law had the effect of discriminating as to terms of payment between certain individuals and the other shareholders of the company it was held to be invalid upon its face. *The North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33.

As to the right to repeal by-laws to the prejudice of parties who obtain vested rights under them, see *Wright* v. *Incorporated Synod of the Diocese of Huron*, 29 Gr. 348, 9 A.R. 411, 11 S.C.R. 95.

In the absence of any provisions to the contrary in the Act or Letters Patent the right to make by-laws for the management of the company is no doubt vested in the whole body of shareholders, but it is competent for the power creating the corporation to vest the power in a select body as is done in the Ontario Companies Act and similar Acts which provide that the directors may pass by-laws for certain purposes specified in the Act. The term of office of the directors is a matter to be dealt with by by-law to be passed by them and where the directors of a company passed a by-law fixing their term of office at one year and this by-law had been confirmed at the annual meeting of shareholders it was held that the shareholders were bound by the by-law and could not themselves pass another one to alter it, they must wait until the next annual meeting and put in a new

set of directors who would pass a new by-law. *Stephenson* v. *Vokes*, 27 O.R., p. 691.

Note that the shareholders' by-law was passed during the directors' year of office, and provided that the directors' appointment should be terminable by resolution. See generally *Temple* v. *Toronto Stock Exchange*, 8 O.R. 705; *Clarkson* v. *Toronto Stock Exchange*, 13 O.R. 213.

The presumption that a corporation's shareholders can pass by-laws necessary for the management of its affairs arises only in the absence of an express power. The clauses in the Ontario Companies Act empowering the directors to pass by-laws in respect to certain matters, withhold from the shareholders the power to pass by-laws in respect to such matters. *Kelly* v. *Electrical Construction Co.*, 10 O.W.R. 704.

Were the rule otherwise, there might be in existence at the same time two inconsistent by-laws, one passed by the directors and the other by the shareholders. *Ibid.* See also *Beaudry* v. *Read*, 10 O.W.R. 622.

SHORT SET OF BY-LAWS.

[NOTE: For forms of by-laws dealing with special matters, see those titles. See also Schedule D. to 7 Edw. VII., c. 34.]

Be it enacted and it is hereby enacted as by-law number one of the Company as follows:—

1. The head office of the Company shall be in the City of Toronto in the Province of Ontario, at such other place in the said city as the directors from time to time decide.

2. The seal, an impression of which is stamped upon the margin hereof, shall be the common seal of the Company.

DIRECTORS.

3. The affairs of the Company shall be managed by a Board of Directors to consist of seven persons, each of whom shall be a shareholder in the Company, holding at least one share of the stock thereof.

4. A director of the Company may fill any position in connection with its management and the administration of its affairs to which he may be appointed by his fellow directors.

5. Should any vacancy occur in the Board of Directors from the death or retirement of a director or from other cause, the remaining directors shall have power to fill such vacancy by a majority vote.

6. Except in so far as the remuneration of the directors shall be fixed by this by-law, the directors themselves shall have power to fix their remuneration either as directors or as officers of the Company, and also the salaries or remuneration to be paid to all salaried officers of the Company, and to vary the same when it may be expedient to do so.

7. The election of directors shall take place yearly at the Annual General Meeting of the Company and all the directors then in office shall retire, but if otherwise qualified shall be eligible for re-election, unless otherwise determined by the directors.

8. Two directors shall form a quorum for the transaction of business.

9. A directors' meeting may be formally called (1) by the president or secretary (2) by two directors jointly to meet at the office of the Company or at any other convenient place in the City of Toronto. Notice of such meetings shall be delivered or mailed at the Toronto Post Office prepaid to each director, not less than five days before the meeting is to take place.

10. Provided that a directors' meeting may be held from time to time without formal notice at any time or place in Ontario, or elsewhere, if all the directors are present thereat or if those absent have waived notice of such meeting or signified their assent thereto in writing.

11. The order of business at meetings of the Board of Directors shall be as follows:—

(*a*) Reading notice calling meeting and proof of mailing same.

(*b*) Reading the minutes of last meeting of directors and confirming same.

(*c*) Receiving reports.

(*d*) Unfinished business.

(*e*) New business.

This order of business may be altered at any meeting by a majority vote of the directors present.

OFFICERS.

12. There shall be a president, vice-president, manager and secretary-treasurer of the Company and such other officers as the Board may determine, and the directors shall from time to time elect from among themselves a president, vice-president and secretary-treasurer and shall also appoint and may remove at pleasure all other officers.

13. The remuneration of the president shall be the sum of $100.00 per month; of the vice-president $50.00 per month.

14. The remuneration of the manager shall be the sum of $150.00 per month, and of the secretary-treasurer $60.00 per month.

15. The president shall preside at all meetings of shareholders and directors of the Company. In his absence a chairman shall be elected. He may delegate by writing his duties to the vice-president.

16. The president, manager and secretary-treasurer or any two of them, may make contracts and engagements of any kind on behalf of the Company, subject to the control of the Board of Directors and without limiting the generality of the foregoing, the president and manager shall have charge of the appointment, functions, duties and removal of all subordinate officers, agents and servants of the Company, and their remuneration, subject to this by-law and to the control of the Board of Directors.

17. The president, manager, and secretary-treasurer or any two of them, shall have power to draw, accept or endorse bills of exchange, promissory notes, cheques and orders for the payment of money on behalf of the Company by way of overdraft or otherwise, to be countersigned as the Board may direct, and to execute all hypothecations, or pledges of the real or personal property of the Company, and to assign, and transfer to the bankers of the Company or other lenders all or any bonds, stock, warehouse receipts, contracts, bills of lading and other securities, and to give security to the said bank under sections 86, 87, 88, 89 or 90 of the Bank Act.

18. And the secretary-treasurer is authorized on behalf of the Company to deposit with or transfer to the bankers of the Company, but for the credit of the Company's account only, bills of exchange, promissory notes, cheques or orders for the payment of money and other negotiable paper and for the said purposes to endorse the same or any of them in the name of and on behalf of the Company, and also to arrange, settle, balance and certify all bank books and the accounts between the Company and the bankers of the Company and to receive all cheques and vouchers from said bankers.

SHAREHOLDERS.

19. The fiscal year of the Company shall terminate on the last day of February.

20. The Annual General Meeting of the shareholders of the Company shall be held at the head office of the Company on the first Monday in April or at such other time and place in Ontario as the directors may decide.

21. All meetings of shareholders shall be called by the president or secretary; provided that the directors may and shall upon requisition made in writing by the shareholders holding in the aggregate one tenth of the issued capital stock of the Company, convene an extraordinary meeting of the shareholders.

22. No public notice or advertisement of the annual or any meeting of shareholders shall be required, but notice of the time and place of any such meeting shall be mailed by prepaid registered letter to each shareholder to his last known place of abode or address and deposited at least five days before the holding of such meeting. Provided always a meeting of shareholders may be held at any time and at any place in Ontario

without such notice if all the shareholders of the Company are present thereat or represented thereat by proxy, or if the absent shareholders signify their assent thereto in writing to such meeting and their inability to attend.

23. Any shareholder may vote by proxy, but the proxy must be a shareholder entitled to vote and his authority must be in writing and filed with the secretary of the Company before the opening of the meeting.

24. The quorum for the transaction of business at meetings of shareholders shall consist of not less than three shareholders present in person or represented by proxy and holding or representing in all not less than 50 per cent. of the issued capital stock of the Company. Provided that in no case can any meeting be held unless there are two shareholders present in person.

25. The accidental omission to give notice of any meeting of shareholders shall not invalidate any resolution passed at such meeting.

26. A Corporation being a shareholder may appoint any one of its officers to be its proxy and such appointment shall be under its common seal.

27. A vote given in accordance with the terms of any instrument of proxy shall be valid notwithstanding the previous death or the prior revocation of the proxy or transfer of the shares in respect to which the vote is given, provided that no intimation of such death or revocation or transfer shall have been received at the head office of the Company before the meeting commenced.

28. The order of business at all meetings of shareholders shall be as follows:—

(*a*) Reading notice calling meeting and proof of mailing same.
(*b*) Report as to quorum.
(*c*) Reading minutes of preceding shareholders' meeting.
(*d*) Confirmation of any by-laws or resolutions passed by the directors.
(*e*) Reception of reports.
(*f*) Election of directors.
(*g*) Unfinished business.
(*h*) New business.

29. The shareholders may, by three-fourths vote remove any director or officer before the expiration of his period of office and appoint another qualified person in his stead for the balance of his term at a special general meeting of which notice specifying the intention to pass such resolution shall have been given.

Stock.

30. Stock certificates shall be in such form as the Board may approve of and shall be under the seal of the Company and shall be signed by the president and secretary-treasurer.

31. A stock transfer book shall be provided in such form as the directors may approve of and all transfers of shares in the capital stock of the Company shall be made in such book by the holder thereof or his attorney duly authorized in writing.

32. In case several persons are registered as the joint holders of a share of stock, the certificate or certificates therefor may be delivered to either of such holders and any one of such persons may give effectual receipts for any dividend or on account of dividends in respect of such shares of stock.

BOOKS.

33. All books required by law to be kept shall be kept by the secretary-treasurer of the Company and no shareholder shall have the right of inspection of any account, book or document of the Company except as prescribed by statute or authorized by the directors or by resolution of the shareholders in general meeting.

DIVIDENDS.

34. No dividend shall be payable except out of the profits of the Company, and no dividend shall bear interest as against the Company until after thirty days from the date of the by-law.

35. The declaration of the directors as to the amount of net profits of the Company shall be conclusive in the absence of fraud on their part, and no director shall be bound to inquire into the accuracy of any statement of profits and loss if certified by the auditor of the Company.

AUDITOR.

36. The auditor shall be appointed by resolution of the shareholders at the time of the Annual General Meeting of the shareholders of the Company.

37. He shall hold office until the next annual meeting after being appointed or until his successor is appointed unless previously removed by resolution of the shareholders in general meeting or by the Board of Directors.

38. The remuneration of the auditor shall be fixed by the shareholders of the Company.

39. The auditor shall be supplied with a copy of the balance sheet and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

40. The auditor shall have a list delivered to him of all books kept by the Company and shall at all reasonable times have access to the books and accounts of the Company.

41. The auditor shall make an annual report to the shareholders upon the balance sheet and accounts at the annual general meeting and in every

such report he shall state whether in his opinion the balance sheet is a full and fair balance sheet and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs.

SOLICITORS.

42. The solicitors of the Company shall be Messrs. Mather, Hitchcock & Murray, of Toronto.

BORROWING AND BANKING BY-LAW.

THE INDUSTRIAL COMPANY, LIMITED.

By-law Number

Whereas, the directors of The , Limited, deem it expedient that a by-law should be passed for the purposes hereinafter set forth,

Now therefore be it enacted, and it is hereby enacted, as follows:

1. That the directors of the Company may from time to time—

(*a*) Borrow money upon the credit of the Company;

(*b*) Limit or increase the amount to be borrowed;

(*c*) Issue the bonds, debentures, or other securities of the Company for the lawful purposes of the Company, and no other, and may pledge or sell the same for such sums and at such prices as may be deemed expedient or be necessary; but no such bonds, debentures or other securities shall be for a less sum than one hundred dollars each; and

(*d*) Hypothecate, mortgage or pledge all or any of the real or personal property, rights and powers of the Company, to secure any such bonds, debentures, or other securities, and any indebtedness or sum or sums so borrowed for the purposes of the Company.

2. That the directors are hereby authorized to execute and deliver from time to time to the Bank of a mortgage or mortgages, hypothèque or hypotheques, upon all the real and personal immovable and movable property of the Company, or any portion or portions thereof by way of additional security for all debts contracted by the Company to the said bank in the course of its business.

3. That the directors are hereby authorized from time to time to assign, transfer and set over to the said bank all the present and future book debts, claims, money demands, mortgages, bills, notes, cheques, judgments, rights, powers, franchises, licenses, warehouse receipts, bills of lading and choses in action of or belonging to the Company, and also all books and papers both present and future containing entries of or in any way relating to the same by way of additional security for all debts contracted to the said bank in the course of its business, and also all present and future indebtedness and liabilities of the Company to the said bank.

4. That the directors are hereby specially authorized to give security from time to time to the said bank upon all of the present and future goods, wares and merchandise and other assets of the Company or upon

any portion or portions thereof as they may see fit for the payment of any or every portion of the present or future indebtedness of the Company to the said bank and such security may be by way of chattel mortgage or under the Bank Act and amending Acts or otherwise.

5. That the directors are hereby specially authorized to borrow, or apply for a line of credit, from said bank upon the security of the present and future goods, wares and merchandise of the Company or such portion or portions thereof as the said bank may require and said directors may give such security in accordance with sections 86, 87 and 88 or other provisions of the said Bank Act and amending Acts or otherwise as they may deem advisable, and the said directors may from time to time and as often as they see fit borrow any sum or sums from the said bank and give such security or securities therefor as they may see fit.

6. That the powers conferred on the directors by this by-law shall extend to all future directors, and shall apply to all present and future sums borrowed or to be borrowed upon the credit of the Company or for the purposes thereof and to all the present and future indebtedness and liabilities of the Company and to all the present and future property and assets of the Company whether specifically referred to in this by-law or not, and the directors may at any time or times and without any further sanction issue said bonds, debentures or other securities, or hypothecate, mortgage or pledge the real or personal property of the Company as security either for any sum already borrowed or for any sums borrowed at the time or any future time or for any portion or portions of the present or future indebtedness or liabilities of the Company or otherwise, and shall include the power to give any and every security mentioned in the Act of the Dominion of Canada known as "The Bank Act" and amending Acts, and all said bonds, debentures, hypotheques, mortgages, pledges or other securities may contain such general special or extraordinary clauses and provisions as the directors may see fit, including a waiver of any of the formalities or requirements of the Bank Act or amending Acts or any other Act or Acts and a provision allowing the said bank to apply any and all payments heretofore or hereafter made as the said bank may see fit and to change such application from time to time should they see fit, and may be drawn in such form as the directors may see fit.

7. That all or any of said bonds, debentures, hypotheques, mortgages, pledges or other securities may be signed by the president, or secretary, or any director, or other person appointed by the Board for that purpose, and the corporate seal of the Company may be attached, as occasion may require, and the same shall be valid and binding on the Company.

8. That the directors may keep a bank account in the name of the Company and transact all their banking business with the said bank, and the president, or secretary, or any director, or other person or persons appointed for that purpose by the Board of Directors, may sign or endorse all cheques, bills of exchange, promissory notes and obligations;

and give all promises and securities and enter into such agreements as may be deemed advisable by said president, secretary, or director, or other person or persons, in any way connected with said banking business, including promises and agreements under sections 89 and 90 of the Bank Act and either special or general waivers of presentment, protest and notice of dishonour of any and all cheques, bills or notes now or hereafter discounted or deposited for any purpose by the Company with the said bank, or to which they are parties, or in which they are in any way interested, and said president, secretary, director, or other person or persons may enter into and transact all banking business either of an ordinary or special nature which he or they may deem necessary in the interests of said Company.

9. That the general manager or assistant general manager for the time being of the said bank, or the agent or acting agent for the time being of the said bank at the branch of the said bank, at which the said banking transactions, or any of them have taken or shall hereafter take place shall be and they and each of them are hereby authorized for and on behalf of the Company and as its attorneys or attorney, to make, sign, seal and execute on behalf of the Company all promises, securities and agreements which they or any of them may see fit in connection with said banking transactions whether under sections 86, 87, 88, 89 or 90 of the Bank Act, or otherwise, and such promises, securities and agreements may be drawn in such form and contain such provisions as said attorneys or attorney may see fit, and the authorities and powers herein contained shall be irrevocable as long as the said Company is indebted to the said bank, and the said Company hereby ratifies and confirms and agrees to ratify and confirm all that may or shall be done in pursuance hereof.

Passed this day of A.D. 190 .

[Seal.]

ADDITIONAL CLAUSES.

GENERAL COUNSEL.

The general counsel shall be the legal adviser of the corporation and shall perform such services as the president, the Board of Directors or the executive committee may require, and shall receive such compensation as may be determined by the Board of Directors or executive committee.

EXECUTIVE COMMITTEE.

There shall be an executive committee of which the president shall be one, of five directors selected by the Board who shall meet at regular periods, or on notice to all by any of their own number. They shall advise with and aid the officers of the corporation in all matters concerning its interests and the management of its business; and when the Board of Directors is not in session, the executive committee shall have and may exercise all the powers of the Board of Directors.

The executive committee, unless otherwise provided by the Board of Directors, shall fix the salaries or compensation of all minor officers.

The executive committee shall keep regular minutes, and cause them to be recorded in a book kept in the office of the corporation for that purpose, to be read to the Board of Directors at each meeting thereof for their information.

SECRETARY.

The secretary shall be ex officio secretary of the Board of Directors and of the standing committees; shall attend all sessions of the Board; shall act as clerk thereof and record all votes and the minutes of all proceedings in a book to be kept for that purpose.

He shall perform like duties for the standing committees when required.

He shall see that proper notice is given of all meetings of the stockholders of the corporation and of the Board of Directors, and shall perform such other duties as may be prescribed from time to time by the Board of Directors, the executive committee or president.

He shall be sworn to the faithful discharge of his duty and shall give such bond as may be required by the Board of Directors or the executive committee.

TREASURER.

The treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation, and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation in such depositories as may be designated by the Board of Directors or executive committee.

He shall disburse the funds of the corporation as may be ordered by the Board, the executive committee or the president, taking proper vouchers for such disbursements, and shall render to the president, executive committee and directors at the regular meetings of the Board, or whenever they may require it, an account of all his transactions as treasurer and of the financial condition of the corporation, and at the regular meeting of the Board in June annually a like report for the preceding year.

He shall give the corporation a bond in form and in a sum and with security satisfactory to the Board of Directors, or the executive committee for the faithful performance of the duties of his office and the restoration to the corporation, in case of his death, resignation or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his profession belonging to the corporation, and containing such other provisions as the Board of Directors or executive committee may require, and shall perform such other duties as the Board of Directors or executive committee may from time to time prescribe or require.

Certificates of stock, when signed by the president or vice-president, shall be countersigned by the treasurer. He shall keep the accounts of

stock registered and transferred in such form and manner and under such regulations as the Board of Directors may prescribe.

PRESIDENT.

It shall be the duty of the president when present to preside at all meetings of the Board of Directors and of the executive committee; to have general and active management of the business of the corporation; to see that all orders and resolutions of the Board are carried into effect; to execute all contracts and agreements authorized by the Board; to keep in safe custody the seal of the corporation, and, when authorized by the Board or executive committee, to affix the seal to any instrument requiring the same, which seal shall always be attested by the signature of the president or vice-president and of the secretary or the treasurer. He may sign certificates of stock.

He shall have the general supervision and direction of all the other officers of the corporation, and shall see that their duties are properly performed.

He shall submit a complete report of the operations and conditions of the corporation for the year to the directors at their regular meeting in , and to the stockholders at their annual meeting in of each year, and from time to time shall report to the directors all matters within his knowledge which the interest of the Company may require to be brought to their notice.

He shall be *ex officio* a member of all standing committees and shall have the general powers and duties of supervision and management usually vested in the office of the president of a corporation.

Loss of Stock Certificate.

Any person claiming a certificate or evidence of stock to be issued in place of one lost or destroyed shall make an affidavit or declaration of that fact and advertise the same in such newspaper, and for such space of time, as the Board of Directors or executive committee may require, describing the certificate, and shall furnish the corporation with proof of publication by the affidavit of the publisher of the newspaper, and shall give the Board a bond of indemnity in form approved by the Board, with one or more sureties, if required in not less than double the par value of such certificate; whereupon the president and treasurer may, at such date, after the termination of the advertisement, as the Board of Directors or executive committee may designate, issue a new certificate of the same tenor with the one alleged to be lost or destroyed, but always subject to the approval of the Board of Directors or executive committee.

CHAPTER XVI.

CONTRACTS.

The subject naturally resolves itself into three branches. First, the power of the company to contract, for a discussion of which the reader is referred to the title "Powers"; secondly, the authority of the agent to make the contract; thirdly, the form of the contract.

1. POWER TO CONTRACT.

(1) A contract *ultra vires* of the company is wholly void and cannot be enforced or ratified.

(2) A contract not *ultra vires* of the company, but *ultra vires* of the directors may be ratified by the shareholders, 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, ubi. supra.*

(3) A contract made before the incorporation of the company by some person professing to act on its behalf cannot be ratified by the company after its incorporation. Palmer's Company Law 5th ed., p. 216.

It is further provided by the Ontario Companies Act, section 108, that a contract made by a public company before it is entitled to commence business as specified in that Act shall be provisional only and shall not be binding on the company until that date and on that date it shall become binding.

These latter words would probably not prevent a contract from being impeached on grounds such as fraud, after it shall "become binding."

The question of *ultra vires* cannot be made to depend upon the further question whether a certain contract was or was not beneficial to the company. Benefit or no benefit has really no bearing upon the question of *ultra vires.* The circumstance that

a contract may require for its full or maximum performance an increased plant is not in itself sufficient to render the contract *ultra vires.* It would be different if such increased plant had been required to carry on a new or different business from that then being carried on by the company. *National Malleable Castings Co.* v. *Smith's Falls,* 14 O.L.R. 22.

Where a contract is being entered into on behalf of the company by directors or agents the company should be the party to the agreement and the directors or agents in signing should sign on behalf of the company.

A company has no power to enter into a contract of suretyship or guarantee or lend its credit to another unless such power is expressly conferred by statute or in its Letters Patent or unless such a contract is reasonably necessary or is usual in the conduct of its business. *Colman* v. *Eastern Counties Ry. Co.,* 10 Beav. 1.

Similarly a company has no power to issue or endorse for the accommodation of others bills or notes in which it has no interest, unless such power is expressly conferred. But if the company is authorized to lend money to its customers or others as in the case with all Ontario Companies incorporated after July first, 1907, it would seem to have an implied power to raise the money and make the loan by endorsing the paper of the other parties.

Apart from express authorization a corporation has no power whatever to enter into a contract of partnership either with an individual or with another company. It is obvious that a company which enters into a partnership is liable to have the management of its affairs taken out of the hands of the directors or officers of the company and to become bound by the acts of the other partners. See, however, section 17.

Implied Contracts.

A company like a natural person is liable on an implied or quasi-contract as where it receives and uses goods sent to it by another or accepts the benefit of services without a valid or express contract to pay for them, or where money is paid by mis-

take or obtained by it by fraud. American and English Encyclopædia, vol. 7, p. 767.

Conflict of Laws.

Many of the contracts entered into by a company in carrying on business are with parties in another province or foreign country or are to be performed outside the province. Similarly contracts are frequently entered into respecting property situate outside the province. The question arises at once for consideration as to what law will govern the contract. In such a case the parties are at liberty to agree that the law of a certain province or country shall govern and such an agreement is binding. *Jacobs* v. *Credit Lyonais*, 12 Q.B.D. 600.

If there is no express agreement the intention of the parties will be ascertained by inference. *Hamlyn* v. *Talisker* (1894), A.C. 202. And the law of the country where the contract is made will *primâ facie* govern. *South African Breweries* v. *King* (1900), 1 Ch. 273.

Preliminary Contracts.

An express provision in the Letters Patent that the company may assume a preliminary contract will not render it binding on the company. With such provision in the Letters Patent the company may by resolution assume the burden of the contract upon incorporation but not otherwise.

A person purporting to contract as a trustee or act for a company to be incorporated is personally liable upon the contract. *Re Northumberland Avenue Hotel*, 33 C.D. 16; *Kelner* v. *Baxter*, 2 C.P. 174. And the subsequent adoption by the company does not relieve the agent or trustee from liability unless there is a novation. *Scott* v. *Lord Ebury*, L.R. 2 C.P. 255.

In preparing such an agreement, to obviate the liability which would otherwise attach to the agent or trustee, it is usual to provide that if the agreement is not ratified or adopted by the company within a certain time then the agent or trustee may rescind.

Mr. Palmer calls attention to the following points which may arise for consideration in preparing preliminary contracts:—

(*a*) On the sale of a business.

Are the book debts to be included? Are any of them bad? Is allowance to be made for bad debts? Will the vendor guarantee the book debts? If they are to be excluded from the sale, is the company to collect them? Is the stock-in-trade to be included at a fixed figure, or to be taken over at a valuation? Is the sale to take effect from the date of the agreement, or from the time fixed for completion or from some past date? Is the vendor to be precluded from competing with the company? Is the business to be carried on till completion on behalf of the vendor or on the company's behalf?

(*b*) On the sale of a patent.

Are improvements to be included in the sale? Are further inventions which would not properly be described as mere improvements to be included? Are foreign patent rights to be included? Is the vendor to be bound to give information as to improvements? Is the patent valid? Is the purchaser to be at liberty to take any opinion as to its validity before completion, and to rescind if the patent be pronounced invalid?

(*c*) On the sale of a mine.

Is it to be examined by an independent expert before competition? Is there a good title? If the property is abroad, can the company hold it, and is the purchase to be completed abroad or at home? If abroad is the purchase money to be sent abroad, or is it to be paid here to trustees pending information as to the title and transfer having been completed?

(*d*) On the sale of a concession.

Is it valid? Can it be vested in the company with or without consent; and in the former case, what is to be done if the consent cannot be obtained?

(*e*) On any sale.

Is there to be power to rescind if the company does not float, and who is to pay the preliminary expenses?

2. AUTHORITY OF AGENT.

A company being an incorporeal person must act through its agents. The directors and officers of the company are its agents, but are not necessarily the only agents of a company. It is usual for them to employ other persons to act for the company, and such persons will have power to bind the company within the limits of their agency. Their authority cannot, as a rule, be denied unless their employment is beyond the power of the directors or unless they have been irregularly employed, and the person dealing with them had notice of the irregularity. *Thompson* v. *Brantford Electric Co.*, 25 A.R. 340, and see also *Ontario Western Lumber Co.* v. *Citizens Telephone Co.*, 32 C.L.J. 237; *Bain* v. *Anderson*, 27 O.R. 369.

In the case of *National Malleable Co.* v. *Smith's Falls*, 14 O.L.R. 22, the validity of a contract entered into by the managing director of a company was considered.

In that case no by-law had been passed defining the general powers of the Board of Directors or of the managing director except as to borrowing for the purposes of the company. The managing director without consulting the Board and without any subsequent ratification by the Board signed a letter agreeing to furnish the plaintiffs in the action with a special line of goods. He knew that in order to carry out his contract a substantial extension of the company's plant and premises would be necessary and the plaintiffs also knew this. It was held that in the absence of bad faith or notice that the plaintiffs were entitled to assume that the managing director was authorized to enter into the agreement, it being one in regard to which the Board would have had power to bind the company. The Court of Appeal said that the contract being one which the Board of Directors could have entered into they could have authorized the manager of the company to do so on behalf of the company. Accordingly in the total absence of bad faith or motive, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question. See also *Duck* v. *Tower Galvaniz-*

ing Co. (1901), 2 K.B. 314; *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 305.

CONTRACTS BETWEEN COMPANIES HAVING CO-DIRECTORS.

The settled American doctrine seems to be that there must be a quorum of directors in both companies not disqualified from acting by reason of being directors in both companies, and where the directors of two companies are the same, contracts are treated as being voidable. Where the agent negotiating the contract is an officer of both companies, such contracts are regarded as being capable of ratification.

Under the Ontario Act a director is not deemed to be interested in a contract nor disqualified from voting or liable to account by reason of his holding shares or being a director in any other company with which a contract is made or contemplated. See section 89.

3. FORM OF CONTRACT.

The principal question arising in connection with the form of contracts is the necessity of the corporate seal. Care must be taken to shew on the face of the contract that the person or persons signing are acting for the company. Words should be inserted in the body of the agreement or in the description of the parties to that effect. See *Gadd* v. *Houghton*, 1 Ex. Div. 357. A company may be bound by an oral contract as in case of an individual, but in all cases within the Statute of Frauds contracts must be in writing to be enforceable.

Where a contract or the material particulars of a contract has been spread on the minutes of the company and the minutes have been signed by the president, this has been held to be a sufficient writing to satisfy section 4 of the Statute of Frauds. *Jones* v. *Victoria Graving Dock Co.*, 2 Q.B.D. 314.

So a resolution expressed to be for the remuneration of an officer of the company was held sufficient to form a contract when acted upon which will bind the company in case of direct action to recover payment. *Fayne* v. *Langley*, 31 O.R. 254.

And see *Swabey* v. *Port Darwin Gold Mining Co.* (1889), 1 Magone's Co.'s Acts, Rep. 385, and *Orton* v. *Cleveland Fire Brick and Pottery Co.* (1865), 3 H. & C. 868; but see *Wright* v. *Peruvian Guano Co., Ex p. Kemp* (1894), 3 Ch. 690, at p. 701.

Seal.

The right to use the corporate seal is usually vested in the directors. Where the by-laws of the company do not expressly deal with the matter the power is derived from general clauses giving them power to make by-laws, to regulate the conduct of the affairs of the company.

The executive officers of the company are presumed to be entitled to use the corporate seal. *Re Barned's Banking Co.*, 3 Ch. 105. And where the document on its face appears to be regular the burden of proving the contrary is on those who allege the irregularity. *Clark* v. *Imperial Gas Co.*, 4 B. & Ad. 315.

Where a contract is produced under the seal of the company, the seal is presumed to be regularly affixed. *Woodhill* v. *Sullivan*, 14 C.P. 265; *Fell* v. *South*, 24 U.C.R. 196. And even where the contract is signed without proper authority, as where no directors of the company have been regularly appointed or no resolution passed authorizing the contract if of a special nature, this will not be allowed to prejudice third parties, provided, however, that they have no notice of any irregularity. *D'Arcy* v. *Tamar Ry. Co.*, L.R. 2 Ex. 158, and see *Duck* v. *Tower Galvanizing Co.* (1901), 2 K.B. 314. The power existing, the Courts will not scrutinize as to how it came to be formerly carried out in the face of a duly authenticated and properly drawn instrument under the corporate seal. *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 309; *Taunton* v. *Sheriff of Warwickshire* (1895), 2 Ch. 319; *McKain* v. *Canadian Birkbeck Co.*, 7 O.L.R. 341.

But where the corporate seal was affixed fraudulently by the secretary it was held that the company was not bound nor estopped from setting up the fraud. *Ruben* v. *Great Fingall Co.* (1904), 2 K.B. 712.

The rule in *Royal British Bank* v. *Turquand* does not apply in cases of non-trading corporations and it has been held that an instrument executed by such corporation the seal must be regularly affixed, otherwise the instrument is inoperative. *Mayor* v. *Bank of England,* 21 Q.B.D. 160; *Freehold Land* v. *Suffield* (1897), 2 Ch. 608.

The affixing of the corporate seal imports delivery and the deed is *primâ facie* operative from the time that the seal is affixed. *London Freehold* v. *Suffield* (1897), 2 Ch. 608.

Necessity for Seal.

The question of the necessity of the corporate seal has recently been discussed by the Ontario Court of Appeal in the case of *National Malleable Castings Co.* v. *Smith's Falls,* 14 O.L.R. 22. The following statements are taken in the main from the very able judgment of Mr. Justice Garrow in that case.

The common law was strict that all contracts by a corporation must be executed under the common seal, but it was early departed from in the case of commercial or trading companies in matters of trivial or everyday occurrence, and this departure widened until it included practically all executed contracts which with a seal would have been lawful.

But in the case of executory contracts, although the apparent tendency has been towards greater freedom, it cannot be said that the Courts have yet fully approved of placing them entirely in the same category with executed contracts.

The furthest advance in this direction was made in the case of *South of Ireland Colliery Co.* v. *Waddle,* L.R. 3 C.P. 463, 4 C.P. 617. In that case a contract had been made by the defendants with the plaintiffs to supply a pumping engine required in the plaintiffs' operations, and the plaintiffs had paid a part, but not all, of the price. The action was brought to recover damages for a failure to deliver the engine, and the defence was the absence of the plaintiffs' corporate seal. The broad rule there laid down is that a trading corporation may be bound by any and all contracts entered into for the purpose for which it was incorporated, although not under the corporate seal, a rule said

by Pollock, C.B., in *Australian Royal Mail Steam Navigation Co.* v. *Marzetti* (1855), 11 Exch. 228, to be founded on justice and common sense.

With this may be compared the judgment in *Wingate* v. *Enniskillen Oil Refining Co.* (1864), 14 C.P. 379, where an opposite conclusion was reached in a case resembling the present. But that decision was before the case of *South of Ireland Colliery Co.* v. *Waddle*. In the Supreme Court of Canada, it is true in a municipal case, and upon an executed contract, the *South of Ireland Colliery Case* was referred to with unqualified approval by Gwynne, J., in whose judgment the majority of the Court concurred, in the case of *Bernardin* v. *Municipality of North Dufferin* (1891), 19 S.C.R. 581, at page 610. On the other hand, in *The Garland Manufacturing Company* v. *The Northumberland Paper Co.* (1899), 31 O.R. 40, a Divisional Court, according to the head-note, fully maintained the old distinction between executory and executed contracts and apparently declined to follow or at least distinguish the *South of Ireland Colliery Case*. The case, however, really proceeds upon the special facts which brought it within *Finlay* v. *Bristol and Exeter R.W. Co.* (1852), 7 Ex. 409, a decision which it was held was not overruled by the *South of Ireland Colliery Case*, apparently also the view of Gwynne, J., who while explicitly approving of the judgment in the last mentioned case in the same judgment, page 598, treats the earlier case of *Finlay* v. *Bristol and Exeter R.W. Co.* as still good law. That, like the case of the *Garland Manufacturing Company* v. *Northumberland Paper Co.*, was an action to recover money for the use and occupation of land, and the Court refused to infer from the circumstances a contract to pay, where the land had not in fact been occupied. The learned Judge goes on to say:—

"There may be reasons for refusing to imply a parol contract in the case of a trading corporation which would under similar circumstances be implied between individuals. The cases before referred to of *Finlay* v. *Bristol and Exeter R.W. Co.*, and the *Garland Manufacturing Company* v. *Northumberland Co.*, are no doubt authorities for that position, but if the before-quoted

rule laid down in the *South of Ireland* v. *Waddle Case* is to be fully adopted, and I think it should be, these cases seem to me to be at least illogical survivals in fact of the older and narrower rule of the common law. For if a trading corporation may be bound by an express contract not under seal, I am unable to understand why it should not also be bound by a similar contract implied by law in the interests of justice always providing, of course, that the contract to be implied would have been unobjectionable if it had been under seal.

In the *Bernardin Case,* Mr. Justice Gwynne has laid down the following proposition:—

"When a corporation aggregate have by their managing body procured work to be done within the purposes for which the corporation was created, under a parol contract and when the managing body of such corporation has accepted the work as completed under the parol contract, and the corporation have received the benefit thereof, it would be a fraud on the corporation to resist payment of the price or value of the work upon the ground that the contract was not executed under their corporate seal and therefore unless by some express statutory enactment to the contrary governing the particular case, they cannot upon any principle of justice and sound sense, be permitted to do so either in Courts of law or equity, whose principles as to the prevention of committing such a fraud are identical."

In another case it was said that contracts not under the corporate seal with trading corporations relating to purposes for which they are incorporated or apparently formed, and of such a nature as would induce the Court to decree specific performance thereof if made between ordinary individuals will be enforced against them. *Ontario Western Lumber Co.* v. *Citizens Telephone Co* (1896), 32 C.L.J. 237; *Thompson* v. *Brantford Electric Co.*, 25 Ont. A.R. 340; *Finlay* v. *Bristol & Exeter R.W. Co.* (1852), 7 Ex. 409, discussed and followed. *Garland Co.* v. *Northumberland Paper Co.*, 31 O.R. 40.

Appointments of an important character such as that of a manager of a company, in order to be binding must be under

seal and should be made by by-law. *Birney* v. *Toronto Milk Co.*, 1 O.W.R. 736. See also *Gold Leaf Mining Co.* v. *Clark*, 6 O.W.R. 1035.

SYNDICATE AGREEMENT FOR PURCHASE AND RE-SALE OF MINES.

Heads of Agreement.

1. A syndicate is hereby established for the purpose of acquiring the mines situate at , and known as the mines, and of disposing of the same at a profit. The capital of the syndicate shall be $, and shall be considered to be divided into shares of $ each. The holders for the time being of the shares shall be members of the syndicate. Each of the subscribers is to be entitled to the number of shares set opposite his signature. The shares are to be transferable, but not divisible. A transfer must be registered.

2. In entering into the contract dated for the acquisition of the said mines, A., one of the subscribers hereto, shall be deemed to have been acting on behalf of the syndicate, and the syndicate shall forthwith repay him the deposit, and shall indemnify him against his liabilities under the contract.

3. A. and B. shall be managers of the syndicate, and shall hold the properties of the syndicate in trust.

4. $ per share shall be paid to the managers forthwith, and they may from time to time make calls on the members in proportion to their shares, but no member is liable to pay more than the amount of his shares.

5. All moneys paid to the managers in respect of calls or otherwise shall be applied for the purposes of the syndicate.

6. The managers shall have the entire control of the affairs of the syndicate, and may conduct the same in such manner as they think best.

7. It is expressly declared that the managers, if they think, fit, (*a*) may sell the mines to a person, or firm, or Company; (*b*) may form and float, or procure the formation and floating, of a Company to purchase the mines; (*c*) may fix the price and agree to accept any part of it in fully paid-up shares, debentures, or otherwise; (*d*) may keep the mines going until disposed of.

8. The managers may convene meetings of the syndicate to deliberate and decide on any of the affairs of the syndicate: every share to confer one vote: majority to decide: votes may be given in person or by proxy. Three days' notice of each meeting to be given.

9. The consideration for sale or disposition of the mines shall be applied, first, in paying all debts and liabilities of the syndicate: secondly, in repaying any capital contributed by the members in respect of their shares: thirdly, the surplus shall be divided amongst the members in pro-

portion to their shares. And for the purposes of this clause the managers may convert into money any shares, debentures, or other specific assets, and may divide any such assets in specie, and make such other arrangements for adjusting the rights of the members as they think fit.

10. Notices to each subscriber may be given by post, addressed to him at his address below mentioned. Notice so given to be deemed served twelve hours after posting.

Dated the day of

OPTION ON MINE.

AGREEMENT FOR PURCHASE OF MINE TO BE TURNED OVER TO A COMPANY. PAYMENT IN INSTALMENTS. SEE NEXT FORM.

This agreement made this day of
Between

hereinafter called the vendor.

Of the First Part.

and

hereinafter called the purchaser.

Of the Second Part.

Witnesseth that the vendor agrees to sell and the purchaser agrees to buy all those certain parcels or tracts of land situate, lying and being in the Township of , in the District of , which may be described as , for the price or sum of $ payable in the manner hereinafter provided, and for the further consideration hereinafter contained.

The vendor agrees to deposit on or before the day of a deed or transfer of the said lands to the purchaser, with the Trust Company, in escrow and on such deposit being made, but not before the day of , the purchaser shall pay to the said Trust Company the sum of $; within days after the said payment is made, the purchaser agrees to pay to the said Trust Company, the further sum of $ and the said Trust Company shall hold the said sum of $ to the credit of the purchaser until the vendor shall have deposited with the said Company a certificate of title to the said lands vesting a clear title thereto in the vendor. The vendor agrees to deposit said certificate of title as soon as he receives same from the Lands Title Office. Upon the deposit of the said certificate the Trust Company shall forthwith pay over to the vendor the said sum of $.

The purchaser shall make a further payment to the said Trust Company of $ within days. The purchaser shall not, however, be under any liability to pay over the said sum of $ until the said certificate of title shall have been so deposited as aforesaid. The said Trust Company shall forthwith upon the receipt of the said sum

of $ pay over the same to the vendor without any deduction or abatement of any kind whatsoever and deliver to the purchaser the said deed or transfer and certificate of title.

The purchaser shall have the right to prepay any or all of the said instalments at any time without notice or bonus.

Should the purchaser not pay the said sums of money as are herein provided to the Trust Company, the Trust Company shall forthwith, after default has been made in any payment, return the said deed or transfer to the said vendor and this agreement shall thereupon be at an end and the purchaser shall have no claim to have any payments of money theretofore made repaid to him nor any claim or right under this agreement or otherwise, it being agreed that all payments made before default shall, when paid become absolutely the property of the vendor.

And as further consideration, the purchaser agrees to incorporate a Company under the laws of Ontario, to be called the Mining Company, Limited, or such other name as the purchaser shall elect, to acquire the said property, such Company to have an authorized capital of $ divided into shares of one dollar each.

The purchaser agrees to convey the said property so soon as he shall be entitled so to do to such Mining Company for such consideration as may be agreed upon between him and the said Company.

The purchaser further agrees that as a further consideration for this sale, he or the said Company will so soon as any stock in the said Company shall have been allotted, pay to the purchaser $ to be paid by the delivery of shares of the said Company, to be valued at the price at which said shares are first bona fide offered to the public in the open market, that is, if the shares are so offered at a discount of cents on the dollar, the purchaser shall receive shares of said stock under this clause.

As a further consideration, the purchaser agrees to sell and deliver to the vendor shares of the said stock at par at any time within days after the last instalment of the said $ shall have been paid under this agreement, but the vendor shall not be bound to purchase said stock.

Provided always that if for any reason the vendor is not ready to deposit the said deed or transfer and certificate of title with the Trust Company, on or before the day of the time for payment of the instalments hereinbefore provided shall be extended for as many days as shall elapse between the day of , and the time when the vendor is ready to so deposit the said deed and advises the Trust Company to that effect.

The purchaser agrees that he will not register in the Land Titles Office at or elsewhere until the full payment of $ to the

vendor as herein provided, any caution or other document against the said property and in case of such registration this agreement shall thereupon come to an end and be absolutely void at the option of the vendor.

Time shall be of the essence of this agreement in all respects.

The purchaser shall be liable for and shall pay all charges of the said Trust Company, in connection herewith.

In witness whereof the parties hereto have executed this agreement.

Signed, Sealed and Delivered
In the presence of

SALE OF MINING LANDS TO COMPANY.

Option to vendor to transfer property to a second Company in such a case giving an option on shares in the second Company to the first Company.

(See previous form.)

This agreement made the day of .

Between

hereinafter called the vendor.

Of the First Part.

and

Limited (no personal liability), a Company incorporated under the laws of Ontario and having its head office at the City of Toronto, hereinafter called the "Company."

Of the Second Part.

Whereas the vendor has acquired under certain agreements all those certain parcels or tracts of land and premises situate lying and being in the Township of , in the District of , described as follows:—

And whereas the Company has been formed with an authorized capital of dollars divided into shares of one dollar each.

And whereas the parties hereto have entered into certain agreements.

Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter contained and of the sum of one dollar now paid by the Company to the vendor, the parties hereto agree as follows:—

1. The vendor agrees to sell and the Company agrees to buy.

Firstly: All the right, title and interest of the vendor in and to the hereinbefore described property, lands and premises;

Secondly: All machinery, plant, fixtures, tools, supplies and all other chattels of every kind and description in or upon the said premises and used in operating and in connection with the mining operations carried on on the said lands and premises;

Thirdly: All ores, minerals, metals and other products of the said mining operations heretobefore carried on on the said lands and premises.

2. The agreement for sale and purchase contained in the next herein preceding paragraph shall be carried out at the option of the vendor and if carried out the purchase price of the said lands, premises, goods and chattels shall be the sum of dollars of lawful money of Canada which said sum shall be paid and satisfied by the issue to the vendor of shares of fully paid-up and non-assessable stock of the Company of the total par value of dollars.

3. The said shares of stock shall be allotted and issued to the vendor as follows:

(*a*) Upon the delivery by the vendor to the Trust Company of transfers in proper form of all his right, title and interest in and to said properties he shall be entitled to receive shares of fully paid and non-assessable stock.

(*b*) After the vendor shall have made or caused to be made a further payment to on account of the purchase price of the properties of $ which payment is due and payable on or before the day of , he shall be entitled to receive and to have issued to him by the Company further certificates of fully paid and non-assessable stock to the number of .

(*c*) Upon payment of the balance of the purchase money to said on or before the day of , being $ the vendor shall be entitled to have issued to him further fully paid and non-assessable shares of stock to the number of being the full balance of the said shares.

(*d*) If the said instalments of purchase money payable to said shall be prepaid in part, the vendor shall be entitled to have issued to him by the Company certificates of stock, which at the price of cents per share would be equal in amount to the amount so paid in part to the said .

4. The vendor shall notify the Company on or before the day of , if he is prepaid to carry out the said agreement of sale and purchase, and if he should not be prepared to carry same out, he hereby agrees with the Company that he will forthwith transfer the herein described property to , Limited, a Company incorporated under the laws of Ontario with a capital of $ divided into shares of $1. each, in consideration of the issue to him of at least shares of fully paid-up and non-assessable stock of the said Company.

5. If the vendor should make the transfer provided in the next preceding paragraph he agrees that he will immediately give an option to the Company for the purchase of all of the said shares so issued to him.

6. The said option shall give the right to the Company of purchasing the said shares of stock for a sum of money equal to the par value of the said shares of stock.

7. The said option shall be a good sufficient and binding option and shall give the Company the right to purchase the said shares of stock at any time within months from the date of such option. The sum of money so to be paid for the said shares of stock shall be paid and satisfied by the issue to the said vendor of a number of shares of the capital stock of the Company equal to the number of shares of , Limited, before referred to and which are to be issued to the vendor in consideration of the said transfer to the latter Company.

8. If the vendor shall transfer the above lands to , Limited, in consideration of the transfer to him of the said shares of stock, the Company agrees that instead of taking an option upon the said shares of stock as above provided it will at the option of the vendor purchase the said lands and premises from the said , Limited, for the price or sum of dollars to be paid and satisfied by the issue to the latter Company or its nominees shares of the capital stock of this Company of the par value of one dollar each, which shares of stock shall be fully paid and non-assessable.

9. The vendor agrees that he will notify the Company in writing on or before the day of , which course he desires to pursue and the transaction shall be then carried out in the manner indicated.

10. The Company shall be entitled to possession of the said lands, premises, machinery, plant, fixtures, tools, supplies, ore, minerals and other chattels above referred to and with the full right to mine and work the said property and to ship and sell at their own cost and for their own benefit the mineral products thus won as soon as the vendor shall be so entitled.

11. The vendor agrees that in case of a transfer of the said lands and premises, goods and chattels to the Company whether by himself or by , Limited, to be incorporated he will cause to be delivered good and sufficient deeds and transfers or bills of sale as may be necessary in the option of counsel to effectually vest all the said property and assets in the said Company, such documents, however, to be prepared at the expense of the Company.

12. This agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

As witness the hands of the vendor and the corporate seal of the Company attested by the signatures of the proper officers thereof thereunto fully authorized the day and year first above written.

Signed, Sealed and Delivered
In the presence of

AGREEMENT TO PURCHASE MINING LANDS; PAYMENT IN CASH AND SHARES IN COMPANY TO BE INCORPORATED. SHARES TO BE HELD BY TRUSTEE; GUARANTEE OF TITLE.

This agreement made in triplicate the day of .

Between

The Mining Company, Limited, a Company incorporated under the laws of the Province of Ontario and having its head office at the City of Toronto, herein after called the Company.

Of the First Part.

and

William Blank, of the City of Toronto, in the Province of Ontario, Esquire, hereinafter called the purchaser.

Of the Second Part.

Whereas the Company is the owner of the hereinafter described mining claims situated in the Township of , in the District of and being described as follows:—

Parcel 1. Etc.

And whereas the Company has agreed to sell the said mining claims to the purchaser for the considerations hereinafter expressed, and the purchaser has agreed to buy the same from the Company upon the terms hereinafter mentioned and subject to the provisions hereof.

Now, therefore, this agreement witnesseth that the Company for itself and its successors agrees to sell, assign, transfer and set over to the purchaser all its right, title and interest in and to all of the said mining claims, lands and premises above described and upon the terms and conditions herein set out, namely:

1. The purchase price of the said parcels, one and two shall be the sum of $ together with 150,000 shares of fully paid and non-assessable stock of a Company to be incorporated by the purchaser with an authorized capital of $ divided into shares of one dollar each, or per cent. of the authorized capital stock of such Company.

2. The purchaser agrees forthwith to procure the incorporation of the Company under the Ontario Companies Act and the Ontario Mining Company's Incorporation Act with an authorized capital of $ divided into shares of one dollar each, and immediately upon incorporation, the herein described property shall be transferred by the purchaser to the said Company in consideration of shares of fully paid and non-assessable stock of the said Company.

3. The said shares shall be issued in the name of , as trustee, subject to the terms of this agreement and shall be deposited with the Trust Company in escrow and subject to delivery to the purchaser or to re-delivery to the Company, as the case may be, pursuant to the terms of this agreement as hereinafter set out.

4. The purchaser shall pay or cause to be paid to the Company the said purchase price of $ as follows:—$ in cash on or before the execution of this agreement; $ in thirty days from the date hereof; $ in sixty days; $ in 90 days, and the balance of $ in 120 days from the date hereof, with the privilege to the purchaser of prepaying any or all of the said payments at any time without notice or bonus and the said 150,000 shares of stock shall be delivered to the said Company at the time of making the last of the cash payments above referred to. Provided that the purchaser shall have the right to pay an additional sum of $ in cash in lieu of delivery of the said shares of stock.

5. On payment of the said first payment, the purchaser shall be entitled to the delivery to him by the Trust Company of of such shares, held in escrow as above set out; on payment of the further sum of $ within thirty days from the date hereof, the purchaser shall be entitled to delivery of additional shares; on payment of an additional sum of $ in ninety days from the date hereof, the purchaser shall be entitled to delivery of an additional shares; and payment of a further sum $ within 120 days from the date hereof, the purchaser shall be entitled to the delivery of the balance of shares, so held in escrow.

6. Immediately upon incorporation of the proposed Company under the name , Limited, or such other name as shall be adopted, the Company agrees to execute good and sufficient deeds and transfers under the Mines Act or otherwise, to fully and effectually vest in the Company the above described mining claims, mines, lands and premises, together with all minerals, or mineral products, if any, already mined therefrom, which may happen to be lying in or upon the said lands, and together with all buildings, plant, tools, fixtures and supplies which may happen to be in or upon the said property, and contemporaneously with the delivery of the said transfer, the purchaser shall cause to be delivered to said trustee the said certificates for shares of stock of the proposed Company.

7. The said proposed Company shall be entitled, upon the execution of the transfers to immediate possession of the said lands and premises with the full right to mine and work the same at its own expense and to ship and sell at its own cost and for its own benefit the mineral products so won.

8. Provided, however, and it is expressly agreed by and between the parties hereto that time shall be the essence of this agreement. And that in the event of the purchaser failing or omitting to pay any of the said payments hereinbefore set out when the same shall become due and payable, the Company shall be entitled to claim any or all shares of stock left in

the hands of the trustee at the date of such default, and to retain the same for its own use and benefit, and the purchaser shall have no further right to claim or demand any of such stock.

9. And in case of such default as aforesaid the said trustee shall upon demand of the Company or its officers deliver the said stock undisposed of as aforesaid to the Company.

10. The Company guarantees that it has an absolute right to the said mining claims herein described and each of them and that they have each and everyone passed inspection or been allowed by the Minister of Mines and that the Company has the absolute right to obtain patents for each and every one of said claims upon completing the necessary work required by the Mines Act, and upon payment of any dues, charges, fees properly payable to the Crown on that behalf.

11. And the Company further guarantees that that there are no outstanding or adverse claimants to the said parcels or claims or any of them, or any liens, charges or encumbrances if any kind effecting the same or any easements of any kind or description effecting the same.

12. And the Company further agrees that it will confirm this agreement at a regularly held meeting of directors to be called immediately and to be held not later than ten days from the date hereof, and will if required by the purchaser ratify same at a special general meeting of shareholders of the Company, and the president and secretary being the signatories to this agreement, hereby personally undertake to have carried out by the Company, the provisions of this paragraph and the terms of this agreement generally.

13. Provided that upon the failure of the Company to have this agreement ratified and confirmed as above provided or upon the refusal or failure of the Company to hand to the purchaser patents of all the above described property within days from the date hereof, this agreement shall, at the option of the purchaser his heirs, executors, administrators or assigns, become null and void and he or they shall be entitled to re-payment of the moneys paid hereunder upon executing or causing to be executed a re-transfer of said properties to the Company.

14. It is understood and agreed that this agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns.

In witness whereof the parties have executed this agreement.

Signed, Sealed and Delivered
In the presence of

MINING LEASE WITH OPTION TO PURCHASE.

Between

, a Company incorporated under the laws of Ontario, and having its head office at the City of Toronto, hereinafter called the lessors.

Of the First Part.

and

, of the City of Toronto, in the Province of Ontario, and hereinafter called the lessees.

Of the Second Part.

1. The lessors demise and lease to the lessees, all the mines, veins and beds of ore whatsoever in and under all those lands situate in the Township of , in the District of , and known as , and, secondly, all houses, buildings, shafts, drifts, ways, watercourses, and all other works and conveniences to the said mines now belonging to the same or used therewith.

2. The lessees may enter upon the said lands and search for, dig, work and obtain for their own benefit, the demised minerals and ores and dispose of them, subject to the royalties and rentals herein provided for.

3. They may erect and build such engines, buildings and machinery, and sink, make and drive such shafts, levels, drifts and other works, whether below or upon the surface of the lands as may be necessary or convenient, and generally may do all things which may be convenient or necessary for working and getting out the demised minerals, and for carrying away and shipping same.

4. The said premises shall be held by the tenants from the day of , for the term of five years, determinable as hereinafter provided.

5. The consideration for these premises shall be the payment by the lessees to the lessors of the sum of $ in cash upon the execution and delivery of this indenture.

6. The lessees shall further pay and render to the lessors 25 per cent. of the net proceeds of the first car of ore shipped or otherwise disposed of by the lessees; 30 per cent. of the net proceeds of the second car and 35 per cent. of the net proceeds of the third car and of all subsequent shipments or sales of ore by the lessees. The lessees hereby agreeing, to ship all ore as mined to a smelter and to make returns or payments as above, to the lessors immediately upon receipt of the returns from the smelter.

7. It is understood and agreed between the lessors and the lessees, that in the event of the option hereinafter set out, being exercised by the lessees, and the property purchased by them, then all moneys paid by the lessees to the lessors under the preceding paragraph, shall be deemed and taken to have been paid on account of the said purchase price, and shall be deducted from such price.

8. The lessees, for themselves, their heirs, executors, and assigns hereby jointly and severally covenant with the lessors as follows:—

(1) To work the demised mines, veins, and beds of metals and ores effectually and without intermission, save only when the working is interrupted by inevitable accidents, or strikes or trade disputes, and to employ in such work, not less than miners per day during the months of November, December, January, February, March and April in each year, and not less than miners per day during the remaining months of the year, and to carry on such work in a skilful and workmanlike manner, according to the best and most improved methods of working, practised in similar undertakings in the district, so that the whole of the said lands and metals and ores thereunder may be fully searched, tried and worked.

(2) To wash, dress and make merchantable all metals and ores got by virtue of these presents, as soon as practicable after same have been got:

(3) To weigh or cause to be weighed, upon some part of the said lands, all such metals and ores, and not to remove or suffer to be removed any such metals and ores until they have been weighed as aforesaid, and to give to the lessors or their agents a memorandum in writing of the result of each of such weighings forthwith after the completion of same.

(4) To ship all such metals and ores to a smelter so soon as it may be possible or expedient to do so, provided that no such shipment shall be made within ten days' notice in writing to the lessors, and upon receipt of the cash or bullion or other returns from the smelter to pay or render to the lessors their just proportion of the same.

(5) To pay and discharge all existing and future rates, taxes and assessments, composed or charged upon the demised premises, and any metals or ores got therefrom. Provided that the lessees shall be at liberty to deduct the royalties of and payable to the Government upon ores from the returns from the smelter before computing the percentage of such returns payable to the lessors hereunder.

(6) To keep all buildings, workshops and plant in good and substantial repair, and to observe in every respect the provisions of the Ontario Mines Act and Amending Acts, and any regulations made thereunder, and to keep the buildings thereon insured to their full insurable value.

(7) To permit the lessors, their servants or agents, at all reasonable times to enter upon the demised mines and premises to inspect and examine the same.

(8) To keep accurate plans of the workings of the mine, and also proper books of account.

(9) Not to assign or sub-let the demised premises or any part thereof without the previous consent in writing of the lessors.

(10) At the determination of the tenancy, to deliver up the demised premises with the buildings, machinery, plant, fixtures therein or upon or under the said lands, in good and substantial repair.

9. It is further agreed that if any part of the royalties hereby reserved shall be unpaid or undelivered for thirty days after the same should be paid or delivered, or if the lessees, or either of them, shall become insolvent, or if any covenant, on the lessees' part shall not be performed, then and in any of such cases, it shall be lawful for the lessees, at any time to re-enter upon the demised premises, or any part of them, in the name of the whole, and thereupon, this demise shall absolutely determine, but without prejudice to the rights of the lessors in respect of any breach or non-observance of the convenants herein contained.

10. It is further agreed that the lessees shall have an option to purchase the demised premises at any time prior to . Such option shall be exercised by delivering a notice to the secretary-treasurer of the lessors, accepting the option, and agreeing to purchase said premises.

11. The purchase price shall be the sum of $. Provided that if said option is exercised on or before the day of , the purchase price shall be $, and the lessees shall be entitled to be credited on account of the said purchase price with all royalties paid or payments made by them from the proceeds of the sale of metals and minerals as above set out.

12. In case the said option is exercised the purchase price shall be payable as follows: $ forthwith after giving such notice, and the balance payable at the rate of $ on the first day of , and each succeeding month until the whole amount shall be fully paid and satisfied.

13. Time shall be strictly of the essence of this indenture and all provisions thereof.

14. Should the lessees make default in any of the payments above provided for, or any of them, then the lessors may, at their option, as above provided, terminate this lease, or if such default arises after said option shall have been exercised, then the lessees may terminate, the agreement to purchase and all payments of every kind made hereunder, shall be forfeited to the lessors, by way of rental and liquidated damages.

15. It is further understood and agreed that the lessees are to have the use of the drills, tools, implements and other chattels now upon the demised premises, which shall become the property of the lessees in the event of their exercising the said option and completing the payments thereunder.

In witness whereof the lessees have hereunto set their hands and seals, and the lessors have fixed their corporate seal, attested by their proper officers.

Signed, Sealed and Delivered
In the presence of

SYNDICATE AGREEMENT WITH A VIEW TO FORMATION OF A COMPANY.

An agreement made the day of between (trustee) of, etc., of the one part and the several persons whose names are subscribed in the schedule hereto of the other part.

Whereas it is intended to incorporate a Company under the Ontario Companies Act to be called the Company, Limited (hereinafter referred to as the Company) having for one of its principal objects the acquisition of .

And whereas it is desired to establish a syndicate for the purposes aforesaid and to provide funds therefor.

Now it is hereby agreed between the several subscribing parties hereto each one with the others of them and with the said (trustee) as follows:—

1. The parties hereto shall constitute a syndicate to be called the Syndicate with the object of entering into a contract to purchase the said and for such other purposes as the subscribing parties (hereinafter called the syndicate members) shall determine including the transfer and resale of the said or of the said contract at a price to be determined by the syndicate members.

2. The said trustee (hereinafter referred to as the trustee, which expression shall include any other trustees or trustee hereunder for the time being) shall act as trustee for the syndicate members.

3. The trustee or any other of the syndicate members who shall enter into any contract for the purchase of the said shall be deemed to have entered into the same on behalf of the syndicate members and shall be entitled to be indemnified against all liabilities under such contract out of the fund to be provided as hereinafter mentioned.

4. At each meeting of the syndicate members a chairman shall be appointed. All questions shall be decided by a majority of the syndicate members present or in case of an equality of votes then by the chairman of the meeting. Mr. one of the syndicate members shall be secretary of the syndicate. He shall convene meetings at the request of the trustee or of any three members. No formal notice shall be necessary for convening meetings of the members but the best notice possible shall be given and the convenience of the majority shall be considered.

5. A syndicate fund shall be raised in manner following; Each of the syndicate members shall pay the sum of $ to the trustee and such further sum not exceeding $ as may be required as and when called up as hereinafter mentioned. The trustee shall pay all sums so received by him to a separate banking account in the names of (three members) three of the members of the syndicate and at each meeting of the syndicate the pass book of the said accounts shall be produced properly written up. All cheques to be drawn on the funds shall be signed by each of the said three members or by such other persons as the syndicate members from time to time appoint "on behalf of the Syndicate."

6. The trustee shall when so directed by a meeting of the syndicate members make such calls as may be necessary not exceeding in the aggregate the said sum of $ from each member. Should any member fail to pay what is due from him, the deficiency shall be made good by the other members in equal shares.

7. The syndicate fund shall be applied in paying all such expenses and generally in such manner as may be determined from time to time by meetings of the syndicate members.

8. No person shall be admitted a member of the syndicate without the written consent of two-thirds of the whole of the members of the syndicate for the time being. No member shall be at liberty to retire from the syndicate until the day of and on the occasion of the death or bankruptcy of any member his estate shall be liable for all sums of money which would have been payable by him had he continued to be alive or solvent as the case may be. The right of voting at meetings and participating in the management of the syndicate shall not be assignable nor shall the same pass to the legal personal representative or assignee in insolvency of or any other person deriving title under any member but the actual individuals who have been admitted members of the syndicate shall alone be entitled to participate in the management thereof.

9. The trustee shall receive any profit on the resale of the said and after payment of all costs and expenses shall distribute any surplus among the syndicate members in proportion to the amounts actually paid by them respectively to the syndicate fund.

10. A notice may be served on any syndicate member personally or by sending it through the post in a prepaid letter addressed to such member at the address set opposite his name in the schedule hereto and any notice so served shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post.

11. The trustee may retire at any meeting of the syndicate members in which case the vacancy shall forthwith be filled up. A meeting of the syndicate members may by resolution at any time remove the trustee and appoint another or other trustees in his place.

12. If the said shall not have been acquired by the Company on the day of the syndicate shall be dissolved and after payment of all expenses connected therewith the fund subscribed shall be divided among the syndicate members in proportion to their respective interests therein.

(Signature of trustee.)

The schedule above referred to.

Signatures of members.	Addresses.

AGREEMENT BETWEEN PARTNERS FOR CONVERSION OF FIRM INTO A LIMITED COMPANY.

An agreement made the day of between (first partner) of, etc., of the first part, (second partner) of, etc., of the second part, (third partner) of, etc., of the third part and (fourth partner) of, etc., of the fourth part.

Whereas the parties hereto are now carrying on the business of at in partnership under the name of & Co. (hereinafter referred to as the firm).

And whereas the parties hereto are desirous of converting the firm into a limited Company upon the terms hereinafter contained.

Now it is hereby agreed as follows:—

1. A Company shall forthwith be incorporated at the expense of the firm and duly incorporated under the Companies Act with a nominal capital of $ divided into ordinary shares of $ each, and preferred shares of $ each, and having as one of its objects the acquisition and management of the business of the firm.

2. Subject to the provisions of this agreement, the Letters Patent and by-laws of the Company shall be in such form and contain such provisions as may be advised by the solicitor to the parties hereto, Mr. or by counsel instructed by him.

3. The preferred shares shall entitle the holders thereof to a non-cumulative dividend at the rate of 7 per cent. per annum, on the nominal value of the shares for the time being issued.

4. None of the shares of the Company shall be offered for public subscription but the ordinary shares may at the discretion of the directors be offered for subscription privately to the customers of the firm.

5. The Letters Patent and by-laws shall contain provisions for the entire management and control of the Company being retained in the hands of the holders for the time being of the common shares.

6. The parties hereto shall each subscribe the stock book and petition for incorporation of the Company for one share. The other subscribers shall be such persons as the parties hereto mutually agree upon (but in the event of any disagreement one of the subscribers shall be determined upon by the said (first partner) another by the said (second partner) and the other by the said (third partner) without any interference by the other parties hereto.

7. The parties hereto shall be the first directors of the Company but shall not be entitled to any remuneration for their services. The said (fourth partner) shall be the managing director of the Company at a salary of $ per annum for the term of years from the date of incorporation, but shall be removable at any time by the other directors for any cause which they shall in their discretion deem sufficient.

8. The consideration payable by the Company under the said agreement for the purchase of the business of the firm shall be divided amongst the parties hereto in the proportion following:—

The said (first partner) shall be entitled to (one-third) part thereof.

The said (second partner) shall be entitled to (one-fourth) part thereof.

The said (third partner) shall be entitled to (one-fourth) part thereof, and a

The said (fourth partner) shall be entitled to (one-sixth) part thereof.

10. The parties hereto shall not during their respective lives transfer any of the shares in the Company to be allotted to them in consideration of the said sale without the previous consent in writing of all the other parties hereto or the survivors or survivor of them and such consent may be withheld without any reason being given therefor.

As witness, etc.

(Signatures of all parties.)

AGREEMENT BETWEEN PROPOSED DIRECTORS AND TRUSTEE FOR INTENDED COMPANY TO TAKE AND PAY FOR QUALIFICATION SHARES.

An agreement made the day of between (director) of, etc., of the first part, (director), etc., of the second part, (director) of, etc., of the third part, and (trustee) of, etc., as trustee for the intended Company hereinafter mentioned of the fourth part.

Whereas a Company is about to be incorporated under the Ontario Companies Act under the name of , Limited, with a capital of $ divided into ordinary shares of $ each, and preference shares of $ each.

And whereas it is understood that the said shall be directors of the Company and that the qualification of a director is to be the holding of (ordinary) shares in the Company of the nominal amount of $ to be obtained within of the appointment of such director and that the minimum subscription on the first public issue of shares shall be per cent. of the shares offered for subscription.

And whereas it is intended that a prospectus shall shortly be issued offering of the said (ordinary) shares for public subscription in which it shall be stated that shares is the minimum subscription upon which allotment will be made.

Now it is hereby agreed as follows:—

1. Each of the said (directors) agrees with the other of them and also with the said (trustee) to become a director of the said Company and as such to execute all necessary documents to do his best to procure that all the qualification shares of the said (directors) shall be duly allotted by the Company to accept his own qualification shares to pay in respect

to them immediately on allotment a proportion equal to the proportion payable on application and allotment on the said shares so intended to be offered for public subscription as aforesaid and duly to pay the residue payable thereon.

2. The said (trustee) shall (do his best to) procure the incorporation of the Company within days of the date hereof, and the due allotment of the said qualification shares to the said (directors) but shall not be under any further liability to the (directors) or any of them.

3. If the Company shall not be incorporated within days from the date hereof either of them the said (directors) may withdraw from this agreement by sending notice in writing to the said (trustee) at his address aforesaid but such withdrawal shall not affect any of the other parties hereto.

As witness, etc.

(Signatures of all parties.)

RATIFICATION BY COMPANY OF AGREEMENT ENTERED INTO BY AGENT ON ITS BEHALF.

The within mentioned Company, Limited, hereby ratifies the within-written agreement which is expressed to be entered into by the within-mentioned (agent) as agent for the said Company, Limited.

Dated the day of .

(Seal of Company.)

AGREEMENT FOR SALE OF BUSINESS BY PARTNERS TO A PRIVATE COMPANY ALREADY INCORPORATED.

An agreement made, etc.

Whereas the Company was on the day of duly incorporated under the Ontario Companies Act with a nominal capital of $ divided into ordinary shares of $ each and deferred shares of $ each, and having as one of its objects the acquisition and management of the said business of the vendors.

Now it is hereby agreed as follows:—

1. The vendors will sell and the Company will purchase the said business of the vendors as a going concern as from the day of with the goodwill thereof, and the benefit of all subsisting contracts and all the freehold and leasehold premises belonging thereto and all the stock in trade, fixtures, book debts, cash in hand and at the bank and all other the property and assets belonging to the vendors in connection with the said business as on the day of .

2. The Company shall accept such title as the vendors have to all the said premises without investigation and shall not be entitled to make any objections or requisitions in relation thereto.

3. The Company shall purchase the said business subject to all debts owing by the vendors in respect thereof and all other liabilities subsist-

ing at the said day of and shall indemnify the vendors and each of them against all claims, actions, or other proceedings in respect of any such debts or liabilities.

4. The consideration for the said sale shall be the sum of $ which shall be satisfied by the allotment to the vendors in such proportions as the vendors shall direct of shares of $ each, numbered to in the capital of the Company credited as fully paid up.

5. The sum of $ shall be taken as the value of the freehold and leasehold premises, the sum of $ as the value of the goodwill, $ as the value of the benefit of existing contracts, book debts and fixtures, and the sum of $ as the value of all the stock-in-trade and other property and assets agreed to be sold.

6. The sale shall be completed on the day of at the offices of Messrs. , solicitors, at at which time and place the Company shall hand over to the vendors certificates for the said shares and the vendors and all other necessary parties shall execute and do all such deeds and things as may be necessary for effectually vesting the said business and premises in the Company.

In witness, etc.

(Signatures and seals of vendors and seal of Company.)

AGREEMENT FOR SALE TO A COMPANY ALREADY INCORPORATED OF THE BUSINESS OF A FIRM WITH PLANT, PATENTS, AND STOCK-IN-TRADE.

An agreement made the day of between (first partner) of, etc., of the first part, (second partner) of, etc., of the second part, (third partner) of, etc., of the third part, and the Company, Limited, whose head office is situate at , (hereinafter called the Company) of the fourth part.

Whereas the said partners (hereinafter collectively referred to as the vendors) are the proprietors of a certain business of carried on at and of the machinery, plant, stock-in-trade and other effects, particulars whereof are set out in the schedule hereto.

And whereas the said (first partner) is the assignee of certain Letters Patent of the Dominion of Canada dated the day of , No. for an invention of improvements in the manufacture of granted to (original patentee) which Letters Patent form part of the assets of the business above referred to.

And whereas the said (first partner) is the inventor of certain improvements upon the invention comprised in the Letters Patent.

And whereas the Company was on the day of duly incorporated under the Ontario Companies Act for the purpose, (amongst other objects) of acquiring the business of the vendors and the goodwill thereof, and the said plant, machinery, stock-in-trade, Letters Patents and improvements.

And whereas the nominal capital of the Company is $ divided into shares of $ each of which will be ordinary shares and will be preferred shares.

Now it is hereby agreed as follows:—

1. The vendors according to their interest in the premises respectively shall sell and the Company shall purchase for the sum of $.

First the said Letters Patent and improvements thereon and the said business and the goodwill thereof and the full benefit of all contracts and agreements to which the vendors are entitled in relation thereto, and

Secondly, the plant, machinery, stock-in-trade and effects belonging to the said business and more particularly specified in the said schedule, and the vendors will jointly and severally pay and indemnify the Company against all debts of the undertaking existing at the date hereof.

2. The book debts due to the vendors shall be collected by the Company in the names of the vendors and the net amount collected (less a commission of per cent. thereon for such collection) shall be paid over by the Company to the vendors once a month. The vendors will give to the Company all authorities necessary for the purpose and will not themselves attempt to collect any debt. If the Company is unable to obtain payment of any debt the Company shall not be responsible but shall not without the consent of the vendors make any arrangement or composition with or give time to any debtor.

3. The said purchase price of $ shall be paid and satisfied as to $ thereof by payment in cash and as to the remaining $ by the allotment to the vendors or as they shall in writing direct of fully paid up common shares of $ each, in the capital of the Company.

4. The sale shall take effect from the day of next up to which date the vendors shall carry on the said business on behalf of and as trustee for the Company.

5. The sale shall be completed on the day of at the offices of Messrs. at when the Company shall pay and hand over to the vendors the said sum of $ in cash and certificates for the said shares and the vendors and all necessary parties shall execute to the Company proper assurances of the said Letters Patent, business and goodwill free from incumbrances and make over to the Company by delivery the said plant, machinery and other chattels.

6. The said (first partner) will at the request and at the cost of the Company do all such further acts and deeds as may in the opinion of the Company be necessary or desirable for obtaining Letters Patent at home or abroad in respect of his said invention and for assigning the same to the Company or as it shall direct.

8. Neither the said (first partner) nor either of the other vendors warrants the title of the said (first partner) to the said Letters Patent or that the same are now valid or subsisting.

As witness.

The schedule above referred to. (Particulars of property to be sold.)

AGREEMENT FOR RECONSTRUCTION BY MEANS OF EXCHANGE OF SHARES.

An agreement made the day of between the Company, Limited (hereinafter called the new Company), of the one part, and (shareholder) of, etc., and all the other holders of (common) shares in & Co., Limited (hereinafter called the old Company), who shall execute this agreement (all of whom are hereinafter called the shareholders) of the other part.

Whereas the shareholders are the holders of the number of (common) shares of $ each in the capital of the old Company set opposite their respective names in the schedule hereto.

And whereas the new Company has been incorporated under the Ontario Companies Act with a capital of $ divided into shares of $ each.

And whereas one of the objects of the new Company is the acquisition of all the undertaking and assets of the old Company, and the new Company also has power to purchase or otherwise acquire any shares in the old Company.

And whereas the new Company is desirous of acquiring the shares in the old Company upon the terms hereinafter appearing.

And whereas each of the shares in the old Company is of the estimated value of at least $.

Now it is hereby agreed as follows:—

1. The shareholders shall respectively transfer to the new Company or its nominees on or before the day of next, the shares set opposite their respective names in the schedule hereto.

2. In consideration of such transfers the new Company shall allot to each of the shareholders on or before the day of next shares of $ each, in the new Company credited as fully paid up in respect of each shares so transferred by such shareholder.

3. This agreement is conditional upon the same being executed by every holder of any share in the old Company on or before the day of next and in the event of this agreement not being so executed it shall be null and void.

(Seal of new Company, duly authenticated.)

THE SCHEDULE ABOVE REFERRED TO.

Names of shareholders.	Number of shares held.	Signatures and seals of shareholders.

CHAPTER XVII.

BORROWING AND DEBENTURES.

To enable a corporation to borrow, it must be given power to borrow by its constitution. Under the present Ontario Act, it would appear that the power to borrow will depend largely upon the objects specified in its Letters Patent. The power may be express or implied, and it will be implied where the objects of the company are such that borrowing may fairly be regarded as incidental to them. This is the case with a trading company. It is obvious that such a company must have an implied power as incidental to its business. See Palmer Company Law, 5th ed., 231. *Walmsley* v. *Rent Guarantee Company*, 29 Gr. 484.

Necessity for By-law.

Section 49 of the former Ontario Act provided that if authorized by by-law passed by the directors and sanctioned by a vote of not less than two-thirds in value of the shareholders, directors of the company might borrow money. The phraseology of the Act gave rise to the contention that there was no power to borrow or to create a mortgage without such a by-law; even if there was an inherent power in a company, it must be exercised under the statute, otherwise it was *ultra vires*. The weight of opinion, however, seemed to be in favour of the view that a company might validly borrow money and create a valid mortgage where no by-law had been passed, and that the lack of a by-law was an irregularity only and that outsiders were not affected with notice of such irregularity. See *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 305; *MacEdwards* v. *Ogilvie*, 4 Man. 6; *McKain* v. *Canadian Birkbeck Co.*, 7 O.L.R. 341; *Trusts & Guarantee Company* v. *Abbott Mitchell Co.*, 11 O.L.R. 403.

Following the rule in the *Royal British Bank* v. *Turquand*, it was laid down in the *MacEdward's Case* that an outsider must

be taken to have notice of all provisions of the Companies Act under which the company is incorporated and it might be also that he must be taken to have notice of the contents of the Letters Patent, as he could become acquainted with them by searching in the office of the proper department, but further than that he could not be expected to go.

The difficulty as to the necessity of a by-law would appear to be removed by the present Ontario Act. The power of a company to borrow will depend apparently upon its nature and objects, and it can no longer be contended that its powers are conditional upon passage of a by-law. Failure to pass a by-law and procure its ratification is an irregularity only. If borrowing by-laws are enacted by the directors of the company they do not take effect until ratified by the shareholders. See sections 73 and 74 and 8 Edw. VII., ch. 43, sec. 1, sub-sec. (6).

General Principles.

In practice, a general borrowing by-law is usually passed and ratified, and it would be obviously impracticable to go through the necessary forms in respect to each loan or act of borrowing or purchase on credit. To secure loans, the directors may charge all or any of the real or personal property, rights and powers, undertaking franchises, as well as the book debts and unpaid calls of the corporation.

It should be noted that the Act refers to borrowing by a corporation, which is defined to include companies with or without share capital. At the same time, it requires ratification by two-thirds in value of the shareholders. This may possibly cause difficulties in regard to borrowing powers on the part of corporations not having share capital. By the amending Act of 1908 the words "or members" have, however, been added.

For a discussion of the possibility of creating a mortgage on the powers, franchises and rights of a company, see *Bickford* v. *Grant Junction Ry. Co.*, 1 S.C.R. 696; *Whiteside* v. *Bell Chamber*, 22 C.P. 241; *Peto* v. *Welland Ry. Co.*, 9 Gr. 455.

The *Bickford Case* may be regarded as authority for the proposition that a corporation *primâ facie* has power to mortgage its

property and no enabling power is requisite to confer it, and that if a company's rights in this respect are limited, it must be by force of some disability in the statute or other instrument creating it. See also *Waterous Engine* v. *Town of Palmerston* (1892), 21 S.C.R. 556; *Bernardin* v. *North Dufferin* (1891), 19 S.C.R. 581; *McArthur* v. *Town of Portage La Prairie* (1893), 9 M.R. 588; *Lincoln Paper Mills* v. *St. Catharines Ry. Co.* (1890), 19 O.R. 106; *Galt* v. *Erie Ry. Co.* (1868), 14 Gr. 499; *Re Rockwood Agricultural Society* (1899), 20 C.L.T. 25.

It has been held that a building society if authorized by its rules may borrow, and may charge its assets with the re-payment of the loan. *Re Farmers Loan Co.*, 30 O.R. 337.

Where a company has power to purchase anything it may purchase it on credit and may bind itself by covenant to pay the purchase money, and give a mortgage to secure it. *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 306.

Persons dealing with a company are affected with notice of a public Act under which it is incorporated, and where a corporation is prohibited from buying on credit, there is no remedy against either the company or against the directors upon an implied warranty. *Struthers* v. *Mackenzie*, 28 O.R. 381. See also as to warehouse receipts given to a bank. *Trusts & Guarantee Company* v. *Abbott*, 11 O.L.R. 403; *Merchants Bank* v. *Hancock*, 6 O.R. 285; *Greenstreet* v. *Paris*, 21 Grant 229. Overdrawing the company's bank account is borrowing. *Brooks* v. *Blackburn Benefit Society*, 9 A.C. 865. It should be noted that while under section 17 of the Ontario Companies Act very broad incidental powers are conferred and may be exercised by the directors of the company in their discretion, the power of borrowing is not one of them.

Where borrowing powers have been regularly vested in the directors, the shareholders cannot by passing a new resolution limit them. *Cann* v. *Eakins*, 23 N.S.R. 475.

Lands sold to the company may remain liable under a vendor's lien for unpaid balance of purchase money. *Peto* v. *Welland Ry. Co.*, 9 Gr. 455; *Lincoln* v. *St. Catharines Ry. Co.*, 19

O.R. 106, and the company may buy chattel property on the basis that a lien is to be created or reserved. *Bickford* v. *Grand Junction Ry. Co., supra.*

It has been contended that two-thirds in value fixed by statute is to be computed upon the total amount which has been called and paid, but this is not the correct meaning to be attributed to the words of the statute. The measure of value of the stock for voting purposes is not determinable by a reference to what has been paid upon it. It is clear that in the Companies Act the Legislature contemplates the power to vote before any stock whatever has been paid up and the shareholder shall be entitled to as many votes as he has shares in the company, provided that he is not in arrears in respect of calls. *Purdom* v. *Ontario Loan and Debenture Company,* 22 O.R. 597; *Whittaker* v. *Lowe,* L.R. 1 Ex. 74.

IRREGULAR BORROWING.

The distinction between borrowing which is *ultra vires* and that which is merely irregular must always be borne in mind, and it may be repeated that where a company, by its constitution has only a limited power of borrowing, third parties dealing with the company and lending it money are bound to make inquiries. *Chapleo* v. *Brunswick Building Society,* 6 Q.B.D. 696; *Struthers* v. *Mackenzie,* 28 O.R. 381. But where the company is authorized to borrow on the condition that a certain resolution or by-law is passed, the lender may infer that this has been regularly done. *Royal British* v. *Turquand,* 6 E. & B. 332.

As to borrowing merely irregular, the rule established by authority is that where the proposed dealing is not inconsistent with the constitution of the company the party borrowing need not enquire into the regularity of the internal proceedings; it is to be assumed that all is being done in due course and the disclosure afterwards that such was not the case will not avail to displace or nullify a completed instrument or transaction. *Per* Boyd, C., in *Sheppard* v. *Bonanza Nickel Co.,* 25 O.R. 305; *McKain* v. *Canadian Birkbeck Co.,* 7 O.L.R. 341; *Agar* v. *Atheneum*

Life Assurance Association, 3 C.B. N.S. 725; *Brock* v. *Toronto Railway Co.*, 17 Gr. 425; *Re Barned's Banking Co.*, L.R. 3 Ch., p. 161; *Royal British Bank* v. *Turquand*, 6 E. & B. 327.

The purchaser of a bond, debenture stock certificate or floating security is not concerned with the regularity of the issue of a security. One of the most recent authorities in support of this proposition is the case of *Duck* v. *Tower Galvanizing Co.* (1901), 2 K.B. 314, where it held that no informality will alter the rights possessed by a *bonâ fide* holder for value of a document that purports to be an order. In that case there was a power to borrow, but the company had never elected any directors. The debenture, however, was under the seal of the company and signed by two persons as directors.

Where two companies had a common director and an *ultra vires* loan was negotiated from one to the other by such director, and the same solicitor acted for both companies, it was held that the borrowing company was not affected with notice of the irregularity. *Re Marseilles Extension Ry.*, L.R. 7 Ch. 161.

Ultra Vires Borrowing.

The following propositions may be laid down:—

1. Where the company can lawfully borrow, and the directors may exercise the power, there is, of course, no difficulty.

2. Where the company has power to borrow and the directors have implied power, but no express authority, the company will be liable unless there is notice of the excess of authority to the lender.

3. Even where the company has authority to borrow, if the directors have no implied or express authority, the company will not be liable in the absence of ratification.

4. If there is a limit on the amount which may be borrowed, then borrowing in excess of that limit is absolutely *ultra vires* and the company will not be liable.

5. If the company cannot lawfully borrow, all borrowing is *ultra vires* and the company cannot be liable *as a debtor* to repay the amount.

6. Where the company is not liable under (4) and (5) it may still be liable on equitable principles where the moneys improperly borrowed have been applied in discharging liabilities which could have been enforced against it. This is on the ground that the company has not really increased its liabilities and has not accordingly exceeded its powers.

7. But in the last mentioned case, the lender is not entitled to the securities, if any, held by the creditor so paid off. *Re Wrexham Railway Co.* (1899), 1 Ch. 440.

He may, however, claim the benefit of any securities given by the company for the loan, but only to extent that his moneys have been used to pay such valid liabilities. *Blackburn* v. *Cunliffe*, 9 A.C. 837. And see generally *Baroness Wenlock* v. *River Dee Co.*, 36 C.D. 675, and Lindley, 6th ed., pp. 284, 285 and 293.

Ultra Vires Borrowing, Relief.

If the company has no power to borrow money, the lender while he cannot claim against the company direct, is entitled to be subrogated to the rights of creditors who have received money borrowed. The company has been said to be a trustee for the lender of the debts purchased by the borrowed moneys, but this seems to be a somewhat artificial view. *Re Cork Ry. Co.*, L.R. 4 Ch. 748; *Blackburn* v. *Cunliffe*, 22 C.D. 61; *Re German Mining Co.*, 4 D.M. & G. 19.

If the company still retains the money loaned, an injunction may be obtained by the lender to restrain the company from parting with it. *Re Wrexham Ry. Co.* (1899), 1 Ch. 440; *Re Johnson* (1904), 2 Ch. 234.

A lender may have a personal remedy against the directors of the company to sue upon an implied warranty. *Chapleo* v. *Brunswick Building Society*, 6 Q.B.D. 716; *Firbank* v. *Humphries*, 18 Q.B.D. 54.

And it is not necessary in such a case that the directors should know that they were exceeding their powers. *Weeks* v. *Propert*, L.R. 8 C.P. 427.

Where directors had only power to borrow money with the consent of a shareholders' meeting and overdrew their account

at the bank without such authority, they were held personally liable upon an implied warranty. *Cherry* v. *Bank of Australasia*, L.R. 3 C.P. 24, and *Re Richardson* v. *Williamson*, L.R. 6 Q.B.D. 276.

The principle would render personally liable directors making an over-issue of debentures. *Firbank* v. *Humphries, supra; Re Cork and Youghal Ry. Co.*, L.R. 4 Ch. 748; *Athenæum Life Society* v. *Pooley*, 3 DeG. & J. 294.

It should be carefully noted that a company is not liable to repay money borrowed *ultra vires*, merely because it has had the use of the money. It is obvious that if this were the case all restrictions on borrowing would be practically unavailing. *Ex parte Williamson*, L.R. 5 Ch. 309.

If securities, such as mortgages are invalid on the ground of *ultra vires*, they are invalid in the hands of *bonâ fide* holders for value. *Landowners Co.* v. *Ashford*, 16 C.D. 411.

Where securities irregularly issued, are in the hands of a person having notice of the irregularity of their issue, they are invalid, but not, however, if acquired for value from some one in whose hands they were valid. *Whitworth's Claim* (1901), 1 Ch. 115.

If, however, the securities are negotiable or if being only choses-in-action the company is estopped as against a *bonâ fide* transferee for value without notice of any impropriety from disputing their validity, such a transferee can enforce them against the company. *Ibid.*

Bonds issued by a company in excess of its borrowing powers, are not validated by the subsequent reduction of the debenture debt below the authorized amount. *Re Pooley Colliery Co.*, 18 W.R. 201. And a new security given in substitution for an invalid security after the necessary borrowing power has been acquired is of doubtful validity. *Ex parte Watson*, 21 Q.B.D. 301.

As to the right to recover money advanced to a company having no power, see also *Cayley* v. *Macdonell*, 8 U.C.R. 454; *Burnham* v. *Peterboro*, 8 Gr. 366.

DEBENTURES.

The term debenture is applied generally to a security for money providing for payment of a certain specified sum to the owner or bearer with interest in the meantime. *Bank of Toronto* v. *Cobourg Ry. Co.*, 7 O.R. 1.

There are various classes of debentures, such as mortgage debentures, which are secured by a charge on the assets or some portion of them; debentures which are merely bonds, and debentures which are nothing more than acknowledgments of indebtedness. A debenture may be defined as an instrument under the seal of the company, providing for the payment of the principal sum at a specified date and for the payment in the meantime of interest and each debenture constitutes one of a series which commonly all rank *pari passu*. See *British India Co.* v. *Commissioners*, 7 Q.B.D. 165; *Levy* v. *Abercorri's* (1895), 37 Ch. 264.

A debenture, however, need not necessarily be one of a series; it is not always under seal; many debentures are not payable at a fixed date, that is to say they are perpetual; and occasionally debentures do not carry interest or the amount of interest is in proportion to the profits. See *Robson* v. *Smith* (1895), 2 Ch. 118; *Edginton* v. *Fitzmaurice*, 29 C.D. 459.

A charge may be created on foreign assets, and it is not necessary to comply with the formalities prescribed by the *lex loci*. *American Co.* v. *River Plate Co.*, 2 C.D. 303. Though an unsecured creditor may obtain priority by taking proceedings in the foreign country. *Re Maudslay & Field* (1900), 1 Ch. 602.

When a company creates an issue of debentures, limited to a certain number, all of which rank *pari passu*, no other debentures can be created to rank with the first series unless such power has been reserved. *Re Hubbard & Company*, 68 L.J. Ch. 54.

Debentures charging all the property to which the company now is or shall hereafter become entitled, have been held not to constitute a charge on the uncalled capital of the company. *Re Russian Spratts Co., Ltd.*, 78 L.T. 480.

When in a charge the words "all the property of the com-

pany" are used, they do not *primâ facie* extend to the books of the company. *Engel* v. *South Metropolitan* (1892), 1 Ch. 442.

Debentures are not issued until they are delivered. *Mowatt* v. *Castle Steel Co.*, 34 C.D. 58.

Power to Create.

Section 73 of the Ontario Act gives the directors express power to mortgage or pledge any of the real or personal property of the company to secure any liability of the company and it should be noted that the present Ontario Act requires a "duplicate original" of the charge, mortgage or other instrument to secure bonds, to be filed in the office of the provincial secretary.

It does not, however, as in the case of the Chattel Mortgage Act, go on to provide that the charge shall be invalid if not registered, nor is any penalty imposed for failure to register. The Chattel Mortgage Act also provides for registration of the trust mortgage to secure debentures, and the provisions of the Registry Act must be regarded as well.

Negotiability.

It is now the accepted view after some conflict of opinion that debentures payable to bearer are negotiable. See *Edenstein* v. *Chuler & Co.* (1902), K.B. 144; *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898), 2 Q.B. 658.

If, however, it is desired to make the debentures negotiable no condition should appear which is inconsistent with the nature of a negotiable instrument.

As to debentures payable to bearer see *Geddes* v. *Toronto St. Railway Co.*, 14 C.P. 513; *Gott* v. *Gott*, 9 Gr. 165; *Trust & Loan Co.* v. *Hamilton*, 7 C.P. 98; *Young* v. *McNider*, 25 S.C.R. 272; *Parish* v. *McFarlane*, 14 S.C.R. 738.

Sale at Discount.

A company may dispose of its debentures at a discount and the rules which prevent a sale of stock at a discount are not applicable to debentures. *Re Anglo Danubian Co.*, L.R. 20 Eq. 339; *Campbell's Case*, 4 C.D. 470.

Issue in Blank.

A deposit of debentures even though they are made out in blank confers a good equitable title on the holder. *Re Regent's Canal Iron Works Co.*, 3 C.D. 43; *Re Hampshire Land Co.* (1896), 2 Ch. 743. As to deposit of debentures see also *Re Strand Music*, 3 DeG. & J. S. 147; *Queensland Land Co.* (1894), 3 Ch. 181; *Pegge* v. *Neath District Co.* (1898), 1 Ch. 183. *Johnston* v. *Wade*, 11 O.W.R. 598.

Other Cases.

If an advance is made to a company upon the understanding that debentures are to be issued or if the money is paid accompanied by an application for debentures the lender acquires an equitable charge upon the assets to the extent of his advance. *New Durham Salt Co.*, 7 T.L.R. 13; *Tailby* v. *Official Receiver*, 13 A.C. 523.

A debenture which is paid off cannot be re-issued, but a company can pay off a portion of the debentures without paying all. *Re Routledge Co.* (1904), 2 Ch. 474; *Tasker & Sons* (1905), 1 Ch. 283.

(Query as to the power of a company to re-issue debentures which have been deposited in blank and subsequently redeemed by the company. The former section 49 of the old Companies Act gave an express power to pledge debentures of the company. In the revision of 1907 this was omitted, but restored by the amending Act of 1908.)

There is a general principle that a debenture holder is not allowed to maintain any advantage over the other debenture holders, and if he obtains any security he is a trustee of it for the other debenture holders. *Small* v. *Smith*, 10 A.C. 119.

And a judgment, if obtained, enures to the benefit of all other debenture holders. *Bowen* v. *Brecon Ry. Co.*, L.R. 3 Eq. 541.

Unless it is provided that debentures are to rank *pari passu*, they rank only according to the date of the issue. *Gartside* v. *Silkstone Coal Co.*, 21 C.D. 762.

An agreement to subscribe for debentures cannot be specificially enforced though damages may be claimed if they can be

shewn. *South African Territories* v. *Wallington* (1897), 1 Q.B. 692, (1898), A.C. 309.

Inasmuch as debentures may be issued at a discount there is no objection to issuing them by way of security for an advance at less than their par value. In such a case the holder is entitled to interest and in the event of insolvency, to dividends upon the full amount of his security. *Re Regent's Canal Co.*, 3 C.D. 43; *Johnston* v. *Wade*, 11 O.W.R. 598.

Debenture Stock.

Debenture stock is borrowed capital consolidated into one mass for the sake of convenience.

It is usually in England created by a trust deed, though section 73 appears to provide for its creation by by-law. It is usually only redeemable on a winding up or in default of payment of interest. Debenture stock certificates commonly bear coupons as in the case of debentures. The trust deed creating the stock is in itself a security by way of charge on the assets. The stock certificates may be transferred in the same manner as a debenture. In the case of debenture stock, however, a certificate is usually transferred in any amount and a single certificate is issued for the aggregate amount of the person's holdings if desired.

The trust deed constituting the debenture stock acknowledges that the company is indebted to the trustee in the total amount of the issue bearing interest at a given rate, and provides for the payment of principal and interest to the owners of the stock, and vests in the trustee security for such payment. Another plan is to issue debentures to the trustee and by deed declare that to be debenture stock. The legal right to enforce payment is vested in the trustee and the equitable title is apportioned among a number of persons who are called stock holders, and whose title is evidenced by register of certificates under the company's seal. Palmer, 8th ed., Part 3, page 5.

Debenture stock while commonly perpetual or irredeemable may be terminable or redeemable at a given time. Debenture

stock holders are not in any sense shareholders of the company, and have no votes or any part in the control of its affairs so long as their securities are not in default.

The following summary of advantages of debentures and debenture stock is taken from Palmer, 8th ed., Part 3, page 12.

To the holders:—

(1) The advantage of being exempt from the need of proving title under the original holder through perhaps a dozen transfers and admissions.

(2) The advantage of being able to refer to the register of holders as evidence of title.

(3) The advantage of being able to transfer in a simple and convenient manner, without the intervention of lawyers and without going into past history.

(4) The advantage of being able to give a good title to a transferee free from any equities available against the original holder.

(5) The advantage of possessing a marketable security well understood on the stock exchange.

(6) The advantage of safety in having the title recorded in the books of the company and not depending on a document which may be lost or mislaid.

To the company:—

(1) The advantage of having its securities framed in a form which commends itself to advisers and investors.

(2) The advantage of precluding almost entirely informal transfers and notices of equities by debenture holders and stock holders and those claiming under them, and thus simplifying the title to the debentures and debenture stock and relieving the company from trouble and disputes.

(3) The advantage of having a record of the names and addresses of the holders for the time being and of thus being able to communicate with them if it be necessary to redeem or pay off, or otherwise deal with the debentures or debenture stock.

(4) The advantage of being able to deal with the registered holders as the owners of the debentures or debenture stock without going into their title on each occasion.

A debenture is usually payable to the registered holder from time to time, but it may be payable to bearer, which, as is said by Mr. Palmer, endows it with the dominant characteristic of a negotiable instrument and in particular—

(1) To make it transferable, free from equities between the company and the person to whom it is issued.

(2) To avoid the necessity for any written transfer.

(3) To render the delivery of the debenture and any interest coupon a good discharge to the company.

(4) To enable the bearer to sue the company in his own name.

(5) To ensure a good title to any person who acquires the debentures *bonâ fide* for valuable consideration, notwithstanding any defect in the title of the person from whom he acquires it.

Floating Charge.

A floating charge may be created upon the property both present and future of the company. *Re Panama Co,* L.R. 5 Ch. 318; *Holyroyd* v. *Marshall,* 10 H.L.C. 191; *Johnston* v. *Wade,* 11 O.W.R. 598. A clause in a debenture such as "the company hereby charges all its assets real and personal of every kind and description including its uncalled capital," is sufficient to create a floating charge. *Ibid.*

It 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 from time to time. It is of the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern. *Johnston* v. *Wade, supra; Government Stock* v. *Manilla Ry.* (1897), A.C. 81.

A company having created a floating charge may, notwithstanding, create specific mortgages ranking in priority to it. *Re Castell & Brown* (1898), 1 Ch. 315, and specific mortgagees are not affected by notice of the floating charge. *Re Hamilton's Windsor Iron Works,* 12 C.D. 707; *Johnston* v. *Wade, supra.*

A floating charge gives a priority over the ordinary creditors in a winding up as against execution creditors. *Re General*

South American Co., 2 C.D. 337; *Re London Pressed Hinge Co.*, 21 T.L.R. 332; *Simultaneous Colour Syndicate* v. *Foweraker* (1901), 1 K.B. 771.

In short a floating security does not prevent the carrying on of the business in the ordinary course. *Wheatley* v. *Silkstone Co.*, 29 C.D. 715.

A floating security may be said to cease to float and become a specific charge whenever the business ceases to be a going concern, as, for instance, when the company executes an assignment for the benefit of its creditors or a winding-up order was made. The document may, of course, be drawn so that the charge shall cease to float upon the contingency of an execution being issued or the principal and interest falling in arrears. *Robson* v. *Smith* (1895), 2 Ch. 118. *Government Stock* v. *Manilla Ry.* (1897), A.C. 81; Lindley, 6th ed., page 325; *Foster* v. *Borax Co.* (1901), 1 Ch. 326; *Metropolitan Bank* v. *Vivian* (1900), 2 Ch. 654; *Johnston* v. *Wade*, 11 O.W.R. 598.

The charge is none the less immediate and subsisting because there is a power of disposition of the assets in the ordinary course. *Driver* v. *Broad* (1893), 1 Q.B. 744; *Wallace* v. *Evershed* (1899), 1 Ch. 891. And even while the charge remains dormant, it will prevail over the rights of execution creditors. *Duck* v. *Tower Galvanizing Co.* (1901), 2 K.B. 314; *Re Opera* (1891), 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire* (1895), 2 Ch. 319; *Re Standard Manufacturing Company* (1891), 1 Ch. 627.

In the absence of a condition by which a floating charge attaches on the alienation of all the assets of the company, it has been held that an injunction will not lie to restrain the carrying out of a sale *en bloc*. *Re Borax Co.* (1901), 1 Ch. 326.

The word "undertaking" necessarily infers that the company will go on and that the debenture holder cannot interfere until either the interest was due or unpaid or until the time has arrived for the payment of his principal and that the principal was unpaid. *Phelps* v. *St. Catharines Ry. Co.*, 19 O.R., p. 506.

So long as a company is a going concern bond holders whose bonds are a general charge on the undertaking have no right,

even though interest is in arrears to seize, take or sell, or foreclose any part of the property of the company, but their remedy is to appoint a receiver. *Phelps* v. *St. Catharines Ry. Co.*, 19 O.R., p. 501.

The words "guaranteed by the capital and assets of the company invested in mortgages on real estate" have been held to be sufficient to create a general charge. *Re Farmers Loan*, 30 O.R. 337.

An equitable mortgage created by depositing the title deeds has been allowed priority over a floating charge. *Re Castell & Brown, Limited* (1898), 1 Ch. 315.

As to the right of a holder of a floating security to restrain proceedings under execution, see *Davey* v. *Williamson* (1898), 2 Q.B. 194.

Registration of Debentures.

Section 78 of the Ontario Act provides that a duplicate original of the charge, mortgage or other instrument of hypothecation shall be filed forthwith in the office of the provincial secretary. It does not, however, as in case of the Chattel Mortgage Act, go on to provide that the charge shall be invalid if not registered, nor is any penalty imposed for failure to register. The Chattel Mortgage Act also provides for registration of the trust mortgage to secure debentures. The question has recently been decided as to whether a floating charge must be registered under the Chattel Mortgage Act. It has been held in effect that a floating charge is not within the scope of the Chattel Mortgage Act and that it need not be registered. *Johnston* v. *Wade*, 11 O.W.R. p. 598.

Debenture Holders' Rights.

It is usual to insert clauses in the trust deed giving power to a meeting of debenture holders to agree to a compromise or modification of their rights. This clause is valid, but the powers must be exercised for the benefit of all debenture holders alike. *Finlay* v. *Mexican Investment Corporation* (1897), 1 Q.B. 517.

But it has been held that this power will not authorize a majority to abandon any of the debenture holders' rights, where there is a *bonâ fide* dispute. *Mercantile Investment Co.* v. *International Company* (1893), 1 Ch. 484.

A majority can, however, compel a dissenting minority to accept fully paid-up shares in another company formed for the purpose of acquiring the business and approving of a loan being made to the company upon the terms of the postponement of the debenture holders' rights. *Sneath* v. *Valley Gold Co.* (1893), 1 Ch. 477; *Fellett* v. *Eddystone Granite Quarries* (1892), 3 Ch. 75.

It has been held in England that a notice of a meeting of debenture holders may be given by advertisement where the trust deed does not provide a method of calling a meeting.

The debentures or the trust mortgage to secure them, commonly provide for very broad powers on the part of the trustee in regard to the realization on the securities. A power of sale is usually included, and also a power to appoint a receiver or manager. A receiver will be appointed by the Court, although power is sometimes given to a particular person to appoint him.

The trustee can proceed to enforce his rights by action, but a more common method is for the individual debenture holder to bring an action on behalf of himself and all other debenture holders against the trustee and the company, although he may sue on his own behalf, and join all other debenture holders as defendants. The relief sought in the action is commonly the appointment of a receiver and manager and for a sale of the property covered by the trust mortgage. *Mortgage Insurance Corporation* v. *Canada Agricultural Co.* (1901), 2 Ch. 377; *Marshall* v. *South Staffordshire Tramway Co.* (1895), 2 Ch. 36; *Fellows* v. *Ottawa Gas,* 19 C.P. 174.

Debenture holders may commence proceedings to protect themselves and to realize upon their security as soon as the principal moneys or interest are in arrear. *Strong* v. *Carlyle* (1893), 1 Ch. 269.

Receivers.

A receiver or a receiver and manager is an officer of the Court and is appointed by the Court to take possession of certain property and to protect it for the benefit of the parties interested therein.

The appointment of a receiver is one of the remedies given to creditors of a company and is very often asked for by those creditors who are holders of debenture stock. The receiver being appointed by the Court is an officer of the Court and without leave of the Court should not be interfered with. Kerr on Receivers, p. 171; *Ex parte Day*, 48 L.T. 912; *Diehl* v. *Carritt*, 15 O.L.R. 202.

A receiver and manager stands in the same position as a receiver, but the former has a larger scope than the latter and is empowered to carry on the business of the company whereas a receiver is merely authorized to take possession and protect the property which comes into his hands. *Manchester* v. *Milford Rail Co.*, 14 C.D. 645.

Appointment by Court.

The Court of Chancery formerly had the jurisdiction to appoint a receiver and this jurisdiction is now given to the High Court of Justice by the Judicature Act, section 58, sub-section 9. *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420. As the appointment of a receiver was an equitable remedy the Court would not grant it where there was an adequate legal remedy. *Sollory* v. *Leaver*, L.R. 9 Eq. 25; *Drury* v. *Barnes*, 3 Russ. 106. Where the application is made on behalf of debenture holders, as is very frequent, the Court will not appoint a receiver unless the company is in default as regards principal or interest, but in certain cases the Court has appointed a receiver where the security of the debenture holders has been in danger and where the winding up of a company is imminent. *Wildey* v. *Mid-Hants Rail Co.*, 16 W.R. 409; *Edwards* v. *Standard Rolling Stock Co.*, 1 Ch. 574; *Foster* v. *Borax Co.*, W.N. 34; *Victoria Steamboats Co.*, 1 Ch. 158; *Hodson* v. *The Tea Co.*, 14 C.D. 859; *McMahon* v. *N. Kent Iron Works Co.*, 2 Ch. D. 148. See also *Marshall* v. *South Staf-*

fordshire T. Co., 2 Ch. 36. The Court will appoint a receiver only upon a proper case being made out for such appointment. *Smith* v. *Port Dover R. Co.*, 12 Ont. App. 288. The appointment of a receiver is not a mere matter of discretion, but the party asking for such an appointment is, in a proper case, entitled *ex debito justitiæ*.

APPOINTMENT BY BONDHOLDERS.

In practice the Court usually appoints the plaintiffs' nominee if he be a fit and proper person, but another person whose qualifications are much greater than the plaintiffs' nominee may be appointed and the Court in urgent cases may even appoint the plaintiff himself. *Taylor* v. *Eckersley*, 12 C.D. 447. Usually, however, an accountant or other expert is appointed. The Court may appoint one or several persons to be either receivers or receivers and managers. Where a liquidator is in possession of the property and the appointment of a receiver is asked the Court will generally appoint the liquidator receiver as he is a Court officer already. *Perry* v. *Oriental Hotels*, 5 Ch. 420. Such appointment is a matter of discretion and the Court of Appeal will not, except under special circumstances, interfere with this discretion. *Giles* v. *Nuthall, In re House Improvement Supply Assn.*, W.N. (1885), 51.

The application for the appointment of a receiver is most frequently made immediately after the commencement of the action upon motion to the Court.

Receivers and managers may be appointed by the bondholders themselves, but in such case the receiver is the agent of the company. Such powers of appointment are commonly contained in debentures and trust deeds. The receiver so appointed derives his authority and power from the parties themselves pursuant to the terms of the instrument under which he is appointed.

Where a receiver is appointed under a power contained in a trust deed or debenture he is not an officer of the Court and any interference with his possession is not a contempt of Court. He is the agent of the company, not of the debenture holders as long as the company remains a going concern. *Owen & Co.* v. *Cronk*

(1895), 1 Q.B. 265; *Gosling* v. *Gaskell* (1897), A.C. 575. Such a receiver is *primâ facie* not entitled to carry on the business of the company, but this power is commonly given in the debentures or trust deed. Where the power is so conferred he may do whatever is reasonable for the carrying on of the business of which he is receiver, and even though there be a resulting loss he will be entitled to indemnity if he so carries it on. He may, for the purposes of the business, he is carrying on, borrow money and by leave of the Court is entitled to mortgage the assets for securing money properly raised for the purpose of carrying on the business. *Stronghill* v. *Anstey*, 1 D. M. & G. 635; *Redman* v. *Rymer*, 60 L.T. 86; *Re Dimmock, Dimmock* v. *Dimmock*, 52 L.T. 494.

Officers of Court.

Where the receiver is appointed by the Court he is not an agent of anybody, but is an officer of the Court. *Burt* v. *Bull* (1895), 1 Q.B.D. 276. He acts on his own responsibility and is personally liable for debts incurred by him in the discharge of his duties, but he is entitled to be indemnified out of the assets of the business which he is carrying on in priority to the claims of persons who have advanced money under an order, making the repayment of such advance a first charge on all the assets and to the costs of the action. Kerry on Receivers, (1900) ed., p. 208; *Strapp* v. *Bull* (1895), 2 Ch. 1; *Ex parte Izard*, 23 C.D. 75; *Batten* v. *Wedgewood Coal & Iron Co.*, 28 C.H.D. 317; *Re Brooke* (1894), 2 Ch. 600; *Lathom* v. *Greenwich Ferry Co.*, 72 L.T. 790; *Olpherts* v. *Smith*, 8 N.Y. Annot. Cas. 400; *In re Glasdir Copper Mines, Ltd.* (1905), W.N. 57, affirmed (1906), 1 Ch. 365. Receivers and managers appointed by the Court are even entitled to indemnity from liabilities necessarily incurred in carrying on the business by them, over and above the amount permitted to be borrowed by them by order of the Court. *In re London United Breweries, Ltd.* (1907), 2 Ch. 511; and *In re British Power Traction & Lighting Co., Ltd.* (1906), 1 Ch. 497, (1907), 1 Ch. 528.

Duties of.

The duty of the receiver is to take such steps as may be necessary to protect the property and preserve it and realize therefrom as much as possible. He is bound to manage and carry on the business in a prudent and judicious manner, subject to the terms of the order appointing him. He may appoint agents to aid him in the performance of his duties and should apply to the Court wherever any special steps appear desirable. The application should be made by a party to the action, usually the plaintiff and not by the receiver. He should have an application made to the Court to permit him to borrow to carry on the business, and in this way would limit his personal liability and insure his right of indemnity beyond doubt.

Duration of Office.

The usual practice when a receiver and manager is being appointed is to appoint him for only a specified time and beyond which time he is not to act without the leave of the Court. At the expiration of that time a further application should be made to continue the receiver or make any change desirable. In this way the Court keeps control over the receiver and prevents needless delay in realization of the assets.

Borrowing Money.

Where a receiver who was carrying on the business of the company of which he was receiver has the power to borrow money this gives him power to create a charge on the property over which he is receiver, ranking in priority to any mortgage debenture or bonds. *Lathom* v. *Greenwich Ferry Co.*, 72 L.T. 790. When a receiver is authorized to raise money he sometimes gives a certificate and sometimes a charge or debenture. Receiver's certificates are scarcely ever used in England, but are a well-known security in United States. See *Hay* v. *Swedish Norwegian Rail Co., Ltd.*, 5 T.L.R. 460.

As to the power of a receiver to compromise claims see *O'Reilly* v. *O'Connor* (1904), 2 J.R. 601.

ENDORSEMENT ON WRIT IN DEBENTURE HOLDERS' ACTION.

The plaintiff claims as a debenture holder of the defendant Company:—

1. For a declaration that the debentures issued by the defendant Company and now outstanding constitute a first charge upon all the property comprised therein.

2. All necessary accounts and inquiries.

3. Payment.

4. Foreclosure and sale.

5. A receiver and manager.

ENDORSEMENT ON WRIT IN DEBENTURE HOLDERS' ACTION WHERE THERE IS A TRUST DEED.

The plaintiff claims as a debenture holder of the defendant Company:—

1. To have an account taken of what is due by the defendant Company to the plaintiff and all others entitled to the benefit of a certain indenture made between, etc., and dated, etc.

2. To have the trusts of the said indenture executed under the order of the Court.

3. The appointment of a receiver and manager of the property comprised in the said indenture.

ORDER APPOINTING RECEIVER AND MANAGER.

IN THE HIGH COURT OF JUSTICE.

The Honourable) day the day of
) A.D.

Between

Plaintiffs;

and

Defendants.

Upon motion made this day unto this Court by counsel on behalf of the plaintiffs, in presence of counsel for the defendants, upon hearing read the writ of summons, the affidavit of , the exhibits therein referred to, and the plaintiffs by their counsel undertaking to be answerable for what, , the receiver and manager hereinafter named shall receive, under this order or become liable to pay until he shall have given security as hereinafter directed.

1. This Court doth order that of the of in the of , be and he is hereby appointed receiver on behalf of the plaintiffs, holders of , and all other debenture holders of the of all the undertaking, capital stock, goods, chattels, effects and other real and personal property of the comprised in or subject to the security and charge created by the debentures issued by to the plaintiffs and the other debenture holders, and to manage the business of the said to act at once, but he is not, without the leave of the Court, to act as manager beyond the day of .

2. And this Court doth further order that the said , the receiver and manager, do on or before the day of give security to the satisfaction of one of the registrars of this Court for the due performance of his duties as such receiver.

And this Court doth further order that the defendant the , do deliver over to the said , as such receiver and manager all stock, goods, chattels, and effects belonging to the said defendant, , and all books, leases, deeds, papers and documents relating thereto.

4. And this Court doth further order that the said , as receiver, do forthwith out of any moneys coming to his hands pay the debtors of which have priority over the claims of the debenture holders, and that he be allowed all such payments in his accounts.

5. And this Court doth further order that the receiver and manager be at liberty to continue the business of the said and to pay all outgoings necessary for that purpose.

6. And this Court doth further order that the said receiver and manager shall be at liberty to borrow moneys for the purpose of carrying on the said business not exceeding $ and any advances which shall be made to him are hereby declared to be a first charge upon the undertaking and assets of the , which shall come to the hands of the said receiver.

7. And this Court doth further order that the said do pass his accounts before of this Court, and pay his balances as the said Master shall direct.

(Sgd.)

ORDER CONTINUING RECEIVER AND MANAGER.

IN THE HIGH COURT OF JUSTICE.

The Honourable day day of A.D.

Between *Plaintiffs;*

and

Defendants.

Upon motion made this day unto this Court by counsel on behalf of the plaintiffs and receiver in presence of counsel for the defendants, upon hearing read the order made herein on the day of , the material upon which such order was granted, the further affidavits of and , the exhibits therein referred to and the other proceedings had and taken herein, and upon hearing what was alleged by counsel, and it appearing that the said receiver has already given security to the satisfaction of this Court.

1. This Court doth order that the receiver and manager appointed herein under the said order of the day of , be continued as such receiver and manager until further order, but the said is not without leave of the Court to act as manager after the day of or until motion made on or before that date to continue the receivership shall have been disposed of.

2. And this Court doth further order that the said be at liberty to continue the business of the said , and to pay all outgoings and do all other acts necessary for the purpose.

3. And this Court doth further order and direct that leave be, and the same is hereby reserved to any person having an interest to apply on notice to the parties to this action and on good cause shewn to implement, vary, rescind, or modify the terms of this order.

4. And this Court doth further order that the said do pass his accounts before an official referee, and pay his balance as the said referee shall direct.

5. And this Court doth further order that the provision of clause of the order of the day of whereby it was directed that the receiver and manager shall be at liberty to borrow moneys for the purpose of carrying on the said business, not exceeding be continued and confirmed as to any portion of the said power not already exhausted and any advances which shall be made to him pursuant to the power hereby granted are declared to be a first charge upon the undertaking and assets of the which shall come to the hands of the receiver.

6. And this Court doth further order that the costs of all parties to this action to be taxed as between solicitor and client and be paid by the receiver out of the first moneys which shall come to his hands.

DEBENTURE HOLDERS' JUDGMENT FOR ACCOUNT.

Upon motion for judgment made this day unto this Court by counsel for the plaintiff, and upon hearing counsel for the plaintiffs and the defendants and upon hearing read the statement of claim herein and the other proceedings had and taken herein, etc.:

This Court doth declare:

1. That the plaintiffs and the other holders of the mortgage debentures forming part of the issue of debentures of the defendant Company are entitled to a first charge on all of the real and personal property, and undertaking of the defendant Company as is covered by aforesaid mortgaged securities (the said property and assets being more fully described in schedule "A" to this judgment for the payment of the moneys secured thereby).

2. This Court doth order that it be referred to to take the following accounts and inquiries:—

1. An account of what is due the plaintiffs and the other holders of the said mortgage debentures issued by the defendant Company.

2. An inquiry of what property or assets of the defendant Company are comprised in the said mortgage debentures and the charge or security thereby created.

3. An inquiry what charges or encumbrances prior to the said debenture holders affect the property respectively comprised in or charged by the said debentures.

4. An inquiry what other encumbrances whether prior or subsequent affect the property respectively comprised in or charged by the said debentures.

5. An inquiry what are the priorities of such other charges or encumbrances and the said debentures respectively.

DEBENTURE HOLDERS' JUDGMENT FOR SALE.

Upon motion made this day unto this Court by counsel for the plaintiff for judgment for sale in the presence of counsel for all the defendants, and hearing read the and the other proceedings had and taken:

This Court doth order and adjudge:

1. That the lands and premises, chattels, undertaking, stock-in-trade, works, plant, property and effects and assets, comprised in the said indenture dated the day of 190 be sold with the approval of the official referee, and that the proceeds of the sale be paid into Court to the credit of this action.

Note—The judgment for sale and for an account may be joined in one judgment if such be granted.

RECEIVER'S CERTIFICATE.

No.

Received from of , the sum of part of a sum of authorized to be raised by an order of the High Court of Justice dated the day of , and made in an action of under which order every part of the said sum of is to rank pari passu as a first charge upon the assets of the said Company comprised in or charged by a certain trust deed for securing debenture stock of the said Company date the day of , and referred to in the said order, in priority to the holders of the said debenture stock and their trustees, and is to bear interest commencing as to the said sum (the receipt whereof is hereby acknowledged) from the date hereof, at the rate of , until repayment, and in addition to such interest each lender of part of the said sum of , is to be entitled to receive on being paid off a bonus as follows, viz., on payment off within one year from his advance a bonus of on the amount advanced or on payment off at any subsequent time a bonus of on the same amount, and any part of the said may be paid off at any time on the terms aforesaid. The said charge will be by way of floating security upon the said assets as aforesaid, as the undersigned does not undertake any personal liability to pay any part of the said sum of or any such interest or bonus as aforesaid.

Dated the day of . Receiver and Manager.

DEBENTURE STOCK CERTIFICATE.

THE COMPANY, LIMITED.

No. $

Bearing interest at the rate of p.c. per annum payable every January and July.

(The stock is redeemable at p.c. at any time after the day of on six calendar months' notice from the Company).

This is to certify that of is the registered holder of of the above mentioned stock which stock is constituted and secured by trust deed dated the day of and made between the Company of the one part, and and (trustee) of the other part, and is issued subject to the provisions contained in that deed.

NOTE.—This certificate must be surrendered before any transfer of the whole or any part of the stock comprised in it can be registered and no fraction of one hundred dollars will be transferred.

DEBENTURE.

THE COMPANY, LIMITED.

Issue of 1,000 debentures of $ each carrying interest at per cent. per annum (all ranking *pari passu*) and numbered to inclusive, made under the authority of by-law No. 2 of the Company and of a resolution of the shareholders dated the day of .

No. Debenture $.

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 of or other the registered holder for the time being hereof the sum of $.

2. The Company will, in the meantime (or 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 payments to be made on the day of next.

3. The Company hereby charges with such payments its undertaking and all its property, present and future including its uncalled capital.

4. This debenture is issued subject to and with the benefit of the conditions endorsed herein, which are to be deemed part of it.

Given under the corporate seal of the Company this day of .

The seal of the Company was affixed hereto in the presence of .

Directors. (Seal.)

CONDITIONS ON DEBENTURE.

The conditions within referred to:

1. This debenture is one of a series of debentures, each for securing the principal sum of issued or about to be issued by the Company. The debentures of the said series are all to rank *pari passu* as a (first) charge on the property hereby charged without any preference or priority over one another, and such charge (save as regards the hereditaments

comprised in the indenture below mentioned) is to be a floating security (if desired add, 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 or *pari passu* with the said debentures.

2. A register of the debentures will be kept at the Company's registered office, wherein 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).

3. 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 hereby secured.

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 $ and such evidence of identity or title as the Company may reasonably require, and thereupon the transfer will be registered and a note of such registration will be indorsed hereon. The Company shall be entitled to retain the transfer.

5. In the case of joint registered holders the principal moneys and interest hereby secured shall be deemed to be owing to them upon a joint account.

6. No transfer will be registered during the seven days immediately preceding the days by this debenture fixed for payment of interest.

7. In respect of each half year's interest on this debenture, a warrant of the Company's bankers, payable to the order of the registered holder thereof, or in case of joint holders to the order of that one whose name 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 and the payment of the warrant, if purporting to be duly indorsed shall be a good discharge to the Company.

8. The principal moneys and interest hereby secured will be paid without regard to any equities between the Company or the original or any intermediate holder thereof, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the Company for the same.

9. 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 calendar months from such notice being given the principal moneys hereby secured shall become payable.

10. The principal moneys hereby secured shall immediately become payable:

(a) If the Company makes default for a period of three 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.

11. At any time after the principal moneys hereby secured become payable (or after the security constituted by the indenture below mentioned becomes enforceable) the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of the same issue, appoint, by writing, any person or persons (approved by the trustees of the said indenture) to be a receiver or receivers of the property charged by the debentures (and not comprised in such indenture) and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment. And a receiver so appointed shall have power—

(1) To take possession of the property charges by the debentures.

(2) To carry on or concur in carrying on the business of the Company, and for that purpose to raise money on the premises charges in priority to the debentures.

(3) To sell or concur in selling any of the property charges by the debentures.

(4) To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture holders.

And all moneys received by such receiver or receivers shall be applied in or towards the satisfaction *pari passu* of the debentures (or if there is a trust deed, paid over to the trustees or trustee of the said debenture to be held on the trusts by that indenture declared of and concerning the moneys to arise from the execution of the primary trust for conversion as therein defined.)

If there is to be a trust deed add

12. The holders of the debentures of the above issue are and will be entitled *pari passu* to the benefit of and subject to the provisions contained in an indenture dated the day of and made between the Company of the one part and A. B. and C. of the other part (whereby certain property of the Company was vested in trustees for securing the payment of the principal moneys and interest payable in respect of the said debentures).

13. The principal moneys and interest hereby secured will be paid at No., street or at the head office of the Company.

14. 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.

15. 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.

FORM OF COUPON.

$

THE COMPANY, LIMITED.

Coupon No. Interest Coupon No.

Interest on $. Debenture No. being . Half year's interest due the day of and payable to bearer at the Bank (address) or at the head office of the Company.

For the Company

Secretary.

PERPETUAL DEBENTURE.

THE COMPANY, LIMITED.

The Company, Limited, being indebted to the person to whom this debenture is issued in the sum of $ upon the terms that such sum is to be payable only in the events and subject as hereinafter expressed, when, etc.

Annexed to this debenture are coupons, each providing for a half year's interest (and if so, and also a voucher for fresh coupons) and such interest will be payable only on presentation of the coupon referring thereto. After the day of (10 years after date) and at the expiration of such succeeding period of 10 years, the registered holder, on production of this debenture for indorsement (or the bearer of the appropriate voucher on presentation thereof) will be entitled to the issue of fresh coupons for a further period of 10 years (add conditions of payment).

DEBENTURE PAYABLE OUT OF PROFITS ONLY.

1. The Company, Limited, will, as and when the principal moneys hereby secured become payable, pay to of the sum of .

2. The Company will in the meantime pay to the said, etc.

3. The principal moneys and interest secured by the debentures of this series are payable exclusively out of the profits of the Company as provided by the by-laws of the Company, and the Company will apply such profits accordingly.

4. This debenture is issued, etc.

DEBENTURE TO BE PAID BY INSTALMENTS.

1. This debenture is one of a series of debentures of the Company which are to be issued upon the footing that the principal sum of is to be paid up thereon by instalments as follows, namely:— per debenture on application and per debenture on allotment, and the balance, if and when called up, and particulars of the principal sums from time to time, and for the time being paid up hereon will be certified on this debenture by the Company's secretary or managing director, and such certificate is to be conclusive notwithstanding that by reason of a discount allowed for payment in advance, or otherwise the amount actually paid up is less than the amount certified.

2. The Company may at any time call up the balance of the said sum of or any part thereof, and the registered holder of this debenture shall be liable to pay up any calls so made on him to the persons and at the time and place appointed by the Company. No calls shall exceed per debenture, and two consecutive calls shall not be made payable at an interval of less than three calendar months. Fourteen days' notice of any call shall be given, specifying the time and place of payment and to whom such call is to be paid.

3. If the registered holder of this debenture fails to pay any call or instalment on or before the day appointed for the payment thereof, the Company may at any time thereafter whilst such call or instalment remains unpaid, serve a notice on such holder requiring him to pay the same, together with interest at the rate of 10 per cent. per annum, as from the time when the same ought to have been paid, and such notice shall state that in default of payment within fourteen days this debenture will be liable to forfeiture, and if the requisitions of such notice are not complied with, the Company may at any time thereafter by resolution of its directors, forfeit this debenture, and if this debenture is so forfeited, it shall forthwith become the property of the Company and shall be given up to the Company to be cancelled.

APPLICATION FOR DEBENTURE.

THE COMPANY, LIMITED.

No. .

Issue of per cent. debentures.

To the Directors of the Company, Limited,

Gentlemen,—

I beg to apply for debentures of the above issue in the terms of the prospectus issued by you, dated on which I have paid the required deposit of $ per debenture, and I undertake to accept the same or any less number you may allot to me, and to make the remaining payments in respect thereof, at the dates specified in the said prospectus.

Your obedient servant,

MORTGAGE OF UNCALLED CAPITAL.

Under section 78 of the Ontario Companies Act power is given to charge uncalled capital.

The Company, as beneficial owner hereby assigns unto the present trustees all that portion of the capital of the Company which at present is uncalled, namely the sum of in respect of each of the shares in the capital of the Company, which have been issued and are outstanding and all calls and sums hereafter made or received in respect thereof. To hold the same unto the present trustees, their executors, administrators and assigns absolutely to the intent that the same may be held as a specific and not a floating security for the payment of the moneys intended to be hereby secured.

As regards the uncalled capital aforesaid, assigned by the last preceding clause hereof, the following provisions shall have effect.

(1) The trustees or trustee may at any time hereafter permit the Company to call up such capital, or to receive the same or any part thereof in advance of calls.

(2) Such permission may be given on such terms and conditions as the trustees or trustee may think expedient.

(3) All such moneys, if and when paid up, shall belong and be paid over to the trustees or trustee, and shall be carried to the redemption fund mentioned in clause hereof.

(4) Save as herein provided, none of the mortgaged capital shall, during the continuance of this security, be called up or received in advance of calls.

(5) The Company shall not at any time during the continuance of this security create any charge on the uncalled capital aforesaid without giving previous notice in writing to the person or persons in whose favour such charge is created of the assignment thereof hereby made.

BILL OF EXCHANGE.

Toronto, 1st Jan., 190 .

$.

Three months after date pay to the order of One Thousand dollars, value received.

For the A.B.C. Company, Limited,

President.
Secretary.

ACCEPTANCE OF BILL.

For the A.B.C. Company, Limited.
And by its authority, payable at, etc.

President.
Secretary.

CHAPTER XVIII.

LEGAL PROCEEDINGS.

A corporation is liable for the acts of its agents as in the case of a private individual. A corporation is not, however, liable for the unauthorized acts of its agents or for acts done outside of the business of the corporation. In a somewhat peculiar case it was held that where acts are done in the presence of the corporation, *i.e.*, of the members of the corporation and while it is convened in meeting and while its principal officers and many of its members present, under these circumstances the wrongful acts must have been taken to be done by and with the consent of the corporation, which is accordingly liable for damages for injury sustained. *Kinver* v. *Phœnix Lodge, I.O.O.F.*, 7 O.R. 377; *Bayley* v. *Manchester R.W. Co.*, L.R. 8 C.P. 148; *Ramsden* v. *Boston & Albany R.W. Co.*, 104 Mass. 117; *Limpus* v. *London General Omnibus*, 1 H. & C. 526.

It was once thought that a corporation was not liable in an action for deceit for the reason that it has no mind and therefore has no motive, nor can it be guilty of a malicious act. Lord Bramwell in *Abrath* v. *North Eastern R.W. Co.*, 11 App. Cas. 247, expressed himself in the most positive language, but other members of the Court, Lord Selborne and Lord Fitzgerald took particular pains to express themselves as not having found it necessary to form any opinion on the point as it was not brought up or argued in the case. And in *Stevens* v. *Midland Counties R.W. Co.*, 10 Ex. 352, Alderson, B., says at page 354: "It seems to me that an action of this description (malicious prosecution) does not lie against a corporation aggregate, for in order to support the action it must be shewn that the defendant was actuated by the motive in his mind and a corporation has no mind."

In *McKay* v. *Commercial Bank of New Brunswick*, L.R. 5 C.P. 394, the action was for a deceitful representation by the

bank manager made to parties by which they were induced to accept bills discounted by the bank and the bank was held liable for the manager's deceit. See also *Smith* v. *Winterbotham*, L.R. 8 Q.B. 244; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, and *Moore* v. *Ontario Investment Association*, 16 O.R. 269.

A corporation may be liable for false imprisonment under an order of its agent within the scope of its authority. *In re MacSorley* v. *Mayor of St. John*, 6 S.C.R. 531; Ritchie, C.J., said, 552: "But there must be evidence justifying the jury in finding that the parties actually imprisoning him had authority from the corporation. And see *Eastern Railway Co.* v. *Broom*, 6 Ex. 314; *Goff* v. *Great Northern Co.*, 3 E. & E. 672; *Polton* v. *Londer & South West Railway Co.*, L.R. 2 Q.B. 534.

These views, however, are not regarded as sound. It is now well settled that 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. *Barwick* v. *English Joint Stock Bank, supra.*

A company is liable for trespass. *Maund* v. *Monmouthshire Canal*, 4 M. & G. 452. For libel. *Caroll* v. *Penberthy Injector Co.* (1889) 16 A.R. 446; *Tench* v. *G. W. R. Co.*, 32 U.C.R. 452. For assault and battery. *Butler* v. *Manchester Ry. Co.*, 21 Q.B.D. 207. For nuisance. *Rapier* v. *London Tramways Co.*, 69 L.T. 361.

Internal Management.

It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers. *Burland* v. *Earle* (1902) A.C., at page 93. But see *Toronto Brewing & Malting Co.* v. *Blake*, 2 O.R. 175.

The Court will not interfere to restrain by injunction the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done if such sanction can afterwards be obtained. If the thing com-

plained of is a thing which in substance the majority of the company are entitled to do or if something has been done irregularly which the majority of the company are entitled to do regularly or if something had been done illegally which the majority of the company are entitled to do legally there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called and ultimately the majority gets its wishes. *Purdom* v. *Ontario Loan and Debenture Co.*, 22 O.R. 597; *Macdougall* v. *Gardiner*, 1 Ch. D., at page 25.

Regulations—Domestic Forum.

Where an association has a code of laws and also rules for the government of members which point out what course a member shall pursue if he finds himself aggrieved he must exhaust the remedies thus provided before applying to the Courts of law for redress.

Action by Shareholders in Name of Company.

It is clear law that in order to redress a wrong done to a company or to recover money or damages alleged to be due to the company the action should *primâ facie* be brought by the company itself.

Where the persons against whom relief is sought themselves hold and control the majority of the shares in a company and will not permit an action to be brought in the name of the company the Courts permit the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure to afford a remedy for a wrong which would otherwise escape redress; and it is obvious in such a case the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff and cannot complain of the acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain

such an action are therefore confined to those in which the acts complained of are of a fraudulent character or are beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate. No informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act so done regularly would be within the powers of the company, and the intention of the majority of the shareholders is clear. *Burland* v. *Earle* (1902), A.C., at p. 93; *Menier* v. *Hooper Telegraph Works*, L.R. 9 Ch. 350; *Macdougall* v. *Gardiner*, 1 Ch. D., at page 25. See also *Essery* v. *Court Pride of the Dominion*, 2 O.L.R. 596.

A sale by directors to one of themselves is open to question in an action by a shareholder. Such a sale, on the other hand, may be entirely validated by resolution of the shareholders. Where an action was brought, the Court considered it proper before deciding the action to direct that a meeting of shareholders be called for consideration of the sale and that they be asked to ratify it or express their disapproval of it. An order was made directing the calling of a meeting on a specified date the president of the company to report fully to the registrar upon affidavit of the result of such meeting. *Ellis* v. *Norwich Broom*, 8 O.W.R. 25.

In the case of an irregular election of directors the Court will not interfere at the instance of individual shareholders and unless the individuals can secure the consent of the company to sue in the company's name, an action by them to test the election should be dismissed. *Kelly* v. *Electrical Construction Co.*, 10 O.W.R. 704.

A shareholder who has participated in the benefit of an illegal act cannot either individually or suing on behalf of the general body of creditors maintain an action against the directors of the company. *Stickney* v. *Buckel*, 6 O.W.R. 751.

The company is a necessary party in an action to call upon the directors to account for their profits. *Meyers* v. *Cain*, 6 O.W.R. 297-834.

Where the holder of a large number of shares of a company had been restrained by an interim injunction from voting on his shares pending the result of an action, and in the meantime, a meeting of shareholders was held and directors elected, the Court refused to set aside the election of directors. It was said that the shareholders might have applied to the Court for an injunction against the election proceeding or to have the injunction against him suspended so far as to allow him to vote for an adjournment of the meeting, but having done neither and neglected such ordinary precautions he was not entitled to have the election set aside. *Beaudry* v. *Read*, 10 O.W.R. 622.

As to the jurisdiction of the Court of Chancery to intervene in internal affairs of the company. See *Marsh* v. *Huron College*, 27 Gr. 605; *Woodruff* v. *Colwell*, 8 O.W.R. 302, 314, 493; *Hamilton Canal Co.*, 1 Gr. 1; *Boulton* v. *Church Society*, 14 Gr. 123, 15 Gr. 450; *International Wrecking Co.* v. *Murphy*, 12 P.R. 423, and *Saskatchewan Land Co.* v. *Leadley*, 4 O.W.R. 39.

One-Man Companies.

The theory has been advanced that what is known as a one-man company may be treated as a "dummy" and that the Court should ignore its corporate existence and hold that the acts of the shareholders are the acts of the corporation itself. The tendency of American Courts is to refuse to be bound by the logic derived from a corporate existence where it serves only to distort or hide the truth. *Anthony* v. *American Glucose Co.*, 146 N.Y. 407. In the case of *Rielle* v. *Reid*, 28 O.R. 497, where one shareholder and his wife owned all the shares of the company except three, two of which were held by employees and the third by his solicitor, the Court said that the company was and had been the mere agent of the debtor, and held that the conveyance by the debtor to the company of his assets was fraudulent

and void and that all the assets of the company were part of the assets of the debtor and liable to be seized by his creditors. On appeal this decision was reversed and the Ontario Court of Appeal took the view that the company was a distinct legal entity, the rights and liabilities of which were not capable of being dealt with on the principle that it was an agent or alias of the debtor. 26 A.R. 54. The leading English case on this is *Salomon* v. *Salomon* (1897), A.C. 22. The House of Lords took the view that all the provisions of joint stock companies having been complied with, it was impossible to dispute that the company was legally incorporated and must be treated like any other individual person, with its rights and liabilities apportioned to itself and that the motives of those who took part in the promotion of the company were absolutely irrelevant.

RECTIFICATION OF REGISTER.

116.—(1) If the name of any person is without sufficient cause, entered in or omitted from such book or books of the corporation, or if default is made or unnecessary delay takes place in entering in said books the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggrieved, or any shareholder or member of the corporation, or the corporation itself may apply to a Judge of the High Court of Justice for an order that the book or books be rectified, and the Judge may either refuse such application or he may make an order for the rectification of the said book or books, and may direct the corporation to pay the costs of such motion or application and any damages the party aggrieved may have sustained. The Judge may in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the said books of the corporation whether such question arises between two or more shareholders, or alleged shareholders or members, or between any shareholders or alleged shareholders or members and the corporation, and the Judge may in any such proceeding decide any question which it may be necessary or expedient to decide for the rectification of the said books.

(2) The Judge may direct an issue to be tried in which any question of law may be raised.

(3) An appeal shall lie from the decision of such Judge as if the same had been given in an action.

(4) This section shall not deprive any Court of any jurisdiction it may have. R.S.O., c. 191, s. 73.

(5) The costs of any proceeding under this section shall be in the discretion of the Judge.

This section affords a summary remedy, where a name is improperly entered or omitted from the register of shareholders or unnecessary delay takes place in removing the name from the register. There should be a demand on the proper officer of the company and a refusal or unreasonable delay in complying before launching the motion. *Nelles* v. *Windsor Ry. Co.*, 11 O.W.R., p. 467.

The section is broad in its terms and application, as the following illustrations will shew.

The power was exercised where an underwriter claimed to have been improperly placed on the list of shareholders. *Re Consort Co.* (1897), 1 Ch. 575; where there was a dispute between the purchaser of certain shares and his vendor. *Ex parte Shaw*, 2 Q.B.D. 463; where a shareholder who had surrendered certain shares sought to have his name reinstated on the ground that the surrender was invalid. *Bellerby* v. *Rolland* (1902), 2 Ch. 14; where it was claimed that the company had improperly acted on a forged transfer. *Re Bahia & Co.*, L.R. 3 Q.B.D. 584; where it was sought to attack a forfeiture of shares as irregular. *Ystalyfera Gas Co.*, W.N. (1887), 30; where misrepresentation was alleged by a subscriber. *Anderson's Case*, 17 C.D. 373. *And* an order may be made *nunc pro tunc*. *Re Sussex Brick Co.* (1904), 1 Ch. 598. See title Transfers, *supra*. See also *Re Imperial Starch Co.*, 10 O.L.R. 22; *Re Panton*, 90 L.R. 3; *Re Dominion Oil Co.*, 2 O.W.R. 826; *Nelles* v. *Windsor Ry. Co.*, 11 O.W.R. 463.

CHAPTER XIX.

PUBLIC COMPANIES.

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

(*a*) The amount (if any) 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 ninety days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the applicants without interest, and if any such money is not so repaid within one hundred 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 ninety days; 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; Provided, however, that the Provincial Secretary may from time to time extend the times herein limited.

(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. Imp. Act, 1900, 4.

Prior to the passage of this Act every company incorporated under the Ontario Companies Act could allot shares, commence business and create liabilities immediately after its incorpora-

tion. Many abuses arose owing to the fact that directors frequently proceeded to allotment on a subscription that was obviously insufficient for the ordinary purposes of the company, but which was large enough to afford a means of re-imbursing them for their preliminary expenses. In other cases an allotment was made where the subscription was inadequate and the moneys taken to make a payment on account of some option on property subsequently lost to the company through its inability to meet the succeeding payments. These abuses will now, in a measure, be obviated.

Limitations of Act.

It should be observed that this part of the act only applies to companies incorporated after July 1st, 1907. See sections 112 and 212.

This section does not apply unless share capital is offered to the public for subscription and it accordingly does not apply to a private company which makes no offer of shares to the public nor does it apply to a company which offers debentures or debenture stock for public subscription. Like section 96, it must be read in the light of section 97. See notes to sections 96 and 97 *supra*.

Furthermore, section 106 does not apply to an allotment of shares subsequent to the first allotment offered to the public for subscription. See sub-section 6. It should be noted that it is only necessary that the minimum amount should be "subscribed" and the proper percentage paid on account of such subscriptions. If then the applications are sufficient, the directors may allot and sell any amount of stock they may deem proper. This would not appear to be of much consequence as under section 108 the company cannot commence business until the minimum subscription has been alloted.

The directors, however, may fix a nominal amount as the minimum subscription and in many cases in England prospectuses published since the passing of this Act have stated as the minimum subscription such a nominal amount as seven shares, the prospectus, however, containing a clause that the directors

do not intend to proceed to allotment unless an amount adequate in their opinion for the purposes of the company is subscribed.

Offer to Public.

What is meant by an offer to the public will probably not be determined without much controversy. In a business sense it would be generally understood to mean an offer by newspaper, advertisement or printed circular to some more or less extended section of the public as distinguished from an offer made privately to a circle of friends, acquaintances or clients. But the mere fact that an offer is made by letter addressed to a number of persons by name would not necessarily deprive it of the character of a public offer. Section 106 must be read in the light of section 99, sub-section 4, and section 97, which may probably afford a key to the riddle. And see *Burrows* v. *Matabele Gold Reefs* (1901), 2 Ch. 23.

If an offer is made to the public but no allotment made, and subsequently a private offer is made it would appear that the provisions of the Act must still be complied with, and the consequences of failing to comply with the Act are of such a serious nature that no one would wish to proceed if there were any doubt in the matter. In view of the onerous provisions of these section the following principles laid down by Mr. Palmer will serve as an excellent guide to directors.

Suggestions for Directors.

They may fix the minimum subscription so low that there will be a practical certainty of its subscription, regard being had to underwriting and to what they themselves will be prepared to do towards making up any deficiency.

They will take care that the application money is paid into a sound bank, and that it cannot be drawn out without their privity and consent.

They will take care that until the minimum subscription is made and the application money is paid in, no part of the application money is paid out.

If within ninety days the minimum subscription is not made, and the application money satisfied, they will at once repay the application moneys.

The period of ninety days runs from the "first issue of the prospectus" which is apparently, unless the contrary be proved, the date of the prospectus.

Consequences of Non-Compliance.

107.—(1) An allotment made by a company to an applicant in contravention of the foregoing provisions of this part of this Act 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.

The use of the word voidable means that there is a binding contract capable of being set aside by the applicant. If the subscriber is entitled to set aside the allotment on the ground that it was made in contravention of the Act but does not take proceedings within one month after the holding of the statutory meeting, he would appear to lose his statutory right.

It should also be noted that even if the company is being wound up a subscriber can repudiate. See *Oakes* v. *Turquand*, L.R. 2 H.L. 325.

If the subscriber wishes to set aside his application, he should notify the company and demand the removal of his name from the list of shareholders of the company. If the company declines to accede to this, proceedings might be taken by action or by motion for rectification of the register under section 116. Where the company is being wound up, the subscriber could raise the defence in a proceeding to place him on the list of contributories.

Director's Liability.

(2) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the foregoing provisions of this part of this Act 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; pro-

vided that proceedings to recover such loss, damage or costs shall not be commenced after the expiration of two years from the date of the allotment. Imp. Act, 1900, 5.

The damages for which the director is made liable would appear to include all loss or expenses of any kind sustained by the allottee by reason of the allotment and all expenses to which the company was put, the company, however, would not appear to be entitled to claim damages for the loss of membership nor would the subscriber be entitled to claim damages for the loss of shares.

COMMENCING BUSINESS.

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

(*a*) Shares held, subject to the payment of the whole amount thereof in cash, have been allotted to an amount not less in the whole than the minimum subscription; and

Commencing business means commencing the exercise of the powers conferred upon the company to trade, manufacture, etc. Borrowing would be an act incidental to carrying on its business. The Legislature, however, has made it doubly clear that no company offering shares for public subscription can create any liabilities or dispose of any of its funds until it has filed the required declaration.

It would seem, however, that the company may at least issue a prospectus, allot stock and enter into provisional contracts of various kinds which contracts become binding on the company the moment it is entitled to receive the official certificate. See *Howland* v. *McNab*, 8 Gr. 47; *Goodwin* v. *Ottawa & Prescott Ry.*, 13 C.P. 254; *Dominion Salvage* v. *Attorney-General*, 21 S.C.R. 72; *Hardy* v. *Pickerel River Co.*, 29 S.C.R. 211.

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

If a director fails or refuses to pay to the company the proper proportion due upon his shares, it is obvious that the

official certificate could not be obtained. Under these circumstances it has been suggested by Mr. Palmer to be advisable to provide in the by-laws or articles that a director shall *ipso facto* vacate his office if he does not pay up his subscription when due.

(*c*) There has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

OFFICIAL CERTIFICATE.

(2) The Provincial Secretary may, 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, however, that upon it being shewn that such certificate was made upon any false statement or upon the withholding of any material statement, the Provincial Secretary may cancel and annul such certificate.

While, as a matter of practice, it would appear very advisable, if not necessary, to obtain the certificate of the provincial secretary that the company is entitled to commence business, at the same time it would not appear technically necessary under the phraseology of sub-section (*c*).

The object of the certificate is to afford conclusive evidence that the company is entitled to commence business. If the certificate were issued and subsequently cancelled, such cancellation would not necessarily afford conclusive evidence that the company was not entitled to commence business and the question of compliance or non-compliance with the preceding provisions would seem to be a question of fact to be determined by the Court in which the issue arose. See *Hadleigh Castle Gold Mines Co.* (1900), 2 Ch. 419.

CONTRACTS PROVISIONAL.

(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.

The word "provisional" is defined by the latter words in the sub-section. The contract would appear to be in existence, but its operation suspended until the date on which it is entitled to

commence business. On that date it takes on full force and effect. This, however, would not apparently interfere with the right of avoiding such contracts on ordinary grounds such as fraud. Nor would it appear to give to the other party a right to repudiate the agreement in the interval. It would seem that notwithstanding any attempt at repudiation on his part based on the ground that there was no completed contract, the contract would become binding on him on that date when the company could commence business.

The position of the third parties dealing with the company is not altogether free from doubt. It would appear, however, from the fact that the declaration must be filed in a public office accessible to those who wish to make inquiries, that the public would be taken to have notice of any failure on the part of the company to comply with the provisions of the Act. This would place parties selling goods for credit or lending money to the company in the same position as in the case of other *ultra vires acts*, of which they had notice.

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

PENALTY.

(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 on summary conviction to a fine not exceeding fifty dollars for every day during which the contravention continues.

MONEYS TO BE HELD IN TRUST.

109. All sums received by the company or by any promoter, director, officer or agent thereof shall be held in trust by the company or such promoter, director, officer or agent until the same may be deposited in a chartered bank to the credit of the company and shall there remain in trust until the issue of the aforesaid certificate by the Provincial Secretary. New.

This provision would appear to be a salutary one and necessary to fully effectuate the purposes of this part of the Act. In many cases moneys might be collected on account of stock sub-

scriptions and used by the promoters for preliminary expenses and other purposes, notwithstanding the fact that the company was not authorized to commence business. A remedy is given by section 106, sub-section 4, which provides that if the conditions of the Act have not been complied with on the expiration of 90 days after the first issue of the prospectus, all moneys shall be repaid to the applicants, and the directors of the company shall be jointly and severally liable to repay that money. If, however, the directors were not men of substance, this provision would be of little benefit to the subscribers.

CHAPTER XX.

AMALGAMATION.

The word amalgamation has, under the Companies Act, no technical meaning. The word is used to describe the transfer of all or part of the assets and liabilities of one or more existing companies to another existing company or to a new company, of which the members of the transferring company or companies become or have the right to become members. Amalgamation can only legally be accomplished pursuant to legislative authority, but agreements may be entered into between the companies which would have the same result as if there had been a legal amalgamation. A transfer by one company of its assets to another does not constitute amalgamation and does not merge the companies into one. *Maple Leaf Rubber Co.* v. *Brodie*, 18 Que. S.C. 352. A transaction is not the less an amalgamation because the terms "purchase and sell" are used. *Stace & Worth's Case*, 4 Ch. 682; *Dougan's Case*, 8 Ch. 540. Nor is it the less an amalgamation because a substantial part of the assets are accepted. *Wall* v. *London and Northern Assets Corporation* (1898), 2 Ch. 469.

How Effected.

Amalgamation may be effected,

1. By special Act of Parliament,

2. By proceeding under section 8 of the Ontario Companies Act.

3. Under the provisions of section 188 of the Ontario Companies Act. This section is almost the same as section 191 of the Imperial Companies Act, 1862. There are two modes of effecting an amalgamation under this section,

(*a*) Company A and company B desire to amalgamate. Company A passes a special resolution to wind up, appointing liqui-

dators and directing them to sell the assets to company B, in consideration of shares in that company to be allowed to the members of company A. The liquidators act accordingly, and company A is then dissolved.

(*b*) Company A and company B desire to amalgamate. Company A is formed to acquire their assets and liabilities and to carry on the amalgamated business. Each of the old companies then passes a special resolution as in the last case, the liquidator carrying the sale into effect and the old companies are then dissolved. This latter mode is available in every case, whereas the former can only be adopted where one of the companies has power to acquire the property and liabilities of the other or others. See Palmer's Company Precedents, Part I, page 1320.

4. Under a power in the Charter to sell the undertaking for shares in another company, combined with the power to divide assets in a winding-up *in specie*.

5. By the formation of a new company and the sale to this new company of the assets of the companies desiring to amalgamate.

This last is the method usually adopted in Canada for the amalgamation of companies.

The basis of such an amalgamation is the formation of a new company with the required capital and the transfer to this company of the assets of the companies desiring amalgamation. The first step in preparing the amalgamation is the settling of the terms upon which the amalgamation is to be based, which terms, when agreed upon, should be embodied in an agreement. Special meetings of the amalgamating companies should be held to approve of and ratify the agreement and to authorize the directors of the companies to execute and carry into effect the agreement. Notice of these special meetings should set out the reasons for the calling of the special meetings and give particulars of the business to be transacted thereat. They might be accompanied by a circular shewing the nature of the plan and the advantages or necessity thereof.

On an amalgamation a compensation is frequently provided for such other officers of the selling company who are not to take office under the purchasing company. *Southall* v. *British Mutual Life Association Society*, 6 Ch. 614. But it has been held that the notice convening the meeting ought to disclose the provisions. *Tiessen* v. *Henderson* (1899), 1 Ch. 861.

Bond holders of a railway company were, by the Statutory Charter, given an option to convert their bonds into stock, such stock to be preferential to the ordinary stock of the company. By subsequent Act the company was authorized to amalgamate with another company and it was declared in the Act that the two companies and those who should become shareholders in the amalgamated company, should constitute the new company. It was held that this amalgamation did not extinguish the right of the bond holders to elect to take stock which should be a preferred stock in the amalgamated company. *Cayley* v. *Cobourg Railway Co.*, 14 Gr. 571.

In 1889, the City of Toronto entered into similar agreements with the defendant companies by which they authorized these companies to lay down and operate underground wires and appliances for the distribution and supply of electricity, and gave them other privileges in connection with their business. By these agreements the defendants were forbidden to lease, to amalgamate with or sell out to any other company, without the consent of the plaintiffs; and if they did so, all rights granted thereby were to cease and determine. In 1896, the Incandescent Co. sold out all their assets and the shareholders transferred their shares to the Electric Light Co.

Held, that the Toronto Electric Light Co. had not, in purchasing, fallen within the prohibition clause, for to hold to the contrary would be to add "buy" to that clause.

What had been done was not an amalgamation of the two companies, inasmuch as the purchase was for cash and for cash only, and the Incandescent Light Co. acquired no interest whatever in the assets and affairs or otherwise of the other company.

Inasmuch as the actions were not commenced till April, 1902, the plaintiffs had, by their long delay in bringing suit and also by their conduct after the alleged breach and before the action, lost their right to complain. The plaintiffs had, by their conduct, waived the alleged forfeiture, the evidence clearly shewing that they had knowledge throughout of the facts upon which the right to claim a forfeiture rested, and it was not necessary to prove actual notice.

Notice to the city engineer was in the circumstances of this case sufficient, although the evidence shewed much more than that, and warranted the conclusion that knowledge of the absorption of the one company by the other was common and general throughout the city, and might safely be imputed to the City Council as a whole, especially as no civic official had denied such an inference. *City of Toronto* v. *Toronto Electric Light Co.; City of Toronto* v. *Incandescent Light Co. of Toronto and The Toronto Electric Light Co.*, 6 O.L.R. 187.

PETITION FOR LETTERS PATENT CONFIRMING AN AGREEMENT OF AMALGAMATION BETWEEN THE COMPANY, LIMITED, AND THE COMPANY, LIMITED.

To

His Honour the Lieutenant-Governor of the Province of Ontario.

The joint petition of the Company, Limited, and the Company, Limited.

Humbly sheweth.

1. That the Company, Limited, was incorporated under the Ontario Companies Act by Letters Patent, dated and the Company, Limited, was incorporated by Letters Patent under the Ontario Companies Act, dated the day of 19 .

2. That the Board of Directors of each of your joint petitioners is duly and lawfully constituted, having regard to the provisions of the statutes and by-laws in that behalf.

3. That pursuant to the provisions of section 8 of the Ontario Companies Act, your petitioners' directors have entered into a joint agreement for the amalgamation of your petitioners, which said agreement has been duly adopted by the shareholders of each of your petitioners at meetings thereof duly called in accordance with the statutes and by-laws in that behalf, and held separately for the purpose of taking the said agreement into consideration;—the said agreement having been adopted at such meetings by more than two-thirds of the votes of all the shareholders of each of your petitioners.

4. That by the said agreement the name of the proposed amalgamated Company is to be .

5. That your petitioners are desirous of obtaining Letters Patent under the Great Seal of the Province of Ontario confirming the said agreement.

6. That the objects of the proposed amalgamated Company are to be those set out in the Letters Patent above referred to incorporating each of your petitioners.

7. That the undertaking of the Company will be carried on from the City of Toronto, and that its post office address will be Toronto.

8. That the head office of the Company will be at the City of Toronto.

9. That the amount of capital stock of the Company will be .

10. That are to be the first directors of the Company.

Your joint petitioners therefore pray that your honour may be pleased to grant under the Great Seal Letters Patent, confirming the said agreement for amalgamation.

And your joint petitioners as in duty bound will ever pray.

Dated at Toronto .

Witness:)
)
)

INDENTURE OF AGREEMENT MADE THIS DAY OF .

Between

Company, Limited, of the one part.

and

Company, Limited, of the other part.

Whereas the Company, was incorporated in the under the Companies Act with a nominal capital of $ divided into shares of $ each.

And whereas the whole of the said shares have been issued and on each share has been paid thereon.

Whereas the Company was incorporated in the year under the Companies Act with a nominal capital of $ divided into shares of $ each.

And whereas the whole of the said shares have been issued and on each share has been paid thereon.

And whereas the respective directors of the said companies have duly passed by-laws providing for amalgamation and authorizing the execution and delivery of this agreement for the purpose of affecting an amalgamation between the two said Companies and subject to the approval of the shareholders of the said companies respectively.

Now it is agreed as follows:—

1. The said Companies shall be amalgamated and consolidated as one Company under the provisions of the Ontario Companies Act.

2. That the name of the new Company shall be Company.

3. That the terms upon which the said amalgamation shall be carried out shall be as follows, namely, the said Companies the Company and Company, shall transfer and the new Company shall take over all and singular the lands, buildings, goods, chattels and moneys, credits, debts, bills, notes and things in action of the old Companies and undertaking, business and goodwill thereof, with the full benefit of all contracts and agreements and of all securities in respect of said things in action to which the old Company is entitled and all other, the real and personal property and assets of the old Companies whatsoever and wheresoever, subject to several mortgages, charges, liens and encumbrances affecting the same or any part thereof.

4. That the said Company shall undertake, pay, assume, satisfy and discharge all the debts and liabilities and obligations of the old Companies respectively whatsoever, and shall accept, perform and fulfil all contracts, engagements and obligations of the said two Companies hereto respectively as the same may exist at the time of such transfer aforesaid.

5. That the said transfer of assets and assumption of liabilities, contracts and obligations shall be made, entered into and carried into effect immediately upon the incorporation of the said new Company, and such incorporation shall be applied for immediately upon this agreement being approved of by the shareholders of the said Companies hereto respectively, as provided by section 8 of the Ontario Companies Act.

6. The number of directors of the Company shall be.

7. That shall be the first directors of the said Company and shall hold office until the first annual meeting of the shareholders of the syndicate.

8. That the capital stock of the said Company shall be divided into shares of $ each.

9. The shareholders of each of the Companies parties hereto shall surrender and deliver up the shares and certificates therefor now held by them and each of them and the shareholders of Company, Limited, shall be allowed pro rata in lieu thereof shares of the capital stock of the Company, calculated on the basis of $ shares in the new Company for every one share held in the Company, and the shareholders of the Company, Limited, shall be allotted pro rata in lieu thereof shares of the capital stock of the Company, calculated on the basis of shares in the new Company for every one share held in the Company.

10. Immediately upon the incorporation of the new Company, a meeting of the directors of the said Company of which meeting at least days' notice in writing shall be given addressed and mailed to the said directors, shall be held and at such meeting the directors shall elect and appoint officers for the management and control of the affairs of the said Company, and transact such other business as they may think proper.

11. Immediately upon the completion of the incorporation of the said new Company and the transfer to it of the assets and properties of the

said two Companies, the parties hereto, as hereinbefore provided, the said two Companies shall thereupon cease to exist.

In witness whereof the parties have hereunto set their hands and seals.

Signed, Sealed and Delivered
In the presence of }

AGREEMENT FOR AMALGAMATION OF TWO COMPANIES BY SALE OF THEIR UNDERTAKINGS TO A NEW COMPANY.

An agreement made the day of between the Company, Limited (hereinafter called the (A) Company of the first part, the Company, Limited (hereinafter called the (B) Company), of the second part, and (trustee) or, etc., of the third part.

Whereas the (A) Company and the (B) Company are the respective owners of the several Letters Patent respectively referred to in the agreement set forth in the first schedule hereto.

And whereas it is intended that the said (trustee) shall procure forthwith the incorporation under the Companies Acts of a Company to be called the Company, Limited (hereinafter called the new Company) and that the (A) Company and the (B) Company shall for the consideration hereinafter mentioned sell their respective businesses, goodwills and other property to the new Company.

And whereas a draft of the contract of sale and by-laws of the new Company has been approved by the (A) Company and the (B) Company and is set out in the second schedule hereto.

Now it is hereby agreed as follows:—

1. The said (trustee) shall forthwith do his best to procure the incorporation under the above mentioned Act of the new Company.

2. With as little delay as possible after the incorporation of the new Company the (A) Company and the (B) Company respectively shall execute and the said (trustee) shall do his best to procure the execution by the new Company of the contract in the terms of the agreement set forth in the second schedule hereto or in such other form as the (A) Company the (B) Company and the new Company shall agree.

3. If the said (trustee) shall not before the day of procure such execution by the new Company either the (A) Company or the (B) Company may by notice in writing to the other parties hereto rescind this agreement.

4. The (A) Company and the (B) Company shall each convene in accordance with its regulations an extraordinary general meeting of its members for the day of for the purpose of considering and if approved of confirming this agreement, and if the same be approved of by the requisite majority of the members present at each of such meetings each Company shall forthwith take all such steps as may be necessary to carry out this agreement.

5. If the members of the (A) Company or of the (B) Company shall refuse or neglect on or before the day of next to confirm this agreement or to pass any resolution necessary for giving effect to the same then in either of such cases either the (A) Company or the (B) Company may rescind this agreement by notice in writing to the other parties hereto.

In witness, etc.

AGREEMENT FOR SALE BY TWO AMALGAMATING COMPANIES TO NEW COMPANY.

An agreement made the day of between the Company, Limited (hereinafter called the (A) Company), of the first part, the Company, Limited (hereinafter called the (B) Company), of the second part, and the Company, Limited, (hereinafter called the purchasing Company), of the third part.

Whereas the (A) Company is the owner of the Letters Patent specified in the first schedule hereto and the (B) Company is the owner of the Letters Patent specified in the second schedule hereto.

And whereas it is intended that each of them the (A) Company and the (B) Company shall, for the consideration hereinafter mentioned sell its business, goodwill and other property to the purchasing Company subject to the provisions and otherwise in the manner and upon the terms hereinafter expressed.

Now it is hereby agreed as follows:—

1. The (A) Company and the (B) Company shall each sell to the purchasing Company and the purchasing Company shall purchase the Letters Patent mentioned in the said schedules belonging to them respectively with the benefit of all improvements in the inventions to which the said Letters Patent respectively relate and of all extensions thereof respectively together with the business, goodwill, rights and privileges, and all other the property whatsoever of the (A) Company and (B) Company respectively expecting only money, book and other debts due to them respectively and any sums due or to become due from the shareholders in such Companies in respect of their shares.

2. Every patent shall be sold subject to such licenses and agreements for licenses as may have been granted or made by the Company owning the same and subject (so far as it is affected thereby) to the agreements mentioned in the schedule in which it is described (but save as aforesaid the Letters Patent, and all other property intended to be comprised herein shall be sold free and discharged by the Company selling the same from all royalties and all claims or demands by any vendor to such Company or other person and from all agreements or other encumbrances whatever).

3. The purchasing Company shall as between itself and the selling Companies respectively take over and discharge all liabilities of the (A) Company under the agreements mentioned in the part of the first schedule hereto and of the (B) Company under the agreements mentioned in the part of

the second schedule hereto and of each Company in respect of contracts with customers or licenses not herein specially referred to, but so that nothing in this clause shall be deemed to extend the rights of any third parties or to create any direct liability between them or any of them and the purchasing Company. All sums of money paid or payable to or by the (A) Company or the (B) Company in respect of any such contracts (less any commission payable for collection) shall, if necessary, be apportioned as from the day of and the apportioned part shall be paid to or by the purchasing Company as the case may be.

4. Save as herein otherwise appears each of them the (A) Company and the (B) Company shall bear and discharge its own debts and liabilities.

5. As the consideration for such sales the purchasing Company shall allot to the (A) Company or as it may direct fully paid-up shares of $ each part of the original capital of the purchasing Company numbered to and to the (B) Company fully paid-up shares of $ each part of the same capital numbered to .

6. The purchase shall be completed on the day of next whereupon the said shares shall be allotted and the (A) Company and the (B) Company respectively shall deliver such of the property hereby agreed to be sold as may be executed by all necessary parties all proper assignments and conveyances of the residue including the said Letters Patent.

7. The sale by each Company shall take effect as from the day of as from which date each selling Company shall as between itself and the purchasing Company be deemed to have carried on business for and on account of the purchasing Company.

8. Neither the (A) Company or the (B) Company shall be deemed to warrant the validity of any Letters Patent hereby agreed to be sold nor be liable for the non-performance by the other of anything hereby agreed to be done by each selling Company shall before completion furnish to the other and if required to the purchasing Company a list of all licenses affecting its own patents.

9. This agreement may be modified from time to time in such manner as the directors of the three Companies present at any meeting convened for the purpose may unanimously agree and any modification so made shall without any further authority have the same force and effect as if it had been originally incorporated in and formed part of this agreement.

10. If any doubt, difference or dispute shall arise between the parties hereto or any of them as to the construction of these presents or as to any account, valuation or apportionment to be taken or under or any property or liability to be sold or undertaken or as to anything to be done or money to be paid thereunder or otherwise as to anything herein contained or referred to, the matter in dispute shall be determined by a single arbitrator to be nominated by the parties interested in the dispute

or in default of agreement to be appointed by the of , etc., and the arbitration shall be deemed to be held under the provisions of the Arbitration Act, 1889.

THE FIRST SCHEDULE ABOVE REFERRED TO

First Part.

(Particulars of Letters Patent belonging to the (A) Company.)

Second Part.

(Particulars of agreements relating to patents.)

THE SECOND SCHEDULE ABOVE REFERRED TO

First Part.

(Particulars of Letters Patent belonging to the (B) Company.)

Second Part.

(Particulars of agreements relating to patents.)

(Seals of all parties duly authenticated.)

Memorandum of agreement made and entered into this day of A.D. 19 , between the , Limited, of the first part, the Company, Limited, of the second part, and hereinafter called the committee of the third part.

Whereas it has been proposed that the said Companies should be amalgamated and consolidated under the provisions of the Ontario Companies Act.

And whereas for the purpose of carrying out such proposed amalgamation and consolidated, the said committee was appointed by the shareholders of the said Company on the day of A.D. 190 , with power to prepare an agreement to submit to the said Companies to properly effect such amalgamation and consolidation.

And whereas the said report has been duly adopted by the said Companies at meetings of the shareholders thereof.

And whereas the shareholders of the respective Companies have authorized this agreement to be executed by the proper officers on behalf of the said Companies and to affix the seals of the respective companies thereto.

And whereas the said to be the provisional directors of the said amalgamated and consolidated Companies.

Now, therefore this indenture witnesseth that for and in consideration of the premises, and for the consideration, covenants and agreements hereinafter set forth of the sum of one dollar paid by each of the said Companies to the other of them, and to the said committee at or before the sealing and delivery hereof it is covenanted and agreed by and between and on behalf of the said Companies and the said committee respectively their successors and assigns as follows, that is to say;

1. The said Companies hereto parties of the first and second parts respectively shall be united, amalgamated and consolidated as one Company under the provisions of the Ontario Companies Act.

2. That the name of the new Company shall be the , Limited.

3. That the said amalgamation and consolidation shall take place upon the following terms namely:—

All the undertaking, assets and property of whatsoever kind of the said two Companies, including the goodwill of each of the said Companies which they are now or shall be at the time of such transfer aforesaid or in any way entitled to shall be transferred to and vest in the said Company forthwith upon the issuance of the Letters Patent for the said amalgamated Company, and the Company, when incorporated shall assume, pay and satisfy all and every of the liabilities, contracts and obligations of the said Companies parties hereto, as the same may exist at the time of such transfer as aforesaid.

4. Immediately upon the execution of this agreement by the said Companies parties hereto the petition for Letters Patent to incorporate the Company shall be applied for.

5. Then the number of directors of the said shall be .

6. That the members of the said committee, parties hereto of the third part shall be the provisional directors of the said .

7. That the number of shares of the capital stock of the said shall be dollars, and the par value thereof shall be each.

8. That the said Company of the first part shall be entitled to receive shares of the capital stock of the said such number of shares being calculated, etc. And the said Company of the second part shall be entitled to receive shares of the capital stock of the said such number of shares being calculated.

9. That the shareholders of each of the said Companies shall deliver up to be cancelled the shares and certificates therefore now held by them and each of them in the said Companies and in return there shall be allotted to each shareholder shares of the said Company in the proportion to which each is entitled as aforesaid.

10. That the shares of so allotted as aforesaid shall be issued fully paid-up (or as the case may be).

That out of as aforesaid, the directors shall pay and discharge all and every of the liabilities of the said Companies parties hereto and the preliminary expenses incidental to the formation and incorporation of the , Limited.

11. That immediately upon the incorporation of the said shall convene a meeting of the said directors by sending notice thereof addressed and mailed to each of the said directors, and at such meeting the said directors shall duly elect and appoint officers for the future management, control and working of the affairs of the said , and shall transact such other business as they may think proper and necessary.

12. That the said committee parties hereto of the third part or any member hereof, shall at all times from and after the date hereof have free access to any and all books whether of account or otherwise, by-laws, minutes of shareholders' and directors' meeting, vouchers or other documents whatsoever belonging to either and both of the said Companies parties hereto.

President.
Secretary.
President.
Secretary.
Committee.

DECLARATION TO BE MADE BY OFFICER OF BOTH COMPANIES.

I, being the duly elected secretary of the Company, Limited, hereby certify that at a general meeting of the shareholders of the said Company held for the purpose of considering the attached memorandum of agreement for the amalgamation and consolidation of , Limited, and the Company, Limited. The said agreement was adopted by the necessary two-thirds votes of all the shareholders of the said Company.

Secretary.

AGREEMENT WITH A VIEW TO AN AMALGAMATION WITH AN EXISTING COMPANY.

An agreement made the day of , between N., of on behalf of the (A) Company, Limited (hereinafter called the (A) Company), of the one and the (B.C.) Company, Limited (hereinafter called the (B) Company), of the other part. Whereas (recite incorporation of (A) Company). And whereas (recite incorporation of (B) Company). And whereas the nominal capital of the (B) Company is divided into shares of each, whereof , and no more, have been issued, and now stand credited in the books of the (B) Company as having been fully paid up: And whereas it is intended to procure the (A) Company to pass special resolutions for a voluntary winding-up, appointing liquidators, and directing them to adopt and carry into effect this agreement.

Now it is hereby agreed as follows:—

1. This agreement is conditional on the adoption hereof before the day of next, by the liquidators of the (A) Company, with the sanction of a special resolution of that Company.

2. The (A) Company shall transfer and the (B) Company shall take over all and singular the lands, buildings, goods, chattels, moneys, credits, debts, bills, notes, and things in action of the old Company, and the undertaking, business and goodwill thereof, with the full benefit of all contracts and agreements, and of all securities in respect of the said things in action,

to which the old Company is entitled, and all other the real and personal property of the old Company, whatsoever and wheresoever; subject nevertheless as to all the said premises to the several mortgages, charges, liens, and incumbrances affecting the same or any part thereof.

3. As a part of the consideration for the said transfer the (B) Company shall pay, satisfy and discharge all the debts, liabilities, and engagements of the (A) Company now, or at the time of such adoption as aforesaid, binding on it, and shall at all times keep the (A) Company, its liquidators and contributories, indemnified against such debts, liabilities, obligations, contracts, and engagements, and against all actions, proceedings, costs, damages, claims and demands in respect thereof.

4. As a further part of the conson for the said transfer, the (B) Company, shall, within three months from the adopfion hereof by the liquidators of the old Company with such sanction as aforesaid, pay to the sum of to the sum of , and to and the sum of apiece, such sums to be accepted by the said persons in full discharge of all claims by them respectively upon the (A) Company for loss of office occasioned by the winding-up thereof.

5. As the residue for the conson of the said sale the (B) Company shall allot to or to the nominee or nominees of every member of the (A) Company who shall require the (B) Company so to do, one of its shares with the sum of credited as paid up thereon in respect of every share in the (A) Company held by him.

6. The sale hereby agreed to be made shall take effect as from the date hereof, and until the completion thereof the (A) Company shall stand possessed of the property hereby agreed to be sold, and shall carry on its business in trust for the (B) Company.

7. The (A) Company and its liquidators shall, as soon as conveniently may be after the adoption hereof by the said liquidators in manner aforesaid (but without prejudice to clause 8 hereof) execute and do, at the expense of the new Company all such assurances and things as shall be reasonably required by the new Company for vesting in it the said property hereby agreed to be transferred, or any part thereof, and giving to it the full benefit of this agreement.

8. Provided always that the old Company and its liquidators shall have a lien upon the whole of the property hereby agreed to be transferred for all moneys (if any) payable by the new Company under clause hereof, and until the same shall have been paid the said liquidators shall be at liberty to retain possession of all or any part of the said property, and thereout at their discretion to raise and pay such moneys or any part thereof.

9. If this agreement shall not before the day of next be adopted by the liquidators of the (A) Company with the sanction of a special resolution of that Company, either of the parties hereto may, upon giving one week's notice in writing to the other, rescind the same.

10. When and so soon as this agreement shall have become binding on the (A) Company and the liquidators thereof, the said N. shall be discharged from all liability in respect thereof.

11. Notwithstanding anything herein contained, if, in order to carry the said transfer into effect, it would be necessary for the liquidators to purchase the interest of members holding more than shares in the old Company, the new Company shall be at liberty, by notice in writing, addressed to the liquidators of the old Company and left at the registered office of that Company to rescind this agreement.

In witness, etc.

CHAPTER XXI.

EXTRA PROVINCIAL CORPORATIONS.

This Act relates to the licensing of foreign corporations to carry on business within the Province of Ontario. A foreign corporation cannot exercise any of its privileges or functions outside of the state or province where it is created except by the comity of the state within which it wishes to carry on its business.

It has been established as a principle of the English law that a foreign corporation may sue or be sued in its corporate name in an English Court. *Dutch West India Co.* v. *Van Moses,* 1 S.T.R. 612; *Hendricks* v. *Dutch West India Co.,* 2 Ld. Raym. 1532. See Lindley on Companies, 5th ed., p. 909, and the principle that a foreign corporation may sue as plaintiffs in an English Court is not now questioned. There are some early Canadian authorities against such right being afforded. See *Genesee Mutual Life Ins. Co.* v. *Westman,* 8 U.C.R. 487; *Bank of Montreal* v. *Bethune,* 4 O.S. 341; *Union Rubber Co.* v. *Hibbard,* 6 C.P. 77, but, however, the principle, as above established, has been followed in the later Canadian cases and a foreign company can sue or be sued in the Courts of Ontario. *Howe Machine Co.* v. *Walker,* 35 U.C.R. 37; *Commercial National Bank of Chicago* v. *Corcoran,* 6 O.R. 527; *Duff* v. *Canadian Mutual Ins. Co.,* 6 A.R. 238, and *C.P.R.* v. *Western Telegraph Co.,* 7 S.C.R. 151.

Companies incorporated by the Dominion Parliament would seem to have a different status from strictly foreign companies in regard to their rights to carry on business within the limits of a province of the Dominion. Under the B.N.A. Act the Dominion has power to incorporate companies to carry on business throughout the Dominion. Such companies, when incorporated by the Dominion, and carrying on business within a pro-

vince, must act in conformity with the laws of that province. *Citizens* v. *Parsons*, 7 A.C. 96; *Tennant* v. *Union Bank* (1894), A.C. 31; *Bank of Toronto* v. *Lamb*, 12 A.C. 575. The province may impose a license and exact a fee from such companies for the purpose of raising a revenue, but it is submitted that the province could not prohibit a Dominion company from carrying on business within its limits so long as the powers of the company are those which the Dominion alone can authorize.

Ministers of Justice have objected to Provincial Acts which make companies incorporated under the laws of the Dominion take out a provincial license before doing business in the province, and have disallowed acts which contained express prohibitory provisions prohibiting the carrying on of business without a provincial license, see Hodgins Provincial Legislation, 2nd ed., p. 315; *Campbell* v. *National Life Ins.*, 24 C.P. 133; *Lundy* v. *Dixon*, 6 L.J. 92; *Washington County Mutual Life Ins. Co.* v. *Henderson*, 6 C.P. 146. It has been held, however, that a province can impose a license fee on companies not incorporated by or under the authority of the Provincial Legislature.

In *Halifax* v. *Jones*, 28 N.S. 454, the defendants were agents of the Mississippi and Dominion Steamship Co., a body incorporated in England with a head office at Liverpool and carried on business at Halifax, through their agents. It was held that as the company carried on business at Halifax they were liable to be taxed the license fee imposed on companies doing business in Nova Scotia, and it was also held that the Act imposing the license fee was *intra vires*. See also *Halifax* v. *Western Ins. Co.*, 18 N.S.R. 387. This was not an Act requiring a foreign company to take out a license before doing business within the province, but merely imposing a fee on all companies for the carrying on the business within the province.

The Legislature has forbidden extra provincial corporations which have not taken out a license, selling their goods in Ontario, except under the circumstances mentioned in the Act. Where a sale was made by a resident agent who was authorized in writing to sell the goods at fixed prices upon commission, the Court

held that there was a contract made orally in Ontario and completed by delivery of the goods in part payment and that the vendors could not maintain an action having taken out no license. *Re Bessemer Gas Engine Co.* v. *Mills*, 4 O.W.R. 325. See also *Kerlin Bros.* v. *Ontario Pipe Lime Co.*, 11 O.W.R. 797.

LICENSES TO EXTRA PROVINCIAL CORPORATIONS.

The application must be by petition addressed to the Lieutenant-Governor in Council, and signed by the executive officers of the company, and passed under the company's common seal. This petition must state material facts, such as—

1. The name of the Kingdom, Dominion, state, province or other jurisdiction under the laws of which the applicant company was incorporated and is working;

2. Its corporate name; which must not contain the words "loan," "mortgage," "trust," "trusts," investment," or "guarantee."

Evidence must also be fyled shewing that the corporate name of the company is not on any public ground objectionably, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive;

3. The date and manner of its incorporation;

4. The place where its head office is situated;

5. Whether its existence is limited by statute or otherwise, and if so, the period of its existence yet to elapse, and whether its existence may be lawfully extended;

6. Whether it is a valid and subsisting corporation;

7. Whether it has capacity to carry on its business in Ontario;

8. Whether it has capacity to hold land, and, if so, the conditions, if any, under which such land is to be held;

9. Its authorized powers set out in full;

10. The powers which it desires to exercise in Ontario;

11. The amount of its authorized capital, and whether such capital is divided into shares, and, if so, how;

12. The amount of its subscribed capital;

13. The amount of its paid-up capital;

14. Its head office, or other chief place of business in Ontario;

15. The name, description and place of residence of its chief agent or representative in Ontario;

16. That the company has authorized the making of the application and has duly appointed an attorney;

17. The name, description and place of residence of such attorney; and

18. Such further and other information as the provincial secretary may require.

The contents of, the signatures to, and the impression of the seal upon the petition must be verified.

If the application be on behalf of a company incorporated under the laws of the Dominion of Canada, a copy of its charter, or of the Act incorporating it, certified by the Deputy Register-General, or by the clerk of the Parliaments, respectively, must be produced with the application. A similar observation will apply to a company incorporated under the laws of any of the provinces of the Dominion of Canada, regard being had to the proper officers in that behalf for the purposes of certification.

If the application be on behalf of a company incorporated under the laws of Great Britain and Ireland, the copy of the memorandum and articles of association produced must be certified to be a true copy by the Registrar of Joint Stock Companies at London, Edinburgh or Dublin, as the case may be.

If the application be on behalf of a company incorporated under the laws of one of the United States of America, the evidence of incorporation must consist of a duly certified copy of the papers originally, and, if any, subsequently, fyled in the Department of the Secretary of State, or other proper officer having the custody of the papers, and duly verified by such officer.

A person resident in Ontario, or a company having its head office in the province, must be appointed by the applicant company to be its attorney and representative in Ontario, and a power of attorney duly executed, for that purpose, under the seal of the company, must be transmitted with the papers. This must be done even when the company is incorporated under the laws of the Dominion and has its head office in Ontario. The power itself may contain any provision not inconsistent with the duties of the attorney to be exercised under the laws of the province, but it must include words expressly authorizing the attorney "to act as such, and to sue and be sued, plead or be impleaded in any Court in Ontario, and generally on behalf of the company and within Ontario to accept service of process and to receive all lawful notices, and, for the purposes of the company, to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney." The power must also provide that until due lawful notice of the appointment of another and subsequent attorney has been given to and accepted by the provincial secretary, service of process, or of papers and notices upon the person or company mentioned in the original or other power last fyled with the provincial secretary shall be accepted by the company as sufficient service in the premises.

PETITION FOR LICENSE FOR EXTRA PROVINCIAL CORPORATION.

To His Honour the Lieutenant-Governor of the Province of Ontario in Council.

The petition

Humbly sheweth:

1. That your petitioner was incorporated under the (state laws under which the Company was incorporated) under the name of by Letters Patent (or as the case may be) dated the day of .

2. That the head office of your petitioner is situated in the of .

3. That there is no limit either statutory or otherwise to the existence of your petitioner.

4. That your petitioner is a valid and subsisting corporation.

5. That your petitioner may, under the provisions of its charter, carry on business in Ontario and may hold the lands necessary for so carrying on such business.

6. That by its charter your petitioner is authorized to carry on the following business (state objects):—

7. That your petitioner desires that a license may be issued to it under the provisions of 63 V., c. 24, Ontario, authorizing your petitioner to use, exercise, and enjoy within the Province of Ontario all or so many of the powers, privileges and rights as were granted to your petitioner by its said charter and may be approved by Your Honour in Council.

(a) Here set out the law or laws under which the Company was incorporated, (or as the case may be).

8. That the authorized capital stock of your petitioner is the sum of $ divided into shares of dollars each. Of which $ has been subscribed and issued and fully paid up.

9. That the chief place of business of your petitioner in the Province of Ontario is in the said of .

10. That your petition has by the power of attorney, duly executed under its common seal, hereto annexed, appointed of the of , in the Province of Ontario, Esquire, to be your petitioner's attorney and representative in Ontario in accordance with the said Act, being 63 V., c. 24, and his consent to so act is herewith attached.

11. That the herein application for a license to carry on business in Ontario was duly authorized and approved at a meeting of the directors of your petitioner held at the of , on the day of 190 , and that a true copy of the resolution in that behalf is hereto attached.

Your petitioner therefore prays that Your Honour will be pleased to issue a license to your petitioner authorizing your petitioner to use, exercise and enjoy, within the Province of Ontario all (or so many of) the powers, privileges and rights set forth in its said charter, as shall be approved of by Your Honour.

And your petitioner, as in duty bound, will ever pray, etc.

Secretary. President.

AFFIDAVIT VERIFYING PETITION FOR LICENSE.

Province of
County of
To wit:

In the matter of the application under an Act respecting the licensing of extra provincial corporations, for the grant of license to the Company.

I, , of the City of , in the County of , Esquire, make oath and say:

1. That I was personally present and did see and , president and secretary, respectively, of the said Company, sign the said petition hereto annexed marked as exhibit "A" hereto; and affix thereto the common seal of the Company, that I know the said parties, and that signatures " " and " " are of the true signatures of the said parties.

2. That I have a knowledge of the matter, and that the allegations in the within petition contained are, to the best of my knowledge and belief, true in substance and in fact.

Sworn, etc.

POWER OF ATTORNEY FROM EXTRA PROVINCIAL CORPORATION.

Know all men by these presents, that the Company, for good and valuable considerations, has made, nominated, constituted and appointed, and by these presents does make, nominate, constitute and appoint of the of , merchant, the true and lawful attorney and representative of the Company, to act as its said attorney and representative, and to sue or be sued, plead or be impleaded in any Court in Ontario, and, generally, on its behalf and within the Province of Ontario, to accept service of process and to receive all lawful notices, and for the purposes aforesaid to do all acts, and to execute all deeds, and other instruments, relating to the matters within the scope of this power of attorney, and the Act being 63 V., c. 24 (Ontario); and the said the Company does hereby confirm and agree to confirm all and singular that its attorney and representative shall lawfully do or cause to be done in the premises by virtue hereof.

Until due lawful notice of the appointment of another and subsequent attorney and representative has been given to and accepted by the Provincial Secretary of Ontario, service of process, or of papers and notices upon the said shall and will be accepted by this said Company as sufficient service in the premises.

In witness whereof the corporate seal of the Company has been hereunto affirmed, and the hands of its president and secretary have hereunto been set this day of in the year of our Lord one thousand nine hundred and .

Witness,

(Seal)

Secretary. President.

CONSENT TO ACT AS ATTORNEY FOR AN EXTRA PROVINCIAL CORPORATION.

I, , of the of in the County of , and Province of Ontario, having been appointed by the Company, its attorney and representative in the Province of Ontario by power of attorney, under date the day of 190 , hereby accept said appointment and agree to act as said attorney under the provisions of 63 V., c. 24, until due lawful notice of the appointment of another and subsequent attorney and representative has been given to, and accepted by the Provincial Secretary of Ontario.

Dated, etc.

CHAPTER XXII.

OTHER MATTERS OF MANAGEMENT.

Annual Returns.

See section 131.

"Duplicate" is a document which is the same in all respects as some other instrument from which it is indistinguishable in its essence and its operation. It is perhaps a more exact word than copy or even than the term true copy, for in these there are more or less variation from the original. *Towner* v. *Hiawatha Gold Mining Co.* (1899), 30 O.R. 547.

Where the name of a shareholder was not contained in the list transmitted to the provincial secretary, but not in the list posted up in the head office of the company, the lists were not regarded as duplicates and that the company were liable to the penalty. *Towner* v. *Hiawatha Gold Mining Co., supra.*

If this section is not complied with, there is a continuing default, no matter how many days have elapsed. *R.* v. *Catholic Life and Fire Insurance Co.* (1883), 48 L.T. 675.

Revocation and Forfeiture of Charter.

21. If a corporation incorporated by Letters Patent does not go into actual operation within two years after incorporation or for two consecutive years does not use its corporate powers, such powers, except so far as is necessary for the winding up of the corporation, shall be forfeited, and its name in whole or in part may be granted to another corporation, and in any action or proceeding where such non-user is alleged, proof of user shall lie upon the corporation, provided, however, that no such forfeiture shall affect prejudicially the rights of creditors as they exist at the date of such forfeiture. R.S.O., c. 191, s. 98.

22. The Letters Patent by which a corporation is incorporated and any Supplementary Letters Patent amending or varying the same, may, at any time, be declared to be forfeited and may be revoked and made void by an Order of the Lieutenant-Governor on sufficient cause being shewn in that behalf, and such forfeiture, revocation and making void may be upon such conditions and subject to such provisions as to the Lieutenant-Governor may seem proper. R.S.O., c. 191, s. 99.

Where a corporation has ceased to exist by forfeiture or cancellation of its charter it becomes necessary to determine what becomes of its property. The common law on the subject appears to be, in such cases, that the lands revert to the grantor and his heirs. It has been apparently settled, in the United States, that this rule is obsolete and useless and that corporation property is deemed to be trust fund for the benefit of its creditors and stock holders. *Bacon* v. *Robertson*, 18 Howard, 480; (1845) 7 Q.B. 385.

In England, however, this view has not been adopted, and in the case of *Colchester* v. *Brooks*, 7 B.R., it was affirmed, Lord Denman saying that in the case of a dissolution the real property of a corporation does not escheat to the Crown, but reverts to the donor or his heirs.

No right is recognized in the corporators. This principle was approved of in the Ontario case of *The Lindsay Petroleum Company* v. *Pardee*, 22 Gr. 18.

The Companies Acts, generally, contain provisions to the effect that Letters Patent or Supplementary Letters Patent or any exemplification or copy under the Great Seal shall be conclusive proof of every matter and thing therein set forth; and further provide that any Letters Patent granted by the Crown may be declared null and void where they have been obtained by means of fraud or by mistake or in ignorance of some material fact.

It was accordingly held, where the names of petitioners had been fraudulently inserted in the petition without their sanction or authority, verified, by false affidavits, that in a suit by parties whose names had been inserted by way of *scire facias* the letters obtained shall be annulled.

It was further held, that they could not be annulled as to the members only who had been injured for to do so would be to alter the constitution of the corporation and the amount of the capital of the corporation as intended by the Crown to be constituted might be and would be materially diminished. *La Banque de Hochelaga* v. *Murray*, 15 A.C. 414.

Where the charter of a company is annulled by *scire facias* that is an end of any actions or other proceedings against the company, and shareholders of the company liable for unpaid calls on stock are only liable to be sued as shareholders of the company in consequence of the return of *nulla bona* by the sheriff to a writ of execution issued upon judgment recovered against the company. *La Banque de Hochelaga* v. *Murray*, 15 A.C. 414.

In a proper case an application to the Attorney-General to obtain a writ of *scire facias* if successful may be used as a means of defeating an action on the part of a creditor of the company. *Ibid.*

Where it was provided in the charter of a bank that a suspension of specie payment for sixty days or an excess of debts of the bank of three times the paid-up stock and deposits should operate as forfeiture of the charter, it was held that total annihilation of the bank was not contemplated by these provisions and that it did not follow from the loss of the charter that there must be a dissolution for all purposes. Some formal process is necessary to finally determine and put an end to the functions of a corporation. *Brooke* v. *Bank of Upper Canada*, 4 P.R. 162.

The appellant company, by its Act of incorporation, 44 V., c. 61(D.), was authorized to carry on business provided $100,000 of its capital stock was subscribed for and thirty per cent. paid thereon, within six months after the passing of the Act, and the Attorney-General of Canada having been informed that only $60,500 had been *bona fide* subscribed prior to the commencing of the operation of the company, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly, and in fact, paid thereon, sought at the instance of a relator by proceedings in the Superior Court of Lower Canada to have the company's charter set aside and declared forfeited: This being a Dominion Statutory Charter, proceedings to set aside were properly taken by the Attorney-General of Canada. Such proceedings taken by the Attorney-

General of Canada under articles 997 *et seq.* C.C.P., if in the form authorized by these articles are sufficient and valid though erroneously designated in the pleadings as a *scire facias*. The *bona fide* subscription of $100,000 within six months from the date of the passing of the Act of incorporation and the payment of the thirty per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within six months, the Attorney-General of Canada was entitled to have the company's charter declared forfeited. *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S.C.R. 72.

Non-compliance with a condition does not *ipso facto* extinguish the company, but such extinction is only to be procured by special action by the Attorney-General. *R.* v. *Cie de Ch. de Fer M. & O.*, 4 Q.L.R. 255; also in *Attorney-General* v. *Bergen*, 29 N.S. 135, it was held that the Attorney-General could maintain the action for an injunction restraining the defendants from exercising the powers of the company as the provisions precedent contained in their charter had not been fulfilled.

Where the Act contained a condition precedent that the company complete its works within a certain period or forfeit its powers, it was held that the non-compliance within the specified time afforded ground for a proceeding by the Attorney-General to have forfeiture declared. *Hardy* v. *Pickerel River Co.*, 29 S.C.R. 211.

The procedure is by writ of *scire facias* against the corporation and by *quo warranto*. The former proceeding is proper where there is a corporation existing *de jure*, but which has abused its power. The latter proceeding is necessary where there is a corporation *de facto* who act as a corporation but have not legally the powers which they presume to have. The proceeding is to be brought in the name of the Attorney-General, whose fiat must be obtained. The granting of the fiat is discretionary with the Attorney-General and the exercise of this discretion and the conduct of the action is not subject to the

control of the Courts wherein the proceeding takes place. Grant's Law Corporations, p. 299. *Regina* v. *Eastern Archipelago*, 1 E. & B. 310. The Attorney-General may also, in his discretion, revoke his fiat or enter a *nolle prosequi*.

Under section 22, the Lieutenant-Governor in Council has power to revoke or annul any charter.

Whether the right of cancellation of Letters Patent be now only statutory or merely a power not a duty, or whether the prerogative right still subsists, the bringing of an action by the Attorney-General for the forfeiture of Letters Patent does not clothe the Court with jurisdiction to restrain the Crown from the exercise of its power of cancellation. *Attorney-General* v. *Toronto Junction Recreation Club*, 8 O.L.R. 440.

Auditors.

An auditor's business is to ascertain and state the true financial position of the company.

It is nothing to an auditor whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably, or whether dividends are properly or improperly declared. The auditor must ascertain the position of the company by examining its books. Section 130 uses the words, "as shewn by the books of the corporation." These words do not exempt the auditor from seeking information outside the books, but should so far as possible satisfy himself that the books shew the company's true position, and take reasonable care to do so. He must certify that the balance sheet is correct according to the books.

An auditor is not an insurer and is not bound to do more than exercise reasonable care in examining, inquiring and investigating. Per Lindley, L.J., *In re London & General Bank* (1895), 2 Ch. 673.

Auditors are not liable for any tracking out ingenious and carefully laid schemes of fraud if there is nothing to arouse their suspicion. *Re Kingston Cotton Mills Co.* (1896), 2 Ch. 284.

Constructive notice is not imputed to shareholders of facts

within the knowledge of the company's auditors. *Speckman* v. *Evans*, L.R. 3 H.L. 171.

Directors may presume a proper execution of their duties by the company's auditors. *Dovey* v. *Cory* (1901), A.C. 477. And if an auditor commits a breach of duty a right of action against him will lie on behalf of the company. *Leeds* v. *Shepherd*, 36 C.D. 787.

The auditor must ascertain the true financial position of the company by the examination of its books. He must take reasonable care to ascertain that the books shew the company's true position. *London and General Bank* (1896), 2 Ch. 673.

The auditor must in his report give the shareholders information and not merely means of information. His duty may be discharged by a confidential report. *London & General Bank, supra.*

If the auditor does not discharge his duty and as a result acts are done such as payment of dividends out of capital, which are a mis-application of the company's funds, the auditor is liable. *Leeds* v. *Shepherd*, 36 C.D. 787.

It is not a part of the auditor's duty to give advice, however, either to shareholders or directors, as to what course of action they should pursue. *Re London and General Bank* (1895), 2 Ch. 673.

See sections 124 to 130 in regard to the election, remuneration, rights and duties of auditors.

Books to be Kept.

See sections 113 to 120.

Supplementary Letters Patent.

Supplementary Letters Patent may be obtained amending the original Letters Patent in any particular.

By this means, the company's capital may be increased or decreased; its powers extended, its name changed; its share redivided and in case of preference stock created by charter, the terms may be varied.

Forms will be found below which may be used to obtain supplementary Letters Patent for the above purposes.

See sections 13 to 16.

Name of Company.

Care should be taken in the selection of a name for a company to see that it does not conflict with or resemble the name of an existing company. Before having the petition, stock book and other papers executed it is advisable to communicate with the office of the Provincial Secretary to ascertain if the name is free from objection. Even if a name be allowed it is still open to any company or individual objecting to the name to take proceedings to have it disallowed.

There is no property in a name, but it is not permitted to a company to represent itself as carrying on a business which is in reality carried on by another, nor to use a name so similar as to be liable to deceive the public. See *Croft* v. *Day*, 7 Beav. 84; *Ærators Limited* v. *Tollit* (1902), 2 Ch. 319; *Montreal Lithographing Company* v. *Sabiston* (1899), A.C. 610; *Societe Panhard* v. *Panhard* (1901), 2 Ch. 513; *National Casket Co.* v. *Eckhardt*, 10 O.W.R. 74.

Where a name is a descriptive one the court is slow to recognize any exclusive right to it. See *London & Provincial Society* v. *London & Provincial Joint Stock Company*, 17 L.J. Ch. 37; *Reddaway* v. *Banham* (1896), A.C. 199.

Where a company sells the good will of its business it passes to the purchaser the right to use its name as a part of the good will. *Levy* v. *Walker*, 7 Beav. 84.

Notices.

If it were required that notices should be personally given to shareholders it would in many cases be a matter of great difficulty to comply with, for this reason, that by-laws usually provide for giving notice in some convenient way as by mailing. The desirability of proving notices were sent to all necessary parties and at the proper time would seem to make it worth

while to prescribe in the by-laws that notices convening meetings of shareholders must be sent by registered prepaid mail. It is also usually provided that it shall be sufficient to address such notices to the address of the shareholder as it appears on the company's stock register.

It has been held in England that it is not necessary to serve notices on shareholders residing abroad. *Re Union Hill Silver Co.*, 22 L.T. 400; *Re Halifax Sugar Co.*, 62 L.T. 564, and while this rule has been acted on to a great extent it would nevertheless seem to be prudent to make provisions for such a case in the by-laws.

An expedient that has much to commend it is that of requiring foreign shareholders to name resident proxies, and direct the notices of shareholders' meetings to be sent to them.

Notice need not be given to the executor of a deceased shareholder. *Allen* v. *Goldreefs* (1900), 1 Ch. 556.

Forms Required.

The application for supplementary Letters Patent to change the name of a company should consist of the following:—

1. Petition of company for change of name.
2. Affidavit or declaration verifying facts set out therein.
3. Copy of resolution or by-law of company authorizing change of name and the application for same.
4. Certificate, affidavit or declaration verifying same.

The application for extending the powers of a company should consist of the following documents, viz.:—

1. Petition by directors for supplementary Letters Patent.
2. Affidavit or declaration verifying signatures of the petitioners.
3. Affidavit or declaration verifying truth of facts set out in petition.
4. Verified copy of notice calling special or general meeting.
5. Copy of by-law or resolution passed by the shareholders.
6. Affidavit or declaration verifying same.

The application for increasing or decreasing the capital stock or subdividing the shares should consist of the following documents:—

1. Petition of directors for supplementary Letters Patent.
2. Affidavit or declaration verifying petition.
3. Affidavit or declaration verifying signatures to petition.
4. Certified copy of by-law under seal of company.
5. Certified copy of notice calling special or general meeting.
6. Copy of proceedings at special or general meeting with respect to passage and sanction of by-laws.
7. Affidavit or declaration verifying such minutes.

PETITION FOR SUPPLEMENTARY LETTERS PATENT INCREASING CAPITAL STOCK.

To His Honour the Lieutenant-Governor of the Province of Ontario:

The petition of the Company, Limited,

Humbly sheweth:

1. That the Company, Limited, was incorporated under the Ontario Companies Act by Letters Patent dated .

2. That the capital stock of the Company was by the said Letters Patent fixed at dollars of which nine-tenths has been taken up and ten per centum thereon paid in.

3. That the said capital is insufficient for the purposes of the said Company.

4. That the Company made, on the day of a by-law increasing the capital stock of the Company to the sum of such amount being considered by your petitioners requisite for the due carrying out of the objects of the Company.

5. That the said by-law was sanctioned by a vote of not less than in value of the shareholders at a general meeting of the Company duly called for considering the same, held at the City of on the day of .

Your petitioner therefore prays that Your Honour may be pleased to grant under the great seal, Supplementary Letters Patent confirming the said by-law.

And your petitioner as in duty bound will ever pray.

Witness:

(Seal)

Secretary. President.

AFFIDAVIT VERIFYING SIGNATURES TO PETITION FOR SUPPLEMENTARY LETTERS PATENT.

Province of Ontario
County of
To wit:

In the matter of the petition of the Company, Limited, for Supplementary Letters Patent confirming a by-law increasing the capital stock of the Company.

I, , of the City of , in the County of , make oath and say:

1. That I was personally present and did see as the president and as the secretary of the said Company sign and seal with the Company's common seal the petition for Supplementary Letters Patent marked as exhibit "A" to this my affidavit.

2. That I know the said parties.

3. That the signatures and are the true signatures of the said parties.

4. That the signature attesting the signatures hereinbefore mentioned, is the true signature of me this deponent.

Sworn, etc.

AFFIDAVIT VERIFYING BY-LAW FOR INCREASE OF CAPITAL STOCK.

Province of Ontario
County of
To wit:

In the matter of the proposed increase of the capital stock of Company, Limited.

I, of the City of , make oath and say:

1. That I am the secretary-treasurer of the said Company.

2. That the paper writing marked " " annexed to this affidavit is by-law number of the Company passed on the day of 190 , for the purpose of increasing the capital stock of the said Company from $ to $, by the issue of new shares of stock of the par value of dollars each.

3. That the said by-law was ratified and confirmed by a vote of not less than two-thirds in value of the shareholders of the said Company present in person or by proxy at a general meeting of shareholders of the Company called for considering the by-law, and held on the day of , 190 .

4. That a copy of the said by-law has been certified under the seal of the Company to the Provincial Secretary.

Sworn, etc.

AFFIDAVIT RESPECTING BONA FIDE CHARACTER OF INCREASE OF CAPITAL STOCK.

Province of Ontario
County of
To wit:

In the matter of, etc.

I, , of the City of in the Province of , make oath and say:

1. That I am the president of the said Company, and that I have a knowledge of the matters herein deposed to.

2. That nine-tenths of the capital stock of the Company has been taken up and ten per cent. paid thereon.

3. That by reason of the increase of the Company's business the present capital of the Company is insufficient for the purposes of the Company.

4. That the proposed increase in the capital stock of the Company is *bona fide* and necessary for the due carrying out of the objects of the Company.

That the allegations in the said petition contained are true to the best of my knowledge and belief in substance and in fact.

Sworn, etc.

AFFIDAVIT VERIFYING BALANCE SHEET.

Province of Ontario
County of
To wit:

In the matter of, etc.

I, , of the of in the County of , chartered accountant, make oath and say:

1. I am auditor for the said Company and am intimately acquainted with its financial position.

2. The annexed statement marked "A" is a correct statement of the financial position of the said Company, up to the present date, and the said Company is solvent.

Sworn, etc.

"A"

TRIAL BALANCE.

Assets.

Stock-in-trade and fixtures .....
Real estate, buildings, machinery and plant.....
Bills and accounts receivable.....
Cash .....
Unpaid calls .....

Liabilities.

To shareholders .....
Amount of paid-up capital .....
To the public .....
Amount owing various creditors .....
Balance .....

BALANCE SHEET TO DECEMBER 31ST.

Cash on hand and in bank.....
Accounts and bills receivable.....
Accounts due by directors, officers and shareholders
Stock on hand .....
Expenditures on future business.....
Real estate and buildings .....
Plant .....
Machinery, tools, patterns, furniture and fixtures.
Patents, trade marks, etc. .....
Goodwill .....

LIABILITIES.

Debts secured by mortgage, etc.

Accounts and bills payable .....
Contingent account .....
Capital stock preferred .....
Capital stock, common .....
Profit and loss account .....

BY-LAW UNDER ONTARIO COMPANIES ACT, FIXING AND DECLARING RATE OF DISCOUNT.

By-law No. of the Mining Company, Limited, (no personal liability), fixing and declaring the rate of discount at which shares are to be sold.

Whereas the , Limited, (no personal liability), deem it advantageous and proper to sell the unissued shares of the Company at a discount, as hereinafter provided.

Now, therefore, the , Limited, enacts as follows:

That the unissued shares of the Company shall be sold at a discount on their par value of seventy-five per cent., that is to say at a price per share of twenty-five cents instead of one dollar.

Enacted, etc.

BY-LAW FOR INCREASE OF CAPITAL STOCK.

By-law No. .

A by-law to increase the capital stock of the Company, Limited.

Whereas the capital stock of the Company, Limited, dollars, divided into shares of , of which nine-tenths has been taken up, and ten per cent. thereon paid up.

And, whereas, it is necessary to increase the capital of the Company to dollars;

Now, therefore, be it enacted as follows:

1. That the capital stock of the said Company be, and the same is hereby increased from the dollars to dollars by the issue of shares of new stock of dollars each.

[Note: See Martin v. Gibson, 10 O.W.R. 66.]

2. That the new shares be issued and alloted to the present shareholders of the Company in proportion to the number of shares now held by them respectively.

3. That should the present shareholders of the Company not subscribe for sufficient new shares to carry out the objects of the company, then the same may be issued and alloted in such manner and proportion, and at such price per share, not however less than par, as the directors of the Company may deem proper for the benefit of the Company.

Enacted, etc.

NOTICE IN NEWSPAPER AND ONTARIO GAZETTE OF APPLICATION FOR ACCEPTANCE OF SURRENDER OF CHARTER.

NOTICE.

Under the provisions of the Ontario Companies Act, the Company, Limited, hereby gives public notice that it will make application to His Honour the Lieutenant-Governor of Ontario for the acceptance of the surrender of its charter on and from the day of .

Dated at .

AFFIDAVIT VERIFYING PETITION FOR CHANGE OF NAME.

Province of Ontario
County of
To wit:

In the matter of the petition of Limited, for an order of His Honour the Lieutenant-Governor changing its corporate name to that of , Limited.

I, , of the City of , in the County of , Esquire, make oath and say:

1. That the allegations in the within petition contained are, to the best of my knowledge and belief, true in substance and in fact.

Sworn, etc.

AFFIDAVIT VERIFYING SIGNATURES TO PETITION.

Province of Ontario,
County of
To wit:

In the matter of the application under the Ontario Companies Act of Limited, for an order changing its name.

I, , of the City of , in the County of , make oath and say:

1. That I was personally present and did see and , president and secretary, respectively, of the said Company, sign the said petition marked as exhibit "A" hereto, and affix thereto the common seal of the Company, that I know the said parties, and that the signatures " " and " " are of the true signatures of the said parties.

Sworn, etc.

PETITION FOR ORDER CHANGING NAME OF COMPANY.

To His Honour the Lieutenant-Governor of the Province of Ontario:

The petition of , Limited,

Humbly sheweth:

1. That , Limited, was incorporated under the Ontario Companies Act, by Letters Patent under the great seal, bearing date the .

2. That your petitioner is desirous of changing its corporate name to that of , Limited.

3. That your petitioner is in a solvent condition, as is shewn by the verified statement in general balance sheet of the Company, hereto annexed.

4. That the change desired is not for any improper purpose and is not otherwise objectionable.

5. That the new name is not that of any known Company incorporated or unincorporated, or of any partnership or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive.

6. That the Company has authorized the making of the application, and that a true copy of the resolution in that behalf is hereunto attached. That the said resolution was passed by the shareholders at a general meeting of the Company duly called for considering the same held at the of on the day of , 190 .

7. That the Company is not in arrear in making its annual returns.

Your petitioner therefore prays that Your Honour will be pleased by order to change the corporate name of your petitioner from that of " , Limited," to that of " , Limited."

And your petitioner, as in duty bound, will ever pray.

(Seal)

Secretary. President.

Dated at , 190 .

AFFIDAVIT VERIFYING PETITION FOR SURRENDER OF CHARTER.

Province of Ontario,
County of
To wit:

In the matter of the herein application for the surrender of the charter of the , Limited.

I, , of the of , in the County of , Esquire, make oath and say:

1. That I am the secretary of the said Company.

2. That I have a knowledge of the matter, and that the allegations in the within petition contained are to the best of my knowledge and belief, true in substance and in fact.

3. That the statement of the affairs of the said Company hereto annexed is true and correct.

Sworn, etc.

PETITION.

FOR SURRENDER OF CHARTER.

Petition for acceptance of surrender.

To His Honour the Lieutenant-Governor of the Province of Ontario:

The petition of the , Limited,

Humbly sheweth:

1. That the said Company was incorporated by Letters Patent issued under the Ontario Companies Act bearing date the for the purposes and objects following, that is to say: (here set out the objects.)

2. That the said Company as shewn by the statement of its affairs hereto annexed has no debts existing or other rights in question.

3. That at a special general meeting of the shareholders of the Company duly called according to the by-laws of the Company held on the day of , 190 , at the Company's office in the City of a resolution was unanimously passed "that the affairs of the Company be wound up and that the Company surrender its charter, and that for the purpose aforesaid the president and secretary-treasurer be and they are hereby authorized to execute and deliver all necessary deeds and documents."

4. That notice of the intention of the Company to apply for acceptance of surrender of its charter was inserted in the a newspaper published in the locality in which the operations of the Company have been carried on, and in the Ontario Gazette, on the following date, viz., , and the cutting hereto annexed is a true copy of the said notice.

5. Your petitioner therefore prays that the surrender of the charter of the said Company may be accepted, and that the same may be cancelled, and the said Company dissolved from and after the day of , 190 .

And your petitioner as in duty bound will ever pray.

PART II.

WINDING UP.

REVISED STATUTES OF CANADA, 1906.

CHAPTER 144.

AN ACT RESPECTING INSOLVENT BANKS, INSURANCE COMPANIES, LOAN COMPANIES, BUILDING SOCIETIES, AND TRADING CORPORATIONS.

SHORT TITLE.

1. This Act may be cited as the Winding-up Act R.S., c. 129, s. 1.

The Act is *intra vires* the Dominion Parliament being in the nature of an insolvency law and applies to all corporate bodies of the nature mentioned in it whether incorporated under Provincial or Dominion Charter. *Re Clarke and Union Fire Ins. Co.* (2), 14 O.R. 618, 16 A.R. 161; *sub nom. Shoolbred* v. *Clarke*, 17 S.C.R. 265.

And see *Allen* v. *Hanson*, 18 S.C.R. 667.

But the only clauses that can apply to an Ontario corporation are those dealing with insolvency. *Re Cramp Steel Co.*, 11 O.W.R. 133.

INTERPRETATION.

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

(*a*) "Minister" means the Minister of Finance.

(*b*) "Company" includes any corporation subject to the provisions of this Act.

See section 6 and notes to that section.

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

(*d*) "Trading company" means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery, stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, sharebrokers, ship-owners, shipwrights, stockbrokers, stock jobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail or by persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the manufacture, workmanship, or the conversion of goods or commodities or trees.

See notes to section 6.

(*e*) "Court" means:—

(1) In the Province of Ontario, the High Court of Justice;

(2) In the Province of Quebec, the Superior Court;

(3) In the Province of Nova Scotia, the Supreme Court;

(4) In the Province of New Brunswick, the Supreme Court;

(5) In the Province of Manitoba, the Court of King's Bench;

(6) In the Province of British Columbia, the Supreme Court;

(7) In the Province of Prince Edward Island, the Supreme Court;

(8) In the Province of Saskatchewan, a superior Court;

(9) In the Province of Alberta, a superior Court;

(10) In the North-West Territories, such Court or magistrate or other judicial authority as is designated from time to time, by proclamation of the Governor in Council published in the Canada Gazette, and

(11) In the Yukon Territory the Territorial Court.

The jurisdiction of the Court and the practice followed is analogous to that in administration actions. *Re Poole*, 17 Eq. 268; *Raines' Case*, L.R. 6 Ch. 44 and 120.

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

(*g*) "Contributory" means a person liable to contribute to the assets of a company under this Act; and in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior

to the final determination of such persons, it includes any person alleged to be a contributory.

See notes to sections 48 and 51.

While a contributory is regarded as a debtor, it is not every debtor that is to be called a contributory. Section 19 implies that contributories are limited to persons who are shareholders or members. *Re Central Bank and Yorke,* 15 O.R. 625.

Semble, or who are alleged to be such.

The scope of the term "contributory" appears to be no greater in this Act than in its English original. *Canadian Pacific Railway Co.* v. *Robinson,* 14 S.C.R. 105.

The description of a contributory does not seem to contemplate that any one but a shareholder or member of the company shall be placed upon the list, although this would probably be held to include a person who had entered into a binding contract with the company to take shares.

Per Burton, J.A., in *Re the London Speaker Printing Company, Pearce's Case,* 16 A.R. 508, at page 513.

(*h*) "Winding-up order" means an order granted by the Court under this Act to wind up the business of the company, and includes any order granted by the Court to bring within the provisions of this Act any company in liquidation or in process of being wound up.

See section 14.

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

Adopted from 62 and 63 Vict. (D.) c. 43, s. 5.

(*j*) "Creditor" includes all persons having claims against the company present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages; and in all proceedings for determining the persons who are to be deemed creditors it shall include any person making any such claim. R.S., c. 129, ss. 2, 33, 56 and 61; 62-63 V., c. 43, s. 5.

See sections 61, 69, 76, 85 and notes thereto.

3. A company is deemed insolvent.

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

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

(*c*) If it exhibits a statement shewing its inability to meet its liabilities.

(*d*) If it has otherwise acknowledged its insolvency.

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

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

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

(*h*) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. R. S., c. 129, s. 5.

If a petition is based on the insolvency of the company the petitioner must strictly prove the existence of one or more of the circumstances set out in this section or his petition will be dismissed. *Re Rapid City*, 9 Man. L.R. 574.

Sub-section (a).

It has been decided in Ontario by Magee, J., in *Re Ewart Carriage Works Limited*, 8 O.L.R. 527, that section 4 of the Act defines the only manner in which a company can be shewn to be "unable to pay its debts as they become due," under this sub-section and that if the petitioner relies on this sub-section and fails to prove the demand in writing and the neglect by the company for sixty days to pay the sum due, his petition must be dismissed. The same decision was given prior to this case in Manitoba in *Re Qu'Appelle Valley Farming Co.*, 5 Man. L.R. 160, and *Re Rapid City Farmers' Elevator Co.* (*supra*).

Prior to any of these decisions it was held in Quebec in *McKay* v. *L'Association Coloniale*, 13 R.L. 383, that the petitioner is not confined to the manner prescribed by section 4 in shewing that the company is "unable to pay its debts as they become due." But this decision is now of no effect in Ontario. And it is submitted that the decision in *Re Ewart* is perfectly sound the legislation having, it would seem, purposely avoided the adoption of the English section allowing the petitioner to prove to the satisfaction of the Court that the company is unable

to pay its debts as they become due, altogether apart from any demand and consequent neglect on the part of the company to pay the debt. In view of this, the English cases on this point must be closely scrutinized before being applied here.

Sub-section (b).

See *Lake Winnipeg, etc.*, 7 Man. R. 252, 255.

Sub-section (d).

If it is intended to rely on this sub-section it is submitted that the petitioner must shew the acknowledgment as an act of the company to the same extent as an act upon which the company can be held liable in an action on a contract. A statement made by a shareholder that the company is insolvent is obviously insufficient; so also with a statement of a director. In fact, it is doubtful whether the president or general manager of a company could make a statement acknowledging the company's insolvency, so as to enable a creditor to obtain an order winding up the company on the strength of that acknowledgment. The business of the president or the general manager is to carry on the business of the company and not to bring it to an end. *Re Briton Medical*, 11 O.R. 478. It is submitted that the acknowledgment must in effect amount to a statement by the company through its board of directors or other proper channels that it is insolvent. See, however, *Hovey* v. *Whiting*, 14 S.C.R. 515. The tendency of the Court is to restrict this sub-section within very narrow limits.

No appearance of a company to oppose a motion is not sufficient acknowledgment of insolvency within this sub-section. *Re Lake Winnipeg T. L. & P. Co.* (1891), 7 M.R. 255. An affidavit of the president of the company, who is also a creditor stating that the company is insolvent but not giving a statement of assets and liabilities was held insufficient evidence. *Ibid.*

The acknowledgment must be alleged in the petition if the petitioner relies on this sub-section.

Re *Briton Medical*, 11 O.R. 478.

Sub-section (g).

Notwithstanding the fact that an assignment for the benefit of creditors is made a ground upon which a winding-up order may be granted, the Court has a discretion to refuse the order and allow the assignment proceedings to be continued if the creditors or the majority of them so desire. But as against the company the order is made *ex debito justitiæ* when an assignment for benefit of creditors is alleged and proven. *Re Strathy Wire Fence Co.*, 8 O.L.R. 186.

See notes to section 14.

If the petition does not allege an assignment for the benefit of creditors and the company executes an assignment between the time of service of the petition and the hearing, the petitioner cannot avail himself of the assignment and unless other grounds are shewn upon which the order can be made the petition will be dismissed with costs. *Re Churchill Manufacturing Company* (unreported), Meredith, C.J. December, 1907.

This is because the Act requires four days' notice to be given to the company and effect cannot be given to a ground of which the company had not that notice. *Re Abbott-Mitchell*, 2 O.L.R. 143.

For an instance, where a winding-up order was made under this sub-section see *Re Qu'Appelle Valley Co.* (1888), 5 M.R. 160.

Sub-section (h).

It is held in Manitoba that the return of a writ of execution by a County Court bailiff *nulla bona* is not a good ground for an order under this sub-section. *Re Rapid City*, 9 M.R. 574.

Where the sale was fixed for January 3rd and the writ was in the sheriff's hands on December 30th it was held in Manitoba that this proved insolvency under this section. *Re Lake Winnipeg, etc., Co.*, 7 M.R. 255.

4. A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. R.S., c. 129, s. 6.

The demand in writing must be served on the company in the manner in which process may legally be served on it. It is not sufficient that verbal demands have been made or demands by letter. *Re Rapid City Farmers' Elevator Co.* 9 M.R. 574.

For the rules governing service see Consolidated Rule 159.

Service of a specially endorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of the above section. What is required is a demand for immediate payment which is reasonably certain in terms and not calculated to mislead. *Re Abbott-Mitchell, etc., Co.,* 2 O.L.R. 143.

The petition need not be presented immediately after the expiration of the sixty days or ninety days as the case may be. Delay in petitioning does not destroy the right. *Re Imperial Hydropathic Co.,* 49 L.T. 147.

It is not a good demand under this section if the debt was not due when demand made. *Re Briton Medical,* 11 O.R. 478.

It is a good demand if the creditor demands payment of a sum greater than that actually due him if the company neglects to pay or offer the sum due. *Cardiff* v. *Norton,* 2 Ch. 405.

The whole period of sixty days must have expired before the petition is launched. *Re Catholic Publishing Co.,* 2 D.J.S. 116.

It has been held in England that mere omission to pay is not "neglect" within this section if there is reasonable cause for the omission. *Re London & Paris,* 19 Eq. 444.

And the fact that the debt is *bonâ fide* disputed is a complete answer. *Ibid.*

"Neglect" of the company to pay the debt demanded is conclusive evidence of insolvency. *Re Imperial Hydropathic Hotel Co., supra.*

If an assignee of a debt petitions and relies on this section he must prove that the assignment was prior in date to the demand. *Re Rapid City,* 10 M.R. 681.

The demand need not be in any special form. It must merely be a clear and unmistakeable call for payment of the debt forthwith. The following, it is submitted, is a sufficient demand.

To Company, Limited.

I hereby demand payment forthwith of the sum of $ owing by you to me for , etc.

Dated at this day of 190 .

5. The winding up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding up. R.S., c. 129, s. 7.

A landlord's claim to be paid preferentially for overdue rent after the service is not good. *Fuches* v. *Hamilton Tribune*, 10 P.R. 409.

See notes to sections 13, 20 and the following sections.

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

(*a*) Which are insolvent; or,

(*b*) Which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act. R.S., c. 129, s. 3; 52 V., c. 32, s. 3.

The words from "this Act" to "Canada" in the seventh line are new.

The section is *intra vires* of the Parliament of Canada and applies to every trading company wherever incorporated which carries on business in Canada. *Allen* v. *Hanson*, 18 S.C.R. 667 (explaining *Merchants Bank* v. *Gillespie*, 10 S.C.R. 312).

But section (*b*) applies only to companies which are insolvent or which were incorporated by the Dominion Parliament or are subject to its control. *Re Cramp Steel Co.*, 11 O.W.R. 133.

Where a foreign company has been ordered to be wound up by a foreign Court and the company is doing business in Canada and has assets here, a Canadian Court can order the company to be wound up so far as its Canadian assets are concerned. The winding-up proceedings here will be ancillary to the winding-up proceedings in the foreign country. *Allen* v. *Hanson*, *supra*.

Our Courts cannot exercise with regard to an English company the full extent of the powers conferred by our Winding-up Act. For example, they cannot by the effect of a winding-up order affect the operations of the company in England, causing it to cease to carry on its business there, as under section 20 the company must do in this country. But the same difficulty existed when the English Courts were asked to make orders to wind up colonial companies, and was held not to affect the jurisdiction.

Allen v. *Hanson*, 18 S.C.R. 667; and see *Re Matheson Bros.*, L.R. 27 Ch. Div. 225, at page 228; and *Re Commercial Bank of South Australia*, L.R. 33 Ch. Div. 174, at p. 178.

All the Winding-up Act seeks to do in the case of foreign corporations is to protect and regulate the property of the corporations in Canada and protect the rights of the creditors of such corporations upon the property in Canada. It by no means follows that because all the provisions of the Act may not be applicable to foreign cases that those portions which are should not be acted upon. *Per* Ritchie, C.J., in *Allen* v. *Hanson, supra.*

The Ontario Winding-up Act does not apply to a company incorporated in Ontario where application for winding up is made by a creditor on the ground that the company is insolvent; the local Legislature having no jurisdiction in matters of insolvency; which are wholly within and "subject to the legislative authority of the Parliament of Canada." The Ontario Act applies solely to voluntary liquidation. *Re Iron Clay Brick Manufacturing Company, Turner's Case*, 19 O.R. 113.

A company incorporated under an Act of the Province of Ontario and carrying on business in Ontario is "doing business in Canada" within the meaning of this section. *Re Ontario Forge and Bolt Company*, 25 O.R. 407.

Upon the application of certain policy holders to a Court of Equity to have a receiver appointed for the purpose of winding up the company and collecting in the assets it was held that the Court could not make such an order, as the object of the Legislature in creating an insolvency Court was to administer the

estates of insolvents and under the Insolvent Act of 1875 (D.) complete provision was made for the carrying out of all that the plaintiffs demanded. A Court of equity has in such case no jurisdiction to make such an order. *McNeil* v. *Reliance Mutual Fire Insurance Co.*, 26 Gr. 567.

It is submitted that the Court will act upon the principle of this decision in respect to this Act.

It has been held that the Act does not apply to a club, or literary society or the like, they not falling within the term "trading companies." *Re Montreal City Club*, 8 R.J.Q. (S.C.) 527; *Re British Athenæum Club*, 43 Ch.D. 236.

In the part of the section introduced in the last revision the term "corporation" is used and not "trading companies." It may, therefore, be that clubs and similar corporations incorporated under the authority of the Acts referred to in the first seven lines of the section (down to the word "Canada") are within the Act and may be wound up.

The following are examples of companies to which this Act applies other than companies incorporated in the ordinary manner under the Companies Act of either the province or Dominion:—

(1) Companies incorporated by special Act: *Re Brentford Tramways Company*, 26 C.D. 527;

(2) Companies incorporated by Royal Charter: *Re Bank of South Australia* (1895), 1 Ch. 578. *Re St. Neot's Co.*, 22 T.L.R. 478.

(3) Foreign companies doing business in Canada. It would seem that such companies must have assets within Canada before a winding-up order can be made. *Allen* v. *Hanson, supra; Re Mercantile Bank of Australia* (1892), 2 Ch. 204; *Re Queen's Land Mercantile Agency*, 58 L.T. 878.

The Act does not apply to an illegal company. *Re Padstow Total Loss*, 20 Ch. 137; or to a company irregularly incorporated. *Oakes* v. *Turquand*, L.R. 2 H.L. 325.

The Act is retroactive in the sense of applying to companies which have become insolvent before the date of the Act. *Wyld*

v. *Hamilton Mutual Insurance Co.*, 6 O.R. 118; *Re Union Fire Insurance Co.*, 13 A.R. 268.

7. This Act does not apply to building societies which have not a capital stock or to railway or telegraph companies. R.S., c. 129, s. 3; 52 V., c. 32, s. 3.

See *Re Union Fire Insurance Company*, 17 S.C.R., p. 274.

8. In the case of a bank other than a savings bank the provisions of this Part are subject to the provisions of Part II. of this Act. R.S., c. 129, ss. 4 and 97.

A bank cannot be wound up under this Act until the preliminary provisions contained in sections 149 to 159 are complied with. *In re Bank of Liverpool*, 14 S.C.R. 650.

9. In the case of life insurance companies, and of insurance companies doing life insurance and other insurance in so far as relates to the life insurance business of such companies, the provisions of this Part are subject to the provisions of Part III. of this Act. R.S., c. 129, ss. 4 and 105.

10. In the case of insurance companies other than life insurance companies, and of insurance companies doing life insurance and other insurance, in so far as relates to such other insurance, the provisions of this Part are subject to the provisions of Part IV. of this Act. R.S., c. 129, ss. 4 and 115.

11. The Court may make a winding-up order.

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

Only the company or a shareholder may petition under this sub-section. The shareholder is not required to hold any specified number of shares.

See section 12.

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

This is similar to the new Ontario section, 7 Edw. VII., c. 34, s. 173(2). Only a company or a shareholder may petition under this sub-section, and no specified amount of stock is required to be held by the shareholder.

See section 12.

(*c*) When a company is insolvent.

See section 3 and notes.

The company or a creditor for at least $200 or a shareholder to the extent of $500 and no others may petition under this sub-section. Note the exception in respect to banks and insurance companies. The ground of insolvency is the only ground upon which a creditor can petition and the debt must be at least $200.

See section 12.

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

Only a shareholder holding shares of the company's stock to the amount of at least $500 may petition under this sub-section.

See section 12.

It was held by Mabee, J., in *Re Cramp Steel Co.*, 11 O.W.R. 134, that this sub-section applies only to companies subject to federal control or incorporated under the Dominion Companies Act. It would appear from this decision that the order can be made in respect to an Ontario corporation under sub-section (*c*) only.

(*e*) When the Court is of opinion that for any other reason, it is just and equitable that the company should be wound up. 52 V., c. 32, s. 4.

A shareholder to the extent of at least $500 is the only person who may petition under this sub-section. See section 12.

It was at one time considered that the words in this sub-section must be confined to cases *ejusdem generis* with the preceding clauses, but this is not now the case. *Re Langham*, 5 C.D. 669; *Re Sailing Ship "Kentmere" Company* (1897), W.N. 58.

In England these words are construed very liberally, but it is to be remembered that the English Act is broader than ours, in so far as the grounds upon which a company may be wound up are concerned. *In re European Life Assurance Asso.*, 9 Eq. 122, it was stated that the company should be wound up if it was plainly and commercially insolvent.

The company may be wound up under this sub-section when the main purposes for which it was formed have failed. This

has received considerable attention in England and is known under the term that "the substratum of the company is gone." *Re Haven Gold Mining Co.*, 20 C.D. 151; *Re Coolgardie Consolidated Gold Mines* (1897), 76 L.T. 269.

For a full discussion of this principle see Palmer Company Precedents, 8th ed., vol. 2, page 43.

It is probably not enough for a shareholder to shew fraud on the part of the company in order to have the Court act under this sub-section. See *Ex parte Barnes* (1896), A.C. 146.

For examples of companies wound up under this clause see *Re Haven Gold Company*, 20 Ch.D. 151, and *Re J. E. Brinsmead & Sons* (1897), 1 Ch. 45 and 406, where an order was granted for the reason that the company was entirely fraudulent. See also *Re Alfred Melson & Co.* (1906), 1 Ch. 841.

12. The application for such winding-up order may, in the cases mentioned in paragrapas (*a*) and (*b*) of the last preceding section be made by the company or by a shareholder; and in the case mentioned in paragraph (*c*) of the last preceding section by the company or by a creditor for the sum of at least two hundred dollars, or, except in the case of banks and insurance corporations, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars, and, in the other cases mentioned in the said section, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars. R.S., c. 129, s. 8; 52 V., c. 32, s. 5; 62-63 V., c. 43, s. 4.

A petition for a winding-up order is considered to be a proper mode of enforcing payment of a debt due from a company provided always that there is a reasonable ground for launching a petition. *Bowes* v. *Hope*, 11 H.L.C. 389. If such proceedings are taken maliciously and the petition is dismissed an action lies against the petitioner by the company for maliciously instituting insolvency proceedings. See notes to section 14.

A petition for winding up which is brought for the purpose of enforcing payment of a debt which the company *bonâ fide* disputes is an abuse of the process of the Court, and should and generally will be dismissed with costs. The Court will, however, take pains to see that the dispute is a *bonâ fide* one. *Re A. Coy*

(1894), 2 Ch. 349; *Re Anglo-Bavarian Steel Ball Co.* (1899), W. N. 80.

A winding-up petition is not a proper mode of enforcing a disputed debt. *Re Goldhill Mines,* 23 Ch. D. 201.

Who May Petition.

A secured creditor may petition, even after he has had a receiver appointed in an action. *Re Borough of Portsmouth Tramway Co.* (1892), 2 Ch. 362.

A debenture holder who cannot get paid may petition. *Re Western Canada Co.,* 17 Eq. 1. So also may a holder of a mortgage debenture. *Moore* v. *Anglo-Italian Bank,* 10 C.D. 681.

The fact that a creditor is entitled to a lien for the full amount of his claim does not disqualify him from being a petitioner. *Re Strathy Wire Fence Co.,* 8 O.L.R. 186; *Re Great West Coal Consumer's Co.,* 21 Ch.D. 799.

If the company borrows money by an *ultra vires* act, the creditor cannot petition. *Re National Permanent,* 5 Ch. 309.

An equitable creditor may petition, but it is preferable and sometimes necessary that the legal creditor should join in the petition. *Re Pentalta* (1898), W.N. 55.

The assignee of a debt can petition: *Re Paris Skating Rink Co.,* 5 Ch. D. 959; but the assignor should join in the petition. *Re People's Loan & Deposit Co.,* 7 O.W.R. 253.

The assigning of claims for the purpose of bringing a petition is not to be encouraged. It is not permissible for various creditors of a company to assign to any creditor or any other person their claims against the company in order that the petitioner may have a claim against the company in excess of two hundred dollars for the purpose of enabling him to petition to wind up the company. *Re People's Loan & Deposit Co.,* 7 O.W.R. 253.

Two or more creditors, each for a sum less than two hundred dollars, but the total of whose claims is in excess of two hundred dollars cannot present a valid petition for the winding up of a

company based on these claims. *Re People's Loan & Deposit Co., supra.*

In *Re European Bank Co.*, L.R. 2 Eq. 521, the petition was refused because the petitioner had not sufficient interest in the debt—it having been attached by his own creditors.

A creditor's executor may petition. *Re Masonic and General Life*, 32 C.D. 373.

It is not clear whether or not a creditor whose claim is not yet payable can petition. In *Re Powell* (1892), W.N. 94 it was held that he could not, but in *Re Australia Joint Stock Co.* (1897), W.N. 48, an order was made upon such petition. The Act does not state that the debt must be due, and it is submitted that the Court should allow a creditor whose claim is not yet due to petition, if the situation warranted such drastic action on his part. A company may be in such circumstances that by the time the debt becomes due no assets will remain. Whereas if an order were made earlier some assets would be available for distribution. The question hinges on the construction of the word "creditor." Under the Ontario Assignments Act it has been held that "creditor" includes one whose claim is not yet due so as to entitle him to sue on behalf of himself and all other creditors to set aside a fraudulent preference. See *MacDonald* v. *McCall*, 12 A.R. 593, 13 S.C.R. 247. And it is submitted that the same would be held under this Act.

A person who has a claim against the company for unliquidated damages is not a creditor within the meaning of the Act and cannot petition. *Pen-y-van Colliery Co.*, 6 Ch. D. 477.

Where a creditor obtains a garnishee order against a company, he is not thereby made a creditor of the company, so as to enable him to petition. *Re Combined Weighing Machine Co.*, 43 C.D. 99; but the garnishor after obtaining judgment on the garnishee proceedings against the company would, of course, become a creditor and can petition.

There is no objection to a company presenting a petition to wind up another company. *Ex parte Mexican* (1890), 34 Sol. Jr. 269.

It is submitted that a liquidator of a company being wound up under this Act can petition in the name of the company for the winding up of another company under this Act in every case where the company itself, if the winding-up order had not been made, could have brought the petition. This is in analogy to the bankruptcy law in England where it is held that a liquidator may in the name and on behalf of the company, serve a bankruptcy notice on a judgment debtor of the company.

See *Re Winterbotham*, 18 Q.B.D. 446.

A person who has guaranteed a debt due by the company cannot petition until he has paid the debt. *Iron Colliery*, 20 C.D. 442.

It has been held in England that where a shareholder petitions on the ground that a company is insolvent he must prove that there will be a sufficient surplus for the shareholders. *Re Rica Gold Company*, 11 Ch.D. 36; *Re Vron*, 20 C.D. 442.

But this, it is submitted, cannot prevail here; section 12 gives a shareholder the right to petition when the company is insolvent and he is not required to shew a surplus. And see now *Re Chic, Ltd.* (1905), 2 Ch. 345.

It does not appear that a petitioning shareholder must have paid up all calls on his stock before a petition is launched, but he must make out a special case to justify his petition, and as a matter of discretion the Court might require him to pay the calls into Court. *Re Dyment Fuel Co.*, 13 Ch. D. 400.

A shareholder cannot petition on the ground that he was induced to take shares by misrepresentation. He should bring an action. *Re Union Hill Silver Co.*, 22 L.T. 400.

One petition to wind up two companies is irregular. *Re Shields Marine Insurance Co.* (1867), W.N. 265-296.

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

(2) Except in cases where such application is made by the company, four days' notice of the application shall be given to the company before the making of the same. R.S., c. 129, s. 8; 52 V., c. 32, s. 6.

The application is made to a Judge in Chambers. See section 109, and see *Re Toronto Brass Co.*, 18 P.R. 248.

As a code of rules has not yet been formulated in Ontario for winding-up proceedings (advantage not yet having been taken of section 134), the petitioner must proceed both before and after the winding-up order is made, as directed by sections 108 and 135, *i.e.*, in a manner as nearly as may be to the ordinary practice of the Court. Accordingly, the petition must be verified by affidavit. See forms of petition and affidavit (*infra*).

In England a statutory affidavit is provided which is made *primâ facie* evidence of the statements in the petition. Here we have no such provisions and the affidavit must follow the usual form of affidavits, the deponent swearing positively to the facts alleged or stating the grounds of his information and belief, if the affidavit is sworn on information and belief. Such an affidavit cannot be read unless the grounds of the information are stated. *Gilbert* v. *Endean*, 9 C.D. 266.

In England there is a Rule requiring the affidavit in support of a petition to be made by the petitioner and in *Re Charterland* (1900), 2 Ch. 870, it was held the power to make such affidavit cannot be delegated. But in *Re African Farms, Ltd.* (1906), 1 Ch. 640, this decision was not followed, it being held that the rule was merely directory and that the affidavit could be made by the petitioner's agent or solicitor if he had knowledge of the facts.

Under our practice it is submitted that the affidavit clearly does not require to be made by the petitioner, but may be made by any one who is cognizant of the facts. There is no provision in the Act relating to the affidavit and there is no provision in the Consolidated Rules of Practice requiring the affidavit to be sworn by a petitioner himself. It therefore seems clear that if authority is needed *Re African Farms, Ltd.*, would be followed.

Evidence in Support of Petition.

The petitioner, as in the ordinary case of a petition or motion, is entitled to examine witnesses on the motion and may

examine deponents on their affidavits filed. The company has, of course, similar rights. See Consolidated Rule 490.

The affidavit must be filed before the petition is served. See Consolidated Rule of Practice 524, which is as follows:—

"The affidavits upon which a notice of motion is founded shall be filed before the service of the notice of motion or petition."

It was held by Falconbridge, C.J., in *Re Victor Varnish* in October, 1907 (unreported), that the Court had no power to waive compliance with this rule.

The petition need not be filed before the day of hearing. *Re Western Insurance Co.*, 6 P.R. 86, but the petition must be filed before an order made thereon can be issued. *Smith* v. *Harwood*, 1 Sm. & G. 137. These two cases are subject to the practice that papers to be used in Chambers shall be filed not later than three o'clock in the afternoon of the day preceding the day upon which the motion is returnable.

Service of the petition is regulated by Consolidated Rule No. 159, and this must be strictly followed. See Holmested & Langton, Judicature Act, p. 291.

It was held by Anglin, J., in 1907, in *Re Kearns Ink & Wax Company* (unreported), that service of the petition on the vice-president of the company when it was not shewn that the president could not be served, was not good service on the company.

Where a company has made an assignment for benefit of creditors, service of a petition for a winding-up order upon the assignee for benefit of creditors is not good service upon the company under this section. *Re Rodney Casket Company*, 12 O.L.R. 409.

If the petitioner is unable to effect service on the company it is submitted that an order may be obtained from the Master in Chambers for substitutional service in a proper case, in the same manner as ordinary Court proceedings.

Leave may be obtained to serve petition out of the jurisdiction. See section 111.

The petitioner is not required to give four clear days' notice. Notice of presentation of the petition served on the 4th of November and returnable on the 8th was held to be good service. *Re Arnold*, 2 O.L.R. 671.

It is to be noted that when the company itself applies for the winding-up order no notice to any person is required.

A notice of presentation of the petition must always be served with the petition. See Consolidated Rule 937.

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

The petition need not be served upon any person except the company. *Re Qu'Appelle Valley*, 5 M.R. 160.

Where the petitioner is out of the jurisdiction security for costs may be ordered. *Re Home Assurance Co.*, 12 Eq. 159. But not if he is the holder of an unsatisfied judgment against the company or of an undisputed debt of sufficient amount. *Re Contract and Agency Co.* (1887), W.N. 218.

Where the petitioner dies before the hearing of the petition it is submitted that an order to continue proceedings can be obtained. See *Re Dynefore Collieries Co.* (1878), W.N. 199.

The petition should shew on its face that an order should be made. *Re Langham*, 5 C.D. 669; *Re Rica Gold Co.*, 11 C.D. 36.

In order that a winding-up order may be made, it is essential (1) that sufficient allegations be contained in the petition to bring the case within the sections of the Act; (2) that the petition should be verified by a sufficient affidavit. *Re Kootenay Brewing Co.* (1898), 6 B.C.R. 131. Leave to file a supplementary affidavit is as a rule refused.

It has been held in England that a petition should state that there are assets of the Company available for payment of the debt. See Palmer's Company Law, 5th ed., p. 338. This is not deemed necessary in Ontario; and the law has been changed in England by the decision in *Re Chic, Ltd.* (1905), 2 Ch. 345, which held that it is not necessary to allege the existence of

available assets. The order may be made although there is no chance of the petitioner getting anything. See also *Re Crigglestone* (1906), 2 Ch. 327.

FORM OF PETITION TO WIND UP (ONTARIO).

IN THE HIGH COURT OF JUSTICE.

In the matter of the Winding-up Act being chapter 144 of the Revised Statutes of Canada and the amending Acts and

In the matter of the . Company, Limited.

To the Honourable the Judges of the High Court of Justice.

The humble Petition of

Sheweth.

1. That the Company, Limited of was incorporated by Letters Patent under the (*Ontario Companies*) Act on or about the day of 19 .

2. The Head Office of the said Company is in in the Province of Ontario.

Or 2. The Head Office of the said Company is in the (*City of New York in the State of New York, one of the United States of America*) and the said Company has no head office in Canada: the chief place (*or one of the chief places*) of business in Canada of the said Company is at in the Province of Ontario.

3. The objects for which the said Company was incorporated among others are the following, that is to say:

Set out objects briefly.

4. The nominal capital stock of the Company is divided into shares of Dollars each, of which shares are said to be subscribed and shares paid up.

5. The directors of the said Company are and the following is a list of the shareholders of the Company.

6. It is claimed that all of the said shares are fully paid up except in the case of of whose shares are said to be fully paid up, and of whose shares are said to be fully paid up.

7. Your Petitioners are not aware of the facts relating to the subscription or payment of the said stock and they desire that the same should be investigated.

8. Immediately after the incorporation of the said Company the same was organized and proceeded to carry on business and carried on business until on or about the day of 190 (*or, is still carrying on business*).

9. Your Petitioner is a creditor of the said Company to the amount of $ and in respect of the said amount the said Company is indebted to the said Petitioner and all the said amount is past due and

owing to the said Petitioner. The said amount is for goods sold and delivered to the said Company by your Petitioner and upon Bills of Exchange of which your Petitioner is the holder (*or, as the case may be*). The following are the particulars:

10. The Company is unable to pay its debts as they become due. On the day of 19 , your Petitioner served upon the Company in the manner in which process may legally be served on it in the Province of Ontario, a demand in writing, a copy of which is marked Exhibit "B" to the affidavit of filed in support of this Petition, requiring it to pay the sum so due forthwith and the Company for sixty days next succeeding the service of the said demand, neglected to pay said sum or to secure or compound the same to the satisfaction of your Petitioner.

11. On or about the day of 19 , the said Company called a meeting of its creditors for the purpose of compounding with them. Such meeting was held on the day of 19 , and the Company's creditors (*or your Petitioner*) refused to compound their debts (*or, as the case may be*).

12. On or about the day of 190 , the Company exhibited to its creditors and to your Petitioner a statement shewing its inability to meet its liabilities, a copy of which said statement is marked Exhibit "C" to the affidavit of filed in support of this Petition.

13. The said Company has otherwise acknowledged its insolvency, and by its president and directors has admitted its inability to meet its liabilities, and has asked certain of its creditors for an extension of time for payment of its liabilities and the said Company is in fact insolvent.

14. The Company has assigned (*or removed or disposed of*) some (*or all*) of its property with intent to defraud, defeat or delay its creditors or some of them and the particulars thereof are as follows:

15. The Company is about to assign, remove or dispose of some (*or all*) of its property with intent to defraud, defeat or delay its creditors or some of them, and the particulars thereof are as follows:

16. On or about the day of 19 , the Company, with intent to defraud, defeat or delay its creditors or some of them procured its money, goods, chattels, land, and property, or some of them, to be seized, levied on and taken under process of execution and the particulars thereof are as follows:

17. On or about the day of 19 , the Company executed (*a general conveyance or*) an assignment of its property for the benefit of its creditors to of the (*City of Toronto*) in the Province of Ontario.

18. On or about the day of 19 , the Company, being unable to meet its liabilities in full, made a sale or conveyance of the whole or the main part of its stock in trade or assets without the consent

of its creditors and without satisfying their claims, the particulars thereof being as follows:

19. Your Petitioner (*or, one John Jones*) on the day of 19 , recovered judgment in this Honourable Court (*or, as the case may be*) against the Company for the sum of $ and costs which costs were afterwards taxed and certified to the amount of $ making a total sum of $ recovered by the said judgment.

20. Your Petitioner (*or, the said John Jones*) subsequently upon the day of 19 , caused a writ of *Fieri Facias* to be issued out of this Honourable Court (*or, as the case may be*) against the said Company directed to the sheriff of (*the City of Toronto*) and the said sheriff did proceed thereunder and on the day of 19 , did seize levy upon and take in execution the goods, chattels, land and property, (*or, some of the goods, etc.*) of the Company; the said Sheriff has fixed the day of 19, for the sale thereof, and the Company has permitted the said execution to remain unsatisfied, notwithstanding that it is now within four days of the time fixed by the said Sheriff for the said sale, and notwithstanding that the said execution has remained unsatisfied for fifteen days after the seizure by the said Sheriff (*or, as the case may be*). The said judgment and execution are wholly unpaid and unsatisfied and the amount is justly due and owing to your Petitioner (*or, to the said John Jones.*)

21. Your Petitioners are also desirous that the affairs and business of the said Company should be investigated and that it should be made to appear in the interests of the creditors how the insolvency has been brought about and that the personal accounts of the president and directors and shareholders should be investigated and also that the claims of the different creditors should be investigated.

22. Your Petitioners are advised that no machinery exists except under "The Winding-up Act" R.S.C., 1906, c. 144 and the amending Acts to accomplish the above mentioned objects.

Your Petitioners therefore pray

1. For a declaration that the above Company is a corporation to which the provisions of the Winding-up Act and amendments are applicable.

2. For a declaration that the Company ought to be wound up under the provisions of the said Act and amendments thereto and for an order directing the winding up of the said Company under the provisions of the Winding-up Act and amendments thereto.

3. For an order appointing a provisional liquidator of the estate and effects of the said Company.

4. For an order referring it to the Master in Ordinary (*or, as the case may be*) to appoint a permanent liquidator of the said Company and empowering and directing the said Master to take all necessary steps and conferring upon the said Master all the powers conferred upon the Court by the Winding-up Act and amendments thereto for the winding up of the said Company.

5. For an order that the costs of this Petition, the order for winding up and of the said reference, be taxed and paid to your petitioners out of the assets of the said Company.

6. And for such further or other order as to the Court may seem just. And your Petitioners will ever pray, etc.

Dated at the day of 19 .

Witness

Signature of Petitioner.

(It is well to allege as many grounds of insolvency as possible in order that if the petitioner is defeated upon one ground he may obtain the order on another. Leave to amend the petition on the hearing by setting up other allegations is almost invariably refused. *Re Abbott-Mitchell*, 2 O.L.R. 143.)

Notice of Hearing (to be endorsed on and served with Petition).

Take notice that the within Petition will be presented and heard before the Honourable the Presiding Judge in Chambers at Osgoode Hall, in the City of Toronto, on the day of 19 , at the hour of 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard; and on such application will be read the affidavit of , this day filed. (if it is intended to examine witnesses in support of the Petition add *and the depositions of and to be taken in support hereof* or *and the depositions of such witnesses as the Petitioner shall examine in support hereof*) and such further or other material as Counsel may advise; and that if you do not appear on the said Petition at such time and place the Court may make such order on the Petitioners' own shewing as shall appear just.

Dated at this day of 1908

A. B.,

Solicitor for Petitioner.

To Limited.

AFFIDAVIT VERIFYING AND IN SUPPORT OF PETITION.

STYLE OF CAUSE.

I, make oath and say that:—

1. I am the Petitioner herein (*or, as the case may be*) and have knowledge of the matters connected with the said Petition, and of the facts herein deposed to.

2. I have read over the Petition of for the winding up of the above named Company, which Petition is now shewn to me and marked Exhibit "A" to this my affidavit, and I say that such of the statements in the said Petition as relate to my own acts and deeds are true, and such of the said statements that relate to any of the acts or deeds of any other person or persons are true to the best of my knowledge, information and belief; the grounds of such information and belief regard-

ing the acts and deeds of other persons are (*the admission or admissions made to me by the president, or the officers or the directors of the said Company, as the case may be. It is well to name each party upon whose admissions reliance is placed*).

3. Now shewn to me and marked Exhibit "B" to this my affidavit is a demand for payment of the sum of Dollars, due by the said Company to the Petitioner herein, which said demand was served upon the said Company in the manner in which process may legally be served on the said Company on the day of 19 , (*sixty days before the service of the Petition*) at the City of Toronto, as appears from the affidavit of filed in support hereof.

4. At the time of the service of the said demand, namely on the day of 19 , the said Company was justly and truly indebted to me (*or the Petitioner*), in the sum of $ being the amount demanded, and the said sum was then due and payable.

5. The said Company has, for sixty days (*or ninety days, as the case may be*), since the service of the said demand neglected to pay such sum so demanded, or to secure or compound the same to my satisfaction (*or to the satisfaction of the Petitioner*).

6. The said Company is justly and truly indebted to me (*or the Petitioner*) in the sum of $ in respect of the matters set forth in the said Petition Exhibit "A" and the said sum of $ is now due and payable by the Company to me (*or the Petitioner*).

7. Now shewn to me and marked Exhibit "C" to this my affidavit is a statement exhibited by the said Company to me (*or, to the Petitioner herein*) on the day of 1908, which statement shews the Company's inability to meet its liabilities.

8. Now shewn to me and marked Exhibit "D" to this my affidavit is (a promissory note made by the said Company in favour of the Petitioner herein for Dollars, upon which note this petition is based; *or* is a letter dated written by the said Company to me (*or to the Petitioner*) wherein the debt upon which the Petition herein is based is acknowledged to be due and payable by the Company; (*or, as the case may be*).

(*It is sometimes desirable to set out in full in the affidavit some of the chief paragraphs of the Petition, and this is usually done.*)
Sworn, etc.

It is desirable that the petitioner's case should be made as strong as possible and therefore affidavits should be filed to supplement the above in every case where it is possible. Set out clearly the validity of the petitioner's claim and the insolvency within the Act.

An affidavit filed in support of a petition stating that the company was insolvent "within meaning of the section" with-

out stating the facts involved, is insufficient. *Re Rapid City Farmers Elevator Co.* (1894), 9 M.R. 574.

If reliance is placed on the company's neglect to pay the debt after demand, the service of the demand must be proved and an affidavit should be made by the party effecting the service, and filed, setting out the date and place of the service, and the officer of the company, upon whom service was made.

14. The Court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just. R.S., c. 129, s. 9.

The question whether or not the Court has a discretion to grant or refuse a winding-up order when the insolvency of a company is shewn as required by the Act, has been considered in several cases of late years. The question first arose in *The Wakefield Rattan Co.* v. *The Hamilton Whip Company, Limited*, 24 O.R. 107. In this case it was shewn that the company had made an assignment for benefit of creditors and that it was the desire of a large majority of the creditors that the company should be wound up under the assignment rather than by compulsory winding-up proceedings. It was held by the Chancellor that the Court had a wide discretionary power under section 9 of R.S.C. 1886, chapter 129 (section 14 of the present Act), and that this discretion should be exercised in accordance with the view of the majority of creditors and the order was refused. Leave was given, however, to renew the application if any exigency arose to justify the intervention of the Court.

The point was next considered in *Re William Lamb Manufacturing Co.*, 32 O.R. 243. The petitioners were creditors to the amount of $500, and it was shewn that the company had made an assignment for benefit of creditors. At the first meeting of creditors, under the assignment where over 90% of the creditors were represented the assignment proceedings were unanimously approved and inspectors appointed. Notwithstanding this it was held by Meredith, C.J., contrary to the *Hamilton Whip Case*, that the Court has no discretion under this section, once the insolvency is shewn, the learned Chief Justice basing

his judgment on the ground that as the legislature had enacted that the making of an assignment for benefit of creditors should be a ground for an application for a winding-up order the Court would be running contrary to the intention of the Legislature if it assumed a discretion to refuse an order and favour the assignment proceedings.

The Chancellor had again the question before him in *Re Maple Leaf Dairy Co.*, 2 O.L.R. 590. An assignment for benefit of creditors had been made prior to the application for winding-up order and the first meeting of creditors had been held. The meeting was attended by almost all the creditors who confirmed the appointment of the assignee and appointed inspectors, and the petitioning creditor then filed his claim and made no objection to the proceedings. Subsequently he launched the petition and it appeared that of thirty-five creditors he alone was in favour of compulsory winding up. The Chancellor followed his former decision and held that the Court had a discretion in granting or withholding the order. He stated that the Court must look, not merely at the one creditor who applies, but at the body of creditors who have the main interest in the assets and ascertain, if it can, their attitude. Citing in support the case in *Re West Hartelpool Iron Works Co.* (1875), L.R. 10 Ch. 618, the Chancellor stated that although the applying creditor may be entitled to a winding-up order, *ex debito justitiæ*, as against the company, he is not so entitled as against the wishes and opposition of all the other creditors.

The question finally came before the Court of Appeal in *Re Strathy Wire Fence Co.*, 8 O.L.R. 186. The company had passed a resolution to assign for benefit of creditors and the assignment was executed by the subsequent petitioner, as managing director, he having also voted in favour of it. The meeting of creditors was held and the petitioner, who had a claim for salary against the company, voted in favour of a resolution confirming the appointment of the assignee and appointing inspectors. Steps were taken by the assignee and inspectors to sell the assets and the petitioner negotiated for their purchase, but the offer of

another person was accepted. A month after this the petitioner filed his petition asking for a winding-up order and the application was refused by Teetzel, J., holding that there was a discretion to refuse the order. From this judgment the petitioner appealed to the Court of Appeal and the appeal was unanimously dismissed. It was distinctly laid down that under section 9 (section 14 of the present Act), the Court has a discretion to refuse the order. The Court must, before granting the order, see that the petitioner has a lawful claim, that the company is insolvent, that there are assets to be administered and that the proceedings proposed are necessary. The creditor or contributory is *primâ facie* entitled to the order where there are assets to be administered upon which the winding-up proceedings can attach with advantage or probable advantage to the estate, but in a proper case the Court will exercise its discretion and refuse the order.

It can now be taken as settled that on an application for a winding-up order the Court has a wide discretion to grant or withhold the order and that the Court will examine into the case and if possible the wishes of the creditors will be observed.

Even where the majority of the creditors are opposed to a winding-up order being made the order will be made in cases where it appears that the minority creditors may be prejudiced unless the winding-up order is made. *Re Charles H. Davis Company, Limited*, 90 W.R. 992.

On an application to wind up a company if it is clearly shewn on the material that the company has no assets and that therefore the creditor can obtain nothing by a winding up the Court will refuse to make the winding-up order. Where, however, it was not clear that there were no assets belonging to a company which was sought to be wound up owing to the fact that there was an amount of subscribed stock only partially paid up and an amount of stock issued as paid up the consideration for which did not satisfactorily appear an order was granted winding up the company, although no other assets were shewn. *In re Georgian Bay Ship Canal and Power Aqueduct Company*, 29 O.R. 358 (*In re Chapel House Colliery Company*, 24 Ch. D. 259, distinguished).

The petitioning creditor is not entitled to the order where there are no assets upon which this "equitable execution" can attach. *Re Chapel House*, 24 C.D. 259, at p. 269. But see *Re Chic, Ltd.* (1905), 2 Ch. 345.

The onus is on the secured creditors to shew that the unsecured creditors will receive no benefit from the winding up. The tendency of the Court is to grant the order if the winding up will be useful (not necessarily fruitful) to unsecured creditors. *Re Crigglestone* (1906), 2 Ch. 327.

If any good grounds are shewn to the Court that there is a possibility of a settlement of all the company's debts being made, provided the winding-up order is not made, the Court will not hesitate to adjourn the petition to allow the arrangements to be made. *Re Western of Canada Oil Co.*, L.R. 17 Eq. 1.

Such enlargement, however, is more likely to be granted if the creditors wish it than if the company or contributories apply for the enlargement. *Consolidated Bank*, 14 L.T. 656.

To enable a company to be wound up under this Act it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the facts as required by the Act shewing insolvency must be disclosed in the material on which the petition is based. *Re Grundy Stove Co.*, 7 O.L.R. 252.

Costs of Petition.

The usual practice when the petition is successful is to give the petitioner his costs out of the estate and also to give costs to the company for opposing the petition. Any creditors and contributories who appear on the petition are also, as a rule, given costs but only one set of costs among creditors and one set of costs among contributories (and this only where there is good ground for their appearance. See *Re Hull*, 10 C.D. 130). This also is the English practice. See *Re Humber Iron Works*, 2 Eq. 15. If the petition fails these costs are usually given against the petitioner. *Re European Banking Co.*, 2 Eq. 501.

Costs so awarded are a first charge on the estate. *Re Andley*, 6 Eq. 245; and are to be paid in full and not proved for. *Re Home Investment*, 14 C.D. 167.

Petitioner's costs rank before liquidator's remuneration in case assets are insufficient. *Re Massey*, 9 Eq. 367.

Where a petition was directed to stand over to establish a debt, and the debt was established and order made, it was held that the petitioner was entitled to costs of establishing debt as well as those of petition. *Re Railway Finance*, 14 W.R. 754.

It has been held in England that if the petition makes personal charges against any director or member such as fraud or misconduct, the director or member charged may appear by separate counsel and the Court may order the petitioner to pay the costs of such appearance if the petition is dismissed or charge disproved. *Re Anglo-Greek Co.*, 2 Eq. 1.

The company is entitled to its costs of appearing on the petition even although it does not oppose the application, but in fact facilitates it; its costs may be paid out of the estate. *Re Wiarton Beet Sugar Co.*, 3 O.W.R. 393.

Second Petition.

The Court generally allows the costs of a second petition up to the time that notice of the presentation of a prior petition is received. *Re General Financial Bank*, 20 C.D. 276.

Where there were two petitioners for a winding-up order against the one company, the applications being heard together, the order was made under both petitions, but the conduct of the proceedings was given to the latter petitioner, a creditor, for money paid, in preference to the earlier one, who was shewn to be an employee of, and in close touch with the company. In ordinary circumstances the first petition has the preference and the second petitioner would lose his costs if he had notice of the previous one, unless there were other reasons for filing a second petition, such, for instance, as in this case, as fear of collusion. *Re Estates Limited*, 8 O.L.R. 564.

A winding-up order having been obtained by a creditor from the Master in Chambers under 45 V., c. 23, s. 98 (D.), on

material which was not regular, and the solicitor who presented the petition, being the solicitor for the company, it was ordered by the Court that the carriage of the proceedings should be given to creditors who presented a petition on the following day. It is preferable to have the winding up conducted by solicitors who are totally disconnected with the company. *Re Joseph Hall Manufacturing Company,* 10 P.R. 485.

If a second petition is presented, the second petitioner must allege and prove an objection to the prior petition, *e.g.*, collusion. *Re Standard Portland Cement Co.* (1890), W.N. 91.

Where a petition was served and filed without notice when a previous petition was pending and the second petition made out a good case for a winding-up order, the petitioners were allowed their costs, although a winding-up order was made on the first petition. *Re Algoma Commercial Co.*, 3 O.W.R. 140.

A second petitioner will be deprived of his costs if he has notice of the first petition and no collusion is alleged or shewn. *Re General Financial Bank,* 20 C.D. 276.

Where a petition is filed for the winding up of a company and a second petition is subsequently filed and brought on for hearing before the first petition, the Court should be informed of the prior proceedings. An attempt made to forestall a *bonâ fide* application by a friendly one is not a practice that should be encouraged. *Re Enterprise Hosiery Co.*, 4 O.W.R. 56.

A creditor presenting a winding-up petition having notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs and must prove not merely that he had reason to suspect that the first was not *bonâ fide,* but that *mala fides* or collusion actually existed. *Re Building Society Trusts,* L.R. 44 Ch. D. 140.

See also *Ex parte Mason, In re White,* L.R. 14 Ch. D. 71.

Miscellaneous Cases.

The petition cannot be amended on the hearing so as to include a ground upon which the order can be made which was not set out in the petition. The Act requires four days' notice of the

application to be given to the company and effect cannot be given to a ground of which the company had not that notice. *Re Abbott-Mitchell*, 2 O.L.R. 143.

But leave will generally be given to serve a new petition.

Leave given to file further material and re-present petition. *Re Redpath Vehicle Co.*, 4 O.W.R. 515.

Leave given to amend petition, offer additional evidence and re-present petition in fourteen days. *Re Ewart*, 8 O.L.R. 527.

A winding-up order will be refused if it appears that the petitioner is an unsecured creditor and all of the assets will be insufficient to meet the claims of secured creditors whose claims are admitted. The Court will generally let the petition stand over in order that an inquiry as to the assets may be made. *Re Chapel House Colliery Co.*, 24 C.D. 259; *Re Olathe Silver Mining Co.*, 27 C.D. 278. But see *Re Chic, Ltd.* (1905), 2 Ch. 345.

It has been held in England that where a company is admittedly insolvent and a large body of creditors ask that the order should be made a contributory (and it is submitted the company) cannot by offering to pay off the petitioning creditor prevent a winding-up order. *Re Pavy's Patent Co.*, 24 W.R. 91.

In England it is provided by the winding-up rules that where a petitioner consents to withdraw his petition or to allow it to be dismissed the Court may 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. (R. 2 of March, 1893.) There is no such provision here and it is doubtful whether the Court would make the substitution before the winding-up order is made. For the English practice, see *Re Charles, Ltd.*, 51 Sol. J. 101.

When a company has been wound up and dissolved a new winding up cannot be made unless the first winding up can be impeached for fraud. *Coxon* v. *Gorst* (1891), 2 Ch. 73; *Re London & Caledonian Co.*, 11 Ch. D. 140.

The order for winding up is binding from the time it is pronounced by the Judge, as in the ordinary case. *Re United Telephone* v. *Dale*, 25 C.D. 778. See also Consolidated Rule 729.

After the order has been pronounced, drawn up and entered the Court has no power to alter it except in a new proceeding brought for the purpose. See Holmested & Langton, p. 838.

Until entry the order may be varied. See Holmested & Langton, p. 837.

After the order has been entered the only power that the Court has to stay its effect is to be found in section 19. Note that the section gives no power to the company to apply for a stay of the order.

The mere existence of a foreign winding-up order is not a bar to an order here. *Mathewson Bros.*, 27 C.D. 225.

Where a winding up is proceeding in a foreign Court and special relief is sued for in a province where certain of the assets are situate, it is not proper for a local Court to interfere in respect to property controlled by the foreign Court in the winding up. If the suit or proceeding is in aid of the foreign proceedings, the shape in which the assistance should be given in the local Court would depend on what has been done in the foreign Court. There must be no conflict between the two Courts and in order to prevent this, the local Court should have evidence to shew the position of matters in the foreign Court and the steps about to be taken there so as to furnish proper relief to the plaintiff and at the same time not to interfere with steps being taken in the foreign Court with the same object. *Louth* v. *Western of Canada Oil Co.*, 22 Gr. 557; *Gray* v. *Raper*, L.R. 1 C.P. 694; *Re The Panama & New Zealand Co.*, L.R. 5 Ch. 318; *Re The Oriental Inland Steam Co.*, L.R. 9 Ch. 557.

Order by Judge in bankruptcy in England enjoining plaintiffs from proceeding in the High Court of Justice for Ontario. See *Maritime Bank* v. *Stewart*, 13 P.R. 86.

In winding-up applications it is advisable to follow the rules for guidance to be found in English cases. *Re Alpha Oil Co.*, 12 P.R. 298. But great care must be taken as many of the English section and rules are entirely different from ours.

The company has a right of action against a person who maliciously presents a petition for its winding up if the petition is dismissed. *Re Quartz Hill* v. *Eyre*, 11 Q.B.D. 674.

The Court will stay, as an abuse of its process all proceedings under a petition presented for an improper purpose, *e.g.*, for putting pressure on a company. *Re A. Company* (1894), 2 Ch. 349.

As to a newspaper proprietor being liable for contempt for commenting on a pending petition see *Re Crown Bank*, 44 C.D. 634, and *Re New Gold, etc., Co.* (1901), 1 Ch. 860.

When the petition is granted the Judge makes two orders, one directing the company to be wound up and the other appointing the provisional liquidator and referring the matter to the Master in Ordinary or other proper officer to appoint a permanent liquidator and take all necessary steps in connection with the winding up. In applications made at Toronto the reference must be directed to the Master in Ordinary under the provisions of section 121 of the Judicature Act unless he certifies that he is unable to take the reference.

WINDING-UP ORDER.

IN THE HIGH COURT OF JUSTICE.

The Honourable } the day of
In Chambers. } 19 .

In the matter of the Winding-up Act being chapter 144 of the Revised Statutes of Canada and amending Acts and

In the matter of Company, Limited.

Upon the Petition of a creditor (*or shareholder*) of the above named Company presented on the day of 19 , by , Esquire, Counsel for the said Petitioner, upon reading the said Petition, the affidavits of and filed, and the exhibits therein referred to and upon hearing what was alleged by Counsel for the said Petitioner, and for the said Company.

1. It is hereby declared that the said , Limited, is an incorporated Company within the provisions of the said Act and is insolvent and liable to be wound up by this Court, under the provisions of the said Act and the amendments thereto.

2. And it is further ordered that the said Company be wound up by this Court under the provisions of the said Act and amendments thereto.

ORDER OF REFERENCE.

Style of cause, etc.

Upon the application of the petitioning creditor (or shareholder *as the case may be*) herein, in the presence of Counsel for the Company,

upon reading the order made this day for the winding up of the said Company, and the papers and documents read and referred to on the application for the said order, and upon hearing what was alleged by Counsel for the Petitioner.

1. It is ordered that of the City of in the County of be, and he is hereby appointed Provisional Liquidator of the estate and effects of the above named Company, upon giving security to the satisfaction of the Master in Ordinary (*or Esquire, an Official Referee, or, as the case may be*) of the Supreme Court of Judicature for the due performance of his duties.

2. And it is further ordered that it be referred to the said Master in Ordinary (*or Official Referee, etc.*), to appoint a Permanent Liquidator or Liquidators of the estate and effects of the said above named Company, and to take all necessary proceedings for and in connection with the winding up of the said Company, and to fix the security to be given by the said Liquidator or Liquidators, upon his or their appointment, and the remuneration to be paid to the said Liquidator or Liquidators.

3. And it is further ordered, in pursuance and by virtue of the statute in that behalf, that all such powers as are conferred upon the Court by the Winding-up Act and amending Acts, as may be necessary for the said winding up of the said Company, be and the same are hereby delegated to the said Master in Ordinary (*or, Official Referee, etc.*).

4. And it is further ordered that the costs of the said Petition and order for winding up and of this motion of the applicant and of the said Company be taxed and be paid by the said Permanent Liquidator out of the assets of the said Company which shall come to his hands.

Proceedings Following a Winding-up Order.

After the winding up is made the officer to whom the wind-up has been referred requires the provisional liquidator to bring in an affidavit shewing the estimated value of the assets of the company, and upon this being done he directs a bond, usually for double the amount of the assets, to be filed by the provisional liquidator. This bond is commonly drawn so as to be sufficient for the permanent liquidator in case the provisional liquidator is subsequently appointed permanent liquidator. (See form of bond *infra*, page 404.) The referee then gives an appointment which he directs to be advertised, calling upon all shareholders, contributories and creditors of the company to attend before him when he will appoint a permanent liquidator. It is not usual to appoint a person other than the provisional

liquidator to be permanent liquidator unless good cause is shewn, but the wishes of the majority of the creditors are usually observed. After the appointment of permanent liquidator he proceeds to sell the assets of the company, with the approval of the Master, either by tender or auction sale after proper advertising. The liquidator also advertises at once for all claims against the company to be filed with him duly verified by affidavit. After the expiration of the last day upon which the liquidator has given notice that claims against the company must be filed with him, he presents the claims filed to the Master, and such claims which are proper to be allowed are allowed. In case the liquidator desires to contest the right of any person to rank upon the estate he serves such person with a notice requiring him to appear before the Master upon a named day and prove his claim. On the return day the disputed claimant must prove the claim to the satisfaction of the Master or his right to rank against the estate is barred.

The liquidator also proceeds forthwith to prepare a list of the persons who, in his opinion, are liable for unpaid stock. The liquidator brings in his affidavit setting out these defaulting shareholders and an order is made by the Master requiring them to attend before him on a named day and shew cause why they should not be settled on the list of contributories. On the return day of this appointment the case is tried before the Master in the ordinary manner. In case the liquidator desires to take proceedings against the directors of the company for breach of trust under section 123, he brings in an affidavit giving his grounds for such proceedings, and if satisfactory to the Master he issues a summons calling upon the directors to appear before him and the liquidator must then make out his case. When all the contributories' cases are disposed of the Master makes his report upon the same, and it is filed and notice of filing given to the contributories, and the report becomes absolute within fourteen days from the date of the service of the notice of filing. The same applies to a misfeasance summons. When all creditors' claims of which the liquidator has notice, whether formal or

otherwise, are either admitted to rank against the company or are barred by the referee, and when the proceedings in connection with the sale of the assets and the realization upon any judgments obtained against contributories or directors, are concluded, the solicitors' costs are taxed, the liquidator brings in his statement of cash received and paid, and the remuneration of the liquidator and the dividend to be paid are fixed. Upon the liquidator producing vouchers to the referee for the payment of all dividends an order is made discharging him from further liability and directing the bond filed by him to be delivered up for cancellation.

For the various forms referred to in the above see index of forms.

15. If the company opposes the application on the ground that it has not become insolvent, or that its suspension or default was only temporary, and was not caused by any deficiency in its assets, or that the capital stock is not impaired to the extent aforesaid, or that such impairment does not endanger the capacity of the company to pay its debts in full, or that there is a probability that the lost capital will be restored within a year or within a reasonable time thereafter, and shews reasonable cause for believing that such opposition is well founded, the Court, in its discretion, may, from time to time, adjourn proceedings upon such application, for a time not exceeding six months from the date of the application, and may order an accountant or other person to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order. R.S., c. 129, s. 10; 52 V., c. 32, s. 8.

No action appears to have been taken under this and the following two sections in Ontario in any reported case. The sections, however, clearly outline the procedure to follow. The company would have to make out a strong case for an investigation if creditors, who had made out a case of insolvency within the Act, pressed for an immediate order. See notes to section 14.

There are no corresponding sections in the English Act.

16. Upon the service on the company of an order made under the last preceding section, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person, shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the

company, and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control, respectively; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company. R.S., c. 129, s. 11.

See penalties provided in section 141. Note apparent misprint in the latter section.

17. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the Court may either refuse the application or make the winding-up order. R.S., c. 129, s. 12.

18. The Court may, upon the application of the company, or of any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further proceedings in any action, suit or proceedings against the company, upon such terms as the Court thinks fit. R.S., c. 129, s. 13.

The application under this section should be made to a Judge in Chambers. See sections 2 (*e*), (*i*) and 109.

An application for an order staying proceedings should usually be made on notice to the plaintiff in the action or suit, but in a proper case an order may be made on an *ex parte* application. The correct practice is to specify what action is restrained, and to restrain proceedings in it, but a departure from this may not invariably be fatal. The order should also contain the usual undertaking as to damages. *In re Tobique Gypsum Co.*, 6 O.L.R. 515, at p. 515.

See *Re General Service Company* (1891), 1 Ch. 497.

See also *Re London and Suburban Bank*, 19 W.R. 950.

The jurisdiction under this section extends to restraining proceedings in actions or suits beyond the ordinary territorial jurisdiction of the Court and more especially when the execution creditor is resident within the jurisdiction. In *Re International Pulp Co.*, 3 Ch.D. 594; *Re Tobique Gypsum Company*, 6 O.L.R. 515.

When it is desired to restrain proceedings in a foreign action, the application should be made to the Court before whom the

winding up is pending. *Westminster* v. *Upward*, 24 Sol. J. 690. But see the decision of Meredith, C.J., in *Canada Cork Company*, cited under section 22. The Court will probably not make the order until the foreign Court has refused to do so.

The enforcement of an execution is a proceeding within the section. In *Re Artistic Colour Co.*, 14 Ch. D. 502; *Re Tobique Gypsum Co.*, *supra*.

There is jurisdiction in the High Court in this province to make an order staying proceedings under an execution in the hands of the sheriff of a county in the Province of New Brunswick. But the sheriff having, notwithstanding, proceeded with the sale under the execution against the lands of the company, and executed a deed of the same to the purchaser, it was held that there was no jurisdiction in the Court to make an order summarily declaring the sale void. The case is not one coming within the class of cases which under the Act may be dealt with in a summary manner by a Judge in the winding-up proceedings. In general, the summary powers cannot be exercised against persons who do not come within some or one of the classes of persons specified in the sections of the Act covering the summary exercises of powers. These classes include contributories, creditors, officers and trustees. The Court is not justified in extending the jurisdiction to other cases not within the terms of the Act. In *Re Tobique Gypsum Co.*, 6 O.L.R. 515.

See section 22 relating to proceedings in an action after the winding-up order is made.

See Ontario Judicature Act, section 57, sub-section 9.

19. The Court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the Court, that all proceedings in relation to the winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks fit. R.S., c. 129, s. 18.

The word "Court" in the sixth line of this section is substituted for the word "he" in the former Act.

In exercising the discretion given by this section the Court should consider the interest of commercial morality and not

merely the wishes of creditors, contributories or the company and will refuse to stay if there is evidence of misfeasance or irregularity demanding investigation. *Re Telescriptor Syndicate* (1903), 2 Ch. 174.

See Palmer Precedents, 8th ed., vol. 2, p. 117.

Note that this section gives no power to the Court to stay the proceedings upon the application of the company. A creditor or contributory must apply.

But in *Re Boehmer Erb Company* (unreported), Teetzel, J., in November, 1907, stayed the winding-up proceedings upon the application of the company for the purpose of allowing the company to settle with their creditors upon representations that all debts would be promptly paid.

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

A contributory petitioning to set aside a winding-up order was required to give security for the costs of the company and the creditor who opposed the petition where it appeared that the creditor was merely acting in the interests of other persons who lived out of the jurisdiction and who had indemnified him as to costs. *Re Rainy Lake Lumber Co.*, 11 P.R. 314.

It is to be noted that under this section, the winding up may be altogether stayed and the company restored to its former status. (Note that under section 20, the corporate state and powers of the company continue until the completion of the winding-up.) It is submitted that this order would not be made unless all creditors were paid in full, or were unanimous in supporting the application. An order was made in *Re Volcanic Reef Co.* (unreported), by Mabee, J., on October 16th, 1906, where all creditors but one were paid and that creditor applied for the order. The writer is not aware of any other case in Ontario when such an order has been made. The following is the form of order made in that case:—

STYLE OF CAUSE.

Upon the petition of, etc., upon reading the affidavit of, etc., and the orders made the 6th day of June, 1905, declaring the said Company insolvent and appointing Provisional Liquidator thereof, and referring it to , Official Referee, to appoint a Permanent Liquidator, and to take all necessary proceedings in connection with the winding up of the Company, and it appearing that there are now no creditors of the said Company other than the Petitioner, , and that the shareholders in meeting duly called for that purpose pursuant to the order of the Court, have determined that in their opinion it is in the interests of the Company that the same should be taken out of liquidation, and have passed upon and accepted the accounts of the Liquidator, and that the Liquidator has duly accounted for all moneys or assets which have come to his hands, and upon hearing what was alleged by Counsel for the Petitioner and for the Liquidator.

1. It is ordered that all proceedings taken under the said orders of this Honourable Court dated the 6th day of June, 1905, be and the same are hereby altogether stayed.

2. And it is further ordered that the said Company be and it is hereby restored to its former status and all the rights, powers and privileges incident thereto, by it enjoyed prior to the making of the said orders dated the 6th of June, 1905.

3. And it is further ordered that the Liquidator do transfer and deliver to the said Company all assets, papers, documents and other the property of the said Company (except original vouchers) that have come to his hands as such Liquidator.

4. And it is further ordered that the said Liquidator be, and he is hereby discharged from his office as Liquidator of the said Company and from all further liability as such Liquidator.

5. And it is further ordered that the bond (if any) given by the said to the Accountant of the Supreme Court of Judicature for the due performance of his duties as such Liquidator, be delivered up to the said and that the same be cancelled and discharged.

20. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up. R.S., c. 129, s. 15.

The liquidator has authority under section 34 subject to the Court's approval, to carry on the company's business.

Note that the company must cease carrying on business only from the time of the making of the order, although under sec-

tion 5 the winding up shall be deemed to commence at the time of the service of the notice of presentation of the petition, *i.e.*, when the order is made, the winding up reverts back to the service of the notice of presentation.

As the corporate state and corporate powers of the company are continued under this section until the completion of the winding up, the powers of the directors do not cease until expressly terminated by the Act. This termination is found in section 32, under which the directors' powers cease upon the appointment of the liquidator. See notes to that section. Until such appointment, the directors' powers exist in full force, except as limited by this Act as in this and the following section.

This section does not invalidate payments made to the company after the winding-up order. *Re Mersey Steel Co.* v. *Naylor*, 9 A.C. 434.

A company when it is actually in winding up is in a moribund condition so that it cannot exercise its powers and capacities; or rather it cannot exercise them in a way which will be inconsistent with the winding up or which will give rise to rights or impose liabilites such as to interfere with the interests of parties, constituted by the actual existence of the winding up. Bryce on Ultra Vires, 3rd ed. 387.

21. All transfers of shares, except transfers made to or with the sanction of the liquidator, under the authority of the Court, and every alteration in the status of the members of the company, after the commencement of such winding up, shall be void. R.S., c. 129, s. 15.

The Court does not encourage dealing in shares after a winding-up order has been made. *Re Cordova Co.* (1891), 2 Ch. 580. 580.

The Court is not disposed to order any registration of a transfer after a winding-up order. *Re Onward Building Society* (1891), 2 Q.B. 463.

The use of the words "after the commencement of such winding up" seems unfortunate as it is almost evident that the provisions of section 5 have been overlooked, by which section the winding up is deemed to commence at the time of the service of the notice of presentation of the petition. The present section

is taken from section 131 of the English Act of 1862 and the wording of this part is not changed.

The question arises whether a transfer of shares made after the service of the notice is void even if the petition is dismissed and the order refused. This section does not refer to the order in any way, but it is submitted that it does not operate unless the order is made, *i.e.*, transfers of shares made after service of the notice are void only if the order is subsequently made upon that petition.

Note that the time named in this section is different from that named in the preceding and the two sections following.

There can be no alteration in the status of the members of the company by the transfer of fully paid shares. *Redfern* v. *Polson, supra.*

22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes. R.S., c. 129, s. 16.

Note that this section does not prohibit proceedings being commenced after the service of the petition; it is only after the making of the order.

It was held by Mulock, C.J., in *Re Kurtz* v. *McLean, Ltd.* (unreported), on January 24th, 1908, that application for leave is properly made to a Judge in Chambers. It is submitted, however, that the Master to whom the winding-up is referred, has at least equal power to hear the application under this section. See section 110.

Leave should be obtained on notice to the liquidator. *Re Western, etc., Co.* v. *Bibby,* 42 L.T. 821.

When a company is being wound up, the proper mode of recovering its assets is by proceeding under the Winding-up Act and not by an action. *Cardiff Coal & Coke* v. *Norton,* L.R. 2 Ch. 405.

In determining whether to give leave or not the Court considers the question of convenience and the special circumstances of the case. *Re St. Cuthbert Lead Co.,* 35 Beav. 384.

To obtain leave to proceed with an action, the applicant must shew such special or unusual circumstances as make it reasonably clear that the matters in question cannot be satisfactorily dealt with by the tribunal specially provided in the winding-up proceedings. *Titterington* v. *Distributors Co.*, 8 O.W.R. 328, *i.e.*, the Master to whom the winding up is referred.

If the claim sought to be enforced can be satisfactorily dealt with in the winding up, other proceedings will be stayed and leave to continue or proceed, refused. *Re Hermann Loog*, 36 C.D. 502; *Re Briton Medical*, 32 C.D. 503; *Re International Pulp*, 3 C.D. 594.

The refusal of the Court to give leave is subject to appeal. *Re McEwan* v. *London, etc., Bank*, 15 W.R. 245, but the appeal will be subject to the provisions of section 101 and the following sections.

Previous to the winding-up order, the company sued a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus.

Held, on the application by the shareholder for leave to proceed in the action, notwithstanding the winding-up order, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim and leave to proceed was accordingly refused. *Re Packenham Pork Packing Co.*, 6 O.L.R. 582.

Where a shareholder has before the commencement of the winding up, brought an action for rescission of contract on the ground of misrepresentation, leave to proceed is generally given. *Re Hall* v. *Old Talargoch, etc.*, 3 C.D. 749.

Except in the case of secured creditors the Court, in giving leave to proceed, generally requires an undertaking not to enforce against the company any judgment obtained, without the leave of the Court; the object in giving leave is to facilitate the ascertainment of the claimant's rights and not to give him priority over the other creditors. *Re McEwan* v. *London, etc., Bank*, 15 W.R. 245.

Where it is desired to commence or continue proceedings against other parties, to which the company is a necessary party, leave will be given. *Re Rio Grande Co.*, 5 C.D. 282.

This section applies to proceedings against assets of the company situated abroad, as well as in this province. See *Re Oriental Inland Co.*, 9 Ch. 557.

And proceedings against the company's property, in a foreign Court will be restrained. *Re Jenkins & Co.*, 51 Sol. J. 715.

The High Court of Justice of Ontario having made an order for the winding up of a company, there is jurisdiction in that Court to restrain an action commenced in a Quebec Court against the company. The Court in such case acts as a Federal Court and a Provincial Court cannot interfere with its proceedings. *Baxter* v. *Central Bank of Canada*, 20 O.R. 214.

But the Court will not grant such an order until evidence is produced shewing that the foreign Court has been advised of the winding-up proceedings and has itself refused to stay the proceedings pending before it. *Re Canada Cork Co.*, an unreported decision of Meredith, C.J., made in 1905.

Where goods were sold to a company before the winding up under a lien agreement (no property passing until payment in full) and the liquidator refused to give up the goods to the vendors, leave was refused the vendors to bring an action against the liquidator for the recovery of the goods; they were directed to proceed under section 133. *Re Kurtz* v. *McLean*, *supra*.

Where a plaintiff obtains leave to proceed and afterwards discontinues the action, he is not debarred from claiming in winding up. *Re the Ardandhu*, 12 A.C. 256.

A creditor who proceeds without leave will be ordered to pay the costs even if, on an application to stay the proceedings, the Court gives leave to proceed. *Re Wanzer Limited* (1891), 1 Ch. 305.

A judgment obtained against a company subsequent to the making of a winding-up order has no force or effect and in fact is absolutely null and void. *Quære* whether an order vacating

such a judgment is necessary. *Keating* v. *Graham*, 26 O.R. 361, at p. 370. See notes to section 23.

After an order had been obtained winding up a foreign company doing business in Ontario, P., a resident of Ontario, brought an action against the company in the State of Michigan with a view of attaching a steamer wintering there which was the property of the company. It was shewn that representations that the company was perfectly solvent had been made by both the secretary and managing director to P. and P. swore that but for these representations he would have taken proceedings before he did which might have enabled him to obtain a judgment before the winding-up order was made. In an action for an injunction to restrain P. from proceeding with his action in Michigan, in which it was shewn that other creditors of the company who were residents of the United States and so not within the jurisdiction of the Court were also proceeding against the steamer, it was held that this case could not be distinguished in principle from *Ex parte Railway Steel and Plant Company, In re Taylor*, 8 Chy. Div. 183, and the Court declined to continue the injunction. It was stated that when the postponement of proceedings in an action is made in pursuance of a request made on behalf of the company for time the creditor was entitled to the benefit of his judgment in priority to other creditors and that the section 20 of 45 V., c. 23 (D.) (section 22 of the present Act) does not make the action absolutely void, but leaves discretion in the Court and under circumstances such as in this case the creditor was entitled to be preferred. *Re Lake Superior Native Copper Co.*, 9 O.R. 277.

It is very doubtful if this case is now good law, although it does not appear to have been expressly overruled. See *Keating* v. *Graham*, 26 O.R. 361, at p. 370. It is submitted that now in no case would such a creditor be given any preference whatever having in view sections 22, 23, 84 and in fact the whole policy of the act which is to provide a rateable distribution of the company's assets among all creditors.

Leave was given in Manitoba to a servant of the company to sue the company for wages so that he would be able to sue the

directors under section 276 of the Manitoba Companies Act after a return of *nulla bona* was made. *Re Lake Winnipeg*, 7 W.L.R. 602. It is submitted that the same leave will be given here so as to enable a servant of the company to comply with section 94 of the Ontario Companies Act.

A secured creditor will not be restrained from enforcing his security. *Re Lloyd* v. *Lloyd*, 6 C.D. 339.

See *Currie* v. *Consolidated Kent Collieries* (1906), 1 K.B. 134.

As to the rights of secured creditors see notes to section 76 and the following sections.

ORDER GIVING LEAVE TO PROCEED.

STYLE OF CAUSE, ETC.

Upon the application of A., the Plaintiff in an action against the above named which action was commenced on 19 , upon reading, etc. (and the applicant by his counsel undertaking not to proceed to enforce any judgment he may obtain against the said Company therein without obtaining the previous leave of the Court, or the Master in Ordinary, (*or, as the case may be*) to whom the winding up of the above Company has been referred).

It is ordered that the applicant shall be at liberty to proceed with the said action against the Company, notwithstanding the winding-up order made herein the day of 19 , and that he shall prosecute the same diligently to judgment.

And it is further ordered that the costs of the Liquidator of this application be costs in the winding up.

The words in brackets are usually included in orders made under the English Act and it is submitted should be included here in order that some control may be retained over the proceedings. The Court may impose such terms as it thinks fit, by virtue of the section.

For various forms in special cases see Palmer's Precedents, 8th ed., vol. 2, pp. 373 *et seq.*

23. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. R.S., c. 129, s. 17.

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

ings at law. *Clarke* v. *Union Fire Insurance Co., Caston's Case,* 10 P.R. 339.

Unless monies levied under any attachment or other process or proceeding are actually paid over to the plaintiff before the winding up commences, *i.e.*, the service of the notice of presentation of the petition, no lien or privilege whatever is created except for such claim as the law of the province allows for costs. This is by virtue of section 84. See that section and notes.

The wording of that section makes it evident that "attachment, sequestration and execution" mentioned in this section are included therein. Consequently such an attachment, etc., is void if "put in force" after the making of the order, and if put in force before the making of the order it is of no effect unless the monies levied or received have been paid over to the plaintiff before the commencement of the winding-up proceedings.

It is submitted that "distress" is not included in section 84, which seems to apply only to judicial proceedings. A distress is not a judicial proceeding; see Bell on Landlord and Tenant, p. 250. For notes on distress see subject "Rent," *infra.*

If the sheriff is in possession before the commencement of the winding up, the execution has been "put in force" before, not after, the commencement of the winding up. *Re London and Devon,* 12 Eq. 190.

If the execution has been so put in force, and the execution creditor attempts to evade the provisions of section 84, the liquidator may act under section 22 and obtain an order restraining him, as, *e.g.*, a sale is a proceeding within that section. *Re Printing, etc., Co.,* 8 C.D. 535; *Re Taylor,* 8 C.D. 183.

An execution is "put in force" when the sheriff seizes; an attachment, *e.g.*, of a debt by a garnishee order, is "put in force" when the order *nisi* is served. *Re Stanhope,* 11 C.D. 161.

Rent.

A landlord's claim to be paid preferentially for overdue rent which had accrued prior to the service of the winding-up petition and for which no distress has been made is invalid by virtue of sections 5 and 84 of the Act.

An undertaking by a provisional liquidator to pay such a claim is by sections 22 and 23 void, unless the permission of the Court is first obtained. *Fuches* v. *Hamilton Tribune*, 10 P.R. 497.

If the landlord has distrained, before the making of the winding-up order, upon the goods of the company for rent properly due, it is submitted that he becomes entitled to a preferred claim for the full amount due because this section invalidates only a distress put in force after making of the winding-up order. If the bailiff has been in possession of the goods before the making of the winding-up order, the distress has been "put in force" under the section.

See *London & Devon Biscuit Co.*, 12 Eq. 190; *Re Great Ship Co.*, 4 D. J. & S. 63.

And it is submitted that section 84 applies only to judicial proceedings. See that section and notes.

But it would appear that a sale is a "proceeding" under section 22 and could not be proceeded with except by leave of the Court. See *Re Printing, etc., Co.*, 8 C.D. 535; *Re Taylor*, 8 C.D. 183.

And that the Court would restrain the sale and direct the landlord to hand over the goods seized to the liquidator, but upon the terms that the liquidator should pay his claim in full.

The case of *Fuches* v. *Hamilton Tribune, supra*, would appear to be contrary to this contention. See that case.

After the making of the winding-up order the landlord will be restrained from making any distress in respect of rent accrued before the commencement of the winding up. *Re Oak Pitts Colliery Co.*, 21 C.D. 322.

The landlord is entitled to be paid in full his rent for the premises subsequent to the date of the winding-up order, if the liquidator has retained possession, for the rent is then considered to be one of the expenses of the winding up and must be paid in full like any other debt properly incurred by the liquidator. *Re Lundy Granite Co.* (1871), 6 Ch. 462; *Re Brown* (1881), 18 C.D. 649.

And of the liquidator refuses to pay this rent, the landlord may apply for liberty to distrain and the Court will give him such liberty or direct the payment of the rent in full, where it is shewn that possession has been retained for the benefit of the winding up. *Re Lundy Granite Co., supra; Re North Yorkshire Iron Co.*, 7 C.D. 661.

The landlord will not be restrained from distraining where by reason of encumbrances the liquidator has no interest in the chattels. *Re New City Constitutional Club*, 34 C.D. 646.

When there is no privity between the company and the landlord (*e.g.*, the company being sub-lessee) and the landlord accordingly has no right to prove against the company; the landlord will not be restrained from making distress on the company's goods. *Re Lundy Granite Co., supra.*

A landlord who cannot distrain, or who has been restrained from so doing, may prove for his debt like any other ordinary creditor. *Re Thomas* v. *Lionite*, 17 C.D. 257.

If rent is due at the date of the winding-up order, and the liquidator retains possession of the property the landlord, in a proper case, and in accordance with the principles above given, may distrain for the rent due subsequent to the winding-up order, but not for that rent due prior to the winding-up order. *Re South Kensington* (1881), 17 C.D. 161.

Taxes.

The right to prove a claim for taxes against a company in liquidation depends upon the right to maintain an action therefor, which right only exists when the taxes cannot be recovered in any special manner provided by the Assessment Act, as *e.g.*, a distress or sale of land. Where, therefore, a claim was made for arrears of taxes against a company in liquidation and it was shewn that before the date of the winding-up order the taxes might have been, but were not, recovered by distress the claim was disallowed. *Re Ottawa Porcelain Co.*, 31 O.R. 679.

There is nothing in this Act or the Assessment Act making taxes a preferred claim in a winding up. The municipal cor-

poration must rank for its claim, for taxes due at the winding up, as an ordinary creditor in accordance with the provisions of section 69. See that section and notes.

See *Re Dry Docks Co.*, 39 C.D. 306.

But see 4 Edw. VII. (Ont.), c. 23, s. 103, s.-s. 3, which is confined to orders made under the Ontario Winding-up Act. *Re Ottawa Porcelain Co.*, 31 O.R. 679 at 690.

It is submitted that subject to the foregoing claims for taxes are governed by the same rules as apply to claims for rent. See above.

The Court will restrain a distress for taxes made after the winding up. *Re Dry Docks Co., supra; Re Blazer Fire Lighter* (1895), 1 Ch. 403.

If the municipal corporation has distrained for taxes before the making of the winding-up order, and is in possession of the goods at the date of the order, it is submitted that the Court will not order the delivery over of the property to the liquidator without payment in full of the amount due, or at least an undertaking to do so because such a distress is not within the terms of the above section, and section 84 seems to apply only to judicial proceedings.

But after the making of the order the company's property cannot be sold for taxes.

School Commissioners v. *Montreal Abattoir*, 3 M.L.R. (Q.B.) 116.

Such sale would be a "proceeding" under section 22.

Where a liquidator retains property with a view to selling, the taxes falling due subsequent to the date of the winding-up order should be paid in full as one of the expenses of the winding up. *Re National Arms*, 28 C.D. 474; *Re International Marine*, 28 C.D. 470.

But no order for such payment will be made unless the liquidator's possession has been beneficial. *Re Watson*, 23 C.D. 500; *Re Blazier Fire Lighter* (1895), 1 Ch. 403.

24. The Court in making the winding-up order may appoint a liquidator or more than one liquidator of the estate and effects of the company. R.S., c. 129, s. 20.

Formerly this section read "The Court in making a winding-up order must appoint a liquidator," etc. It was held in *Shoolbred* v. *Union Fire*, 14 S.C.R. 624, that the Court could not delegate this duty and that further the liquidator could not be appointed without notice to the creditors and shareholders. The result was that no winding-up order could be made without first notifying the creditors and shareholders since the liquidator had to be appointed by the winding-up order and he could not be appointed without such notice. The section, however, was amended by 47 V., c. 39, s. 4, the word "may" being substituted for "must" and retained in that manner in the revision of 1886, as section 20. In the last revision section 20 has been split up and included in sections 24, 27 and 39, but the wording is substantially the same, and "may appoint" is retained. If, however, the Court desires to appoint the liquidator at the same time as making the winding-up order, the notice must be given as prescribed. Under section 29 the Court has power to appoint a provisional liquidator and the invariable practice now is for the Court to appoint a provisional liquidator under that section at the same time as the winding-up order is made, but by a separate order and refer the appointment of permanent liquidator to a Master who makes such appointment after proper notice to the creditors and contributories, the provisional liquidator remaining in possession, and doing all necessary acts in the meantime. This practice was commended by Patterson, J., in *Shoolbred* v. *Clark*, 17 S.C.R., at p. 272. See notes and forms under section 14 (*supra*).

This is because the Court has power, after the winding-up order has been made to delegate its powers (see section 110), and as the proceedings are analogous to administration proceedings they can be carried on much better in the Master's office.

At the same time as an order was made for the winding up of a company, an order was also made, upon the application of the petitioners and upon the consent of the company's counsel, appointing the local manager of a bank, which was the largest creditor of the insolvent company, permanent liquidator upon

his giving proper security. The order was subsequently varied on the application of three shareholders declaring him to be a provisional liquidator only and directing a reference of the local Master to appoint a permanent liquidator. It was held that unless section 27 is complied with it is a substantial objection to the appointment of the liquidator. *Re Guelph Linseed Oil*, 2 O.W.R. 1151. See notes to section 27.

25. If more than one liquidator is appointed the Court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators. R.S., c. 129, s. 23.

If more than one liquidator is appointed, and no order made under this section, it is not proper for one of them to delegate duties or powers to another. They should act in conjunction and give the estate the benefit of their joint judgment and discretion in all matters pertaining to their office. If any exigency arises, or it is found impossible to act in conjunction, the Court may exercise its jurisdiction under this section, upon an application for that purpose. *Re Central Bank*, 15 O.R. 309.

Where more than one liquidator is appointed it is well to have included in the order appointing them an order defining their separate powers.

Where several liquidators are to be appointed and there is a difference of opinion as to who should be appointed, the test laid down by the English Judges is sound in principle and should be followed, *i.e.*, the choice should be given to the nominees of those who will have the benefit and immediate concern in realizing the assets. *Central Bank*, 15 O.R. 309.

This rule applies equally well to the appointment of a single liquidator.

See notes to section 27.

26. The Court may, if it thinks fit, after the appointment of one or more liquidators, appoint an additional liquidator or liquidators. R.S., c. 129, s. 22.

The words "an," "liquidator" and "or" in the second line of this section are new.

See notes to sections 25 and 27.

27. No liquidator aforesaid shall be appointed unless a previous notice is given to the creditors, contributories and shareholders or members; and the Court shall by order direct the manner and form in which such notice shall be given and the length of such notice. R.S., c. 129, s. 20.

As stated in the notes to section 24, the practice is for the Court on making the winding-up order to appoint a provisional liquidator under section 29 and to delegate its powers under section 110 to a Master or official referee to appoint a permanent liquidator, and to generally supervise the conduct of the winding up. No notice to creditors or contributories is required before making the appointment of provisional liquidator (see section 29). He is appointed by an order supplementary to and at the same time as the winding-up order, notice of which application has of course been given to the company under the provisions of section 13.

It is usual for the Court to appoint the petitioner's nominee as provisional liquidator and leaving any contest in respect to the appointment to be fought out before the Master on the appointment of the permanent liquidator. This was stated to be the proper practice by Boyd, C., on a petition to wind up The Stark T. L. & P. Company in November, 1907 (unreported). If there has been an assignment for the benefit of creditors, the assignee is generally appointed provisional liquidator.

For the form of order appointing provisional liquidator see *supra*, page 376.

When the order of reference is brought in to the Master he names a day for the appointment of the permanent liquidator, and directs notice of this appointment to be served upon the persons named in this section usually by advertising in one or two newspapers which are most likely to reach the parties, and by mailing copies to such of these persons as are known to the liquidator, *e.g.*, as shewn in the company's books. Personal service is rarely required. The day named is usually ten days or two weeks from the date of the first advertisement, the time, of course, varying according to the circumstances of each case. The manner and time of service is left by this section to the discretion of the Court (which means the Master, if an order of refer-

ence under section 110 has been made) and the rule is to follow the practice in administration proceedings. For a form of notice of appointment of permanent liquidator see *infra* page 402.

Upon the return of the appointment, the provisional liquidator files an affidavit proving the publication and service of the notice in the manner directed by the Master.

Unless the provisions of this section are observed, it is a substantial objection to the appointment of the permanent liquidator. *Re Guelph Linseed Oil,* 2 O.W.R. 1151; *Shoolbred* v. *Union Fire,* 14 S.C.R. 624.

The following are some of the principles laid down by the Court for the appointment of liquidators:—

The test laid down by the English Judges is sound in principal and should be followed, *i.e.,* the choice should be given to the nominee of those who will have the benefit and have the immediate concern in the realization of the assets. *Re Central Bank,* 15 O.R. 309.

It is desirable that the liquidator should be a disinterested person and for this reason neither creditors nor shareholders should be appointed. *In re Northumberland, etc.,* 2 DeG. & J. 357.

It is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The Court abstains from laying down any such rule as that the nominee of the petitioning creditor should have a preference. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation and other things being equal will act upon their recommendation. *Re Alpha Oil Co.,* 12 P.R. 298.

Where the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff, and opposed the nominee of the petitioning creditors, and the sheriff who resided in the county where the company's operations were carried on, and where all its books and assets were, was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was other-

wise well qualified for the position the Court appointed him liquidator. The rule as to costs suggested in *Re North Assam Tea Co.*, 5 Ch. 664, followed. *Ib.*

In no case will the Court award the costs of a contest respecting the appointment of a liquidator. *Re Commercial Bank*, 13 C.L.T. 381.

It is submitted that a creditor or shareholder will not be appointed merely because he is willing to act gratis. See *Re Civil Service* (1884), W.N. 158.

The Court has a discretion in the appointment and is not bound to accept the nominee of the creditors and contributories. *Re Northern Assam.*, 5 Ch. 644; *Re International Contract*, 1 Ch. 523.

Where a proposed liquidator of a bank was formerly an official of the bank and was largely indebted to it, although the debt was claimed to be fully secured, it was held that the objections to his appointment were serious and substantial. *Re Commercial Bank*, 9 M.L.R. 342.

Other things being equal the Court will generally appoint the petitioner's nominee. *Re Albert*, 5 Ch. 597.

Where a voluntary winding up (or an assignment for benefit of creditors) is superseded by a winding up under this Act the voluntary liquidator (or assignee) is usually appointed permanent liquidator. *Re London*, 15 W.R. 33.

But the Court is not bound to appoint any particular person although the wishes of those chiefly interested are usually regarded. *Re Northern Assam., supra.*

An appeal lies from the order of the Master appointing a permanent liquidator to a Judge in Court (as does an appeal from any other order made by him in the winding-up proceedings) on the general principle that when the Court has delegated to a subordinate tribunal any of its powers a right of appeal always exists from such tribunal to the Court itself. *Markle* v. *Ross*, 13 P.R. 135.

Further appeals are governed by section 101 *et seq.* It is submitted that the appointment of liquidator would fall within

section 101(*a*), but it has been held in England that the Court of Appeal will not interfere with the discretion of the Judge (*semble*, the Master) in the appointment of liquidator. *Re International Contract*, 1 Ch. 523; *Re Albert*, 5 Ch. 597.

NOTICE OF APPOINTMENT OF PERMANENT LIQUIDATOR.

Judicial notice to creditors, contributories, shareholders and members of Company, Limited.

STYLE OF CAUSE.

Pursuant to the winding-up order in the matter of the above Company dated the day of 19 , the undersigned will on the day of 19 , at o'clock in the noon at his Chambers (at Osgoode Hall in the City of Toronto, *or, as the case may be*) appoint a Permanent Liquidator of the above Company and let all parties then attend.

Dated, etc.

Signed

Master in Ordinary.
(*or, as the case may be.*)

ORDER APPOINTING PERMANENT LIQUIDATOR.

STYLE OF CAUSE.

Upon the application of , the Petitioning Creditor (*or, shareholder*) (upon reading the report of the result of the meetings of Creditors, etc., held respectively on the, etc.; *if meetings are held under section* 61), upon reading the affidavit, etc. (*proving publication, etc., of notice*) and upon hearing what was alleged on behalf of all parties:

1. It is ordered that of be appointed Liquidator of the above named Company upon his giving security to the amount of $ for the due performance of his duties as such Liquidator.

2. And it is further ordered that the said Liquidator do deposit at interest in the Bank of at all sums of money coming into his hand belonging to the said Company whenever and so often as such sums amount to $100, pursuant to the Statute in that behalf.

3. And it is further ordered that the costs of and incidental to this application be costs in the winding up.

28. The Court shall also determine what security shall be given by a liquidator on his appointment. R.S., c. 129, s. 24.

It is competent for the Court to refer it to the Master to decide upon the security to be given by the liquidator. *Schoolbred* v. *Clarke; Re Union Insurance Co.*, 17 S.C.R. 265.

No rules or special forms have been adopted in Ontario in respect to security to be given by liquidators, but the practice in administration matters is followed as is the case with practically all proceedings in the Master's office in the course of the winding up. In order that the Master may be in a position to determine the proper amount of security, one of the first duties of the provisional liquidator is to bring in an affidavit setting out the assets which have come to his hands, and their value. See form *infra.* The Master then fixes the security to be given by the liquidator which is usually twice the amount of the assets. Usually the security is given by a bond made by the liquidator and a guarantee company, which company has been approved by Order in Council under 62 V. (2) Ont. C. 12. In such case no additional surety, and no affidavit of justification is required. See the above statute. If the security is given by any other persons, the usual affidavits of justification must be made. Note section 30 (2).

A form of bond which is in common use is given *infra.* Sometimes no bond is filed for provisional liquidator, but it is usual to file a bond in the form below so as to cover the case of the provisional liquidator being appointed permanent liquidator and thus saving the expense of two bonds.

The cost of furnishing security by the liquidator is borne by him personally and cannot be charged against the assets of the company as an expense incurred in the winding up.

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

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

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

Held, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court.

In re Army & Navy Clothing Company of Toronto, Limited, 3 O.L.R. 37.

See also *Re Birmingham*, 52 L.J. Ch. 358.

AFFIDAVIT OF VALUE OF ASSETS.

STYLE OF CAUSE.

I, etc.

1. I am the Provisional Liquidator of the above named Company.

2. I have made an examination of the books, stock sheets and the assets of the said Company, which have come into my hands as such Provisional Liquidator.

3. The said assets and their value as nearly as I can now ascertain and compute the same, are as follows:—

Real estate, value	$10,000	
Less mortgage	5,000	$5,000
Plant and machinery, value	$8,000	
Less machinery held on lien	5,000	$3,000
Stock-in-trade		$15,000
Tools and fixtures		500
Book debts	4,000	
(All assigned to bank.)		
Total		$23,500

(Set out under general headings any further assets there may be.)

4. The liabilities of the said Company are, so far as I can ascertain at the present time $30,000.

Sworn, etc.

LIQUIDATOR'S BOND.

Know all men by these presents that we (Liquidator and Guarantee Company) are severally held and firmly bound unto the Accountant of the Supreme Court of Judicature for Ontario, his successors and assigns, each in the penal sum of dollars, to be paid to the said Accountant, his successors and assigns, for which payment well and truly to be made I, the said (Liquidator) bind myself, my heirs, executors, administrators and assigns, and we the said (Guarantee Company) bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this day of 19 .

Whereas by an order made by the High Court of Justice and dated the day of 19 , and made in the matter of Company, Limited, it was ordered and adjudged that the said Company, Limited, was insolvent, and should be wound up pursuant to the provisions of the Dominion Winding-up Act and Amending Acts.

And whereas by a further order made by the High Court of Justice in the same matter, and bearing date the day of 19 , it was ordered that the said should be Provisional Liquidator of the estate and effects of the said Company, and it was referred to the said Master to appoint a fit and proper person or persons to be liquidator, or liquidators of the said Company, such liquidator or liquidators first giving security to the satisfaction of the said Master before he or they shall in any wise intermeddle with the property of the Company.

And whereas the said Master has appointed the day of 19 , for the appointment of a Permanent Liquidator of the estate and effects of the said Company.

And whereas the said Master has approved of the above bounden (Guarantee Company) as sureties and has also approved of the above written obligation with the underwritten conditions as a proper security to be entered into by the said (Liquidator) pursuant to the said order as his security as said Provisional Liquidator and as Permanent Liquidator of the said Company (in case he shall be appointed as such) and in testimony whereof has signed an allowance in the margin hereof.

Now the conditions of the above obligation is such that if the above bounden (Liquidator) his executors or administrators or any of them do and shall duly and regularly keep and render all accounts which pursuant to the said Acts or any Act of the Parliament of Canada, and pursuant to the rules of the said Court in that behalf ought to be kept and rendered by him as Provisional Liquidator of the said Company, and as Permanent Liquidator of the said Company (in case he shall be appointed as such) and shall account for and duly and regularly pay over all and every such sum or sums of money as shall come into his hands on account of his holding either of the said offices at such periods and in such manner as in the said Act or Acts or Rules is directed or as the Court or the said Master shall from time to time direct, and shall also in all other respects faithfully fulfil, perform, and discharge all the duties of his said office and duly perform the trust reposed in him in respect thereof as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) and shall in all things observe and perform the orders and directions of the said Court touching or concerning the property of the said Company and winding up thereof, then the above obligation shall be void; otherwise the same shall remain in full force and virtue.

And it is understood and agreed between the parties hereto and particularly by the said sureties, their successors and assigns, that a certificate under the hand of the said Master of the amount for which the said

(Liquidator) is liable as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) shall be sufficient evidence against him, his executors, and administrators and against the said (Guarantee Company), their successors and assigns, and all other parties of the liabilities and indebtedness, of the said (Liquidator) as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) to the amount of the sum stated in the said certificate, and shall form a valid and binding charge and claim not only against the said (Liquidator) as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) his executors, administrators and assigns, but also against the said sureties, their successors and assigns, and the funds and property thereof, without it being necessary for the said Accountant, his successors and assigns to first take legal or other proceedings for the ascertainment thereof, and without any further or other proof being given or any action, suit or other proceedings taken to enforce this bond as against the said (Liquidator) or (Guarantee Company) or either of them; provided always that in taking and allowing the accounts of the said liquidator as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) sufficient notice of the times and places when and where the said accounts of the said (Liquidator) as such Provisional Liquidator or Permanent Liquidator (in case he shall be appointed as such) are to be taken and allowed is to be given to the said (Guarantee Company).

In witness whereof the parties hereto have hereunto set their hands and seals this day of 19 .

Signed, Sealed and Delivered
In the presence of

If separate bonds are drawn for provisional liquidator and permanent liquidator the above form can be amended accordingly. In the case of a bond for permanent liquidator only, substitute for the recital in the above form, setting out the day named for appointment of permanent liquidator the following:—

And whereas the said Master after due notice to the creditors and contributories of the said Company has appointed the above named as Permanent Liquidator of the above Company, subject to his giving security to the amount above specified.

29. The Court may on the presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him. R.S., c. 129, s. 26; 52 V., c. 32, s. 12.

See notes to sections 24 and 27. As stated above the invariable practice now is to appoint a provisional liquidator by an order made at the same time as the winding-up order, and the permanent liquidator is appointed on the reference to the Master. The Act requires no notice of the appointment of provisional liquidator to be given to creditors or contributories, whereas notice of the appointment of a permanent liquidator must be given. It is probable that it is for this reason that the practice outlined is followed.

It is not usual to embrace in the order of reference any restrictions upon the powers of the provisional liquidator. All that the provisional liquidator does is to bring the liquidation to the attention of the Master, take possession of the property of the company and continue in possession, take stock of the company's properties and examine the company's books in order that he may submit to the Master and interested persons present a report on the position of the company's affairs at the time of the appointment of the permanent liquidator. It is submitted that a provisional liquidator has not power, for instance, to make a sale of any of the company's properties unless specific authority so to do is given in the order. This was done in *Re Guelph Linseed Oil Co.*, 2 O.W.R. 1151.

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

The provisional liquidator is also required to file and give security for the due performance of his duties. The amount of the bond being fixed through the statement of the assets of the company, which the liquidator submits under oath to the Master for this purpose. See notes to section 28.

Meetings of creditors and contributories, etc., are called by the Court and not by the provisional liquidator. See section 61.

30. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the Court. R.S., c. 129, s. 21.

(2) Where under the laws of any province a trust company is accepted by the Courts of such province, and is permitted to act, as administrator, assignee or curator without giving security such trust company may be appointed liquidator of a company under this Act without giving security. 6-7 Edw. VII., c. 51, s. 2.

Sub-section (2) was added in 1907.

31. Upon the appointment of the liquidator all the powers of the directors shall cease, except in so far as the Court or the liquidator sanctions the continuance of such powers. R.S., c. 129, s. 34.

Note also section 20.

Note that nothing is said as to the powers of the company's officers. But as under section 20 the company must cease, on the making of the order to carry on business, it is submitted that no contract could be made after that date which would be binding on the company unless made by the liquidator under the powers given him by the Act, or *semble*, with his approval. Note that the directors' powers do not cease until the appointment of the liquidator. There is no decision on the point as to whether this applies to the appointment of provisional liquidator. It is submitted, however, that as the whole scheme of the Act is to place the control of the company in the Court or the liquidator from the date of the winding-up order, no Act of the directors would be held valid if done after the appointment of provisional liquidator.

It is, perhaps, of little importance, however, in view of sections 20 and 21.

If the powers of directors are not continued under this section, a sale of the assets to one or more of them by the liquidator is valid as their fiduciary relations to the company or its shareholders have come to an end. *Re Chatham National Bank* v. *McKeen*, 24 S.C.R. 348.

32. A liquidator may resign or may be removed by the Court on due cause shewn, and every vacancy in the office of liquidator shall be filled by the Court. R.S., c. 129, s. 27.

The words "on due cause shewn" as a general rule "point to some unfitness of the person—it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up—some unfitness in the wide

sense of the term." *Per* Jessel, M.R., in *Sir John Moore Gold Co.*, 12 C.D. 325.

The liquidator may be removed whenever it is for the interests of the liquidation. *Re Adam Eyton*, 36 C.D. 299.

In re Oxford Building Society, 49 L.T. 495, it is stated that where all the creditors desired the liquidator's removal, that would be "due cause shewn."

An experienced liquidator will not be removed merely because a creditor is willing to act *gratis*. *Re Civil Service* (1884), W.N. 158.

It is not necessary to prove fraud to have the liquidator removed. *Ex parte Newitt*, 14 Q.B.D. 177.

The liquidator may appeal from the order removing him. *Re Adam Eyton*, 36 C.D. 299.

This section probably applies to a provisional as well as a permanent liquidator, but the point is doubtful.

Where the liquidators of a colliery company sold the colliery to a new company in which they took shares, it was held that they must be removed from office. *Re Devonshire* (1878), W.N. 71.

It is to be noted that there is no provision in the Act vesting the company's assets in the liquidator. This section merely places all of the company's assets in his custody, and the following section gives him power to sell them.

It is submitted that the liquidator, accordingly, cannot in any way be regarded as a purchaser of the assets so as to be able, for instance, under the Chattel Mortgage Act, to dispute the validity of a chattel mortgage for want of registration. See *Re Rainy Lake Lumber Co.*, 15 A.R. 749. Under the English Act, in the case of an unregistered company, the Courts, in certain cases, may make an order vesting the property of such company in the liquidator. See Companies Act of 1862, section 203.

The assets of the company, however, being placed in the liquidator's possession by the Act, it is submitted that any interference in the possession of the liquidator is a contempt of

Court, and may be punished by committal. Such interference, undoubtedly, may be restrained by injunction. See Oswald on Contempt, 2nd ed., page 77.

The proper course for a person who considers himself wronged or impeded by the possession of the liquidator, is to apply to the Court. *Re Henry Pound*, 42 C.D. 402.

Where a person is in possession of a lien or security on any of the company's assets such lien will not be disturbed without his consent. *Re Capital Fire*, 24 C.D. 408. See also *Re Hawes* (1898), 2 Ch. 1.

There can, however, be no lien on the register of shareholders or book or other books or documents required by the Companies Act to be kept, and where the Act requires the books to be kept at a particular place this may prevent a lien from arising. *Re Hawes, supra.*

As to a solicitors' lien. See *Re Taylor et al.* (1891), 1 Ch. 590.

The liquidator represents all classes of creditors in the winding-up. *Re Farmers Loan and Savings Co.*, 2 O.W.R. 854.

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the Court or by this Act. R.S., c. 129, c. 30.

Creditors may have a claim in damages against the liquidator personally for breach of his statutory duties, if he has not used proper diligence to protect their claims before the company has been dissolved and they have thus lost their remedy against it. *Pulsford* v. *Devinish* (1903), 2 Ch. 625.

The E. Company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof, which were put in the name of the defendants, a trust company, with them for safe keeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold same in their safe deposit vaults to the order

of the loan company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. Company, the remuneration of the trust company also being provided for. 375 of the shares had been acquired by the E. Company under an agreement with another company, the A. Loan Company, which had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendants' possession both loan companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. Company, and the L. & W. Trust Company liquidators of the E. Company. After the commencement of the liquidation proceedings the L. & W. Company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to deliver them up, this action was brought for damages for the detention.

Held, that the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62 V. (2) c. 15, s. 1(O.); for, owing to their dual character of trustee of the E. Company and liquidators of the A. Company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. Loan Company, that the whole 525 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery. *The Elgin Loan & Savings Co. et al.* v. *The National Trust Company, Limited*, 10 O.L.R. 41.

34. The liquidator may, with the approval of the Court, and upon such previous notice to the creditors, contributories, shareholders or members as the Court orders:—

(*a*) Bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be;

(*b*) Carry on the business of the company so far as is necessary to the beneficial winding up of the same;

(*c*) Sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels;

(*d*) Do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company;

(*e*) Prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any sum due the company from such contributory, and take and receive dividends in respect of such sum in the matter of the bankruptcy, insolvency or sequestration, as a separate debt due from such contributory and ratably with the other separate creditors;

(*f*) Draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(*g*) Raise upon the security of the assets of the company, from time to time any requisite sum or sums of money; and,

(*h*) Do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets.

2. The drawing, accepting, making or endorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or endorsed by or on behalf of such company in the course of the carrying on of its business.

3. No delivery of the whole or of any part of the assets of the company shall be necessary to give a lien to any person taking security as aforesaid upon the assets of the company. R.S., c. 129, s. 31; 62-63 V., c. 42, s. 3.

It is common practice for an order to be made under section 124, giving liberty to the liquidator to do the things required to be done by him in the course of the winding-up, and particularly those things set out in this section without previous notice to creditors, contributories, etc. See form of order in notes to section 124. Unless this order is made, notice must be given as required by the Act.

Note also, that under section 38, authority may be given to the liquidator to exercise all powers given him by the Act without the sanction or intervention of the Court. This order is

rarely made, as it is much safer for the liquidator to have the protection of a Court order in all things that he does. But see *London* and *Western Trusts Co.* v. *National Trust, supra.*

The general principles upon which the Court acts in giving or refusing leave to the liquidator to do any Act, are stated in *Re Commercial Bank*, 1 Ch. 538, to be as follows:—

1. The Court will check anything that might prejudice the estate.

2. It will not sanction anything that is improper or contrary to the ordinary course of trade.

3. It will exercise its discretion for the benefit of the general body of creditors.

Bringing and Defending Actions, etc.

In practice, it is not necessary for the liquidator to obtain authorization from the Court to recover the company's assets without action. It is necessary, however, if it is desired to bring or defend an action. But see next case.

After a winding-up order has been made, the company (*semble the liquidator*) has power to sue under the statute and if it chooses to run the risk of costs, it would seem it may do so without the sanction of the Court. If an action is brought without the sanction of the Court, the proper course is to take the objection that there is no authority to sue on a motion in Chambers to dismiss on that ground. It is too late to take such an objection at the trial. *Sarnia Agricultural Implement Manufacturing Co.* v. *Hutchinson*, 17 O.R. 676.

For the right of creditors and contributories to obtain leave to sue in the name of the company. See *Re Cape Breton Co.*, 19 Ch.D. 77; *Re Imperial Bank of China*, 1 Ch. 339.

Liquidators are officers of the Court. *Re Central Bank, Henderson's Case*, 17 O.R. 110.

But a liquidator may be guilty of *laches* and thereby lose rights to which he was entitled. *Re National Bank of Wales* (1907), 1 Ch. 582.

Quære, whether he would thereby render himself liable for misfeasance under section 123. See *Re New Zealand Joint Stock Co.*, 23 T.L.R. 238.

The liquidator is an officer of the Court and must act in a perfectly impartial manner. It is his duty to make himself thoroughly acquainted with the affairs of the company; to suppress nothing and to conceal nothing which has come to his knowledge in the course of his investigation which is material to ascertaining the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect. *Re Gooch's Case*, 7 Ch. 207.

The liquidator should not compel litigation which is not necessary thereby wasting the company's assets. *Re General Share and Trust Co.*, 20 C.D. 260.

"The Court of Bankruptcy ought to be as honest as other people." *Per* James, L.J., in *Ex parte James*, 9 Ch. 609. Accordingly, the liquidator was directed to repay money paid to him under a mistake of law. See also *Re Opera* (1891), 3 Ch. 260.

Primâ facie, the liquidator is entitled to be paid out of the assets his costs of all proceedings properly taken or defended by him. *Silver Valley Mines*, 21 C.D. 381. Costs improperly incurred by the liquidator may be disallowed and he may be ordered to pay them personally. *Re Silver Valley Mines*, 17 Q.B.D. 492.

In the case of proceedings between the liquidator and another party, if the other party is successful, he should get his costs. *Re Home Investment Society*, 4 C.D. 167.

The order is generally made that the costs be paid out of the estate and no order is made against the liquidator personally. *Re London Metallurgical Society* (1895), 1 Ch. 758.

In some cases, however, the order is made that the liquidator should pay the costs personally, leaving him to recoup himself out of the assets. *Re W. Powell & Sons* (1896), 1 Ch. 681. In *Re Salsbury, Jones' Case* (1895), 1 Ch. 333, it was laid down by the Court of Appeal that it was not the practice to order the

liquidator to pay the costs personally unless he had done something to make himself personally liable, and that the costs should be made payable out of the estate.

The liquidator may appeal from an order refusing him costs out of the estate. *Re Raynes Park* (1899), 1 Q.B. 961.

Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it. *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.*, 17 P.R. 156.

The liquidator is liable for costs of continuing proceedings which were commenced by the company before the winding-up order. *Re London Drapery Stores* (1898), 2 Ch. 685.

Actions begun before the liquidation should be continued in the name of the company. A fresh action should not be begun. *Ross* v. *Perras*, 5 R.J.Q. 470.

After the action was at issue, an order was made by the Quebec Court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator: *Held*, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter having succeeded upon his claim was entitled to a judgment for his costs both against the company and the liquidator personally. This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets. *Boyd* v. *Dominion Cold Storage Co.*, 17 P.R. 468.

In England there is a rule allowing the defendant to obtain an order requiring the liquidator to give security for costs in

cases where it is not apparent that there are sufficient assets to pay the defendant if he should be successful. There is no such rule, however, in this province.

A shareholder resident out of the jurisdiction intervened for the purpose of expediting the actions of the liquidator during the course of the winding-up. It was held that the referee had power to order security for costs to be given and proceedings stayed until such security was provided for. It was also held that the liquidator was not barred of this right to security by not applying until after the original application of the shareholder had been dismissed and appeals taken; but that the security should be limited to the cost of the appeal. *Sarnia Oil Co.*, 14 P.R. 335.

An order winding up a company having been made in the High Court of Justice of Ontario, an injunction was granted by that Court to restrain proceedings commenced in a Quebec Court against the liquidators for acts done by them as officers of the Court or under the authority thereof or in discharge of their duties as such liquidators. *Baxter* v. *Central Bank of Canada*, 20 O.R., p. 214.

A liquidator is liable in an action to give discovery. *Re Barned's Banking Co.*, L.R. 2 Ch. 350.

It is submitted that when the liquidator brings an action, the adverse party has no right to examine for discovery an officer of the insolvent company.

The liquidator is not the assignee of the chose in action, and the assets are not vested in him by the Act and even if he were, it has been held in *Bank of Toronto* v. *Quebec Fire Ins. Co.*, 18 P.R. 41, that consolidated rule 441, which allows the assignor of a chose in action to be examined for discovery in an action brought by his assignee, does not extend so far as to allow an officer of a corporation, which corporation is the assignor of the chose in action, to be examined. The only other rule upon which an examination could be founded is consolidated rule 440, which states that "A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination."

In a sense, the action is brought for the benefit of the company. In the case of assignments for the benefit of creditors, an examination of the debtor has been allowed in an action by or against his assignee for the benefit of creditors. See *Garland* v. *Clarkson*, 9 O.L.R. 281. But this rule does not, in terms, extend to officers of corporations and by analogy to the decision in *Bank of Toronto* v. *Quebec Fire Insurance Company, supra*, under rule 441, and the decision in *Perrins* v. *Algoma Tube Work Co.*, 8 O.L.R. 634, which holds that consolidated rule 477 does not extend to the examination of officers of foreign corporations, it is submitted that in no case has the adverse party a right to examine an officer of the insolvent corporation in an action brought by the liquidator, in his own name. If the action were brought in the name of the company, it is submitted that the ordinary rights of examination would exist.

Quare, whether the liquidator of a company under the Winding-up Act can object to the want of registration for formal defects in a chattel mortgage as an execution creditor or subsequent mortgagee could do. *Re Rainy Lake Lumber Co.*, 15 A.R. 749.

In *Kent* v. *Blankley* (1896), 19 Q.R.S.C. 255, it was held that the liquidator could bring an action to nullify a payment made by the company to a creditor, who sued the insolvent estate of that company on the ground that the liquidator represents the creditors in respect of bringing actions which belong to creditors themselves. It is submitted, however, that unless the action can be brought under sections 94 to 100, there is no decision or expression of opinion in a decided case which assists one in determining to what extent the liquidator represents and stands in the place of creditors in a liquidation, beyond the fact that the liquidator is to realize the assets to the best advantage and distribute them among the creditors, and take such proceedings on behalf of creditors as are authorized by sections 94 to 100. It is submitted with deference that beyond the powers given under these sections, the liquidator stands on no higher footing than the company and cannot be regarded as a creditor or sub-

sequent purchaser, under the provisions of the Chattel Mortgage Act, Conditional Sales Act, and kindred Acts. In such cases, it is submitted that no greater relief can be given to the liquidator than to the company if it were bringing the action. In cases where it is desired to contest the validity of a chattel mortgage on the ground, for instance, that it has not been filed within the time required by the Act, the better and proper way is to have the action brought by a creditor on behalf of himself and all other creditors of the company, proper leave to bring the action first having been obtained. See *Re Marine Mansions Co.* (1867), 4 Eq. 601, where Page-Wood, V.C., stated at page 610, "The liquidator does not act more for the creditor than he does for the company—I think a liquidator is much more in the position of an ordinary receiver or even of a mortgagor, who has executed a bill of sale than of an execution creditor." The liquidator represents the company, the creditors and the general body of contributories. *Re Joint Stock Discount Co., Sichell's Case*, 3 Ch. 119. In *Knowles* v. *Scott* (1891), 1 Ch. 717, it was held that the assets in the liquidator's hands are to some extent impressed with a trust, but that the liquidator, strictly speaking, is not a trustee for either the creditors or contributories, his true position being an agent for the company. It is, accordingly, held, that in the absence of fraud, etc., the liquidator is not liable in damages to either a creditor or contributory for delay in distributing the estate.

The powers of the liquidator in some cases exceed those of the company. See *Re London Celluloid* (1888), 39 C.D. 190. *Re Sharpe* (1892), 1 Ch. 154.

The liquidator stands in a higher position than receivers appointed on behalf of mortgagees. *British Linen Co.* v. *South American Co.* (1894), 1 Ch. 108.

See also *Re Central Bank, Nasmith's Case*, 16 O.R. 293, at p. 305, and *Re Standard Fire, Caston's Case*, 12 A.R. 486, at p. 495.

The liquidator represents the creditors only because he represents the company, and it is through the company so represented, that the rights of the creditors are to be enforced. *Re*

Bolt and Iron Co., 10 P.R. 437. For forms of orders see *infra*, pages 421 and 422.

Carrying on the Company's Business.

The liquidator should not carry on the business of the company without special leave from the Court. *Re East of England Bank Co.*, 4 Ch. 14.

It cannot be intended that the liquidator should carry on an unsaleable business merely on the chance that he may make profits and thus speculate with the assets. *Re Wreck Recovery Co.*, 15 Ch.D. 353.

Special reasons for carrying on the business should be shewn and particularly that it is for the benefit of the unsecured creditors and that it does not involve an expenditure at their expense for the benefit of the secured creditors. Leave to carry on the business is sometimes given by the winding-up order. *Re General Service Stores*, 64 L.T. 272.

Quære as to the liability of the liquidator under the Workman's Compensation Act when he carries on the business of the company. See *Anglo-Moravian Co.*, 1 C.D. 130; *Graham* v. *Edge*, 20 Q.B.D. 683.

As to the liquidator's liability for the negligence and misconduct of his employees when he is carrying on business, see Boustead on Agents, 175.

For form of order see *infra*, page 422.

Sale of the Assets.

The power to sell the assets of a company is vested in the liquidator and not in the Court, although the liquidator must obtain the approval of the Court as a condition of exercising the power of sale. *In re Canadian Woollen Mills, Limited, Long's Appeal*, 9 O.L.R. 367.

The sale of the assets of a company being wound up under this Act is governed by the ordinary Court practice in sale cases, *i.e.*, first, to have an enquiry whether a sale by auction or by tender or by private contract would be the most advantageous

to the estate and then to offer the property for sale by the mode adopted. Where there is a sale by private contract an affidavit of the actual value of the property should be produced so that such value may be compared with the price offered. *Re Bolt and Iron Co.*, 10 P.R. 437.

A sale by tender was advertised and all bids were to be in on a certain day at 5 o'clock p.m. At that hour only one bid had been received and the referee enlarged the time for the arrival of a train which was late. It was held that the referee had power to enlarge the time in this way. *Re Alger and Sarnia Oil Co.*, 21 O.R. 440, affirmed 19 A.R. 446.

When a sale is advertised by tender (not saying it is to be sold to the highest bidder) it is a proclamation that the owners are ready to receive offers for the purchase. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt. *Spencer* v. *Harding*, L.R. 5 C.P., at p. 564.

While the general rule in the absence of special conditions is that in sales by the Court the highest bid should be accepted, yet the Master is not bound to accept the highest bid, but ought to consider all the circumstances in the same way as an independent owner would in dealing with his own property. *In re Costello's Minors, Ex parte Dillon*, 2 J. & L. 244.

What the Court always looks at in sales made under its authority is to do the most complete justice to those whose property it has ordered to be sold and to obtain for such property the highest price that any one will give for it. It follows, therefore, that unless when to act otherwise would operate unjustly on other parties, the Court will always sell the property to the highest bidder. *Re Sir Thomas Jones Settles' Estates*, 1 Giff., at p. 287.

When a sale by auction is announced "without reserve" this means that the vendor shall not bid, nor any one on his behalf, and that the property shall be sold to the highest bidder whether the sum bid be equivalent to the real value or not. *Warlow* v. *Harrison*, 1 E. & E., at p. 316.

If the powers of the directors are not continued as provided by section 31 of the Act their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator is valid. *Chatham National Bank* v. *McKeen*, 24 S.C.R. 348.

A liquidator cannot purchase the assets. *Silkstone Coal Co.* v. *Eddy* (1900), 1 Ch. 167.

It was held in *Ex parte Gallard*, 4 Manson 52, that a liquidator's partner may purchase the assets on his own account. Such a transaction, however, would be very closely scrutinized by the Courts and would not be allowed to stand unless the utmost good faith prevailed and also, it is submitted that leave of the Court was first obtained.

Quære whether an agreement to purchase the assets of a company at a certain rate on the dollar of the unascertained claims of the creditors of such company would be valid, if it is not expressly provided in the agreement by whom the claims are to be admitted or adjudicated. Although there would be no doubt that the liquidator was intended by the parties to the agreement to determine upon the claims, nevertheless this case would seem to shew that the liquidator must be expressly named in the agreement. *Re Bolt & Iron Company*, 10 P.R. 437.

For forms see *infra*, pages 422 and 423.

Drawing Bills of Exchange.

If several liquidators have been appointed all should concur in drawing, accepting, etc., a bill. It is doubtful if they can authorize one of themselves to do so. *Re Birmingham Banking Co.*, 3 Ch. 651.

ORDER GIVING LEAVE TO SUE.

(Style of cause.)

Upon the application of the liquidator, upon reading his affidavit filed, and upon hearing counsel for the liquidator.

It is ordered that the liquidator be at liberty to institute an action in the High Court of Justice against A. to recover payment of the debt due from A. to the said Company and to proceed to the trial of the said action. The costs of this application to be costs in the winding up.

ORDER GIVING LIBERTY TO DEFEND ACTION.

(Style of cause.)

Upon the application of the liquidator, upon reading his affidavit filed, and the writ of summons issued on the day of 19 , in an action brought by, etc.

It is ordered that the liquidator be at liberty on behalf of the said Company to take all necessary and proper proceedings as he may be advised by way of defence to the said action and to proceed to the trial thereof. The costs of this application to be costs in the winding up.

ORDER GIVING LEAVE TO CARRY ON BUSINESS.

(Style of cause.)

Upon the application of the liquidator, upon reading his affidavit filed, and upon hearing the solicitor for the liquidator.

1. It is ordered that the liquidator do carry on the works and business of the above named Company for the space of three months from the date of this order and for the purpose of carrying on such business the liquidator shall be at liberty to pay the salaries of workmen and any other necessary expenses for the proper carrying on of the said business, and to execute orders already received and use up the stock of raw materials now in his possession and to make such purchases of goods as may be proper in the ordinary course of business for cash, and from time to time to make such sales of the effects of the said Company as may be necessary or proper in the ordinary course of business.

2. And it is further ordered that the liquidator do, until further notice, render accounts of the said business, so to be carried on, by him as aforesaid, once a month commencing on the 1st day of .

3. And it is further ordered that the costs of this application be costs in the winding up.

ORDER GIVING LIBERTY TO SELL.

(Style of cause.)

Upon the application of the liquidator, upon reading his affidavit filed, and upon hearing the solicitor for the liquidator.

It is ordered that the said liquidator be at liberty to sell with the approval of the Court all the assets real and personal, effects and choses of action of the above Company by tender (or by auction or private sale, as the case may be).

And it is further ordered that the costs of this application be costs to the liquidator in the winding up.

(NOTE.—It is usual for the Master to merely make a direction for sale and the order is rarely taken out.)

ADVERTISEMENT FOR SALE.

Judicial sale of assets of the Company, Limited.

Tenders will be received addressed to the Master-in-Ordinary, Osgoode Hall, Toronto, and marked "Tender, Re Company, Limited," up to four o'clock p.m., of the day of next for the purchase of the assets of the above named Company. Such tenders shall be for the following separate parcels:—

1. Manufactured goods consisting of stock of, etc.
2. Raw materials and goods in the course of manufacture.
3. Machinery and plant.
4. Office furniture and fixtures.
5. The freehold property situate at Street Number in the City of Toronto, and containing lots according to plan registered in the Registry Office for the Division of the City of Toronto.

The following buildings are situate upon the said land (describing them).

The stock sheet and detailed schedule of assets can be examined at the office of , the liquidator, , and the stock-in-trade, machinery, fixtures, etc., may be inspected upon application to him.

Parcel number five will be sold subject to a certain registered mortgage under which is payable the sum of and interest thereon at the rate of per annum from the day of .

Terms of sale:—25 per cent. in cash and the balance in two and four weeks, secured to the satisfaction of the liquidator.

A marked cheque payable to the liquidator for 10 per cent. of the amount of the tender must accompany each tender which will be returned if the tender is not accepted.

The tenders will be opened by the Master-in-Ordinary at his Chambers, Osgoode Hall, Toronto on the day of next at the hour of eleven o'clock a.m. and all who tender are requested to be then present.

The highest or any tender not necessarily accepted.

The other conditions of the sale are the standing conditions of the Court, so far as applicable.

For further particulars apply to the liquidator or his solicitors.

Dated, etc.

A. B.
Liquidator. No Street.
Toronto.

It is to be noted in connection with the sale of the assets of the company that there is no provision in the Act vesting the assets in the liquidator, consequently it is necessary, when assets are sold, for the deed or bill of sale to be executed by the liquidator under the seal of the company and his own seal.

When an agreement for sale has been made between the liquidator and an intending purchase it is usual for an agreement to be drawn up between them in the ordinary form of agreements. The approval of the Master is usually given, not in the form of an order, but by endorsing his approval in the margin of the agreement. When a bill of sale or deed is made pursuant to the agreement, the Master again endorses his approval in the margin. It is usual in the bill of sale or deed to insert recitals shewing the winding-up order, order of reference, appointment of liquidator, advertisement for sale, acceptance of the offer and so on.

ORDER GIVING LEAVE TO BORROW.

(Style of cause.)

Upon the application of the liquidator, etc.

It is ordered that the liquidator be at liberty to borrow immediately or from time to time such sum or sums as he may require for the purpose of carrying on the business of the above Company and for payment of current expenses, and for the completion of the orders now in course of execution, etc., not exceeding in the whole dollars, and the rate of interest on the amount borrowed not exceeding per cent. per annum.

And it is further ordered that the amount so to be borrowed with interest thereon do constitute a first charge upon all the assets of the Company, subject only to any existing charge thereon and that the liquidator be at liberty to execute a proper instrument or instruments for perfecting such charge and that the costs of this application and of carrying out the said loan be paid out of the assets of the Company.

For forms of special orders giving leave to the liquidator to do various things in connection with the winding up see Palmer, vol. 2, 8th ed., pp. 305 *et seq.*

35. The liquidator may, with the approval of the Court, appoint a solicitor or law agent to assist him in the performance of his duties. R.S., c. 129, s. 32.

It is preferable to have the proceedings under a winding-up order conducted by solicitors who are totally unconnected with the company to be wound up. *Re Joseph Hall Manufacturing Co.*, 10 P.R. 485.

In a proceeding for the winding up of a company a solicitor who is acting for claimants whose claims must be contested by

the liquidator cannot obtain the sanction of the Court to his acting also as solicitor for the liquidator, nor will the Court sanction an appointment of a special solicitor to act for the liquidator in the matter of contested claims. The policy of the statute contemplates the prosecution of the Winding-up Act by a disinterested solicitor whose services will not be divided by the assertion of antagonistic claims. In this case the solicitors were directed to elect whether or not they would give up their whole services to the prosecution of the winding up with a view to the realization and administration of all the assets. *Re Charles Stark Co.* (No. 2), 15 P.R. 471.

Under a reference for the winding up, the referee appointed a firm of solicitors to represent the general body of creditors and ordered that they should be notified to attend whenever he should direct and that their costs as between solicitor and client should be paid out of the assets by the liquidator. The liquidator was represented by another solicitor: *Held*, that this class of order and liability was not favoured by the Courts. It should only be involved and attendances thereupon had, when there was a special reason in which the appearance of some one to represent the creditors was desirable. Attendances and services of such solicitor should not be paid for out of the assets except where contemporaneously provided for by the referee and it is not proper practice to extend this at the close of the proceedings by obtaining a certificate from the referee that had he been applied to from time to time, he might have provided for other attendances and services. *Re Drury Nickel Co.*, 16 P.R. 525.

But see now section 131(*a*).

The liquidator's partner cannot act. *Re Universal, etc., Co.*, 23 L.T. 629.

If assets are insufficient costs incurred in a winding up rank after the petitioner's costs. *Re Massey*, 9 Eq. 367, and after the costs ordered to be paid by the liquidator or out of the assets. *Re Dominion of Canada Plumbago Co.*, 27 C.D. 33; and after the liquidator's necessary disbursements. *Re Sanitary, etc., Assn.* (1900), 2 Ch. 289; but before the liquidator's remuneration. *Re Massey, supra.*

Quære as to whether the liquidator is liable personally for his solicitors' costs. In England it has been held that he is not. *Re Anglo-Moravian*, 1 C.D. 130; *Re Trueman*, 14 Eq. 278. See also *London Metallurgical Co.* (1897), 2 Ch. 262.

The point does not seem to have been decided in Ontario.

The solicitor appointed fyles an appointment with the Master which has been signed by the liquidator and which may be in the words following:—

STYLE OF CAUSE.

I hereby appoint of the City of , solicitor, to act as my solicitor, and law agent in connection with the winding up of the above Company.

Dated, etc.

Liquidator.

Approved.

Master-in-Ordinary.

36. The liquidator may, with the approval of the Court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, demands and matters in dispute in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon.

2. The liquidator may take any security for the discharge of such calls, debts, liabilities, claims, demands, or disputed matters, and give a complete discharge in respect of all or any such calls, debts, liabilities, claims, demands or matters. R.S., c. 129, s. 33.

The Court has no power under this section to compromise *per se*. The only power is in the liquidator with the approval of the Court. The scheme of compromise must be initiated or recommended by the liquidator. *Re Sun Lithographing*, 24 O.R. 200.

In this case it was also held that there was no power in the Court to enforce a compromise upon a dissentient minority. Since that decision, however, 62 & 63 V., c. 43, s. 3, was passed and the provisions are now to be found in section 63 and 64 ot the present Act. See these sections, which allow three-fourths in value of the creditors to force, with the sanction of the Court, a compromise upon the dissentient minority.

In sanctioning a compromise the Court is exercising a judicial discretion, and therefore evidence of propriety of the compromise must be produced. *Ex parte Totty*, Dr. & Sm. 273.

The Court, however, may act on the knowledge obtained in the winding up. *Re Oriental Bank Corporation* (No. 2), 56 L.T. 868.

The Court may rescind a compromise made with its sanction if obtained by misrepresentation. *Ex parte Clarke*, 14 W.R. 856.

The liquidator is not obliged to consult the creditors of the company before applying to the Court for authority to effect a settlement. *Morin* v. *Belodoau*, 8 R.J.Q. 330, Q.B.

Twenty years after a compromise was made with a contributory, an action was commenced against him on the ground that when negotiating with the liquidator he concealed his assets. It was held that no concealment was proved or could be assumed after so long a time. *Watt* v. *Assets Co.* (1905), A.C. 317.

It is common for a contributory or debtor to endeavour to effect a compromise and he is generally required to make an affidavit as to his means, and if it is desirable he can be cross-examined thereon. If the liquidator is satisfied to compromise he generally enters into a provisional agreement with the contributory, embodying the terms of compromise and then applies for the approval of the Court.

The following forms may be used:—

AFFIDAVIT OF CONTRIBUTORY WITH A VIEW TO COMPROMISE.

(Style of cause.)

1. I am a contributory of the above Company and have been settled on the list for the sum of , and the said sum has been called.

2. I am unable to pay the said sum in full.

3. The paper writing now shewn to me, and marked with the letter A., contains a full and true account of all the property and effects, real and personal, which I possessed, or in which I had any share or interest in possession, reversion or expectancy at the date of the winding-up order herein on the of , and also of all such parts of my said property as have since been sold, or contracted to be sold, and the price at which such sales or contracts have been paid, and as nearly as I can ascertain the full and true value of all such parts thereof as still remain to be sold.

4. I have no property whatsoever, real or personal, of any description, nor am I entitled either in possession or reversion to any share or interest in any property whatsoever which is not included in the said statement.

5. I have not made away with, incumbered or charged, settled or in any manner parted with any part of my property or effects, real or personal, since the winding up of the said Company on the , 19 , save as appears by the said account.

6. The paper writing now produced and shewn to me, marked B., contains a true and just account of all sums of money received and paid by me since the , 19 , down to the , 19 , instant.

7. My income is derived from a salary of per annum, which I receive from my employers, Messrs. , and such income has not for the last two years exceeded the sum of per annum.

(And any other special clauses.)

AFFIDAVIT OF LIQUIDATOR AS TO PROPOSED COMPROMISE.

(Style of cause.)

1. H., of , has been settled on the list of contributories of the above named Company in respect of shares therein, and by an order in these matters dated, etc., a call amounting to , etc.

2. The said H. has applied to me to accept a compromise of , to be paid as follows, etc., and towards the costs of the agreement for the said compromise, in full discharge of his liability in respect of the said call , and all liability as a contributory of the said Company.

3. I have investigated the affairs of the said H., who has made an affidavit as to his means, dated the day of (and have caused him to be cross-examined on such affidavit, *if such is the fact*), and as a result of such investigation (and cross-examination) it appears that the said H. cannot pay the said call; and I believe that I cannot obtain by process of execution as much as I shall by the said compromise. I believe that it will be beneficial to the said Company that the said compromise shall be accepted.

AGREEMENT WITH CONTRIBUTORY FOR COMPROMISE.

(Style of cause.)

Memorandum of agreement entered into this day of , 19 , between R.P.H., of, etc., the liquidator of the above-named Company of the one part, and S.B., of, etc., one of the contributories of the said Company of the other part.

Whereas the said S.B. has been settled on the list of contributories of the said Company as a contributory in respect of shares in the said Company; and whereas by an order made by the High Court of Justice dated the day of , 19 , a call of $ per

share was made on all the contributories of the said Company, and there is now due from the said S.B. to the said Company the sum of $ in respect of the said call. And whereas the said S.B. has proposed to pay the said liquidator the sum of $ by way of compromise and in satisfaction and discharge of the said sum of $ and of all liability whatsoever as a contributory of the said Company. And whereas the said liquidator, having investigated the affairs of the said S.B. and believing that such compromise will be beneficial to the said Company, hath in exercise of the power for that purpose given to him by the above statute agreed to accept the same, subject to the sanction of the Master-in-Ordinary and to the conditions and agreements hereinafter contained. And the said Master-in-Ordinary having sanctioned the said compromise and having approved of this indenture as testified by his signature in the margin hereof. Now it is hereby agreed by and between the said parties hereto;

1st. That the said liquidator shall before the day of next apply to the said Master-in-Ordinary to sanction this agreement of compromise.

2nd. That upon this agreement being sanctioned by the said Master, the said S.B. shall, within days next after such sanction, pay to the said liquidator the said sum of $ and when thereto required shall do and execute all such acts and deeds as may be necessary for transferring or surrendering and releasing to the said liquidator on behalf of the said Company or in such manner as the said Master may direct, the said shares held by the said S.B. in the said Company and all claim and demand whatsoever which the said S.B. has or may have against the said Company in respect of the said shares, or the distribution of the assets of the said Company or otherwise howsoever.

3rd. That the said sum of $ and the transfer or surrender and release of the said shares and interests of the said S.B. as aforesaid, shall be accepted by the said liquidator as and shall be deemed and taken to give to the said S.B. a full and complete discharge from all calls and liabilities, claims and demands whatsoever, which the said Company or the said liquidator thereof, now has or may hereafter have or be entitled to against the said S.B. in respect of his being or having been the holder of the said shares or otherwise as a contributory of the said Company.

4th. That in case this agreement shall not be sanctioned by the said Master it shall cease and determine and the said liquidator and the said S.B. shall be remitted to their original rights with respect to each other, as if this agreement had not been entered into.

5th. That in case this agreement shall be sanctioned by the said Master and the said S.B. shall not in all respects perform the same on his part, the said liquidator shall be at liberty, with the sanction of the said Master and without notice to the said S.B., to enforce the performance thereof, or, with the like sanction to give notice to the said S.B., that he abandons

this agreement whereupon the same shall cease and determine and the said liquidator shall be entitled to proceed against the said S.B. to enforce payment of the full sum of $ or so much thereof as shall then remain due and unpaid, as if this agreement had not been entered into.

As witness, etc., R.P.H.
Witness Liquidator.
S.B.

CONFIRMATION OF AGREEMENT FOR COMPROMISE.

(Style of cause.)

Upon the application of , liquidator, it is ordered that the conditional agreement dated, etc., and made, etc., for the compromise of the debt of $, due from the said X., (as a contributory of the above-named Company) be confirmed and carried into effect.

37. The liquidator may, with the approval of the Court, make such compromise or other arrangement with creditors or persons claiming to be creditors of the company as he shall deem expedient. R.S., c. 129, s. 61.

Any compromise which is made under this section is generally in reference to the amount of the claim for which the creditor is to rank. It would be under only the most exceptional circumstances that the amount of the dividend to be paid a certain creditor would be fixed before the general dividend was decided upon.

There are so many different circumstances under which the liquidator desires to compromise a creditor's claim that a form is of little service. Usually the liquidator fyles an affidavit setting out the facts, and if approved by the Master the claim is admitted to rank for the amount fixed, no special order being taken out.

38. The Court may provide, by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by this Act, without the sanction or intervention of the Court. 52 V., c. 32, s. 12.

An order is very rarely made under this section, the Court preferring to retain a general control of proceedings. See notes to section 34.

39. The Court may appoint, at any time when found advisable, one or more inspectors, whose duty it shall be to assist and advise the liquidator in the liquidation of the company. 62-63 V., c. 42, s. 1.

It is not usual in ordinary liquidations to appoint inspectors. However, when the liquidation is complicated or involves the disposal of a large business, inspectors have frequently been appointed, whose knowledge of the technical features of the business or the peculiar situation of the company being wound up was such as to be of assistance to the liquidator.

An inspector cannot become the purchaser of the company's assets either directly or indirectly or derive any profit out of the winding up or receive any remuneration without the sanction of the Court obtained before the business is commenced from which the profit is derived. This consent cannot be given otherwise. *Ex parte Gallard* (1896), 1 Q.B. 68.

An inspector appointed in liquidation proceedings under the Winding-up Act is in a fiduciary position as regards the disposal of the assets and cannot, without the consent of all persons interested, become the purchaser thereof. *In re Canada Woollen Mills, Limited, Long's Appeal*, 9 O.L.R. 367.

40. The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the Court directs, upon such notice to the creditors, contributories, shareholders or members, as the Court orders.

2. If there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the Court directs. R.S., c. 129, s. 28.

In fixing the liquidator's remuneration it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidator. The amount allowed should be equally spread over the whole period of the liquidation so as to secure vigilance and expedition at all stages of the liquidation as well as proper distribution among the liquidators if there are more than one. It is not proper to pay a large part of the compensation at an early stage of the liquidation. *In re Central Bank, Lyle's Claim*, 22 O.R. 247.

The general rule is to allow a liquidator a commission upon the corpus which is finally distributed by him, such commission being paid when the distribution of the corpus takes place from time to time and he is further allowed a reasonable annual allow-

ance for care and management. The Court may, instead of fixing the remuneration by way of percentage, allow one lump sum, to include and cover the percentages upon the receipts and disbursements of the corpus and the allowance for the care and management of the estate. The usual commission allowed for the receipts and disbursements of the corpus of an estate is five per cent. exclusive of the annual allowance for care and management, but each case must depend upon its own circumstances. *Re Farmers Loan and Savings Company*, 3 O.W.R. 837.

In England the liquidator is paid according to a fixed scale at the rate of so much per hour for work done. Here we have no such regulation and the percentage basis rules. Although there is no fixed percentage the usual course is to allow five per cent. The liquidator is also entitled to receive his disbursements in full.

The liquidator cannot charge in his disbursements, the premium paid by him on the bond filed by him as security for his proper distribution of the estate. This is the ordinary practice, although there is no direct authority.

The section intends that the remuneration is not necessarily to be increased because three liquidators are to be paid instead of one. The recompense for services under the Act is properly one, based chiefly upon consideration of the time occupied, the work done, the responsibility imposed and being fixed it will go to the liquidator or if more than one it will be distributed amongst them. *Re Central Bank*, 15 O.R. 309.

In England under section 18 of the first schedule to the Act of 1890 the Court may refuse to allow any remuneration to a liquidator who has solicited proxies to aid him in his appointment as liquidator. No such provision is contained in our Act, although the Court does not favour such proceedings as a liquidator canvassing for votes.

As to priority of the liquidator's remuneration when there is a deficiency of assets, see *Re London Metallurgical Co.* (1895), 1 Ch. 758, and *Re Sanitary Burial Assn.* (1900), 2 Ch. 289, and cases cited under section 35, *supra*.

Where there are mortgages or debentures existing against the assets the rights of encumbrancers are in priority to the remuneration of the liquidator. *Re Oriental Hotels*, 12 Eq. 126.

41. The Court shall determine the remuneration, if any is deemed just, of the inspector or inspectors. 62-63 V., c. 42, s. 2.

42. The liquidator shall deposit at interest in some chartered bank or post office savings bank, or other Government savings bank, designated by the Court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars. R.S., c. 129, s. 35.

In the order appointing the permanent liquidator it is usual to insert a clause naming the bank in which deposits are to be made. See form of order, *supra*, page 402.

43. Such deposits shall not be made in the name of the liquidator individually, on pain of dismissal; but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator. R.S., c. 129, s. 36.

Deposits are usually made to the credit of A. B., liquidator of the company.

44. The liquidator shall, within three days after the date of the final winding up of the business of the company, deposit at interest in the bank appointed or designated, as hereinbefore provided, any money belonging to the estate then in his hands not required for any other purpose authorized by this Act, with a sworn statement and account of such money, and that the same is all that he has in his hands. R.S., c. 129, s. 40.

45. In case any liquidator shall not, within three days after the date of the final winding up of the business of the company, deposit in the bank, appointed or designated as hereinbefore provided, any money belonging to the estate of which he is such liquidator, then in his hands, he shall be deemed a debtor to His Majesty for such money, and may be compelled as such to account for and pay over the same. R.S., c. 129, s. 40.

46. If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the Court. R.S., c. 129, s. 25.

Note that as in the case of the liquidator, there is nothing in this section vesting the company's property in the Court. The title to the property always remains in the company, but the

property is in the custody of the liquidator or the Court until sold.

47. Whenever a company is being wound up, and the realization and distribution of its assets has proceeded so far that in the opinion of the Court it becomes expedient that the liquidator should be discharged, and that the balance remaining in his hands of the moneys and assets of the company can be better realized and distributed by the Court, the Court may make an order discharging the liquidator, and for payment, delivery and transfer into Court, or to such officer or person as the Court may direct, of such moneys and assets, and the same shall be realized and distributed, by or under the direction of the Court, among the persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the liquidator.

2. In such case the Court may make an order directing how the books, accounts and documents of the company and of the liquidator may be disposed of, and may order that they be deposited in Court or otherwise dealt with as may be thought fit. 55-56 V., c. 28, s. 2.

It seems peculiar that there is no provision other than this section in the Act providing for the discharge of the liquidator, and this section is rarely acted upon. The general case is for the liquidator to complete the winding up, distribute the assets and obtain his discharge from the Court, and the cancellation and delivery up of his bond. This is the practice, although, as stated, there is no provision in the Act governing or providing for it. The liquidator passes his accounts in the ordinary manner of an administrator upon notice being given to all parties interested, *i.e.*, creditors, contributories, etc., and upon the accounts being passed and dividend declared the liquidator proceeds to pay the dividends and upon producing to the Master vouchers for the payment of the dividends the liquidator is discharged.

Notice of passing accounts is given usually by advertising; and the Master may also direct a copy to be served on each creditor and contributory which is done usually by mailing. A form of notice is as follows:—

NOTICE OF PASSING LIQUIDATOR'S ACCOUNTS, ETC.

(Style of cause.)

Take notice that the undersigned has appointed the day of , 19 , at the hour of o'clock, in the noon, at his Chambers, Osgoode Hall, in the City of Toronto, to pass the liquidator's

accounts, declare the final dividend, settle the liquidator's remuneration, direct taxation of costs and settle report herein.

Dated this day of 19 .

Master-in-Ordinary.

After accounts have been passed, dividend declared, etc., the liquidator sends out cheques for dividends to the creditors whose claims have been admitted or proved. He then presents the paid cheques to the Master who directs his discharge and the cancellation of his bond. In case any cheques have been issued and not cashed within a reasonable time the liquidator may take advantage of section 136.

LIQUIDATOR'S AFFIDAVIT ON PASSING ACCOUNTS.

(Style of cause.)

I, etc.,

1. That I am liquidator of the above Company duly appointed by the order of , Esquire, official referee.

2. That now shewn to me and marked Exhibit "A" to this my affidavit is a true and correct account of my dealings with the assets of the said Company and correctly sets out my dealings with same.

3. The only assets of the above Company which came into my hands on my appointment as Permanent Liquidator were the stock and real estate of the said Company and there was no cash on hand or other assets of the said Company at that date.

4. As shewn in said Exhibit "A" the total amount realized from the sale of the real estate and stock was $ and I have also caused to be collected the sum of $, the balance due by various contributories for unpaid stock subscribed and which amount of $ is the total amount received by me for unpaid stock subscriptions.

5. The disbursements which I have made in connection with the winding up of the said Company total $, as shewn in said Exhibit "A."

6. The amount is made up of the following payments:

(*a*) $ paid the Bank under order of the official referee herein, for which payment was received the securities held by the Bank and valued by them at the said sum.

(*b*) The sum of $ paid representing the costs of 's solicitors and paid to them under an order of the said official referee herein.

(*c*) The sum of $ for rent.

(*d*) The sum of $ for taxes and insurance.

(*e*) The sum of paid of which were the costs of the Company payable under the winding-up order, the

remaining $ being the costs of on taxation herein, payable under the direction of the said official referee.

(*f*) The sum of $ being the liquidator's travelling expenses herein.

(*g*) The sum of $ which I paid under a taxing officer's certificate to my solicitors for services rendered in the winding up of the estate, and the sum of $ paid to , Esquire, official referee, on account of his fees.

7. That set out in the said schedule is the sum of $ being the amount realized by me on the securities purchased from the Bank for $.

8. The disbursements in paragraph five are my total disbursements in connection with the estate and deducting this amount from the total amount of assets received by me, there is left in my hands for payment to creditors the sum of $.

9. The only remaining assets in my hands are certain of the securities above mentioned, and which were purchased by me from the Bank and which securities I have been unable to realize upon. So far as I can ascertain the debtors are worthless and it would be a useless expense to the estate to take legal proceedings against them. The said securities have been passed upon by the official referee.

Sworn, etc.

ORDER MADE ON PASSING ACCOUNTS.

(Style of cause, etc.)

Pursuant to the orders made herein by the Honourable and dated the day of 19 , whereby it was ordered that the Company, Limited, should be wound up and it was referred to me to appoint a permanent liquidator and to take all necessary proceedings for and in connection with the winding up of the said Company, I hereby certify and report:—

1. That on the day of 19 , I appointed Esquire, of the City of Toronto, in the County of York, liquidator of the Company, he having given security to my satisfaction.

2. That the assets of the said Company were disposed of by the said liquidator with my approval and the sum of $ realized therefrom.

3. That the sum of was realized from contributories liable for unpaid stock.

4. That the sum of was realized from certain securities taken over by the liquidator from the Bank with my approval for the sum of $ the amount at which the said securities were valued by the said bank.

5. That the amounts referred to in the next three preceding paragraphs together constitute the total amount of the assets of the above Company, realized by the liquidator.

6. That the amount of unsecured claims against the said Company which have been admitted by the liquidator with my approval is $.

7. That the claim of the Bank referred to in the fourth paragraph hereof was the only secured claim against the said Company.

8. That the preferred claims for wages and rent admitted and paid by the liquidator with my approval amounted to $.

8. That the disbursements of the said liquidator passed before me amounted to the sum of $.

10. That I have allowed to the said liquidator as remuneration for his services the sum of $.

11. That I have allowed for subsequent fees, costs and disbursements the sum of $.

12. That after all proper deductions have been made I find that there is the sum of $ in the liquidator's hands available for distribution.

13. That I have directed a dividend of cents on the dollar to be paid to the creditors of the said Company whose claims have been admitted by the liquidator with my approval and whose claims are referred to in the 6th paragraph hereof, the total amount of the dividend being $.

Dated at Toronto this day of 19 .

ORDER DISCHARGING LIQUIDATOR.

(Style of cause.)

Upon the application of the liquidator herein, and upon hearing the proceedings and evidence in this matter, and it appearing that the said has accounted for all moneys received by him and has paid all accounts and dividends ordered except as to certain small sums amounting to the sum of $ mentioned in his accounts herein and for which it appears that he has issued cheques to the several parties mentioned in said accounts;

It is ordered that the said be and he is hereby discharged from further liability and from his office as such liquidator;

And it is further ordered that the bond given by him on his appointment as such liquidator be delivered to him, cancelled and discharged.

And it is further ordered that in case the cheques for the several sums amounting to the said sum of $ be not presented to the Bank within three years from the date of this order the said bank shall at the end of the said three years pay over the same or so much thereof as shall be then remaining in the said bank unclaimed with the accrued interest thereon to the Minister of Finance pursuant to the 136th section of the above Act.

48. As soon as may be after the commencement of the winding up of a company the Court shall settle a list of contributories. R.S., c. 129, s. 42.

The practice in Ontario is that the liquidator examines the books of the company and prepares a list of all the parties who, he considers, are liable to contribute in respect to unpaid balances on stock distinguishing under section 49, those who are liable in their own right from those who are liable as representing others, or liable for the debts of others. This list is verified by the liquidator's affidavit and brought in to the Master. On the liquidator's *ex parte* application the Master makes an order directing each of the contributories, if he desires to contest the liquidator's claim to settle him upon the list, to file and deliver by a certain date a statement in writing of his objections to being placed on the list, and to appear before the Master on a subsequent named day and shew cause why he should not be placed on the list. In default of the appearance of a contributory he is settled on the list on the liquidator's own shewing. If any contributories appear the Master proceeds to try their cases at once, or on a subsequent fixed day and give judgment according to the merits of each case. When the last case has been disposed of the Master makes his report, which report is filed and notice of filing is served on each contributory. At the expiration of fourteen days the report becomes absolute under consolidated rule 769, unless the contributory appeals. The liquidator may issue execution on this report if necessary. Sometimes an individual report is made in each case, filed and notice of filing served.

If a contributory successfully resists the liquidator's claim to settle him on the list he usually gets his costs. *Gower's Case,* 6 Eq. 77.

49. In the list of contributories, persons who are contributories in their own right shall be distinguished from persons who are contributories as representatives of or liable for the debts of others. R.S., c. 129, s. 43.

50. It shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of

such contributory, but such heirs or devisees may be added as and when the Court thinks fit. R.S., c. 129, s. 43.

AFFIDAVIT OF LIQUIDATOR VERIFYING LIST OF CONTRIBUTORIES.

(Style of cause, etc.)

I, etc.

1. That I am the liquidator of the above named Company.

2. That the paper writing now shewn to me and marked Exhibit "A" contains a list of the contributories of the said Company who are contributories in their own right made up by me from the books and papers of the said Company together with their respective addresses and the number of shares attributed to each so far as I have been able to make up or ascertain the same.

3. That the paper writing now shewn to me and marked Exhibit "B" contains a list of the contributories of the said Company who are representatives of or liable for debts of others, made up by me from the books and papers of the said Company together with their respective addresses and the number of shares attributed to each, so far as I have been able to make up or ascertain the same.

4. That contained in said Exhibits "A" and "B" is a true and accurate list of the contributories of the said Company so far as I have been able to make up and ascertain the same.

5. The amounts appearing in the columns in said Exhibits "A" and "B" headed "Amount unpaid" is the amount unpaid upon the shares held by the several persons named as contributories in the said lists respectively.

In ordinary liquidations it is necessary that all unpaid balances on stock should be paid up at once and it is accordingly advisable to include this clause:—

5. It is necessary for the purpose of liquidating the liabilities of the said Company to its creditors (and of adjusting the rights of the contributories among themselves) that all of the amounts appearing to be unpaid upon the shares held by the several persons named in said Exhibits "A" and "B" should be forthwith paid up by them respectively.

EXHIBIT "A."

Name.	Address.	Description.	Number of Shares.	Amount unpaid.

EXHIBIT "B."

Name.	Address.	Description.	In what character included.	Number of shares.	Amount unpaid.

(The persons set out in Exhibit "B" are executors and administrators of deceased shareholders and assignees for the benefit of creditors of insolvent shareholders or liquidators of insolvent company shareholders, etc. It is to be remembered that where shares are held by A. in trust for B. the latter is not a contributory. *King's Case,* 6 Ch. 196.)

ORDER DIRECTING CONTRIBUTORIES TO SHEW CAUSE WHY THEY SHOULD NOT BE SETTLED ON LIST.

Upon the application of the liquidator and upon reading his affidavit filed, and upon hearing counsel for the liquidator.

1. It is ordered that each of the parties named in the list of contributories this day filed in the office of the Master in Ordinary, a copy of which list is attached as a schedule hereto, do attend before the said Master in Ordinary at his Chambers, at Osgoode Hall, in the City of Toronto, on the day of , 19 , at the hour of eleven o'clock in the forenoon, and shew cause why each of the said parties so named in the said list, should not be settled on the list of contributories, and held to be a shareholder and contributory of the said Company, Limited, for the number of shares and amount due thereon as set out in the said list so filed.

2. And it is further ordered that the said list of contributories be then settled and also the amounts due from each of the parties named in the said list as such contributories, or for which each of the said parties is liable as a shareholder in respect of the shares held by him as stated in such list.

3. And it is further ordered that in case any of the said persons named in the said list shall desire to contest the entry of his name on said list, or his liability in respect to the said number of shares, or in respect to the amount set out in the said list of contributories, he shall file in the office of the Master-in-Ordinary, at Osgoode Hall, Toronto, and also serve on the liquidator or his solicitors on or before the day of 19 , a statement in writing setting forth his grounds of objection and

defence to the said list and his being settled on the said list and liable as a contributory as aforesaid.

4. And it is further ordered that in case any of the said parties named on the said list and served as aforesaid shall refuse or neglect to serve a statement of objections and defence as aforesaid or to attend before the said Master-in-Ordinary at the time and place aforesaid, each said party shall be held to have admitted his liability as such contributory for the amount claimed against him on the said list, and that the said liquidator shall be entitled to judgment therefor and to issue proper writs of execution against the goods and chattels and lands of each of the said contributories, or such process as may be awarded for the collection of the said amounts, and that the said liquidator shall be entitled to take all other and necessary proceedings against the said parties without any further notice or service upon the said party so refusing or neglecting as aforesaid.

5. And it is further ordered that each of the said parties be served with a copy of the winding-up order and of the order of reference herein and of this order, and the schedule hereto attached, and such service may be made by mailing the same by registered mail in the Toronto General Post Office addressed to each of the said parties respectively, at their last addresses which appear in the books of the said Company.

STATEMENT OF CONTRIBUTORIES' OBJECTIONS.

(Style of cause, etc.)

A.B., one of the contributories named in the list of contributories, filed by the liquidator in the office of the Master-in-Ordinary in this matter objects to his name being settled on the said list and asks that the same be struck off on the following amongst other grounds:

1. The said A.B. never applied for shares in the said Company.
2. No shares were ever allotted to him.
3. If allotted, no notice of allotment was given to the said A.B.
4. The meeting of directors at which certain shares of stock are alleged to have been allotted to A.B. was an irregular meeting not duly constituted and the allotment of the said shares is irregular.
5. The directors who purported to allot certain shares of stock to A.B. were not the duly elected directors of the Company.
6. The application for shares made by A.B. was subject to a condition which has not been performed and he never became a shareholder in the said Company, etc., etc.

(It is well to state all possible objections to the entry of the name on the list, setting them out in a brief, concise manner and concluding by asking that the liquidator be ordered to pay the contributories' costs.)

REPORT SETTLING LIST.

(Style of cause.)

Pursuant to the winding-up order herein dated the of 19 , whereby it was among other matters referred to me to settle the list

of contributories of the above named Company, having been attended by the solicitor for the liquidator, the solicitor for several contributories mentioned in schedule "A" hereto, excepting said appearing before me in person, and the several contributories mentioned in schedule "B" hereto failing to attend before me although having been duly served with the winding-up order and the notice given pursuant thereto, as has been made to appear to my satisfaction:

1. I find and certify that the several persons named in the schedule "A" are contributories in respect of the amounts set opposite their respective names in said schedule "A."

2. And I further find and certify that the several persons named in the schedule "B" hereto are contributories in respect of the number of shares and for the amounts set opposite their respective names in said schedule "B."

3. I further find and certify that the several persons named in schedule "C" hereto have been represented before me by solicitors, and that I find them to be contributories in respect of the amounts (also set out in said schedule) set opposite their respective names.

4. And I make this report reserving the settlement of further or additional list of other contributories for another report.

Master-in-Ordinary.

ORDER OF REMOVAL FROM LIST OF CONTRIBUTORIES.

(Style of cause, etc.)

Pursuant to the winding-up order herein dated the day of 19 , whereby it was among other matters referred to me to settle the list of contributories of the above named Company, I was attended by the solicitors for the liquidator and the solicitors for A.B. a contributory mentioned in the list of contributories filed in my office by the liquidator of the above named Company on the day of 19 , and upon hearing the evidence adduced and the argument of the solicitors for the liquidator and for the said contributory, I directed that this cause should stand over for judgment, and the same coming on this day for judgment;

1. I hereby certify and report that the said application be and the same is hereby dismissed and that the name of the said A.B. be and the same is hereby struck off the list of contributories of the said Company.

2. And I do further certify and report that the costs of the said A.B. of the said application be paid by the liquidator to him out of the assets of the said Company forthwith after taxation.

51. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act. R.S., c. 129, s. 44.

When notice has been served upon each contributory and days named for the trial of the cases as indicated in the notes to section 48, the Master proceeds to try each case. The trials are conducted in the same manner as other proceedings before the Master. Either party may summon witnesses to attend by service of a subpœna, and oral evidence is taken under oath. See section 115. The Master's order has the force of a judgment. See section 112. The order is filed as a report, notice of filing served, and it becomes absolute in fourteen days if not appealed against. See Consolidated Rules Nos. 693, 694 and 769.

There is no provision in the Act for discovery as between the liquidator and a contributory and it is submitted that the right to discovery does not exist in these cases. It is otherwise in England. See Palmer, 8th ed., vol. II, p. 140.

After a winding-up order is made, the power of collecting the assets of the company is vested solely in the liquidator; a judgment creditor of the company cannot then take proceedings against a shareholder for unpaid calls. *Shaver* v. *Cotton*, 23 A.R. 426; *Re Bolt and Iron Co.*, 10 P.R. 437; *Bank of Hochelaga* v. *Garth*, 2 M.L.R. 201.

When proceedings are taken by the liquidator and are unsuccessful costs may be awarded against him. *Re Bolt and Iron Co.*, 10 P.R. 437.

A contributory is not allowed to set up all defences against the liquidator which he might have been allowed to set up against the company in an action for calls. The liquidator represents the creditors as well as the company, and the rights of the creditors must be considered. *Re Central Bank, Henderson's Case*, 17 O.R. 110. See this point more fully considered, *infra*.

This section has no application to any liability which is not one of a shareholder or member as such. *Re Wiarton Beet Sugar Co., Freeman's Case, infra.*

The onus of proof that a person is a shareholder and is liable to contribute to the assets of the company on a winding-up is upon the liquidator. *Per* Meredith, J.A., in *Re Canadian Tin Plate Co.*, 12 O.L.R. 591, at p. 601.

It is submitted that this onus is satisfied by the liquidator if he shews that the alleged contributory has been treated in the company's books as a shareholder; and that the onus is then cast upon the contributory to shew that he is not a shareholder. See *Knight's Case*, 2 Ch. 321; *Re Great Northern Salt*, 44 C.D. 472, and *Hill's Case*, 10 O.L.R. 501. See also, *Re London Speaker Co.*, 16 A.R. 508, at p. 514.

The defences most commonly raised by contributories may be classified as follows:—

1. Subscription induced by fraud, misrepresentations, etc.
2. No binding contract to take shares.
3. Shares transferred, and transfer registered, or not registered through default of company.
4. Shares paid for in full,
   (*a*) In cash.
   (*b*) In property.
   (*c*) In services.
5. Shares forfeited before winding-up order made.

These defences will be considered in their order.

1. Subscription induced by fraud, misrepresentations, etc.

The broad statement may be made that this is no defence whatever, unless an action has been begun before the date of the winding-up order to set aside the contract to take shares on the ground of fraud, misrepresentations, etc.

After the winding-up order is made a shareholder cannot evade liability by setting up misrepresentation or fraud in the purchase of his shares. Proceedings to set the contract aside must be taken before the making of the winding-up order to be effectual. *Re The London Speaker Printing Company, Pearce's Case*, 16 A.R., at p. 513.

The defence is of no avail unless the contract was effectually repudiated before the commencement of the winding-up. *Oakes*

v. *Turquand*, 2 H.L. 325. *Re Scottish Petroleum*, 23 C.D. 413, and this is so even though the misrepresentation was contained in a prospectus issued by promoters before incorporation. *Re Karberg's Case* (1892), 3 Ch. 1.

But if in an action for calls before the winding up, the shareholder counterclaims for rescission on the ground of fraud, misrepresentation, etc., he can obtain all relief in the winding up which he could have obtained in the action. *Re Packenham Pork Co.*, 6 O.L.R. 582. And this is so even though the counterclaim is not delivered before the commencement of the winding up, where the shareholder in opposing a motion for speedy judgment files an affidavit stating that he intends to counterclaim for rescission and he is given leave to defend on that ground. *Re Whiteley* (1900), 1 Ch. 365.

Note, that in the *London Speaker Case*, it is said that the proceedings must be taken before the date of the winding-up order, while in *Oakes* v. *Turquand*, the commencement of the winding up is set as the proper time. The point has not been squarely up for decision here, but it would seem that the latter is preferable having in view section 21.

2. No binding contract to take shares.

The defences under this heading may be sub-divided as follows:—

(*a*) No offer.

(*b*) No acceptance.

(*c*) Offer withdrawn before acceptance.

(*d*) Offer subject to a condition which has not been fulfilled.

(*e*) Offer accepted with a condition which was not accepted by shareholder.

Dealing first with the defence of no offer to take shares.

Reference may be had generally to the title, Subscription and Allotment, *ante*, p. . It is there stated that persons may become shareholders in various ways:—

1. By subscribing to the memorandum of agreement filed on incorporation.

2. By applying to the company for shares and receiving notice of allotment after such allotment has been made or something amounting to notice of the acceptance of the application.

3. By taking a transfer of shares from a shareholder and being registered in respect of such shares in the stock register of the company.

4. By registration in succession to a deceased or insolvent shareholder.

5. By estoppel, as by receiving and retaining a certificate of shares and attending meetings or receiving dividends in respect of same; by allowing one's name to appear on the register of shareholders or by acting as a director of the company without the necessary qualifying shares.

(*a*) No offer.

Applications for and allotment of shares must be treated upon the same principles as ordinary contracts between individuals. *Hebb's Case*, 4 Eq. 9; *Gunn's Case*, 3 Ch. 40; *Pellatt's Case*, 2 Ch. 527; *Re Canadian Tin Plate Co.*, 12 O.L.R. 594, at p. 600.

The ordinary law of contracts accordingly applies to all cases of shareholders' liability, including the law of estoppel.

The offer for shares need not be in writing; nor need it be a formal offer. The company may make the offer as by alloting shares to a person and if, after it is brought to his notice, he does not repudiate them, but rather, has voted as a shareholder, he will be held liable. *Re Standard Fire*, 12 A.R. 486.

If a shareholder attend and vote at a meeting of the company after he has knowledge that he has a right to repudiate his contract to take shares, and before he has issued a writ to cancel his contract, he thereby affirms the contract and loses his right to repudiate. *Re Sharpley* v. *Louth*, 2 C.D. 663.

The mere fact that a person's name appears in the register of shareholders is not sufficient to render him liable. *Oakes* v. *Turquand*, 2 H.L. 325. But if it can be shewn that he assented to his name being on the register as by keeping his certificate, receiving dividends, voting or otherwise acting as a member, he will be held liable. *Hindley's Case* (1896), 2 Ch. 121.

Some authority from a contributory for the placing of his name in the register must be shewn. *Re Scottish Petroleum Co.*, 23 C.D. 413; or subsequent ratification. *Challis' Case*, 6 Ch. 266.

There is, of course, no offer to take shares binding upon the contributory, if the person who made the offer had no authority so to do. *Ormerod's Case* (1894), 2 Ch. 474. Unless the agent had ostensible authority or the act was subsequently ratified. *Bentley's Case*, 69 L.T. 204.

An offer to take shares may be made by a person signing a memorandum of agreement referred to in the Ontario Companies Act, section 3 and 4, etc., and the Dominion Companies Act, section 5, etc., either before or after incorporation and without anything more being done he will be regarded as a shareholder and liable to pay the amount subscribed, granting, of course, that the company has been actually incorporated.

This arises from the fact that as stated by Boyd, C., in *Re Queen City Refining Co.*, 10 O.R. 264, "the Act really contemplates two modes of acquiring stock, one by subscription and the other by allotment."

The Ontario Companies Act, section 3, provides that all those who petition for a charter and "any others who have or may thereafter become subscribers to the memorandum of agreement hereafter referred to" shall be "a body corporate and politic," etc.

It is to be noted that the Dominion Companies Act is slightly different from this. It provides that a charter may be granted to those persons who apply therefor, "constituting such persons and others who have become subscribers to the memorandum of agreement hereinafter referred to and who thereafter become shareholders in the company thereby created a body corporate and politic," etc.

The Dominion Act, therefore, expressly recognizes that persons may become shareholders without signing the memorandum of agreement, while the Ontario Companies Act does not. In the old Ontario Companies Act, in section 2, the definition of shareholder was contained stating that shareholder shall mean

"every subscriber to or holder of stock in the company and shall extend to and include the personal representatives of the shareholders." The present Dominion Act contains the same definition, but there is no definition whatever in the present Ontario Act. It, therefore, may be open to some question as to whether a person can become a shareholder in a company incorporated under the Ontario Companies Act unless he signs the memorandum of agreement referred to in the Act. But see *Re London Speaker Co., infra.*

It is submitted, however, that it is clear that those persons who subscribe to the memorandum of agreement before incorporation are now liable as shareholders without any further act of the directors. It was held in *Re London Speaker Co.*, 16 A.R. 508, that where a person before incorporation signs an agreement to take stock he does not become liable as a shareholder without anything further being done. That decision, however, was under the old Companies Act before its amendment, which provided that only those who petition for the charter, and others who may become shareholders in the company should be constituted a body corporate and politic, etc., and furthermore, the agreement signed in that case was not an agreement provided by the Act. A perusal of the judgments of Burton, J.A., and Osler, J.A., in that case, will shew clearly that the Court was of the opinion that those who had signed the memorandum of agreement referred to in the Act, would become shareholders without allotment. It is submitted, however, that in view of this case, even under the present Acts, a person who signs an agreement in the form other than that given by the Ontario Act or Dominion Act, prior to incorporation, will not become a shareholder unless there is allotment of stock and notice to him in the ordinary way.

And see now *Modern Bedstead Co.* v. *Tobin*, 12 O.W.R. 22.

Those persons who are named in the charter of a company as shareholders are liable for the stock stated in the charter to be held by them, and no further act of the directors is necessary. *Re Haggert Bros.*, 19 A.R. 582.

The Statute of Limitations does not begin to run against a company until a call is made and notice given and, accordingly, persons named in the charter issued in 1880 as shareholders, were, in 1891, held liable, no call having been made in the meantime. *Ibid.*

It would appear that those persons who sign the memorandum of agreement referred to in the Companies Act after incorporation are liable without allotment. See judgment of Burton, J.A., in *Re London Speaker Co.*, 16 A.R. 508, at p. 513, explaining the decision of Boyd, C., in *Re Queen City*, 10 O.R. 264.

A person signed the memorandum of agreement and stock book upon the incorporation of the company, subscribing for $2,200 worth of stock, and he was named in the charter as a provisional director. He was subsequently elected president of the company. No shares were ever allotted to him. It was held that he was liable as a contributory in respect of the $2,200. No allotment of stock was necessary to hold the petitioner for incorporation liable. *Re Cement Stone & Building Co., McBean's Case*, 8 O.W.R. 264.

Where A. signs the memorandum of agreement on incorporation and the petition, but is really acting for B. and signs on his behalf, A. alone and not B. is liable on the winding-up, as petitioners must, by the Companies Act, own the shares subscribed for in their own right. *Re Wakefield Mica Co.*, 7 O.W.R. 104.

The Ontario Companies Act provides that "No person shall hold office of a director unless he is a shareholder absolutely in his own right, . . ." and if a person act as a director it is submitted that he is liable to pay on a winding-up a sum equal to the amount required by the by-laws of the company as qualifications for directors, and in default of any provision in the by-law, he would be liable for one share. See *Isaacs' Case* (1892), 2 Ch. 158; *Re Hucynia Co.* (1894), 2 Ch. 403; *Hutchinson's Case* (1895), 1 Ch. 226.

It is submitted that *Brown's Case*, 9 Ch. 102, in which it was held that a director who had acted and had not paid up his

qualification shares would not be liable because his appointment was void as possession of qualification shares was, by the regulations, a condition precedent to the election, does not apply here in view of the provisions of the Companies Act which is that he shall not "hold office" unless he is a shareholder. The holding of office, it is submitted, is sufficient conduct on the part of a director to justify the conclusion that he desired to become a shareholder to the extent of at least one share, and in acting, considered himself to be a shareholder.

(b) No acceptance of offer.

The most common mode of acquiring shares is by application to the company after incorporation and acceptance of the offer by the company which issues the shares applied for. The only manner in which a company can accept an application for shares is by doing two acts which are separate and distinct. These are:

(*a*) Alloting the shares applied for,

(*b*) Giving notice to the shareholder that the shares have been allotted to him and his offer thereby accepted.

"One of the things now determined to be essential to the constitution of a contract (between the company and an applicant for shares) is that the letter of application should be followed by an allotment and communication of that allotment. The form of the communication is not material, but it has been decided that unless there is a communication of the allotment to the person who has made the application for the shares, there is no concluded contract and he does not become a shareholder." *Robinson's Case*, L.R. Ch. 322, at p. 332.

"To constitute a binding contract to take shares in a company where such contract is based upon application and allotment, it is necessary that there should 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 Ch.D. 413, at p. 430.

The contributory is not liable if the company fails in either of these acts; *e.g.*, if no proper allotment he is not liable. *Howard's Case*, 1 Ch. 561, *Harris' Case*, 7 Ch. 587, and not liable if shares are properly allotted, but no notice given. *Pellatt's Case*, 2 Ch. 527; *Gunn's Case*, 3 Ch. 40. This is because as stated in a great many cases, the contract to take shares is like all other contracts, an offer must be accepted. And the only way in which a company can accept such an offer is by doing the two acts named.

In reference to allotment reference may be had to the title Allotment, *supra*. It may be stated here, however, that owing to the change in the Ontario Companies Act, there would now appear to be less necessity for strict and regular proceedings in respect to allotment than there formerly was. By the old Ontario Companies Act, section 26, it was provided that "shares shall be allotted when and as the directors by by-law or otherwise ordain." The cases cited *infra* shew that the directors were required to act regularly and in a body in making an allotment of stock which would be binding on the shareholders, unless such things were done that it might be said as in *Hill's Case*, *infra*, that the directors had "otherwise ordained." But under the present Ontario Act, the only provision in respect to allotment is contained in section 87 which states that "the directors may make by-laws to regulate the allotment of shares."

It is thus seen that there is no direct provision requiring the directors to make by-laws actually alloting the shares. It will almost seem that under this provision the directors may pass a by-law placing the allotment of stock in the hands of an officer, such as the secretary, and regulate the allotment by him. It was held in *Galloway's Case*, 12 O.L.R. 100, that this could not be done. But this decision was given under section 26 of the old Act, which is not now in force. The question is open to serious doubt as all depends on the construction which the Courts will place on "regulate the allotment of shares."

It may be mentioned that since the revision of 1886 the Dominion Act is more stringent in respect to the allot-

ment of stock than is the Ontario Act. In section 46 of the present Dominion Act it is provided that "stock shall be allotted as the directors by by-law shall prescribe." It would seem, therefore, in the case of Dominion Companies, that it is essential that there should be a proper by-law of the company alloting stock in order to make a shareholder liable.

A person who applies for shares which are not allotted to him, and where there is no recognization by the company of his position as a shareholder and no action on his part presuming himself to be a shareholder is not liable on a winding-up. *Re Zoological Society*, 16 A.R. 543.

A contributory escapes liability if the allotment to him was irregular as for instance if the directors who purported to allot the stock were not duly qualified or if there were no quorum present at the meeting. *Howard's Case*, 1 Ch. 561; *Re Portuguese Mines*, 42 C.D. 160.

But a contributory would lose the benefit of this defence by the doctrine of estoppel if he had notice of the irregularity and expressly or impliedly waived it. *Re Portuguese Mines, supra.*

A shareholder applied for stock and upon receipt of his application his name was placed in the shareholders' list, an account opened for him in the stock ledger and a draft made on him for 10% of his stock which was paid. A letter was sent him with the draft advising that the company was drawing upon him for the first payment "on account of his stock." He was held liable on a winding-up, although no by-law was passed by the directors alloting the stock. It was held that all these Acts must be regarded as evidence that the directors "otherwise ordained" the allotment of this stock. *Hill's Case*, 10 O.L.R. 501. See *supra* as to change in Companies Act.

Where a contributory applied for stock and was notified that the directors had allotted him the stock in accordance with his application, but as a matter of fact the directors had not passed a by-law providing for or "otherwise ordained" the allotment of stock as required by the old Ontario Companies Act, and had merely passed a resolution that the "secretary be instructed to

allot stock as applications are passed in," it was held that he was not liable upon a winding up on the ground that the directors could not delegate to a subordinate officer their duty to allot stock. There was no valid acceptance of his application. *Galloway's Case*, 12 O.L.R. 100.

In the same case where a contributory had applied for preference stock and it was admitted that the provisions of the Companies Act had not been complied with in respect to the creation of preference stock it was held that he could not be liable as the company was never in a position to give him that for which he had applied and he was not estopped from shewing this. *Ibid.*

In *Higginbottom's Case*, 12 O.L.R. 100, which arose out of the same liquidation, a contributory applied for stock, acted as director, gave a note in payment of his stock, made payments thereon, attended meetings of shareholders and moved resolutions thereat, but he had not notice until after the liquidation of any irregularities in connection with the allotment. It then appeared that the directors had passed no by-law or otherwise ordained the allotment of stock, but had merely delegated the power of allotment to the secretary. It was held that making payments in ignorance of these facts was not a conclusive act, and the attendance and conduct at the meetings was not such an act of participation in the affairs and business of the company as to debar any question as to his status as a shareholder.

"In order to impute to a person a contract to take shares something like a contract must be established or something shewn which prevents him from saying there is not a contract. Here there was nothing in the records to shew that he was a shareholder except entries in an imperfect stock book or ledger. *Per* Moss, C.J.O., s.c., at page 113.

A contributory applied for shares and on the same date as the application, an entry was made in the stock ledger debiting him with these shares, and on the same day he gave the company's agent a cheque on account. On the following day he notified the agent that he withdrew his offer to take shares and

stopped payment of the cheque. No evidence was adduced in respect to allotment. A formal notice of allotment was not given, but notice of calls were given: *Held*, no valid allotment and contributory not liable. *Morton's Case*, 12 O.L.R. 594.

Unless expressly authorized directors can only delegate to their officers those duties which belong to the ordinary commercial business of the company. *Cartmell's Case*, L.R. 9 Ch. 691.

Nor can they delegate to their officers or to third parties their statutory powers of allotting shares or making calls. *Hovenden's Case*, 10 P.R. 434.

Where the rights and claims of creditors are involved no person taking shares can escape liability on account of irregularities in the issue of the stock or the neglect of some prescribed formalities so long as the issue or creation of the stock was substantially lawfully authorized by charter. *Re Ontario Express Company*, 21 A.R. 646, at page 654.

"It may well be that in many instances a shareholder may have a defence to an action by the company for calls or may be entitled to maintain action against the company to be relieved from liability to pay calls on his shares where he may, nevertheless, be held liable as a contributory in a winding-up proceeding, but I have failed to find a case in which where a company has attempted to issue shares under circumstances in which their Act of incorporation absolutely prohibits them from doing so, the shareholder has been held disentitled to contest his liability. At all events where he has done no more than subscribe to the illegal issue and accept the illegal allotment." *Per* Osler, J.A. *Ibid.*

Whether the mere notice of a call can be regarded as equivalent to notice of allotment is perhaps questionable. *Nasmith* v. *Manning*, 5 A.R. 126, 5 S.C.R. 417.

It may, perhaps, be so framed as to be sufficient for that purpose. *Re Canadian Tin Plate Co.*, 12 O.L.R. 594, at p. 600.

Where a subscriber never received notice of allotment, but received notices asking for payment of the shares, this was held to be evidence sufficient to prove knowledge of the acceptance

of his offer by the company, and he was held liable. *Denison* v. *Lesslie*, 3 A.R. 536.

A person is not liable if, although the shares were alloted to him, he was given no notice of allotment. *Pellat's Case*, 2 Ch. 527; *Gunn's Case*, 3 Ch. 40.

But he is liable if notice of allotment was posted, even though he does not receive it, provided the conduct of the parties contemplated acceptance by mail. *Harris' Case*, 7 Ch. 587; *Household* v. *Grant*, 4 Ex. D. 216.

No formal notice of allotment is necessary to enable a shareholder to be held liable. It is enough if sufficient takes place from which it can be deduced that the contributory must have known that the company had accepted the application. *Re Publishers' Syndicate; Harts' Case*, 1 O.W.R. 508.

A contributory can waive notice expressly or impliedly as *e.g.*, when he pays calls, receives dividends, votes or otherwise acts as a member. *Crawley's Case*, 4 Ch. 322. *Hindley's Case* (1896), 2 Ch. 121.

The contributory escapes liability if notice of allotment is not given within a reasonable time. *Ramsgate Hotel* v. *Montefiore*, 1 Ex. 109.

But the mere fact that a company delays for some considerable time to give the notice, will not relieve the shareholder from liability if it does not appear that he took steps to repudiate his position as a shareholder before the winding-up proceedings or that prejudice had resulted to him from the failure of the company to notify him that he was accepted as a shareholder. *Close's Case*, 8 O.R. 92.

"In a great majority of cases (of applications for stock) there is an offer to buy in writing, the only evidence of acceptance of which is an allotment or transfer of the shares by the company to the intending purchaser and notice of such allotment to him, but any other evidence of a concluded bargain ought to be just as effectual. There ought to be in principle, no difference in the sale of shares in the stock of a company from that of any other commodity. There is generally a difference

in the mode in which it is contracted, and the evidence by which it is usually established." *Per* Meredith, J.A., in *Re Canadian Tin Plate Company*, 12 O.L.R. 594, at p. 600.

The contributory's offer is, of course, not accepted if he applies for a specific number of shares and a greater or less number is allotted to him.

If a person applies for a specific number of shares and a less number is allotted to him, he cannot be held liable unless he expressly or impliedly accepts the smaller number. *Robert's Case*, 1 Drew. 204; *Crawley's Case*, 4 Ch. 322.

A contract to take shares is an ordinary contract and if a new contract is created by the allotment of the shares the contract is not binding and the contributory not liable unless he expressly or impliedly agrees to the new term. *Beck's Case*, 9 Ch. 392; *Crawley's Case, supra.*

It would, of course, be otherwise if in the application the company was given authority to allot a less number of shares than that applied for.

(*c*) Offer withdrawn before acceptance.

A contributory escapes liability if he can shew he withdrew his application before notice of allotment. *Hebb's Case*, 4 Eq. 9; *Ritso's Case*, 4 C.D. 774, but he cannot escape if notice of allotment was posted before notice of withdrawal was given, if acceptance by mail was contemplated. *Household Fire Insurance Co.* v. *Grant*, 4 Ex. Div. 216.

See also *Morton's Case, supra.*

But if the offer to take shares be under seal, it cannot be revoked, and the company can act upon it at any time. *Nelson Coke* v. *Pellatt*, 4 O.L.R. 481.

But even in the case of an offer under seal some favourable response to the offer must be made by the company and communicated to the shareholder. *Ibid.*

And where a person offered under seal to take one share of stock upon which 10% was payable with application, and he did not pay the 10%, but purported to revoke his offer the following day, and the company did not treat him as a shareholder ex-

cept to draw on him for the 10% and write him for payment, to which he paid no attention, he was held not liable, on the ground that the company had not accepted him as a shareholder, and if they had, no notice was given him. *Calderwood's Case,* 10 O.L.R. 705.

(*d*) Offer subject to a condition which has not been fulfilled.

If an application for shares is subject to a condition precedent which is not complied with the contributory is not liable. *Howard's Case,* 1 Ch. 561; *Pellatt's Case,* 2 Ch. 527. But it is otherwise if the condition is actually a collateral agreement and not a condition precedent. *Elkington's Case,* 2 Ch. 511; *Bridger's Case,* 5 Ch. 304. Or if he acts as a member of the company with knowledge that the condition was not complied with before or after allotment. *Jackson & Shaw's Case* (1867), W.N. 226.

The difficulty in connection with this defence is to distinguish between a condition precedent and a collateral agreement. If the bargain is that something must be performed either by the company, or by the contributory, or by a third person before the contributory will assume the status of a shareholder, then unless or until that condition has been fulfilled or complied with, the shareholder is not liable. But if the bargain is such that the contributory becomes a shareholder *in præsenti* with a condition subsequent or collateral agreement attached, as, for instance, in reference to the mode of payment for his shares, he is liable to pay in full in cash for his shares on a winding up, even though the widest provisions are contained in his contract to the effect, for instance, that he may pay for his shares in goods. The winding up is for the purpose of realizing the assets of the company and distributing them as soon as possible and accordingly cash must be paid.

See *Re Wiarton Beet Sugar Co., Jarvis' Case,* 5 O.W.R. 542, for an example of a collateral agreement.

T. signed a power of attorney to C. to subscribe for twenty shares of stock and delivered it to him on the understanding that it was not to be used unless he became a director of the company. C. directed the accountant to enter T.'s name in the stock ledger

as a shareholder, which was done. Blotting pads were issued and an advertisement published in a newspaper and a return made to the government, with T.'s name inserted as a director in the two former and as a member in the latter; but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement or returns, and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call he at once repudiated all liability: *Held*, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder and that T.'s name must be removed from the list of contributories. *Re Standard Fire Ins. Co., Turner's Case*, 7 O.R. 448.

M. signed and handed to the company's agent an application for five shares of stock with the understanding that the application was subject to a condition not appearing on its face, that he was not to be required to accept any allotment that might be made unless and until he should collect a sum of about $700 then due him, and which would enable him to pay for the shares. This condition was fully communicated to the president of the company by the agent. The directors allotted five shares to M. upon the application being laid before them, but no formal notice of allotment was given, no money was paid by M. and he never attended any meeting of shareholders and never in any way acted as a shareholder. He never collected the $700, upon which he had relied as a means of paying for the shares; he was twice asked by persons sent by the company whether his money had come in and each occasion he gave the manager to understand that it had not come in, and that he would be unable to take the shares. Finally he told the president that he had failed to collect the money and would not take the shares and was told that it was all right.

On a winding up it was held on appeal to Street, J., that M. was not liable as a contributory, the application being accompanied by a condition and no notice of allotment having been given. *In re Publishers' Syndicate, Mallony's Case*, 3 O.L.R. 552.

As to the liability of a shareholder on a subscription which was supposed to be substituted for a prior subscription see *Fuches* v. *Hamilton Tribune, Copp's Case,* 10 O.R. 497.

(*e*) Offer accepted with a condition attached.

A contract is not made, of course, if the offer as made is not accepted unless the offeror assents to the term added by the offeree.

So if shares are alloted subject to a condition to which the shareholder does not assent he is not liable. *Pentelow's Case,* 4 Ch. 178.

Or if allotted subject to a condition which the shareholder does not perform—unless the condition were waived by the company before the winding up. *Ibid.*

Subsequent ascquiescence or delay may defeat the contributory's rights. *Crawley's Case,* 4 Ch. 322.

3. Shares Transferred, and Transfer Registered, or not Registered Through Default of Company.

Where shares have been allotted as fully paid-up shares under circumstances which render a shareholder liable to pay for the shares, but when the shareholder, before the commencement of the winding up, transferred these shares to a person who is accepted by the company as the transferee, and who is entitled to hold the shares as fully paid, the original shareholder is not liable to be placed on the list of contributories for the amount which ought to have been paid in respect to the shares.

The Ontario Companies Act contains no provision similar to that in the English Companies Act making past members liable a year after they have ceased to be members in the event of the company being wound up, and there is nothing in the Winding-up Act which creates any such liability on a past member when such a member is not subjected to such liability by the Act under the authority of which the company was created or some Act relating thereto. *Re Wiarton Beet Sugar Co., Freeman's Case,* 12 O.L.R. 149.

As the shareholder in this case was a director at the time of these transactions it was stated he would probably be liable for breach of trust under section 123. See that section.

After a winding-up order has been made it is too late for holders of shares entered as such in the books of the company to escape liability by shewing irregularities in the transfers to more or less remote predecessors in the title. There is no responsibility upon the part of the creditors of shewing a lawful issue in the original acquisition of the stock and of faultless regularity in every transfer down to the liquidation. *Re Central Bank of Canada, Home Savings & Loan Company's Case,* 18 A.R. 489.

Where H. subscribed for shares in the memorandum of agreement and stock book before incorporation acted as a provisional director at the first meeting, but at the adjournment of the provisional directors advised the Board that he declined to act as director and desired to withdraw altogether from the company and transfer his shares to another person, all of which requests were agreed to by the company, it was held that H. could not be held liable as a contributory. At the date of this transfer of shares the company had no transfer book, but H.'s name was removed from the shareholders' book, and it was held that this was a sufficient entry of the transfer in the books of the company, under the circumstances. *Re Sprouted Food Company, Hudson's Case,* 6 O.W.R. 514.

A company should not be allowed to set up their own want of books and improper bookkeeping or neglect to do all the stated matters in regard to joint stock companies as a ground to fix a contributory with liability. *Ibid.*

A person who is once a shareholder must remain a shareholder until he can shew that he has in some lawful way got rid of his liability. *Re Patent Paper Co.,* 5 Ch. 294.

Once having been a shareholder, a person cannot lose that character by mere inaction. *Bell's Case,* 4 A.C. 500.

Every one who has at any time become a shareholder and is unable to shew that at the date of the order he had ceased to belong to the company either by the forfeiture or transfer of his

shares or in some other authorized manner must be placed upon the list of contributories. *Spackman* v. *Evans*, L.R. 3 H.L. 171.

The certificate is not the title, but evidence of the title to the shares and an assumed act of cancellation where there is no proper assignment or transfer does not divest the title to the shares. *Société Générale de Paris* v. *Walker*, 11 A.C. 20.

Where the 10% required by the Bank Act to be paid with the application or within 30 days was not paid until later, but was then adopted by the bank the transferor was held not entitled to rely on this as a defence. *Re Central Bank, Baines' Case*, 16 O.R. 293.

See *Paton's Case*, 5 O.L.R. 392, where a transferor was not allowed to escape liability.

In connection with the defence of stock transferred regard must always be paid to the provisions of the Companies Acts providing that no transfer shall be valid, etc., until entry thereof is made in the company's books. See section 52 of the Ontario Companies Act, and section 64 of the Dominion Act.

4. Shares Paid for in Full.

(*a*) In cash.

It is clear law that a company must receive value for its shares of stock and unless the person who has accepted the stock has paid for it in full either in cash, property or services, he is liable on a winding up to pay the balance. No authority is needed for this proposition.

It is also clear that shares cannot be sold at a discount. They are not like bonds or debentures. If cash is to be paid the company must receive the full par value of the stock.

Shares cannot be issued at a discount and the contributory is liable for the difference. *Re Almada & Tirito Co.*, 38 C.D. 415; *Re Welton* v. *Saffery* (1897), A.C. 299.

Where shares have been issued at a discount the amount credited by way of discount is to be treated as so much on the uncalled capital and the rights of contributories are to be adjusted accordingly. *Welton* v. *Saffery, supra.*

If shares are issued to a person at a discount he is liable to pay on a winding up the difference between the par value of the shares and the purchase price which he paid. *Ex parte Wilton* (1895), 1 Ch. 255.

Where shares were applied for and the applicants paid to the company an amount equal to the face value of the shares, but at the same time by a colourable transaction received from the company a portion of the price as alleged consideration for services it was held in a judgment creditor action that the company had really issued its shares at a discount and that the shares to the extent of the amounts so allowed must be treated as unpaid shares. *Union Bank* v. *Morris; Union Bank* v. *Code*, 27 A.R. 396.

It must be borne in mind that under the present Ontario Companies Act (s. 96), permission is given public companies, upon complying with certain requisites, to pay a commission on the sale of shares. So that shares so sold cannot be treated as sold at a discount.

There is no similar provision in the Dominion Act, but in respect to companies incorporated under that Act and to Ontario companies to which the commission section does not apply, it is submitted that the English cases holding that a company may pay a reasonable commission on the sale of its shares, will apply. See *Metropolitan Coal Co.* v. *Scrimgeour* (1895), 2 Q.B. 605.

A company cannot traffic in its own shares, and where a company by its directors authorized the manager to purchase from the holder thereof a number of partly paid-up shares of the company on which calls were in arrear and the transfer was taken to him as "manager in trust," it was held that the manager was liable in winding-up proceedings for the amount unpaid on the shares. He was not allowed to evade liabilities by shewing that the purchase was in trust for the company and that the purchase money was actually paid by the company. *Re The Union Fire Insurance Company, McCord's Case*, 21 O.R. 264.

In re Owen Sound Dry Dock Company, 21 O.R. 349, it was held that where a company had sufficient surplus assets to rep-

resent the amount of the discount allowed on shares the company may issue shares at a discount and the shareholders who receive such discount are not liable as contributories.

The circumstances of this case are somewhat peculiar owing to re-incorporation after the transaction took place, but, nevertheless, it seems to be clear authority for the principle stated, although there does not appear to be any other case on the subject.

A certificate of 238 shares of stock was issued to one McN., described as fully paid up, pursuant to an understanding between him and the directors. He paid for 171 shares and accepted the certificate, knowing that 67 shares were not paid for, but believing that there was no further liability in respect to them. There was no evidence of any application for them by him or of any allotment to him. He transferred one share, surrendered his certificate and got a new one for 237 shares and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares.

Held, that he was a shareholder with all the rights and liabilities of a shareholder, and that he was liable for the amount actually unpaid in respect of all the shares. *Re Wiarton Beet Sugar Mfg. Co., Alex. McNeil's Case*, 10 O.L.R. 219.

Disbursements made by a person from time to time on behalf of a company and afterwards credited on account of unpaid stock constitute a valid payment of the stock. *Re Ottawa Cement Co.*, 14 O.L.R. 389.

Payment in cash for shares may be effected without any money passing. It is sufficient if there is a debt presently and unconditionally due on either side, and the parties agree to set it off and the transaction is completed in the books. *Re Spargo's Case*, 8 Ch. 407; *Re Larocque* v. *Beachemin* (1897), A.C. 358.

Where the transaction is not completed in the books see *Kent's Case*, 39 C.D. 191; and *Johannesburg Co.* (1891), 1 Ch. 119.

(*b*) In property.

Shares may be paid for by transfer of property as well as by cash.

When the company is incorporated under the Ontario Act, payment for shares may take place in kind as well as in cash. *Per* Ferguson, J., in *Re Hess Manufacturing Company,* 21 A.R. 66, at page 67.

And while shares must be paid up in money or money's worth that by no means involves the proposition that the property transferred must be equal to the nominal value of the shares. On the contrary decided cases shew that the Courts will not enquire into the value in the absence of fraud. *In re Hess Manufacturing Co., Edgar* v. *Sloan,* 23 S.C.R. 664, at p. 666.

There is no necessity for paying cash for stock. Any valuable consideration accepted knowingly by the company is sufficient. *Re Harris Co,* 5 O.W.R. 514.

It is an important and far-reaching principle that if shares are issued as fully paid up under a valid agreement for property sold or services rendered, the Court will not on a winding up inquire into the value, or the adequacy of the consideration. *Re Pell's Case,* 5 Ch. 11; *Re Theatrical Trust* (1895), 1 Ch. 771; *Re Wragg, Limited* (1897), 1 Ch. 796.

When consideration is illusory see *Chapman's Case* (1895), 1 Ch. 771; *Ames' Case* (1896), W.N. 79.

If shares are paid for in money's worth, *e.g.,* by property conveyed to the company, it is beyond the jurisdiction of the Master in the winding up to enquire into the adequacy of this consideration. The only principle on which the Master can act in placing a shareholder upon the list of contributories is in assuming that no consideration was given for the shares. If any consideration is given it is beyond the Master's competence to enquire into the adequacy of it. *In re Hess Manufacturing Company,* 23 S.C.R. 644.

"Shares which are *bonâ fide* given as paid up in payment of property transferred to the company or of services rendered to it or of claims against it must on the winding up of the company be treated as paid-up shares; and in the absence of fraud the Court will not enquire into the value of that which is taken by the company in payment instead of money." Lindley, 5th ed., p. 785.

The only course open to the liquidator where he is of opinion that a shareholder who has paid for his shares by a transfer of property should be settled on the list of contributories is to bring a formal action to rescind the contract and to do so he must make out a case of fraud. *Re Hess Mnfg. Co.*, 23 S.C.R. 644, at p. 654. See also *Jones* v. *Miller*, 24 O.R. 268.

On an appeal to Anglin, J., to hold a contributory liable for shares of stock which were alleged to have been issued to him in payment of the goodwill of the business, the nominal value of the shares being greatly in excess of the actual value of the good will, it was held that the whole consideration was paid for the entire property turned over and that there should be no apportionment of the consideration. Futhermore, applying the principals in *Re Wragg, supra,* the consideration could not be impeached. *Re North Bay Supply Company,* 6 O.W.R. 85.

Where a consideration has been given for shares the question of value cannot be raised on a winding up. *Re Co-operative Cycle and Motor Company,* 1 O.W.R. 778.

The failure of the consideration in respect of which the paid-up shares are issued will not render the holders liable to calls. *Re Mege & Angier's Case* (1875), W.N. 208.

The dictum of Strong, C.J., in *Re Hess Manufacturing Co.,* 23 S.C.R. 644, at pp. 665-666, that "relief by way of rescission is beyond the jurisdiction of the Master, in a winding-up proceeding under the Dominion statute," is explained by Britton, J., in *Re Packenham Pork Packing Co.,* 6 O.L.R. 582, at p. 583, where the learned Judge says: "I think the learned Chief Justice did not intend to go so far as to say that the Master has no jurisdiction to declare a rescission to the extent of removing a name from the list of contributories, or in other words to give effect to a defence if proved of fraud in procuring the signature of a shareholder. The Master has no authority to grant substantial relief such as might be claimed by counterclaim or to rescind in the case of a sale by a promoter or to give the consequential relief which in some cases rescission would involve."

See *Hood* v. *Eden*, 36 S.C.R. 476, for a case in which the shareholders had in effect paid up their stock by transfer of property and were held not liable. The case depends upon a set of complicated facts.

In connection with the issue of shares for property it should be remembered that the Ontario Companies Act (s. 99), requires the fact of such issue to be set out in the prospectus which is filed with the Provincial Secretary, and section 110 (*b*) requires the contract to be filed.

It is improbable, however, that the omission to file the prospectus or to include such facts or to file the contract would affect the contract in itself. The Act merely attaches a penalty for omission to file. There is now no provision in the Dominion Companies Act requiring the contract to be filed.

(*c*) In services.

An agreement to pay for stock by performing services for the company is valid, and acceptance of the shares for such services will not render a contributory liable to pay in cash for them. *Inglis* v. *Wellington*, 29 C.P. 387.

"I do not understand that if a company says to a man to induce him to enter into its services, we will give you $1,000 of stock and $50 a month as long as we can get on and he agrees to that, that is not a bargain with consideration on both sides, or why the whole bargain must not stand." *Per* Meredith, C.J., in *Re Publisher's Syndicate, Paton's Case*, 5 O.L.R. 392.

Shares Forfeited Before Winding-up Order Made.

When section 35 of R.S.O., 1897, chapter 191, was in force it was held that where shares had been properly forfeited or surrendered those who had held such shares were not liable on a winding up for calls made prior to the forfeiture or surrender. *Re Ontario Express & Transportation Company*, 24 O.R. 216; *Stocken's Case*, L.R. 3 Ch. 412; *In re Holyake, R.W. Company*, L.R. 9 Ch. 257, at p. 260.

Now, however, under section 56 of 7 Edw. VII. (Ont.), c. 34, s. 56, the provisions of the Act in relation to the forfeiture of shares are altered in so far as enacting that forfeiture shall not relieve any shareholder of any liability to the company or a creditor. It is accordingly submitted that now on a winding up of a company incorporated under the Ontario Act, a contributory would be held liable for shares which have been forfeited or surrendered in respect to which calls were unpaid before the forfeiture or surrender took place.

Section 64 of the Dominion Companies Act provides for similar liability, and shareholders of a Dominion company whose stock has been forfeited remain liable to the then creditors of the company less any sums which are subsequently received by the company in respect thereof.

In England it has been held that a contributory escapes liability if his shares have been properly forfeited by the company before the winding up. *Bridger's Case*, 4 Ch. 266, but he cannot escape if there were want of *bonâ fides* in the forfeiture. *Ex parte Littledale*, 9 Ch. 257. *Spackman* v. *Evans*, 3 H.L. 171.

Miscellaneous Cases.

When a person's name does not appear in the books of the company as a shareholder it will not release him from liability if in fact he is a shareholder and should appear in the books. *Re Hercyina Copper Co.* (1894), 2 Ch. 403.

The entry of a person's name in the stock ledger of the company is not conclusive evidence that he is a shareholder. *Gunn's Case*, L.R. 3 Ch. 40.

Although it raises a presumption that he is a shareholder and he must displace this presumption. See *Hill's Case*, and *Re London Speaker Co., supra.*

A call made on winding up is in the nature of a specialty debt. *Buck* v. *Robson*, L.R. 10 Eq. 629.

Where the Act of incorporation of a company provided that it should be lawful for a company to increase the amount of its capital stock when $100,000 of the capital stock had been paid

in full and where the company by a "juggle" had illegally declared this $100,000 worth of stock to be paid up and issued new stock, the subscribers for this new stock were held in winding-up proceedings to be not liable for the amount unpaid. *In re the Ontario Express & Transportation Company*, 21 A.R. 646.

It is not within the power of a shareholder at all events after the winding-up order has been made to set up defects and illegalities in the organization of a company incorporated under the Companies Act. Such a ground can be taken only by direct proceedings at the instance of the Attorney-General. *Common* v. *McArthur*, 29 S.C.R. 239.

Where a person purchases shares as fully paid up in good faith without notice that they have been issued at a discount he is not liable to pay the balance. *McCracken* v. *McIntyre*, 1 S.C.R. 479.

Where a person buys shares *bonâ fide* in reliance on a certificate of the company which represents the shares to be fully paid up, the company, and the liquidator are estopped from shewing that in fact they are not paid up. *Parbury's Case* (1896), 1 Ch. 100; *Bloomenthal* v. *Ford* (1897), App. Cas. 157; *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004.

Where a director has received in breach of trust a present of paid-up shares from the company's vendor he may be made liable for misfeasance under section 123, but he cannot be made liable as a contributory for unpaid shares. *Carling's Case*, 1 C.D. 115; *Re Innes & Co.* (1903), 2 Ch. 254.

An equitable mortgagee of shares is not a contributory. *Sichill's Case*, 3 Ch. 119.

Nor is one who holds shares as collateral security for accommodation paper made by him for the company, although the stock is issued in his own name. *Allan's Case*, 11 O.W.R. 186.

Where shares are held by A. in trust for B., the latter is not a contributory. But the former is. *King's Case*, 6 Ch. 196.

52. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the

case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act.

2. The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid. R.S., c. 129, s. 45.

This section is designed to meet such cases as are dealt with in the Bank Act placing a liability on shareholders for a certain time and under certain restrictions after they have transferred their shares and to provide for cases in which as under that Act a shareholder is liable beyond the amount unpaid on his shares. There is nothing in the Winding-up Act which creates any liability on the part of a past member of a company, where such a member is not subjected to such a liability by the Act under the authority of which the company is created or some Act relating to it. *Re Wiarton Beet Sugar Company, Freeman's Case,* 12 O.L.R. 149.

The section would also apply to cases of fraudulent or collusive transfers made to avoid liability. Where shortly before liquidation a shareholder transfers his shares under such circumstances that the transferee has a right in equity to be relieved against the transfer, the transferor will be placed on the list of contributories as the transfer is not *bona fide. Re Discoverers Finance Co.,* 24 T.L.R. 12. There is nothing in the Ontario or Dominion Companies Act fixing past members with liability for a stated time after the transfer of their stock as there is in the Imperial Act.

53. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability. R.S., c. 129, s. 46.

A person who is merely a debtor of the company is not a contributory, although in a sense he may be liable to contribute to the assets of the company. *King's Case,* 6 Ch. 196.

These sections apply only to the liability of a shareholder or member as such. *Re Wiarton Beet Sugar Co., Freeman's Case, supra.*

54. In the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate. R.S., c. 129, s. 46.

As in nearly every liquidation it is necessary to enforce payment of all balances due on stock this section is not frequently called into use. The original of this and the preceding section was first passed in England to remove difficulties in connection with proving for calls against the estates of bankrupt contributories. See Lindley on Companies, 5th ed., 556.

55. The Court may, at any time, after making a winding-up order, require any contributory for the time being settled on the list of contributories as trustee, receiver, banker, agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *prima facie* entitled. R.S., c. 129, s. 47.

The object of this section, which is the same as section 100 of the Imperial Act of 1862, was to give a summary mode of procedure as against the persons named. *Ex parte Hawkins,* 3 Ch. 787. It gives no jurisdiction as against outsiders. *Re Ilkley Hotel Co.* (1893), 1 Q.B. 248.

When the person in possession of property, demanded by the liquidator, has a lien on it his lien will not be disturbed without his consent. *Re Capital Fire,* 24 C.D. 408.

But there can be no lien upon the books or documents required to be kept by the directors under the constitution of the company. *Re Anglo-Maltese Co.,* 54 L.J. Ch. 730.

If property is in the hands of some person not a contributory settled for the time being on the list, and the liquidator is of opinion that it belongs to the company and desires to obtain possession of it, he must proceed in the ordinary way, by action, after obtaining leave, as no summary provisions are made for such cases. See *Re Ilkley Hotel Co., supra.* Section 134 applies

only to cases where the liquidator is in possession and a third party claims the property.

56. The Court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act. R.S., c. 129, s. 48.

It is to be noted that this section does not apply to calls made pursuant to the Act, *i.e.*, after the contributory has been found liable after his trial and payment directed to be made. Sections 57 and 58 apply to these cases.

The amount of the dividend improperly paid to a shareholder would be a sum of money due within the meaning of this section, and in respect to which an order may be made. *Stringer's Case*, 4 Ch. 475.

It is also to be noted that the jurisdiction does not arise until the contributory is placed on the list. No jurisdiction is conferred as against outsiders.

A contributory ordered to pay money under this section cannot set-off a debt due to him from the company. *Grissell's Case*, 1 Ch. 528.

The section applies to a call on a contributory made by the directors of the company before the winding up. *Re Cawley & Co.*, 42 C.D. 209.

The order is made on the liquidator's affidavit setting out the facts and the necessity for call, and may be in the following form:—

ORDER FOR PAYMENT OF CALL DUE BEFORE WINDING UP.

(Style of cause, etc.)

Upon the application of the liquidator, etc., it is ordered that A.B., a contributory of the said Company for the time being settled on the list of contributories, do within seven days after service of this order upon him pay to the said liquidator at his office Number in the City of Toronto the sum of $ being the amount due in respect of a call on the shares in the said Company held by him before the com-

mencement of the winding up of the said Company together with interest thereon at the rate of per cent. per annum from the day of 190 , (date of call) until payment.

And that the said A.B. at the said time and place pay to the said liquidator the costs of this application after taxation thereof.

Every order made under this Act is to be deemed a judgment and enforceable in the ordinary way. See section 112.

In England orders have been made allowing the liquidator to pay a commission to persons giving him information enabling him to recover moneys from contributories who have not satisfied their liability, and to a detective to find out the whereabouts of the contributories. Palmer's Company Precedents, 8th ed., Vol. 2, 509.

57. The Court may at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves. R.S., c. 129, s. 49.

Upon a winding-up order being made all unpaid balances on stock immediately become due and payable, and when a contract provided for payment of shares to be made by instalments, some of which were not due at the date of the order, calls may at once be made for the amounts unpaid. *Re Cordova* (1891), 2 Ch. 580.

The directions of the Master as to the *quantum* of a call will not be interfered with on appeal unless the strongest reasons for so doing are shewn. *Re Contract Corporation*, 2 Ch. 95.

The liquidator is not bound to put off making the call until the claims are established. A call may be made before any of the claims are proved. *Re Contract Corporation, supra; Re Barned*, 36 L.J. Ch. 215.

58. The Court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same; provided that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. R.S., c. 129, s. 49.

It is submitted that the latter part of this section does not apply so as to prevent the liquidator obtaining immediate payment of unpaid balances due on stock even when the shares have been bought on the basis of instalment payments. The winding-up order overrides the contract between the company and the shareholder and substitutes a statutory for the contractual liability. See, for instance, *Re Wiarton Beet Sugar*, 5 O.W.R. 542.

It is submitted that the latter part of the section applies only to the order against contributories as made in the winding up.

Before the Court directs a call to be made an affidavit of the liquidator is brought in shewing the necessity for the call and the order is made on this affidavit. See the forms following.

LIQUIDATOR'S AFFIDAVIT AS TO NECESSITY FOR CALL.

(Style of cause, etc.)

I, , of, etc., the liquidator of the above named Company, make oath and say as follows:

1. I have in the schedule now produced and shewn to me, and marked with the letter "A," set forth a statement shewing the amount due in respect of the debts proved and admitted against the said Company, and the estimated amount of the costs, charges and expenses of and incidental to the winding up the affairs thereof, and which several amounts form in the aggregate the sum of $ or thereabouts.

2. I have also in the said schedule set forth a statement of the assets in hand belonging to the said Company, amounting to the sum of $ and no more. There are no other assets belonging to the said Company, except the amounts due from certain of the contributories of the said Company, and to the best of my information and belief it will be impossible to realize in respect of the said amounts more than the sum of $ or thereabouts.

3. persons have been settled on the list of contributories of the said Company in respect of the total number of shares.

4. For the purpose of satisfying the several debts and liabilities of the said Company, and of paying the costs, charges and expenses of and incidental to the winding up the affairs thereof, I believe the sum of $ will be required in addition to the amount of the assets of the said Company mentioned in the said schedule "A" and the sum of $.

5. In order to provide the said sum of $ it is necessary to make a call upon the several persons who have been settled on the list of contributories as before mentioned, and having regard to the probability that some of such contributories will partly or wholly fail to pay the

amount of such call, I believe that for the purpose of realizing the amount required, as before mentioned, it is necessary that a call of $ per share (or per cent.) should be made.

ORDER SANCTIONING THE CALL.

(Style of cause, etc.)

Upon the application of the liquidator, etc., it is ordered that leave be given to the liquidator to make a call of $ per share on all the contributories of the said Company (or as the case may be); and it is ordered that each such contributory do, on or before the day of , 190 , pay to the liquidator of the Company the amount which will be due from him or her in respect of such call.

If the calls are not paid, the liquidator applies to the Master on affidavit setting out the fact of the call, service and default in payment, and the Master then makes an order for payment, which may be in the form following:—

ORDER FOR PAYMENT OF CALLS.

(Style of cause, etc.)

Upon the application of the liquidator of the above-named Company and upon reading, etc., it is ordered that C.D. of, etc., (or E.F. of, etc., the legal personal representative of L.M., late of, etc., deceased, one of the contributories of the said Company (or, if against several contributories, the several persons named in the second column of the schedule to this order, being respectively contributories of the said Company), do on or before the day of , 19 , or within four days after service of this order, pay to the liquidator of the said Company at his office, No. Street, in the City of , the sum of $, (if against a legal personal representative add, out of the assets of the said L.M., deceased, in his hands to be administered, or if against several contributories, the several sums of money set opposite to the respective names in the column of the said schedule hereto) such sum (or sums) being the amount, or amounts, due from the said C.D. (or L.M., or the said several persons respectively), in respect of the call of $ per share duly made.

Dated the day of , 19 .

Instead of having successive orders as above, an order made on the affidavit of the liquidator, *ante*, page 473, will suffice. It may be in the form following:—

ORDER FOR CALL.

(Style of cause, etc.)

1. Upon the application of the liquidator in the presence of counsel for certain creditors and in the presence of counsel for and in the pre-

sence of in person, no one appearing for the other contributories although duly notified in that behalf as by affidavits of personal service appears.

Upon reading the affidavit of the liquidator of the said Company filed on this application and the exhibits therein referred to, and upon hearing what was alleged by counsel aforesaid and it appearing that there are certain of the persons settled on the list of contributories herein who have already paid or who have arranged with the said liquidator for the payment of the amounts found due by them as contributories of the said Company and that there are certain others who have not been served with notice of this motion and against whom no order is asked at present.

2. It is ordered that all the persons named in schedule "A" to this order being contributories of the said Company settled on the list of contributories by the report of the Master in Ordinary dated the day of 19 , do, on or before the day of , 19 , pay into the bank at the to the credit of the liquidator of the above Company the several sums of money set opposite their respective names in schedule "A" and that in default of such payment as aforesaid execution do issue against the said parties respectively for the said amounts, subject to the provisions in the 2nd paragraph hereof.

3. And it is further ordered that the amounts found due by the persons named in schedule "B" hereto annexed who are representatives or trustees for other parties and named in the books of the Company as executors or trustees of other parties, be paid into the said bank to the credit of said liquidator out of the amounts that come to their hands, or which may hereafter come to their hands respectively as such executors and trustees and not otherwise.

4. And it is further ordered that the liquidator be at liberty to apply hereafter as he may be advised for an order for payment of the amount of their several liabilities by those contributories referred to in paragraph 1 hereof who are not included in this order.

5. And it is further ordered that the costs, charges and expenses of the said liquidator of this application as between solicitor and client be paid out of the assets of the said Company after taxation thereof.

59. The Court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post office savings bank, or other bank or Government savings bank, to the account of the Court, instead of the liquidator.

2. Such order may be enforced in the same manner as if it had directed payment to the liquidator. R.S., c. 129, s. 50.

The words "or other bank" are new.

60. The Court shall adjust the rights of the contributories among themselves. R.S., c. 129, s. 51.

The jurisdiction is to adjust their rights, *qua* contributory only. *Re Alexandra Palace Co.*, 23 C.D. 297.

If there is a surplus and the shares are not all fully paid up the assets must *primâ facie* be distributed to throw the loss of capital on the members in proportion to the nominal amount of the capital held by them respectively. *Re Maude's Case,* 6 Ch. 51.

Where, after paying off the whole of the paid-up capital there is a surplus, that surplus is *primâ facie* distributed *pari passu. Re Birch* v. *Cropper,* 14 A.C. 525.

Where shares have been issued at discount the holders must *primâ facie* be treated as holders of only partly paid-up shares, and must, if necessary, to adjust the rights of the contributories pay up accordingly.

See *Re West Coast Gold Fields* (1906), 1 Ch. 1.

As to the distributions of profits earned before and after liquidation see *Bishop* v. *Smyrna Railway* (1895), 2 Ch. 596, 596; *Re Bridgewater* (1891), 2 Ch. 317. *Primâ facie* preference shares are not entitled to any preference in a winding up. *Re London India Rubber Co.,* 5 Eq. 519.

But, of course, such preference may be given by the by-laws creating the preference stock. See sections 73 *et seq.,* of Ontario Companies Act. And see *Re New Transvaal Co.* (1896), 2 Ch. 750; *Re Mutoscope Syndicate* (1899), 1 Ch. 896.

61. The Court may, if it thinks expedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. R.S., c. 129, s. 19.

Meetings have been called in England to consider whether a winding-up order should or should not be made. *Re Thomas Edward Brinsmead & Sons* (1897), 1 Ch. 406.

In such cases where no cause for winding up is made out the Court will not order a meeting to be held. *Re Joint Stock Coal Company,* 8 Eq. 146.

Where the Master orders a meeting of creditors to be held for the discussion of specific questions in connection with a winding

up, there is no right to discuss other questions at this meeting. *Re Sun Lithographing Company*, 5 O.W.R. 509.

Creditors are entitled to notice of the time, the place and the business proposed to be transacted at the meetings called under this section. *Ibid.*

Where the interests of creditors and shareholders conflict, the Court in a winding up will exercise its discretion for the benefit of the creditors. *Re Commercial Bank Corporation*, 1 Ch. 538.

It is submitted that the liquidator is not bound to follow the directions or resolutions made or carried at such meetings as may be held under this section. It would not be wise for the liquidator to disregard the directions without applying to the Court, but it is submitted that the Court may make an order allowing him or directing him to disregard the directions made at such meeting. See *Ex parte Cocks*, 21 Ch.D. 405.

If the liquidator were to follow the directions made at such meetings, and the directions were unreasonable, he may possibly be ordered to pay the resulting costs personally. *Ex parte Brown*, 17 Q.B.D. 488.

If the creditors pass resolutions which are not in the interest of the winding up, but are for some other object, the liquidator may get the leave of the Court to disregard the resolutions. *Re Poole* (1882), 21 Ch. D. 397.

Creditors who do not attend a meeting after proper notice has been given are bound by the action of those who do attend. *Re Exchange Bank* v. *Campbell* (1885), 15 R.L. 373.

See *Re Sun Lithographing Co.*, 24 O.R. 200, for powers of dissentient minority.

The order summoning such meetings may be in the following form:—

ORDER CALLING MEETING OF CREDITORS AND SHAREHOLDERS.

(Style of cause.)

This matter coming on this day in the presence of the liquidator and of certain creditors, contributories and shareholders of the said Company, upon hearing what was alleged by counsel for the liquidator, and by certain of the creditors, contributories and shareholders personally and by counsel.

It is ordered that a meeting of the creditors of the said Company be summoned and held for the purpose of ascertaining the wishes of the creditors of the said Company in respect to .

And it is further ordered that a separate meeting of the contributories and shareholders of the said Company be summoned and held for the purpose of ascertaining the wishes of the said contributories and shareholders of the said Company in respect to the aforesaid .

And it is further ordered that the said meeting be summoned by , who is hereby appointed to act as chairman thereof and to report the results of the meeting to the , and to make a report to him of the lists of the creditors, contributories and shareholders who shall have voted at the said separate meetings if hereafter required.

And it is further ordered that proof of the claims of the creditors who vote at said meetings shall be to the satisfaction of the chairman thereof.

And it is further ordered that do act as secretary of the said separate meetings and record their proceedings.

And it is further ordered that the said creditors, contributories and shareholders or such of them as may be ascertained be notified of the time, place and purpose of such meetings by notices sent to them respectively by registered mail addressed to their last known place of abode respectively.

And it is further ordered that the costs and expenses of and incidental to this application and order, and to the summoning and holding of the said separate meetings of creditors, contributories and shareholders, be costs in this matter to the said liquidator, and allowed to the said liquidator on passing his accounts.

Master in Ordinary.

62. In such case regard shall, as to creditors, be had to the amount of debt due to each creditor and as to shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company.

2. The Court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting. R.S., c. 129, s. 19.

A creditor must prove a debt due him before he can vote. *Re Newton* (1896), 2 Q.B. 403.

See also *Re Sun Lithographing Co.*, 5 O.W.R. 510.

It is doubtful if a creditor would be allowed to vote at any meetings held under the above sections in respect to any unliquidated or contingent debt or a debt, the amount or probable amount of which cannot be estimated until the happening of some event. See *Ex parte Ruffle*, 8 Ch. 1001.

63. Where any compromise or arrangement is proposed between a company in course of being wound up under this Act and the creditors

of the company, or by and between any such creditors or any class or classes of such creditors and the company, the Court, in addition to any other of its powers, may, on the application, in a summary way, of any creditor, or of the liquidator, order that a meeting of such creditors or class or classes of creditors shall be summoned in such manner as the Court shall direct. 62-63 V., c. 43, s. 3.

The form of order given under section 61 may be adapted for the purposes of a meeting under this section.

64. If a majority in number, representing three-fourths in value, of such creditors, or class or classes of creditors, present either in person or by proxy at such meeting, agree to any arrangement or compromise, such arrangement or compromise may be sanctioned by an order of the Court, and in such case shall be binding on all such creditors, or on such class or classes of creditors, as the case may be, and also on the liquidator and contributories of the company. 62-63 V., c. 43, s. 3.

Until the passing of this section it was held that the majority could not force a compromise upon an unwilling minority. See cases cited under section 36. Now, of course, if the necessary majority is obtained and the Court makes an order sanctioning the arrangement, the minority must abide by it.

It is to be noted that this and the preceding section deal only with compromises with creditors of the company and not with contributories or other debtors. See section 36.

65. In directing meetings of creditors, contributories, shareholders or members of the company to be held as provided in this Act, the Court may either appoint a person to act as chairman of such meeting, or direct that a chairman be appointed by the persons entitled to be present at such meeting; and, in case the appointed chairman fails to attend the said meeting, the persons present at the meeting may elect a chairman qualified who shall perform the duties prescribed by this Act. 52 V., c. 32, s. 13.

66. No contributory, creditor, shareholder, or member shall vote at any meeting unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally. R.S., c. 129, s. 55.

In England, rules have been passed under the Winding-up Act for the conduct of meetings similar to those required by the above sections. In this connection see Palmer Company Precedents, 8th ed., vol. 2, pp. 201 *et seq.* No rules have been adopted here.

FORM OF PROXY UNDER THE ABOVE SECTION.

IN THE HIGH COURT OF JUSTICE.

In the matter of the Winding-up Act, etc.

I, , of , a creditor (or a contributory) hereby appoint of to be my proxy to vote for me and in my behalf at the meeting of creditors (or shareholders) to be held in the above matter on the day of , 190 , or at any adjournment thereof.

Dated this day of , 190 .

Witness: (Signed)

67. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass-book, shewing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal. R.S., c. 129, s. 37.

The Act does not specifically direct the liquidator to keep any books whatever with the exception of the bank pass-book required by this section. However, the liquidator must keep proper books in accordance with the general practice of receivers, administrators, trustees, etc., and before he can obtain his discharge, he must produce to the Master all his paid cheques, vouchers, etc., and submit an affidavit setting out all moneys received by him and the manner of their disposition. See section 148.

68. The liquidator shall also produce such pass-book whenever ordered to do so by the court. R.S., c. 129, s. 38.

If the liquidator failed to comply with an order made under this section he would be subject to the penalties provided by section 140.

69. When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages shall be admissible to proof against the company.

2. In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the Court shall determine the value of the same and the amount for which it shall rank. R.S., c. 129, s. 56.

In England the proving of claims against an insolvent company is regulated by the bankruptcy law by virtue of section 10

of the Judicature Act of 1875. In this province there is no provision regulating the proof of claims except such as is found in this and the following sections.

Claims are proved by affidavit in the ordinary way. See form *infra*. The affidavit may be made by the creditor himself or some person duly authorized by him. If the latter he should state his authority and the means of his knowledge. *Ex parte Hare,* 10 Ch. 218.

The creditor bears the costs of proving his claim. But in case of a contestation the costs are, under section 88, in the discretion of the Master.

If the creditor cannot prove for the claim he cannot prove for the costs. *Re Newman,* 3 Ch. 494.

A creditor may obtain leave to amend his proof, but without prejudice to dividends already declared. *Re Barned's Banking Co.,* 14 W.R. 722.

A shareholder of the company may prove for a debt due him as a stranger in the same manner as a stranger may prove. *Re Grissell's Case,* 1 Ch. 528.

Until the contrary is proved it is to be assumed that a company which is being wound up is insolvent. *Re Milan Tramways Co.,* 25 C.D. 587.

After the winding-up order a judgment creditor of the company cannot bring an action against a contributory for payment of the amount unpaid on his shares. The winding-up order is a complete bar to his recovery and he must come in with the other creditors and receive whatever may be coming to him on a fair division of all available assets. *Shaver* v. *Cotton,* 23 A.R. 426.

The debts, for the proof of which provision is made by this and the following sections, are unsecured or only partly secured debts, in respect of which the creditor seeks to rank upon the general state of the company in the liquidation and have no application to fully secured claims where the creditor is content to rely upon his security and that only, and does not seek to share in common with other creditors in the distribution of the general assets of the company. Such a creditor cannot be com-

pelled to file his claim in winding-up proceedings and have it adjudicated upon therein. *Re Brampton Gas Co.*, 4 O.L.R. 509.

Creditors holding claims under the ordinary hire receipt notes occupy a peculiar position in a winding up. Assuming that the property in the goods has not passed to the company, the creditor if he values the hire receipt note as a security under section 76, would lose his position as owner of the goods and would admit that the property had passed to the company. *McIntyre* v. *Crossley* (1895), A.C. 457. Upon this being done the liquidator would have the right to take over the goods at the specified value named by the creditor.

If, on the contrary, such a creditor does not value his security, the liquidator must either pay his claim in full or allow the creditor to retake the goods covered by the hire receipt note, and the amount to be paid the creditor is governed entirely by the wording of the hire receipt note. In cases where it is provided that the property shall not pass until the price of the goods purchased subsequently to the hire receipt note is paid, as well as the price of the goods originally purchased, the liquidator must pay this sum or allow the creditor to retake the goods. *Re Canadian Camera Co.*, 2 O.L.R. 677.

Lien holders cannot retake possession of the goods, sell them and after crediting the proceeds, rank for the balance in default of any provisions contained in the hire receipt note as to re-sale. As by the re-sale the original agreement is put an end to. *Sawyer* v. *Pringle*, 18 A.R. 218.

The company's debts and liabilities are ascertained as they existed at the date of the winding-up order. *Re General Rolling Company*, 20 W.R. 762.

Under this Act, creditors whose debts carry interest are only entitled to dividends on the amount due for principal debt and the interest thereon computed up to the date of the winding-up order unless when there is a surplus after paying the creditors one hundred cents on the dollar, when they will receive their interest in full. *Re Union Fire Ins. Co.*, 8 O.W.R. 9; *Hughes' Claim*, L.R. 13 Eq., at page 623.

See also *Re Duncan & Co* (1905), 1 Ch. 307.

Debenture holders are entitled to interest. *Re Vint and Sons* (1905), 1 I.R. 112.

A creditor cannot rank for interest on his claim after the commencement of the winding up. *Re Quartermain's Case* (1892), 1 Ch. 639.

The Statute of Limitations ceases to run after the date of the winding-up order. *Re General Rolling Stock Co.*, 7 Ch. 646. But a claim which has been barred by the statute, before the winding up, is not admissible to proof. *Re Mitchell's Claim*, 6 Ch. 822.

If the debt has been barred by the Statute of Limitations before the winding up, the acknowledgment of it in the statement of affairs prepared by the liquidator does not take the case out of the statute. *Ex parte Topping*, 34 L.J. Bk. 44.

The holders of a bill of exchange upon which the company is liable, either as drawer, acceptor or endorser may prove. *Re Alsager* v. *Curry*, 12 M. & W. 751; the bill should be produced to the liquidator.

The holders of a bill of exchange may prove for notarial charges. *Re English Bank* (1893), 2 Ch. 438.

A creditor can prove for damages for breach of contract. *Re Empress Engineering Company*, 16 C.D. 125.

The Master has the same jurisdiction in a winding up to try claims of unliquidated damages arising out of a breach of contract as he would have in an administration proceeding. *Clarke* v. *Union Fire Insurance Co., Caston's Case*, 10 P.R. 339.

The winding-up order determines contracts as from the commencement of the winding up, but the creditor may prove for damages even for breaches occurring after the winding up. *Re Trent*, 6 Eq. 396.

A claim can be made in respect to a breach of trust. *Re Metropolitan Bank*, 15 C.D. 139.

A person cannot rank for a claim for a commission on future profits of the business of the company if the company is under no obligation to continue its business. *Ex parte Maclure*, 5 Ch. 737.

A trustee for a company may prove in respect to liabilities incurred as such. *Re National Financial Co.*, 3 Ch. 791.

If a claim is assigned before it is filed with the liquidator the assignee may prove in his own name. *Ex parte Colborne*, 11 Eq. 478.

Notice to the liquidator protects the assignee as against subsequent assignments. *Re Ragge's Case*, 5 Eq. 284.

The section is extremely broad in its terms and contingent liabilities of every kind, no matter what difficulty may be involved in calculating their amount may be proved, unless the Court declares them incapable of being fairly estimated. *Re Hardy* v. *Fothergill*, 13 A.C. 351; *Re National Funds Company*, 3 Ch. 791.

A person who has guaranteed a debt of the company may prove in respect to his liability to be called upon to make payment under his guarantee, even though payment has not yet been made by him. The claim which he proves is practically a claim to indemnity. *Ex parte Delmar*, 38 W.R. 752; *Ex parte Reid* (1897), 1 Q.B. 122.

When the company holds unpaid stock in another company the liability to pay for calls previously made can be proved as a debt presently payable, and the liability to future calls may be proved as a contingent debt. *Re Mercantile Mutual*, 25 C.D. 415.

Where a company has contracted to indemnify a party against certain contingencies the party can rank on a winding up, the amount of his claim being estimated in the best manner possible. *Re National Financial Co.*, 3 Ch. 791.

When a debt of the company has been guaranteed the guarantor, even though he has paid nothing under the guarantee, may prove in respect to his contingent liability. *Re Blackpool Motor Car Co.* (1901), 1 Ch. 77.

If a company is surety for payment of A.'s debt to B., B. can rank in the liquidation, but if the debt is not payable when the claim is filed he can only prove as for a contingent liability for it is not presumed that A. will not pay in due course. *Re Parrott*, 63 L.T. 777.

If there is an acceleration clause in a lease, the landlord may prove for the future rent reserved if he accepts a surrender of the lease. *Hardy* v. *Fothergill*, 13 A.C. 351; *In re Panther Lead Co.* (1896), 1 Ch. 978.

For cases in respect to proving for rent upon a winding up see notes to section 23.

Where parties have purchased claims against the company at a discount they may rank for the face value of the claims, but can only receive dividends up to the extent of the purchase price of the claims. *Re Catholic Register, Ex parte Foy & Coffee*, a decision of the Master in Ordinary (Ontario) made the 10th February, 1900, and unreported.

If, before liquidation, the company commenced action against another person and judgment was given against the company ordering it to pay costs the defendant can prove for the costs on the winding up. *Ex parte Peacock*, 8 Ch. 682.

But if no judgment was given until after the winding up the defendant cannot rank for the costs. *Vint* v. *Hudspith*, 30 C.D. 24.

There is no decided case as to whether a creditor, who has commenced an action against the company to recover money, can rank for the costs of the proceedings if the winding-up order has been made before the judgment is given in the action. It would seem, however, in analogy to the preceding cases, that he cannot rank for these costs as there is no actual debt and there cannot be one. It is submitted, therefore, that he can only rank for his claim.

If an action is brought against the company to recover money and after judgment in favour of the creditor the company goes into liquidation, the costs are treated as an addition to the claim, and if the creditor can prove for the claim or judgment he can also prove for the costs. *Re Emma Silver Mining Co.* v. *Grant*, 3 Ch. 494.

Where an action is commenced before the winding up and is continued by the plaintiff after the winding up by leave of the Court, the plaintiff has not a preferred claim for his costs, but

is in the same position as if he had prosecuted his suit to judgment before the winding up., *i.e.*, he must add his costs to his debt and rank for them. *Re Thurso New Gas Co.*, 42 C.D. 486.

But it is otherwise where the proceedings are really continued by the liquidator adopting the company's defence. In such case the plaintiff if successful is entitled to receive his costs in full. *Re Wenborn & Co.*, 74 L.J. Ch. 283.

Where a solicitor puts in a claim in respect to a bill of costs, the Master will refer it to the taxing officer for taxation. *Ex parte Evans*, 11 Eq. 151.

See *Clarke* v. *Union Fire, Caston's Case*, 10 P.R. 339, for a statement of the Master's jurisdiction to refer bills of costs to a taxing officer.

If the directors' remuneration has been properly fixed in accordance with the provisions of the Companies Act they can prove for the same in a winding up along with other creditors. *Re Orton* v. *Cleveland Fire Brake*, 3 H. & C. 868.

By virtue of the Ontario Companies Act the sanction of the shareholders is a condition precedent to the validity of payments voted by directors to any one or more of themselves whether under the guise of fees for their attendances at board meetings or for the performance of any other services for the company. It is immaterial whether the payments are made to the president for performance of duties of president or to the directors for performance of their duties as directors or in what manner the payment is disguised. The president and directors cannot vote to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders. *Birney* v. *Toronto Milk Company*, 5 O.L.R. 1, overruling on this point *Re Ontario Express Co.*, 25 O.R. 587.

The assignment of a claim against the company made by a director after the winding-up order has been acted on is subject to all the equities which would arise against the claim and against the assignor as a director and trustee of the company's funds. *Re Bolt & Iron Company, Livingston's Case*, 14 O.R. 211.

The Crown is entitled to be paid out of the assets in priority to all other creditors. *Re Oriental Bank Corporation*, 28 C.D. 643; *Exchange Bank* v. *Regina*, 11 A.C. 157.

A claim for taxes has no priority and is to be treated as an ordinary debt. *Re Drydock's Corporation*, 39 C.D. 306.

But where the liquidator retains possession of the property with a view to sale he may be ordered to pay taxes subsequently following due as part of the expenses of the winding up. *Re National Arms*, 28 C.D. 474.

A municipality's right to prove a claim for taxes against a company in liquidation depends upon the municipality's right to maintain an action therefor. Under the Assessment Act this right of action only exists when the taxes cannot be recovered in a special manner provided for by the Act and after these special manners have been exhausted. Where, therefore, a claim was made for arrears of taxes against a company in liquidation and it was shewn that before the date of the winding-up order the taxes might have been, but were not recovered by distress, the claim was disallowed. *Re Ottawa Porcelain & Carbon Co.*, 31 O.R. 679.

Shareholders in a loan company, in answer to a proposal from the company, paid, towards the reserve fund, dividends, paid to them by the company, and various other sums of money, with a view to increasing the reserve fund to the same amount as the paid-up stock. In winding-up proceedings: *Held*, that such shareholders were not entitled to rank as creditors upon the assets of the company with the other creditors, depositors, and debenture holders, and that any claim they had against the company and its reserve fund was subject to the payment of the debts of the company. *Re Atlas Loan Company* (*Claims on Reserve Fund*), 9 O.L.R. 468.

Where by the law of the province where the lease was made the lessor has the right upon the insolvency of the lessee to receive the whole amount of his rent, taxes, etc., to the end of the term, the lessor was allowed to rank here for such full amount. The section does not interfere with the *lex loci contractus*. *Re Hart and Ontario Express*, 22 O.R. 510.

If it is found that the company has issued debentures and debenture stock, which are usually secured by mortgage or charge upon the whole undertaking of the company and its uncalled capital, the liquidator should carefully investigate the security as any defect in it would enure for the benefit of the unsecured creditors.

In Palmer's Company Precedents, vol. 2, 8th ed., at page 416, it is stated that the liquidator should investigate the following matters:—

1. Was the issue of the debentures or debenture stock within the power of the company?

2. Was the issue within the power of the directors, and was that power regularly exercised?

3. Were the debentures issued at a discount, and was there power thus to issue them?

4. Were the debentures or debenture stock or any of them issued within three calendar months before the commencement of the winding up, and if so did their issue constitute a fraudulent or undue preference?

5. What is the value of the property charged? Is there any margin for the unsecured creditors; if there be, is it an assured margin or only a speculative margin?

6. In the interest of the unsecured creditors, is it advisable to pay off the debentures or to pay the interest on the debentures or debenture stock, and to obtain time to realize, or to procure from other sources an advance sufficient to pay them off, or is it wiser to leave the security holders to realize their security as best they can?

7. If the debentures include uncalled capital, was there power to charge that in the articles, and has it been effectually charged?

For the law in respect to the valid creation of debentures or debenture stock, see p. 273, *et seq., supra.* If the necessary requirements for the creation of the security have not been followed the liquidator should take steps to impeach the securities.

Where the liquidator has not obtained leave to carry on the

business, his only duty is to wind it up and distribute the assets among the creditors according to their claims as they existed at the commencement of the winding up. He cannot alter these liabilities by making new contracts. *Re East of England*, 4 Ch. 14. He can, of course, compromise claims under the provisions of section 37.

Debts properly contracted by the liquidator are part of the expenses of the winding up and should not be confounded with debts contracted by the company before the winding-up order. The former are payable in full out of the assets of the company in priority to the other unsecured claims against the company. See section 92.

The following form may be used in proving a claim against an insolvent company. If the affidavit is made by an agent he should state his knowledge of the claim and the grounds of his knowledge.

IN THE HIGH COURT OF JUSTICE.

In the matter of, etc.

A. B.'s claim.

I, etc.

1. That the above named Company is justly and truly indebted to me in the sum of for goods sold and delivered by me to the said Company at its request as per statement hereunto annexed and marked "A" (*or as the case may be*).

2. That I hold no security for the said claim or any part thereof. (*If any security is held, the nature and amount and value should be stated*).

3. And I, speaking positively for myself, and to the best of my knowledge and belief as to other persons, lastly say that I have not, nor hath nor have any other person or persons by my order or for my use received the said sum of $ or any part thereof or any security or satisfaction whatsoever therefor.

Sworn, etc.

70. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order. R.S., c. 129, s. 56.

The making of the winding-up order terminates all contracts made by the company, including those of employment, and is a notice of discharge to the company's servants. *Re Oriental Bank*, 32 C.D. 366.

It was held in *Re English Joint Stock Bank*, 3 Eq. 203, that where the business is continued after the winding-up order and the company's servants are continued, the old contract between the company and its servants continues in force, and notice of discharge must be given pursuant thereto.

It is submitted that this is not the case. It is the liquidator, in his capacity as such, who carries on the business, and in so doing he is not acting as delegate for the company. When the liquidator hires servants to assist him in carrying on the business it is submitted that an entirely new contract is made which, in respect to notice and all other matters, stands entirely on its own footing.

A winding-up order operates as a dismissal. *Chapman's Case*, 1 Eq. 346, but see *Re Midland County's Bank* (1905), 1 Ch. 357.

The expression "other person" in this section must be interpreted as meaning persons of a companionable class or associate occupations. Clerks in the employment of the company are of the service and not of the executive or master class. The managing director cannot be classed as a "clerk or other similar person" in the employment of the company. *Re Ritchie-Hearn Company*, 6 O.W.R. 424.

A person employed as mechanical expert and inspector of departments of the company and having charge of the sale of a special article and as sales agent for this article in Toronto, was held not to be a "clerk or other person" in the employ of the company, so as to entitle him to preferred claim for wages. *Re American Tire Co., Dingman's Case*, 2 O.W.R. 29.

An auditor is not within the class mentioned in this section. *Re Ontario Forge Co., Townsend's Case*, 27 O.R. 230.

Under the terms of his contract an opera singer was held to be a "servant" and entitled to the benefit of a similar English provision. *Re Winter German Opera*, 23 T.L.R. 662.

71. The law of set-off, as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.. R.S., c. 129, s. 57.

"Mutuality" was and always had been an essential of the law of set-off up to the time of the passing of the Winding-up Act, and there is nothing in the latter Act in any way derogating from this universal principle. Therefore a contributory of an insolvent bank who is also a creditor cannot set off the debt due to him by the company against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Banking Act, R.S.C., c. 120, as the fund constituted by such calls is in law a fund which the directors would hold in trust for the creditors of the bank, whilst the debt which the shareholder seeks to set off is a debt due not from the creditors of the bank, but from the banking corporation itself, consequently they are not in any sense "mutual debts." *The Maritime Bank* v. *Troop*, 16 S.C.R. 456.

Upon the application of the liquidator, one, McN., was placed on the list of contributories of a company for $1,675 being the amount unpaid upon shares held by him. McN. had paid $1,500 on a guarantee given for the company and claimed to set-off that amount against his liability on the shares: *Held*, that there was no right of set-off on the ground of absence of mutuality between the claim of the liquidator against McN., and McN.'s claim as a creditor of the company, following *Maritime Bank* v. *Troop*, 16 S.C.R. 456.

The debt due by McN. as a contributory is due to the liquidator as trustee for the creditors of the company and to be divided *pari passu* among them. The debt due to McN. as a creditor is one due him by the company alone. *Re Wiarton Beet Sugar Co., McNeil's Case*, 10 O.L.R. 219.

A creditor cannot set off a debt due from the company to him against calls due by him, whether made before or after the commencement of the winding up. *Grissell's Case*, 1 Ch. 528; *Whitehouse & Co.*, 9 C.D. 595; *Gill's Case*, 12 C.D. 755.

If, before the winding-up order has been made, the amount due on stock has actually been set off by the company against the debt due by it to the contributory, entries made in the company's books, etc., the transaction will stand. *Re Victor Varnish Company, McWater's Case,* an unreported decision of the Master-in-Ordinary (Ontario), December, 1907.

A contributory who obtains a winding-up order will be entitled to his costs free from set-off for amounts due on stock. *Re General Exchange Bank,* 4 Eq. 138.

If a creditor, who is also a shareholder, assigns his debt after the winding up has commenced the liquidator may, if he so desires, set off against the debt any moneys due from the shareholder on unpaid stock. *Ex parte Mackenzie,* 7 Eq. 240.

The winding up does not interfere with the ordinary right of set-off as between non-shareholders and the company. *Anderson's Case,* 3 Eq. 337.

A debt due to A. and B. jointly cannot be set off against a debt due from A. to the company. *Ex parte Morier,* 12 C.D. 491; *Howell* v. *Dominion,* 37 U.C.R. 484.

As to setting off costs see *Ex parte Lewis* (1896), 1 Q.B. 219.

Unliquidated damages for breach of a contract may be set off against a claim for money due under a contract. *Peat* v. *Jones,* 8 Q.B.D. 147.

Unliquidated damages for misrepresentation in regard to property sold may be set off against the price. *Jack* v. *Kipping,* 9 Q.B.D. 113.

In the winding up of an insurance company a claim on a policy that has matured before the winding up can be set-off. *Sovereign Life & Dodd* (1892), 2 Q.B. 573.

Notice of a floating security of all the company's property at the time when the creditor's debt was contracted will not prevent a set-off from binding the debenture holders. *Biggerstaff* v. *Rowatt's Wharf* (1896), 2 Ch. 93.

Where the company places moneys in a person's hands for a specific purpose and after satisfaction of it and a balance remains, the person, in whose hands the money was placed, cannot

after the winding-up order is made set off a debt owing to him unless he can shew that the balance was retained with the company's consent. *Re Mid-Kent Fruit Factory* (1896), 1 Ch. 567.

"It is impossible that a person, who at the time of the bankruptcy, owes a debt to the bankrupt and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt." *Per* Lord Selbourne, L.C., in *Re Milan Tramways,* 25 C.D. 587.

Where the liquidator or a creditor claims to set-off an assigned debt, the onus lies on the claimant to shew that the assignment was made before the commencement of the winding up. *Re Dickson* v. *Evans,* 6 T.R. 57.

A director of a company was held liable to contribute to the assets of the company under section 123 of the Act. The director claimed to set-off against this amount a debt due him by the company at the commencement of the winding up. It was held that there was no right to do so. *In re Wiarton Beet Sugar Company, Freeman's Case,* 12 O.L.R. 149.

If the liquidator supplies goods in pursuance of a contract made before the winding up commenced, a purchaser cannot set-off a debt incurred to himself by the company prior to the winding up, for the reason that there is no mutuality. The purchaser's debt is due to the liquidator while it was the company who owed the money to the purchaser. *Mersey Steel Co.* v. *Naylor,* 9 Q.B.D. 648; nor would the case be different if the contract were made by the liquidator himself subsequent to the winding-up order for the same reasons.

Where the G. Company, Limited, held shares in the A. Company, Limited, and orders were made for the winding up of both companies and before the liquidation of either, calls were made on the shares and subsequently the A. company became indebted to the G. company for money lent, it was held that the liquidator of the G. company had no right to set-off the debt against the call. *Re Uriferous Co.* (1898), 6 Ch. 691.

But if the debt is incurred by the liquidator in the winding up it may be set-off. *Ex parte Clark,* 7 Eq. 550.

In connection with the question of set-off by a contributory the change made in the arrangement of sections by the Ontario Companies Act must be considered. In R.S.O. 1897, c. 191, the defence of set-off to an action against a shareholder by a judgment creditor of the company was given the shareholder in a paragraph of the same section which defined the shareholder's liability to such creditors, *i.e.*, section 37. In the present Act, 7 Edw. VII., c. 34, section 37 has been split up into two sections —68 and 69—and it may be that the defence of set-off given by section 69 will be held to apply in a winding up as well as in a judgment creditor action. The point is worthy of consideration. But see the judgment in *Re Wiarton Beet Sugar Co., McNeil's Case*, 10 O.L.R. 219.

See section 100 as to the acquisition of claims against the company by persons indebted to it. This section was extended in 1889 (52 V., c. 32, s. 16) to apply to ordinary debtors of the company as well as contributories.

72. The Court may fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors. R.S., c. 129, s. 59.

It is not a matter of discretion for the referee to allow a proper claim which is filed after the time limited by the advertisement; the allowance of the claim is *ex debito justitiæ*. *Re Central Bank, Cayley's Case*, 17 O.R. 122. But see section 74 (2) for claims of which the liquidator has not notice at the time of distribution.

The notice required under this section is usually given by advertising in such papers as the liquidator and the Master consider will reach the majority of the creditors and by mailing notices to all known creditors.

The advertisement is usually in the following form:—

FORM OF ADVERTISEMENT FOR CREDITORS.

Judicial notice to the creditors of the Company.

Pursuant to the winding-up order made by the High Court of Justice in the matter of the Winding-up Act and amendments thereto and in the matter of the Company, bearing date the day of ,

19 , the creditors of the above named Company and all others who have claims against the said Company formerly carrying on business in the of , are on or before the day of , 190 , to send by post, prepaid, to , liquidator of the said Company, at his office, street , their Christian and surnames, addresses and descriptions, the full particulars of their claims and the nature and amount of the securities (if any) held by them and the specified value of such securities, verified by oath and in default thereof they will be peremptorily excluded from the benefits of the said Act and winding-up order.

The undersigned Master in Ordinary will on the day of 19 , at o'clock in the forenoon at his chambers in Osgoode Hall in the City of Toronto, hear the report of the liquidator upon the claims of creditors submitted to him pursuant to this notice, and let all parties then attend.

Dated this day of , 19 ,

Master in Ordinary.

73. The liquidator may give notice in writing to creditors who have sent in their claims to him, or of whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the Court on a day to be named in such notice and prove their claims to the satisfaction of the Court.

2. In case any creditor does not attend in pursuance to such notice his claim shall be disallowed, unless the Court sees fit to grant further time for the proof thereof.

3. If any creditor attends in pursuance of such notice, the Court may on hearing the matter allow or disallow the claim of such creditor in whole or in part. 52 V., c. 32, s. 14; 55-56 V., c. 28, s. 1.

The Master directs the mode of service which the liquidator is to follow in giving the notice referred to in this section. Sometimes the service is required to be personal; but more usually the service is made by registered mail. The notice informs the creditor that his claim is disputed and requires him to attend before the Master on a certain fixed day and prove his claim. In default the claim is barred. The notice may be in the following form:—

(Style of cause.)

Take notice that the liquidator disputes the claim against the above Company filed by you with him for the sum of $ on the ground, etc.

And take further notice that the Master in Ordinary has appointed the day of , 19 , at the hour of

o'clock in the forenoon for the consideration of your said claim and that if you do not then and there appear and prove your said claim to the satisfaction of the Court the same will be forever barred and you will be peremptorily excluded from the benefit of the winding up.

Dated, etc.

Signed A. B.
Liquidator.
By his Solicitors, etc.

To

The costs of proving a claim disputed by the liquidator are in the discretion of the Master. Usually costs are given to a successful creditor.

74. After the notices required by the two last preceding sections have been given, and the respective times therein specified have expired, and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the Court in whole or in part, the liquidator may distribute the assets of the company or any part thereof among the persons entitled thereto and without reference to any claim against the company which shall not have then been sent to the liquidator.

2. The liquidator shall not be liable to any person whose claim shall not have been sent in at the time of distributing such assets or part thereof for the assets or part thereof so distributed. R.S., c. 129, s. 60.

All debts due to unsecured creditors must be paid *pari passu* and judgment creditors have no priority. *Re Leinster Contract Corporation* (1903), 1 Ir. R. 517.

See notes to section 69.

"If he had knowingly and wilfully left unpaid a debt, of which he had notice, I am not prepared to say that the liquidator is not personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty to pay the debts *pari passu* out of the assets of the company as they came to his hands." *Per* James, L.J., in *Re London & Caledonian Co.*, 11 C.D. 140.

Even though a creditor has not filed his claim the liquidator, if he has notice or knowledge of the claim and does not dispute it, must pay over the proper dividend to such creditor and will be liable to him personally if he does not. See *Carling* v. *Black*, 6 O.R. 441. It would be otherwise if the creditor failed to prove his claim after notice under section 73.

75. In case any claim or claims shall be sent in to the liquidator after any partial distribution of the assets of the company, such claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company. R.S., c. 129, s. 60.

The liquidator cannot proceed to a distribution until the notice required by section 72 is given and such notices are given as the liquidator desires to give under section 73, because on the ordinary principles of law he is bound to distribute the assets among the persons entitled, and of whose claims he has notice. If after such notices are given the liquidator distributes part of the assets, and subsequently receives notice of a new claim, the latter under this section shares in the distribution of the remaining assets only. The liquidator is protected by section 74 in respect to the assets distributed.

76. If a creditor holds security upon the estate of the company, he shall specify the nature, and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon. R.S., c. 129, s. 62.

A secured creditor is one who has any security for his claim upon the property of the company. *Re Printing Co.*, 8 C.D. 535.

A landlord who has exercised his right of distress before the winding up is a secured creditor. *Thomas* v. *Patent Lionite*, 17 C.D. 250.

This section and those following, in respect to secured claims, are applicable only where there is no contest as to the right of the creditor to the security which he claims to hold for his debt. They are applicable only where the right to the security is not disputed and are designed for the purpose of ascertaining for what sum the creditor is to be entitled to rank in the liquidation as an unsecured creditor.

Section 83 indicates plainly that the claims with which this group of sections deals are claims to be entered upon the dividend sheet, and to receive dividends out of the general estate. *Re Brampton Gas Co.*, 4 O.L.R. 509.

A secured creditor may either come in and prove his claim or may rely on his security if he think fit to do so. *In re Kit Hill Tunnel, Ex parte Williams*, 16 Ch. D. 590.

Apart from the necessity of obtaining leave in the winding up to bring his action (section 22) and subject to the provisions of section 133, it is the right of a debenture holder or mortgagee of the company to bring his action against the company to realize his security, and the leave is granted almost as a matter of course. *Re Brampton Gas Co.*, 4 O.L.R. 509. See also *Re Lloyd*, 6 C.D. 339; *Re Stubbs* (1891), 1 Ch. 475.

In Palmer's Company Law, 5th ed., page 349, the following alternatives are given as being open to every secured creditor and it would appear that the same alternatives are open to a secured creditor under this Act, viz.:—

1. He may rest on his security and not prove.

2. He may realize on 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.

Holders of debentures and debenture stock, if they are not content to rely on their securities for the full amount of their claim and desire to rank against the general assets of the company must value their securities and rank for the balance. It is, however, better for the debenture holders to realize on their securities by causing a sale of the assets to be made upon which their debentures are charged, and then to rank for the deficiency as in this manner the actual deficiency due them is ascertained whereas by valuing their securities they cannot be certain of the amount which they will realize.

If a secured creditor has had a receiver appointed before the winding-up order he will not always be displaced in favour of the liquidator. See *British Linen Co.* v. *South American, etc., Co.* (1894), 1 Ch. 108.

In England the liquidator has been ordered to give up possession to a receiver appointed by a secured creditor. *Re Henry Pound*, 42 C.D. 402.

A secured creditor who realizes his security may apply the proceeds towards payment of his principal, interest and costs, but he cannot apply the proceeds first in payment of interest due after the winding up and then in reduction of principal and prove for the balance. *Re London-Windsor, etc., Co.* (1892), 1 Ch. 639.

A secured creditor is entitled to all his costs properly incurred in enforcing his security. *Re Rio Grande Co.*, 5 C.D. 282.

If a creditor values his security he cannot prove for more than the balance, although the security realizes less than his valuation. *Williams* v. *Hopkins*, 18 Ch. D. 370.

Where a secured creditor has inadvertently proved without valuing his security he is allowed to amend his proof. *Re Henry Lister & Company* (1892), 2 Ch. 417.

A creditor, whose debt is guaranteed by some third party, is not to be considered a secured creditor and bound to value the guarantee as a security, even if the company has contracted to indemnify the surety. *Sheffield Bank* v. *Clayton* (1892), 1 Ch. 621.

A person who has realized a portion of his debt upon the insolvent estate of a co-debtor cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtor jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. *Ontario Bank* v. *Chaplin*, 20 S.C.R. 152.

A mechanic's lien is a security within this section. *Re Empire*, 8 Man. L.R. 424.

See notes under s. 69 as to rights of vendors under hire receipt notes, etc.

On a petition of a mortgagee asking for the liquidator's reconveyance to him of the company's equity of redemption in the mortgaged property, the Court has jurisdiction to make the usual order of foreclosure or sale. *Re Essex Land Co.*, 21 O.R. 367.

77. The liquidator, under the authority of the Court, may either consent to the retention by the creditor of the property and effects constitut-

ing such security or on which it attaches, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment. R.S., c. 129, s. 62.

Note that no time limit is given within which the liquidator is required to exercise his discretion. A reasonable time would govern.

78. In case of such retention, the difference between the value at which the security is retained and the amount of the claim of such creditor shall be the amount for which he may rank as aforesaid. R.S., c. 129, s. 62.

See notes to section 76.

79. If a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of the three last preceding sections, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof.

2. After the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. R.S., c. 129, s. 62.

The holder of a bill of exchange upon which the company is secondarily liable may collect all that he can from the other parties to the bill and the company concurrently, provided he does not obtain more than the total amount of the bill. *Ex parte Cama*, 9 Ch. 686.

80. If the security consists of a mortgage upon ships or shipping, or upon real property, or of a registered judgment, or an execution binding real property which is not by some other provision of this Act invalid for any purpose of creating a lien, claim or privilege upon the real or personal property of the company, the property mortgaged or bound by such security shall only be assigned and delivered to the creditor:—

(*a*) Subject to all previous mortgages, judgments, executions, hypotheca and liens thereon, holding rank and priority before his claim; and,

(*b*) Upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens; and,

(*c*) Upon his securing the estate of the company to the satisfaction of the liquidator against any claims by reason of such previous mortgages, judgments, executions, hypothecs and liens. R.S., c. 129, s. 63.

81. If there are mortgages, judgments, executions, hypothecs, or liens upon such ships or shipping or real property subsequent to those of such creditor, he shall only obtain the property:—

(*a*) By consent of the subsequently secured creditors; or,

(*b*) Upon their filing their claims specifying their security thereon as of no value; or,

(*c*) Upon his paying them the value by them placed thereon; or,

(*d*) Upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens. R.S., c. 129, s. 63.

This and the preceding section make it clear that the summary proceedings provided for by section 133 are intended to apply only to the cases where the liquidator is the sole party interested in the property mortgaged. *Re Canada Cabinet Company*, 9 O.W.R. 818.

82. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the Court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof. R.S., c. 129, s. 64.

83. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established as herein provided. R.S., c. 129, s. 65.

See sections 76 *et seq.*, s. 70, etc.

84. No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company.

2. No lien, claim or privilege shall be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced; provided that this section shall not affect any lien or privilege for costs,

which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued. R.S., c. 129, s. 66.

There is no provision in the English Acts corresponding to this section, the former being confined in respect to executions, etc., to a section similar to section 23 of our Act, being section 163 of the Imperial Act of 1862. Consequently in England an execution creditor who has put the sheriff in possession before the commencement of the winding up becomes a secured creditor for the whole of his claim. *Re Printing, etc., Co.*, 8 C.D. 535; *Re Hill Pottery Co.*, 1 Eq. 649.

Here the law is that if an execution creditor has an execution in the sheriff's hands binding the goods of the company, when the petition for the winding-up order is presented, he has a lien for his costs. *Re Saw Bill Lake Gold Mining Company*, 2 O.W.R. 1143. But he has no lien for the debt.

It would appear that where a seizure had been made by the sheriff before the winding-up order is made, the execution creditor and the sheriff are entitled to their costs as a preferred claim. Where a writ of execution was placed in the sheriff's hands on February 28th, and a seizure was made by him on March 23rd, it was held by the Master in Ordinary that the sheriff and the execution creditor were entitled to a preferred claim for their costs, notwithstanding the fact that the winding-up order was made on the 23rd March. *Re Oshawa Heat & Light & Power Company*, 8 O.W.R. 415.

The above would naturally apply to the first execution creditor only.

As to execution creditor's rights see also *Re Hill*, 1 Eq. 649, and *Re Hille India Rubber Co.* (2) (1897), W.N. 20.

A winding-up order does not defeat a valid lien claimed by the solicitor of the company on documents belonging to the company in his hands before the service of the petition. *Re Capital Fire*, 24 C.D. 408.

This section should be read with sections 22 and 23. See notes to those sections.

85. Any liquidator, creditor or contributory, or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared. R.S., c. 129, s. 67; 52 V., c. 32, s. 15.

See *Ex parte Harper,* 21 C.D. 537; *Re Stenson,* 25 C.D. 147.

86. If a claim or dividend is objected to, the objection shall be filed in writing with the liquidator, together with the evidence of the previous service of a copy thereof on the claimant.

2. The claimant shall have six days to answer the objections, or such further time as the Court allows, and the contestant shall have three days to reply, or such further time as the Court allows. R.S., c. 129, s. 67.

87. Upon the completion of the issues upon the objections, the liquidator shall transmit to the Court all necessary papers relating to the contestation, and the Court shall then, on the application of either party, fix a day for taking evidence upon the contestation, and hearing and determining the same. R.S., c. 129, s. 67.

An appeal lies from a decision of the Master to a Judge in Court.

88. The Court may make such order as seems proper in respect to the payment of the costs of the contestation by either party or out of the estate of the company. R.S., c. 129, s. 67.

See *National Whole Meal Company* (1892), 2 Ch. 457, where the liquidator was ordered to pay the costs and *Re Knight,* 57 L.T. 238, where the claimant was ordered to pay costs.

The liquidator may be ordered to pay the costs personally if he has disputed the claim improperly. *Re Powell* (1896), 1 Ch. 681.

89. If, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the Court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right. R.S., c. 129, s. 67.

90. The Court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the Court thinks just. R.S., c. 129, s. 67.

91. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding up its affairs. R.S., c. 129, s. 58.

92. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims. R.S., c. 129, s. 91.

The assets of the company in the case of encumbered property mean the equity of redemption or surplus, after clearing off the encumbrances. *Re Anglo-Austrian Union* (1895), 2 Ch. 891.

The liquidator's right to remuneration ranks after the rights of encumbrancers, such as mortgagees or debenture holders. *Re Oriental Hotels Co.*, 12 Eq. 126.

Costs ordered to be paid by the liquidator out of the assets are *primâ facie* payable immediately and in full and are therefore the first charge on the net assets. *Re London Metallurgical Co.* (1895), 1 Ch. 758.

See also *Re Home Investment Co.*, 14 C.D. 167.

If an action commenced by the company before the winding up is continued by the liquidator, with the Court's leave, the defendant, if successful, is entitled to his costs in full as a first charge as from the commencement of the action. *Re London Drapery Stores* (1898), 2 Ch. 685.

Where certain creditors applied for an order that the moneys in the hands of the liquidator be retained and set apart to meet preferred claims and that the same be not chargable with any of the costs of the liquidation until certain claims were disallowed, it was held that there was no power to make such an order. *Re Sun Lithographing Company*, 6 O.W.R. 358.

93. The Court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company, and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company. R.S., c. 129, ss. 51 and 58.

The Crown is entitled to be paid in full. *Maritime Bank* v. *The Queen*, 17 S.C.R. 657.

See *Re West Coast Gold Fields* (1906), 1 Ch. 1.

94. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever, whether a creditor of the company or not, within three months next preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of such company. R.S., c. 129, s. 68.

For a full discussion on fraudulent preferences, the defence of pressure, etc., see Parker on Frauds on Creditors.

95. All contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements, and in respect to which a winding-up order under this Act is afterwards made, with a person whether a creditor of the company or not, who knows such inability or has probable cause for believing such inability to exist, or after such inability is public and notorious, shall be presumed to be made with intent to defraud the creditors of such company. R.S., c. 129, s. 68.

Quære as to whether this section includes mortgages or conveyances. *Kerby* v. *Rathbun Co.*, 32 O.R. 9.

96. A contract or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether a creditor of the company or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding-up of the business of such company under this Act, or at any time afterwards, is voidable and may be set aside by any Court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract as the Court orders. R.S., c. 129, s. 69.

A mortgage was made of land by an insolvent company on the 5th of April in consideration of past indebtedness and an extension of time. On the 5th of May following, a winding-up order was made. It was found as a fact that there was no fraudulent intent on the part of the company fraudulently to impede, obstruct or delay its creditors. The result, however, of the conveyance was to injure and obstruct the creditors as it was made by the company when it was unable to meet its engagements. It was held that since the transaction was within thirty days of the commencement of the winding up, the transaction was void-

able and might be set aside by a Court of competent jurisdiction. The words "upon such terms as to the protection of such persons from actual loss or liability by reason of such contract as the Court orders" should not be invoked in any case where the transaction was such as giving a mortgage as security for a past debt. *Kirby* v. *Rathbun Co.*, 32 O.R. 9.

97. All contracts or conveyances made and acts done by a company respecting either real or personal property, with intent fraudulently to impede, obstruct or delay the creditors of the company in their remedies against the company, or with intent to defraud the creditors of the company or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the company, whether a creditor of the company or not, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them, or any of them, shall be null and void. R.S., c. 129, s. 70.

98. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor, or if any property, real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any Court of competent jurisdiction.

2. If such sale, deposit, pledge or transfer is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency. R.S., c. 129, s. 71.

The Master to whom the Court has delegated its powers for the purpose of winding up a company is not a "Court of competent jurisdiction" within the meaning of this section for the purpose of trying questions of fraudulent transfers of property alleged to be in contravention of the section. *Hart* v. *Ontario Express & Transportation Co.*, 25 O.R. 247.

The presumption referred to in the second part of this section is rebuttable. *Re Kerby* v. *Rathbun Co.*, 32 O.R. 9.

In England it has been held that an issue of debentures may be set aside as a fraudulent preference. *Gas Light Co.* v. *Terrell*,

10 Eq. 168. But debentures issued *bonâ fide* to prevent insolvency were held not to be invalid. *Inns of Court Hotel*, 6 Eq. 82.

A debenture issued for a prior debt, although pursuant to an agreement made at the time the debt was incurred was set aside, the issue having been made only a few days before the winding up. *Re Jackson and Bassford, Ltd.* (1906), 2 Ch. 467.

99. Every payment made within thirty days next before the commencement of the winding-up under this Act by a company unable to meet its engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by the liquidator by suit or action in any Court of competent jurisdiction.

2. If any valuable security is given up in consideration of such payment, such security or the value thereof shall be restored to the creditor upon the return of such payment. R.S., c. 129, s. 72.

The withdrawal by a depositor of money on deposit in a bank does not come within the meaning of any of the provisions in the Act relating to fraudulent preferences. *Re Central Bank, Cayley's Case*, 17 O.R. 122.

A bank suspended payment September 15th, 1883, and the winding-up proceedings were commenced on 22nd of November, following, the winding-up order being made on December 5th. On November 19th the defendant, who was a depositor in the bank and had certain sums standing to his credit, sold his cheque for $320 to the local manager of the insolvent bank. The cheque was negotiated and accepted by the bank on the 23rd November, after the winding-up proceedings had begun: *Held*, that it would probably be an invalid transaction so far as the person who received value from the bank for the cheque was concerned, but there was no payment to the defendant (who was the depositor in the bank) of anything within the scope and meaning of the 75th section of the Act 45 V., c. 23 (D.), the same as the above section, and as the transaction was attacked only upon that section, the action failed as the defendant received no money or valuable consideration from the bank which he should be ordered to re-pay. *The Exchange Bank* v. *Stinson*, 8 O.R. 667.

100. When a debt due or owing by the company has been transferred within the time and under the circumstances in the last preceding section mentioned, or at any time afterwards, to a contributory, or to any person indebted or liable in any way to the company, who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory, or such person so indebted or liable to the company, to set up, by way compensation or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory or person. R.S., c. 129, s. 73; 52 V., c. 32, s. 16.

Before the amendment of 52 V., c. 32, s. 16, which is embodied in the above section, it was held that the prohibition against acquiring debts for the purpose of set-off was limited to the case of contributories; as to debtors the law of set-off, administered by the Courts, was applicable in the same manner and to the same extent as if the company was a going concern. *Re Central Bank of Canada, Yorke's Case,* 16 O.R. 625. But now the section applies to contributories and debtors alike.

This section has not a retrospective operation. An *ex post facto* construction will never be adopted when substantial rights are affected even in matters of procedure. *Ings* v. *Bank of Prince Edward Island,* 11 S.C.R. 265. See notes to s. 71.

101. Except in the Northwest Territories, any person dissatisfied with an order or decision of the Court or a single judge in any proceeding under this Act may:—

(*a*) If the question to be raised on the appeal involves future rights; or,

(*b*) If the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or,

(*c*) If the amount involved in the appeal exceeds five hundred dollars; by leave of a Judge of the Court, appeal therefrom. R.S., c. 129, s. 74.

The whole procedure for appeals in winding-up proceedings is provided for in the sections 101-106. They do not, however, include the appeals from the Master or Referee to whom the winding up has been referred, as such appeal lies as of right. A party may always go to the Court with a complaint against the judgment of the Referee to whom the Court has delegated its authority. *Markle* v. *Ross,* 13 P.R. 135. Accordingly, there

is always an appeal from an order of the referee to a Judge in Court. In Ontario there is now no appeal to a Divisional Court. The appeal goes to a Judge in Court from the officer conducting the reference, whether or not that officer is the Master in Ordinary. See C.R. 768 A. and 771. The appeal is on seven clear days' notice.

From the decision of such Judge no appeal lies except to the Court of Appeal in Ontario upon the leave of the Judge of the Court appealed from. There is no provision whatever in the Act for an appeal to a Divisional Court.

An appeal lies from original winding-up order under this section. *Re Union Fire Insurance Company*, 13 A.R. 268.

In *Re Lake Superior Native Copper Company, Ltd.*, 9 O.R. 277, it was held by Proudfoot, J., that a winding-up order made by one Judge will not be set aside by another, and that an application for that purpose must be made to a Divisional Court.

The decision of the Court of Appeal, however, in *Re Union Fire Insurance Company, supra*, affirmed on this point in 14 S.C.R. 624 (*sub nomine, Shoolbred* v. *Union Fire Insurance Company*) will govern, and the appeal must accordingly be made to the Court of Appeal in accordance with section 102. *Quære*, as to stay of proceedings pending the appeal. A special application for that purpose would, probably, have to be made.

The liquidator may appeal from an order of the Master without leave, but he will be liable personally for costs, if he fails, although the Court appealed to may relieve him and direct the costs to be payable out of the estate. *Re Silver Valley Mines* 21 C.D. 381.

The liquidator may appeal from an order refusing his costs out of the estate. *Re Raynes Park Golf Co.* (1899), 1 Q.B. 961; or against an order for his removal. *Re Adam Eyton* (1887), 36 Ch.D. 299.

Neither interest nor costs can be added to bring the amount involved to an amount in excess of $500, under sub-section (*c*).

The amount involved must exceed $500, exclusive of interest and costs. *Re Wiarton Beet Sugar Company, Kydd's Case*, 6 O.W.R. 590.

An appeal lies from the ruling of the Master as to proper disposition of balance of monies in liquidators' hands, when, after passing their accounts these monies have been paid back to them by parties who have erroneously received them. *Hogaboom's Case*, 19 C.L.T. 66.

Where an application for leave to appeal to the Court of Appeal from a decision in a matter under the Winding-up Act has been made under section 101 to a Judge of the High Court and refused by him, a fresh application will not be entertained by another Judge, and no appeal lies from that decision. *Sarnia Oil Co.*, 15 P.R. 347. "Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing final and conclusive, and without an appeal unless an appeal from it is expressly given." *Ex parte Stevenson* (1892), 1 Q.B. 394 and 609.

An appeal does not lie from an order giving leave to appeal. *Re Central Bank*, 17 P.R. 395.

As to circumstances under which leave to appeal is granted, see *Re Central Bank*, 17 P.R. 370.

102. Such appeal shall lie:—

(*a*) In Ontario, to the Court of Appeal for Ontario;

(*b*) In Quebec, to the Court of King's Bench; and

(*c*) In any of the other provinces, and the Yukon Territory, to a superior Court *in banc*. R.S., c. 129, s. 74.

The trial of a petition before a Judge of the Assizes, praying that the liquidator be ordered to deliver up certain lumber under the equivalent of the present section 133, is not the trial of an action, but is a matter in the winding up. An appeal, therefore, does not lie to a Divisional Court, but to the Court of Appeal under this and the preceding section. *Re Rainy Lake Lumber Co.*, 12 P.R. 27.

The Divisional Courts are not constituted appellate courts for the purposes of Dominion jurisdiction under the Winding-up Act, and an appeal does not lie to a Divisional Court from an order of a Judge in Court in a proceeding under that Act. The appeal lies only to the Court of Appeal, and then only by leave of

a Judge of the Court appealed from. *Sarnia Oil Co.*, 15 P.R. 182.

103. In the Northwest Territories, any person dissatisfied with an order or decision of the Court or a single Judge in any proceeding under this Act may, by leave of a Judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada. R.S., c. 129, s. 74.

104. All appeals shall be regulated, as far as possible, according to the practice in other cases of the Court appealed to, but no appeal hereinbefore authorized shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the Court or Judge appealed from, or, in the Northwest Territories, a Judge of the Supreme Court of Canada, allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the Court appealed to, that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. R.S., c. 129, s. 74.

Note that this section has the effect in Ontario of shortening considerably the ordinary time for appealing to the Court of Appeal.

105. If the party appellant does not proceed with his appeal, according to this Act and the rules of practice applicable, the Court appealed to, on the application of the respondent, may dismiss the appeal with or without costs. R.S., c. 129, s. 75.

This section is a little different from the corresponding section in the old Act, which reads: "If the party appellant does not proceed with his appeal according to the law or the rules of practice, as the case may be, the Court appealed to, on the application of the respondent, may dismiss the appeal with or without costs."

106. An appeal, if the amount involved therein exceeds two thousand dollars, shall, by leave of a Judge of the Supreme Court of Canada, lie to that Court from:—

(*a*) The Court of Appeal for Ontario;

(*b*) The Court of King's Bench in Quebec; or,

(*c*) A superior Court *in banc*, in any of the other provinces or in the Yukon Territory. R.S., c. 129, s. 76.

Where, in one case, six persons were placed on the list by the Master, one for $1,000, and the others for $900 each, and all

were released from liability by the decision of the Court of Appeal, the Supreme Court held that the aggregate amount for which the respondents were sought to be made liable exceeding $2,000 did not give it jurisdiction, but that the position was the same as if proceedings had been taken separately against each. *Stephens* v. *Gerth, In re The Ontario Express and Transportation Company,* 24 S.C.R. 716.

It is submitted that as in the case of appeals to the Court of Appeal, interest and costs cannot be added to the amount involved to make it over $2,000. See in *Wiarton Beet Sugar Co.,* 6 O.W.R. 590.

Leave to appeal *per saltum* under section 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act.

An application under section 76 (the present section 106) of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick was refused, where the Judge had made no formal order on the petition for a winding-up order, and the proceedings before the Full Court were in the nature of a reference from his decision. *Re Cushing Sulphite Fibre Company,* 36 S.C.R. 494.

After a case was set down for hearing before the Supreme Court, the appellant, who had failed to obtain leave to appeal to the Court in accordance with the above section, obtained from the Judge of the Court below an order extending the time for bringing the appeal before the time expired, and the registrar of the Supreme Court sitting as a Judge in Chambers, to whom a motion *nunc pro tunc* was made, granted leave to appeal. His order declared that all proceedings had upon the appeal should be considered as taken subsequently to the order granting leave to appeal. *Ontario Bank* v. *Chaplin,* 20 S.C.R. 152.

Note that in appeals to the Supreme Court, leave must be given by a Judge of that Court and on appeals to the Court of Appeal the leave must be given by a Judge of the High Court.

107. In all proceedings connected with the company, a liquidator shall be described as the liquidator of the (name of the company), and not by his individual name only. R.S., c. 129, s. 29.

108. The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceedings within the jurisdiction of the Court. 52 V., c. 32, s. 21.

The practice in the Master's office is analogous to that followed in administration proceedings.

By virtue of this section the Consolidated Rules of Practice, so far as applicable, govern winding-up proceedings in Ontario. And in effect this, and its kindred sections, subject winding-up proceedings to the practice and procedure of the Court of the province in which the winding-up order is made and the winding up conducted.

The intention of Parliament in submitting all proceedings instituted for the winding up of an insolvent company under this Act, to the jurisdiction of the ordinary Courts in the respective provinces of the Dominion, was to leave those proceedings or cases to be dealt with in those Courts by machinery and course of procedure commonly in use in those Courts in similar cases. *Re Union Fire Ins. Company*, 17 S.C.R. 265 and 268.

A contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition where it appeared that the contributory, although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction and who had indemnified him as to costs. *Re Rainy Lake Lumber Co.*, 11 P.R. 314. See also section 135.

109. The powers conferred by this Act upon the Court may, subject to the appeal in this Act provided for, be exercised by a single Judge thereof; and such powers may be exercised in Chambers, either during term or in vacation. R.S., c. 129, s. 77.

It is under this section that a Judge in Chambers obtains authority for the making of the winding-up order.

Before the amendment of 52 V., c. 32, s. 20, a winding-up order could be made by the Master in Chambers, the Master in

Ordinary, or the local Master. The amendment, however, removed this jurisdiction, and now the order can be made only by a Judge. *Queen City Refining Company*, 10 P.R. 415.

Appeals from the Master or Referee go to a Judge in Court under C.R. 771.

110. After a winding-up order is made the Court may, subject to an appeal according to the practice of the Court in like cases, from time to time as to the Court may seem meet, by order of reference, refer and delegate, according to the practice and procedure of the Court, to any officer of the Court any of the powers conferred upon the Court by this Act. 52 V., c. 32, s. 20.

The Court acts upon this section in making the usual order of reference at the same time as the winding-up order is made. See *ante*. The Master conducts the winding up in a manner analagous to that of administration proceedings. *Stringer's Case*, 4 Ch. 475.

There is always an appeal to the Court which made the order of reference, from a decision of an officer to whom the reference is made. *Markle* v. *Ross*, 13 P.R. 135.

For a concise statement of the power of the Master to whom the reference is made, see *Re Farmers' Loan, Ex parte Toogood*, 8 O.W.R. 12.

In *Titterington* v. *Distributors Co.*, 8 O.W.R. 328, Teetzel, J., stated that the Master in Ordinary has all the powers of a High Court Judge in the winding-up proceedings.

But this would appear to be subject to some limitations. In *Carnegie* v. *Federal Bank*, 11 P.R. 311, it is stated that the Master has only a delegated and very limited jurisdiction, and possesses no part of the original jurisdiction of the Court as to amendment of pleadings or variations of a decree. But see now section 128.

The Master to whom the winding up is delegated has no power to decide a question as to the propriety and validity of a transfer of property by the company which is alleged to be in contravention of section 98 of the Act and to operate an unjust preference. *Hart* v. *Ontario Express & Transportation Co.*, 25 O.R. 247.

Relief by way of rescission of a contract is beyond the jurisdiction of the Master in a winding-up proceeding. Therefore it is not competent in such case to the Master, not having jurisdiction to rescind, to make a vendor who has sold property to the company while occupying a fiduciary relationship to that company to account for any profit which may have accrued to him or to those whom he represented. *In re Hess Mnfg. Co.*; *Edgar* v. *Sloan*, 23 S.C.R. 664, at p. 666.

An order having been made by the Court delegating the powers exercisable for the purpose of winding up the company to a local Judge, it was held that he had power under such delegation to order security for costs and to stay proceedings until security should be given by a shareholder residing out of the jurisdiction and who had no property within Ontario who had intervened for the purpose of expediting the actions of the liquidator. *Re Sarnia Oil Co.*, 14 P.R. 335.

In the course of a reference made to the Master in Ordinary in winding-up proceedings, a claim was made for rent and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference and void as against creditors of the company, and further, that the alleged lease was never executed: *Held*, that the Master had no jurisdiction to adjudicate upon this contention, and that the liquidator should be left to proceed under section 31 (now section 34) by way of action. In *Re Sun Lithographing Company, Farquhar's claim*, 22 O.R. 57.

A perusal of the above case will indicate that the Court leans against allowing an extensive jurisdiction to the Master and that where important questions are raised the liquidator will be forced to proceed by action rather than having them decided by the Master. See section 133 and notes.

111. The Court shall have the power and jurisdiction to cause or allow the service of process or proceedings under this Act to be made on persons out of the jurisdiction of the Court, in the same manner, and with the like effect, as in ordinary actions or suits within the ordinary jurisdiction of the Court. 52 V., c. 32, s. 19.

This section overrides *British Canadian Lumbering Co.* v. *Grant*, 12 P.R. 301, which held, before this section was passed, that there was no power to allow service out of the jurisdiction in a winding-up matter. See C.R. 162(2).

112. Every order of the Court or Judge for the payment of money or costs, charges or expenses made under this Act shall be deemed a judgment of the Court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any superior Court obtained in any suit may bind lands or be enforced in the province where the Court making the same is situate. 58-59 V., c. 18, s. 1.

The powers given to the liquidator under this and the following sections enable him to realize in a winding up as effectually as if he has obtained a judgment in an action, issued execution, etc.

Equitable execution may be resorted to. *Re Manchester* v. *Parkinson*, 22 Q.B.D. 173; *Re Shepherd*, 43 C.D. 136.

113. The practice with respect to the discovery of assets of judgment debtors, from time to time in force in the superior Courts or in any superior Court in the province where any such order is made, shall be applicable to and may be availed of in like manner for the discovery of the assets of any person who by such order is ordered to pay any money or costs, charges or expenses. 58-59 V., c. 18, s. 1.

See notes to section 69 as to the right to discovery in a contest between the liquidator and a claimant; and notes to section 34 as to right to discovery in an action in which the liquidator is a party. See Consolidated Rules 900, *et seq.*

114. Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may, in any province where the attachment and garnishment of debts is allowed by law, be attached and garnisheed in the same manner as debts in such province due to a judgment debtor may be attached and garnisheed by a judgment creditor. R.S., c. 129, s. 79.

115. In any action, suit, proceeding or contestation under this Act, the Court may order the issue of a writ of *subpœna ad testificandum* or of *subpœna duces tecum*, commanding the attendance, as a witness, of any person who is within Canada. R.S., c. 129, s. 80.

Note that this section requires that the Court should order

the issue of the writ. It should seem that a party cannot as of right issue the writ without a direction of the Court. In practice this rule is not strictly observed, the parties to any contest generally attending themselves to the manner of bringing their evidence before the Master.

A liquidator who has been ordered to be cross-examined need not be subpœnaed. *Re General Financial Bank* (1888), W.N. 47.

116. The Court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for money, goods and chattels to be seized, and him and them to be safely kept until such time as the Court orders. R.S., c. 129, s. 52.

The Court should be satisfied by affidavit of the liquidator or some one conversant with the facts that the order should be made. In any case, it would seem advisable for the liquidator to pledge his oath that the arrest would be in the best interests of the estate.

For requirements of the affidavit see *Central Bank* v. *Earle*, 28 N.B.R. 173. See also, *Re Imperial Mercantile Co.*, 5 Eq. 264.

117. The Court may, after it has made a winding-up order, summon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, estate or effects of the company. R.S., c. 129, s. 81.

The object of this and the following section is to enable the liquidator to obtain discovery and there need not be any specific issue or dispute pending. *Re Clement's Case*, 13 Eq. 179.

The powers conferred by this section are frequently exercised where the liquidator, from an examination of the books and papers, has reason to suspect that there may be any claim

against the directors, officers, etc., under section 123 or a claim against promoters or others, or where proceedings are pending against the company, and he desires to ascertain whether he can prudently defend the action. *Re Massey* v. *Allen,* 9 Ch.D. 165; *Re Metropolitan Brush Co.,* 51 L.T. 817.

A *prima facie* claim against any person need not be made out by the liquidator to obtain an examination under this section. It is enough if the Court is satisfied that there is a fair ground for suspicion. *Re Gold Co.,* 12 C.D. 77.

And it is not necessary to shew that the person to be examined can give any information. It is enough if the Court thinks he may be able to give information. *Re Clement's Case,* 13 Eq. 179.

A mere creditor of the company who is not shewn to be capable to give any information is not to be examined under this section. *Re Accidental Insurance Co.,* 5 Eq. 22.

Primâ facie the examination is conducted by the liquidator, but the Court may entrust it to a contributory or a creditor.

Witnesses' depositions on the examination under this section may be used against them in subsequent proceedings, civil or criminal. *Re Pugh & Sharman's Case,* 13 Eq. 566.

118. If any person so summoned, after being tendered a reasonable sum for his expenses, refuses, without a lawful excuse, to attend at the time appointed, the Court may cause such person to be apprehended and brought up for examination. R.S., c. 129, s. 81.

The Court may either order his apprehension or order him to attend at his own expense. *Re Lisbon Steam Tramway,* 2 C.D. 575.

119. The Court may require any such officer or person to produce before the Court, any book, paper, deed, writing or other document in his custody or power relating to the company. R.S., c. 129, s. 81.

120. If any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien. R.S., c. 129, s. 81.

See *Re Capital Fire Insurance Company,* L.R. 24 Ch.D. 408,

for classes of documents to which the solicitor's lien attaches. See also *Re Boston Wood Rim Company*, 5 O.W.R. 149. See notes to sections 23, 33, 69 and 84.

121. The Court or person so named may examine, upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner aforesaid, concerning the affairs, dealings, estate or effects of the company, and may reduce to writing the answers of any such person, and require him to subscribe the same. R.S., c. 129, s. 82.

122. After a winding-up order has been made, the Court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the Court thinks just.

2. Any books and papers in the possession of the company may be inspected in conformity with the order of the Court, but not further or otherwise. R.S., c. 129, s. 54.

After a winding-up order is made the right to inspect the books of the company given to shareholders by the Companies Acts comes to an end, and inspection can only be obtained by order of the Court under this section. *Re Kent Coal Fields Syndicate* (1898), 1 Q.B. 754.

The right of inspection includes the right to take copies. *Re Boord* v. *African Consolidated* (1898), 1 Ch. 596.

Inspection may be refused if it is sought for some purpose not connected with the winding up. *Re North Brazilian Sugar Co.*, 37 Ch.D. 83.

Special circumstances must generally be shewn in order to obtain an order for inspection. *Re Imperial Land Co. of Marseilles* (1882), W.N. 173.

123. When in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee and upon such examination may make an order requiring him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate

as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the Court thinks fit. R.S., c. 129, s. 83.

This section is very commonly resorted to in almost every liquidation. Very frequently directors of companies, which are placed in liquidation, are found to have done certain acts which they should not have done, and which acts have resulted in a financial loss to the company. This section affords the necessary relief to the liquidator and gives a speedy method of realizing against such directors.

When the liquidator has made his investigation and has found that directors have not acted properly in respect to the company's affairs and has satisfied himself that proceedings should be taken against them under this section, he brings in an affidavit to the Master setting out the facts which he has ascertained and stating that he deems it advisable in the interests of the estate to take proceedings against these directors or officers under this section. The Master thereupon issues a summons calling upon the directors attacked to appear before him on the application of the liquidator. This summons is then served on all necessary parties and on the return day evidence is heard by the Master for and against the liquidator's application and judgment given as in the Master's opinion seems proper. An appeal lies from the Master's decision in accordance with the ordinary procedure. For a form of summons see *infra*.

Note the class of persons against whom proceedings may be taken. Our section is not quite as wide as the English section (section 10, 1890) which allows proceedings to be taken against any person who has taken part in the formation or promotion of the company. This class of persons is not included in our Act.

This section does not create any new rights or liabilities, but provides merely a more convenient means of enforcing rights and remedies which would have been enforceable by action if there had been no winding up. *Coventry & Dixon's Case*, 14 C.D. 660; *Cavendish* v. *Fenn*, 12 A.C. 652.

A test is therefore given in that if no action would lie for the offence charged if it were not for this section, then proceedings cannot be taken under the section. See *Kingston Cotton Mill* (*a*) (1896), 2 Ch. 279.

The word "misfeasance" in a similar English section has been defined by James, L.J., in *Coventry & Dixon's Case, supra,* as meaning "Misfeasance, in the nature of a breach of trust; that is to say it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any money of the company or by which the company's property has been wasted or the company's credit pledged. It must be some act resulting in actual loss to the company."

"In order to make a director liable under this section it must not only be shewn that he was guilty of some misfeasance but that the misfeasance resulted in damage to the company." *Re Manes Tailoring Co.*, 11 O.W.R. 498.

The application need not be based on fraud. *Re Sale Hotel,* 78 L.T. 368.

Mere non-feasance is not misfeasance. *Forest of Dean,* 10 C.D. 450; but 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. *Ibid. Re Cawley,* 42 C.D. 209. 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 they represent, they discharge both their legal and equitable duties to the company, and will not be liable for mistakes or errors of judgment. *Lagunas Nitrate Syndicate* (1899), 2 Ch. 393. If the alleged misfeasance consists of an act which is not *ultra vires* the company and not fraudulent and dishonest, the directors are not liable unless it can be shewn that they did not really exercise their discretion and judgment as such directors and that the omission to do so resulted in loss or damage to the company. *Re New Mashonaland* (1892), 3 Ch. 586.

The act must be done fraudulently and improperly and not merely by a default of judgment and must result in loss to the company. *Turquand* v. *Marshall*, 4 Ch. 376; see also *Overend Gurney* v. *Gibb*, 5 H.L. 480.

Negligence amounting to a breach of trust is a misfeasance within the section. *Re Liverpool Household Co.*, 62 L.T. 873, *Marquis of Bute's Case* (1892), 2 Ch. 100, and on the same principle as governs all proceedings under the section, the negligence for which a director will be held liable must be such as would make him liable in an action. *Marzetti's Case*, 28 W.R. 541.

It is not necessary that the moneys of the company should have belonged to the company before it came into the possession of the person liable. Money had and received for the use of a company is sufficient. *Re Sale Hotel*, 78 L.T. 368.

In the case of a breach of trust which was not fraudulent, the lapse of six years after the breach would probably be a bar to the action under R.S.O. c. 129, s. 32; see in England *Re Lands Allotment Co.* (1894), 1 Ch. 616; see also *Re Sharpe* (1892), 1 Ch. 154.

Where an order is made under this section no set-off is allowed. *Flitcroft's Case*, 21 C.D. 519; *Milan Tramways*, 25 C.D. 571; *Pelley's Case*, 21 C.D. 492; *Freeman's Case*, 12 O.L.R. 149.

Primâ facie the company's solicitor is not an officer within this section. *Re Great Western*, 31 C.D. 496; but he may be if he does all the work for a fixed salary. *Re Liberator*, 71 L.T. 537.

The payment of dividends out of capital is a breach of trust and the directors who allow such payments to be made will be held liable under this section with probably a right of recourse against each shareholder for the amount received. *Re National Funds Assurance Co.*, 10 C.D. 118; *Re London and General Bank* (2) (1895), 2 C.D. 673; see also *Alexandra Palace Co.*, 21 C.D. 149, and *Re Moxham* (1900), 1 Q.B. 88.

Where a director purchased property of a company, which was being sold under mortgage, and re-sold at a profit it was

held that he "became liable or accountable" for whatever profits he might have received on the sale, and an order was made against him under this section. *Re Iron Clay Co.*, 19 O.R. 113.

A director is liable under this section when he improperly accepts a present of his qualification shares from the promoter of the company or a vendor of property to the company. *Pearson's Case*, 5 C.D. 336; *Archer's Case* (1892), 1 Ch. 322; *Metcalfe's Case*, 13 C.D. 169; *Postage Stamp Co.* (1892), 3 Ch. 566. The measure of damages in such cases as those immediately preceding would appear from a perusal of the cases to be the par value of the shares.

A director is liable under this section to account for profits made by him on a sale of his own property to the company without disclosing the fact of his ownership. *Re Cape Breton Co.*, 29 C.D. 795, 12 A.C. 652; see also the *Olympia* (1898), 2 Ch. 168 (1900), A.C. 241; *Re Leeds & Hanly* (1902), 2 Ch. 809.

It cannot be said that the law is clear on the liability of a person who promotes a company and sells his own property to it at an overvaluation, if all of the shareholders approve of the transaction and even though the vendor is also a director of the company, provided, however, he discloses his interest. If he does not disclose his interest the contract would not comply with the provisions of the Companies Act, and if he were a director he would be plainly liable for a breach of trust. But the case very commonly arises where a man causes a company to be incorporated for the purpose of acquiring his own business. He nominates his own incorporators and his first Board of Directors, and while thus in absolute control of the company he causes a contract to be made whereby the company takes over his business, generally with a large overvaluation of the goodwill. Assuming the contract to be validly made by the directors and ratified by all of the shareholders of record at the time of the transaction, it is extremely difficult to hold the vendor liable even though he was a director at the time, because he has disclosed his interest not only to the Board of Directors but to each and every shareholder of the company. It is stated

by Lord Herschell in *Re Cape Breton Co.*, 12 A.C. 652, that the misfeasance in the case of a sale by a director to the company is not in the selling but in not disclosing.

It is plain that in such a case the vendor is not liable as a contributory because the company has received value for the shares; see notes to section 51; and it would seem as a fair result of the cases that there is no liability even under this section if full disclosure was made, for the reason that it is impossible to shew what loss was occasioned to the company. In support of this principle see *Re Ambrose Lake Co.*, 14 C.D. 390; *Re Cape Breton Co.*, 26 C.D. 230; *Erlanger* v. *Sombrero*, 3 A.C. 1218; *Re Hess*, 23 S.C.R. 610; *Felix Hadley* v. *Hadley*, 77 L.T. 131; *Cavendish* v. *Fenn*, 12 A.C. 652; *Wade* v. *Kendrick*, 37 S.C.R. 32; *Earle* v. *Burland*, 27 A.R. 561; *Highway Advertising* v. *Ellis*, 7 O.L.R. 504; *Hopper* v. *Hoctor*, 35 S.C.R. 645; *O'Sullivan* v. *Clarkson*, 9 O.W.R. 46. In such a case the company and the liquidator are, apparently, without a remedy unless the contract can be rescinded and the parties placed in *statu quo ante*. *Re Hess, supra.* See cases there collected. For a lucid discussion of this principle see *Re Wragge Limited* (1897) 1 Ch. 796, where the earlier cases are collected. See also title Promoters, *ante*, p. 55, *et seq.*

To shew that the company suffered loss in such a case the liquidator must attack the adequacy of the consideration; to do this he must first impeach the agreement and this cannot be done unless fraud is alleged and proved, and it is possible to restore the parties to their former position. *Re Wragge, supra.*

When the Letters Patent incorporating a company give power to the company to adopt an agreement previously made, under which property is transferred to the company for an amount of stock greatly in excess of the actual value of the property: *Quære*, as to the right of any person to impeach the transaction. *Thompson* v. *Brantford*, 25 A.R. 340; *Ashburn* v. *Rische*, 7 H.L. 653; *Re Wakefield Mica Co.*, 4 O.W.R. 535, 7 O.W.R. 104.

Bonus shares were allotted to a director, upon which nothing

was paid and he transferred some of them to persons under such circumstances that they could not be held as contributories. It was held that he was liable under this section for the amount unpaid on the stock. *Freeman's Case*, 12 O.L.R. 149.

Directors were held liable under this section for not exercising their discretion in the best interests of the company in procuring responsible transferees of stock. *Re Peterboro Cold Storage Co.*, 14 O.L.R. 475.

Directors who pay themselves remuneration when they are not properly entitled to do so under the by-laws are liable to repay the amounts under this section. *Livingstone's Case*, 14 O.R. 211, 16 A.R. 397.

A director who signs cheques for the company without inquiring for what purposes the cheques are to be used is liable under this section if the company has suffered loss. *Joint Stock Discount Co.* v. *Brown*, 8 Eq. 381.

Directors issued stock to themselves as fully paid up, when it was not in fact paid up. Subsequently one of them transferred his stock to one of the others and received from him $125. On a winding-up order it was held that he was liable under this section for the sum of $125, only and not for the par value of the stock as the company had not suffered loss, the transferee of the stock being not in a position of a *bonâ fide* purchaser of paid-up stock and he was therefore subject to liability for calls. *Re Manes Tailoring Co.*, 11 O.W.R. 498. If in this case the transferee of the stock had been in a position to hold it as fully paid up the transferor would have been liable under *Freeman's Case, supra*, for the full par value of the stock.

Directors were ordered to repay excessive consideration paid to contractors under an *ultrâ vires* agreement. *London Trust Co.* v. *Mackenzie* (1893), W.N. 9. Directors were ordered to repay money paid to them in reality for rigging the market. *Marzetti's Case*, 28 W.R. 541.

A director was ordered to repay presents of the company's monies to himself. *Geo. Newman Co.* (1895), 1 Ch. 674.

A shareholder applied under section 22 for leave to add the company as a party to an action on behalf of herself and other

shareholders for damages against the directors for breach of trust. As the liquidator was willing to proceed against the directors under this section, leave was refused on the ground that so far as the company was concerned the claim could be more satisfactorily disposed of in the winding up. *Re Farmers' Loan*, 8 O.W.R. 12.

No formal objection should be allowed to affect the proper operation of this section. *Livingstone's Case*, 14 O.R. 211.

FORM OF MISFEASANCE SUMMONS.

(Style of cause, etc.)

Let all parties concerned attend before the Master in Ordinary at his Chambers, Osgoode Hall, Toronto, on the day of , 19 , at the hour of 11 o'clock in the forenoon on the hearing of an application on the part of the liquidator of the above Company that it may be declared that , directors of the above named Company are guilty of misfeasance and breach of trust in relation to the above named Company inasmuch as that all of the said directors excepting acted as directors of the said Company without being duly qualified, and accepted presents or gifts of stock, so as to make it appear that they were duly qualified to act as directors and inasmuch as all of the said directors were parties to and approved of an improvident disposition of the stock of the said Company, and the handing of the same over to said , such disposition also being one by which all of the said directors, except the said , personally profited by obtaining stock from the said without having paid for the same, and generally that the said directors acted in their own interests and contrary to the interests of the Company in breach of their duties as directors and of the provisions of the statute in that behalf.

And that it may be declared that they are jointly and severally liable to the said Company and to , Esquire, as the liquidator thereof to the extent of the amount of stock respectively obtained by them as above set out together with interest on the value of the said stock from the date of said misfeasance and breach of trust and also are liable to make good any loss which the said Company may have sustained by reason of such misfeasance or breach of trust and that the said directors may be ordered to pay to the applicant his costs of and relating to this application or for such other order as may be made in the premises and as the nature of the case may require.

Master in Ordinary.

The summons should clearly state all grounds of complaint against each director or other person charged. See *Re New Mashonaland* (1892), 3 Ch.D. 577; *Re Mutual Society*, 22 C.D. 714.

ORDER.

Upon the application, etc.

Declared that and are guilty of misfeasances and breaches of trust in relation to the above named Company and have become liable to contribute the several sums hereinafter mentioned to the assets of the above named Company, and ordered that the said several persons do within four days after service of this order upon them respectively pay to the liquidator of the said Company the respective sums set opposite their respective names in the second column of the schedule to this order together with the liquidator's costs of and incidental to this application.

Schedule shewing names, amounts and costs.

124. The Court may, by any order made after the winding-up order and the appointment of a liquidator, dispense with notice to creditors, contributories, shareholders or members of the Company required by this Act, where in its discretion such notice may properly be dispensed with. 52 V., c. 32, s. 11.

Note that this order may be made only after the liquidator has been appointed. His appointment must be on notice. See section 24 *et seq.* See sections 34, 36, 63, etc.

ORDER DISPENSING WITH NOTICE TO CREDITORS.

(Style of cause.)

Upon the application of the liquidator of the above named Company upon hearing read the winding-up order herein dated the day of , 19 , and the order of reference of the same date, and the order appointing permanent liquidator of the above named Company, dated the day of , 19 , upon reading the affidavit of , and considering the matter and hearing what was alleged by , counsel for the liquidator.

It is ordered that all acts, matters and things required or authorized by the above-mentioned Act and the amending Acts to be done by the liquidator, may be done by the said liquidator and particularly the acts, matters, things and powers referred to in sections 34 and 36 of the said Act, may be exercised by the said liquidator [without the approval, sanction or intervention of the Court and] without previous notice to the creditors, contributories, shareholders and members of the said Company, notice to such creditors, contributories, shareholders and members being hereby dispensed with.

[And it is further ordered that this order be read at the meetings of creditors, contributories and shareholders to be hereafter held as provided by order made herein on the day of , 19 .]

And it is further ordered that the costs of this application and order be costs in the matter to the said liquidator.

Master in Ordinary.

The clause allowing the various things to be done without the intervention of the Court is rarely included.

125. The Courts of the various provinces, and the Judges of the said Courts respectively, shall be auxiliary to one another for the purposes of this Act, and the winding-up of the business of the company or any matter or proceeding relating thereto may be transferred from one Court to another with the concurrence, or by the order or orders of the two Courts, or by an order of the Supreme Court of Canada. R.S., c. 129, s. 84.

The Court initiating winding-up proceedings is a Dominion Court *ad hoc*, and can restrain actions in the Courts of other provinces, which may affect the assets of the company. *Baxter* v. *Central Bank*, 20 O.R. 214.

Meredith, C.J., held, in 1905, however, in *Re Canada Cork Company* (unreported) that such an order would not be made unless evidence was given that the Court in the other province had received notice of the winding-up order and had refused to take cognizance of it. See also *Re International Pulp Company*, 3 C.D. 594.

126. When any order made by one Court is required to be enforced by another Court, an office copy of the order so made, certified by the clerk or other proper officer of the Court which made the same, under the seal of such Court shall be produced to the proper officer of the Court required to enforce the same. R.S., c. 129, s. 85.

127. Such last mentioned Court shall, upon such production of the said certified copy of such order, take the same proceedings thereon for enforcing the order as if it was the order of the Court required to enforce it. R.S., c. 129, s. 85.

128. The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the Court, shall apply, as far as practicable, to all pleadings and proceedings under this Act.

2. Any Court before which such proceedings are being carried on shall have full power and authority to apply to such proceedings the appropriate rules of such Court as to amendments. R.S., c. 129, s. 86.

"It is plain, I think, that section 86 (the present section 128) has reference to amendments only," *per* Ferguson, J., in *Re The Sun Lithographing Co.*, 22 O.R. 57, at p. 62.

129. No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded; but the same

may be dealt with according to the rules and practice of the Court in cases of irregularity or default. R.S., c. 129, s. 87.

130. Any powers by this Act conferred on the Court are in addition to, and not in restriction of any other powers at law or in equity of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, or his estate, for the recovery of any call or other sum due from such contributory, debtor, or estate, and such proceedings may be instituted accordingly. R.S., c. 129, s. 90.

131. The Court may, as to all matters relating to the winding-up, have regard, so far as it deems just, to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence. R.S., c. 129, s. 19.

131A. The Court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants, or shareholders can be classified, may after notice by advertisement or otherwise nominate and appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings, and all the persons composing any such class shall be bound by the acts of the solicitor and counsel so appointed, and service upon such solicitor of notices, orders or other proceedings of which service is required, shall for all purposes be, and be deemed to be, good and sufficient service thereof upon all the persons composing the class represented by him; and the Court may by the order appointing a solicitor and counsel for any class or by subsequent order provide for the payment of the costs of such solicitor and counsel by the liquidator of the company out of the assets of the company, or out of such portion thereof as to the Court seems just and proper. 6-7 Edw. VII., c. 51, s. 1.

Section 131(*a*) was added in 1907. See notes to section 35. Until this section was passed there was no provision in our Act for the attendance of creditors and shareholders at the winding-up proceedings. As a matter of practice they attended if they so desired, but at their own expense. Now an order can be made under the above section providing for representation. See notes to section 61 *et seq.*

Where the interests of creditors and shareholders conflict the Court will exercise its discretion for the benefit of the creditors. *Re Commercial Bank,* 1 Ch. 538.

132. The liquidator shall be subject to the summary jurisdiction of the Court in the same manner and to the same extent as the ordinary

officers of the Court are subject to its jurisdiction and the performance of his duties may be compelled by order of the Court. R.S., c. 129, s. 39.

See notes to section 34.

133. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever. R.S., c. 129, s. 39.

On a petition by a mortgagee in winding-up proceedings asking for the conveyance to him by the liquidator of the company's equity of redemption in certain property the Court has jurisdiction to make the usual order for foreclosure or sale. The jurisdiction exists by virtue of this section and may be exercised in a summary way. It is a matter of convenience and discretion as to when an action will be directed or summary proceedings sanctioned. *Re The Essex Land & Timber Co.*, 21 O.R. 367.

But sections 80 and 81 make it clear that this section is not intended to apply to cases where prior or subsequent mortgagees are concerned. *Re Canada Cabinet Company*, 9 O.W.R. 818.

The summary action provided for in this section as to mortgages on land may be properly exercised only when the liquidator is the sole party interested in the property mortgaged. *Ibid.*

A secured creditor has *primâ facie* a clear right to apply for and obtain leave to bring or proceed with an action for enforcing his securities. *Re David Lloyd & Co.*, 6 C.D. 339; *Re London, etc., Hotel Co.* (1892), 1 Ch. 639.

In general, the summary powers cannot be exercised against persons who do not come within some or one of the classes of persons specified in the sections of the Act covering summary exercise of powers. These classes include contributories, creditors, officers and trustees. The Court is not justified in extending the jurisdiction to other cases not within the terms of the Act. *Re Tobique Gypsum Co.*, 6 O.L.R. 515.

Goods were sold to a company under a lien agreement (no property passing until payment in full). Upon the winding-up

order being made the liquidator refused to allow the vendors to take back the goods. The vendors were refused leave to bring an action to recover the goods, but were directed to proceed in accordance with this section. *Re Kurtz & McLean, Ltd.*, an unreported decision of Mulock, C.J., January 24th, 1908.

134. A majority of the Judges of the Court, of which the chief justice shall be one, may, from time to time make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel, and by or to officers of Courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act: Provided that in Ontario the Judges of the High Court of Justice, and in Quebec, the Judges of the Court of King's Bench or a majority of such Judges of which the Chief Justice shall be one, shall make and settle such forms, rules and regulations. R.S., c. 129, s. 92.

No rules have yet been made in Ontario.

135. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, shall, unless otherwise specially provided, be the same as nearly as may be as those of the Court in other cases. R.S., c. 129, s. 93.

See notes to section 108.

136. All dividends deposited in a bank and remaining unclaimed at the time of the final winding up of the business of the Company shall be left for three years in the bank where they are deposited, subject to the claim of the persons entitled thereto.

2. If such dividends are unclaimed at the expiration of three years aforesaid they shall be paid over by such bank, with interest accrued thereon, to the Minister.

3. If such dividends are afterwards duly claimed they shall, with such interest, be paid over to the persons entitled thereto. R.S., c. 129, s. 94.

Liquidators had passed their accounts and paid the balance in their hands into Court. Before the expiration of three years the moneys were paid to parties who were not entitled to them. It was held that the Receiver-General, who in the old Act was named instead of the Minister of Finance, had such an interest

in the fund even before the expiration of the three years to apply to have the moneys repaid into Court by the parties to whom they were erroneously paid. *Hogaboom's Case*, 28 S.C.R. 192.

137. The money deposited in the bank by the liquidator after the final winding up of the business of a company shall be left for three years in the bank, subject to be claimed by the persons entitled thereto, and if not then paid out to such persons, shall be then paid over, with the interest accrued thereon, to the Minister, and if afterwards claimed shall be paid, with such interest, to the persons entitled to the same. R.S., c. 129, s. 41.

138. When a winding-up order is made, if it appears in the course of such winding up that any past or present director, manager, officer or member of the company is guilty of an offence in relation to the company for which he is criminally liable, the Court may, on the application of any person interested in such winding up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company. R.S., c. 129, s. 96.

In a proper case the Court will direct the prosecution under this section. See *London & Globe Finance Corporation* (1903), 1 Ch. 728.

For cases under a similar English section see *Re Eupion Fuel Co.* (1875), W.N. 10; *Re Northern Counties' Bank*, 31 W.R. 546; *Re Dunham & Co.*, 32 W.R. 920.

139. Every person who, with intent to defraud or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty of an indictable offence and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any gaol or in any place of confinement other than a penitentiary for any term less than two years, with or without hard labour. R.S., c. 129, s. 95.

Section 415 of the Criminal Code (R.S.C. c. 146) renders an officer, clerk or servant liable to seven years' imprisonment who is guilty of any offences, similar to those set out in this section, in respect to his employer's books. This would, of course, apply if the employer were a company.

140. Any liquidator, director, manager, receiver, officer or employee of a company, failing to comply with the requirements or directions of any order made by the Court under this Act, shall be guilty of contempt of Court and shall be subject to all process and punishments of such Court for contempt.

2. Any liquidator so failing may in the discretion of the Court be removed from office as such liquidator. R.S., c. 129, ss. 38, 39, 40 and 83.

In the previous Act the penalties which were directed to follow any disobedience were contained in a great many sections. Now all provisions are concisely embodied in this section.

141. Any refusal on the part of the president, directors, officers or employees of a company to give all information possessed by them respectively as to the affairs of the company required by the accountant or other person ordered by the Court under this part to inquire into the affairs of the company and to report thereon, shall be a contempt of Court, and such president, directors, officers or employees shall be subject to all possessed by them respectively as to the affairs of the company. C. 129, s. 11.

Note the obvious misprint in this section. The words "possessed by them . . . the company" have apparently been repeated through error. Probably it was intended to include the words "process and punishments of such Court for contempt" as in section 140 (1).

142. Every liquidator who shall not within three days after the date of the final winding up of the business of the company, deposit in the bank, appointed or designated as hereinbefore provided, any money belonging to the estate of which he is such liquidator, then in his hands and not required for any other purpose authorized by this Act, with an account of such money, and a sworn statement that the same is all that he has in his hands, shall incur a penalty not exceeding ten dollars, and not less than ten per centum per annum interest upon the sums in his hands for every day after expiration of the said three days on which he neglects or delays such payment. R.S., c. 129, s. 40.

143. Every person being brought up for examination before the Court after the Court has made a winding-up order, or appearing before the Court for such examination, who refuses without lawful excuse to answer any question put to him or to subscribe any answer made by him on such examination, shall be guilty of contempt of Court, and shall be subject to all process and punishment of such Court for contempt. R.S., c. 129, s. 82.

144. If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded. R.S., c. 129, s. 53.

This section is different from the English Act, which reads "between the contributories and the company." Under this section it would seem that in a contest between the liquidator and a contributory the books are not *primâ facie* evidence. They are only *primâ facie* evidence in proceedings between contributories.

This becomes of importance in an action by the liquidator to settle the contributory on the list. By virtue of this section all that is necessary for the liquidator to do in England is to prove that the contributory's name is entered in the books of the company as a shareholder and that there is a balance unpaid on his stock and the contributory must then shew that his name is improperly in the books. *Re Great Northern Salt Co.*, 44 Ch. D. 472; *Knight's Case*, 2 Ch. 321; *Arnot's Case*, 36 C.D. 702.

This section was considered in *Hill's Case*, 10 O.L.R. 501, where McMahon, J., treated the section as having the same effect as the English section. The case, however, was decided on another ground and it has not yet been definitely decided here what the effect of this section is as between the liquidator and a contributory, although in addition to *Hill's Case* it has been intimated by Osler, J.A., in *Re London Speaker Co.*, 16 A.R. 508, at p. 514, that as between the company and the contributory the books are *primâ facie* evidence. But his statement is *obiter* only. See also *Calderwood's Case*, 10 O.L.R. 705.

145. Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the Court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, Judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada before any Judge of a Court of record, any commissioner for taking affidavits to be used in any Court in Canada, any notary public, the chief municipal officer of any town or city, any British consul or vice-consul, or any person authorized by or under any statute of Canada, or of any province, to take affidavits. R.S., c. 129, s. 88.

Note that the liquidator is given power to take affidavits.

146. All Courts, Judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal or stamp or signature, as the case may be, of any such Court, liquidator, Judge, notary public, commis-

sioner, justice, chief, municipal officer, consul, vice-consul, or other person, attached, appended or subscribed to any such affidavit, affirmation or declaration or to any other document to be used for the purposes of this Act. R.S., c. 129, s. 89.

147. When any order made by one Court is required to be enforced by another Court, the production of an office copy of the order so made certified by the clerk or other proper officer of the Court which made the same, under the seal of such Court, shall be sufficient evidence of such order having been made. R.S., c. 129, s. 85.

148. The absence of mention in the minutes of any meeting of contributories, creditors, shareholders or members under this Act, of the production of the liquidator's bank pass book, shall be *primâ facie* evidence that such pass book was not produced at such meeting. R.S., c. 129, s. 37.

See section 67.

PART II.

BANKS.

149. The provisions of this part apply to banks only, not including savings banks. R.S., c. 129, s. 97.

Note that savings banks are subject to the provisions of Part I. of the Act.

A bank cannot be wound up under this Act until the provisions contained in this part are complied with. *Re Bank of Liverpool*, 14 S.C.R. 650; *Re Central Bank*, 15 O.R. 309.

150. The application for a winding-up order shall be made by a creditor for a sum of not less than one thousand dollars. R.S., c. 129, s. 98.

151. The Court shall, before making the order, direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held, and conducted as the Court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators. R.S., c. 129, s. 98.

152. The Court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank, or other person who usually presides at a meeting of shareholders, shall be chairman. R.S., c. 129, s. 99.

153. The Court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment, the creditors at the meeting shall appoint a chairman. R.S., c. 129, s. 99.

154. In taking a vote at the meeting of shareholders, regard shall be had to the number of votes conferred by law, or by the regulations of the bank, on each shareholder present or represented at such meeting. R.S., c. 129, s. 100.

155. In taking a vote at the meeting of creditors, regard shall be had to the amount of the debt due to each creditor. R.S., c. 129, s. 100.

156. The chairman of each meeting shall report the proceedings of the meeting of the Court, and, if a winding-up order is made, the Court shall appoint one or more liquidators not exceeding three to be selected, in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively. R.S., c. 129, s. 101; 52 V., c. 32, s. 17.

There is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators appointed by the Court. The Court may exercise its discretion and choose whatever liquidator it sees fit from those nominated at the meetings of shareholders and of creditors. *Quære* as to the right of appeal from the appointment. *Forsythe* v. *Bank of Nova Scotia*, 18 S.C.R. 707. But when the double liability of the shareholders was likely to be called upon the nominee of the creditors was preferred. *Re Central Bank*, 15 O.R. 309; *Re Bank of Liverpool*, 22 N.S. 97.

See *Re Commercial Bank*, 9 Man. L.R. 342.

157. If no one has been so nominated, the liquidator or liquidators shall be chosen by the Court. 52 V. c. 32, s. 18.

158. The liquidators shall ascertain as nearly as possible the amount of notes of the bank intended for circulation and actually outstanding, and shall reserve dividends on any part of the said amount in respect of which claims are not filed, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if such last dividend is not made until after the expiration of the said time.

2. If claims are not filed and dividends applied for in respect of any part of the said amount before the period by this section limited, the dividends so reserved shall form the last or part of the last dividend. R.S., c. 129, s. 103.

159. Publication in the Canada Gazette, and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office of a bank is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of bank notes in circulation.

2. If the head office is situated in the Province of Quebec, one of the newspapers in which publication is to be made shall be a newspaper published in English and the other a newspaper published in French. R.S., c. 129, s. 104.

PART III.

LIFE INSURANCE COMPANIES.

160. The provisions of this Part apply only to life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the life insurance business of such companies. R.S., c. 129, s. 105.

See notes to section 149.

161. Whenever a license of a company has expired or been withdrawn under the Insurance Act, and has not been renewed within thirty days after such expiry or withdrawal, the company shall be subject to the provisions of this Act applicable to the case of insolvency of such a company, except in case of,—

(*a*) A company which previously to the twenty-eighth day of April, one thousand eight hundred and seventy-seven, was licensed to transact the business of life insurance in Canada and ceased to transact such business before the twenty-first day of March, one thousand eight hundred and seventy-eight, having before that date given written notice to that effect to the Minister; or,

(*b*) A company licensed under the Insurance Act to transact the business of life insurance in Canada which has, in manner provided by the said Act, procured the transfer of its outstanding policies in Canada to some company or companies licensed under the said Act, or obtained the surrender of its policies as far as practicable. R.S., c. 129, s. 106.

162. In case of the insolvency of any company, the deposits of such company held by the Minister, and the assets held by the trustees under the Insurance Act, shall be applied pro rata towards the discharge of all claims of policyholders in Canada duly authenticated against such company. R.S., c. 129, s. 107.

Canadian policyholders in an insurance company may obtain distribution of a deposit made by the company with the Minister of Finance under 31 V., c. 48 (D.), and 34 V., c. 9 (D.), although the company is a foreign corporation and proceedings have been instituted in the foreign country to wind up the company. *Re Briton Medical and General Life Association* (2), 12 O.R. 441.

163. Upon the insolvency of any company and the making of a winding-up order under this Act, the policyholders in Canada shall be entitled to claim for the full net values, including bonus additions and profits accrued, of their several policies at the time of the winding-up order, less any amount previously advanced by the company on the security of the policies.

2. Such claims shall rank with judgments obtained and claims matured on Canada policies, in the distribution of the assets. R.S., c. 129, s. 108.

164. The liquidator may require the superintendent of insurance to value, or procure to be valued under his supervision, the policies of the policyholders in Canada, on the basis prescribed in the Insurance Act.

2. The expenses of such valuation, at a rate of three cents for each policy or bonus addition so valued, shall be retained by the Minister from the securities held by him. 62-63 V., c. 43, s. 6.

165. Upon the completion by the liquidator of the statement to be prepared by him of all judgments against the company upon policies in Canada, and of all claims upon policies matured or outstanding, the Court shall cause the securities held by the Minister for such company, and the assets held by the trustees provided in the Insurance Act, or any part of them it deems fit, to be sold or realized in such manner and after such notice and formalities as the Court appoints. R.S., c. 129, s. 108.

166. The proceeds so realized, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of policies, be distributed pro rata amongst the claimants according to such statement.

2. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policyholders shall not be barred from any recourse they have, either in law or equity, against the company issuing the policy or against any shareholder or director thereof, other than for a share in the distribution of the proceeds aforesaid, or in respect to any distribution of the general property and assets of the company, other than the deposit and the assets vested in trustees. R.S., c. 129, s. 108.

167. Whenever the company or the liquidator or the holder of the policy or contract of insurance exercises any right which it or he has to cancel any policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. R.S., c. 129, s. 109.

168. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing by the books and records of the officers of the company to be creditors or claimants on any matured, valued or cancelled policy or contract of insurance, and of the amount due to each such person in respect of such claims, and every such person shall be collocated and

ranked as, and shall be entitled to the right of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim. R.S., c. 129, s. 110.

169. A copy of such statement, certified by the liquidator, shall, forthwith after the making of such statement, be filed in the office of the superintendent of insurance at Ottawa.

2. Notice of such filing shall forthwith be given by the liquidator by notice in the Canada Gazette and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office in Canada of the company is situate.

3. The liquidator shall also, forthwith, send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. R.S., c. 129, s. 110.

170. The holder of a policy or contract of life insurance, upon which a claim accrues after the date of the winding-up order and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement referred to in the last preceding section, shall be entitled to claim as a creditor for the full net amount of such claim less any amount previously advanced by the company on the security of the policy or contract, and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days aforesaid shall rank upon the estate unless nor until there is sufficient to pay all creditors in full. R.S., c. 129, s. 111.

171. If, before the expiration of the thirty days hereinbefore mentioned, the holder of a policy or contract of life insurance, on which a claim has not accrued, signifies in writing to the liquidator his willingness to accept an insurance in some other company for the amount which can be secured by the dividend on his claim to which such holder is or may become entitled, the liquidator may, with the sanction of the Court, effect for such holder an insurance to the amount aforesaid in another company or companies, approved of by the Superintendent of Insurance, and may apply to that purpose the dividend on his claim to which such holder is or may become entitled: Provided that such insurance shall be effected only as part of a general scheme for the assumption, by some other company or companies, of the whole or part of the outstanding risks and liabilities of the insolvent company. R.S., c. 129, s. 112.

172. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance one in every six months,

or oftener as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires. R.S., c. 129, s. 113.

173. Publication in the Canada Gazette, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of policies or contracts of insurance in respect of which notice of claim has been received. R.S., c. 129, s. 114.

PART IV.

Other than Life Insurance Companies.

174. The provisions of this Part apply only to insurance companies other than life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the insurance business of such companies which is not life insurance business. R.S., c. 129, s. 115.

175. Any company shall be deemed insolvent upon his failure to pay any undisputed claim arising, or loss insured against in Canada, upon any policy held in Canada for the space of sixty days after becoming due, or, if disputed, after final judgment and tender of a legal valid discharge, and, in either case, after notice thereof to the Minister.

2. In any case when a claim for loss, is, by the terms of the policy, payable on proof of such loss, without any stipulated delay, the notice to the Minister under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due. R.S., c. 129, s. 116.

176. Any deposit held by the Minister for policyholders, shall be applied pro rata towards the payment of all claims duly authenticated against such company, upon or in respect of policies issued to policyholders in Canada. R.S., c. 129, s. 117.

177. Holders of policies or contracts of insurance on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as creditors, for such part of the premium paid, as is proportionate to the period of their policies or contracts respectively unexpired at the date of the winding-up order.

2. Such return or unearned premium shall rank with judgments obtained and claims accrued in the distribution of the assets. R.S., c. 129, s. 118.

178. Upon the completion of the statement to be prepared by the liquidator under this Act, the Court shall cause the securities held by the Minister for the company, or any part of them it deems fit, to be sold in such manner and after such notice and formalities as the Court appoints.

2. The proceeds thereof, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of the policies, be distributed pro rata among the claimants according to such statement.

3. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policyholders shall not be barred from any recourse they have, either at law or in equity, against the company issuing the policy, other than for a share in the distribution of the proceeds of the securities held for such company by the Minister. R.S., c. 129, s. 118.

179. Whenever the company or the liquidator, or the holder of the policy or contract of insurance, exercises any right which it or he has to cancel the policy or contract, the holder shall be entitled to claim as a creditor, for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. R.S., c. 129, s. 118.

180. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing, by the books and records of the officers of the company, to be creditors or claimants under the three last preceding sections, and of the amounts due to each such person thereunder. R.S., c. 129, s. 119.

181. Every such person shall be collocated and ranked as, and shall be entitled to the rights of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any person not collocated, or dissatisfied with the amount for which he is collocated, may file his own claim. R.S., c. 129, s. 119.

182. A copy of such statement, certified by the liquidator, shall, forthwith after the making of such statement, be filed in the office of the Superintendent of Insurance, at Ottawa, and notice of such filing shall be forthwith given by the liquidator by notice in the Canada Gazette and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of the Company is situate.

183. The liquidator shall also forthwith send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditor, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. R.S., c. 129, s. 119.

184. The holder of a policy or contract of insurance, upon which a claim accrues, after the date of the winding-up order, and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement aforesaid, shall be entitled to claim, as a credi-

tor, for the full net amount of such claim; and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days hereinbefore mentioned, shall rank upon the estate, unless nor until there is sufficient to pay all creditors, in full. R.S., c. 129, s. 120.

185. Before the expiration of the thirty days aforesaid, the liquidator may, with the sanction of the Court, arrange with any incorporated insurance company, approved of for such purposes by the Superintendent of Insurance, for the re-insurance by such company of the outstanding risks of the insolvent company, and for the assumption by such company of the whole or any part of the other liabilities of the insolvent company. R.S., c. 129, s. 121.

186. In case of such arrangement the liquidator may pay or transfer to such company, such of the assets of the insolvent company as may be agreed on as the consideration for such re-insurance or assumption, and in such case the arrangement for re-insurance shall be in lieu of the claim for unearned premium.

2. Any remaining assets of the insolvent company shall be retained by the liquidator as a security to the creditors for the payment of their claims, and shall, if necessary, be so applied, and shall not be returned to the company, except on the order of the Court after the satisfaction of such claims. R.S., c. 129, s. 121.

187. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance once in every six months, or oftener, as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires. R.S., c. 129, s. 122.

188. Publication in the Canada Gazette, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors are to be notified, shall be sufficient notice to holders of policies or contracts of insurance, in respect of which no notice of claim has been received. R.S., c. 129, s. 123.

AMENDING STATUTE.

6-7 EDWARD VII., CHAPTER 51.

An Act to Amend the Winding-up Act.

His Majesty by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The Winding-up Act, chapter 144, of the Revised Statutes, 1906, is amended by adding the following section immediately after section 131 of the said Act:—

131A. The Court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants, or shareholders can be classified, may after notice by advertisement or otherwise, nominate and appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings, and all the persons composing any such class shall be bound by the acts of the solicitor and counsel so appointed, and service upon such solicitor of notices, orders, or other proceedings of which service is required, shall for all purposes be, and be deemed to be, good and sufficient service thereof upon all the persons composing the class represented by him; and the Court may by the order appointing a solicitor and counsel for any class, or by subsequent order, provide for the payment of the costs of such solicitor and counsel by the liquidator of the Company out of the assets of the Company, or out of such portion thereof as to the Court seems just and proper.

2. The said Act is hereby further amended by adding to section 30 thereof the following as sub-section 2:—

"2. Where under the laws of any Province a trust Company is accepted by the Courts of such Province, and is permitted to act, as administrator, assignee or curator without giving security, such trust Company may be appointed liquidator of a Company under this Act, without giving security."

ONTARIO WINDING-UP ACT.

The old Ontario Winding-up Act was repealed by the Ontario Companies Act of 1907, and the winding-up provisions are now contained in that Act, being sections 171 to 208 inclusive. The former Ontario Act was seldom used for the winding up of a company, chiefly because a more complete code of procedure was given by the Dominion Act, and also because under the former Act the winding up was conducted in the County Court, where the machinery for carrying on a liquidation is not adequate. A change, however, has been made in this by the present Act, which provides in sections 191 and 193 that the winding-up order shall be made by a Judge or a Local Judge of the High Court, and that the matter should be referred to a Master or Referee of that Court. It will probably be found that the new Ontario Act will be used much more frequently than the previous one.

There are no reported decisions on the new Act. The case of *Re Iron Clay Brick Co.*, 19 O.R. 113, is still, of course, applicable in holding that the Ontario Winding-up Act can only apply in the case of voluntary liquidation. Under section 91 of the B.N.A. Act, bankruptcy and insolvency are exclusively within the jurisdiction of the Dominion Parliament. The Ontario Act can accordingly have no application where a creditor applies for a compulsory winding up on the ground of insolvency. See also *Re Cramp Steel*, 11 O.W.R. 133.

The following cases may be consulted in reference to the Ontario Act, although they were decided under the former Act. *Re Macdonald & Noxon*, 16 O.R. 368; *DLA. Jones Co.*, 19 A.R. 63; *Re Union Fire*, 7 A.R. 783; *Re Essex*, 19 A.R. 125; *Haggert Bros.*, 20 A.R. 597; *Re Equitable Savings*, 2 O.W.R. 366; *Re Equitable*, 4 O.L.R. 479, 6 O.L.R. 26; *Morrow* v. *Peterboro*, 4 O.L.R. 324.

The winding-up sections of the Ontario Act follow, being sections 171 to 208 inclusive of 7 Edw. VII., c. 34.

171. If a contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representative, heirs and devisees shall be liable in due course of administration to contribute to the assets of the corporation in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly. R.S.O., c. 222, s. 3, s.-s. 3.

172. The liability of any person to contribute to the assets of a corporation under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability. (Imp. 75), amended.

173. A corporation may be wound up voluntarily under this Act:

1. Where the period, if any, fixed for the duration of the corporation by the Act, charter or instrument of incorporation has expired; or where the event (if any) has occurred, upon the occurrence of which it is provided by the Act or Letters Patent or instrument of incorporation that the corporation is to be dissolved and the corporation in general meeting has passed a resolution requiring the corporation to be wound up;
2. Where the corporation in general meeting called for that purpose has passed a resolution requiring the corporation to be wound up;
3. Where the corporation (though it may be solvent as respects creditors) has passed a resolution in general meeting to the effect that it has been proved to its satisfaction that the corporation cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same. R.S.O., 1887, c. 183, s. 4, amended.

174. A winding up shall be deemed to commence at the time of the passing of the resolution authorizing the winding up. R.S.O., 1887, c, 183, s. 6, amended.

175. Whenever a corporation is wound up voluntarily, the corporation shall, from the date of the commencement of such winding up, cease to carry on its undertaking, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the corporation, taking place after the commencement of such winding up, shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its constating instrument or by-laws, continue until the affairs of the corporation are wound up. R.S.O., c. 222, s. 8, s.-s. 1, amended.

176. Notice of any resolution passed for winding up a corporation voluntarily shall be given by advertisement in the *Ontario Gazette* and fyled in the office of the Provincial Secretary. New.

177. After the commencement of the winding up, no suit, action or other proceeding shall be proceeded with or commenced against the corporation, and no attachment, sequestration, distress or execution shall be put in force against the estate or effects of the corporation. Provided, however, that after a winding up order has been made by the Court as hereinafter provided, such suit, action or other proceeding, attachment, sequestration, distress or execution may be proceeded with by leave of the Court and subject to such terms as the Court may impose. And further provided that this section shall not apply to any proceeding taken under the Winding-up Act of the Parliament of the Dominion of Canada or other Act respecting Insolvency or Bankruptcy for the time being in force. New.

178. The following consequences shall ensue upon the voluntary winding up of a corporation:

(1) The property of the corporation shall be applied in satisfaction of all its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the by-laws of the corporation, be distributed *pro rata* amongst the members or shareholders according to their rights and interests in the corporation;

(2) In distributing the assets of the corporation, the salary or wages of all clerks and wage-earners in the employment of the corporation due at the date of the commencement of the winding up or within one month before, not exceeding three months' salary or wages, shall be paid in priority to the claims of the ordinary general creditors, and such persons shall be entitled to rank as ordinary or general creditors for the residue of their claims. 60 V., c. 36, s. 196.

(3) Liquidators shall be appointed for the purpose of winding up the affairs of the corporation and distributing the property;

(4) The corporation in general meeting shall appoint such person or persons as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him;

(5) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him;

(6) Upon the appointment of liquidators all the powers of the directors shall cease except in so far as the corporation in general meeting or the liquidators may sanction the continuance of such powers;

(7) 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;

(8) The liquidators shall settle the list of contributories of the corporation and any list so settled shall be *primâ facie* evidence of the liability of the persons named therein to be contributories;

(9) The liquidators may at any time after the passing of the resolution for winding up the corporation and before they have ascertained the sufficiency of the assets of the corporation, call on all or any of the contributories, for the time being settled on the list of contributories, to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the corporation, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same;

(10) The liquidators shall pay the debts of the corporation and adjust the rights of the contributories, shareholders or members amongst themselves.

179. All costs, charges and expenses properly incurred in the voluntary winding up of a corporation, including the remuneration of the liquidators, shall, after taxation by a taxing officer of the High Court who is hereby empowered to tax the same, be payable out of the assets of the corporation in priority to all other claims. R.S.O., c. 222, s. 20.

180. The liquidators shall have power to do the following things:

(1) To bring or defend any action, suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the corporation;

(2) To carry on the business of the corporation so far as may be necessary for the beneficial winding up of the same;

(3) To sell the real and personal property, effects and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or corporation, or to sell the same in parcels;

(4) To do all acts and to execute, in the name and on behalf of the corporation, all deeds, receipts and other documents, and for that purpose to use, when necessary, the corporation's seal;

(5) To draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the corporation, also to raise upon the security of the assets of the corporation, from time to time, any requisite sum or sums of money; and the drawing, accepting, making or indorsing of every such bill of exchange or promissory note as aforesaid on behalf of the corporation shall have the same effect with respect to the liability of such corporation as if such bill or note had been drawn, accepted, made or endorsed by or on behalf of such corporation in the course of carrying on the business thereof;

(6) To take out, if necessary, in his official name, letters of administration to the estate of any deceased contributory and to do in

his official name any other act that may be necessary for obtaining payment of any moneys due from a contributory or from his estate and which act cannot be conveniently done in the name of the corporation; and in all cases where he takes out letters of administration or otherwise uses his official name for obtaining payment of any moneys due from a contributory, such moneys shall, for the purpose of enabling him to take out such letters or recover such moneys be deemed to be due to the official liquidator himself;

(7) To do and execute all such other things as may be necessary for winding up the affairs of the corporation and distributing its assets.

181. A corporation about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by resolution, delegate to any committee of its members, contributories or creditors, hereinafter referred to as inspectors, the power of appointing liquidators and filling any vacancies in the office of liquidators, or may by a like resolution 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; and any act done by the said inspectors in pursuance of such delegated power shall have the same effect as if it had been done by the corporation.

182.—(1) The liquidators shall deposit at interest in some chartered bank to be indicated by the inspectors all sums of money which he may have in his hands, belonging to the corporation, whenever such sums amount to $100.

(2) Such deposit shall not be made in the name of the liquidator generally, on pain of dismissal; but a separate deposit account shall be kept for the corporation of the moneys belonging to the corporation, in the name of the liquidator as such, and of the inspectors (if any); and such moneys shall be withdrawn only on the joint cheque of the liquidator and one of the inspectors, if there be any.

(3) At every meeting of the shareholders or members of the corporation the liquidators shall produce a pass book, shewing the amount of deposits made for the corporation, the dates at which the deposits were made, the amounts withdrawn and dates of such withdrawal; of which production mention shall be made in the minutes of the meeting, and the absence of such mention shall be *primâ facie* evidence that the pass book was not produced at the meetings.

(4) The liquidator shall also produce the pass book whenever so ordered by the Court at the request of the inspectors or a member of the corporation, and on his refusal to do so, he shall be treated as being in contempt of Court. R.S.O., c. 222, s. 19, s.-s. 3, 4, 5, 6.

183. Where a corporation is being wound up voluntarily, the liquidators may from time to time, during the continuance of such winding up,

summon general meetings of the corporation for the purpose of obtaining the sanction of the corporation by resolution, or for any other purposes they think fit; and in the event of the winding up continuing for more than one year, the liquidators shall summon a general meeting of the corporation at the end of the first year and of each succeeding year from the commencement of the winding up, and shall lay before such meeting an account shewing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year. R.S.O., c. 222, s. 22(2), (3).

184. If any vacancy occurs in the office of liquidators appointed by the corporation, by death, resignation or otherwise, the corporation in general meeting may, subject to any arrangement they may have entered into upon the appointment of inspectors, fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the corporation, and shall be deemed to have been duly held in manner prescribed by the by-laws of the corporation, or in default thereof in the manner prescribed by this Act for calling general meetings of the shareholders or members of the corporation. R.S.O., c. 222, s. 25 (1), in part.

185. The provisions of section 38 of chapter 129 of the Revised Statutes of Ontario shall apply *mutatis mutandis* to liquidators.

186. The liquidators may, with the sanction of a resolution of the corporation or the inspectors, make such compromise or other arrangement as the liquidators deem expedient, with any creditors, or persons claiming to be creditors, or persons having or alleging to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the corporation whereby the corporation may be rendered liable. R.S.O., c. 222, s. 11.

187. The liquidators may, with the sanction of a resolution of the corporation or of the inspectors, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the corporation and any contributory or other debtor or person apprehending liability to the corporation and all questions in any way relating to or affecting the assets of the corporation, or the winding up of the corporation, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon; and the liquidators to take any security for the discharge of such debts or liabilities, and give a complete discharge in respect of all or any such calls, debts or liabilities. R.S.O., c. 222, s. 12, amended.

188.—(1) Where a corporation is proposed to be or is in the course of being wound up, and the whole or a portion of its business or property is proposed to be transferred or sold to another corporation, the liquidators of the first mentioned corporation, with the sanction of a resolution of the

corporation by whom they were appointed conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, may receive, in compensation or in part compensation for such transfer or sale, shares or other like interest in such other corporation, for the purpose of distribution amongst the members of the corporation which is being wound up, or may, in lieu of receiving cash, shares, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing corporation.

(2) Any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the shareholders or members of the corporation which is being wound up, subject to the proviso that if any member of the corporation which is being wound up, who has not voted in favour of the resolution passed by the corporation of which he is a member, expresses his dissent from any such resolution, in writing, addressed to the liquidators or one of them, and left at the head office of the corporation, or the place where its undertaking is carried on, not later than seven days after the date of the meeting at which such resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer, that is to say, either (*a*) to abstain from carrying such resolution into effect, or (*b*) to purchase the interest held by such dissentient member, at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the corporation is dissolved, and to be raised by the liquidators in such manner as may be determined by resolution.

(3) No resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the corporation or for appointing liquidators.

(4) The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement; but if the parties dispute about the same such dispute shall be settled by arbitration under the provisions of the Arbitration Act. R.S.O., c. 222, s. 13, s.-s. 1, 2, 3, 4, amended.

189. The liquidator or liquidators or any creditor affected by the provisions of section 162 of this Act or the inspectors may at any time apply to the Master-in-Ordinary in the County of York or the Local Master in any other county or union of counties for his opinion, advice or direction in any matter arising in the liquidation, and the said master may give such opinion, advice or direction after hearing such parties as he shall direct to be notified or after such steps as he may prescribe have been taken, and such advice, opinion or direction shall be followed and shall be binding upon all parties in the liquidation subject to an appeal to a Judge of the High Court of Justice in Chambers if leave to appeal is given by such master and the order of such Judge of the High Court of Justice shall be final and binding in the liquidation.

190. A corporation may be wound up by order of the Court:

1. Where it may be wound up voluntarily;
2. Where proceedings have been taken to wind up voluntarily and it appears to the Court that it is in the interests of contributories and creditors that it should be wound up under the supervision of the Court.
3. Where on the application of a contributory the Court is of the opinion that it is just and equitable that the corporation should be wound up. New.
4. When the Letters Patent or Supplementary Letters Patent have been declared forfeited or revoked or made void under the provisions of sections 22 or 148.

191. The winding-up order may be made on petition to a Judge or local Judge of the High Court in Chambers by the liquidator or by any contributor, shareholder, member or when the corporation is being wound up voluntarily by a creditor having a claim of $200 or upwards. New.

192. Where a winding-up order is made by the Court without prior voluntary winding-up proceedings, the winding-up shall be deemed to commence at the time of service of notice of motion for the order. New .

193. The Court may make the order applied for or may dismiss the petition with or without costs; may adjourn the hearing conditionally or unconditionally, or may make any interim or other orders as may be just, and upon the making of the order may, according to the practice and procedure of such Court, refer the proceedings for the winding-up and may also delegate any powers of the Court conferred by this Act to a master or referee of the Court. R.S.C., 129, 9, amended.

194. The Court in making the winding-up order may appoint a liquidator or liquidators of the estate and effects of the corporation; but no such liquidator shall be appointed unless a previous notice is given to the creditors, contributories, shareholders, or members in the manner and form prescribed by the Court. Provided, however, that if a liquidator has already been appointed in a voluntary liquidation such notice need not be given. R.S.C., 129, 20, amended.

195.—(1) If from any cause there is no liquidator acting either provisionally or otherwise, the Court may on the application of a member of the corporation, appoint a liquidator or liquidators.

(2) The Court may also on due cause shewn, remove a liquidator and appoint another liquidator.

(3) When there is no liquidator the estate shall be under the control of the Court until the appointment of a new liquidator. R.S.O., c. 222, s. 25, s.-s. 2, 3, 4.

196. When a winding-up order has been made proceedings for the winding up of the corporation shall be taken in the same manner and with the like consequences as hereinbefore provided for a voluntary winding up. Provided, however, that the list of contributories shall be settled by the Court except where the same has been settled by the liquidator prior to the winding-up order when such list shall be subject to review by the Court and that all proceedings in said winding up shall be subject to the order and discretion of the Court. New.

197.—(1) The Court may direct meetings of the shareholders or members of the corporation to be summoned, held and conducted in such manner as the Court thinks fit for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court.

(2) The Court may require any contributory for the time being settled on the list of contributories, or any trustee, receiver, banker, or agent or officer of the corporation to pay, deliver, convey, surrender or transfer forthwith, or within such time as the Court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the corporation is *primâ facie* entitled.

(3) The Court may make such order for the inspection by the creditors and contributories of the corporation of its books and papers as the Court thinks just; and any books and papers in the possession of the company may be inspected in conformity with the order of the Court, but not further or otherwise. R.S.O., c. 222, s. 23, s.-s. 5, 6, 10.

198. The Court may, at any time after the commencement of the winding up of the corporation, summon to appear before the Court or liquidator any officer of the corporation, or any other person known or suspected to have in his possession any of the estate or effects of the corporation, or supposed to be indebted to the corporation; or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate or effects of the corporation, and in case of refusal to appear and answer the questions submitted, he may be committed and punished by the Judge as for a contempt.

(2) Where in the course of winding up a corporation under this Act, it appears that any person who has taken part in the formation or promotion of the corporation or any past or present director, manager, official or other liquidator, or any officer of the corporation has misapplied, or retained in his own hands, or become liable or accountable for, moneys of the corporation, or been guilty of any misfeasance or breach of trust in relation to the corporation, the Court may, on the application of a liquidator, or of any contributory of the corporation, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such promoter, director, manager, or other officer, and compel him to repay the moneys so misapplied or retained, or for which he

has become liable or accountable, together with interest, such rate as the Court thinks just, or to contribute such sums of money to the assets or the corporation by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just. R.S.O., c. 222, s. 23, s.-s. 11, 17.

199. If at any time a member of the corporation desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the corporation, and the liquidator, under the authority of the members of the corporation or of the inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the member of the corporation shall have the right to obtain an order of the Court authorizing him to take such proceeding in the name of the liquidator or corporation, but at his own expense and risk, upon such terms and conditions as to indemnity to the liquidator, as the Court may prescribe; and thereupon any benefit derived from such proceeding shall belong exclusively to the member of the corporation instituting the same, for his benefit and that of any other member of the corporation who may have joined him in causing the institution of such proceeding; but if, before such order is granted, the liquidator signifies to the Court his readiness to institute such proceeding for the benefit of the corporation, an order shall be made prescribing the time within which he shall do so and in that case the advantage derived from such proceeding shall appertain to the corporation. R.S.O., c. 222, s. 24.

200. Any powers by this Act conferred on the Court shall be deemed to be in addition to any other power, of instituting proceedings against any contributory, or against any debtor of the corporation for the recovery of any call or other sums due from such contributory, or against any debtor of the corporation, for the recovery of any call or other sum due from such contributory or debtor or his estate, and such proceedings may be instituted accordingly. R.S.O., c. 222, s. 28.

201. The Court at any time after an order has been made for winding up a corporation may, upon the application by motion of any contributory, and upon proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the Court deems fit. R.S.O., c. 222, s. 33.

202. Any party who is dissatisfied with any order or decision of the Court or of a Master or Referee in any proceeding under this Act, may appeal therefrom to a Judge of the High Court as in the case of a like order made in any action. New.

203. The Lieutenant-Governor in Council may from time to time make rules of practice and procedure for the due carrying out of the provisions of this part of the Act, and until such rules have been made the practice shall be the same as in cases of administration of estates so far as the same are applicable, or in the Master's office in cases under the Winding-up Act. (Canada.) New.

204.—(1) As soon as the affairs of the corporation are fully wound up, the liquidators shall make up an account shewing the manner in which the winding up has been conducted, and the property of the corporation disposed of; and thereupon they shall call a general meeting of the members or shareholders of the corporation for the purpose of having the account laid before them, and hearing any explanation that may be given by the liquidators; the meeting shall be called in the manner provided by the by-laws for calling general meetings of the shareholders or members of the corporation.

(2) The liquidator shall make a return to the Provincial Secretary of such meeting having been held, and of the date at which the same was held; which return shall be filed in the office of the Provincial Secretary; and on the expiration of three months from the date of the filing of such return, the corporation shall be deemed to be dissolved. R.S.C., c. 222, s. 40.

205. Whenever the affairs of the corporation have been completely wound up, the Court may make an order that the corporation be dissolved from the date such order, and the corporation shall be dissolved accordingly; which order shall be reported by the liquidator to the Provincial Secretary. R.S.C., c. 222, s. 41.

206. If the liquidator makes default in transmitting to the Provincial Secretary the return mentioned in section 187(2) or in reporting the order (if any) declaring the corporation dissolved, he shall be liable on summary conviction to a penalty not exceeding $20 for every day during which he is in default. R.S.O., c. 222, s. 42.

207. All dividends deposited in a bank and remaining unclaimed at the time of the dissolution of the corporation, shall be left for three years in the bank where they are deposited, and if still unclaimed, shall then be paid over by such bank, with interest accrued thereon, to the Treasurer of Ontario, and, if afterwards duly claimed, shall be paid over by the Treasurer to the persons entitled thereto. R.S.O., c. 222, s. 43.

208.—(1) Every liquidator shall, within thirty days after the date of the dissolution of the corporation, deposit in the bank appointed or named as hereinbefore provided for, any other moneys belonging to the estate then in his hands not required for any other purpose authorized by this Act, with a sworn statement and account of such money, and that the same is all he has in his hands; and he shall be liable on summary conviction to a penalty of not exceeding $10 for every day on which he neglects or delays such payments; and he shall be a debtor to His Majesty for such money and may be compelled as such to account for any pay over the same.

(2) The money so deposited shall be left for three years in the bank, and shall be then paid over, with interest, to the Treasurer of the Province, and if afterwards claimed shall be paid over to the person entitled thereto.

(3) Where a corporation has been wound up under this Act and is about to be dissolved, the books, accounts and documents of the corporation and of the liquidators may be disposed of in such a way as the corporation by resolution directs in case of voluntary winding up or the Court in case of winding up under order.

(4) After the lapse of five years from the date of such dissolution no responsibility shall rest on the corporation or the liquidators, or any one to whom the custody of such books, accounts and documents has been committed, by reason that the same or any of them are not forthcoming to any party claiming to be interested therein. R.S.O., c. 222, s. 44.

STATUTES

ONTARIO COMPANIES ACT.

7 EDW. VII., CHAPTER 34.

An Act respecting Joint Stock and other Companies.

[*Assented to 20th April*, 1907.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:—

1. This Act may be cited as the Ontario Companies Act. R.S.O., c. 191, s. 1.

2. (*a*) The word "corporation" in this Act includes all companies, whether with or without capital, and whether the capital thereof is divided into shares or not.

(*b*) The word "company" in this Act means only a company having a capital divided into shares.

3. The Lieutenant-Governor may, by Letters Patent, grant a charter to any number of persons, not less than five, of the age of twenty-one years, who petition therefor, constituting such persons and any others who have or may thereafter become subscribers to the memorandum or agreement hereafter referred to, a body corporate and politic with or without capital divided into shares, for any of the purposes to which the authority of the Legislature of Ontario extends, except the construction or working of railways for public use within Ontario, the business of insurance, and of loan corporations within the meaning of the Loan Corporations Act. R.S.O., c. 191, s. 9, amended.

4.—(1) The applicants for incorporation of a company with capital divided into shares, may petition the Lieutenant-Governor, through the Provincial Secretary, for the grant of Letters Patent. The petition of the applicants shall shew:

(*a*) The proposed corporate name of the company;

(*b*) The objects for which the company is to be incorporated;

(*c*) The place within Ontario where the head office of the company is to be situated;

(*d*) The amount of the capital of the company, the number of shares, and the amount of each share;

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

(*f*) The names of the applicants, not less than three, who are to be the provisional directors of the company.

(2) The petition may be in the form or to the effect set out in Schedule "A" to this Act, and shall be accompanied by a memorandum of agreement, executed in duplicate in the form or to the effect set out in Schedule "B" to this Act.

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

(4) The petition may ask to have embodied in the Letters Patent any provision which, under this Act might be embodied in any by-law of the company when incorporated. R.S.O., c. 191, s. 10, amended.

5.—(1) The applicants for the incorporation of a corporation not having share capital may petition the Lieutenant-Governor through the Provincial Secretary for the grant of Letters Patent. The petition of the applicants shall shew:—

(*a*) The proposed corporate name of the corporation;

(*b*) The objects for which the corporation is to be incorporated;

(*c*) The place within Ontario where its objects are to be carried out;

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

(2) The petition may be in the form or to the effect set out in Schedule "C" to this Act.

(3) The petition shall be accompanied by a memorandum of agreement signed by the petitioners setting out such regulations as may be deemed expedient—(1) for the selection of members, trustees, directors and officers; (2) for the holding of meetings of members, trustees and directors; (3) for the establishment of branches; (4) for the payment of directors, trustees, officers and employees; (5) for the control and management of the affairs of the corporation. The memorandum shall be expressed in separate paragraphs numbered consecutively, and may be in the form or to the effect set out in Schedule "D" to this Act, and the petitioners may adopt all or any of its provisions or substitute others in lieu thereof. New.

6. The Lieutenant-Governor on any application for Letters Patent or Supplementary Letters Patent may give a different name to the corporation than that proposed and may vary the objects or other provisions or terms. New.

7. Any corporation without share capital heretofore or hereafter incorporated upon the consent in writing of all the members of such corporation, may by by-law provide for the creation of a capital divided into shares and may provide for the allotment and payment of such shares and fix and prescribe the rights and privileges of the shareholders therein; Provided, however, that no such by-law shall be valid until confirmed by Letters Patent. New.

8.—(1) Any two or more corporations incorporated under the laws of this province, and having the same or similar objects within the scope of this Act, may, in the manner herein provided, amalgamate, and may enter into all contracts and agreements necessary to such amalgamation.

(2) The corporations proposing to amalgamate as aforesaid, may enter into a joint agreement for the amalgamation, prescribing the terms and

conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the names, callings, and places of residence of the first directors thereof, and how and when the subsequent directors shall be elected, with such other details as may be necessary to perfect the amalgamation and the subsequent management and working thereof, and in cases of companies having capital divided into shares the number of shares of the capital, the amount of par value of each share, and the manner of converting the share capital of each of the said corporations into that of the new corporation.

(3) The agreement shall be submitted to the shareholders or members of each of the said corporations at a general meeting thereof, called for the purpose of taking the same into consideration.

(4) At such meetings of shareholders or members the agreement shall be considered, and if two-thirds of the votes of all the shareholders or members of each of such corporations are for the adoption of the agreement, then that fact shall be certified upon the agreement by the secretary of each of such corporations under the corporate seal thereof; thereupon the several corporations by their joint petition may, through the Provincial Secretary, apply to the Lieutenant-Governor for Letters Patent confirming the said agreement, and on and from the date of the said Letters Patent the said corporations shall be deemed and taken to be amalgamated and to form one corporation by the name in the Letters Patent provided, and the corporation so incorporated, shall possess all the properties real, personal and mixed, rights, privileges and franchises and be subject to all the liabilities, contracts, disabilities and duties of each of the corporations so amalgamated. R.S.O., c. 191, s. 103, s.-s. 1, 2, 3, 4, amended.

9. Any corporation incorporated for purposes or objects within the scope of this Act, whether under a special or general Act, and being at the time of its application a subsisting and valid corporation, may apply for Letters Patent under this Act; and the Lieutenant-Governor may grant Letters Patent incorporating the shareholders or members of the said corporation as a corporation under this Act. R.S.O., c. 191, s. 104.—1, in part.

10. Where an existing corporation applies for the issue of Letters Patent under the provisions of the preceding section, the Lieutenant-Governor may, by Letters Patent, extend the powers of the corporation to such other objects as the applicant desires, name the first directors of the new corporation, and give to the new corporation the name of the old corporation or any other name. R.S.O., c. 191, s. 105, amended.

11. All rights of creditors against the property, rights and assets of a corporation amalgamated or re-incorporated under the provisions of this Act, and all liens upon the property, rights and assets of such corporation, shall be unimpaired by such amalgamation, or re-incorporation, and all debts, contracts, liabilities and duties of such corporations shall thenceforth attach to the amalgamated or re-incorporated corporation and may

be enforced against it to the same extent as if the said debts, contracts, liabilities and duties had been incurred or contracted by it. R.S.O., c. 191, s. 103, s.-s. 6, amended.

12. No action or proceeding shall abate or be affected by such amalgamation or re-incorporation, but for all the purposes of such action or proceeding, such corporation may be deemed still to exist, or the new corporation may be substituted in such action or proceeding in the place thereof. R.S.O., c. 191, s. 103, s.-s. 7, amended.

13. Any corporation may from time to time pass by-laws by a vote of not less than two-thirds in value of those shareholders or members present in person or by proxy at a general meeting of the corporation duly called for considering the subject of such by-laws authorizing an application by petition to the Lieutenant-Governor, to direct the issue of Supplementary Letters Patent to the corporation, embracing any or all of the following matters:—

(*a*) Increasing or decreasing the capital; provided, however, that the capital of a company shall not be increased until ninety per centum thereof has been subscribed and ten per centum paid thereon, and further provided, that on a reduction of the capital of a company the liability of shareholders to persons who at the time of such reduction are creditors of the company shall remain as though the reduction had not been made.

(*b*) Redividing the capital of the company into shares of smaller or larger amount;

(*c*) Extending the powers of the corporation to any objects which the corporation may desire;

(*d*) Limiting or increasing the amount which the corporation may borrow upon debentures or otherwise;

(*e*) Varying any provision contained in the special Act or Letters Patent incorporating the corporation;

(*f*) Making provision for any other matter or thing in respect of which provision might have been made had the corporation been incorporated under this Act. R.S.O., c. 191, ss. 17-21, 102, 106, amended.

14. Before Letters Patent or Supplementary Letters Patent are issued the applicants shall establish to the satisfaction of the Provincial Secretary the sufficiency of the petition, memorandum of agreement, by-law, resolution and all documents fyled on such application, and shall furnish such evidence of the *bonâ fides* of any application as he may deem necessary. R.S.O., c. 191, s. 12, amended.

15.—(1) The Provincial Secretary, or any officer to whom the application may be referred, may for any purpose under this Act, take evidence in writing, under oath or affirmation.

(2) Proof of any matter which may be necessary to be made under this Act, may be made by statutory declaration, affidavit, or deposition before the Provincial Secretary, or officer as aforesaid, or before any other person authorized to take affidavits. R.S.O., c. 191, s. 13, amended.

16. Notice of the granting of Letters Patent or Supplementary Letters Patent, shall be given forthwith by the Provincial Secretary in the *Ontario Gazette*, and the corporation shall be deemed to be existing from the date of the Letters Patent incorporating the same. R.S.O., c. 191, s. 15, amended.

17. A company having share capital shall possess the following powers as incidental and ancillary to the powers set out in the Letters Patent or Supplementary Letters Patent:—

(*a*) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(*b*) To acquire or undertake the whole or any part of the business, property and liabilities of any person or company carrying on any business which the company is authorized to carry on, or possessed of property suitable for the purposes of the company;

(*c*) To apply for, purchase or otherwise acquire, any patents, licenses, concessions and the like, conferring any exclusive or non-exclusive, or limited right to use, or any secret or other information as to any invention which may seem capable of being used for any of the purposes of the company, or the acquisition of which may seem calculated directly or indirectly to benefit the company, and to use, exercise, develop or grant licenses in respect of, or otherwise turn to account the property, rights or information so acquired;

(*d*) To enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concession or otherwise, with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same;

(*e*) To take, or otherwise acquire and hold, shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly to benefit the company;

(*f*) To enter into any arrangements with any authorities, municipal, local or otherwise, that may seem conducive to the company's objects, or any of them, and to obtain from any such authority any rights, privileges and concessions which the company may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions;

(*g*) To establish and support or aid in the establishment and support of associations, institutions, funds, trusts 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 or guarantee money for charitable or benevolent objects, or for any exhibition or for any public, general or useful object;

(*h*) To promote any company or companies for the purpose of acquiring all or any of the property and liabilities of the company, or for any other purpose which may seem directly or indirectly calculated to benefit the company;

(*i*) To purchase, take on lease or in exchange, hire or otherwise acquire, any personal property and any rights or privileges which the company may think necessary or convenient for the purposes of its business and in particular any machinery, plant, stock-in-trade;

(*j*) To construct, improve, maintain, work, manage, carry out or control any roads, ways, tramways, branches or sidings, bridges, reservoirs, watercourses, wharves, manufactories, warehouses, electric works, shops, stores and other works and conveniences which may seem calculated directly or indirectly to advance the company's interests, and to contribute to, subsidize or otherwise assist or take part in the construction, improvement, maintenance, working, management, carrying out or control thereof;

(*k*) To lend money to customers and others having dealings with the company and to guarantee the performance of contracts by any such persons;

(*l*) To draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, warrants, and other negotiable or transferable instruments;

(*m*) To sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company;

(*n*) To adopt such means of making known the products of the company as may seem expedient, and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or interest, by publication of books and periodicals and by granting prizes, rewards and donations;

(*o*) To sell, improve, manage, develop, exchange, lease, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company;

(*p*) To do all or any of the above things as principals, agents, contractors, trustees or otherwise, and either alone or in conjunction with others;

(*q*) To do all such other things as are incidental or conducive to the attainment of the above objects;

Provided however, that the powers set out in any or all of the foregoing paragraphs may be withheld by the Letters Patent or Supplementary Letters Patent. New.

18. Any corporation incorporated under this Act shall have power—

(*a*) To alter or change its common seal at pleasure. R.S.O., c. 191, 25(*a*);

(*b*) To construct, maintain and alter any buildings or works necessary or convenient for the purposes of the corporation. R.S.O., c. 191, 25(*d*);

(*c*) To acquire by purchase, lease or other title and to hold, use, sell, alienate and convey any real estate necessary for the carrying on of its undertaking, and the corporation shall, upon its incorporation, become and be invested with all the property and rights, real and personal theretofore held by or for it under any trust created with a view to its incorporation. R.S.O., c. 191, s. 25 (*g*).

19. Unless other special statutory enactments apply, no parcel of land or interest therein at any time acquired by the corporation and not required for its actual use and occupation or not held by way of security, or not situate within the limits or within one mile of the limits of any city or town, shall be held by the corporation or by any trustee on its behalf, for a longer period than seven years after the acquisition thereof, or after it has ceased to be required for the ordinary purposes of the corporation, but shall be absolutely sold and disposed of, so that the corporation shall no longer retain any interest therein unless by way of security; and any such parcel of land or any interest therein not within the exceptions hereinbefore mentioned, held by the corporation for a longer period than seven years, without being disposed of, shall be forfeited to His Majesty for the use of this province; provided that the Lieutenant-Governor may extend the said period from time to time not exceeding in the whole twelve years; and further provided that no such forfeiture shall take effect or be enforced until the expiration of at least six calendar months after notice in writing to the corporation of the intention of His Majesty to claim such forfeiture, and during such six months the corporation may dispose of the same; and it shall be the duty of the corporation to give the Lieutenant-Governor, when required, a full and correct statement of all lands at the date of such statement held by or in trust for the corporation. R.S.O., c. 191, s. 25, in part.

20. The provisions of this Act relating to matters preliminary to the issue of the Letters Patent or Supplementary Letters Patent shall be deemed to be directory only; and no Letters Patent or Supplementary Letters Patent, notice, order or other proceeding by or on behalf of the Lieutenant-Governor, Provincial Secretary or other Government or Departmental officer under this Act shall be held to be void or voidable on account of any irregularity, or otherwise in respect of any matter preliminary to the issue of the Letters Patent or Supplementary Letters Patent, notice, order or other proceeding or of any alterations in any petition or documents submitted in order to make them comply with this Act or with the departmental practice thereunder. R.S.O., c. 191, s. 96.

21. If a corporation incorporated by Letters Patent does not go into actual operation within two years after incorporation or for two consecutive years does not use its corporate powers, such powers, except so far as is necessary for the winding up of the corporation, shall be forfeited, and its name in whole or in part may be granted to another corporation, and in any action or proceeding where such non-user is alleged, proof of user shall lie upon the corporation, provided, however, that no such forfeiture shall affect prejudicially the rights of creditors as they exist at the date of such forfeiture. R.S.O., c. 191, s. 98, amended.

22. The Letters Patent by which a corporation is incorporated and any Supplementary Letters Patent amending or varying the same, may, at any time, be declared to be forfeited and may be revoked and made void by an Order of the Lieutenant-Governor on sufficient cause being shewn in that behalf, and such forfeiture, revocation and making void may be upon such conditions and subject to such provisions as to the Lieutenant-Governor may seem proper. R.S.O., c. 191, s. 99.

23. If a corporation exercises its corporate powers when the number of its shareholders or members is less than five, for a period of six months after the number has been so reduced, every person who is a shareholder or member of the corporation during the time that it so exercised its corporate powers after such period of six months and is cognizant of the fact that it is so exercising its corporate powers with less than five shareholders or members, shall be severally liable for the payment of the whole of the debts of the corporation contracted during such time and may be sued for the same without the joinder in the action or suit of the corporation or of any other shareholder or member, but any shareholder or member who has become aware that the corporation is exercising its corporate powers when the number of its shareholders or members is less than five, may serve a protest in writing on the corporation and may by registered letter notify the Provincial Secretary of such protest having been served and of the facts upon which it is based and such shareholder or member may thereby and not otherwise from the date of his said protest and notification exonerate himself from liability, and if after notice from the Provincial Secretary, the corporation refuses or neglects to bring the number

of its shareholders or members up to five such refusal or neglect may, upon the report of the Provincial Secretary, be regarded by the Lieutenant-Governor as sufficient cause for the revocation of the charter of the corporation. R.S.O., c. 191, s. 100, amended.

24. The charter of a corporation incorporated by Letters Patent may be surrendered if the corporation proves to the satisfaction of the Lieutenant-Governor:—

(*a*) That it has no debts existing or other rights in question, or,

(*b*) That it has parted with its property, divided its assets rateably amongst its shareholders or members and has no debts or liabilities, or,

(*c*) That the debts and obligations of the corporation have been duly provided for or protected or that the creditors of the corporation or other persons holding them consent;

(*d*) And that the corporation has given notice of the application for leave to surrender by publishing the same once in the *Ontario Gazette* and once in a newspaper published at or as near as may be the place where the corporation has its head office, or if it be without share capital where its operations are carried on;

And the Lieutenant-Governor upon a due compliance with the provisions of this section, may accept the charter and direct its cancellation, and may, by his Order, fix a date upon and from which the corporation shall be deemed to be dissolved, and the corporation shall thereby and thereupon become dissolved accordingly. R.S.O., c. 191, s. 101, amended.

25. The corporate existence of a corporation incorporated otherwise than by Letters Patent may be terminated by order of the Lieutenant-Governor upon petition therefor by such corporation under like circumstances, in like manner and with like effect as a corporation incorporated by Letters Patent may surrender its charter. New.

26. The Lieutenant-Governor in Council may, from time to time, make regulations with respect to the following matters, namely:—

(*a*) The cases in which notice of application for Letters Patent or Supplementary Letters Patent under this Act must be given;

(*b*) The forms of Letters Patent, Supplementary Letters Patent, notices and other instruments and documents relating to applications and other proceedings under this Act;

(*c*) The form and manner of the giving of any notice required by this Act;

and such regulations shall be published in the *Ontario Gazette*. R.S.O., c. 191, s. 11, amended.

27.—(1) The corporate name of every company with share capital shall have the word "Limited" as the last word thereof.

(2) Wherever the company or any director, manager, officer or employee thereof uses the name of the company, the word "Limited" shall appear

as the last word thereof: Provided, that stamping, writing, printing, or otherwise marking on goods, wares and merchandise of the company, or upon packages containing the same shall not be deemed to be within the provisions of this section: Provided also that where the word "company," "club," "association" or other equivalent word forms part of the said name the word "Limited" may be abbreviated to "Ltd." or "Ld."

(3) Every company and every director, manager, officer or other employee making default in complying with the foregoing provisions of this section shall be liable upon summary conviction to a penalty not exceeding ten dollars for each and every offence: Provided, that the offender upon a subsequent conviction for a similar offence committed after such first conviction shall be liable upon summary conviction to a penalty not exceeding one hundred dollars.

(4) The prosecution or proceeding to recover a penalty for an offence against the foregoing provisions of this section shall be commenced within six months after the offence has been committed and not afterwards. 63 V., c. 23, s. 3, amended.

28. The name of every corporation shall not on any public ground be objectionable and shall not be that of any known corporation or association incorporated or unincorporated, or of any partnership or of any individual or any name under which any known business is being carried on, or so nearly resembling the same as to deceive; provided, however, that a subsisting corporation, association, partnership, individual or person may consent that its or his name, in whole or in part, be granted to a new corporation incorporated for the purpose of acquiring its or his business or promoting its objects. R.S.O., c. 191, s. 10 (*a*), in part amended.

29. The name of a corporation which has not, for three consecutive years, made the annual summary prescribed by this Act, may be given in whole or in part to a new corporation, unless the defaulting corporation, on notice by the Provincial Secretary by registered letter addressed to the corporation or its president as shewn by its last return, proves to the satisfaction of the Lieutenant-Governor that it is still a subsisting corporation; provided, that if at the end of one month from the date of such notice, the Provincial Secretary shall not have received from the corporation or its president response to such notice, the corporation may be deemed to be not a subsisting corporation, and no longer entitled to the sole use of its corporate name; and further provided, that when no annual summary has been fyled by a corporation for three years immediately following its incorporation its name may be given to another corporation without notice and such corporation shall be deemed not to be subsisting. 1 Edw. VII., c. 18, s. 3, amended.

30. In case it is made to appear to the satisfaction of the Lieutenant-Governor that any corporation is incorporated under a name the same as, or so similar to that of an existing corporation, company, partnership, as-

sociation, individual, or business as to deceive, the Lieutenant-Governor may by order, change the name of the corporation. R.S.O., c. 191, s. 24, amended.

31.—(1) Where a corporation is desirous of changing its name, the Lieutenant-Governor, upon being satisfied that the corporation is in a solvent condition, and that the change desired is not for any improper purpose, and is not otherwise objectionable, may by order change the name of the corporation. R.S.O., c. 215, s. 1, amended.

(2) In case the proposed name is considered objectionable, the Lieutenant-Governor may change the name of the corporation to some unobjectionable name. R.S.O., c. 215, s. 3, amended.

32. Notice of the change of the name of a corporation shall be given by the Provincial Secretary by publication in the *Ontario Gazette*. New.

33. No such alteration of name of a corporation shall affect the rights or obligations of the corporation; and all proceedings that might have been continued or commenced by or against the corporation by its former name may be continued or commenced by or against the corporation by its new name. New.

34.—(1) The provisional directors of a company not offering shares for public subscription, shall call a general meeting of the company to be held at a convenient place within two months from the date of the Letters Patent for the purpose of electing directors, appointing auditors, sanctioning the by-laws of the company, and transacting such other business as may be necessary to enable the company to carry on its undertaking, and shall, at least ten days before the day on which such meeting is held, give notice of such meeting by registered letter addressed to each shareholder, setting out in detail the business to be transacted and matters to be considered thereat.

(2) The provisional directors shall report to such meeting the number of shares subscribed or underwritten; the names of the subscribers or underwriters; the amount paid thereon; all contracts entered into by or on behalf of the company; the amount of the preliminary expenses and a financial statement of the affairs of the company signed by the auditors (if any). New.

(3) If the said meeting is not called by the provisional directors as aforesaid, any three or more shareholders of the company may call the meeting. R.S.O., c. 191, s. 16, amended.

35. In default of other express provisions in such behalf in the special Act the Letters Patent or by-laws of the company, notice of the time and place for holding general meetings of the company, including the annual and special meetings shall be given at least ten days previously thereto by registered letter to each shareholder at his last known address, and by an advertisement in some newspaper published at or as near as may be to the head office and to the chief place of business of the company, if these differ, or in the *Ontario Gazette*. R.S.O., c. 191, s. 50, amended.

36.—(1) The annual meeting of the shareholders of the company shall be held at such time and place in each year as the special Act, Letters Patent, or by-laws of the company may provide, and in default of such provisions in that behalf the annual meeting shall be held at the place named in the Letters Patent as the place of the head office of the company, on the fourth Wednesday in January in every year.

(2) At such meeting the directors shall lay before the company,

(*a*) A balance sheet made up to a date not more than three months before such annual meeting;

(*b*) A statement of income and expenditure for the financial period ending upon the date of such balance sheet;

(*c*) The report of the auditor or auditors;

(*d*) Such further information respecting the company's financial position as the Letters Patent or the by-laws of the company may require;

and, on resolution affirmed by shareholders holding at least five per centum of the capital of the company, shall furnish a copy thereof to every shareholder personally present at such meeting and demanding the same.

(3) The balance sheet shall be drawn up so as to distinguish at least the following classes of assets and liabilities, namely:—

(*a*) Cash;

(*b*) Debts owing to the company from its customers;

(*c*) Debts owing to the company from its directors, officers and shareholders;

(*d*) Stock in trade;

(*e*) Expenditures made on account of future business;

(*f*) Land, buildings and plant;

(*g*) Goodwill, franchises, patents and copyrights, trade marks, leases, contracts and licenses;

(*h*) Debts owing by the company secured by mortgage or other lien upon the property of the company;

(*i*) Debts owing by the company but not secured;

(*k*) Amount received on common shares;

(*l*) Amount received on preferred shares;

(*m*) Indirect and contingent liabilities.

(New.)

37. The directors may and upon a requisition made in writing by the holders of not less than one-tenth of the subscribed shares of the company shall, convene a special general meeting of the company, to transact the business set out in the notice calling such meeting. R.S.O., c. 191, s. 52, amended.

38. Upon the receipt of such requisition, which shall set out the objects for which such meeting is proposed to be called and shall be left at the head office of the company, the directors shall forthwith proceed to convene a special general meeting. If they do not cause the same to be held within twenty-one days from date upon which the requisition was left

at the head office of the company, any shareholders, holding not less than one-tenth in value of the subscribed shares of the company whether they signed the requisition or not, may themselves convene such special general meeting. R.S.O., 1897, c. 191, ss. 53, 54.

39. The president of the company shall preside as chairman at every general meeting of the company; if there is no president or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the shareholders present shall choose some one of their number to be chairman. R.S.O., c. 191, ss. 58, 59.

40. The chairman may with the consent of the meeting and subject to such conditions as the meeting may decide, adjourn any meeting from time to time and from place to place. R.S.O., c. 191, s. 60.

41. At any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried and an entry to that effect in the proceedings of the company, shall be *primâ facie* evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution. R.S.O., c. 191, s. 61.

42. If a poll is demanded, it shall be taken in such manner as the by-laws prescribe, and in case the by-laws make no provision therefor, then as the chairman may direct. In the case of an equality of votes, at any general meeting, the chairman shall be entitled to a second or casting vote. R.S.O., c. 191, s. 62.

43. Subject to the special Act, Letters Patent or by-laws of the company, at all general meetings of the company every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy, but no shareholder being in arrear in respect of any call shall be entitled to vote at any meeting of the company. R.S.O., c. 191, ss. 63, 64, amended.

44. All meetings of the shareholders and directors shall be held at the place of the head office of the company, save and except when the company is authorized by the special Acts, Letters Patent or Supplementary Letters Patent, to hold meetings of shareholders or directors out of Ontario.

45. This part of the Act shall apply only to companies having share capital. New.

46. Every shareholder 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. New.

47. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding twenty-five cents, and on such terms, if any, as to evidence and indemnity as the directors think fit. New.

48. The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act, the special Act, the Letters Patent or by-laws of the company may be prescribed. R.S.O., c. 191, s. 27.

49. No shareholder of a co-operative cold storage company or association to which aid has been or may hereafter be granted under the provisions of any statute in that behalf, or of a cheese and butter manufacturing company carried on for co-operative purposes, shall hold shares exceeding $1,000.

50. The directors may refuse to allow the entry in any such books, of any transfer of shares whereof the whole amount has not been paid in; and whenever entry is made in such book of any transfer of shares not fully paid in, to a person being of apparently not sufficient means, the directors present when such entry is authorized shall be jointly and severally liable to the creditors of the company in the same manner and to the same extent as the transferring shareholder, but for such entry, would have been; but if any director present, when such entry is allowed, forthwith enters a written protest against the same, and within eight days thereafter causes such protest to be notified, by registered letter, to the Provincial Secretary, such director may thereby, and not otherwise, exonerate himself from such liability. R.S.O., c. 191, s. 28.

51. The directors, upon the passing of a by-law authorizing the payment of a dividend upon shares of the company, may direct that no entry of transfers shall be made in books of the company for a period of two weeks immediately preceding the payment of such dividend and payment thereof shall be made to the shareholders of record on the date of closing said books. New.

52. No transfer of shares unless made by sale under execution, or under the order or judgment of some competent Court in that behalf, shall, until entry thereof has been duly made, be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto toward each other, and as rendering the transferee liable, *ad interim*, jointly and severally with the transferor, to the company and its creditors, until entry thereof has been duly made in the books of the company. R.S.O., c. 191, s. 29.

53.—(1) The directors may, for the purpose of notifying the person or persons registered therein as owners of such shares, refuse to allow the entry in any such books of a transfer of shares.

(2) Such owner may lodge a caveat against the entry of such transfer, and thereupon such transfer shall not be made for a period of forty-eight hours.

(3) If within one week from the giving of such notice or the expiration of the said period of forty-eight hours, whichever shall last expire, no order shall have been served upon the company enjoining the entry of such transfer, the company may enter the same.

(4) When a transfer is entered after the proceedings heretofore set out the company shall be free from liability in respect of shares so transferred to a person whose rights are purported to be transferred but without prejudice to any claim which the transferor may have against the transferee. New.

54. No shares shall be transferable until all previous calls have been fully paid in, or until declared forfeited for non-payment of calls. R.S.O., c. 191, s. 30.

55. The directors of the company may call in and demand from the shareholders thereof, the amount unpaid on shares by them subscribed or held, at such times and places and in such payments or instalments as the Letters Patent or this Act, or the by-laws of the company require or allow; and interest shall accrue at the legal rate for the time being upon the amount of any unpaid call, from the day appointed for payment of such call. R.S.O., c. 191, s. 32.

56. If, after a demand therefor, any call is not paid within the time and in the manner provided by the Special Act or Letters Patent or by-laws, the directors by resolution to that effect, reciting the facts and duly recorded in their minutes may summarily forfeit any shares whereupon such payment is not made; and the same shall thereupon become the property of the company and may be disposed of, as by by-law or otherwise the company may ordain; provided that such forfeiture shall not relieve any shareholder of any liability to the company or any creditor. R.S.O., c. 191, s. 35, amended.

57. A company if authorized so to do by Letters Patent or Supplementary Letters Patent and subject to the provisions thereof, may, with respect to any share which is fully paid up, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the share or shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the share or shares included in such warrant, hereinafter referred to as a share warrant. New. Imp. Act. 1867, s. 27.

58. A share warrant shall entitle the bearer of such warrant to the shares specified in it and such shares may be transferred by the delivery of the share warrant. New. Imp. Act. 1862, s. 28.

59. The bearer of a share warrant shall, subject to the provisions and regulations contained in the Letters Patent or Supplementary Letters Pa-

tent respecting share warrants, be entitled on surrendering such warrant for cancellation, to have his name entered as a shareholder in the register of shareholders, and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register of shareholders the name of any bearer of a share warrant in respect of the shares specified therein without the share warrant being surrendered and cancelled. New. Imp. Act, 1867, s. 29.

60. The bearer of a share warrant may, if the regulations respecting share warrants so provide, be deemed to be a shareholder of the company, either to the full extent or for such purposes as may be prescribed by such regulations; provided, that the bearer of a share warrant shall not be qualified in respect of the shares specified in such warrant for being a director of the company in cases where such a qualification is prescribed by the by-laws of the company. New. Imp. Act, 1867, s. 30.

61. On the issue of a share warrant in respect of any share, the company shall strike out of its register of shareholders the name of the shareholder then entered therein as holding such share as if he had ceased to be a shareholder, and shall enter in the register the following particulars:—

(1) The fact of the issue of the warrant;

(2) The statement of the shares included in the warrant, distinguishing each share by its number;

(3) The date of issue of the warrant.

New. Imp. Act, 1867, s. 31.

62. Until the warrant is surrendered the above particulars shall be deemed to be the particulars which are required by section 113 of this Act, to be entered in the register of shareholders of a company; and on the surrender of a warrant the date of such surrender shall be entered as if it were the date at which a person ceased to be a shareholder. New. Imp. Act, 1867, s. 32.

63. 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 share 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. Imp. Act, Table A, 38.

64. Subject as herein otherwise expressly provided no person shall, as a 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. Imp. Act, Table A, 39.

65. 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. Imp. Act, Table A, 40.

66. The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share; and the receipt of the shareholder in whose name the same stands on the books of the company shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share, whether or not notice of the trust has been given to the company; and the company shall not be bound to see to the application of the money paid upon such receipt. R.S.O., c. 191, s. 31.

67.—(1) Every executor, administrator, guardian or trustee shall represent the shares in his hands, at all meetings of the company and may vote accordingly as a shareholder, and every person who mortgages or hypothecates his shares may nevertheless represent the same at all such meetings, and may vote accordingly as a shareholder, unless in the instrument creating the mortgage or hypothecation he shall have expressly empowered the holder of such mortgage or hypothecation to vote thereon in which case only such holder or his proxy may vote in respect of said shares. R.S.O., c. 191, s. 36, amended.

(2) If shares be held jointly by two or more persons, any one of them present at a meeting may, in the absence of the other or others, vote thereon, but if more than one joint shareholder be present or be represented by proxy, they shall vote together on the shares jointly held. R.S.O., c. 191, s. 36, amended.

68. Each shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, but not beyond the amount so unpaid on his said shares, shall be the amount recoverable with costs, against such shareholder. R.S.O., c. 191, s. 37, s.-s. 1.

69. Any shareholder may plead by way of defence in whole or in part, any set-off which he could set up against the company, except a claim for unpaid dividend, or a salary or allowance as a president or a director of the company. R.S.O., c. 191, s. 37, s.-s. 2.

70. The shareholders shall not, as such, be held responsible for any act, default or liability whatsoever, of the company, or for any engagement,

claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the company, beyond the unpaid amount on their respective shares. R.S.O., c. 191, s. 37, s.-s. 3.

71. No person holding shares as executor, administrator, guardian or trustee, shall be personally subject to liability as a shareholder; but the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate or the minor, ward, or person, interested in the trust fund, would be, if living and competent to act and holding such shares. R.S.O., c. 191, s. 38.

72. No person holding shares as collateral security shall, prior to foreclosure, be personally subject to liability as a shareholder, but the person transferring such shares as collateral security shall, until foreclosed, be considered as holding the same, and shall be liable as a shareholder in respect thereof. R.S.O., c. 191, s. 39, amended.

73. The directors of a corporation may make by-laws:—

(*a*) For borrowing money;

(*b*) For issuing bonds, debentures, or other securities.

And the directors of companies with share capital may make by-laws:—

(1) For creating and issuing any part of the capital as preference shares;

(2) For creating and issuing debenture stock;

(3) For the conversion of preference shares into common shares or debentures or debenture stock, debentures into debenture stock or preference shares, or any class of shares or securities into any other class. R.S.O., c. 191, s. 49, amended.

74. No by-law referred to in the last preceding section shall take effect until it has been confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company, duly called for considering the same, by notice specifying the terms of the law to be confirmed or unanimously sanctioned in writing by the shareholders of the company. New.

75. A by-law for the creation and issue of preference shares or for the conversion of debentures or debenture stock into preference shares may provide that the holders of such shares shall have such preference as regards dividends and repayment on dissolution or winding-up as may be therein set out; may have the right to select a certain stated proportion of the board of directors, or such other control over the affairs of the company as may be considered expedient; or may limit the right of the holders thereof to specific dividends or control of the affairs of the company or otherwise, not contrary to law or to this Act, and may provide for the purchase or redemption of such shares by the company as therein set out; provided, however, that any term or provision of such by-law, whereby the rights of holders of such shares are limited or restricted, shall be fully set out in the certificate of such shares, and in the event of such limitations and re-

strictions not being so set out they shall not be deemed to quality the rights of holders thereof. New.

76. Unless preference shares, debenture stock, debentures or bonds are issued subject to redemption or conversion, the same shall not be subject to redemption or conversion without the consent of the holders thereof. New.

77. No such by-law which has the effect of increasing or decreasing the capital of the company or otherwise varying any term or provision of the special Act or Letters Patent of the company shall be valid or acted upon until confirmed by Supplementary Letters Patent. New.

78. The directors may charge, hypothecate, mortgage, or pledge any or all of the real or personal property, rights and powers, undertaking, franchises, including book debts and unpaid calls of the corporation to secure any bonds, debentures or other securities or any liability of the corporation and a duplicate original of such charge, mortgage or other instrument of hypothecation or pledge made to secure bonds, debentures or other securities, shall be forthwith fyled in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf. New.

79. The persons named as provisional directors in the special Act or in the Letters Patent shall be the directors of the company, until replaced by the same number of others duly elected in their stead, and shall be eligible for election. R.S.O., c. 191, s. 41, amended.

80. The affairs of the company shall be managed by a board of not less than three directors, who shall be elected by the shareholders in general meeting of the company. R.S.O., c. 191, s. 40, amended.

81.—(1) Except as in this section provided no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present. Such quorum shall consist of a majority of the directors of the company.

(2) Whenever it shall happen that from any cause there is not a quorum of directors in office the requisition mentioned in section 37 of this Act may be served on such directors of the company as are still in office, and such directors, though less in number than a majority of the board, may nevertheless call a meeting under section 38 for the election of directors to fill vacancies in the board, and in default of their doing so the requisitionists or other shareholders may call such meeting as in section 38 provided.

(3) This section shall not apply to a sole director remaining in office. If there be no directors remaining in office a meeting to elect directors may be called without service of any requisition.

(4) So long as a quorum of directors remains in office casual vacancies in the board may be filled by such directors as remain in office. New. Amended 8 Edw. VII., c. 43, s. 1, s.-s. (9).

82. The shareholders of a company, having more than six directors, may at a general meeting called for that purpose, by resolution of two-thirds of the shareholders present in person or by proxy, authorize the directors to delegate any of their powers to an executive committee, consisting of not less than three, to be elected by the directors from their number. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by such resolution or by the directors. 3 Edw. VII., c. 7, s. 35; 8 Edw. VII., c. 43, s. 1, s.-s. 10.

83. No person shall hold office as a director unless he is a shareholder absolutely in his own right, and not in arrear in respect of any call thereon, and where any person, who is a director, ceases to be a *bonâ fide* holder of shares, he shall thereupon cease to be a director. R.S.O., c. 191, s. 42.

84.—(1) The election of directors shall take place at the annual meeting, all the members of the board retiring, and (if otherwise qualified) being eligible for re-election.

(2) Election of directors shall be by ballot, if demanded.

(3) The directors shall, from time to time, elect from among themselves a president of the company, and shall also appoint, and may remove at pleasure, all other officers thereof. R.S.O., c. 191, s. 43, amended.

85. If at any time an election of directors is not made, or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any general meeting of the company duly called for that purpose; and the directors shall continue in office until their successors are duly elected. R.S.O., c. 191, s. 44.

86.—(1) A company may, by by-law, vary the number of its directors, but so that the number shall be not less than three, or may change the company's head office in Ontario.

(2) No by-law for either of the said purposes shall take effect until confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a meeting of the company duly called for considering the same. A copy of the by-law certified under the seal of the company shall be forthwith filed in the office of the Provincial Secretary and published in the Ontario Gazette; and in case of the removal of the Head Office, twice in a newspaper published in each of the places where the Head Office was fixed and to where it is to be removed, or as near thereto as may be.

87. The directors may, from time to time, make by-laws not contrary to law, or to the Letters Patent of the company, or to this Act, to regulate:—

(*a*) The allotment of shares; the making of calls thereon; the payment thereof; the issue and registration of certificates of shares; the forfeiture of shares for non-payment; the disposal of forfeited stock and of the proceeds thereof; the transfer of shares;

(*b*) The declaration and payment of dividends;

(*c*) The term of service, manner of selection, and the qualification of the directors;

(*d*) The time at which and place where the meetings of the company shall be held; the calling of meetings of the company; the requirements as to proxies; and the procedure in all things at such meetings;

(*e*) The imposition and recovery of all penalties, and forfeitures admitting of regulation by by-law, and

(*f*) The conduct in all other particulars of the affairs of the company;

And may from time to time repeal, amend or re-enact the same; but every such by-law, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company; and in default of confirmation thereat shall, at and from that time only, cease to have force; and in that case no new by-law to the same or the like effect or re-enactment thereof, shall have any force until confirmed at a general meeting of the company; provided, however, that the company shall have power either at a general meeting called as aforesaid, or at the annual meeting of the company, to repeal, amend, vary or otherwise deal with any by-laws which have been passed by the directors, but no act done or right acquired under any by-law shall be prejudicially affected by any such repeal, amendment, variation or other dealing. R.S.O., c. 191, s. 47.

88. No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting. 60 V., c. 28, s. 46.

89. No director of any company shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise, and any director who may be in any way interested in any contract or arrangement proposed to be made with the company shall disclose the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and in case he discloses the nature of his interest, and refrains from voting, he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realized by such contract or arrangement; provided, however, that no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding shares or being a director in any other company with which a contract or arrangement is made or contemplated; provided, also, that this section shall not apply to any contract by or on behalf of a com-

pany to give the directors or any of them security by way of indemnity. 2 Edw. VII., c. 24, s. 1.

90. The company shall not, unless authorized by the special Act, Letters Patent or Supplementary Letters Patent, use any of its funds in the purchase of shares of any other corporation until the directors have been expressly authorized by a by-law passed by them for the purpose and confirmed by a vote of not less than two-thirds in value of those shareholders present in person or by proxy at a general meeting of the company duly called for considering the same. R.S.O., c. 191, s. 82, as amended by 1 Edw. VII., c. 18, s. 2.

91. The directors of the company shall not declare or pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent, or diminishes the capital thereof; but if any director present when such dividend is declared, forthwith, or if any director then absent, within twenty-four hours after he has become aware thereof, and able so to do, enters his written protest against the same, and within eight days thereafter causes such protest to be notified, by registered letter, to the Provincial Secretary, such director may thereby, and not otherwise, exonerate himself from liability. R.S.O., c. 191, s. 83.

92. For the amount of any dividend which the directors may lawfully declare payable in money, they may declare a stock dividend and issue therefor shares of the company as fully paid or partly paid, as the case may be, or may credit the amount of such dividend on the shares of the company already issued but not fully paid and the liability of the holders of all shares mentioned in this section shall be reduced by the amount of such dividend. New.

93. No loan shall be made by the company to any shareholder, and if such loan is made all directors and other officers of the company making the same and in any wise assenting thereto, shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with legal interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof. R.S.O., c. 191, s. 84.

94. The directors of the company shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against the directors. R.S.O., c. 191, s. 85.

95.—(1) In this Act the word "prospectus" shall mean any prospectus, notice, circular, advertisement or other invitation offering for subscription or purchase any shares, debentures or other securities of a company, or published or issued for the purpose of being used to promote or aid in the subscription or purchase of such shares, debentures or securities, and the word "company" shall mean any company incorporated or proposed to be incorporated. Imp. Act, 1900, 30.

(2) This part of this Act shall apply to every company whether formed before or after the commencement of this Act which offers for subscription or sale shares, debentures or other securities and to every company whether incorporated under the laws of the Province of Ontario or otherwise, the shares, debentures or other securities of which are dealt within the Province of Ontario.

96.—(1) Upon any offer of shares to the public for subscription, 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 and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the Letters Patent or Supplementary Letters Patent and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized.

(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. Imp. 1900, s. 8.

97.—(1) Every company heretofore or thereafter incorporated under any general or special Act, the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation or which has its debentures or other securities held by more than ten persons, and every company incorporated otherwise than as above set out which has more than ten shareholders or holders of debentures or other securities within Ontario, shall file a prospectus in the manner hereafter set out.

(2) All purchases, subscriptions or other acquisitions of shares, debentures or other securities of any company required in the manner above

provided to fyle a prospectus, shall be deemed as against the company or the signatories to the prospectus to be induced by such prospectus, and any term, proviso or condition of such prospectus to the contrary shall be void.

(3) No subscription for stock, debentures or other securities, induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus.

98.—(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 shall be signed by every person who is named therein as a director or proposed director or provisional director of the company, or by his agent authorized in writing, and shall be filed with the Provincial Secretary, on or before the date of its publication.

(3) The Provincial Secretary shall not receive or fyle any prospectus unless it is so dated and signed. No prospectus shall be issued until so filed, and every prospectus shall state on the face of it that it has been so filed. Imp. Act, 1900, 9.

99.—(1) Every prospectus issued by or on behalf of a company or in relation to any intended company or by or on behalf of any person who is or has been engaged or interested in the formation or promotion of the company, shall state:—

(*a*) The names, descriptions and addresses of the original incorporators, and the number of shares subscribed for by them respectively;

(*b*) The number of shares, if any, fixed as the qualification of a director, and any provision in the by-laws of the company as to the renumeration of the directors;

(*c*) The names, descriptions and addresses of the directors or proposed directors;

(*d*) The minimum subscription on which the directors may proceed to allotment, and the amount payable on 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, and the amount actually allotted;

(*e*) The time or times at which under the by-laws of the company a further call or calls may be made upon shares subscribed for;

(*f*) The number and amount of shares 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 the number and amount of bonds, debentures or other securities issued or to be issued and allotted to any person;

(*g*) 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 publication of the prospectus and the amount payable in cash, shares, bonds, debentures or other securities 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;

(*h*) The amount (if any) paid or payable as purchase money in cash, shares or debentures of any such property as aforesaid, specifying the amount payable for good-will;

(*i*) The amount (if any) paid or payable as commission for subscribing, or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares in the company, or for underwriting or procuring underwriting of any securities issued or to be issued by the company or the rate of any such commission;

(*j*) The amount or estimated amount of preliminary expenses;

(*k*) The amount paid or intended to be paid in cash shares or debentures to any promoter and the consideration for any such payment;

(*l*) 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 three years before the date of publication of the prospectus;

(*m*) The names and addresses of the auditors (if any) of the company;

(*n*) 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, with a statement of all sums paid or agreed to be paid to him in cash or shares by any person either to qualify him as a director or otherwise for services rendered by him in connection with the formation of the company.

(2) For the purposes of this section the word "vendor" shall extend to and include 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 publication 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 such 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 rent, and the expression "sub-purchaser" included a sub-lessee.

(4) This section shall not apply to a circular or notice inviting existing shareholders or debenture holders of a company to subscribe for further shares or debentures; 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; provided that—

(*a*) The requirements as to the original incorporators 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 published more than one year after the date of the first general meeting, and

(*b*) In the case of a prospectus published more than one year after the date of such meeting, the obligation to disclose all material contracts shall be limited to a period of two years immediately preceding the publication of the prospectus.

(5) 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.

(6) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary to specify the names of original incorporators and the number of shares subscribed for by them. Imp. Act, 1900, 10.

100.—(1) Every provisional director, director or other person responsible for the issue and publication of such prospectus shall for every violation of the provisions of the next preceding three sections be liable on summary conviction to a penalty not exceeding $200 and costs, provided that no provisional director, director or other person shall incur any liability by reason of non-compliance with the said sections:—

(*a*) As regards any matter not disclosed, if he was not cognizant thereof; or

(*b*) If the non-compliance arose from an honest mistake of fact on his part,

And provided that in the event of non-compliance with the requirements contained in paragraph (*a*) of sub-section (1) of section 5, no director or other person shall incur any liability in respect of such non-compliance unless it is proved that he had knowledge of the matters not disclosed.

(2) Nothing in this section or the said preceding three sections shall limit or diminish any liability which any person may incur under the general law apart from this Act. Imp. Act, 1900, 10(7).

101.—(1) Where any advertisement, letter head, account or document issued or published by any corporation or any officer, agent or employee, of any such corporation, purports to state the capital of the corporation,

then the capital actually and in good faith subscribed and no more shall be so stated.

(2) Any such corporation, officer, agent or employee who causes to be inserted an advertisement or who publishes, issues or causes to be published or issued any advertisement, letter-head, account or document which states, as the capital of such corporation any larger sum than the amount of such subscribed capital so actually and in good faith subscribed as aforesaid, or which contains any false statement as to the incorporation, control, supervision, management or financial standing of such corporation shall be liable, upon summary conviction, to a penalty not exceeding $200 and costs and not less than $50 and costs.

(3) Any one may be prosecutor or complainant under this Act, and one-half of any fine imposed by virtue of this Act, shall, when received, belong to His Majesty for the use of the Province and the other half shall belong to the prosecutor or complainant. R.S.O., c. 217.

102.—(1) Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in, or debentures or debenture stock or other security of, a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures or debenture stock or other security on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal and of the reason therefor to be given. Imp. Act, 1896, s. 3(1).

(2) A promoter in this section means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting solely in a professional capacity for persons engaged in procuring the formation of the company. Imp. Act, 1890, s. 3(2).

103. Where any company, which has issued shares or debentures or other securities, shall be desirous of obtaining further capital by subscrip-

tions for shares or debentures or other securities, and for that purpose shall issue a prospectus or notice, no director of such company shall be liable in respect of any statement therein, unless he shall have authorized the issue of such prospectus or notice, or have adopted or ratified the same. Imp. Act, 1890, s. 3(3).

104. Where any such prospectus or notice as aforesaid contains the name of a person as a director of a company, or as having agreed to become a director thereof, and such person has not consented to become a director or has withdrawn his consent before the issue of such prospectus or notice, and has not authorized or consented to the issue thereof, the directors of the company (except any without whose knowledge or consent the prospectus or notice was issued) and any other person who authorized the issue of such prospectus or notice shall be liable to indemnify the person named as director of the company, or as having agreed to become a director thereof as aforesaid, against all damages, costs, charges and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or notice, or in defending himself against any action or legal proceedings brought against him in respect thereof. 54 V., c. 34, s. 5. 60 V., c. 3, s. 3; c. 28, s. 95(3). Imp. Act, 1890, 4.

105. 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 or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract from any other person who, if sued separately, would have been liable to make the same payment. 54 V., c. 34, s. 6; 60 V., c. 3, s. 3; c. 28, s. 95 (4). Imp. Act, 1890, 5.

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

(*a*) The amount (if any) 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 ninety days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the appli-

cants without interest, and if any such money is not so repaid within one hundred 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 ninety days; 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; Provided, however, that the Provincial Secretary may from time to time extend the times herein limited.

(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. Imp. Act, 1900, 4.

107.—(1) An allotment made by a company to an applicant in contravention of the foregoing provisions of this part of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company, and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the foregoing provisions of this part of this Act 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 such loss, damage or costs shall not be commenced after the expiration of two years from the date of the allotment. Imp. Act, 1900, 5.

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

(*a*) Shares held, subject to the payment of the whole amount thereof in cash, have been allotted to an amount not less in the whole than the minimum subscription; and

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

(*c*) There has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2) The Provincial Secretary may, 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, however, that upon it being shewn that such certificate was made upon any false statement or upon the withholding of any material statement, the Provincial Secretary may cancel and annul such certificate.

(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 application.

(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 on summary conviction to a fine not exceeding fifty dollars for every day during which the contravention continues.

109. All sums received by the company or by any promoter, director, officer or agent thereof shall be held in trust by the company or such promoter, director, officer or agent until the same may be deposited in a chartered bank to the credit of the company and shall there remain in trust until the issue of the aforesaid certificate by the Provincial Secretary. New.

110.—(1) Whenever a company makes any allotment of its shares the company shall, within one month thereafter, file with the Provincial Secretary:—

(*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 in whole or in part for a consideration other than cash, a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect of which such allotment was made and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been alloted.

(2) 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 upon summary conviction to a fine not exceeding fifty dollars for every day during which the default continues. Imp. Act, 1900, 7.

111.—(1) Every company 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 shareholders of the company, which shall be called the statutory meeting.

(2) The directors shall, at least ten days before the day on which the meeting is held, forward to every shareholder of the company a report certified by not less than two directors of the company, stating:—

(*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 and payments of the company on capital account to the date of the report, and an account or estimate of the preliminary expenses of the company;

(*d*) The names, addresses and descriptions of the directors, auditors (if any), manager (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.

(3) The 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.

(4) The directors shall cause a copy of the report, certified as by this section required, to be filed with the Provincial Secretary forthwith after the sending thereof to the members of the company.

(5) The directors shall cause a list shewing the names, descriptions and addresses of the shareholders 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 shareholder of the company during the continuance of the meeting.

(6) The shareholders 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 report, whether previous notice has been given or not, but no resolution of which notice has not been duly given may be passed.

(7) The meeting may adjourn from time to time, and at any such adjourned meeting any resolution of which notice has been duly given, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(8) If default is made in filing such report as aforesaid or in holding the statutory meeting, then at the expiration of fourteen days after the last day on which the meeting ought to have been held any shareholder may petition the Court for the winding up of the company in the manner hereinafter provided in that behalf, and, upon the hearing of the petition, the Court may either direct that the company be wound up or give directions for the report being filed or a meeting being held, or make such other order as may be just, and may order that the costs of the petition be paid by any persons who, in the opinion of the Court, are responsible for the default. Imp. Act, 1900, 12.

112. This part of this Act shall apply to all companies offering shares for public subscription and shall not apply to a company incorporated before the commencement of this Act.

113. The corporation shall cause the secretary, or some other officer especially charged with that duty, to keep a book or books wherein shall be kept recorded:—

(*a*) A copy of the Letters Patent incorporating the corporation and of any Supplementary Letters Patent issued to the corporation and if incorporated by special Act, a copy of such Act;

(*b*) The names, alphabetically arranged, of all persons who are or have been shareholders or members of the corporations;

(*c*) The post office address and calling of every such person while such shareholder or member;

(*d*) The names, post office addresses and callings of all persons who are or have been directors of the corporation, with the several dates at which each person became or ceased to be such director.

And in cases of companies having share capital—

(*e*) The number of shares held by each shareholder;

(*f*) The amounts paid in, and remaining unpaid, respectively, on the shares of each shareholder;

(*g*) The date and other particulars of all transfers of shares in their order. R.S.O., c. 191, s. 71.

114. The books referred to in the preceding section as well as those referred to in section 120 shall be kept at the head office of the company within the province, whether the company is permitted to hold its meetings out of Ontario or not. Any director, officer or employee of a company who shall remove or assist in removing such books from Ontario or who shall act contrary to the provisions of this section shall be liable on summary conviction to a penalty of $200; Provided, however, that upon necessity therefor being shewn and adequate assurance being given that such books may be inspected within Ontario by any person entitled thereto after application for such inspection to the Provincial Secretary, the Lieutenant-Governor in Council may relieve any company permitted to hold its meetings out of Ontario from the provisions of this section upon such terms as may be fit. New.

115. No director, officer or servant of the corporation shall knowingly make or assist to make any untrue entry in any book or books of the company, or shall refuse or neglect to make any proper entry therein; and any person violating wilfully the provisions of this section shall, besides any criminal liability which he may thereby incur, be liable in damages for all loss or injury which any person interested may have sustained thereby. R.S.O., 1897, c. 191, s. 72.

116.—(1) If the name of any person is without sufficient cause, entered in or omitted from such book or books of the corporation, or if default is made or unnecessary delay takes place in entering in

said books the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggrieved, or any shareholder or member of the corporation, or the corporation itself may apply to a Judge of the High Court of Justice for an order that the book or books be rectified, and the Judge may either refuse such application or he may make an order for the rectification of the said book or books, and may direct the corporation to pay the costs of such motion or application and any damages the party aggrieved may have sustained. The Judge may in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the said books of the corporation whether such question arises between two or more shareholders, or alleged shareholders or members, or between any shareholders or alleged shareholders or members and the corporation, and the Judge may in any such proceeding decide any question which it may be necessary or expedient to decide for the rectification of the said books.

(2) The Judge may direct an issue to be tried in which any question of law may be raised.

(3) An appeal shall lie from the decision of such Judge as if the same had been given in an action.

(4) This section shall not deprive any Court of any jurisdiction it may have. R.S.O., c. 191, s. 73.

(5) The costs of any proceeding under this section shall be in the discretion of the Judge.

117. The books referred to in section 113 shall during reasonable business hours of every day, except Sundays and holidays, be kept open for the inspection of shareholders, members and creditors of the corporation and their personal representatives or agents, at the head office or chief place of carrying on its undertaking, and every such shareholder, member, creditor, agent or representative, may make extracts therefrom. R.S.O., c. 191, s. 74.

118. Any director or officer who refuses to permit any person entitled thereto to inspect such book or books, or make extracts therefrom, shall be liable upon summary conviction to a penalty of $100. R.S.O., c. 191, s. 75, amended.

119. Such books shall be *primâ facie* evidence of all facts purporting to be thereby stated, in any action or proceeding against the corporation or against any shareholder or member. R.S.O., c. 191, s. 76.

120. The directors shall cause proper books of account to be kept containing full and true statements:—

(*a*) Of the financial transactions of the corporation;

(*b*) Of the assets of the corporation;

(*c*) Of the sums of money received and expended by the corporation, and the matters in respect of which such receipt or expenditure takes place, and

(*d*) Of the credits and liabilities of the corporation; and also a book or books containing minutes of all the proceedings and votes of the corporation, or of the board of directors, respectively, and the by-laws of the corporation, duly authenticated, and such minutes shall be verified by the signature of the president, or other presiding officer of the corporation. R.S.O., c. 191, s. 77.

121. If any person in any return, report, certificate, balance-sheet or other document required by or for the purposes of this Act, wilfully makes a statement false in any material particular he shall be liable on summary conviction to imprisonment not exceeding three months, with or without hard labour, and to a fine of $100 in lieu of, or in addition to such imprisonment as aforesaid. R.S.O., c. 191, s. 97, amended.

122.—(1) Upon an application by not less than one-fifth in value of the shareholders of a company, or one-fifth in number of the members of a corporation without share capital, a Judge of the High Court of Justice may appoint an inspector to investigate the affairs and management of the corporation. Such inspector shall report thereon to the Judge, and the expense of such investigation shall, in the discretion of the Judge, be defrayed by the corporation or by the applicants, or partly by the corporation and partly by the applicants, as he may order, and he may require the applicants to give security to cover the probable cost of the investigation, and he may make rules and prescribe the manner in which and the extent to which the investigation shall be conducted; or the Judge may examine the officers or directors of the company under oath as to matters that shall come in question.

(2) A corporation may by resolution passed at the annual meeting, or at a special general meeting called for the purpose, appoint an inspector to examine into the affairs of the corporation. The inspector so appointed shall have the same powers and perform the same duties as an inspector appointed by a Judge of the High Court of Justice, and he shall make his report in such manner and to such persons as the corporation by said resolution directs.

(3) It shall be the duty of all officers and agents of the corporation to produce for the examination of any such inspector all books and documents in their custody or power. Any such inspector may examine upon oath the officers and agents of the corporation in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the corporation, he shall upon summary conviction be liable to a fine not exceeding $20, in respect of each offence. R.S.O., c. 191, s. 80, amended.

123. The accounts of the corporation shall be examined once at least in every year, and the correctness of the balance-sheet shall be ascertained by an auditor or auditors. R.S.O., c. 191, s. 87, amended.

124. The first auditors of the corporation may be appointed by the directors before the first meeting of the shareholders or members, and the auditors so appointed shall hold office until the first general meeting. New. Imp. Act, 1900, s. 21, s.-s. 4.

125. Thereafter the auditors shall be appointed by resolution at a general meeting of the corporation; they shall hold office until the next annual meeting unless previously removed by a resolution of the shareholders or members in general meeting. R.S.O., c. 191, s. 88, amended.

126. The said auditors may be shareholders or members of the corporation, but no person shall be eligible as an auditor who is interested, otherwise than as a shareholder or member, in any transaction of the corporation, and no director or other officer of the corporation shall be eligible during his continuance in office. R.S.O., c. 191, s. 89.

127. If an appointment of auditors is not made at an annual meeting, the Provincial Secretary may, on the application of any member or shareholder of the corporation, appoint an auditor of the corporation for the current year, and fix the remuneration (if any) to be paid to him by the corporation for his services. New.

128. The directors of a corporation 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, and any auditor shall be eligible for re-appointment. New. Imp. Act, 1900, s. 21, s.-s. 5.

129. The remuneration of the auditors of a corporation shall be fixed by the corporation in general meeting, except that the remuneration of any auditors appointed before the first general meeting or to fill any casual vacancy may be fixed by the directors. New. Imp. Act, 1900, s. 22.

130. Every auditor of a corporation shall have the right of access at all times to the books, accounts and vouchers of the corporation, and shall be entitled to require from the directors and officers of the corporation such information and explanation as may be necessary for the performance of his duties, and the auditors shall sign a certificate at the foot of the balance sheet stating whether or not their requirements as auditors have been complied with and shall make a report to the shareholders or members on the accounts examined by them, and on every balance sheet laid before the corporation in general meeting during their tenure of office; and in every such report shall state 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 corporation's affairs as shewn by the books of the corporation; and such report shall be read before the corporation in general meeting. New. Imp. Act, 1900, s. 23.

131.—(1) The corporation shall, on or before the first day of February in every year, make out a summary, verified as hereinafter required, con-

taining as of the thirty-first day of December preceding, correctly stated, the following particulars:—

(*a*) The corporate name of the corporation;

(*b*) The manner in which the corporation is incorporated, whether by special Act, or by Letters Patent, and the date thereof;

(*c*) The name, residence and post office address of the president, secretary, and treasurer of the corporation;

(*d*) The name, residence and post office address of each of the directors of the corporation;

(*e*) The date upon which the last annual meeting of the corporation was held;

In case of companies having share capital in addition—

(*f*) The place of the head office, giving street and number when possible;

(*g*) The amount of the capital of the company and the number of shares into which it is divided;

(*h*) The number of shares subscribed for and allotted;

(*i*) The number of shares (if any) issued fully paid as consideration for any transfer of assets, good will or otherwise; if none is so issued, this fact to be stated;

(*j*) The amount of calls made on each share;

(*k*) The total amount of calls received;

(*l*) The total amount of shares forfeited;

(*m*) The total amount of shares issued as preference shares and the rate of dividend thereon;

(*n*) The total amount paid on such shares;

(*o*) The total amount of debentures, debenture stock or bonds authorized, and the rate of interest thereon;

(*p*) The total amount of debenture stock, bonds or debentures issued;

(*q*) The total amount realized from debentures, debenture stock, and bonds;

(*r*) The total number of share warrants issued and the names and addresses of the persons to whom same were issued.

If the company be a mining company

(*s*) The number of shares sold or otherwise disposed of at a discount or premium;

(*t*) The rate at which such shares were sold or disposed of;

(*u*) Whether a sworn copy of the by-laws, if any, providing for the sale of stock at a discount or otherwise, was sent to the Provincial Secretary;

(*x*) The date, or dates, upon which such by-laws, if any, were passed and sanctioned.

(2) In cases of companies having share capital the summary shall also contain a list of persons who, on the 31st day of December previously, were shareholders of the company; and such list shall state the names alphabetically arranged, and the address and occupation of each such person; the amount of stock held by each; and the amount, if any, unpaid and still due by each such person.

(3) A duplicate of such summary with the affidavit of verification, shall be posted up in a conspicuous position in the head office of the company on or before the 2nd day of February in each year, and shall be available for inspection by any shareholder or creditor of the company; and the company shall keep the same so posted until another summary is posted under the provisions of this Act.

(4) The summary of every corporation shall be verified by the affidavit of the president and secretary, and if there are no such officers, or they, or either of them, are, or is, at the proper time out of this province or otherwise unable to make the same, by the affidavit of the president or secretary and one of the directors, or two of the directors, as the case may require; and if the president or secretary does not make or join in the affidavit the reason thereof shall be stated in the substituted affidavit. (As amended by 63 V., c. 23, s. 4.)

(5) The summary, verified as aforesaid, shall, on or before the 8th day of February next after the time hereinbefore fixed for making the summary, be transmitted to the Provincial Secretary.

(6) If a corporation makes default in complying with the provisions of this section, the corporation shall incur a penalty of $20 for every day during which the default continues, and every director, manager or secretary of the corporation, who knowingly and wilfully authorizes or permits such default, shall incur the like penalty, but such penalties shall be recoverable only by action at the suit of or brought by a private person suing on his own behalf with the written consent of the Attorney-General of the Province of Ontario.

(7) This section shall not apply to any corporation until the 1st day of February next after the 31st day of December of the year in which the corporation was organized, or has gone into actual operation, whichever shall first happen. R.S.O., c. 191, s. 79.

132.—(1) The Lieutenant-Governor in Council may from time to time, establish, alter and regulate the tariff of fees to be paid to the Provincial Secretary on applications, returns, fylings, and all transactions under this Act; and may prescribe the form of proceedings and record in respect thereof, and all other matters requisite for carrying out the objects of this Act.

(2) Such fees may be made to vary in amount, under any rule or rules —as to nature of the corporation, amount of capital and otherwise—that may be deemed expedient.

(3) No step shall be taken in the department towards the issue of any Letters Patent or Supplementary Letters Patent, or the fyling of any document under this Act, until all fees therefor and all fees due the department for any other service have been duly paid. R.S.O., c. 191, s. 95, amended.

133. No tender or transmission of any return, by-law or other document shall be deemed to be a due compliance with the provisions of this Act unless and until the prescribed fee for receiving and fyling the same has been paid to and has been accepted by the Provincial Secretary. New.

134. A copy of any by-law of the corporation under its seal and purporting to be signed by any officer of the corporation or a certificate, similarly authenticated, to the effect that a person is a shareholder or member of the corporation that a call or calls or dues, assessments or other payments has or have been been made are due and have not been paid shall be received as *primâ facie* evidence of the by-law or of the statements contained in such certificate in all Courts in Ontario. R.S.O., c. 191, s. 66.

135. Any writ, notice, order or proceeding requiring authentication by the corporation may be signed by any director, manager or other authorized officer of the corporation, and need not be under the seal of the corporation. R.S.O., c. 191, s. 67.

136. A notice or demand to be served or made by the corporation upon a shareholder or member may be served or made either personally or by post, registered, and addressed to the shareholder or member at his place of abode as it last appeared on the books of the corporation. R.S.O., c. 191, s. 68.

137. A notice or other document served by post by the corporation on a shareholder or member shall be held to be served at the time when the registered letter containing it would be delivered in the ordinary course of post; and to prove the fact and time of service it shall be sufficient to prove that such letter was properly addressed and registered, and was put into the post office, and the time when it was put in, and the time requisite for its delivery in the ordinary course of post. R.S.O., c. 191, s. 69.

138. Any by-law by this Act required to be sanctioned by a two-thirds vote of the shareholders at a general meeting specially called for considering the same may in lieu thereof be validly sanctioned by the consent in writing of all the shareholders. New.

139. A mining company heretofore incorporated or hereafter incorporated under this Act and made by the Letters Patent subject to the provisions of this part of the Act, may issue its shares at a discount or at any other rate in the manner hereinafter provided. New.

140. No shareholder of such company holding shares issued as herein provided, shall be personally liable for non-payment of any calls made upon his shares beyond the amount agreed to be paid therefor. R.S.O., c. 197, s. 5, s.-s. 5, amended.

141. No shares shall be issued at a discount unless authorized by a by-law of the company confirmed by a majority of the shareholders thereof, at a meeting duly called for considering the same, fixing and declaring the rate and any other term and conditions of issue. R.S.O., c. 197, s. 5, s.-s. 1, in part, amended.

142. A copy of such by-law shall, within twenty-four hours after the same was confirmed, be transmitted by post, registered and prepaid, to

the Provincial Secretary, or be fyled in the office of the Provincial Secretary within five days, and such copy shall be verified as a true copy by the joint affidavit of the president and secretary, and if there are no such officers, or they, or either of them, are, or is, at the proper time unable to make the same, by the affidavit of the president or secretary and one of the directors, or two of the directors, as the case may require; and if the president or secretary does not make or join in the affidavit the reason thereof shall be stated in the substituted affidavit. R.S.O., c. 197, s. 5, s.-s. 1, in part.

143. Every such mining company shall have written or printed immediately after or under the name of such company, wherever such name may be used by the company or any director, officer, servant or employee thereof, and shall have engraved upon its seal the words "No Personal Liability"; and upon every share certificate issued by the company, distinctly written or printed in red ink, where such share certificates are issued in respect of shares subject to call, the words "Subject to Call"; or if in respect to shares not subject to call, the words "Not Subject to Call," according to the fact. R.S.O., c. 197, s. 5, ss. 2, 3, amended.

144. In the event of any call or calls on shares in a company subject to the provisions of this part of this Act remaining unpaid by the holder thereof for a period of sixty days after notice and demand of payment, such shares may be declared to be in default, and the secretary of the company may advertise such shares for sale at public auction to the highest bidder for cash by giving notice of such sale in a newspaper published at the place where the principal office of the company is situated, or in case no newspaper is published thereat, then in a newspaper published at the nearest place to said office once a week for four successive weeks; and said notice shall contain the numbers of the share certificates in respect of such shares and the number of shares, the amount of the call or calls due and unpaid and the time and place of sale; and in addition to the publication of the notice aforesaid, notice shall be personally served upon such shareholder by registered letter mailed to his last known address; and if the holder of such shares fails to pay the amount due upon such shares with interest upon the same and cost of advertising before the time fixed for such sale, the secretary shall proceed to sell the same, or such portion thereof as shall suffice to pay such calls together with interest and cost of advertising; provided that if the price of the shares so sold exceeds the amount due with interest and costs thereon, the excess thereof shall be paid to the defaulting shareholder. R.S.O., c. 197, s. 5, s.-s. 4.

145. A company which acts in contravention of any provision of this part of the Act, and every director, manager, officer or agent thereof, shall be liable on summary conviction to a fine of $200 and costs. R.S.O., c. 197, s. 7, amended.

146. Notwithstanding anything contained in this part of this Act, the directors of the company shall be liable as provided by section 94 of this Act. R.S.O., c. 197, s. 8, amended.

147.—(1) No company shall be incorporated, or otherwise authorized, by Letters Patent to execute the office of executor, administrator, trustee, receiver, assignee, guardian of a minor's estate or committee of a lunatic's estate, and no Letters Patent shall be granted to any company heretofore incorporated conferring any such powers upon such company unless such company complies with the provisions of this part of this Act. R.S.O., c. 206, s. 4.

148. At all times at least three-fourths of the shares of a company incorporated under the provisions of this part of this Act, shall be held by persons who are residents of this province, or by companies incorporated under the laws of this province. If at any time it is shewn to the satisfaction of the Lieutenant-Governor in Council that less than three-fourths of the shares of the company are held otherwise than as aforesaid, the Letters Patent incorporating the company may be forfeited under the provisions of section 22 of this Act. R.S.O., c. 206, s. 4, s.-s. 2, amended.

149. No company shall receive authority by Letters Patent to become or be appointed guardian of the persons of infants or committee of the persons of lunatics. R.S.O., c. 206, s. 5.

150. The Lieutenant-Governor in Council may from time to time make regulations regarding notice of application for incorporation of trust companies, the objects of incorporation and evidence that the general fitness of the applicants for the discharge of the duties appertaining to such trusts as aforesaid is such as to command the confidence of the public, and that the public convenience and advan age will be promoted by granting to the company the powers applied for. New.

151. The liability of a trust company to persons interested in an estate held by the company as executor, administrator, trustee, receiver, assignee, guardian or committee as aforesaid, shall be the same as if the estate had been held by any private person in the like capacity, and its powers shall be the same. R.S.O., c. 206, s. 9.

152. The Provincial Secretary may, from time to time, appoint a person to investigate the affairs and management of any trust company; and such person shall report thereon and upon the security afforded to those by or for whom the engagements of the company are held; and the expense of such investigations shall be defrayed by the company; and such person may examine the officers or directors of the company under oath for the purposes of such investigation. R.S.O., c. 206, s. 10, in part, amended.

153. No company incorporated under this Act, or chapter 157 of the Revised Statutes of Ontario, 1887, or chapter 206 of the Revised Statutes of Ontario, 1897, or any other general Act with power to execute the office of executor, administrator, trustee, receiver, assignee, guardian of the estate of a minor, committee of the estate of a lunatic, shall issue debentures. R.S.O., c. 206, s. 12.

154. This part of the Act shall apply to all applications for incorporation of companies intended to operate or control any public or municipal franchise, undertaking or utility or which may require for its purposes the erection of any permanent structure in or upon any highway, stream or adjoining navigable waters, and to such companies when incorporated. New.

155. With the application for incorporation the applicants shall produce to the Provincial Secretary:

(*a*) Evidence that the proposed capital is sufficient to carry out the objects for which the company is to be incorporated; that such capital has been subscribed or underwritten and that the applicants are likely to command public trust and confidence in the undertaking;

(*b*) A detailed description of the plant, works and intended operations of the company, and an estimate of their cost;

(*c*) A by-law of every municipality in which the operations of the company are to be carried on authorizing the execution thereof in the manner set out in the detailed description above referred to;

(*d*) If the undertaking is to be carried on in an unorganized district, a report from the Minister of Lands, Forests and Mines approving of the undertaking.

(*e*) If it is proposed that the company shall acquire any plant, works, land, undertaking, good will, contract or other property or assets, a detailed statement of the nature and value thereof. New.

156. The Provincial Secretary may refer the application and all statements, evidence and material fyled thereon to engineers, architects, valuators or other experts for consideration, investigation and report regarding the public necessity for the undertaking of the company, the amount of capital required therefor, the value of any plant, works, lands, undertaking, good will, contract or other property or assets to be acquired by the company and any other matter which may appear to be in the public interest regarding such undertaking. New.

157. All Letters Patent and Supplementary Letters Patent of companies to which the provisions of this part of this Act are made applicable and of all companies heretofore incorporated for any purpose referred to in section 154, shall be issued on order of the Lieutenant-Governor in Council, and such Letters Patent or Supplementary Letters Patent may be issued in terms and conditions different from those applied for.

158. Notice of the application shall be published in such manner and shall be given to such persons or corporations as the Provincial Secretary may determine. New.

159. The term of existence of the company may be limited by the Letters Patent. New.

160. The Letters Patent may limit (1) the rate of dividend payable on the shares of the capital stock of the company and on debentures or

other securities, and (2) the amount which the company may borrow on debentures, mortgages or other securities. New.

161. Upon any application for Supplementary Letters Patent extending the powers, increasing the capital or otherwise varying any term of the Letters Patent the company shall produce such evidence and statements as are referred to in section 155 hereof and such other evidence and statements as the Provincial Secretary may require, and he may refer the same in the manner and for the purposes set out in section 156. New.

162. The Supplementary Letters Patent may fix the conditions upon which any shares, debentures, or other securities of the company, therein provided to be issued, may be allotted, sold or otherwise disposed of, and may vary any term, condition or proviso of the application therefor. New.

163. No provision contained herein or in the Letters Patent of the company regarding the issue of debentures or other securities or the making of mortgages to secure the same shall in any way prejudice the right which any municipality may have under the statute in that behalf to take possession of the plant and undertaking of the company. New.

164. The company may pass by-laws regarding the control and management of its undertaking; its dealings with the public it is incorporated to serve; the collection of tolls, charges, rates or levies for the public service given by the company; and for the use, protection and care of its property while being used, enjoyed or otherwise subject to public use, and may impose penalties for the infraction thereof; provided, however, that no such by-laws shall have any force or effect or be acted upon until approved by the Lieutenant-Governor in Council and published four times in a public newspaper published at the place where the undertaking of the company is carried on, or as near thereto as may be, and in the *Ontario Gazette*. New.

165. In addition to the other returns which may be required by this or any other Act, the company shall on or before the 8th day of February in each year make a report to the Provincial Secretary, under oath of the president and secretary which shall specify:

(*a*) The cost of the work, plant and undertaking of the company;
(*b*) The amount of its capital, and the amount paid thereon;
(*c*) The amount received during the year from tolls, levies, rates and charges and all other sources stating each separately;
(*d*) The amount and rate of dividends paid;
(*e*) The amount expended for repairs; and
(*f*) A detailed description of any extension or improvement of the works or of any new works proposed to be undertaken in the current year, together with an estimate of the cost thereof.

166. The books of account of the company shall be at all times open to the inspection and examination of any shareholder. New.

167. The Provincial Secretary may appoint a person to inspect and

examine such books and every person so appointed may take copies or extracts from the same, and may require and receive from the keeper of such books, and also from the president and each of the directors of the company, and all the other officers and servants thereof, all such information as to such books and the affairs of the company generally, as the person so appointed deems necessary for the full and satisfactory investigation into and report upon the state of the affairs of the company, so as to enable him to ascertain the correctness of statements furnished by the company. New.

168. The Lieutenant-Governor in Council may, by Supplementary Letters Patent, extend the term of existence of any company incorporated for a limited period under this Act, for such further period as by Order in Council made previous to the expiry of such period he may direct, and the provisions of this Act having regard to the expiration of the term of existence of a company shall thereupon apply to such term as so extended. New.

169. A company incorporated for the purpose of operating any municipal or other public franchise, utility or undertaking and to which this part of this Act is made applicable by the Letters Patent may take, without the consent of the owner thereof, lands and easements therein which may be necessary for the purposes of its undertaking, in like manner as under the provisions of the Ontario Railway Act in that behalf lands may be expropriated for the purpose of a railway; Provided, however, that any such right of expropriation may be limited or any section or sections of the said the Ontario Railway Act may be excluded. New.

170. This part of the Act shall apply to any company heretofore incorporated under any general or special Act for the purposes referred to in section 154. New.

(*For Sections* 171 *to* 208, *see pages* 545-555.)

209. The Lieutenant-Governor in Council may by Supplementary Letters Patent upon the application of a corporation, a shareholder, a creditor, a holder of bonds, debentures or other securities or obligation thereof or any person, firm or corporation with whom the company may have dealings, relieve the corporation from any duty, obligations or other disability, or may limit any right, power or other advantage which may have been cast or conferred upon the corporation by the repeal of the general Act under which the said corporation was incorporated and by the enactment of this Act. Notice shall thereupon be given in the *Gazette* by the Provincial Secretary of such Supplementary Letters Patent setting out the manner in which any such duty, obligation or other disability has been relieved or in which such right, power or other advantage has been limited.

210. This Act except in so far as it may have been particularly made otherwise applicable, shall apply to the following companies:

(*a*) To every company incorporated under any special or general Act of the Parliament of the late Province of Upper Canada.

(*b*) To every company incorporated under any special or general Act of the Parliament of the late Province of Canada which has its head office and carries on business within the Province of Ontario, and which was incorporated with objects or purposes to which the legislative authority of the Legislature of the Province of Ontario extends; and

(*c*) To every company incorporated under any special or general Act of the Legislature of the Province of Ontario;

Provided, however, that this Act shall not apply to any such company incorporated for the construction and working of a railway, the business of insurance and the business of a loan corporation within the meaning of the Loan Corporations Act; and further provided that the Lieutenant-Governor in Council may relieve any company incorporated before the first day of July, 1897, from compliance with any of the provisions of this Act as may be deemed expedient.

211. The Acts mentioned in Schedule E to this Act are hereby repealed to the extent specified in the third column of that schedule; provided, that

(1) Any Letters Patent, Supplementary Letters Patent, Order in Council, certificate, by-law, rule or regulation made or granted with respect to any company, corporation or association within the scope of this Act under any enactment hereby repealed, shall continue in force as if it had been made or granted under this Act.

(2) The corporate existence and powers of all companies, association or other corporation within the scope of this Act incorporated otherwise than by Letters Patent under any enactment hereby repealed shall continue as if such companies, associations or other corporations had been incorporated under this Act.

(3) The corporate existence, rights and powers of any and all corporations, associations and societies, registered as friendly societies, and incorporated under any Act respecting benevolent, provident and other societies, or any other Act of this province, and all the rights and privileges of the members thereof and their beneficiaries are (subject to the provisions of the Ontario Insurance Act and all amendments thereto) hereby continued notwithstanding the repeal of any Act hereunder and notwithstanding anything in this Act hereinbefore contained.

(4) Saving and excepting those corporations referred to in subsection 3 hereof, any document referring to any Act or enactment hereby repealed shall be construed to refer to this Act or to the corresponding enactment of this Act.

(5) Any penalty may be recovered and any offence may be prosecuted under this Act for any matter or thing provided for under the Acts hereby repealed.

212. This Act shall, except as otherwise expressed, come into operation on the first day of July, one thousand nine hundred and seven.

ONTARIO COMPANIES AMENDMENT ACT.

8 EDW. VII., CHAPTER 43 (ONTARIO).

An Act to amend the Ontario Companies Act.

[*Assented to* 14*th April*, 1908.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The various sections of the Ontario Companies Act, being chapter 34 of the statutes of the seventh year of the reign of King Edward the Seventh, are hereby amended in the manner following, that is to say:—

(1) Section 3, By striking out the words "except the construction or working of railways for public use within Ontario, the business of insurance, and loan corporations within the meaning of the Loan Corporation Act, and inserting in lieu thereof the following: "except those of railway companies within the meaning of the Ontario Railway Act, insurance companies within the meaning of the Ontario Insurance Act, and loan corporations within the meaning of the Loan Corporations Act.

(2) Section 13. By striking out the first eight lines, and substituting in lieu thereof the following: "The directors of any corporation may from time to time pass by-laws authorizing an application, by petition to the Lieutenant-Governor, to direct the issue of Supplementary Letters Patent to the corporation embracing any or all of the hereinafter set out matters after such by-law has been confirmed by vote of not less than two-thirds in value of the shareholders or members present in person or by proxy at a general meeting of the corporation duly called for considering the subject of such by-laws."

(3) Section 36 (3). By striking out the word "The" in the first line thereof and substituting therefor the word "Every."

(4) Section 44. By striking out the words "and directors" in the first line thereof.

(5) Section 73. By inserting as clause (*c*) thereof immediately following clause (*b*): "For pledging or selling such bonds, debentures or other securities for such sum and at such prices as may be deemed expedient or be necessary."

(6) Section 73. By adding to said section the following: "Provided, however, that nothing in this part of this Act shall apply to promissory notes, bills of exchange, bills of lading, warehouse receipts or other securities of a commercial nature issued in the ordinary course of business."

(7) Section 74. By inserting the words "or members" after the word "shareholders" in the third line and in the seventh line thereof.

(8) Section 75. By inserting the word "shares" after the words "conversion of" in the second line thereof.

(9) Section 81. (1) By striking out the words "three directors or" in the fourth and fifth lines thereof and the words "if such majority numbers more than three" in the fifth and sixth lines thereof, and subsection (2) by striking out the words "three or" in the fifth line thereof.

(10) Section 82. By striking out the word "by-law" in the ninth line, and substituting therefor the word "resolution."

(11) Section 86 (2). By substituting in lieu thereof the following: (2) No by-law for either of the said purposes shall take effect until confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a meeting of the company duly called for considering the same. A copy of the by-law certified under the seal of the company shall be forthwith filed in the office of the Provincial Secretary and published in the *Ontario Gazette;* and in case of the removal of the head office, twice in a newspaper published in each of the places where the head office was fixed and to where it is to be removed, or as near thereto as may be.

(12) Section 90. By inserting the words "except as hereinbefore provided" after the word "corporation" in the fourth line thereof.

(13) Section 94. By striking out the word "by" in the fourth line thereof and inserting the word "for."

(14) Section 100. By inserting before the word "shall" in the seventh line the words "responsible for the prospectus."

(15) Section 100 (1). By striking out the proviso following the subsection the numeral "5" in the third line thereof, and substituting therefor the numerals "99."

(16) Section 101 (3). By striking out the word "Act" in the second line thereof, and substituting the word "section."

(17) By striking out the Roman numerals IX., immediately preceding section 131, and inserting in lieu thereof the Roman numeral X.

(18) Section 131. By adding thereto the following sub-section:—

8. Corporations heretofore incorporated under any Act hereby repealed except chapter 191 of the Revised Statutes of Ontario, 1897, and Acts consolidated therewith or for which the said Act was substituted shall make such returns under the section as are required from corporations without share capital.

(19) By striking out the Roman numeral "X" immediately preceding section 139, and inserting in lieu thereof the Roman numerals "XI."

(20) By striking out the Roman numerals "XI" immediately preceding section 147, and adding in lieu thereof the Roman numerals "XII."

(21) By striking out the Roman numerals "XII" immediately preceding section 154, and inserting in lieu thereof the Roman numerals "XIII."

(22) By striking out the Roman numerals "XIII" immediately preceding section 169, and inserting in lieu thereof the Roman numerals "XIV."

(23) By striking out the Roman numerals "XIV" immediately preceding section 171, and adding in lieu thereof the Roman numerals "XV."

(24) Section 189. By striking out the numerals "162" in the second line thereof and inserting in lieu thereof the numerals "188."

(25) Section 206. By striking out the numerals "187 (2)" in the third line thereof and inserting "204 (2)."

2. The following is added as section 154*a*:—

(1) Where a trust company is authorized to execute the office of executor, administrator, trustee, receiver, assignee, guardian of a minor, or committee of a lunatic, then in case the Lieutenant-Governor in Council approves of such company being accepted by the High Court as a Trusts Company for the purposes of such Court, the said Court or any Judge thereof, and every other Court or Judge having authority to appoint such an officer may, with the consent of the company, appoint such company to exercise any of the said offices in respect of any estate or person under the authority of such Court or Judge, or any grant to such company probate of any will in which such company is named an executor, but no company which has issued, or has authority to issue, debentures shall be approved as aforesaid.

(2) A trust company so approved of may be appointed to be a sole trustee, notwithstanding that, but for this Act, it would be necessary to appoint more than one trustee, and may also be appointed trustee jointly with another person.

(3) Such appointment may be made whether the trustee is required under the provisions of any deed, will or document creating a trust, or whether the appointment is under the provisions of the Act respecting Trustees and Executors and the Administration of Estates or otherwise.

(4) Notwithstanding any rule of practice, or any provision of any Act requiring security, it shall not be necessary for the said company to give any security for the due performance of its duty as such executor, administrator, trustee, receiver, assignee, guardian or committee, unless otherwise ordered.

(5) The Lieutenant-Governor in Council may revoke the approval given under this section, and no Court or Judge, after notice of such revocation, shall appoint any such company to be an administrator, trustee, receiver, assignee, guardian or committee, unless such company gives the like security for the due performance of its duty as would be required from a private person. R.S.O., 1897, c. 206, s. 8.

EXTRA PROVINCIAL CORPORATIONS.

63 VICT., CHAPTER 24.

An Act respecting the Licensing of Extra Provincial Corporations.

[*Assented to 30th April*, 1900.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. In this Act the expression "Extra Provincial Corporation" means a corporation created otherwise than by or under the authority of an Act of the Legislature of Ontario.

2. Extra Provincial Corporations of the classes mentioned in this section are not required to take out a license under this Act, viz.; corporation created by or under the authority of—

Class I. An Act of the Legislature of the late Province of Upper Canada, or by Royal Charter of the Government of that province;

Class II. An Act of the Legislature of the late Province of Canada, or by Royal Charter of the Government of that province, and carrying on business in Ontario at the date of the commencement of this Act;

Class III. Corporations which have before the commencement of this Act received from the Government of Ontario a license to carry on business in Ontario, or which have been authorized by Act of the Legislature of Ontario to carry on business in Ontario, provided that such license or Act is in force at the date of the commencement of this Act;

Class IV. Corporations now or hereafter licensed or registered under the provisions of the Ontario Insurance Act, or of the Loan Corporations Act;

Class V. Corporations liable to payment of taxes imposed by chapter 8 of the Ontario Statutes for 1899, intituled an Act to supplement the revenues of the Crown in the Province of Ontario; or by chapter 31 of the said Statutes for 1899, intituled an Act respecting Brewers' and Distillers' and other Licenses. Amended by 1 Edw. VII., c. 19, s. 1, and enacted to take effect as if the amendment originally formed part of the said clause;

Class VI. Corporations not having gain for any of their objects.

3. Extra Provincial Corporations of the classes mentioned in this section are required to take out a license under this Act, viz., Corporations (other than those mentioned in section 2) created by or under the authority of—

Class VII. An Act of the Legislature of the late Province of Canada or by Royal Charter of the Government of that province, authorized to carry on business in Upper Canada, but not carrying on business in Ontario at the date of the commencement of this Act;

Class VIII. An Act of the Dominion of Canada, and authorized to carry on business in Ontario;

Class IX. Corporations not coming within any of the foregoing classes.

4. A corporation coming within class VII. or VIII. shall, upon complying with the provisions of this Act and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Ontario.

5. A corporation coming within class IX. may, upon complying with the provisions of this Act and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Ontario as may be embraced in the license; subject however to such limitations and conditions as may be specified therein.

6. No Extra Provincial Corporation coming within class VII. or VIII. or IX shall carry on within Ontario any of its business unless or until a license under this Act so to do has been granted to it, and unless such license is in force; and no company, firm, broker, agent, or other person shall, as the representative or agent of or acting in any other capacity for any such Extra Provincial Corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force. Amended by 1 Edw. VII., c. 19, s. 2.

Provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative and no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of this Act.

Provided further that this section shall not apply until the first day of November, A.D. 1900, to any such corporation which at the date of the commencement of this Act is carrying on business in Ontario.

Provided also that the onus of proving that a corporation has no resident agent or representative and no office or place of business in Ontario, or that it was at the date of the commencement of this Act carrying on business in Ontario shall in any prosecution for an offence against this section rest upon the accused.

7. An Extra Provincial Corporation coming within class VII. or VIII. or IX. may apply to the Lieutenant-Governor in Council for a license to carry on its business or part thereof, and exercise its powers or part thereof, in Ontario; and upon the granting of such license such corporation may thereafter while such license is in force carry on in Ontario the whole or such parts of its business and exercise in Ontario the whole or such parts of its powers as may be embraced in the license; subject however to the provisions of this Act and to such limitations and conditions as may be specified in the license. Provided always that no limitations or conditions shall be included in any such license which could limit the rights of a corporation coming within class VII. or class VIII., to carry on in Ontario all such parts of its business, and to exercise in Ontario all such parts of

its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein. Amended by 1 Edw. VII., c. 19, s. 3.

8. The Lieutenant-Governor in Council may from time to time make regulations respecting the following matters namely:—

(*a*) The evidence required, upon the application for a license under this Act, respecting the creation of the corporation applying and its powers and objects and its existence as a valid and subsisting corporation;

(*b*) The appointment and continuance by the corporation of a person or company as its representative in Ontario on whom service of process, notices or other proceedings may be made, and the powers to be conferred on such representative;

(*c*) The forms of licenses, powers of attorney, applications, notices, statements, returns and other documents relating to applications and other proceedings under this Act;

and such regulations shall be published in the *Ontario Gazette*.

The Lieutenant-Governor in Council may make orders with respect to particular cases where the general regulations may not be applicable or where they would cause unnecessary inconvenience or delay.

9. Upon the application for a license the applicant shall establish to the satisfaction of the Provincial Secretary, or such other officer as may be charged by him to report thereon, that the provisions of this Act and the regulations made hereunder have been complied with; and the Provincial Secretary, the Assistant Provincial Secretary or such other officer may for the purposes aforesaid, or for any other purpose under this Act, take any requisite evidence in writing under oath or affirmation.

Proof of any matter which may be necessary to be made under this Act may be made by statutory declaration or by affidavit or by deposition before the Provincial Secretary, or Assistant Provincial Secretary or other officer as aforesaid, or before any justice of the peace or commissioner for taking affidavits, or notary public, who for this purpose are hereby authorized and empowered to administer oaths or to take affirmations.

Or if made outside of Ontario may be made before any person authorized to take affidavits under the Registry Act.

10. A corporation receiving a license under this Act may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument, acquire, hold, mortgage, alienate and otherwise dispose of real estate in Ontario and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under the Ontario Companies Act with power to carry on the business and exercise the powers embraced in the license.

11. Notice of the granting of a license under this Act shall be given by the Provincial Secretary in the *Ontario Gazette* and a copy of such *Gazette*

containing such notice shall be *primâ facie* evidence, in all proceedings by and against the corporation and otherwise under this Act or otherwise, of the granting of the license and of the terms thereof mentioned in the notice; and a copy of the license certified by the Provincial Secretary or Assistant Provincial Secretary shall be sufficient evidence of the license before all courts and tribunals.

12. A corporation receiving a license under this Act shall on or before the eighth day of February in every year during the continuance of the license, make and transmit to the Provincial Secretary a statement, under oath and according to a form approved of by the Lieutenant-Governor in Council, containing information similar to that required under section 131, of the Ontario Companies Act, or so much thereof or such additional information as may be prescribed in such form, and the Lieutenant-Governor in Council may at any time require the corporation to supply such further and other information as shall seem to him to be reasonable and proper. Amended, 8 Edw. VII., c. 33, s. 43.

13. If a corporation receiving a license under this Act makes default in observing or complying with the limitations and conditions of such license, or the provisions of section 12 of this Act, or the regulations respecting the appointment and continuance of a representative in Ontario, the Lieutenant-Governor in Council may suspend or revoke such license in whole or in part, and may remove such suspension or cancel such revocation and restore such license.

Notice of such suspension, revocation, removal or restoration shall be given by the Provincial Secretary in the *Ontario Gazette*.

14. If any Extra Provincial Corporation coming within class VII. or VIII. or IX. shall, contrary to the provisions of section 6 hereof, carry on in Ontario any part of its business, such corporations shall incur a penalty of fifty dollars for every day upon which it so carries on business; and so long as it remains unlicensed under this Act it shall not be capable of maintaining any action, suit or other proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of said section 6.

Provided, however, that upon the granting or restoration of the license, or the removal of any suspension thereof, such action, suit or other proceeding may be maintained as if such license had been granted or restored or such suspension had been removed before the institution thereof.

15. If any company, firm, broker, agent or other person shall, contrary to the provisions of section 6 hereof, as the representative or agent of or acting in any other capacity for an Extra Provincial Corporation, carry on any of its business in Ontario such company, firm, broker, agent or other person shall incur a penalty of twenty dollars for every day upon which it, he or they carry on such business.

16. The Lieutenant-Governor in Council may, when or after granting a license, remit in whole or in part any penalty incurred under this Act by the corporation receiving the license or by any representative or agent thereof, and may also remit in whole or in part the costs of any action or proceeding commenced for the recovery of any such penalty, and thereupon the whole or such part of the costs as the case may be, shall not be recoverable.

17. The penalties imposed by this Act shall be recoverable only by action at the suit of or brought with the written consent of the Attorney-General of Ontario, and any action or proceeding to recover any such penalty shall be commenced within six months after the liability for such penalty has been incurred, and not afterwards.

18. There shall be paid to His Majesty for the public uses of Ontario by every corporation requiring a license under this Act such fees as may from time to time be approved of by the Lieutenant-Governor in Council. 3 Edw. VII., c. 7, s. 53.

There shall be paid to Her Majesty for the public uses of Ontario, upon transmitting to the Provincial Secretary the statement required by section 12 hereof the fee of five dollars, if the capital stock of the company does not exceed the sum of one hundred thousand dollars, and a fee of ten dollars if the capital stock of the company exceeds the said sum of one hundred thousand dollars, and until such fee has been paid such statement shall be deemed not to have been made and transmitted as required by said section.

The fees payable by Extra Provincial Corporations coming within class III. of section 2 of chapter 24 of the Acts passed in the 63rd year of the reign of Her late Majesty Queen Victoria, intituled an Act respecting the licensing of Extra Provincial Corporations for fyling the annual statement or return required of such corporations shall be as follows, viz., $5 if the capital stock of the company does not exceed $100,000, and $10 if it does exceed $100,000. Enacted by 1 Edw. VII., c. 18, s. 4.

19. An Extra Provincial Corporation which is not required by this Act to take out a license may apply for and receive a license authorizing it, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument, to acquire, hold, mortgage, alienate and otherwise dispose of real estate in Ontario and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under the Ontario Companies Act with power to carry on the business or exercise the powers embraced in the license. For such license there shall be paid to Her Majesty for the public uses of Ontario such fee as the Lieutenant-Governor may prescribe, and compliance with section 12 hereof may be dispensed with by the Lieutenant-Governor in whole or in part.

(2) Schedule A and B of the said are repealed.

20. A statement shewing the licenses issued under this Act during the preceding calendar year and the authorized capital stocks of the companies licensed and the fee paid for each license shall be laid before the Legislature at each session thereof.

21. Notice of the passing of this Act in such form and with such particulars thereof as the Provincial Secretary may think proper shall be published by him in the *Ontario Gazette* and in the *Canada Gazette* and in the *Official Gazette* or other official publication of each province of Canada, for such time as to him may seem best.

22. This Act shall commence and take effect on and after the first day of July, A.D. 1900, and on and after that day section 107 of the Ontario Companies Act shall be and the same is hereby repealed.

EXTRA PROVINCIAL CORPORATIONS.

1 EDW. VII., CHAPTER 19.

An Act to amend "An Act respecting the Licensing of Extra Provincial Corporations."

[*Assented to April 15th*, 1901.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1.—(1) Section 2 of chapter 24 of the Acts passed in the 63rd year of the reign of Her late Majesty Queen Victoria, is amended by adding at the end of the clause commencing with the words "Class V." therein, the words "or by chapter 31 of the said statutes for 1899, intituled 'An Act respecting Brewers' and Distillers' and other Licenses.'"

(2) The amendment made by this section shall take effect as if it originally formed part of the said clause.

2. Section 6 of the said Act chaptered 24 is amended by striking out of the third line of the first proviso thereof the word "and" and substituting therefor the word "or."

3. Section 7 of the said Act is amended by adding thereto the following proviso—"Provided always that no limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class VII. or VIII., to carry on in Ontario all such parts of its business, and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein."

An Act to amend the Statute Law, 3 Edw. VII., C. 7.

53. Section 18 of the Act respecting the Licensing of Extra Provincial Corporations is hereby amended by striking out the first three paragraphs of the said section and inserting in lieu thereof the words "There shall be paid to His Majesty for the public uses of Ontario by every corporation requiring a License under this Act such fees as may from time to time be approved of by the Lieutenant-Governor in Council.

(2) Schedules "A" and "B" of the said Act are repealed.

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