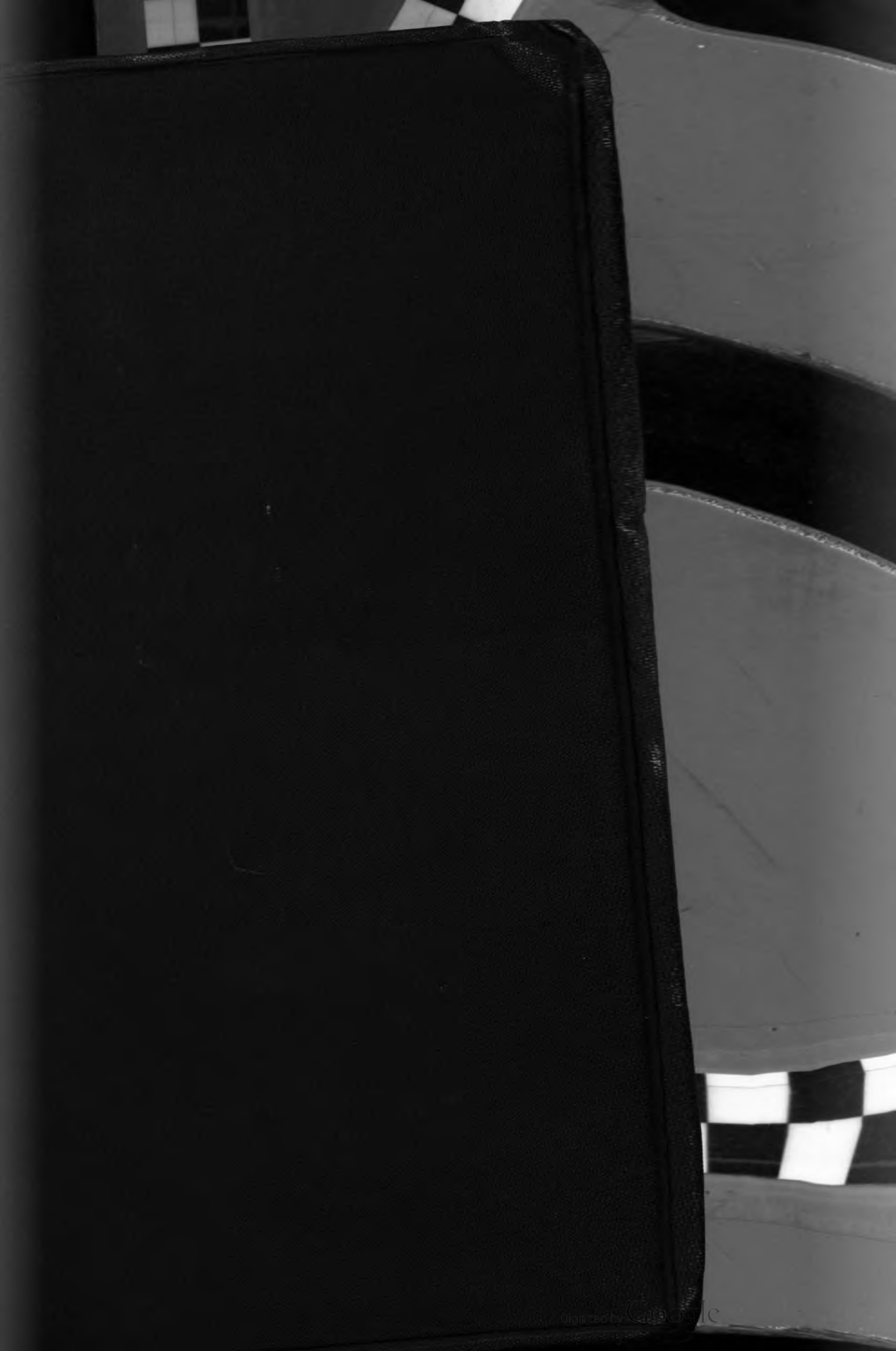

Text
Simonson

A TREATISE ON THE LAW

RELATING TO

DEBENTURES AND DEBENTURE STOCK

A TREATISE ON THE LAW

RELATING TO

DEBENTURES

AND

DEBENTURE STOCK

ISSUED

BY TRADING AND PUBLIC COMPANIES AND BY LOCAL AUTHORITIES

WITH FORMS AND PRECEDENTS

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW

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PREFACE TO THE FOURTH EDITION.

SINCE the publication of the last edition of this treatise in 1902 many of the defects in the law relating to debentures and debenture stock, which were pointed out and fully dealt with in the former editions of this book, have been remedied by statutory amendments. Thus one of the most serious of these defects (*viz.*: the legality of a floating charge created by an insolvent company shortly before its liquidation with the object of securing a past unsecured debt, and thus giving priority to such debt over the other unsecured creditors of the company) has been rectified by section 212 of the Companies Consolidation Act, 1908, which renders void floating charges created for the purpose of securing past debts within three months from the commencement of the liquidation of a company.

The doubts as to the validity of perpetual debentures and debenture stock issued by companies registered under the Companies Acts, which were raised and discussed at length in the former editions of this book, have been set at rest by section 103, which expressly provides that such securities are valid.

Several other salutary amendments of the branch of Company law, which forms the subject-matter of this book, have been made by the Companies Consolidation Act, 1908, but are marred by slovenly drafting, due, no doubt, in a large measure to the haste with which this Act (like so many others) was hurried through Parliament. The following may serve as instances of the bad drafting found in this Act:—

SECTION 84 (which makes the directors and several other classes of persons liable for untrue statements contained in pro-

spectuses inviting subscriptions for shares, debentures or debenture stock) is by the opening words made applicable "where *a prospectus invites persons* to subscribe for shares in or debentures of a company". A doubt arises as to whether this section is intended to apply to *all prospectuses* inviting such subscriptions or *only* to prospectuses issued to the *public*.

Section 84 of the Act of 1908 is substantially a re-enactment of section 3 of the Directors Liability Act, 1890. The opening words (cited above) occur in both these sections; but, whereas the Act of 1890 *does not* define the term "prospectus" and consequently applies to all prospectuses inviting such subscriptions, section 285 of the Act of 1908 *does* define this term, and by such definition restricts the meaning of such term (when used in this Act) to prospectuses issued to the public. Are the opening words "Where a prospectus invites persons to subscribe for "shares in or debentures of a company" to be treated as applying only to prospectuses issued to the public, when construing section 84 of the Act of 1908, though they apply to all prospectuses as used in section 3 of the Act of 1890? Though it is impossible to answer this question with any degree of confidence, it is believed that the Court will probably decide that section 84 of the later Act only applies to prospectuses issued to the public. Presumably the words in the earlier Act were reproduced verbatim in the later Act without bearing in mind that the earlier Act did not (and the later Act does) contain a definition limiting the natural meaning of "prospectus".

SECTION 93 (1) enacts (*inter alia*) by clause (*d*) that every mortgage or charge created by an English or Irish Company on any land (wherever situate) or any interest in land shall be void against the liquidator and other creditors of the company, unless registered in the manner prescribed, and further provides by subclause (iv) that "the holding of debentures entitling the "holder to a charge on land shall not be deemed to be an interest "in land". This proviso, which the author has with the greatest diffidence endeavoured to explain in the text, is ungrammatical and extremely obscure, and it is little short of astonishing that

this section (and the identical provision in section 10 of the Companies Act, 1907) should have been allowed to be passed in this form.

SECTION 105, whilst providing that a contract with a company to *take up and pay for any debentures* (or debenture stock) may be enforced by an order of the Court for specific performance, does not expressly make the corresponding provision that a contract by a company *to issue debentures* (or debenture stock) may be enforced by such an order. It would therefore appear to be doubtful whether a company, which declines to carry out a contract to issue debentures or debenture stock, can be compelled to specifically perform such contract, and whether the company can in such a case be made liable otherwise than in damages for breach of such a contract.

The growing interest of the public in the subject-matter of this treatise cannot be better illustrated than by calling the reader's attention to a few figures (contained in the latest return made by the Registrar of Joint Stock Companies in April, 1912), specifying the number of the companies registered under the Companies Consolidation Act, 1908, or the Companies Act, 1862, and the nominal value of their paid-up share capital. According to the latest return of the Registrar the companies registered under the Companies Acts, which were carrying on business in the United Kingdom in April, 1912, were 56,352 in number with an aggregate paid-up capital of £2,335,203,841. Of these, 50,425 with a paid-up capital of £2,093,460,607 were registered in London, 4,134 with a paid-up capital of £194,525,269 were registered in Edinburgh, and 1,793 with a paid-up capital of £47,217,965 were registered in Dublin. These figures are roughly about 25 per cent. higher than the corresponding figures found in the Registrar's return of 1902.

As the debenture capital of a company is generally roughly estimated to amount to between a third and a quarter of its share capital (*see* evidence of Mr. S. Boulter before the Committee of the House of Lords, § 904), the value of the debentures

and debenture stock issued by such companies would amount to between £550,000,000 and £650,000,000.

This estimate, which does not comprise the large sums secured by debentures and debenture stock issued (1) by public companies (*i.e.*, companies incorporated by Special Act of Parliament for the purpose of carrying on a business of a public nature), or (2) by local authorities, can, of course, only be approximately correct, but it sufficiently indicates the importance of the subject-matter of this treatise.

As debentures and debenture stock issued by ordinary trading companies are in many respects essentially different from debentures and debenture stock issued (1) by public companies, or (2) by local authorities, each of these various kinds of debentures and debenture stock has been separately considered.

In the First Book an attempt has been made to deal exhaustively with the nature of the various classes of debentures and debenture stock issued by *trading companies*, with the issue of, and the stamp duties payable in respect of, debentures and debenture stock, the registration under various Acts of Parliament of the charges created in favour of the debenture or debenture stock holders, and the transfer and various modes of disposing of such securities.

The Second Book enumerates the most important rights and remedies of a holder of debentures or debenture stock issued by a trading company (1) against such company, (2) against the creditors of such company other than the holders of such securities, (3) against the other holders of debentures or debenture stock, (4) against the directors of the company, and (5) against the trustees of the covering deed.

The Fifth Chapter of this Book contains a detailed account of all the stages of a debenture and debenture stock holder's action.

In the Third Book the debentures and debenture stock issued by *public companies* incorporated by Special Acts of Parliament and by *local authorities* are dealt with, and the question is con-

sidered whether debentures and debenture stock certificates to bearer subject to the provisions of the Local Loans Act, 1875, are or are not negotiable.

The Table of Cases comprises all the decisions before January, 1913, so far as they materially affect the subject of this treatise; there is prefixed to each case the year in which it was decided.

Quotations of sections or portions of sections of Acts of Parliament are for the sake of convenience denoted by inverted commas at the commencement of each line of the passage quoted, in order to enable the reader to distinguish them at a glance from quotations of Rules of the Supreme Court or passages out of judgments, which are denoted by inverted commas at the commencement of the first line and at the end of the passage quoted.

The author wishes to express his warmest acknowledgment of gratitude to Sir C. Chadwyck-Healey, K.C., for his kind permission to extract from the Third Edition of Sir C. Chadwyck-Healey's Book on *Company Law and Practice* two forms of trust deeds. (Forms 12 and 13 in the Appendix to this treatise).

Owing to certain references made in the body of the book, it has become necessary to make some slight alterations in and additions to the Forms so extracted.

The Appendix to the present edition contains a considerable number of forms and precedents, which may (the author ventures to hope) prove serviceable to practitioners.

Most of the cases cited in the following pages were decided before the Companies Consolidation Act, 1908, came into operation, and are therefore based on the provisions of the now repealed Companies Acts. It has therefore been thought convenient to insert a comparative table showing the sections of the Companies Acts corresponding to the sections of the Companies Consolidation Act, 1908, which are referred to in the text hereafter.

P. F. S.

4 Stone Buildings, Lincoln's Inn, W.C.
March, 1913.

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Showing the sections of the repealed Companies Acts, 1862 to 1907, which correspond to the sections of the Companies Consolidation Act, 1908, referred to hereafter.

Comp. Cons. Act, 1908.	Subject Matter of Section.	Corresponding Sections of Repealed Companies Acts.
Sec. 9	Alteration of objects of company . . .	1890, cap. 62, ss. 1, 2.
Sec. 13	Alteration of articles by special resolution .	1862, cap. 89, ss. 50, 176.
Sec. 26	Annual list of members and summary . .	1862, cap. 89, ss. 26, 27; 1867, cap. 131, s. 32; 1900, cap. 48, s. 19; 1907, cap. 50, ss. 7, 20, 21.
Sec. 49	Objections by creditors to reduction of capital and settlement of list of objecting creditors.	1867, cap. 131, ss. 13, 14; 1877, cap. 26, s. 4.
Sec. 50	Order confirming reduction of capital . .	1867, cap. 131, ss. 11, 12.
Sec. 59	Provision for reserve capital of company .	1879, cap. 76, s. 5.
Sec. 72	Restrictions on appointment and advertisement of directors	1900, cap. 48, s. 2; 1907, cap. 50, s. 1 (2).
Sec. 80	Filing of prospectus	1900, cap. 48, s. 9; 1907; cap. 50, s. 3.
Sec. 81	Specific requirements as to particulars of prospectus	1900, cap. 48, s. 10; 1907, cap. 50, s. 2.
Sec. 82	Obligation of company where no prospectus is issued	1907, cap. 50, ss. (1), (5).
Sec. 83	Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus	1900, cap. 48, s. 11; 1907, cap. 50, s. 1 (2).
Sec. 84	Liability for statements in prospectus . .	1890, cap. 64, ss. 3-5; 1907, cap. 50, s. 33.
Sec. 85	Restriction on allotment of shares . . .	1900, cap. 48, s. 4; 1907, cap. 50, s. 1 (3).
Sec. 87	Restriction on commencement of business and exercise of borrowing powers . . .	1900, cap. 48, s. 6; 1907, cap. 50, s. 1 (2).
Sec. 88	Return of allotments	1900, s. 7; 1907, s. 6.
Sec. 89	Power to pay commissions for placing and underwriting shares	1900, cap. 48, s. 8; 1907, cap. 50, s. 8.
Sec. 92	Limitation of time for issue of certificates .	1907, cap. 50, s. 5.

Comp. Cons. Act, 1908.	Subject Matter of Section.	Corresponding Sections of Repealed Companies Acts.
Sec. 93	Registration of mortgages and charges in England and Ireland	1862, cap. 89, s. 43; 1900, cap. 48, ss. 14, 34 (2); 1907, cap. 50, s. 10.
Sec. 94	Registration of appointment of receiver . .	1907, cap. 50, s. 11.
Sec. 95	Filing of accounts of receivers and managers	1907, cap. 50, s. 41.
Sec. 96	Rectification of register of mortgages . .	1900, cap. 48, s. 15.
Sec. 97	Entry of satisfaction of mortgage . . .	1900, cap. 48, s. 16.
Sec. 98	Index of register of mortgages and charges .	1900, cap. 48, s. 17.
Sec. 99	Penalties	1900, cap. 48, s. 18; 1907, cap. 50, s. 10 (6).
Sec. 100	Company's register of mortgages . . .	1862, cap. 89, s. 43.
Sec. 101	Right of inspection of copies of mortgages and company's register of mortgages . .	1862, cap. 89, s. 43; 1907, cap. 50, ss. 10 (8), 17.
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Sec. 104	Power to re-issue redeemed debentures . .	1907, cap. 50, s. 15.
Sec. 105	Specific performance of contract to subscribe for debentures	1907, cap. 50, s. 16.
Sec. 107	Payment of certain debts in priority to claims of floating charge	Pref. Pay. in Bankruptcy Act, 1897, s. 3.
Sec. 116	Service of documents on company . . .	1862, cap. 69, s. 62.
Sec. 120	Power of company to make arrangements with creditors and members . . .	1870, cap. 104, s. 2; 1900, cap. 48, s. 24; 1907, cap. 50, s. 38.
Sec. 121	Meaning of private company . . .	1907, cap. 50, s. 37.
Sec. 123	Liability of contributories	1862, cap. 69, s. 38.
Sec. 125	Nature of liability of contributory . . .	1862, cap. 69, s. 75.
Sec. 129	When company may be wound up by Court .	1862, cap. 69, s. 79; 1900, cap. 50, s. 12 (8); 1907, cap. 48, s. 37.
Sec. 130	When company is deemed unable to pay its debts	1862, cap. 69, s. 80; 1907, cap. 50, s. 28.
Sec. 131	Jurisdiction to wind up companies in England	1890, cap. 63, s. 1.
Sec. 139	Commencement of winding up by Court .	1862, cap. 69, s. 84.
Sec. 140	Power of Court to stay or restrain proceedings against company	1862, cap. 69, s. 85.
Sec. 141	Powers of Court on hearing petition . .	1862, cap. 69, s. 86; 1900, cap. 48, s. 12 (8); 1907, cap. 50, s. 29.
Sec. 142	Actions stayed on winding up order . .	1862, cap. 69, s. 87.
Sec. 145	Court may have regard to wishes of creditors and contributories	1862, cap. 69, s. 91.
Sec. 149	Appointment, remuneration and title of liquidator	1862, cap. 69, ss. 85, 92-94; 1890, cap. 63, s. 4.

Comp. Cons. Act, 1908.	Subject Matter of Section.	Corresponding Sections of Repealed Companies Acts.
Sec. 151	Powers of liquidator	1862, cap. 69, ss. 95-97; 1890, cap. 63, s. 12.
Sec. 162	Power to appoint official receiver as receiver	1890, cap. 63, s. 4 (6).
Sec. 165	Power to order payment of debts by contributory	1862, cap. 69, s. 101; 1867, cap. 131, s. 6.
Sec. 183	Commencement of voluntary winding up .	1862, cap. 89, s. 130.
Sec. 195	Final meeting and dissolution of company .	1862, cap. 89, ss. 142, 143; 1907, cap. 50, s. 31.
Sec. 197	Saving rights of creditors and contributories .	1862, cap. 89, s. 145.
Sec. 200	Effect of petition for winding up subject to supervision	1862, cap. 89, s. 148.
Sec. 201	Court may have regard to wishes of creditors and contributories	1862, cap. 89, s. 149.
Sec. 203	Effect of supervision order	1862, cap. 89, s. 151; 1886, cap. 23, s. 6.
Sec. 205	Avoidance of transfers of shares after commencement of winding up	1862, cap. 89, ss. 131, 153.
Sec. 207	Application of bankruptcy rules in winding up of insolvent companies . . .	38 & 39 Vic., cap. 77, s. 10; 40 & 41 Vic., cap. 57, s. 28 (1).
Sec. 209	Preferential payments	51 & 52 Vic., cap. 62; 52 & 53 Vic., cap. 60.
Sec. 210	Fraudulent preference	1862, cap. 89, s. 164.
Sec. 211	Avoidance of attachments, executions, etc. .	1862, cap. 89, s. 163.
Sec. 212	Effect of floating charge	1907, cap. 50, s. 13.
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Sec. 219	Meetings to ascertain wishes of creditors or contributories	1862, cap. 89, s. 91.
Sec. 267	Meaning of unregistered company . .	1862, cap. 89, s. 199.
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ABBREVIATIONS.

THE following abbreviations of the titles of text-books have been adopted in the present treatise:—

Buckley = Buckley's Treatise on the Companies Acts, *ninth edition.*

Chadwyck Healey = Chadwyck Healey on Companies, *third edition.*

Lindley = Lindley on Companies, *sixth edition.*

R. S. C. = Rules of the Supreme Court, 1883, and subsequent rules.

Seton = Seton on Decrees, *seventh edition.*

In references to the Law Reports from 1875 to 1890 the following notation has been adopted:—

Cases in a *Court of first instance* are referred to as } Ch. D. / Q. B. D.

Cases in the *Court of Appeal* are referred to as } Ch. Div. / Q. B. Div.

BOOK I.

THE ISSUE OF DEBENTURES AND DEBENTURE STOCK BY A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1862, OR THE COMPANIES CONSOLIDATION ACT, 1908.

BOOKS I. and II. of this treatise deal mainly with the nature of, and the mode of issuing, and the rights and remedies of the holders of, debentures and debenture stock created by companies registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908.

Book III., on the other hand, deals separately with the nature of, and the mode of issuing, and the rights and remedies of the holders of:—

I. Debentures subject to the provisions of:—

(i) The Companies Clauses Act, 1845 (8 & 9 Vic., cap. 16);

(ii) The Railway Companies Securities Act, 1866 (29 & 30 Vic., cap. 108); and the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127);

(iii) The Mortgage Debenture Acts, 1865 and 1870 (28 & 29 Vic., cap. 78, and 33 & 34 Vic., cap. 22); and

(iv) The Local Loans Act, 1875 (38 & 39 Vic., cap. 83); and

II. Debenture stock subject to the provisions of:—

(i) The Companies Clauses Act, 1863 (26 & 27 Vic., cap. 118);

(ii) The Railway Companies Securities Act, 1866 (29 & 30 Vic., cap. 108) and the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127); and

(iii) The Local Loans Act, 1875 (38 & 39 Vic., cap. 83).

The debentures and debenture stock mentioned in Books I. and II. of this treatise do not include the debentures or debenture stock issued under or regulated by one or more of the above-mentioned Acts, unless it is expressly so stated.

CHAPTER I.

DEFINITIONS.

SECTION I. *The Meaning of a "Debenture".*

Bk. I., Ch. I., Sec. I.

Original use of term "Debenture".

THE term debenture is a very old one and appears to have been applied to receipts; it is derived from the Latin *debentur*, because, it is said, "these receipts began with the words *debentur mihi*" (*a*).

The term debenture (sometimes spelt debentur or debenter) is found in many old Acts of Parliament, meaning a certificate given to officers or soldiers, which certified that certain arrears were due to them; (*b*) such arrears were in some cases charged on specified property (such as rebel land in Ireland and land at the disposal of the Commonwealth); (*c*) in other cases on specified rates and duties (such as the General Fund) (*d*). The term is not used in the early Acts of Parliament in relation to companies; (*e*) thus the Companies Clauses Act of 1845 speaks of "bonds and mortgages" and not of "debentures". On the other hand, the term "debentures" occurs frequently in the Companies Consolidation Act, 1908, though it is not defined by this Act, which merely provides by section 285, that "debenture," when used in this Act, shall include debenture stock (which latter term is likewise not defined by this Act).

Present meaning of "Debenture".

The following are the principal decisions dealing with the meaning of the word "debenture":—

Malins, V. C., says: "A debenture merely means an instrument, which shows that the party owes and is bound to pay". (*f*)

Chitty, L. J. (then J.), says: "The term (debenture) itself imports a debt—an acknowledgment of a debt—and speaking of

(*a*) *Levy* v. *Abercorris Slate and Slab Co.*, 37 Ch. D. 260, 264.

(*b*) Scobel's Acts and Ordinances, 1649, cap. 63, and 1652, cap. 14. See Appendix, Forms 1 and 2.

(*c*) Scobel's, 1652, cap. 14.

(*d*) 6 Geo. I., cap. 17, sec. 1; see also 9 Geo. I., cap. 19, sec. 10.

(*e*) The term "debenture" as now used is not confined to instruments issued by companies (*e.g.*, clubs issue debentures), but the vast majority of debentures are issued by companies.

(*f*) In re *Imperial Land Co. of Marseilles*, ex pte. *Colborne and Strawbridge*, 11 Eq. 478, 489.

the numerous and various forms of instruments, which have been called debentures without anybody being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security, so that there are debentures, which are secured, and debentures, which are not secured."(*g*)

Again Chitty, L. J. (then J.), says: "In my opinion a debenture means a document, which either creates a debt or acknowledges it, and any document, which fulfils either of these conditions, is a debenture".(*h*)

Lord Lindley says: "What is called a debenture may be a mere promise to pay, a covenant to pay under seal or a mortgage or charge under the seal of the company".(*i*)

It is difficult to reconcile these very wide and comprehensive definitions with the decisions of *Brocklehurst* v. *Railway Printing and Publishing Co.*(*j*) and *Ross* v. *Army and Navy Hotel Co.*(*k*)

In *Brocklehurst* v. *Railway Printing and Publishing Co.*(*j*) the defendant company borrowed £1500 and secured such sum and interest by issuing fifteen debentures and by executing a deed (such deed is called a covering or trust deed) (*l*) containing an assignment of all their plant, machinery, stock-in-trade, etc., to a trustee for the debenture-holders. This assignment was registered as a bill of sale, but was not in the form required by the Bills of Sale Act, 1882; it was held by Field, J., that the covering deed was void as a bill of sale, not being in the form required, and that it was not a debenture and was therefore not protected by section 17 of that Act, which exempts "debentures" from the operation of the Act.

In *Ross* v. *Army and Navy Hotel Co.*(*m*) debentures were issued by the defendant company under its common seal with a condition annexed that the holders of the debentures of that issue

(*g*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215, 219. A debenture imports a personal liability only *primâ facie*, see *Florence Land and Public Works Co.*, ex pte. *Moor*, 10 Ch. Div. 530, 548; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, but under special circumstances see *The Hansard Publishing Union, Ld.*, 8 Times L. R. 280.

(*h*) *Levy* v. *Abercorris Slate and Slab Co.*, 37 Ch. D. 260, 264.

(*i*) Lindley, p. 300; see also *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, 172.

(*j*) W. N. (1884), p. 70.

(*k*) 34 Ch. Div. 43.

(*l*) As to the question when debentures are usually further secured by a covering deed, see infra, Bk. I., ch. ii., sec. iii., and as to the usual provisions of such a deed, see Appendix, Forms 12 and 13.

(*m*) 34 Ch. Div. 43.

were entitled *pari passu* to the benefit of a covering deed, whereby (*inter alia*) all the machinery, fittings, fixtures and furniture on the premises of the company and all the machinery, fittings, fixtures and furniture that might be substituted therefor during the continuance of the security effected by the said indenture were expressed to be vested in the trustees to secure payment of all moneys payable on such debentures. The covering deed purported to be a conveyance and assignment of the hereditaments, fixtures and chattels in terms rather larger than those used in the condition; the future chattels were not only those substituted for existing chattels, but also any brought upon the premises in addition thereto. This deed was not registered under the Bills of Sale Act, 1882. The Court of Appeal held, that the covering deed was void as a bill of sale (not being in the form required), and, not being a debenture, was not protected by section 17 of the Bills of Sale Act, 1882, but that the debentures, which manifestly intended to give the holders a valid charge on all the property comprised in the covering deed, created a valid charge on all such chattels.(*n*)

It is not easy to see why a covering deed is not a debenture, if the decisions mentioned at the commencement of this chapter are correct.

As a rule, a series of debentures is issued and each person gets his own document and can deal with it separately, but it has been held by Chitty, L. J. (then J.), that a memorandum of agreement containing a covenant by a company to pay *pari passu* to each of nine persons, who were mentioned in the agreement as lenders, the sum of money set opposite to his name and charging the undertaking and all the property of the company as security for the payment thereof was a debenture.(*o*) However, North, J., says: "I feel some little difficulty in following that decision (*Edmonds* v. *Blaina Furnaces Co.*) for this reason: it was held by Mr. Justice Field in Chambers in *Brocklehurst* v. *Railway Printing and Publishing Co.*, and by the Court of Appeal in

(*n*) Though the Court has held in *Richards* v. *Overseers of Kidderminster* (1896), 2 Ch. 212; 44 W. R. 505 following re *Standard Manufacturing Co.* (1891), 1 Ch. (C. A.) 627, that the Bills of Sale Acts did not apply to debenture or debenture stock holders' covering deeds, which had to be registered under sec. 43 of the Companies Act, 1862, any more than they did to debentures, yet the cases above-mentioned are still valuable for the purpose of arriving at the correct meaning of the word debenture.

(*o*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215.

Ross v. *Army and Navy Hotel Co.*, that the covering deed, which usually accompanies debentures as a security for the payment of the debentures, when due, is not a debenture within section 17, but requires registration under the Bills of Sale Acts, if it deals with personal chattels, and is void, if not registered. I feel a difficulty in seeing how, if a covering deed is not a debenture, an agreement, which contains substantially the material parts of a covering deed, *viz.*: the agreement to pay the several persons named *pari passu* and the charging of the debts upon the property of the company—can be a debenture."(*p*)

Debentures need not be issued and numbered *seriatim*; a single debenture may be issued to one man.(*q*)

In determining, whether a document is or is not a debenture, it is not necessary to hold that a document is a debenture, because it is on its face called a debenture or a debenture bond,(*r*) but the substance of such document must be looked at, and only if it contains an acknowledgment of or an agreement to pay a debt, will it be held to be a debenture.

A mere memorandum in writing of a deposit by a coal or fire-clay working or brick-making company with their bankers of documents relating to certain specific beds of coal and fire clay as a security for the balance, which is and may thereafter become due to their bankers, but which the company do not specifically admit to be due or agree to pay, has been held not to be a debenture.(*s*)

Result of cases.

The result of the foregoing authorities would appear to be, that any instrument (other than a covering or trust deed) which either creates or agrees to create a debt in favour of one person or corporation, or several persons or corporations, or acknowledges such debt, is a debenture. If, on the other hand, Mr. Justice North's doubt concerning the correctness of the decision of *Edmonds* v. *Blaina Furnaces Co.* should be held to be well founded, then the foregoing sentence will have to be modified as follows: Any instrument (other than a covering deed) which either creates or agrees to create a debt in favour of one person (including joint holders) or corporation, or acknowledges such debt, is a debenture.

(*p*) *Topham* v. *Greenside Glazed Fire Brick Co.*, 37 Ch. D. 281, 291.

(*q*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 221.

(*r*) *Edmonds* v. *Blaina Furnaces Co.*, ubi supra, 215, 220; *Levy* v. *Abercorris Slate and Slab Co.*, 37 Ch. D. 260, 266.

(*s*) *Topham* v. *Greenside Glazed Fire Brick Co.*, 37 Ch. D. 281.

SECTION II. *The Meaning of "Debenture Stock" Issued by companies registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908.*

Bk. I., Ch. I., Sec. II.
Meaning of "Debenture Stock".

"Debenture Stock," says Lord Lindley, (*t*) "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan." It will be seen from his lordship's definition, that debenture stock differs from a debenture in form rather than in substance. The holder of a debenture of a company is entitled to a separate debt (either secured or unsecured), which is payable by the company to him in certain specified events, or after the expiration of a specified term of years. The holder of debenture stock of a company, on the other hand, is entitled to a share of a debt (either secured or unsecured), which is usually made payable in certain specified events, or after the expiration of a specified term of years. The debenture stockholder's charge is almost invariably secured by a trust or covering deed, whereby the company covenants to pay to the debenture stockholders the interest and (in certain events) the principal moneys due to them respectively in respect of their debenture stock, and the trust deed usually secures the debenture stock by (i) vesting certain specific property in the trustees thereof and creating a legal mortgage thereon and (ii) creating a floating charge on the undertaking and remaining assets of the Company. (*u*)

Trust deeds securing debenture stock used formerly to provide for the issue of debentures (of the nominal value of the issue of the debenture stock) to the trustees of the trust deed, as it was considered doubtful whether a trust deed creating a charge on chattels was not liable to registration as a bill of sale; but the above-mentioned practice has been discontinued for some years, as the doubts above referred to are now not considered to be well founded.

Though the debenture stock holder does not, as a rule, enter

(*t*) Lindley, p. 346. The debenture stock issued by a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, differs essentially from the debenture stock issued under and subject to the provisions of the Companies Clauses Act, 1863 (26 & 27 Vic., cap. 118), the Railway Companies Securities Act, 1866 (29 & 30 Vic., cap. 108), the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127), or the Local Loans Act, 1875 (38 & 39 Vic., cap. 83), as to these, see infra, Bk. III.

(*u*) For the usual clauses in such covering deed, see Bk. I., ch. ii., sec. iii., and Form 13 of the Appendix infra.

into any direct contract with the company, his equitable rights will be recognised by a Court of Equity. (*v*).

The peculiar characteristic and convenience of debenture stock (as compared with debentures) is that, whereas each debenture forming a part of a series is always for a fixed sum (say £50), fractions of which cannot be transferred, the amount of debenture stock held by the different holders of a company is not a fixed one, and fractions of the amount so held may be freely transferred.

The term "debenture stock," though repeatedly used in the Companies Consolidation Act, 1908, is not defined by that Act.

The various kinds of debentures and debenture stock are fully dealt with in the following chapter.

(*v*) Re *Empress Engineering Co.*, 16, Ch. Div. 125; *Gandy* v. *Gandy*, 30 Ch. Div. 57; *Touche* v. *Metropolitan Warehousing Company*, 6 Ch. 671.

CHAPTER II.

THE USUAL PROVISIONS CONTAINED IN THE SECURITIES OF DEBENTURE AND DEBENTURE STOCK HOLDERS.

SECTION I. *The usual Clauses contained in the Securities of Debenture Holders.*

Various categories of Debentures.

THE various kinds of debentures may be divided into the following categories:—

I. *Debentures* simply, sometimes called *naked debentures* (that is to say), debentures which are not in any way secured, and *Mortgage debentures*(*a*) (that is to say), debentures which are secured (either only by a charge in the debentures themselves, or else by such a charge and a further charge created by a trust or covering deed).

II. *Determinable debentures* (that is to say), debentures which become payable in any event at or not later than a specified date, and *Perpetual debentures* (that is to say), debentures which do not become payable in any event at any fixed date, but which only become payable on the happening of certain events (such as the company being wound up or default being made in the payment of interest for a specified period), and

III. *Debentures* (*payable*) *to bearer* (being sometimes convertible into debentures payable to the registered holder) and *debentures* (*payable*) *to the registered holder* (registered debentures).

The following are the various kinds of debentures:—

(1) Perpetual debenture to bearer.
(2) Determinable debenture to bearer.
(3) Perpetual debenture to registered holder.
(4) Determinable debenture to registered holder.
(5) Perpetual mortgage debenture to bearer.
(6) Determinable mortgage debenture to bearer.

(*a*) Except where it was expressly intended to distinguish between debentures and mortgage debentures, the term "debenture" has been used in this treatise as signifying either or both kinds of debentures.

(7) Perpetual mortgage debenture to registered holder.

(8) Determinable mortgage debenture to registered holder.

Numbers (1), (2), (3) and (4) are not usual, as the public is not often willing to advance money to a company without having the same secured by a charge on the property of the company, to whom the advance is made. Numbers (5) and (6) used to be the favourite kinds of debentures until the Stamp Duty on instruments transferable by delivery was raised to 10s. per cent. by the Customs and Inland Revenue Act, 1885 (48 & 49 Vic., cap. 51, sec. 21). This duty has now been further raised to £1 per cent. (see Schedule to the Stamp Act, 1891, under the head of "Marketable Security (3)" and section 76 of the Finance Act (1909-1910), 1910). Owing to this heavy stamp duty imposed on instruments transferable by delivery, numbers (7) and, more especially, (8) are now the favourite kinds of debentures.

Companies frequently issue several series of debentures or debenture stock, of which one series (usually called the Preferred debentures or debenture stock) ranks above one or more other series (usually called Deferred debentures or debenture stock).

Debentures are almost invariably under the seal of the company, but it is not necessary that they should be under seal.

Ordinary clauses.

As will be seen by referring to the forms in the Appendix(*b*), the ordinary form of debenture consists of a promise to pay the principal on a specified date and interest in the meantime (or in the case of perpetual debentures a promise to pay interest until the principal becomes due) and a statement, that the debenture is held subject to the conditions endorsed thereon. These conditions may be set out in the body of the debenture, but this is unusual. Most debentures contain a condition stating, that the debenture forms one of a series of like debentures, all of which are to rank *pari passu* with one another. In the absence of this clause the debentures will respectively rank according to the date of their issue.(*c*) The condition (which is to be found in almost every debenture) providing that on the happening of certain specified events the principal shall immediately become payable is not a clause inflicting a penalty, against which equity will give relief.(*d*)

(*b*) See Forms 3, 4, 5 and 6.

(*c*) *Gartside* v. *Silkstone and Dodsworth Iron Co.*, 21 Ch. D. 762; *James* v. *Boythorpe Colliery Co.*, W. N. (1890), p. 28.

(*d*) *Thompson* v. *Hudson*, L. R., 4 H. L. 1, 28, 30; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 696, 702.

Bk. I., Ch. II., Sec. I.

A debenture containing a covenant by the company to pay "*on or after*" a specified date the principal moneys thereby secured will render the company liable to pay the principal moneys on the specified date or on demand at any time after such date.(*c*)

Power to give Notice of Intention to pay off.

The conditions endorsed on debentures frequently confer on the company a power to give "notice by advertisement of its intention to pay off this debenture". Such a power authorises the company to give such notice *before* the date, on which the principal moneys would otherwise become due. Notice under such a power must *not* be a *general* notice (such as a notice "to pay off such of the debentures . . . as have not already been redeemed") but must identify the particular debentures to be paid off. Hence, where a notice given under such a power is (i) given after such date or (ii) in general, the notice will be invalid.(*d*)

Restriction on creation of future mortgages.

Sometimes a condition is endorsed on debentures, which provides, that the company (though empowered to carry on its business notwithstanding the debenture charge) shall not be at liberty to create any mortgage or charge in priority to that issue of debentures; this provision has been held not to affect a mortgagee or purchaser, who takes the legal estate in any of the company's property charged by the debentures without having notice of such prohibition.(*e*)

Place of payment.

Where a debenture contains a condition, which provides that the payment of the principal and interest due to the debenture-holder shall be made *at a specified place*, there can be no default in payment, until *demand* for payment is made *at such place*.(*f*)

A part or the whole of an issue of debentures or debenture stock is sometimes made redeemable by a company at par or at a premium (as the case may be) on giving notice by advertisement in certain specified newspapers.

Redemption at a premium on Company being wound up for re organisation or reconstruction.

Where debentures or debenture stock, which are redeemable at a premium on giving notice, are made immediately redeemable at par, if the company commences to be wound up "otherwise than for the purposes of re-organisation or reconstruction," such company may, on passing a resolution for a

(*c*) Re *Tewkesbury Gas Co.*; *Tysoe* v. *Same Co.* (1911), 2. Ch. 279.

(*d*) *First National Bank of Chicago* v. *Orinoco Shipping and Trading Co.*, 21 T. L. R. 39 (Farwell J.)

(*e*) *English and Scottish Mercantile Co.* v. *Brunton* (1892), 2 Q. B. (C. A.) 700. See also infra p. 130.

(*f*) *Thorn* v. *City Rice Mills*, 40 Ch. D. 357; Re *Escalera Silver and Lead Co.*, 25 T. L. R. 87.

voluntary winding-up with a view of carrying into effect an agreement for amalgamation, redeem the securities at par, as such an agreement amounts to an agreement for sale and not to a re-organisation or reconstruction.(*g*)

Profit Debentures.

Some debentures (usually called profit debentures) provide that the payment of the interest, or of the principal and interest, due to the debenture-holder shall be repayable exclusively out of the profits of the company. But, except where it is expressly so provided, the interest need not be paid out of the profits of the company, but may be partly or wholly paid out of its capital.(*h*)

Periodical drawings.

Frequently provision is made for the redemption of a specified proportion of the debentures according to the result of periodical drawings.(*i*)

Coupons.

The interest on debentures is often made payable on the presentation of the coupons or warrants for interest, which are attached to the debentures. These coupons or warrants for interest are mere tokens, the real obligation to pay interest being contained in the debenture itself.(*j*) The bearer of a coupon is usually assumed to be entitled to the sum mentioned therein. The seal of the company issuing the debentures need not be affixed to the coupons, the signature of a person duly authorised being sufficient. Coupons are exempt from Stamp duties.(*k*)

The coupons are detached for payment and usually forwarded to the debenture-holder's banker, who collects the interest therein specified. An additional convenience afforded by coupons is, that the holder can, if in want of money, have his coupons discounted before the interest therein specified becomes due.

Income Tax.

The sum specified in the coupon should be expressly made payable less income tax. For, though an English company may even in the absence of such express provision deduct income tax

(*g*) *Hooper* v. *Western Counties Telephonic Co.*, W. N. (1892) 148; 68 L. T. R. 591; 41 W. R. 84, 86; where Chitty, L J., says that re-organisation and reconstruction are alternative expressions.

(*h*) *Bosanquet* v. *St. John's D'El Rey Mining Co.*, 77 L. T. R. 206. See Appendix, Forms 7 and 8.

(*i*) As to the legality of such a provision, see infra, Bk. I., chap. iv., sec. iii.

(*j*) *Enthoven* v. *Hoyle*, 13 C. B. 373. For usual form see Appendix, Form 3*a*.

(*k*) Stamp Act, 1891. Schedule under the heading of Bills of Exchange Exemptions. See also sec. 40 of the Finance Act, 1894 (57 & 58 Vic. cap. 30).

Bk. I., Ch. II., Sec. I. (1). Bk. I., Ch. II., Sec. I. (2).

from the interest payable or (where there are coupons) from the sums specified in the coupon as against the debenture or debenture stock holders residing in England, such company may not have a right to make such deduction as against holders residing abroad. Whether such company does or does not deduct income tax from the interest payable to debenture or debenture stock holders, it will not be allowed to deduct such interest from its profits and gains for the purpose of assessing the sum chargeable with income tax.(*l*)

SUB-SECTION 1. *Unsecured Debentures.*

Unsecured Debentures.

The term debenture *primâ facie* only imports a personal liability on the part of the company to pay to the holder the capital and interest due from the company to him, (*m*) but debentures, which are not in any way secured by some charge on the property of the company, are very unusual. In some cases the debentures do not themselves charge the property of the company, but state that the registered holder (or bearer) of the debenture is entitled to the benefit and is subject to the terms of the trust deed.(*n*) The clauses inserted in and conditions endorsed on debentures, which do not create any charge, are the same as those inserted in ordinary mortgage debentures, which are not secured by a trust deed, with this sole difference, that the clause charging the property of the company must be omitted.(*o*)

SUB-SECTION 2. *Secured Debentures.*

Secured Debentures.

The usual clauses contained in the secured debentures (to bearer or to registered holder) and in the covering deeds, whereby such debentures are frequently further secured, will be found in the forms in the Appendix.(*p*)

Sinking Fund.

Debentures and debenture stock are sometimes secured by establishing a sinking fund, that is to say, a specified sum is directed to be set apart every year out of the profits made by the company after making certain payments, and the sums so

(*l*) *Alexandria Water Co.* v. *Musgrave*, 11 Q. B. Div. 174; *Gresham Life Assurance Soc.* v. *Styles* [1892], A.C. 309, 321, 325.

(*m*) In re *Florence Public Works Co.*, ex pte. *Moor*, 10 Ch. Div. 530, 548; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, 469; see also in re *Hansard Union*, 8 Times L. R. 280.

(*n*) For form of trust deed see Appendix, Form 12.

(*o*) See Appendix, Forms 3 and 4.

(*p*) See Forms 3, 4, 5, 6, and 12.

set apart are appropriated exclusively to the payment of the debenture debt. This method of providing funds for paying off a debenture debt is peculiarly appropriate in cases, in which the property charged with the debenture debt is of a wasting nature, such as patents, coal mines, a foreign concession for a term of years or the like. But for such a provision the security of the holders of debentures and debenture stock charged on the property of a wasting nature will become worse from day to day. Where it is intended, that a sinking fund should be provided, the company should be made to covenant to pay a specified sum out of the profits to form part of the sinking fund, so as to enable the debenture or debenture stock holders to enforce the provision.(*q*)

Guarantee.

Debentures and debenture stock are sometimes secured by a guarantee of a guarantee society. This is very desirable, where the concern of the company proposing to issue such securities, though in reality successful and offering amply sufficient security, is not well known to the public.(*r*)

Some debentures (called profit debentures) are, as has already been stated, charged on the profits.(*s*)

Debentures charged on Profits.

Second Series of Debentures.

It appears that a company having a power to issue debentures may redeem the debentures issued by it and issue others in their place, or may, if the terms of the original debentures permit it, re-issue the redeemed debentures and make them rank *pari passu* with the original debentures. As will be seen hereafter (see p. 83) a company may, subject to the conditions imposed by section 104 of the Companies Consolidation Act, 1908, redeem and re-issue its debentures and debenture stock and give to the holders of such securities, when re-issued, the same rights as if such securities had not been previously issued. Persons intending to advance money to be secured by a second series of debentures should

(*q*) Appendix, Form 5.

(*r*) For a form of such a guarantee see Appendix, Form 9. A holder of a debenture, which formed part of a series ranking *pari passu*, was held to be entitled to enforce on the due date fixed by the debenture payment under a guarantee, which guaranteed payment of the moneys secured by such debenture, if default was made for more than three months "in the payment of any principal money due under the debentures," even though an effectual resolution had been passed by the holders of the series postponing the due dates fixed by the debentures. *Finlay* v. *Mexican Investment Co.* (1897), 1 Q. B. 517. A guarantee for the regular payment of interest secured by the debentures of a company may be enforceable even after the company has been dissolved. Re *Fitzgeorge, ex parte Robson* [1905], 1 K. B. 462.

(*s*) In re *Western Canada Oil Lands and Works Co.*, 17 Eq. 1; W. N. (1874) 148. See Apendix, Forms 7 and 8.

Bk. I., Ch. II., Sec. I. (2).

therefore be careful to have appropriate words inserted into their debentures so as to charge them on the assets of the company in priority to any debentures of the first series, which have been paid off before (and which may be re-issued after) the date of the issue of the second series or which have not been issued at the date of the issue of the second series. In the case of *Lister* v. *Henry Lister & Son, Limited*,(*t*) the Court held that a second series of debentures, which were charged on the assets of the company "subject and in subordination to the first series of debentures, already issued by the company, or such of them as are now outstanding." ranked after such of the first debentures as had been issued or re-issued before the date of the issue of the second debentures, but above such of the first debentures as had been re-issued since that date; the expression, "debentures already issued," was there interpreted as meaning the series of, not the individual, debentures already issued, and "such of them as are now outstanding," as meaning such of them as, having been issued, had not been paid off (the latter words in the debenture being directed against the re-issue of debentures, which had been paid off).

Debentures issued by way of renewal.

A company sometimes issues debentures or debenture stock by way of renewal of former debentures or debenture stock; the validity and the extent of the charge created by the debentures or debenture stock issued by way of renewal depends on the validity and the extent of the charge created by the documents, in substitution for which they are issued.(*u*) The legal position of a holder of debentures or debenture stock issued by way of renewal is analogous to that of the holder of a new bill of exchange given in lieu of an old bill; in this latter case it is still competent to recover interest due under the old bill.(*v*)

Supplemental Debentures.

Supplemental debentures (that is to say, debentures issued in order to cure a supposed defect in the original debentures) only constitute a charge on the property originally intended to be charged by the original debentures.(*w*)

Extent of Charge.

The debenture debt is almost invariably made a floating charge or a charge on the undertaking of the company. Where part of

(*t*) 41 W. R. 330; 62 L. J. Ch. 569; 68 L. T. R. 826; W. N. (1893) 33.

(*u*) Lindley, 308; *Fountaine* v. *Carmarthen Railway Co.*, 5 Eq. 316.

(*v*) In re *Joseph Wright & Co.*, 4 Times L. R. 105.

(*w*) *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. Div. 43, 56.

the property of the company is specifically charged, such part may be excepted from the operation of the floating charge. The charge may, according to the words used in the documents constituting the charge, extend to all the property of the company (including book debts, which may not have accrued due)(*x*) both present and future, and to the past and future calls of the company.

In the following pages it is proposed to examine the authorities as to the effect of a "floating charge," a charge on present and future property, and a charge on uncalled capital, and as to what assets of the company can be charged with the debenture debt.

(*a*) *A Floating Charge or Charge on the Undertaking of a Company.*

Meaning of a Charge on the Undertaking or a Floating Charge.

The meaning of the expression "a floating charge," or "charge on the undertaking of a company,"(*y*) was first explained in the case of *in re Panama, New Zealand and Australian Royal Mail Co.*(*z*) In that case a steamship company having power to issue debentures issued debentures, charging the undertaking and all sums of money arising therefrom, and all the estate, right, title and interest of the company therein, with repayment at a specified time of the money borrowed with interest. Before the moneys became payable under the provisions contained in the said debentures the company was wound up and the ships and other property of the company were sold. L. J. Giffard's judgment contains the following passage: "I have no hesitation in saying, that in this particular case, and having regard to the state of this particular company, the word 'undertaking' had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company.(*a*) And I take

(*x*) *Bloomer* v. *Union Coal and Iron Co.*, 16 Eq. 383.

(*y*) It should here be noticed that a "floating charge," or charge on the undertaking of a company, is ineffectual in Scotland. See *Clerk* v. *West Calder Oil Co.*, 30th June, 1882, 9 R. 1017.

(*z*) 5 Ch. 318. For the meaning of and the rights conferred by a charge on an undertaking of a public nature carried on by a corporation, which derives its powers under an Act of Parliament, see infra, Bk. III., ch. i., and *Gardner* v. *London, Chatham and Dover Railway Co.*, 2 Ch. 201, 217.

(*a*) See also in re *Mersey Wood Working Co.*, 1 Times L. R. 566.

Bk. I., Ch. II., Sec. I. (2a).

the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that the debenture-holder could not interfere, until either the interest, which was due, was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and furthermore that during the interval the debenture-holder will not be entitled to any account of mesne profits or of any dealing with the property of the company in the ordinary course of carrying on their business.(*b*) . . . I see no difficulty or inconvenience in giving that effect to this instrument. But the moment the company comes to be wound up and the property has to be realised, that moment the rights of these parties, beyond all question, attach.(*c*) My opinion is, that, even if the company had not stopped, the debenture-holders might have filed a bill to realise their security. I hold that, under these circumstances, they have a charge upon all property of the company, past and future, by the term 'undertaking,' and that they stand in a position superior to that of the general creditors, who can touch nothing until they (the debenture-holders) are paid."

In the case of *in re Florence Land and Public Works Co., ex parte Moor*,(*d*) debentures purporting to charge the estate, property and effects of the company were held to be equivalent to a charge on the undertaking.(*e*) Jessel, M. R., makes the following remarks: "It is inconsistent to suppose, that the moment you executed a bond or debenture you paralysed the company and prevented it carrying on its business, for, if you read the words to mean a specific charge on the property of the company, then, of course, no practical use could be made of the money borrowed, because that would become the property of the company, and anybody with notice would be liable on that view to repay it to the mortgagee or debenture-holder. That would be one extravagant result. Another would be this, that, if the

(*b*) *Driver* v. *Broad* (1893), 1 Q. B. (C. A.) 744, 749.
(*c*) *Wallace* v. *Universal Automatic Machine Co.* (1894), 2 Ch. 547.
(*d*) 10 Ch. Div. 530.
(*e*) Ibid., 541.

company is formed to build and to let and mortgage its property, you can neither lease nor mortgage without the assent of every individual bond or debenture holder, which again to my mind would be extravagant. But, if you read it as making a charge only to this extent, subject to the powers of the directors whilst they are carrying on the business, then, if they make default in payment of the principal or interest, a creditor can apply to a Court of Justice for a Receiver and stop them from going on; but, subject to that, they carry on their business as usual, leaving the creditor to his remedy in case of default or in case of a total winding up."

James, L. J., says in his judgment in the same case: "I am of opinion, that the law does allow such a company as this to charge its undertaking, meaning by charging its undertaking, charging the assets for the time being".

Floating Charge or Security.

The meaning of a floating security or charge has been further explained in the following passage of Jessel, M. R.'s, judgment in the case of *in re Colonial Trusts Corporation, ex parte Bradshaw.*(*f*) "What is the nature of the floating security? Now, as has been already pointed out both by the Lord Justice James and myself in the case of *ex parte Moor*,(*g*) it would be a monstrous thing to hold, that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object, for which the money was borrowed, namely, the carrying on of the business of the company, and I may refer, as regards this company, to the following clause of the articles: 'To buy, take on lease, or otherwise acquire land, and manage and improve the same, and to erect, improve or repair any buildings thereon, and from time to time to settle (query sell) or dispose of such land and buildings upon such terms and conditions as they think fit'. It is obvious, that they could not sell the land and make a title to it, if there was this charge upon it, which prevented their doing anything at all. Then it proceeds thus: 'To manage estates, collect and receive rents, and transact any agency or commission business'. The fact is, the only way of making the thing workable is to treat it (as I understand was decided in the case

(*f*) 15 Ch. D. 465, 472. (*g*) 10 Ch. Div. 530.

Bk. I., Ch. II., Sec. I. (2a).

referred to) as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by the debenture-holders against the company or at the commencement of the winding up, where the company is wound up either by voluntary winding up or under the compulsory power of winding up by the Court." (*h*) A floating charge will not protect the chattels comprised in such charge from distress for poor rate.(*i*)

The following passage out of a judgment (*j*) of Lord Macnaghten will further explain the meaning of a floating charge: "A floating security 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, in which it happens to be from time to time. It is of the essence of such a charge, that it remains dormant until the undertaking charged ceases to be a going concern or until the person, in whose favour the charge is created, intervenes. His right to intervene may, of course, be suspended by agreement. But, if there is no agreement for suspension, he may exercise his right whenever he pleases."

Lord Macnaghten lays down in the case of *Government Stock Investment Co.* v. *Manila Railway Co.* (*k*) that that, which changes the character of a floating security to that of a fixed charge, is either the cessation of the carrying on of business by the company or the *actual intervention* of the debenture-holder, but not his *mere right to intervene.* Mere default on the part of the company does not change the character of the security.(*l*)

In the case of *Illingworth* v. *Houldsworth* (*m*) Lord Macnaghten says: "A floating charge . . . is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property,

(*h*) See also *Hamilton's Windsor Ironworks*, 12 Ch. D. 707; in re *Marine Mansions*, 4 Eq. 601; *Wallace* v. *University Automatic Machines Co.* (1894), 2 Ch. (C. A.) 547.

(*i*) In re *Marriage, Neave & Co., North of England, etc., Assets Corporation* v. *Marriage, Neave & Co.* (1896), 2 Ch. (C. A.) 663.

(*j*) *Government Stock and other Securities Investment Co.* v. *Manila Railway Co.* (1897), A. C. 81, 86.

(*k*) (1897) A. C. 81.

(*l*) *Evans* v. *Rival Granite Quarries Ld.* (1910) 2 K. B. (C. A.) 979, 993.

(*m*) (1904) A. C. 355, 358.

which it is intended to affect, until some event occurs or some act is done, which causes it to settle and fasten on the subject of the charge within its reach and grasp."

A holder of a debenture containing a floating charge may, if he thinks fit, at any time after the debenture has become enforceable, convert the floating into a fixed charge by taking the proper steps and, when the charge has become a fixed charge, the debenture-holder may be able to prevent effect being given to execution or garnishee proceedings. But neither a demand by a debenture-holder, that the company do pay the money secured by his debenture, nor a notice by the debenture-holder to the company's bankers claiming payment to him of the company's bank balance (which has been attached by a judgment creditor of the company under a garnishee order) will convert a floating into a fixed or specific charge.(*f*)

The term "floating charge" occurs in sec. 14 of the repealed Companies Act, 1900, which is re-enacted with modifications by sec. 93 of the Companies Consolidation Act, 1908. The Court of Appeal, whose decision was affirmed by the House of Lords, have held that every charge, which has the following characteristics, is a "floating charge" within the meaning of sec. 14 (1 (*d*)) of the Companies Act, 1900:—

(1) If it is a charge on a class of assets (present or future) of a company,

(2) If that class is one, which in the ordinary course of the business of the company would be changing from time to time, and

(3) If you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company shall carry on its business in the ordinary way as far as concerns the particular class of assets comprised in the charge. A charge may be a "floating charge" within this section, though it is only charged on part of the company's property. (*g*)

Buckley, L.J., has summarised the former decisions as to the effect of a floating charge as follows (*h*):—

(*f*) *Evans* v. *Rival Granite Quarries Ld.* (1910) 2 K. B. (C. A.) 979.

(*g*) Re *Yorkshire Woolcombers' Assoc. Ld. Houldsworth* v. *Same Co.* (1903), 2 Ch. (C. A.) 284; *Illingworth* v. *Houldsworth* (1904), A. C. 355.

(*h*) *Evans* v. *Rival Granite Quarries Ld.* (1910), 2 K. B. at p. 999.

Bk. I., Ch. II., Sec. I. (2a).

"A floating security is not a future security; it is a *present security*, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is *not* a *specific* security: the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way, that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done, which causes it to crystallize into a fixed security."

The owner of the floating charge cannot, so long as the charge continues to float, single out a particular debt due to the company and require by notice that debt to be paid to him or not to be paid to the company or to those validly claiming through the company. (*i*)

What words will create a floating charge.

A floating charge or charge on the undertaking of a company may, as appears from the cases cited above, be created without actually using either of these expressions; thus a charge on the "estate, property and effects," (*j*) or on "all the property, book debts, credits, assets, moneys and other effects" (*k*) of a company has been held to be equivalent to a charge on the undertaking.

Company may create Specific Charge having priority over Floating Charge.

A company having power to borrow may give priority over the debenture or debenture stock holders' floating charge on the company's undertaking to a specific charge on a particular asset of the company made for the purpose of carrying on the business of the company.(*l*) Thus in a recent case (*m*) it was decided that a company having borrowing powers and still carrying on its business may give to a person advancing money to the company for the purpose of carrying on its business priority over deben-

(*i*) *Robson* v. *Smith* (1895), 2 Ch. (C. A.) 118, 126; *Evans* v. *Rival Granite Quarries Ld.* (1910), 2 K. B. 979.

(*j*) In re *Florence Land and Public Works Co.*, 10 Ch. Div. 530, 546.

(*k*) In re *General South American Co.*, 2 Ch. Div. 337.

(*l*) *Ward* v. *The Royal Exchange Shipping Co. Ld.*, 58 L. T. R. 174; *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, 29 Ch. D. 715.

(*m*) *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, ubi supra.

ture-holders, whose debentures are a charge upon the undertaking of the company, and may secure the sum so advanced by the deposit of the company's title deeds.

Acting on the same principles as were applied in the foregoing decisions, the Court held, that a company whose undertaking was charged with debentures could, while it was still a going concern, pay a just debt even to its own directors, thereby giving the directors priority over the debenture-holders, as the company was dealing in the ordinary course of its business within the condition of its debentures.(*n*)

Specific Mortgage securing second Debentures may be given priority over Floating Charge securing first Debentures.

A floating charge securing a series of first debentures or debenture stock will not prevent the company from creating a specific mortgage or charge securing (and giving priority over the said first series to) a subsequent series of debentures or debenture stock, provided that the subsequent issue is created for the purposes of the company's business and in the ordinary course of its business.(*o*) Where a company, which is formed (not for the purpose of carrying on ordinary trade, but) for the purpose of carrying on public undertakings, creates a mortgage securing a second series of debentures or debenture stock, the Court will not assume (in the absence of proof) that the objects, for which such second series was created, are not in the ordinary course of the business of the company.(*p*)

Conditions restricting Alienation.

After the decision of *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* some debentures were prepared containing a clause providing "that the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures". Such a restrictive clause is effective as between the company and the debenture-holders, but a *bonâ fide* purchaser for value without notice of such provision, who obtains the legal title to any property charged with the debentures, will nevertheless gain priority over such debenture-holders; such purchaser will not be affected with constructive notice of such restrictive

(*n*) *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147.

(*o*) Re *Colonial Trusts Corporation* 15 Ch. D. 465, 472; *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604 612.

(*p*) *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604.

Bk. I., Ch. II., Sec. I. (2a).

clause, even though he had notice of the existence of the debentures, provided that he was at the date of such purchase unaware of the fact that such restrictive clause formed part of the debentures.(*l*) Such a restrictive clause is to be read strictly and was held in a recent case not to preclude a solicitor from asserting his lien against the debenture-holders (for the lien was held to be a right given by the general law, and not "a charge," or, at any rate, not a "charge created by the company")(*m*) and was held in another case not to interfere with the rights obtained under a garnishee order (for garnishee proceedings are only a form of execution, and do not lead to any "charge" being created by the company on the debt garnished).(*n*)

As will be seen hereafter, (*o*) debentures or debenture stock of a company, which has been incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, must be registered in the manner prescribed by section 93 of the last mentioned Act. But registration under that section of debentures or a trust deed securing a series of debentures or debenture stock merely gives constructive notice of such debentures or deed, but *not* notice of any special provision therein prohibiting the creation by the company of a mortgage or charge ranking *pari passu* with or prior to such debentures or deed. A person, who *bonâ fide* advances money to a company, and who knows of the existence of such debentures or a trust deed securing a series of debentures or debenture stock, but does not know that it contains any such restrictive clause, will accordingly not be precluded by the registration of such debentures or of such a trust deed from obtaining priority over the mortgage or charge created by such debenture or trust deed.(*p*)

Company may sell its Undertaking notwithstanding Floating Charge.

If a company has power under its memorandum of association to sell its undertaking (whether for shares or cash), such company will not be precluded by a floating charge from exercising such a

(*l*) *English & Scottish Mercantile Investment Co.* v. *Brunton* (1892) 2 Q. B. 1700; Re *Castell & Brown L Roper* v. *Same Co.* (1898) 1 Ch. 315. See *infra*, Bk. II. ch. v. sec. i.

(*m*) *Brunton* v. *Electrical Engineering Corporation* (1892) 1 Ch. 434.

(*n*) *Robson* v. *Smith* (1895) 2 Ch. 118.

(*o*) See infra Bk. I. ch. V. sec. 1.

(*p*) *Wilson* v. *Kelland* (1910), 2 Ch. 306, 313.

power.(*q*) We shall see hereafter, (*r*) that a floating charge becomes immediately enforceable, if the company ceases to be a going concern, (*s*) but a company authorised to sell and selling its undertaking for shares would appear not to cease to be a going concern, as it will carry on the business of holding the shares, which is one of the objects for which the company was incorporated.(*t*) If the agreement for the sale of such a business contains a provision prohibiting the company from carrying on *any* business similar to that agreed to be sold, it may be that the debenture or debenture stock would be held to be immediately enforceable on the ground that the nature of the security has been altered by the agreement.(*u*)

As a company authorised by its memorandum to sell its undertaking may sell its *whole* undertaking without necessarily making the floating charge crystallize by so doing, it follows that, where company A, which has power to carry on three distinct businesses and to sell and deal with all or any of its property and to hold shares in any other company with objects similar to its own, has issued debentures creating a floating charge on its assets, company A can notwithstanding such charge sell one of its businesses to another company in consideration of shares in any such other company.(*v*)

How far Floating Charge on undertaking of Company affects its reconstruction or amalgamation.

The next question to be considered is, whether a floating charge will hamper the reconstruction of a company or its amalgamation with another company. A company, which is authorised by its memorandum of association to sell its business, undertaking and assets or any part thereof and to subscribe for, take and hold shares in any company, may, it would appear, transfer any part or parts of its business to another company for the purpose of carrying out a scheme of reconstruction or amalgamation, notwithstanding that it has issued debentures creating a floating charge on its undertaking and assets. For such a transfer being *intra vires* of the company, the Court will not, so long as the undertaking of the company continues to be a

(*q*) *Booth* v. *New Afrikander Gold Mining Co.* (1903), 1 Ch. (C. A.) 295, 313, 315; *Doughty* v. *Lomagunda Reefs Ld.* (1902) 2 Ch. 837.

(*r*) See infra, pp. 213-215.

(*s*) *Government Stock Investment Co.* v. *Manila Ry. Co.* (1897) A. C. 81, 86.

(*t*) Buckley, p. 231.

(*u*) Re *Borax Co.* (1901) 1 Ch. 326, 343.

(*v*) Re *Vivian & Co., Metropolitan Bank of England* v. *Same Co.* (1900), 2 Ch. 654.

Bk. I., Ch. II., Sec. I. (2a).

going concern, grant an injunction (at the instance of a holder of such debentures) restraining the company from giving effect to the agreement embodying such scheme merely on the ground that such a transfer will endanger the security of the debenture-holders. If, however, the agreement embodying such a scheme contains a clause precluding the transferring company from carrying on any business similar to the business transferred, a holder of debentures, which create a floating charge, may possibly be able to obtain an injunction restraining the company from giving effect to the scheme on the ground that such a clause alters the nature of the security.(*q*)

Company retains Title Deeds when it creates Floating Charge.

A company generally retains its title deeds, when it issues debentures or debenture stock, which are or is only secured by a floating charge, as the object of creating a floating charge is to enable the company, so long as it pays the interest due in respect of such securities, to carry on its business and deal with all its property in the ordinary way of business without any interference on the part of the holders of such securities.

When a Floating Security ceases to Float.

Debentures and debenture stock constituting a floating security are usually made enforceable on the happening of any of the following events: (1) on the company making default in payment of interest for a specified number of days; (2) on a winding-up order of the company being made by a Court of competent jurisdiction; or (3) on a resolution for the winding up of the company being passed; (*r*) or else power is given by the debenture to the company to carry on its business notwithstanding the charge created by the debenture, until default shall be made for a specified period in payment of any interest secured by the debenture, or a winding-up order shall be made or a resolution for the winding up of the company passed.(*s*)

The effect of a floating security containing either of the above provisions is to give an immediate equitable charge on the assets of the company subject nevertheless to a licence to the company to carry on its business, and, until something is done to terminate such licence, the property of the company may be dealt with in

(*q*) Re *Borax Co., Foster* v. *Borax Co.* (1901), 1 Ch. (C. A.) 326.

(*r*) *Robson* v. *Smith* (1895), 2 Ch. 118.

(*s*) *Government Stock Investment Company* v. *Manila Railway Co., Ld.* (1895), 2 Ch. (C. A.) 551, (1897), A. C. 81.

the ordinary course of business as if the debentures had not been given—in other words, such a security does not cease to be a floating security, or (to use another expression) does not become an active security, until the company has been wound up or stops business or a receiver has been appointed at the instance of the debenture or debenture stock holders.(*s*) Hence, even after the interest payable on such securities has been in arrear for the time specified, the company can deal with the property in the ordinary course of business, until the company has been ordered to be wound up or stops business or a receiver has been appointed.(*t*)

Sale or Mortgage of Land by Company which has created a Floating Charge on its Property.

A company, which has issued debentures or debenture stock constituting a floating charge on its undertaking and all its property (including its lands), is bound on selling any part of such land, if required by the purchaser thereof, to give reasonable evidence, that no default has been made in the payment of the principal or interest secured by such debentures or debenture stock.(*u*)

The prescribed particulars of a floating charge created by a company after 1st July, 1908, must by virtue of section 93 of the Companies Consolidation Act, 1908, be registered with the Registrar of Joint Stock Companies at Somerset House within twenty-one days after its creation. (As to this see *infra*, Bk. I., ch. v., sec. 1). As the file of the charges so registered is open to the inspection of the public, every member of the public has notice of such charges. It is, as has been stated before, now a common practice to fortify a floating charge by adding a provision prohibiting the creation of a mortgage or charge ranking above the floating charge. It will therefore be necessary in future, that every person, who intends to advance money to a company on having the same secured by a mortgage or charge, should search the file of the mortgages and charges registered at Somerset House, in order to ascertain, whether the company has incum-

(*s*) *Wallace* v. *Evershed* (1899), 1 Ch. 1891; *Evans* v. *Rival Granite Quarries Ld.* (1910) 2 K. B. (C. A.) 979.

(*t*) *Robson* v. *Smith* (1895), 2 Ch. 118; *Government Stock Investment Co.* v. *Manila Railway Co., Ld.*, ubi supra. This last decision is not contrary to the case of in re *Horne and Hellard*, 29 Ch. D. 736, the charge in that case being totally different; it should also be borne in mind, that in re *Horne and Hellard* was a vendor and purchaser's case.

(*u*) In re *Horne and Hellard*, ubi supra. A purchaser of real property having notice of the issue of debentures cannot rely on *English and Scottish Investment Co.* v. *Brunton*, ubi supra.

Bk. I., Ch. II, Sec. I. (2a).

bered its property by the creation of a floating charge or otherwise, and, if a floating charge is registered, he should insist on the company showing him a copy of the instrument creating such charge and he will then be able to satisfy himself whether the company's power to mortgage or charge its property is restricted by the instrument creating the floating charge.

Floating Charge created within three months of winding up.

Section 212 of the Companies Consolidation Act, 1908, provides:

Sec. 212 of Comp. Cons. Act, 1908.

"Where a company is being wound up, a floating charge "on the undertaking or property of the company created within "three months of the commencement of the winding up shall, "unless it is proved that the company immediately after the "creation of the charge was solvent, be invalid, except to the "amount of any cash paid to the company at the time of or "subsequently to the creation of, and in consideration for, the "charge, together with interest on that amount at the rate of "five per cent. per annum."

Effect of Sec. 212.

The object of section 212 is to prevent insolvent companies from creating floating charges to secure past debts or moneys, which do not go to swell their assets and become available for creditors. Hence, where the directors of a company guaranteed the company's overdraft at its bank and subsequently the company (being then insolvent) within three months of the commencement of its winding up issued to such directors debentures (creating a floating charge) as a security for the moneys paid by such directors under the above-mentioned guarantee, such debentures were held to be invalid under section 212, on the ground that they had been issued to secure an antecedent independent transaction.(*v*)

The Court of Appeal affirming Neville, J., held that money paid in reliance on a resolution of the board of directors of a company, that a debenture for a sum of £1000 secured by a floating charge should be executed, was paid "at the time of the creation . . . of the charge" within the meaning of section 212, though £750 was in fact paid to the company ten days before the execution of the debenture.(*w*)

(*v*) Re *Orleans Motor Co.* [1911] 2 Ch. 41.

(*w*) Re *Columbian Fireproofing Co.* [1910] 2 Ch. (C.A.) 120.

(b) *A Charge on the Present and Future Property of a Company.*

Charge on Future Property is good.

There appears at one time to have been a notion, that a general charge upon future property was void,(*v*) but it is now well settled that a charge on future property, possibilities or expectancies is good, provided that the subject charged is capable of identification, when the subject has come into existence.(*w*) Hence a charge on a company's present and future property to secure the debts due to the debenture or debenture stock holders is good.

During the course of the argument in the case of *Florence Land Co., ex parte Moor*,(*x*) Jessel, M. R., suggested a doubt as to whether section 10 of the Judicature Act, 1875 (38 & 39 Vic., cap. 77) (*xx*) did not interfere with a company's power to charge after-acquired property. This section assimilates the administration of the estates of companies in winding up, as to the respective rights of secured and unsecured creditors, to the administration of estates in bankruptcy. The M. R. asks, whether it would not be contrary to the policy of the bankruptcy laws, that a mortgage security should affect after-acquired property. This point has never been decided by any English Court. It has, however, been decided (and, it is submitted, rightly decided) in an Irish case (*y*) that the section 28 (1) of the Irish Judicature Act (which is identical in terms with section 10 of the Judicature Act, 1875) does not interfere with a company's power to charge after-acquired property.

A debenture charging the undertaking may, according to the words used, charge all the property of the company, both present and future, or else only the property in existence at the date of the debentures and not subsequently acquired property.

What words create a Charge on Future Property.

The following expressions charging the property of a company have been held to comprise present as well as future property: a charge "on our undertaking and property and receipts and revenue aforesaid,"(*z*) "on the undertaking and all sums of money arising therefrom, and all the estate, right, title

(*v*) *Belding* v. *Read*, 3 H. & C. 955; in re *D'Epineuil* (2), 20 Ch. D. 758, both now overruled by *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

(*w*) *Tailby* v. *Official Receiver*, 13 App. Cas. 523, 530; *Coombe* v. *Carter*, 36 Ch. Div. 348, 353.

(*x*) 10 Ch. Div. 530, 535.

(*xx*) Now repealed, but re-enacted by sec. 207 of the Comp. Cons. Act, 1908.

(*y*) In re *Dublin Drapery Co.*, ex pte. *Cox*, L. R. (Ir.), 13 Ch. D. 174, 191.

(*z*) *Marine Mansions Co.*, 4 Eq. 601.

Sk. I., Ch. II., Sec. I. (2b).

and interest of the company therein,"(*a*) "on all the company's estate, property(*aa*) and effects";(*b*) "the company bound themselves and their successors and their real and personal estate" (this last case was held to charge the real and personal estate, as it existed at the commencement of the winding up, but not including the then uncalled capital);(*c*) a charge "on the company's undertaking and all its property whatsoever and wheresoever, both present and future".(*d*)

On the other hand, a charge "on the undertaking and all the real and personal estate" of a company has been held to create a valid charge on the personal estate (concerning which only the question was raised) to the extent of all the personal estate existing at the date of the debentures, but not on the subsequently acquired personal estate of the company.(*e*)

Charge on Book Debts.

An assignment (whether contained in the debenture or debenture stock holders' securities) by a company of all the book debts, which are and which will during the continuance of a security become due and owing to the mortgagor, is good,(*f*) if the company has power to make such assignment and if appropriate words are used to show the intention of assigning present and future book debts.

Under a power "to raise money by mortgage or on bonds, debentures or otherwise, as the company may see fit," it has been held that a company has power to charge book debts not yet accrued due.(*g*)

However, where a company by its debenture trust deed assigned its "business premises and the plant, machinery and effects in or upon premises or used in connection therewith," and covenanted that all the lands, etc., and all machinery and effects, which they should thereafter acquire, should be included in the security, and it was further provided that the company should not be precluded from dealing with their property for the purposes of the company, the Court held that the stock-in-trade

(*a*) *Panama, New Zealand, etc., Co.*, 5 Ch. 318.

(*aa*) The terms "assets" or "property" include the goodwill of the company's business. See *Jennings* v. *Jennings* (1898), 1 Ch. 378, 384; re *Leas Hotel Co., Salter* v. *Leas Hotel Co.*, W. N. (1902), p. 10; (1902) 1 Ch. 332.

(*b*) *Florence Land Co.*, ex pte. *Moor*, 10 Ch. Div. 530.

(*c*) In re *Colonial Trusts Corporation*, 15 Ch. D. 465.

(*d*) *Brunton* v. *Electrical Engineering Co.* (1892), 1 Ch. 434.

(*e*) In re *New Clydach Co.*, 6 Eq. 514.

(*f*) *Tailby* v. *Official Receiver*, ubi supra, 528; *Anderson* v. *Butler Wharf Co.*, W. N. (1879) 162. See Sec. 93 (1 (*e*)) of the Companies Consolidation Act, 1908.

(*g*) *Bloomer* v. *Union Coal and Iron Co.*, 16 Eq. 383.

at the time of the default passed, but not the book debts owing to the company.(*h*)

(*c*) *A Charge on the Past and Future Calls of a Company.*

Charge on Calls.

Very frequently the past and future calls of a company are charged with repayment of the sums advanced by the debenture or debenture stock holders together with interest thereon. It is proposed to refer shortly to the cases, which show what powers are sufficient to authorise, and what words are sufficient to create, a charge on the past and future calls of a company.

Calls made or determined on may be charged.

It has been decided, that a company may, under a power to mortgage its property and effects, secure debentures by a charge on arrears of calls already made,(*i*) the proceeds of a call already made, but not immediately payable,(*j*) and also on the proceeds of a call not yet actually made but determined on;(*k*) even where there were large general powers, but not an express borrowing power, in a deed of settlement, it has been held, that a charge on the proceeds of calls already made, but not immediately payable, was valid.

Nature of Future Calls.

Uncalled capital (as distinguished from calls made or determined on) is only *sub modo* the property of the company,(*l*) and the company has no absolute right, and the shareholders are under no absolute liability to pay: the right only arises, if and when calls are made by the directors in the exercise of a discretion within the limit and time prescribed by the deed of settlement, charter or articles of association.(*m*)

How Power to Charge Uncalled Capital is conferred on a Company.

Uncalled capital, being more in the nature of a power than of property, can only be charged by a company, if it is authorised so to do. A company having power by virtue of its memorandum of association (whether expressly or by implication)(*n*) to borrow will be authorised to secure the money so borrowed by a charge on its uncalled capital, if its memorandum or articles of association contain a power to charge its uncalled capital.(*o*)

(*h*) Re *Anglo-American Leather Cloth Co., Ld.*, 42 L. T. R. 504; 43 L. T. R. 43.

(*i*) *Humber Iron Works Co.*, 16 W. R. 474, 667.

(*j*) In re *Sankey Brook Coal Co.* (No. 2), 10 Eq. 381; *Pickering* v. *Ilfracombe Railway Co.*, L. R., 3 C. P. 235, 247.

(*k*) In re *Sankey Brook Coal Co.*, 9 Eq. 721.

(*l*) *Gibbs and West's Case*, 10 Eq. 312.

(*m*) *Bank of South Australia* v. *Abrahams*, L. R., 6 P. C. 265.

(*n*) As to the question of implied borrowing powers, see infra, Bk. I., ch. iv., sec. i. (2).

(*o*) Re *Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683; 32 L. T. R. 854; re *Pyle Works Co.*, 44 Ch. Div. 534; *Jackson* v. *Rainford Colliery Co.* (1896), 2 Ch. 340.

Bk. I., Ch. II., Sec. I. (2c).

Charge on Uncalled Capital is good.

If, however, such power is given (there being nothing in the Companies Consolidation Act, 1908, which prohibits a limited company from mortgaging its unpaid up capital) a charge on the uncalled capital is good.(*p*) In the absence of such a power uncalled capital cannot be charged with debentures or debenture stock or otherwise, as such a charge would prevent the directors of the company from exercising the discretion given to them as to calling up capital.(*q*)

Uncalled Capital reserved for purposes of Winding up.

By section 59 of the Companies Consolidation Act, 1908, it is enacted, that "a limited company may by special resolution "determine that any portion of its share capital which has not "already been called up, shall not be capable of being called up, "except in the event of and for the purpose of the company being "wound up, and thereupon that portion of its share capital "shall not be capable of being called up except in the event and "for the purposes aforesaid". Where the capital of a company has been so divided, that part, which can only be called up in the event of a winding up, ceases to be subject to the control of the directors, and cannot be charged by them with debentures or debenture stock.(*r*)

What words are sufficient to Authorise and to Constitute a Charge on Future Calls.

It having been shown that, if a sufficient power is given, uncalled capital can be charged in favour of debenture or debenture stock holders, the next question to be considered is, what words have been held to authorise or constitute a charge on uncalled capital. A power in a deed of settlement of a company authorising the directors to mortgage or charge the "property and funds" (*s*) or "property" (*t*) of the company does not authorise them to include future calls in such mortgage or charge. Under a power "to pledge, mortgage or charge the works, hereditaments, plant, property and effects of the company," the proceeds of a call already made could be charged, but not the proceeds of a future call.(*u*) A power to mortgage

(*p*) *Newton* v. *Debenture-holders of Anglo-Australian Investment Co.* (1895), A. C. 244, approving in re *Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683; *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156; in re *Pyle Works*, 44 Ch. Div. 534.

(*q*) In re *Sankey Brook Coal Co.*, 9 Eq. 721.

(*r*) In re *Pyle Works*, ubi supra, 586; in re *Mayfair Property Co., Bartlett* v. *Same Co.* (1898), 2 Ch. (C. A.) 28.

(*s*) Ex pte. *Stanley*, 4 De G. J. & S. 407, 10 L. T. R. 674.

(*t*) *Bank of South Australia* v. *Abrahams*, L. R., 6 P. C. 265 (observing on *Lishman's Case*, 32 L. T. R. 759, which seems to be no longer law); *Bower* v. *Foreign Gas Co.*, W. N. (1877) 222.

(*u*) In re *Sankey Brook Coal Co.* (No. 2), 10 Eq. 381.

"the properties and rights" of a company,(*v*) under certain circumstances a power to charge "all or any of the real or personal assets" of the company,(*w*) or a power to "receive money on loan or deposit or otherwise upon any security of the company, or upon the security of any property of the company," (*x*) or a power "to charge the land and other property and effects for the time being of the company in such manner as the company may determine," (*y*) was held to authorise a charge of debentures on the uncalled capital of the company. Of course, where power is given to mortgage "uncalled capital" or "all future calls" (*z*) the company may mortgage its whole uncalled capital, including the capital payable in respect of its unissued shares.(*a*) A charge on "all the lands, tenements and estates of the company and all their undertaking" has been held not to include uncalled capital.(*b*)

Debentures charging "the real and personal estate of the company" were held to be a charge on the real and personal estate of the company as it existed at the date of the winding up, but not including the then uncalled capital; (*c*) and, in the same way, debentures charged on the "undertaking and all the property, both present and future," were held to create a charge on the property of the company as it existed at the commencement of the winding up, but not on the uncalled capital.(*d*)

Debentures issued by the directors of a company under their power to charge uncalled capital, and secured on "all the property, assets and revenues of the company" (no specific mention being made of uncalled capital), were held to be a charge on the uncalled capital, which was held to be included in the word "assets".(*e*)

(*v*) *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*w*) In re *Pyle Works*, 44 Ch. Div. 534.

(*x*) *Newton* v. *Anglo-Australian Investment Co.* (1895), A. C. 244.

(*y*) *Jackson* v. *Rainford Colliery Co.* (1896), 2 Ch. 340.

(*z*) *Phœnix Bessemer Steel Co.*, 44 L. J. (Ch.) 683.

(*a*) *English Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*b*) *King* v. *Marshall*, 33 Beav. 565, 10 Jur., N. S. 921. *New Zealand Gold Co.* v. *Peacock* (1894), 1 Q. B. (C. A.) 622, 631, 632.

(*c*) In re *Colonial Trusts Corporation*, ex pte. *Bradshaw*, 15; Ch. D. 465. It does not appear from the report, how this company had power to charge uncalled capital at all.

(*d*) In re *Streatham and General Estates Co.* (1897), 1 Ch. 15; 45 W. R. 105, followed in re *Russian Spratts Patent, Ltd.*, *Johnson* v. *Same Co.*, 103 L. T. J. 37; (1898), 2 Ch. (C. A.) 149.

(*e*) *Page* v. *International Agency and Industrial Trust*, W. N. (1893), p. 32; 62 L. J. Ch. 568. See also *Webb* v. *Whiffin*, L. R., 5. H. L. 711.

Bk. I., Ch. II., Sec. I. (2d).

A charge on the uncalled share capital of a company does not deprive the directors of the company of their power to forfeit the shares, which are not fully paid up.(*d*)

Charge on Uncalled Capital only retains priority in Scotland if notice is given to Scotch Shareholders.

It would appear, that, if the uncalled capital of shares, the holders of which are resident in Scotland, is to be charged with debentures or debenture stock, notice of the charge created by such debentures or debenture stock should be given to the shareholders liable for such calls. If such notice is not given, any person issuing the Scotch process known as an arrestment of the calls owing by the shareholders resident in Scotland will, according to the law of Scotland and the *jus gentium* as administered in the Courts of Scotland, gain priority over the holders of such debentures or debenture stock. (*e*)

Mortgages and charges on the uncalled share capital of a company, which is incorporated in England or Ireland, must be registered in the manner prescribed by section 93 of the Companies Consolidation Act, 1908.(*f*)

(*d*) *How far the Books of the Company are affected by the Debenture or Debenture Stock Holders' Charge.*

Who is entitled to the custody of the Books of the Company.

Debenture or debenture stock holders, whose debt is charged by general words on the effects of a company, are not entitled under their security to seize the books of the company; (*g*) indeed, it seems doubtful whether such books can be charged. But a receiver appointed in a debenture or debenture stock holder's action is as against a first mortgagee, whose debt is charged "on the land of a company, and all goods and chattels of what nature soever thereon," entitled to the delivery of such of the company's books as apply to the debenture or debenture stock holder's security, provided that such delivery does not interfere with the rights of such mortgagee.(*h*) On the other hand, on a company being ordered to be wound up, the official liquidator is as against a receiver (or a receiver and manager) appointed at the instance of the plaintiff in a debenture or debenture stock

(*d*) Re *Agency Land and Finance Co. of Australia; Bosanquet* v. *Same Co.*, 20 Times L. R. 41.

(*e*) In re *Queensland Mercantile and Agency Co.* (1892), 1 Ch. (C. A.) 219.

(*f*) As to this see *infra*, Bk. I., ch. v. sec. i.

(*g*) Re *Clyne Tin Plate Co.*, 47 L. T. R. 439.

(*h*) *General Assets Purchase Co.* v. *Chesterton*, 32 Sol. Jo. 645.

holder's action, entitled to the custody of such of the books of the company as relate to the management and business and are not necessary to support the title of the debenture or debenture stock holders, even though the debentures or debenture stock are a charge on the whole of the company's assets.(*i*) A properly appointed liquidator of a company is, of course, entitled to its documents against a receiver, if such documents are not comprised in the charge, for the protection of which the receiver is appointed.(*ii*)

It is competent to a Court, which has at the instance of a debenture or debenture stock holder made an order directing that a company's books and documents should be delivered to a receiver and manager, to vary such order from time to time, as may be expedient for the purposes of the action and winding up, and accordingly, notwithstanding a previous order directing the delivery of all the company's books and documents to the receiver, the Court in a recent case ordered the delivery by the receiver of certain of the books and documents to the liquidator on an undertaking by him to produce them to the receiver appointed in, or the plaintiff in, a debenture-holder's action at all proper times on receiving notice requiring production.(*j*)

(*e*) *Charge on Lands outside the Jurisdiction.*

Charge enforced by jurisdiction *in personam*.

Debentures and debenture stock are frequently charged (by English companies or by foreign companies carrying on business at a place of business in England) on lands situated outside the jurisdiction.(*k*) Such a charge can, of course, not be enforced *in rem* by the courts of this country, as they have no means of enforcing the execution of their judgment by dealing with the land itself, but the Court of Chancery has always exercised, and the High Court now exercises its jurisdiction *in personam*, and is thus able to compel a company within its jurisdiction to carry out orders, which it would be unable to enforce *in rem*.(*l*)

(*i*) *Engel* v. *South Metropolitan Brewery, etc. Co.* (No. 2) (1892), 1 Ch. 442.

(*ii*) In re *Trench Tubeless Tyre Co., Bethell* v. *Same Co.*, W. N. (1900), p. 42.

(*j*) Ibid.

(*k*) *Newby* v. *Van Oppen*, 7 Q. B. 293; *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q. B. Div. 519.

(*l*) *Penn* v. *Lord Baltimore*, Wh. & T. L. C. 6th Ed., I., p. 1047; 7th Ed. I., p. 755. *British S. Africa Co.* v. *De Beers Consolidated Mines* (1910), Ch. 354; (1910) 2 Ch. (C. A.) 502; *Duder* v. *Amsterdamsch Trustees Kantoor* (1902) 2 Ch. 132. As to mortgages and charges on foreign lands, see *infra*, Bk. I., ch. v., sec. i. and Bk. II., ch. iii., sec. ii.

Bk. I., Ch. II., Sec. I. (3).

By virtue of this jurisdiction the Court has declared, that debentures charged on a company's land abroad constituted a first charge,(*m*) has decreed foreclosure (*n*) or even the sale, (*o*) or has appointed receivers and managers (*p*) of mortgaged property, which was situated outside its jurisdiction. If it is desired to proceed *in rem* as regards land outside the jurisdiction, the necessary steps must be taken in the country, in which the land is situated.

But it must be borne in mind, that persons having a charge on land situated in a foreign country always run the risk of being postponed to a subsequent incumbrancer, if the land is not effectually bound by complying with all the formalities prescribed by the laws of such country (*e.g.*, registration under the statutory provisions of such country).(*q*)

SUB-SECTION 3. *Determinable and Perpetual Debentures.*

Determinable Debentures.

Debentures may (as has been stated above) be determinable or perpetual. The principal moneys secured by determinable debentures (*r*) are made payable either on or not later than a specified date.(*s*) Where coupons are attached to such debentures, there are as many coupons as there are payments of interest to be made. Thus a debenture, which is to be paid off ten years hence with interest, payable half-yearly, will have twenty coupons attached to it.

Perpetual Debentures.

The principal moneys secured by perpetual debentures (or irredeemable debentures, as they are sometimes called) are usually made payable only in the event of an order being made or an effective resolution being passed for the winding up of the company or on default being made for a specified period in the

(*m*) *Statham* v. *London and Jagersfontein Mining Co.* See Palmer I., 6th Ed., 882.

(*n*) *Toller* v. *Carteret*, 2 Vern. 495; *Paget* v. *Ede*, 18 Eq. 118.

(*o*) *Barry* v. *Sao Pedro Gas Co.* Palmer, *Comp. Prec.*, 5th ed., 621.

(*p*) As to the appointment of receivers and managers of land abroad see post, Bk. II., ch. iii., sec. v. (1*a*).

(*q*) *Norton* v. *Florence Land Co.*, 7 Ch. Div. 332; see also *Mercantile Investment Co.* v. *River Plate Trust Co.* (No. 1) (1892), 2 Ch. 303.

(*r*) See Appendix, Forms 3, 4, and 5.

(*s*) Where no provision is made for paying off the principal secured by a debenture, it becomes payable on six months' notice being given to the company; *Hopkins* v. *Worcester and Birmingham Canal*, 6 Eq. 437.

payment of interest.(*t*) The company issuing the perpetual debentures has very frequently a power to redeem the debentures on giving six months' notice. Interest coupons are usually annexed to perpetual debentures, and a voucher entitling the bearer to fresh coupons; such voucher will be so printed that it can be detached immediately after the last coupon of the series. As will be seen in the form in the Appendix,(*u*) the principal distinction between a perpetual and a determinable debenture is, that the former binds the company to pay, when the principal moneys become due, without fixing any date, whereas the latter fixes a date, at which the company binds itself to pay, though on the happening of certain events the company may have to pay at some earlier date.

Perpetual debentures are, of course, very convenient to the company issuing them, because the principal sums advanced need not be repaid so long as the company remains a going concern and the interest is regularly paid. Persons, who wish to make permanent investments, will likewise find them very convenient and may frequently be willing to advance their money on perpetual debentures, whereas they might not care to invest their money in determinable debentures.

Perpetual Debentures Legalised.

Until recently there was some doubt whether the validity of such perpetual or irredeemable debentures could not be impugned on the ground that they (1) constituted an undue clog on the equity of redemption, or (2) infringed the rule against perpetuities; (*a*) but such doubt has for the future been set at rest by section 103 of the Companies Consolidation Act, 1908, which runs as follows:—

Sec. 103 of Comp. Cons. Act, 1908.

"A condition (*b*) contained in any debentures or in any deed "for securing any debentures, whether issued or executed before or "after the passing of this Act, shall not be invalid by reason only "that thereby the debentures are made irredeemable or redeemable "only on the happening of a contingency, however remote, or on

(*t*) Where it is intended to issue perpetual debentures, *i.e.*, to limit the right of repayment of the principal as stated in the text, "you must have something very definite and clear showing that that is a condition of the contract". *Hopkins* v. *Worcester and Birmingham Canal*, 6 Eq. 437, 446.

(*u*) Form 6.

(*a*) These questions were raised and are fully discussed in the first three editions of this treatise.

(*b*) "Condition" means provision (*Ashbury* v. *Watson* 30 Ch. Div. 376).

Bk. I., Ch. II., Sec. I. (4).

"the expiration of a period, however long, any rule of equity to the "contrary notwithstanding."

The effect of this section (so far as it affects perpetual debentures) is to preclude the raising of any objection to the validity of a perpetual debenture on the ground that such debenture is—

(*a*) altogether irredeemable, or

(*b*) not redeemable until after the expiration of a long period, or

(*c*) not redeemable until a specified remote contingency or one or more of several specified remote contingencies has or have happened,

and might therefore, but for the provisions of section 103, have been held to constitute (i) an infringement of the rule against perpetuities, or (ii) an undue clog in the company's equity of the redemption by reason of the remoteness of the contingency or the length of the period.

SUB-SECTION 4. *Debentures to Bearer and Debentures to Registered Holder.*

Debentures may (as has been stated above) be to bearer or to registered holder.

Debentures to Bearer.

The usual clauses contained in, and the conditions endorsed on debentures to bearer, will be found in the form in the Appendix. (*f*).

It is usual to insert in such debentures a clause stating, that such debenture shall be treated as negotiable. The principal object of this clause is to estop the company from setting up equities and to estop any person for the time being entitled to (but not having possession of) such an instrument from raising any claim in respect of such instrument as against a *bonâ fide* holder thereof for value without notice; any such person is so estopped, as each holder of such an instrument is taken to have adopted such clause.

Sometimes debentures to bearer contain a clause empowering the bearer to call for registration.

The coupons attached to debentures to bearer are made payable to bearer.

(*f*) Form 4.

Debenture to Bearer to Provide for Payment to Specified Person or Bearer, not merely to Bearer.

Debentures to bearer (whether determinable or perpetual) should provide for payment to the person advancing the money secured or to bearer, and not merely to bearer; for a debenture merely to bearer would, it is submitted, by reason of section 4 of the Statute of Frauds,(*g*) not create a valid charge on the land or any interest in land belonging to the company.(*h*) This section requires (*inter alia*) that an agreement for the sale of lands or any interest in or concerning such lands, or some memorandum or note thereof shall be in writing. Now, this has been explained to mean, that the essentials of such an agreement must be stated in writing, and the names of the contracting parties are (as has frequently been decided) amongst the essentials. No doubt, even where the contracting parties are not specified by name, this section will be satisfied if the parties are sufficiently described, so that their identity cannot fairly be disputed;(*i*) but "the bearer" is not, it is submitted, a sufficient description to satisfy these requirements. In some cases, however, a sufficient memorandum in writing of the charge, which debentures to bearer purport to create on the lands of the company, may be constituted by documents other than the debentures themselves.

Advantages and Disadvantages of Debentures to Bearer.

A debenture to bearer has (*inter alia*) the following advantages: It can be transferred free of charge and such transfer may be carried out by the mere delivery of the security to the transferee, it may be enforced by the bearer in his own name, and the delivery thereof to the company is (if it contains no provision inconsistent with its negotiability) a good discharge to the company. It has recently been held, that a debenture to bearer, which contains no provision inconsistent with negotiability, is negotiable by law merchant, and consequently passes by the mere delivery to a *bonâ fide* purchaser for value without notice, even though the person delivering the same has no title to it.(*j*)

On the other hand, a debenture to bearer, which contains no

(*g*) 29 Car. II., cap. 3.

(*h*) A debenture creating a floating charge on the property (including some land) belonging to a company has been held to be an interest in land within this section, *Driver* v. *Broad* (1893), 1 Q. B. 539, 744.

(*i*) *Potter* v. *Duffield*, 18 Eq. 4; *Thomas* v. *Brown*, 1 Q. B. D. 714; *Williams* v. *Jordan*, 6 Ch. D. 517; *Jarrett* v. *Hunter*, 34 Ch. D. 182. See also *Catling* v. *King*, 5 Ch. Div. 660.

(*j*) *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898), 2 Q. B. 658. As to the nature of negotiable instruments, see infra, Bk. I., ch. vi., sec. ii. (1).

Bk. I., Ch. II. Sec. I. (4).

provision inconsistent with its negotiability, has the serious disadvantage, which all negotiable instruments have, namely, in case such instrument is lost or stolen, a purchaser for value thereof without notice may gain priority over the person to whom such instrument belonged at the time of the loss or theft. The heavy stamp duties payable in respect of debentures to bearer form another objection to such debentures.

Debentures to Registered Holder.

A debenture to registered holder or registered debenture,(*k*) though it cannot be transferred as conveniently as a debenture to bearer, has the great advantage of not exposing the holder to the possibility of being deprived of the benefit of his security by the debenture being lost or stolen. Hence in many cases, where trustees would hesitate to invest their trust moneys in debentures to bearer, they are willing to advance them, if they are secured by debentures to registered holder.

Interest coupons are very frequently annexed to debentures to registered holder; for, though investors frequently object to expose themselves to the risks, which holders of securities to bearer incur, they do not object to the slight risk, which they incur by holding interest coupons payable to bearer.

Debenture to Registered Holder with Name of Obligee in blank.

A debenture to registered holder, to which the seal of the company has been duly affixed leaving the name of the obligee in blank, though void as a legal instrument,(*l*) constitutes the holder an equitable holder thereof, just as it would have constituted the holder a legal holder, if the name of the obligee had been inserted before the execution. The holder of a debenture with the name of the obligee in blank stands in the same position in equity as the legal holders of the other debentures of the same issue and is entitled to rank *pari passu* with the holders of debentures of the same issue.(*m*)

Where it is intended to issue debentures creating a charge on the land of a company, it should be borne in mind, that debentures with the name of the obligee in blank do not constitute a sufficient memorandum to satisfy section 4 of the Statute of Frauds;(*n*) for, in order to satisfy that section, the names of both

(*k*) See Appendix, Form 3, for the usual clauses of a debenture to registered holder.

(*l*) Sheppard's *Touchstone*, p. 52; *Weeks* v. *Maillardet*, 14 East 568; *Enthoven* v. *Hoyle*, 13 C. B. 373.

(*m*) In re *Queensland Land and Coal Co.*; *Davis* v. *Martin* (1894), 3 Ch. 181; in re *Strand Music Hall Co.*, 3 De G. J. & S. 147.

(*n*) 29 Car. II., cap. 3, sec. 4.

contracting parties (forming, as they do, essential portions of a contract) must be set out in writing. The memorandum required by this section may, however, sometimes be found in some document other than the debenture itself. Thus in a recent case(*o*) the lands and mines of a company were conveyed to trustees for the holders of a series of debentures. The debentures themselves created a charge on such lands and mines. On the 23rd of October, 1883, the board of directors of the company passed a resolution, whereby they resolved that the seal of the company should be affixed to debentures of the nominal value of £20,000 (forming part of the said series) and that such debentures should be handed to the Queensland National Bank by way of collateral security to secure the sum of £5000. Minutes of such resolution were entered in the books of the company and signed by the chairman of the board. The bank was on the 24th of October registered in the register kept by the company as the holder of debentures of the value of £20,000 and debentures dated the 24th of October with the name of the obligee in blank were handed to the bank. A further advance of £1000 was obtained by the company from the bank and secured in the same way by an issue of precisely similar debentures of the nominal value of £2000 to the bank. The company was dissolved in 1888 and in the following year an action was commenced by originating summons by a holder of some debentures of the above-mentioned series against the trustees of the trust deed asking for the execution of the trusts of such deed. When the bank claimed to participate *pari passu* with the other debenture-holders in the property comprised in the trust deed, it was contended that the debentures held by the bank were bad by reason of the Statute of Frauds. However, North, J., held, that the minutes of the resolutions and the debentures themselves bearing the dates of the days following such resolutions and the entries in the register of debentures were so closely connected in point of time as to show, that the various documents formed one transaction and that these documents together formed a sufficient memorandum within the Statute of Frauds. The learned judge further held, that the signature of the chairman followed by the

(*o*) Re *Queensland Land and Coal Co.; Davis* v. *Martin*, 71 L. T. R. 115. The part of the Judgment dealing with the Statute of Frauds is not reported in the Law Reports.

issue of debentures was a signature binding on the company. The result of this decision was, that the bank was allowed to participate *pari passu* with the other debenture-holders in the property realised under the trust deed, provided that it did not receive in respect of its debentures more than the moneys advanced and interest thereon.

Inspection of Registers of Debenture Holders.

The registers of debenture and debenture stock holders kept by a company are required by section 102 of the Companies Consolidation Act, 1908, to be kept open to the inspection of the holders of such securities and of the members of the company.

SECTION II. *Debenture Stock Certificates.*

How the Debenture Stock Debt is usually secured.

Debenture stock issued by a company incorporated under the Companies Consolidation Act, 1908, or the Companies Act, 1862,(*p*) is almost invariably secured by a trust deed, to which the debenture stock certificates refer. The chief provisions of the trust deed are dealt with in section iii. of this chapter; a form of such a deed containing the usual clauses will be found in the Appendix.(*q*)

Debenture Stock Certificate.

The debenture stockholder receives a certificate, which is under the common seal of the company and which certifies that the holder (mentioning the name) is the registered holder (or that the bearer of the certificate is the holder) of the portion of the debenture stock specified in the certificate and that the stock is constituted subject to the provisions of the trust deed.(*r*)

Debenture stock certificates to registered holder usually contain a footnote stating, that no transfer of the debenture stock or any portion thereof will be registered, unless accompanied by the certificate;(*s*) the chief object of such a note is to prevent a holder, who has raised money by depositing such certificate with a transfer in blank, from attempting to deal with or dispose of the debenture stock, so long as such certificate is in the hands of the depositee.(*t*)

The debenture stock is sometimes made redeemable at a fixed date (with power to the company to pay it off before), but

(*p*) The debenture stock issued under the provisions of the Companies Clauses Act, 1863, (26 & 27 Vic., cap. 118), is essentially different from the debenture stock here alluded to. See post, Bk. III., ch. ii.

(*q*) Form 13.

(*r*) See Appendix, Forms 10 and 11. See sec. 92 of the Companies Consolidation Act, 1908, which requires every company to have a debenture stock certificate ready for delivery within two months after the allotment or the registration of the transfer of the debenture stock.

(*s*) See Appendix, Form 11.

(*t*) See infra, Bk. I., ch. vi., sec. i.

more frequently perpetual, (that is to say, redeemable, not at a fixed date, but only on the happening of certain specified events).

Though the debenture stock certificates (whether to registered holder or to bearer) do not in general contain any direct contract by the company to pay to the registered holder or the bearer (as the case may be), the contract being between the company and the debenture stock holders' trustees, yet a Court of Equity will recognise the equitable rights of a debenture stock holder, and will at his instance enforce the obligations imposed on the company by the covering deed.(*u*)

Coupons are frequently attached to the debenture stock certificates.

It is believed (as will be seen in a later chapter of this treatise) (*v*) that debenture stock certificates to bearer, which are issued by a company incorporated under the Companies Consolidation Act, 1908, or the Companies Act, 1862, would now be held to be negotiable instruments by law merchant, but hitherto the Courts have never expressly decided to this effect. The provisions for attaching as far as possible the incidents of negotiability to a debenture stock certificate to bearer are generally contained in the covering deed, whereby the debenture stock is secured, and the bearer of such a certificate is bound by such provisions; but these provisions are sometimes endorsed on the certificates.

Where an official quotation of an issue of debenture stock on the London Stock Exchange is desired, the stock certificates should state *on their face* (i) the authority, under which the company is constituted, (ii) the nominal share capital of the company, (iii) the dates when the interest on the debenture stock is payable, and (iv) the authority, under which the issue is made (*i.e.*, the articles and resolutions); and *on the back* the conditions of issue, redemption and transfer (see Appendix 26 D to the Rules, infra, pp. 73-74).

SECTION III. *When Debentures or Debenture Stock are secured by a Trust Deed or Covering Deed.*

Usual Provisions of a Trust or Covering Deed.

Debentures issued by trading companies are very frequently, and debenture stock is almost invariably, secured by a trust or covering deed.(*w*) Though it is not necessary that debenture or

(*u*) *Empress Engineering Co.*, 16 Ch. Div. 125; *Gandy* v. *Gandy*, 30 Ch. Div. 57.

(*v*) Bk. I., ch. vi., sec. ii. (1).

(*w*) See Appendix, Forms 12 and 13, for the provisions usually contained in covering deeds.

Bk. I., Ch. II., Sec. III.

debenture stock holders should have their debts secured by a trust deed in addition to their debentures or debenture stock certificates, there are certain advantages attaching to a trust deed, which make it expedient in many cases and almost indispensable in others. Such trust deed usually contains (i) a conveyance of certain specific property of the company to the trustees of the debenture or debenture stock holders upon trust to permit the company to remain in possession of such property for the purpose of carrying on its business until the security becomes enforceable and then upon trust to enter upon and take possession of and in certain events to sell the property comprised in the trust deed and out of the proceeds to pay off the debentures or debenture stock and to hold the surplus (if any) upon trust for the company, and (ii) a floating charge on all the property of the company, which has not been conveyed to the trustees.

Where debentures are further secured by a trust deed, the debenture holders are entitled to the cumulative benefit of the security created by their debentures and by the trust deed. Hence, where each one of a series of debentures and the trust deed securing the same respectively prohibited the creation of any charge on the company's present or future property ranking in priority to or *pari passu* with the security created in favour of the debentures, but the debentures provided that nothing "herein" contained should prevent the creation of specific mortgages upon after acquired freehold or leasehold property, the Court held that the security created by the trust deed was not controlled by the proviso endorsed on the debentures and that the company was precluded by the trust deed from creating a mortgage in priority to the trust deed.(*w*)

Charge on the Chattels of the Company.

Until recently the debenture or debenture stock holders' trust deed did not usually contain a charge on the personal chattels comprised in the debentures because of the decisions,(*x*) which held, that the trust deeds containing a charge on the chattels had to be in the form prescribed by and to be registered under the Bills of Sale Act, 1882 (45 & 46 Vic., cap. 43). It has, however, recently been held, that a trust deed containing a charge on the assets of a trading company in favour of its debenture-holders is

(*w*) *Wilson* v. *Kelland* (1910), 2 Ch. 306.

(*x*) *Brocklehurst* v. *Railway Printing Co.*, W. N. (1884), p. 70; *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. Div. 43.

not a bill of sale within the Bills of Sale Acts, and therefore not liable to registration thereunder; hence such a charge on the chattels of a trading company will, if inserted in such trust deed, be good.(*y*)

Charge on Chattels of Industrial or Provident Society.

A trust deed securing debentures or debenture stock issued by a society registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vic., cap. 39), and purporting to create a charge on its chattels is a bill of sale within the Bills of Sale Acts and will therefore, so far as the charge on the chattels is concerned, be void, unless it is in the form prescribed by and is registered under the provisions of the Bills of Sale Acts.(*z*) In so far as such trust deed creates a charge on property other than the chattels, it will be good, even though it is void so far as it purports to create a charge on the chattels.(*a*)

Advantages of a Covering Deed.

One of the chief advantages of a trust deed is, that it vests in the trustees the legal estate in the property conveyed to the trustees, who hold the same for the benefit of all the debenture or debenture stock holders.

The legal estate will secure to the debenture or debenture stock holders a first charge on the property comprised in such securities as against all equitable incumbrancers, *viz.*: (1) as against the holders of equitable charges of an earlier date, of which the debenture or debenture stock holders had no notice at the date of the issue of their securities (for in such a case, the equities being equal, the legal estate prevails),(*b*) and (2) as against the holders of equitable charges of a later date, who might have gained priority over the debenture or debenture stock holders' charge by getting in the legal estate of the property comprised in their equitable charge, if the debenture or debenture stock holders' charge had not been secured by the legal estate.

Power of Trustees and Company to summon Meetings.

A trust deed usually also contains a clause empowering the trustees or the company to convene meetings of the holders and enabling a meeting convened to sanction any modification or compromise of the rights of the holders, on a resolution being passed to that effect by a majority consisting of not less

(*y*) *Richards* v. *Overseers of Kidderminster*, 44 W. R. 595; (1896) 2 Ch. 212 following in re *Standard Manufacturing Co.* (1891), 1 Ch. (C. A.) 627. The case is equally applicable to a debenture stockholder's trust deed, see infra, Bk. I., ch. v., sec. iii.

(*z*) *Great Northern Railway Co.* v. *Coal Co-operative Society* (1896), 1 Ch. 187; see infra, Bk. I., ch. v., sec. iii.

(*a*) Re *Burdett*, 20 Q. B. Div. 310.

(*b*) *Pilcher* v. *Rawlins*, 7 Ch. 259; *Bailey* v. *Barnes* (1894), 1 Ch. (C.A.) 25.

Bk. I., Ch. II., Sec. III.

than a specified proportion of the holders present at the meeting. In some few instances the provisions for the meetings of debenture-holders have been endorsed on the debentures instead of being inserted in the trust deed. It is obviously greatly to the advantage of the holders generally, that the majority of the holders should be able to control a minority or a single holder, who might but for such power wilfully prevent the other holders from doing what the majority of the holders regard as necessary for the preservation of the land or chattels comprised in their securities. Thus it may be necessary under certain circumstances in the interest of all the holders to obtain a further advance of money for the purposes of the company and to give to the person so advancing the money priority over all the debenture or debenture stock holders, and the majority are enabled by passing the above-mentioned resolution to give such priority over all the debentures or debenture stock against the will of a minority or an individual holder. The trust deed usually vests a discretion in the trustees in case of default of payment to enter at once or to give the company time, and provides that the trustees shall, on default being made, enter and sell, if requested to do so by a fixed proportion of the holders; power is usually conferred on the trustees to concur with the company in selling or exchanging part of the property charged by the trust deed and also to appoint a receiver; these different powers are highly desirable in the interest of all the debenture or debenture stock holders, and no danger is incurred, if such powers are conferred on trustees who act in the interest of all the holders, but such powers could not safely be conferred on the separate holders, as they might, if capriciously exercised, seriously injure the interests of the other debenture or debenture stock holders.

When Covering Deed is usual.

When ships are to be charged in favour of debenture or debenture stock holders, trust deeds are sometimes required; the ships will in such a case be mortgaged to the trustees by mortgages in the statutory form and duly registered under the Merchant Shipping Act, 1894,(*c*) and the trustees will execute a separate declaration of trust.

Again a trust deed is usually thought expedient when

(*c*) 57 & 58 Vic., cap. 60, sec. 31.

patents are charged in favour of debenture or debenture stock holders.(*d*)

When it is desired to give to the holders of debentures payable to bearer an option of changing their debentures for registered debentures, a trust deed is usual.

When real property abroad is charged in favour of debenture or debenture stock holders, a trust deed is almost invariably required. Of course, it may be, that, if land situated abroad is charged otherwise than in accordance with the formalities prescribed by the *lex situs*, the holders' charge may be postponed to a purchaser or mortgagee, who has complied with the *lex situs*. But, whether such formalities have been complied with or not, land situated abroad, but belonging to a company registered in England, can in most cases be effectually charged in favour of debenture or debenture stock holders or trustees on their behalf, because the Court of Chancery has jurisdiction *in personam* and would enforce against the company equities in regard to foreign land, even though such Court has no jurisdiction over the land.(*e*)

Debenture Directors.

It may be here mentioned that the debenture or debenture stock holders of a company have frequently a right reserved to them to have a specified number of nominees on the directorate. Provision for such nomination is usually made by a clause inserted in the articles of association. It is, however, conceived that, as the articles of association are always liable to be modified by a resolution of the shareholders of the company, it is advisable to provide (not only by the articles of association, but also) by the trust deed, that the debenture or debenture stock holders' trustees shall have the right to nominate such number of directors, so long as any moneys remain owing under the trust deed (*f*)

Selection of the Trustees of the Covering Deed.

A few words should here be said as to the selection of the trustees of the trust deed; this is a subject which usually receives far less attention than it deserves; for, if the proper persons are appointed, they can render very valuable services to the persons

(*d*) A trust deed containing an assignment of a patent must be registered in the Register of Patents. See 46 & 47 Vic., cap. 57, sec. 87.

(*e*) *Penn* v. *Lord Baltimore*, Wh. & T. L. C., 6th Ed., I., p. 1047; 7th Ed. I., p. 755. See infra, Bk. II., ch. iv., sec. ii.

(*f*) For such a provision in the articles, see Appendix, Form 15; for the provision in the trust deed, see Form 12, clause 23.

Bk. I., Ch. II., Sec. III.

on whose behalf they act: thus, when a company, which has issued debentures or debenture stock, proposes a scheme of reconstruction, the trustees can be of great assistance to their debenture or debenture stock holders by examining such scheme and, if necessary, convening a meeting of the holders and calling their attention to such portions of the scheme as are detrimental to the interests of the holders.

The trustees should, if they are to perform their functions satisfactorily, be men, who have wide experience in business matters of this nature and who have no interests in any way conflicting with those of the debenture or debenture stock holders, on whose behalf they act. Some companies, such as the Law Debenture Corporation, Limited, undertake to act as trustees.

Where the articles of association provide, that the office of a director shall be vacated, if he accepts any other "office or place of profit under the company," he will be incapable of acting as director, if he becomes a trustee of a covering deed securing debentures or debenture stock of the company and receives a salary for so acting.(*o*)

As it is essential, that the trustees of the trust deed should perform their duties to the satisfaction of the debenture or debenture stock holders, on whose behalf they act, it is desirable to empower such holders to remove any one or more of their trustees, whenever they are dissatisfied with him or them; (*p*) such holders could, of course, not remove their trustee, in the absence of an express power authorising them to do so.

Company may be one of several Trustees.

By virtue of the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vic., cap. 20) a body corporate may hold real or personal property in joint tenancy with an individual, and a limited company may accordingly (if authorised by its memorandum of association) be one of several original trustees of a trust deed securing debentures or debenture stock, or may be appointed in the place of one of the original trustees.(*q*)

Public Trustee not to be appointed Trustee of Covering Deed.

Having regard to section 5 of the Public Trustee Act, 1906 (6 Edw. VII., cap. 55) and to rule 7 of the Public Trustee Rules,

(*o*) *Astley* v. *New Tivoli, Limited* (1899), 1 Ch. 151. As to the trustees' remuneration, see infra, Bk. II., ch. vii., p. 394.

(*p*) See Appendix, Form 12.

(*q*) Re *Thompson's Settlement Trusts* (1905), 1 Ch. 229.

1907, made pursuant to this Act, which provides (*inter alia*) that the public trustee is not to accept the trusts of any instrument made solely by way of security for money, the public trustee should not be appointed trustee of a trust deed securing debentures or debenture stock.

Validity of Covering Deed securing Perpetual Debentures not to be impugned on ground of rules of equity.

As we have seen above (see pp. 35-36), section 103 of the Act provides that: "A condition contained in any . . . deed for "securing any debentures . . . shall not be invalid by reason only "that thereby the debentures are made irredeemable or redeemable "only on the happening of a contingency, however remote, or on "the expiration of a period, however long, any rule of equity to the "contrary notwithstanding".

The expression "condition," which occurs in the above section 103 and also in sections 81 (4) and 85 (5) of this Act, appears to mean stipulation or provision.(*r*)

The expression "debenture" includes debenture stock.(*s*)

The effect of section 103 (so far as it affects trust deeds) is to preclude the raising of any objection to the validity of a trust deed on the ground that the debentures or debenture stock thereby secured are or is:—

(*a*) altogether irredeemable, or

(*b*) not redeemable until after the expiration of a long period or

(*c*) not redeemable until a specified remote contingency or one or more of several specified remote contingencies has or have happened

and that the trust deed therefore constitutes

(i) an infringement of the rule against perpetuities, or

(ii) an undue clog on the company's equity of redemption by reason of the length of the period or the remoteness of the contingency or contingencies.

Provisions to be inserted in Covering Deed where Stock Exchange quotation is desired.

Where it is desired to obtain a quotation on the London Stock Exchange of an issue of debentures or debenture stock secured by a covering deed, such deed should contain the provisions specified in Appendix 26 (*c*) to the Rules of the Stock Exchange.(*t*)

Inspection of Register of Debenture Holders.

Where, as is generally the case, the trust deed securing an issue of debentures or debenture stock imposes on the company

(*r*) *Ashbury* v. *Watson*, 30 Ch. Div. 376.

(*s*) See sec. 285 of the Comp. Cons. Act, 1908.

(*t*) As to this see infra, Bk. I., ch. iii., p. 73.

Bk. I., Ch. II., Sec. IV.

the duty of keeping a register of the holders of such securities, such register must, by virtue of section 102 of the Companies Consolidation Act, 1908, be kept open to the inspection of the holders of such securities and the members of the company (subject nevertheless to the power of the company to close the same for a period, not exceeding 30 days in the year, specified in the company's articles).

Debenture Holder entitled to copy of Trust Deed.

Every holder of the debentures or debenture stock of a company secured by a trust deed is, by virtue of section 102 (2) of the Companies Consolidation Act, 1908, entitled to a copy of such trust deed, on payment of a small fee.

Default in allowing inspection of the register of debentures or debenture stock or in supplying the copy of the trust deed is punishable by a fine.

Solicitor's Charges for Covering Deed.

The scale charge in Part I. of Schedule I. to the General Order under the Solicitor's Remuneration Act, 1881,(*u*) does not apply to a trust deed containing a conveyance of property by a company to trustees for securing debentures or debenture stock intended to be (but never in fact) issued by such company; for the issue of debentures or debenture stock is a condition precedent to the creation of a security and, until they are issued, the the trust deed has no effect other than the passing of the legal estate. Prior to the issue of the debentures or debenture stock the mortgage cannot be a "completed mortgage". Such a trust deed may, perhaps, be called a "mortgage," still it falls within clause 2 (*c*) of the general order as being business "not completed".(*v*)

SECTION IV. *Stamp Duties.*

Stamp on Debentures to Registered Holder.

The Stamp Act, 1891,(*w*) imposes the following stamp duties on a debenture to registered holder (see Schedule under the headings of Marketable Security (1) and Mortgage Bond Debenture, etc.):—

(1) For every debenture to registered holder (*x*) being the only or principal or primary security for the payment or repayment of money:—

(*u*) 44 & 45 Vic., cap. 44.

(*v*) In re *Bircham* (1895), 2 Ch. (C. A.) 786; 11 Times L. R. 547.

(*w*) 54 & 55 Vic., cap. 39. This Act applies to debentures and debenture stock certificates, whether issued by an ordinary trading company or by a local authority (see infra, Bk. III., ch. iv.), and also to debentures issued under the Mortgage Debenture Acts (see infra, Bk. III., ch. v.), or by a public (including a railway) company (see infra, Bk. III., ch. i. and ch. iii.), and to debenture stock certificates issued by a public (including a railway) company (see infra, Bk. III., ch. ii. and ch. iii.).

(*x*) Sec. 76 of the Finance Act (1909-10), 1910, does not apply to registered debentures.

	£	s.	d.
Not exceeding £10	0	0	3
Exceeding £10 and not exceeding £25	0	0	8
„ £25 „ £50	0	1	3
„ £50 „ £100	0	2	6
„ £100 „ £150	0	3	9
„ £150 £200	0	5	0
„ £200 „ £250	0	6	3
„ £250 „ £300	0	7	6
„ £300			
For every £100 and also for any fractional part of £100 of the amount secured	0	2	6

(2) For every debenture to registered holder being a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped.

For every £100, and also for any fractional part of £100 of the amount secured	0	0	6

Stamp on Debenture to be Redeemed at a Premium

A debenture redeemable at a premium *in any event* must be stamped with a stamp covering the sum advanced and the premium (*e.g.*, if redeemable at £105, it should bear a 3s. 9d. stamp); but the stamp on a debenture, which is *only* redeemable at a premium *on the happening of a contingency*, need not cover the premium.(*x*)

Distinction between a Debenture and a Promissory Note for purposes of Stamp.

For the purposes of stamp duty a distinction is drawn between a debenture, which is liable to the duties hereinbefore mentioned, and a promissory note, which is only liable to duty of 1s. per £100 (see Stamp Act, 1891, under the head of Bill of Exchange) and a debenture will not be sufficiently stamped, if it is stamped as a promissory note.(*y*)

A debenture may be stamped after execution, but a promissory note may not.(*z*)

Stamp on Debentures to Bearer.

The Stamp Act, 1891 (as amended by sec. 76 of the Finance (1909-10) Act, 1910), imposes the following stamp duties on debentures to bearer which are marketable securities within the

(*x*) *Rowell & Son, Limited* v. *Commissioners of Inland Revenue*, 13 Times L. R. 324; (1897) 2 Q. B. 194. *Knights Deep, Limited* v. *Commissioners of Inland Revenue* (1900), 1 Q. B. (C. A.) 217.

(*y*) *British India Steam Navigation Co.* v. *The Commissioners of Inland Revenue*, 7 Q. B. D. 165. This decision, which was founded on the terms of the Stamp Act, 1870, applies equally to the Stamp Act, 1891. See also *Speyer Brothers* v. *Commissioners of Inland Revenue* (1907), 1 K. B. (C. A.) 246; (1908), A. C. 92.

(*z*) 7 Q. B. D., p. 173.

Pt. I., Ch. II., Sec. IV.

meaning of the Act (*g*) (see Schedule under the head of Marketable Security (3)), that is to say, 2s. for every £10 and also for any fractional part of £10 of the money thereby secured. But such debentures to bearer, if, "given in substitution for a *like* "security duly stamped in conformity with the law in force at the "time when it became subject to duty," are now only liable to a stamp of 1s. for every £20 (and also for any fractional part of £20) of the money thereby secured (see Schedule to the Stamp Act, 1891, under the head of Marketable Security (4)). However, debentures to bearer issued by a *Colonial* company in lieu of existing debentures to bearer issued by an *English* company are not given in substitution for a "*like*" security and are therefore subject to the full stamp duty of 2s. for every £10 secured.(*h*)

Stamp on Re-issued Debentures.

If a company pays off and re-issues debentures, such re-issued debentures would, it appears, be liable to a fresh *ad valorem* stamp. (*i*)

Coupons.

Coupons are not chargeable with any stamp duty, whether they are issued with the security or subsequently in a separate sheet. (*j*)

Stamp on Debenture-holders' Covering Deed.

Where debentures are further secured by a covering deed, the debentures themselves are stamped with the same *ad valorem* stamp as when they are not so secured.

It has been the practice at Somerset House for many years to treat a covering deed securing an issue of debentures as not being liable to an *ad valorem* duty of 6d. per £100 as a "collateral, auxiliary or substituted security or by way of further assurance" (*k*) for the repayment of the money secured and to pass such a covering deed on adjudication with a 10 shilling stamp, if the de-

(*g*) That is to say: capable of being sold in any stock market in the United Kingdom (sec. 122). It is not essential that the security should be quoted. *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue*, 11 Times L. R. 585; (1895) 2 Q. B. (C. A.) 598. A reduced stamp duty is by reason of sec. 13 of the Finance Act, 1911 (1 & 2 Geo. V. cap. 48), payable in respect of such debentures to bearer, which must be paid off within a term *not exceeding three* years (that is to say): 3 *pence* for every £10 of the money secured, if they are to be paid off within *one* year, or 6 *pence* for every £10, if they are to be paid off within a term exceeding *one* year and not exceeding *three* years.

(*h*) *Mount Lyell Mining and Railway Co.* v. *Commissioners of Inland Revenue* (1904) 1 K. B. 757; (1905) 1 K. B. (C. A.) 161.

(*i*) Re *W. Tasker & Sons Ld.*; *Hoare* v. *Same Co.* (1905) 1 Ch. 283; (1905) 2 Ch. (C. A.) 587, 601. See sec. 104 (4) of the Companies Consolidation Act, 1908.

(*j*) Sec. 40 of the Finance Act, 1894 (57 & 58 Vic., cap. 30).

(*k*) Sec. 54 & 55 Vic., cap. 39 schedule under the head of "Mortgage Bond, Debenture, Covenant, etc." (2).

bentures were produced duly stamped. The Court has never been called upon to decide whether such a covering deed was or was not a "collateral, auxiliary or substituted security or by way of further assurance," but it has decided (*l*) that a conveyance to the trustees of a covering deed executed in pursuance of the provisions of the covering deed was liable to stamp duty at the rate of 6d. per £100 as being an "auxiliary security or by way of further assurance". The point has, however, ceased to be of any practical importance since the passing of the Revenue Act, 1903 (3 Edw. VII., cap. 46), which provides (sec. 7) that "the whole amount of "duty payable under or by reference to paragraph (2) of the heading 'Mortgage, Bond, Debenture, Covenant and Warrant of Attorney' in the first schedule to the Stamp Act, 1891, on any "instrument being a collateral or auxiliary or substituted security "or by way of further assurance shall not exceed ten shillings". This section is not retrospective and is consequently inapplicable to documents executed before 1st September, 1903. (*m*)

Sec. 7 of Rev. Act, 1903.

Stamp on Conveyance of Property to Trustees in Exchange for Property Specifically Mortgaged by the Trust Deed.

The provision of section 7 of the Revenue Act, 1903, (3 Edw. VII., cap. 46) was rendered necessary by a recent case, (*n*) in which the Court held that, where the trustees of a covering deed had power to release any part of the property comprised in such deed and to take other property in exchange for the property so released, the deed conveying the property in exchange to the trustees was liable to a stamp duty of 6d. per £100 on the entire issue secured by the covering deed. The effect of this decision was that, if an issue of debentures or debenture stock of £500,000 was secured by a covering deed and it was desired to exchange a part of the property (say, of the value of £100) comprised in the covering deed, the conveyance of the property taken in exchange was liable to a stamp duty of 6d. per £100 on £500,000 (*i.e.* £125). This anomaly has now been done away with by section 7 of the Revenue Act, 1903, under the provisions of which the stamp duty payable in such a case, as is mentioned above, cannot exceed ten shillings.

A debenture secured by separate mortgages on ships and

(*l*) *British Oil and Cake Mills Ld.* v. *Commissioners of Inland Revenue* (1903) 1 K. B. (C. A.) 689.

(*m*) *Lord Suffield* v. *Commissioners of Inland Revenue* (1908), 1 K.B. 865.

(*n*) *Gartside (Brookside) Brewery Led.* v. *Commissioners of Inland Revenue* 82 L. T. R. 686; 16 Times L. R. 378.

containing the provisions hereinafter specified was held to be liable to stamp duty as a "marketable security":

Stamp on Debenture Charged on Ships.

The debenture (forming part of a series for securing an aggregate amount not exceeding £20,000) contained (i) a covenant by the company with the registered holder to pay £1000 and interest, and (ii) a clause purporting to charge with the payment of the £1000 and interest three steamships, and (iii) a proviso authorising the company to use the steamships in the usual course of their business until default was made in the payment of the principal or interest secured by the debenture. The conditions endorsed on the debentures provided (i) that the series of debentures should rank *pari passu* as a first charge on the steamships, (ii) that the holders of the debentures of the said series should (in addition to the charge thereby created) be entitled *pari passu* to the benefit of a deed of covenants dated 22nd Dec., 1909, and three several mortgages of even date therewith on the said three steamships (which three mortgages were in the form contained in Part I. of the First Schedule to the Merchant Shipping Act, 1894).

The deed of covenants recited the three mortgages (which were made in favour of trustees for the debenture holders) and contained covenants by the company with the trustees with regard to the payment of the principal and interest secured by the debentures. Hamilton, J., and the Court of Appeal held that the debentures did not create any charge beyond that, which had already been created by the mortgages and deed of covenants, and that, if they transferred any interest, they did so contingently, in an event which had not happened, and not as their substantial object, and that such a debenture was therefore not an "instrument for the disposition of an interest in a ship" within the meaning of clause 2 of the "General Exemptions from all stamp duties" contained in the First Schedule to the Stamp Act, 1891, and consequently that the debentures were liable to stamp duty under the head of "Marketable Security" clause 1 contained in the First Schedule to the Act.(*o*)

Each Holder should see that the Debenture is properly stamped.

Each debenture-holder should see, that his debenture is properly stamped, as he is liable to a penalty specified in section 15 of the Stamp Act, 1891, if his debenture is not so stamped.

(*o*) *Deddington Steamship Co.* v. *Commissioners of Inland Revenue* (1911) 1 K. B. 1078; (1911) 2 K. B. (C. A.) 1001.

The trustees of the debenture or debenture stock holders' covering deed are liable to penalties, if their covering deed is not properly stamped.

Stamps on Registered Debenture Stock holders' Securities.

Debenture stock certificates to registered holder, which are also secured by a covering deed, need not be stamped. Where the debenture stock is secured by a covering deed only, the covering deed must be stamped with an *ad valorem* stamp. A covering deed securing an issue of 3½ per cent. debenture stock of a company and enabling the company to redeem out of the moneys so secured a previous issue of 4 per cent. debenture stock is not an "additional" or "substituted" security within the meaning of this Act, but is liable to the full duty of 2s. 6d. per £100.(*p*) Where, on the other hand, the debenture stock is not secured by a covering deed, the debenture stock certificates to registered holder would appear to be chargeable under the head of "bond, covenant or instrument, being the only or principal or primary security for any annuity," *viz.*, with a 2s. 6d. stamp for every £5 of the annuity.(*q*)

Stamp on Covering Deed where only part of the Debenture Stock secured is issued.

It is sometimes desirable only to issue a part of an issue of debenture stock secured by a covering deed and to issue the remaining parts thereof from time to time, if and when it is deemed expedient or necessary to do so. In such cases the company are naturally unwilling to stamp the trust deed *ad valorem* for the whole of the amount of the issue, but prefer to limit the stamp to the part of the issue actually issued.

If the covering deed is made a security for a fixed amount (say, for an issue of debenture stock of the value of £100,000), duty will have to be paid on that sum; for section 88 of the Stamp Act, 1891 (54 & 55 Vic., cap. 39), provides as follows:—

Sec. 88 of Stamp Act, 1891.

"(1) A security for the payment or repayment of money to "be lent, advanced, or paid, or which may become due upon an "account current, either with or without money previously due, is "to be charged, where the total amount secured or to be ultimately "recoverable is in any way limited, with the same duty as a "security for the amount so limited.

"(2) Where such total amount is unlimited, the security is to "be available for such an amount only as the *ad valorem* duty

(*p*) *City of London Brewery Co.* v. *Commissioners of Inland Revenue* (1899) 1 Q. B. (C. A.) 121; *Mount Lyell Mining & Ry. Co.* v. *Commissioners of Inland Revenue* (1905) 1 K. B. (C. A.) 161.

(*q*) See Stamp Act, 1891, Schedule.

"impressed thereon extends to cover, but where any advance or "loan is made in excess of the amount covered by that duty the "security shall for the purpose of stamp duty be deemed to be "a new and separate instrument, bearing date on the day on "which the advance or loan is made."

If it is desired to issue only part of an issue of debenture stock secured by a covering deed and only to stamp such deed to the extent of the amount issued, this object may be attained by making the covering deed a security for a sum equivalent to the face value of stock issued and also for any further sums (if any) from time to time advanced by the holders of such securities before a specified day and by providing that the stock securing such further sums shall rank *pari passu* with the remainder of the issue. In cases, in which the stamp on the covering deed only covers part of the issue thereby secured, an additional stamp should be affixed to such deed before any further part of such issue is issued.

Stamps payable in Respect of Debenture Stock to Bearer.

It is the practice at Somerset House to require debenture stock certificates to bearer to be stamped with a stamp equal to three times the amount of the *ad valorem* stamp duty, which would be chargeable on a deed transferring the debenture stock specified in the certificate, if the consideration for the transfer were the nominal value of such debenture stock.(*h*)

Where debenture stock certificates to bearer have been stamped with an *ad valorem* stamp, the covering deed, by which such debenture stock is secured, is only required to be stamped with a 10s. stamp.

It is not easy to understand, why a debenture stock certificate to bearer (which, as we have seen, only differs in form from a debenture to bearer), should be subject to a stamp of 30s. per £100, whereas a debenture to bearer is only charged with £1 per £100. It would, however, appear, that the joint effect of section 5 (1) of the Finance Act, 1899, and section 108 of the Stamp Act, 1891,

(*h*) See 54 & 55 Vic., cap. 39 sec. 108 and Schedule, sub tit. "Share Warrant and Stock Certificate," and 62 & 63 Vic., cap. 9, sec. 5. A reduced stamp duty is by reason of sec. 13 of the Finance Act, 1911 (1 & 2 Geo. V., cap. 48) payable in respect of debenture stock certificates to bearer, which are marketable securities, if the principal moneys payable in respect of such stock must be paid off within a term *not exceeding three* years (that is to say): 3 *pence* for every £10 of the moneys secured, if they are to be paid off within *one* year, or 6 *pence* for every £10 of such moneys, if they are to be paid off within a term *exceeding one year* and not exceeding *three* years.

is to impose a stamp duty of 30s. per £100 on debenture stock certificates to bearer.

Section 5 (1) of the Finance Act, 1899 (62 & 63 Vic., cap. 9), provides as follows: "The stamp duty charged on stock cer- "tificates to bearer as defined by the Stamp Act, 1891, shall "extend to any instrument to bearer issued by or on behalf of "any company or body of persons formed or established in the "United Kingdom and having a like effect as such a stock cer- "tificate to bearer".

The definition of the expression "stock certificate to bearer" in the Stamp Act, 1891 (54 & 55 Vic., cap. 39), is contained in section 108, which provides that the expression shall "include "every stock certificate to bearer issued . . . under the provisions "of the Local Loans Act, 1875, or any other Act authorising the "creation of debenture stock, county stock, corporation stock, "municipal stock or funded debt by whatever name known".

Stamp on Statement of Amount of Proposed Issue to be delivered to Commissioners.

A company intending to issue debentures or debenture stock is required by section 8 of the Finance Act, 1899 (62 & 63 Vic., cap. 8), to send to the Commissioners of Inland Revenue a statement of the amount of the proposed issue and such statement must be stamped with an *ad valorem* stamp of 2s. 6d. per £100, unless and except so far as the Commissioners are satisfied by the production of the debentures or the trust deed or both (according to the circumstances of the case) duly stamped, that the proper stamp duty has been paid. A duly stamped statement must, by virtue of section 8, be sent to the Commissioners, not only when an issue of debentures or debenture stock is originally made, but also when one or more issue or issues is or are cancelled and replaced by one or more issue or issues conferring rights, which differ from the rights conferred by the cancelled securities.(*i*)

Stamp on Transfer on Sale of Debentures or Debenture Stock.

A transfer on sale of debentures or debenture stock to registered holder, which are marketable securities,(*j*) is chargeable with the following duties:—

(*i*) *Att. Gen.* v. *Regents Canal & Dock Co.* (1904) 1 K. B. (C. A.) 263; *London & India Docks Co.* v. *Att. Gen.* (1909) A. C. 7.

(*j*) The term "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom (Stamp Act, 1891, sec. 122) that is to say: a Stock Exchange security. See *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue* (1895) 2 Q. B. (C. A.) 598; *Speyer Brothers* v. *Commissioners of Inland Revenue* (1907) 1 K. B. 246, 257. See Schedule to Stamp Act, 1891, under head of "conveyance or Transfer". Section 73 of the Finance (1909-10) Act, 1910, does not affect transfers of marketable securities.

	£	s.	d.
Where the amount or value of the consideration for the sale does not exceed £5	0	0	6
Exceeds £5 and does not exceed £10	0	1	0
„ £10 „ £15	0	1	6
„ £15 „ £20	0	2	0
„ £20 „ £25	0	2	6
„ £25 „ £50	0	5	0
„ £50 „ £75	0	7	6
„ £75 „ £100	0	10	0
„ £100 „ £125	0	12	6
„ £125 „ £150	0	15	0
„ £150 „ £175	0	17	6
„ £175 „ £200	1	0	0
„ £200 „ £225	1	2	6
„ £225 „ £250	1	5	0
„ £250 „ £275	1	7	6
„ £275 „ £300	1	10	0
„ £300			
For every £50 and also for any fractional part of £50, of such amount or value	0	5	0

Most debentures and debenture stock certificates are marketable securities and they may be marketable securities without being quoted; thus in a case of *Texas Land Company* v. *Commissioners* (*j*) debentures, though not readily saleable, were held to be capable, according to the use and practice of stock markets, of being bought in any stock market in the United Kingdom and therefore liable to a transfer duty of 10s. per £100.

Transfers of registered debentures or debenture stock, which are not marketable securities, are liable to an *ad valorem* duty of 6d. per £100 (see Stamp Act, 1891, Schedule under the head of Mortgage, Bonds, Debentures, etc. (4)).

Stamp on Transfer by way of Security.

A transfer by way of security of debentures or debenture stock to registered holder is chargeable with the same duty as any other mortgage (see Stamp Act, 1891, Schedule under the head of Mortgage, Bonds, Debentures, etc.).

A charge under hand given by way of security for a loan on the occasion of a deposit of debentures or debenture stock certificates is chargeable as an agreement with a 6d. stamp (see Stamp Act, 1891, sec. 23, and Schedule under the head of Agreement or Contract).

A voluntary transfer of debentures or debenture stock *inter*

(*j*) 26 Sc. L. R. 51. See also *Brown, Shipley & Co.* v. *Commissioners of Inland Revenue* (1895) 2 Q. B. (C.A.) 598.

vivos is by virtue of section 74 (1) of the Finance Act, 1910, chargeable with the like stamp duty as if it were a conveyance or transfer on sale with the substitution in each case of the value of the property transferred for the amount or value of the consideration for the sale. Such a voluntary transfer will, however, not be liable to stamp duty under section 74, if the transfer is made (i) for the purpose of securing the repayment of an advance or loan, or (ii) for effectuating the appointment of a new trustee or the retirement of a trustee.

Stamp on Voluntary Transfer.

The stamp duties hereinbefore mentioned were until 1899 charged on debentures, debenture stock and other marketable securities issued by a foreign corporation only in the following cases (that is to say) (1) if such securities are made or issued in the United Kingdom, (2) if such securities are offered for subscription and given or delivered to a subscriber in the United Kingdom, or (3) if, being payable in the United Kingdom, such securities are assigned, transferred or in any manner negotiated in the United Kingdom (see section 82 of the Stamp Act, 1891). These being the only cases, in which such securities issued by foreign corporations were liable to duties, the Court held in a recent case,(*k*) that no stamp duty was payable in respect of new debentures, which were issued in America by an American company under a scheme of reconstruction and were subsequently sent to their agents in England and delivered by such agents to the original holders of an old series of debentures, which had been issued by an English company and in lieu of which the new debentures were issued by the American company under the above-mentioned scheme.

Stamp Duties when Payable on Marketable Securities issued by Foreign Corporation.

On the other hand, in another case where bonds,(*l*) which were secured by a trust deed and were expressed not to be valid, unless authenticated by the certificate of the trustee of the trust deed, were issued by a foreign company abroad and delivered to the trustee abroad for the bond holders and were subsequently certified by the trustee in England and delivered by him to the persons entitled to the bonds, the Court held that such bonds were marketable securities, "made" and "issued" in England and therefore liable under section 82 of the Stamp Act, 1891, to stamp duty.

(*k*) *Chicago Railway Terminal Co.* v. *The Commissioners of Inland Revenue*, 45 W. R. 138, 242.

(*l*) *Revelstoke* v. *Commissioners of Inland Revenue* (1898) A. C. 565.

Bk. I., Ch. II., Sec. IV.

Stamps on Marketable Securities to Bearer made by Foreign Company and negotiated in the United Kingdom.

The above provisions are now supplemented by section 4 of the Finance Act, 1899,(*m*) which provides that every marketable security made or issued by a foreign or colonial corporation or company, being a security transferable by delivery, which is transferred or negotiated in the United Kingdom after the 1st of August, 1899, and which is not under the law existing at the passing of the Finance Act, 1899 (20th June, 1899), chargeable with stamp duty as a marketable security transferable by delivery, and every stock certificate to bearer, by means of which any stock of any foreign company or corporation is after the 1st of August, 1899, transferred or negotiated in the United Kingdom, shall be liable to a stamp duty of 1s. for every £10 of the nominal value of the security and also for every fractional part of £10.

Stamp on Scrip Certificates.

Scrip certificates to registered holder issued in respect of debentures or debenture stock are liable to be stamped with a 1d. stamp.(*n*)

Scrip certificates to bearer issued in respect of such securities are likewise liable to be stamped with a 1d. stamp, unless section 5 of the Finance Act, 1899 (62 & 63 Vic., cap. 9), is applicable to them. This section provides, that "the stamp "duty charged on stock certificates to bearer as defined by "the Stamp Act, 1891, shall extend to any instrument to "bearer issued by or on behalf of any company or body of "persons formed or established in the United Kingdom and "having a like effect as such a stock certificate to bearer". It is, however, submitted that a scrip certificate, which provides that its bearer will be entitled to debentures or debenture stock of a specified value in the event of certain payments being made,(*o*) cannot be said to have a like effect as a certificate, which provides that its bearer is entitled to a certain amount of stock. If section 5 was applicable to scrip certificates to bearer, the duty would be 10s. per £100.

62 & 63 Vic., cap. 9, sec. 5.

Receipts endorsed on Scrip Certificates not to be stamped.

Receipts endorsed on duly stamped scrip certificates are exempted from stamp duty.(*p*) An instrument, which was

(*m*) 63 & 64 Vic., cap. 9.

(*n*) See Stamp Act, 1891 (54 & 55 Vic., cap. 39) Schedule I., Title "Scrip Certificate".

(*o*) See infra, Appendix, Form 31.

(*p*) See *London and Westminster Bank* v. *Commissioners of Inland Revenue*, 16 Times L. R. 106; (1900) 1 Q. B. (C. A.) 166. See Stamp Act, 1891, Schedule I., Title "Receipt," Exemption 11.

endorsed on a covering deed and signed by the trustees of the covering deed and which acknowledged that the debenture stock secured by the covering deed had been redeemed, was held to be exempted from stamp duty.(*q*)

Receipt attached to Letter of Allotment not to be stamped.

A receipt, which is attached to a duly stamped letter of allotment of debentures or debenture stock, would likewise appear to be exempted from stamp duty as being a "receipt "indorsed on or otherwise written upon or contained in any instru- "ment liable to stamp duty, and duly stamped, acknowledging the "receipt of the consideration money therein expressed or the "receipt of any principal money, interest or annuity thereby "secured or therein mentioned". As such exemption appears to extend, not merely to *one* receipt for the entire consideration, but to *several* receipts for the various instalments of the consideration, a considerable saving of expense may be effected, where the allottees are numerous, by attaching to each letter of allotment the receipts for *all* the instalments of the consideration specified in such letter, instead of following the ordinary practice of attaching only *one* receipt to such letter.(*r*)

Stamp on Letters of Allotment and Renunciation.

Letters of allotment and letters of renunciation are respectively liable to a stamp duty of 6d., where the nominal amount, which is allotted or to which the letter of renunciation relates, is not less than £5. In cases, in which such nominal amount is less than £5, the stamp duty is 1d.(*s*)

Stamp on Contract Note.

Where debentures or debenture stock of the value of £5 or upwards are bought or sold through a broker or agent or any person, who by way of business deals or holds himself out as dealing as a principal in stocks or marketable securities, section 78 of the Finance Act, 1910, prescribes under a penalty that a contract note shall be executed. Section 77 of the same Act requires such contract note to be stamped with an *ad valorem* stamp ranging from 6d. to £1 varying with the value of the securities bought.

(*q*) *Firth & Sons, Ld.* v. *Commissioners of Inland Revenue* (1904), 2 K. B. 205.

(*r*) See *London and Westminster Bank* v. *Commrs. of Inl. Rev.*, 16 Times L. R. 106; (1900) 1 Q. B. (C. A.) 166. See Stamp Act, 1891, Schedule I., Title "Receipt," Exemption 11.

(*s*) See Finance Act, 1899 (62 & 63 Vic., cap. 9), sec. 9.

CHAPTER III.

THE PROSPECTUS.

Bk. I., Ch. III.

Prospectus.

WHERE it is intended to raise money by an issue of debentures or debenture stock of a public company, the usual course is to issue a prospectus inviting the public to apply at par or at a specified premium or discount (as the case may be) or to tender for such securities. Such prospectus (*a*) is brought to the notice of the public by circulating printed copies thereof together with a form of a letter of application (*b*) and attached thereto a banker's receipt for the deposit to be paid on the application for such securities (*c*) and generally also by advertising such prospectus in the newspapers.

Statements in Prospectus.

Apart from the provision in sections 80, 81 and 83 of the Companies Consolidation Act, 1908, the draftsman of a prospectus has merely to bear in mind, that the prospectus must not conceal any material fact or contain any misrepresentation or ambiguous statement as to any material fact.(*d*) Such a misrepresentation may, as will be seen hereafter, enable a person, who has applied for debentures or debenture stock relying on such misrepresentation and to whom debentures or debenture stock have been allotted, to rescind his contract,(*e*) or else may render the company (*f*) or its directors (*g*) liable in an action for deceit or else may make its directors liable in an action for breach of warranty (*h*) or liable under the provisions of section 84 of the Companies Consolidation Act, 1908.(*i*)

(*a*) For the Form of Prospectus and Tender, see Appendix, Forms 16, 19 and 20.

(*b*) For the Form of letter of application, see Appendix, Form 17. (2).

(*c*) For Form of Banker's receipt, see Appendix, Form 18. (1).

(*d*) As to what is "a fact," see infra, Bk. II., ch. i., sec. i. (3).

(*e*) See infra, Bk. II., ch. i., sec. i.

(*f*) See infra, Bk. II., ch. i., sec. ii.

(*g*) See infra, Bk. II., ch. vi., sec. i.

(*h*) See infra, Bk. II., ch. vi., sec. i.

(*i*) See infra, Bk. II., ch. vi., sec. i.

An ambiguous statement, on the other hand, may entitle a person, who applied for debentures or debenture stock misunderstanding the true meaning of the words, but putting a reasonable construction on them, to rescind his contract.(*j*)

Nature of information required by Comp. Cons. Act, 1908, to be given in Prospectus.

A prospectus (which expression is by section 285 of the Act defined as meaning "any prospectus, notice, circular, advertisement, "or other invitation, offering to the public (*k*) for subscription or "purchase any shares or debentures or debenture stock of a com- "pany") which is issued by or on behalf of a company or by or on behalf of any person, who is or has been engaged or interested in its formation, is required, not merely (as hitherto) not to conceal or misrepresent facts, but must contain the specific information mentioned in section 81 of the Companies Consolidation Act, 1908.

This section provides as follows:—

Sec. 81 of the Comp. Cons. Act, 1908. Specific requirements as to particulars of Prospectus.

"81.—(1) Every prospectus issued by or on behalf of a com- "pany, or by or on behalf of any person who is or has been "engaged or interested in the formation of the company, must "state:—

"(*a*) the contents of the memorandum, with the names, de- "scriptions, and addresses of the signatories, and the "number of shares subscribed for by them respec- "tively; and the number of founders or management "or deferred shares, if any, and the nature and "extent of the interest of the holders in the property "and profits of the company; and

"(*b*) the number of shares, if any, fixed by the articles as the "qualification of a director, and any provision in the "articles as to the remuneration of the directors; and

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

(*j*) See infra, Bk. II., ch. i., sec. i.

(*k*) The expression "the public," which occurs in several sections of the Act, is explained in *Burrows* v. *Matabele Gold Reefs Co.* (1901) 2 ch. (C. A.) 23, 27; *Sherwell* v. *Combined Incandescent Mantles Ld.* (1907) W. N. 110; the circumstances of each case will have to be considered, for the purpose of deciding whether a particular invitation was or was not issued to "the public".

(*l*) Before a person is named as a director or proposed director in a prospectus issued within one year from the date, at which the company is entitled to commence business, he should by himself or his agent in writing (1) sign and file with the Registrar a consent to act as director and (2) either sign the memorandum of association for a number of shares not less than his qualification shares (if any) or sign and file with the Registrar a contract to take from the company and pay for his qualification shares (if any). See 72 of the Companies Consolidation Act, 1908.

"(*d*) the minimum subscription on which the directors may "proceed to allotment,(*m*) and the amount payable on "application and allotment on each share; and in the "case of a second or subsequent offer of shares, the "amount offered for subscription on each previous "allotment made within the two preceding years, and "the amount actually allotted, and the amount, if any, "paid on the shares so allotted; and

"(*e*) the number and amount of shares and debentures which "within the two preceding years have been issued, or "agreed to be issued, as fully or partly paid up other- "wise than in cash, and in the latter case the extent "to which they are so paid up, and in either case "the consideration for which those shares or debentures "have been issued or are proposed or intended to be "issued; and

"(*f*) the names and addresses of the vendors of any property "purchased or acquired by the company, or proposed "so to be purchased or acquired, which is to be paid "for wholly or partly out of the proceeds of the issue "offered for subscription by the prospectus or the pur- "chase or acquisition of which has not been completed "at the date of issue of the prospectus, and the amount "payable in cash, shares, or debentures, to the vendor, "and where there is more than one separate vendor, "or the company is a sub-purchaser,(*n*) the amount so "payable to each vendor: Provided that where the "vendors or any of them are a firm the members of "the firm shall not be treated as separate vendors; and

(*m*) The minimum subscription of shares is the amount (if any) fixed by the company's memorandum or articles of association (see sec. 85 of the Act). It will be noted, that the prospectus is required to *expressly* state the minimum subscription; a statement, from which the minimum subscription may be *implied* or *inferred*, will not satisfy this provision (*Roussell* v. *Burnham* (1909) 1 Ch. 127, 133). But a prospectus stating that "the minimum subscription is fixed by the articles at 10 per cent. of the shares offered" has been held to satisfy this provision (Re *West Yorkshire Darracq Agency Ld.* (1908) W. N. 236).

(*n*) A company is not a "sub-purchaser" within the meaning of this clause, unless it has to pay the purchase price (in cash, debentures, debenture stock or shares) to some one other than its own vendor. This clause does *not* require the prospectus to state the amount of any consideration paid or to be paid *by any one other than the company itself* or to disclose the amount of the purchase money, however small, paid by the vendor upon his acquiring the property, however recent such acquisition may be (*Brookes* v. *Hansen* (1906) 2 Ch. 129, 136).

"(*g*) the amount (if any) paid or payable as purchase money "in cash, shares, or debentures, for any such property "as aforesaid, specifying the amount (if any) payable "for goodwill; and

"(*h*) the amount (if any) paid within the two preceding years, "or payable, as commission for subscribing or agreeing "to subscribe, or procuring or agreeing to procure sub- "scriptions, for any shares in, or debentures of, the com- "pany, or the rate of any such commission: (*o*) Pro- "vided that it shall not be necessary to state the com- "mission payable to sub-underwriters; and

"(*i*) the amount or estimated amount of preliminary ex- "penses;(*p*) and

"(*j*) the amount paid within the two preceding years or in- "tended to be paid to any promoter,(*q*) and the con- "sideration for any such payment; and

"(*k*) the dates of and parties to every material contract,(*r*) 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 (*s*) "carried on or intended to be carried on by the company, "or to any contract entered into more than two years "before the date of issue of the prospectus; and

"(*l*) the names and addresses of the auditors (if any) of the "company; and

(*o*) The prospectus, though only inviting subscriptions for debentures or debenture stock, is by clause (*h*) required to state the commissions paid for placing or underwriting shares as well as debentures and debenture stock.

(*p*) "Preliminary expenses" mean expenses incurred prior to the registration of the company (*Meilhado* v. *Porto Alegre &c. Ry. Co.* L. R. 9 C. P. 503).

(*q*) A "promoter" is a person, who sets in motion the machinery, by which this Act enables him to create an incorporated company (*Whaley Bridge Printing Co.* v. *Green* 5 Q. B. D. 109, 111; *Twycross* v. *Grant* L. R. 2 C. P. Div. 469, 541; *Erlanger* v. *New Sombrero Co.* 3 A. C. 1218, 1268; *Emma Silver Mining Co.* v. *Lewis* 4 C. P. D. 396, 407).

(*r*) "Material contract" means a contract, which assists a person in determining whether he will take the shares, debentures or debenture stock offered (*Sullivan* v. *Mitcalfe* 5 C. P. Div. 461, 465; *Nash* v. *Calthorpe* (1905) 2 Ch. (C.A.) (237) or which would or might deter or tend to deter an ordinarily prudent investor from applying for the shares, debentures or debenture stock (*Smith* v. *Chadwick* 9 A. C. 187; *Broome* v. *Speak* (1903) 1 Ch. (C. A.) 586, 604, 627, 629). "Contract" includes "executed contract" (*Broome* v. *Speak* W. N. (1902) 96) and probably includes verbal contract (*Capel* v. *Sims Co.* 38 L. T. R. 807).

(*s*) As to the meaning of "The ordinary course of business," see *Tennant* v. *Howatson* 13 A. C. 489, 493-4; *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604; Re *Hubbard & Co. Ld.* 79 L. T. R. 665.

"(*m*) full particulars of the nature and extent of the interest "(if any) of every director in the promotion of, or in "the property proposed to be acquired by, the company, "or, where the interest of such a director consists in "being a partner in a firm, the nature and extent of "the interest of the firm, with a statement of all sums "paid or agreed to be paid to him or to the firm in "cash or shares or otherwise by any person either to "induce him to become, or to qualify him as, a director "or, otherwise for services rendered by him or by the "firm in connexion with the promotion or formation of "the company; and

"(*n*) where the company is a company having shares of more "than one class, the right of voting at meetings of the "company conferred by the several classes of shares "respectively.

"(2) For the purposes of this section every person shall be "deemed to be a vendor who has entered into any contract, ab- "solute or conditional, for the sale or purchase, or for any option "of purchase, of any property to be acquired by the company, in "any case where—

"(*a*) the purchase money is not fully paid at the date of "issue of the prospectus; or

"(*b*) the purchase money is to be paid or satisfied wholly or "in part out of the proceeds of the issue offered for "subscription by the prospectus; or

"(*c*) the contract depends for its validity or fulfilment on the "result of that issue.

"(3) Where any of the property to be acquired by the com- "pany is to be taken on lease, this section shall apply as if the "expression 'vendor' included the lessor, and the expression "'purchase money' included the consideration for the lease, and "the expression 'sub-purchaser' included a sub-lessee.

"(4) Any condition requiring or binding any applicant for "shares or debentures to waive compliance with any requirement "of this section, or purporting to affect him with notice of any "contract, document, or matter not specifically referred to in the "prospectus, shall be void.

"(5) Where any such prospectus as is mentioned in this "section is published as a newspaper advertisement, it shall not

"be necessary in the advertisement to specify the contents of "the memorandum or the signatories thereto, and the number of "shares subscribed for by them.

"(6) In the event of non-compliance with any of the require- "ments of this section, a director or other person responsible for "the prospectus shall not incur any liability by reason of the "non-compliance, if he proves that—

"(*a*) as regards any matter not disclosed, he was not cognisant "thereof; or

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

"Provided that in the event of non-compliance with the "requirements contained in paragraph (*m*) of sub-section (1) of this "section no director or other person shall incur any liability in "respect of the non-compliance unless it be proved that he had "knowledge of the matters not disclosed.

"(7) This section shall not apply to a circular or notice "inviting existing members or debenture holders of a company to "subscribe either for shares or for debentures of the company, "whether with or without the right to renounce in favour of other "persons, but subject as aforesaid, this section shall apply to any "prospectus whether issued on or with reference to the formation "of a company or subsequently.

"(8) The requirements of this section as to the memorandum "and the qualification, remuneration, and interest of directors, "the names, descriptions, and addresses of directors or proposed "directors, and the amount or estimated amount of preliminary "expenses, shall not apply in the case of a prospectus issued "more than one year after the date at which the company is "entitled to commence business.

"(9) Nothing in this section shall limit or diminish any lia- "bility which any person may incur under the general law or this "Act apart from this section."

Prospectuses which are affected by sec. 81 of Comp. Cons. Act, 1908.

As this section only purports to apply to a "prospectus "issued by or on behalf of a company or by or on behalf of any "person who is or has been engaged or interested in the forma- "tion of the company," it would not, it is submitted, be applicable to a prospectus issued by any person or persons or body of persons (such as an issuing house or group of financiers), who have not in any way been engaged or interested in the formation

of the company and who have subscribed for the whole or part of an issue of debentures or debenture stock.

Consequences of non-compliance with sec. 81 of Comp. Cons. Act, 1908.

It will be observed, that, while section 81 enumerates in detail the various matters, which must be disclosed by the prospectus, there is no express provision in the Act stating, what is to happen, if a prospectus is issued, which omits to disclose one or other of such matters. It will, however, be seen, for reasons which will be stated more fully hereafter,(*r*) that the consequences of making default in complying with the provisions of section 81 will be, that the directors and other persons responsible for the prospectus, and probably also the company itself, will be guilty of a misdemeanour at common law, for which they will be liable to be indicted,(*s*) and that they will be liable in damages to any persons, who have applied for debentures or debenture stock on the faith of the prospectus and who have suffered damages by reason of the default in disclosing the necessary particulars. (*t*)

Non-compliance with section 81 does not entitle a person, who has applied for an allotment of debentures or debenture stock in response to a prospectus, which did *not* comply with the requirements of that section, to *rescind* his contract after such securities have been allotted to him.(*u*)

Prospectus to be dated and filed with Registrar.

Section 80 of the Companies Consolidation Act, 1908, makes the following provision for the (i) dating of every prospectus, and (ii) the filing of a copy of every prospectus with the Registrar of Joint Stock Companies.

Sec. 80 of Comp. Cons. Act, 1908. Filing of Prospectus.

80.—"(1) Every prospectus issued by or on behalf of a "company or in relation to any intended company shall be dated, "and that date shall, unless the contrary be proved, be taken as "the date of publication of the prospectus.

"(2) A copy of every such prospectus, signed by every person "who is named therein as a director or proposed director of the

(*r*) See infra, Bk. II., ch. i.,sec. iii., and Bk. II., ch. vi., sec. i. (4).

(*s*) *Rex* v. *Wright*, 1 Burr. 543; *Rex* v. *Harris*, 4 T. R. 202; *Reg.* v. *Whitchurch*, 7 Q. B. Div. 534, 536; *Reg.* v. *Tyler* (1891) 2 Q. B. (C. A.) 588, 592, 597.

(*t*) *Chamberlaine* v. *Chester, etc., Railway Co.*, 1 Ex. 870; *Pickering* v. *James*, L. R., 8 C. P. 489; *Britton* v. *Great Western Cotton Co.* L. R., 7 Ex. 130; *Ross* v. *Rugge Price*, 1 Ex. Div. 269; *Dormont* v. *Furness Railway Co.*, 11 Q. B. Div. 496; *Groves* v. *Wimborne* (1898) 2 Q. B. (C. A.) 402, 415; *Brookes* v. *Hansen* (1906) 2 Ch. 129; Re *South of England Natural Gas and Petroleum Co.* (1911) 1 Ch. 573.

(*u*) *Re Wimbledon Olympia Ld.* (1910) 1 Ch. 630; followed In re *South of England Natural Gas & Petroleum Co.* (1911) 1 Ch. 573.

"company, or by his agent authorised in writing, shall be filed "for registration with the registrar of companies on or before "the date of its publication, and no such prospectus shall be issued "until a copy thereof has been so filed for registration.

"(3) The registrar shall not register any prospectus unless "it is dated, and the copy thereof signed, in manner required by "this section.

"(4) Every prospectus shall state on the face of it that a "copy has been filed for registration as required by this section.

"(5) If a prospectus is issued without a copy thereof being "so filed, the company, and every person who is knowingly a party "to the issue of the prospectus, shall be liable to a fine not "exceeding five pounds for every day from the date of the issue "of the prospectus until a copy thereof is so filed."

It is not quite clear, whether all the persons named in the prospectus as directors or proposed directors or their agents must sign the *same copy* or whether the terms of section 80 (2) will be complied with, if such persons sign *different copies*, all of which are subsequently filed. It is, however, submitted, that it is not necessary that such signatures should all be affixed to the same copy of the prospectus.

Consequences of non-compliance with sec. 80 of Comp. Cons. Act, 1908.

If a prospectus is not duly dated and signed, the result will be that the Registrar will refuse to register it.

This Act does not expressly state, whose duty it is to file a copy of each prospectus before its publication, but inflicts a fine on any person, who issues the prospectus without filing a copy thereof.

Issue of Prospectus not affected by sec. 82 and 87 of Comp. Cons. Act, 1908, or sec. 8 of Finance Act, 1899.

Though, as will be seen hereafter, (*v*) certain companies are by sections 82 and 87 of the Companies Consolidation Act, 1908, and by section 8 of the Finance Act, 1899, required to comply with certain prescribed formalities, before they issue their debentures or debenture stock, these provisions do not in any way prevent the company from issuing a prospectus inviting subscriptions for its debentures or debenture stock.

Application for and Allotment of Debentures offered for Subscription.

The first step to be taken by a person, who receives a prospectus offering an issue or part of an issue of debentures or debenture stock for subscription and who wishes to apply for part of the securities so offered, is to fill up the blanks in the

(*v*) See infra, Bk. I., ch. iv., sec. iii. (3).

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letter of application, (*w*) which is generally enclosed in the prospectus, and to insert therein the sum paid by him as deposit and the number of debentures or the amount of debenture stock, which he is applying for, and to sign the letter of application. He will then send this letter (without detaching the banker's receipt, (*x*) which is attached to the letter) together with the cheque for the deposit to the company's bankers, who will detach the sheet and return it duly signed.

The board of directors of the company will consider the applications and will pass resolutions allotting debentures or debenture stock to such subscribers as they think fit and thereupon letters of allotment (*y*) will be sent out to such subscribers.

A banker's receipt (*z*) for the sum payable on allotment is generally attached to each letter of allotment. This letter of allotment with the receipt attached to it should be presented to the company's bank together with a cheque for the amount payable on allotment and this receipt will thereupon be signed by the bank and returned to the subscriber.

The prospectus frequently gives an option to the allottees to pay in full immediately on allotment (instead of paying by instalments) subject to discount.

Scrip.

The prospectus frequently provides for the issue of scrip certificates (*a*) to the persons, to whom debentures or debenture stock have been allotted, on the payment of the instalment due on the allotment, such scrip certificates to be exchanged for definite debentures or debenture stock certificates (as the case may be) on the balance payable in respect of such securities being received by the company. If, however, the company issuing such debentures or debenture stock is ordered to be wound up before the last instalment payable on such securities has been paid, the holder of the scrip may decline to pay any further instalment.(*b*)

Within two months after the allotment of debentures or deben-

(*w*) For Form of a letter of application, see Appendix, Form 17.

(*x*) For Form of a Banker's receipt see Appendix, Form 18.

(*y*) For Form of letter of allotment, see Appendix, Form 26. For stamp duty on letter of allotment, see supra, Bk., I., ch. ii., sec. iv.

(*z*) This receipt is exempt from duty, if letter of allotment is duly stamped. See supra, Bk. I., ch. ii., sec. iv.

(*a*) The scrip certificates to bearer are negotiable instruments by law merchant. *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194. For Form see Appendix, Form 31. For the stamp duty payable on scrip certificates, see supra, Bk. I., ch. ii., sec. iv.

(*b*) In re *Ellerby's Claim*, 20 W. R. 855

ture stock, the company must pursuant to section 92 of the Companies Consolidation Act, 1908, complete the debentures allotted or a certificate for the debenture stock allotted and have the same ready for delivery.

Delivery of Debentures or stock certificates after allotment.

Sometimes instead of applying in the ordinary course by a letter of application for the allotment(*c*) of debentures or debenture stock, a person or a company agrees to underwrite a part of or the whole of an issue of debentures or debenture stock (that is to say, agrees, in the event of the public not taking up a part or the whole of the issue, to take for an agreed commission an allotment of such part or the whole of the issue, as the case may be).(*d*) A company may, without infringing any rule of law, pay a reasonable commission for underwriting such securities.

Underwriting.

Section 89 of the Companies Consolidation Act, 1908, applies to the underwriting of shares, but does not affect the underwriting of debentures or debenture stock.

Where commission is paid for underwriting or placing the debentures or debenture stock of a company, the particulars required by section 93 to be sent to the Registrar for registration should include the amount or rate of each commission (section 93 (4)) and the total amount so paid or allowed or so much thereof, as shall not have been written off, should be stated in every balance sheet of the company until the whole amount thereof shall have been written off.

The following are some of the chief points, which a prospectus inviting the public to subscribe for debentures or debenture stock should elucidate:—

Chief points to be disclosed by Prospectus.

(1) Why does the company require to raise money? (*e.g.*, to extend the business or to pay off existing mortgages, so as to reduce the rate of interest payable on the moneys advanced to the company).

(2) How does the company propose to secure the debentures or debenture stock?

(3) What are the assets of the company and how much of the capital remains uncalled?

(4) Has the business of the company been a profitable one? What have the profits thereof been during the last few years?

(*c*) For Form of letter of application, see Appendix, Form 17.

(*d*) In re *Hansard Publishing Union, Limited*, 8 Times L. R. 280. In re *Licensed Victuallers Mutual Trading Association*, 42 Ch. Div. 1, 6.

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Effect of Allotment.

After an intending subscriber for debentures or debenture stock has sent out his letter of application together with the deposit specified in the prospectus and received his allotment letter, he will be treated in equity as if the securities had been actually granted, provided always that the prospectus states sufficiently clearly on what property the debentures or debenture stock applied for are to be charged.(*e*)

Prospectus not to be looked at to interpret Debenture.

A prospectus inviting subscriptions for debentures issued by a company cannot, as a rule, be looked at for the purpose of ascertaining the correct meaning of the terms of such debentures; for the debentures form the contract and the whole contract between the company and the debenture-holder.(*f*)

Specific performance of contract to take up or to issue Debentures.

Where a person has sent his application to a company for a specified amount of debentures or debenture stock and the company has allotted such debentures or debenture stock to him, the contract (being "a contract with the company to take up and pay for" such debentures or debenture stock) may, by virtue of section 105 of the Companies Consolidation Act, 1908, now on the *application of the company* be enforced by an order for specific performance. But for this provision, the proper remedy of the company in the event of default in carrying out a contract to take up debentures or debenture stock (like any other contract to advance money) would be, not specific performance, but damages for breach of contract.(*g*)

It will, however, be observed that section 105 does not expressly enact that a contract *by a company to issue* debentures or debenture stock may be enforced by specific performance; it would therefore appear to be doubtful whether section 105 confers on the Court a power to order a company to specifically perform such a contract. If section 105 is held not to confer such a power on the Court, the question, whether a company will or will not be ordered to specifically perform a contract to issue such

(*e*) Re *Strand Music Hall*, 3 De G. J. & S. 147; re *New Durham Salt Co.* 2 Meg. C. R. 360; 35 Sol. Jo. 24; *Mercantile Investment Co.* v. *River Plate Trust* (No. 1) (1892) 2 Ch. 303. Re *Hansard Publishing Union*, 8 Times L. R. 280.

(*f*) Re *Tewkesbury Gas Co. Tysoe* v. *Same Co.* (1911) 2 Ch. 279, 283. See also in re *Chicago and North Western Granaries Co., Morrison* v. *Same Co.* (1898) 1 Ch. 263, where the Court held, that a statement, that debentures were redeemable "within a specified period" by periodical drawings, meant that the debentures were liable to redemption, but did not impose any obligation on the company to redeem before the expiration of the period.

(*g*) *South African Territories Ld.* v. *Wallington* (1898) A. C. 309.

securities, will be regulated by the law as it stood before the provision of section 105 was enacted, *viz.*, the Court will not order specific performance of a contract to borrow and will therefore not order a company to specifically perform a contract to issue *determinable* debentures or debenture stock and the company will in such a case merely be liable in such damages (if any) as have been suffered by reason of the non-performance of the contract.(*h*) Where, however, a person has *actually advanced* money to a company on the terms that it is to be secured by the issue of debentures or debenture stock, the Court can under its general powers (*i.e.*, independently of the powers conferred by section 105) specifically enforce such a contract.(*i*)

Perpetual debentures or debenture stock, being in the nature of perpetual annuities, would appear to stand upon a different footing, and a contract to issue such securities may consequently be liable (independently of the provisions of section 105) to be ordered to be specifically enforced.

Official quotation on the London Stock Exchange.

Prospectuses inviting the public to subscribe for important issues of debentures or debenture stock generally contain a clause stating, that it is intended to apply for an official quotation on the London Stock Exchange. Such an official quotation, it is needless to say, enhances the market value of the securities quoted, as they thereby become more readily saleable. In order to obtain an official quotation, the requirements specified in the Rules of the London Stock Exchange must be complied with; it is proposed to call the reader's attention to these Rules, so far as they affect the quotation of debentures or debenture stock.

Rules of London Stock Exchange.

Rule 139 runs as follows:—

"The Committee may order the quotation in the Official List of any security of sufficient magnitude and importance."

Applications for quotation must be made to the Secretary of the Share and Loan Department and must comply with such conditions and requirements as may be ordered from time to time by the Committee (*Vide* Appendix 26 to the Rules).

Three days' public notice must be given of every application.

A broker, a member of the Stock Exchange, must be authorised

(*h*) *South African Territories Ld.* v. *Wallington* (1897) 1 Q. B. (C. A.) 692, 696; (1898) A. C. 309; *Rogers* v. *Challis*, 27 Beav. 175; *Western Waggon & Property Co.* v. *West* (1892) 1 Ch. 271, 275. As to the measure of damages in such a case, see re *Bahamas (Inagua) Sisal Plantation Ld.* v. *Griffin*, 14 Times L. R. 139.

(*i*) *Ashton* v. *Carrigan*, 13 Eq. 76; *Hermann* v. *Hodges*, 16 Eq. 18.

to give to the Committee full information as to the security and to furnish them with all they may require.

The conditions prescribed by the London Stock Exchange Rules with reference to debentures or debenture stock (all of which conditions are contained in Appendix 26 to these Rules) are as follows:—

Conditions precedent to application for Official Quotation.

(A) Conditions Precedent to an Application for Official Quotation.

1. That the prospectus—
   - Shall have been publicly advertised;
   - Agrees substantially with the Act of Parliament or articles of association;
   - Provides for the issue of not less than one-half of the authorised capital and for the payment of 10 per cent. upon the amount subscribed;
   - If offering debentures or debenture stock, states fully the terms of redemption.
   - In cases where a company has sold an issue of debenture or debenture stock which is subsequently offered for public subscription either by the company or any subsequent purchaser, states the authority for the issue and all conditions of sale.
2. That two-thirds of the amount proposed to be issued of any class of shares or securities, whether such issue be the whole or a part of the authorised amount, shall have been applied for and unconditionally allotted to the public, shares or securities granted in lieu of money payments not being considered to form a part of such public allotment.
3. That the articles of association, and the trust deed where such is required, contain the provisions specified hereafter.
4. That the certificate or bond is in the form approved.

Necessary clauses in Articles of Association where Official Quotation is desired.

(B) Articles of Association.

Articles of association should contain the following provisions:—

1. That none of the funds of the company shall be employed in the purchase of, or in loans upon the security of its own shares;
2. That directors must hold a share qualification;
3. That the borrowing powers of the board are limited;
4. That the non-forfeiture of dividends is secured;
5. That the common form of transfer shall be used;
6. That all share and stock certificates shall be issued under the common seal of the company, and shall bear the signatures of one or more directors and the secretary;
7. That fully-paid shares shall be free from all lien;
8. That the interest of a director in any contract shall be disclosed before execution, and that such director shall not vote in respect thereof;
9. That the directors shall have power at any time and from time to time to appoint any other qualified person as a director either to fill a casual vacancy or as an addition to the Board, but so that the total number of directors

shall not at any time exceed the maximum number fixed; but that any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election;

10. That a printed copy of the report, accompanied by the balance sheet and statement of accounts, shall, at least seven days previous to the general meeting, be delivered or sent by post to the registered address of every member, and that two copies of each of these documents shall at the same time be forwarded to the Secretary of the Share and Loan Department, The Stock Exchange, London;
11. That the charge for a new share certificate issued to replace one that has been worn out, lost, or destroyed shall not exceed one shilling.

(C) TRUST DEEDS.

Necessary clauses in Trust Deed, where Official Quotation is desired.

Trust deeds should contain the following provisions:—

1. Where provision is made that the security shall be repayable at a premium, either at a fixed date or at any time upon notice having been given, the trust deed must further provide that, should the company go into voluntary liquidation for the purpose of amalgamation or reconstruction, the security shall not be payable at a lower price.
2. The following clause should be inserted in all deeds:—

> "The statutory power of appointing new trustees hereof shall be "vested in the company, but a trustee so appointed must in the "first place be approved of by a resolution of the debenture (or "debenture stock) holders passed in the manner specified in the "schedule hereto. A corporation or company may be "appointed a trustee of these presents."

3. In the clause regulating the convening of meetings of the debenture (or debenture stock) holders, the following words should be inserted, "and the "trustee or trustees shall do so upon a requisition in writing signed by "holders of at least one-tenth of the nominal amount of debentures (or debenture stock) for the time being outstanding".
4. The clause defining an "extraordinary resolution" must provide that the "expression 'extraordinary resolution' means a resolution passed at a "meeting of the debenture (or debenture stock) holders duly convened "and held at which a clear majority in value of the whole of the debenture (or debenture stock) holders is present in person or by proxy and "carried by a majority consisting of not less than three-fourths of the persons voting thereat upon a show of hands, and if a poll is demanded then "by a majority consisting of not less than three-fourths in value of the "votes given on such poll".
5. Should debentures or debenture stock be entitled "first mortgage," provision must be made for the creation of a specific first mortgage in favour of the debenture or debenture stock holders.

(D) SHARE AND STOCK CERTIFICATES.

Matter to be stated in Debentures and Debenture Stock Certificates where Official Quotation is desired.

Debentures and debenture stock certificates should, in addition to legal requirements, state on their face the authority under which the company is constituted, the nominal capital of the company, the dates when the interest on the debentures or debenture stock is payable, and the authority under which the issue is made (*i.e.*,

articles of association and resolutions); and on their back the conditions of issue, redemption, and transfer.

(F) New Companies.

Documents to be submitted by new Company before application for Official Quotation.

Before the application form can be issued for signature there must be supplied:—

A copy of the prospectus.

Two copies of the articles of association.

In the case of debentures or debenture stock the trust deed (where possible before execution).

(H) After the application form has been signed there must be supplied in the case of:—

Debentures and Debenture Stock.

Documents to be submitted after application for Official Quotation has been signed.

The certificate of incorporation, or Act of Parliament, and the certificate that the company is entitled to commence business.

A certified printed copy of the mortgage deed or other similar document, and the official certificate of the registration of the mortgage or charge.

Certified copies of the articles of association, resolutions, or other authority for the present issue.

Two certified copies of the prospectus.

The original letters of application.

The allotment book containing a list of applicants, the amount applied for by each, and the result of each application, with a summary of the whole, signed by the chairman and secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a certified list of present stockholders will also be required.

A copy of the allotment letter, and the date when posted.

A specimen of the debentures or debenture stock certificate, and of the scrip where scrip is issued; certificates of debenture stock allotted the vendors in lieu of money payments being enfaced "issued to vendors".

A copy of the last published report and accounts.

The bankers' pass book, accompanied by a certificate, on a special form, from the company's bankers, stating the amount of deposits received by them and the amount of debentures or debenture stock on which such deposits (*i.e.*, application money only, being £ per debenture) were paid.

A statutory declaration by the chairman and secretary, stating:—

1. That the prospectus complies with the provisions of the Companies Acts, and that all documents required by the Companies Acts have been duly filed with the registrar of joint stock companies, and the dates of filing.
2. The amount of stock applied for by the public.
3. The amount unconditionally allotted to the public (Nos. to).
4. The amount, *viz.*, £ per cent., paid thereon in cash.
5. The amount allotted for a consideration other than cash (Nos. to).
6. The total amount of deposits, and that such deposits are absolutely free from any lien.
7. That the debentures or debenture stock certificates are ready for delivery, and that there is no impediment to the settlement of the account.
8. That a trust deed has been executed and completed, if such be the case.

9. The effect of such trust deed, and the nature of the charge created thereby in favour of the debenture-holders.
10. The total number of allottees.
11. The largest amount of debentures or debenture stock (*a*) applied for by, and (*b*) allotted to any one applicant.

A statutory declaration by the chairman and secretary stating:—

1. The total amount of the authorised capital of the company, and how constituted.
2. The number of shares allotted unconditionally to the public (Nos. to) and the amount paid on each share in cash.
3. The number of shares taken by concessionaires, owners of property, contractors or other parties not included in the public allotment (being Nos. to).
4. That the share certificates have been delivered; that the purchase of the properties has been completed and the purchase money paid.

CHAPTER IV.

WHEN A COMPANY MAY ISSUE AND WHEN IT WILL BE BOUND BY THE ISSUE OF DEBENTURES OR DEBENTURE STOCK.

Creation of Power to issue Debentures or Debenture Stock.

IT has for many years been the practice to include "borrowing" among the objects specified in the memorandum of association of companies registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, and, as this practice is almost universally followed, it is perhaps not advisable to depart from it.(*a*) But the authority to borrow is not (as a rule) properly an "object" of a company at all and need not consequently be enumerated among the objects specified in its memorandum of association.(*b*) If the objects specified in a company's memorandum comprise borrowing, its contemporaneous articles of association may be referred to for the purpose of explaining the manner, in which the company is by its memorandum authorised to borrow;(*c*) but "borrowing" involves the obligation at some time to repay and therefore can only authorise the issue of *determinable* debentures or debenture stock, and not *perpetual* debentures or debenture stock, which latter securities are in the nature of perpetual annuities. The authority to issue perpetual debentures or debenture stock must be comprised in the "objects" specified in the company's memorandum, as the creation of such securities is not subsidiary to the general objects of a commercial or trading undertaking. If the company's memorandum does not authorise the issue of perpetual debentures or debenture stock, its articles of association cannot be referred to for the purpose of showing that the company has the power to issue such securities; for the purposes, for which the articles may be read to explain or supplement

(*a*) For a form of clause in a memorandum of association giving authority to borrow see Appendix, Form 32.

(*b*) Re *Southern Brazilian Rio Grande do Sul Ry. Co.* (1905) 2 Ch. 78, 84.

(*c*) Re *Tilbury Cement Co.* W. N. (1893) p. 141; the *Phœnix Bessemer Steel Co.* 44 L. J. Ch. 683; 32 L. T. R. 854; Re *Southern Brazilian Rio Grande do Sul Ry. Co.* (1905) 2 Ch. 78, 84.

the memorandum, do not extend to explaining or supplementing the memorandum in respect of a matter, which is required by the Companies Act, 1862 (or the Companies Consolidation Act, 1908) to be contained in the memorandum.(*d*)

Where the memorandum of association confers expressly or by implication a general borrowing power on a company, a power to charge uncalled capital need not necessarily be contained in the memorandum, but may be conferred on the company by the articles of association as originally drawn or as subsequently altered by special resolution.(*e*)

Meaning of term "to issue".

The term "to issue" debentures or debenture stock is not a technical expression, but a mercantile term, which is used to denote delivery over of the debenture or debenture stock certificate by the company to the person, who is entitled to the charge, whether the name of such person is inserted or not.(*f*) A debenture, which is sealed, but has not been delivered, is not issued.(*g*) On the other hand, a deposit of a debenture by way of security is an "issue," though the name of the holder is left in blank.(*h*)

General Borrowing Power authorises Issue of Debentures.

Where a company has not an express power to issue debentures or debenture stock, but only an express or implied general borrowing power, it has been held, that such power will warrant the issue of determinable debentures or debenture stock;(*i*) and such a power may be exercised either (i) by a resolution of the company in general meeting directing the directors to raise a sum not exceeding a specified amount by the issue of debentures or debenture stock, or (ii) by a resolution of the directors, if the borrowing powers are vested in them by the company's articles of association.(*j*)

Public companies (*i.e.*, companies which are not "private companies" as defined by section 121 of the Companies Consolidation

(*d*) Re *Southern Brazilian Rio Grande do Sul Ry. Co. Ibid.* p. 84.

(*e*) Re *Phœnix Bessemer Steel Company*, ubi supra, *Newton* v. *Debentureholders of Anglo-Australian Investment Co.* (1895) A. C. 244; *Jackson* v. *Rainsford Colliery Co.* (1896). 2 Ch. 340. As to what words will confer on a company power to charge uncalled capital, see supra, Bk. I., ch. ii., sec. i. (2*e*).

(*f*) *Levy* v. *Abercorris Slate Co.*, 37 Ch. D. 260, 264.

(*g*) *Mowatt* v. *Castle Steel and Iron Works*, 34 Ch. D. 58.

(*h*) Re *Perth Electric Tramways Ld.* (1906) 2 Ch. 216.

(*i*) *Inns of Court Hotel*, 6 Eq. 82, *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156, 270; *Landowners West of England Co.* v. *Ashford*, 16 Ch. D. 411.

(*j*) *Bryon* v. *Metropolitan Saloon and Omnibus Co.*, 3 De G. & J. 123; *Australian Auxiliary Steam Co.* v. *Mounsey*, 4 K. & J. 733; see Appendix, Forms 33 and 34.

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Statutory Restrictions on issue of Debentures.

Act, 1908) are, as we shall see hereafter (pp. 97-99) precluded by sections 82 and 87 of that Act from exercising their borrowing powers (and therefore from issuing any debentures or debenture stock) until the requirements of those sections have been complied with.

Power to issue Perpetual Debentures.

As has been stated above, a power to "borrow" does not include a power to issue perpetual debentures or debenture stock. Of course, where a company's memorandum of association (as it frequently does) expressly authorises the raising of money by the issue of such securities, there can be no doubt as to the company's power to do so; but it is submitted, that a power to "raise money by the issue of debentures or otherwise" is sufficient to authorise the issue of so-called perpetual securities. Indeed, it may well be, that a mere power to issue debentures might be held to implicitly authorise the issue of perpetual debentures; for a perpetual debenture is a debenture within the meaning of the word, as explained in the first chapter of this treatise, as it creates a debt: such debt is, no doubt, a contingent one (*viz.*, payable only on the company being wound up or on default being made in the payment of interest) but it is nevertheless a debt.(*k*) Moreover, perpetual debentures very frequently contain a clause enabling the company to redeem at any time, on giving six months' notice of its intention so to do, and it would be strange, if a company, which has power to bind itself unconditionally by the issue of determinable debentures to pay interest for a fixed period (say twenty years) and then to pay the principal moneys secured, were held to be acting *ultra vires*, if it bound itself to pay interest, until it gave notice of redemption, and upon giving such notice to pay the principal: for a perpetual debenture containing the above-mentioned clause is far less onerous to the company than a determinable debenture.

Purposes for which Debentures may be issued.

A company having an express or implied power to issue debentures or debenture stock may issue such securities (whether by way of principal or collateral security (*l*) for the purpose of securing money lent or discharging an existing debt,(*m*) whether im-

(*k*) As to the nature of perpetual debentures, see supra, Bk. I., ch. ii., sec. i. (3), and also Appendix, Form 6.

(*l*) Re *Queensland Land and Coal Co., Davies* v. *Martin* (1894), 3 Ch. 181; 71 L. T. R. 115.

(*m*) Re *Inns of Court Hotel*, 6 Eq. 82, *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156, 170; *Landowners West of England* v. *Ashford*, 16 Ch. D. 411, Lindley, p. 291.

mediately payable or not,(*n*) or for the purpose of satisfying a debt owing by a third person, who has a right to be indemnified by the company in respect of such debt,(*o*) or for the purpose of securing to the solicitor acting for the company the costs of defending an action brought against the company.(*p*) A company can only validly issue debentures or debenture stock for the purpose of raising money to be applied for the purposes of such company, and, if and so far as such securities purport to create a charge for any other purpose, such charge is *ultra vires* and void. Thus, where three companies issued under their joint seals debentures purporting to charge the several undertakings and assets of the three companies, the Court held that a valid charge was created by such debentures on the assets of each company to the extent, to which the money raised had in fact been applied to the purposes of that Company, and that as regards the other moneys the charge was *ultra vires* and therefore void.(*q*) But, in the absence of any notice that the moneys to be raised by debentures or debenture stock will be used otherwise than for the purposes of the company issuing such securities, a person advancing money to the company on the security of such debentures or debenture stock is not bound to inquire to what purpose such money will be applied.(*r*)

Creation or Extension of Power to Issue Debentures after Registration of Company.

Where on the other hand, the memorandum of association or the deed of settlement of a company gives *no express* or *implied* borrowing power to the company and it is desired to raise money by the issue of debentures or debenture stock, the company should, after passing and confirming a special resolution (*s*) for the alteration of such memorandum of association or deed of settlement, so as to enable the company so to raise money, petition the Court for the confirmation by the Court of such special resolution.(*t*) And similarly, where the memorandum of association or deed of settlement only gives a limited borrowing

(*n*) *Davies* v. *Bolton & Co.* (1894) 3 Ch. 678.

(*o*) *Seligman* v. *Prince & Co.* (1895) 2 Ch. (C. A.) 617.

(*p*) Re *Hubbard & Co. Ld.* 79 L.T.R. 665.

(*q*) Re *Johnstone Foreign Patents Co. Ld.* (1904) 2 Ch. (C. A.) 234.

(*r*) Re *David Payne & Co. Ld.*, *Young* v. *Same Co.* (1904) 2 Ch. (C. A.) 168 over-ruling Davis's Case, 12 Eq. 516.

(*s*) Sec. 9 of the Companies Consolidation Act, 1908, re-enacting sections 1 and 3 of the Companies (Memorandum of Association) Act, 1890.

(*t*) In re *Reversionary Interest Society* (No. 1) (1892) 1 Ch. 615, but before confirming any resolution the Court must be satisfied, that every debenture and debenture stock holder of the company has received notice.

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power to a company and it is desired to extend such limited power, a special resolution to that effect should be passed and confirmed and thereupon a petition be presented to the Court for the confirmation by the Court of such special resolution.

On being satisfied that any alteration is required, in order to enable the company (i) to carry on its business more economically or more efficiently, or (ii) to attain its main purpose by new and improved means, or (iii) to enlarge or change the local area of its operations, or (iv) to carry on some business or businesses, which under existing circumstances may conveniently or advantageously be combined with the business of the company, or (v) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement, the Court may confirm such resolution by virtue of its powers under section 9 of the Companies Consolidation Act, 1908.

Fraudulent Preference.

Of course, a company may not exercise its power of raising money by the issue of debentures or debenture stock in such a way as to constitute a fraudulent preference; for, if such power is so exercised, the debentures or debenture stock issued under it will be invalid. However, an issue of debentures or debenture stock just before a winding up is not a fraudulent preference, if such securities are issued, not in contemplation of a winding up, but for the purpose of preventing it.(*u*) But the issue of debentures or debenture stock by a company to its director within three months of its winding up would be a fraudulent preference, if such director was aware, at the date of the issue, that the company was insolvent.(*v*) Again, where a company agreed with one of its directors, who had guaranteed an overdraft at the company's bank, that the company would, whenever called upon to do so, issue to such director a debenture for the amount, for which he would be liable under such guarantee, and the director, after waiting till the company had become insolvent, called upon the company to issue a debenture to him pursuant to the above mentioned agreement, the Court held, that the issue of such debentures under such circumstances constituted a fraudu-

(*u*) In re *Inns of Court Hotel*, 6 Eq. 82, 90: *Seligman* v. *Prince* (1895), 2 Ch. (C. A.) 617.

(*v*) *Gas Light Improvement Co.* v. *Terrell*, 10 Eq. 168; in re *Washington Diamond Mining Co.* (1893) 3 Ch. (C. A.) 95. See infra, Bk. II., ch. iii., sec. vii.

lent preference and accordingly declared that the debenture was void.(*w*)

Court will not restrain Company from issuing Debentures at instance of a Creditor of such Company.

The Court will not at the instance of an unsecured creditor of a company restrain such company from exercising its power to issue debentures or debenture stock merely on the ground, that the purposes, for which such securities are raised, are *ultra vires*.(*x*)

Where a company has issued only a part of a series of debentures, the fact that proceedings have been commenced to enforce the debentures will not, so long as no receiver has been appointed, debar the company from issuing the remaining debentures.(*y*)

A company can validly exercise its power to issue debentures and debenture stock after a garnishee order against the company has been made absolute and such debentures or debenture stock, if issued *bona fide*, may rank above the garnisher's claim.(*z*)

Statement of intended Loan to be delivered to Commissioners of Inland Revenue.

Before issuing debentures or debenture stock a company must deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue and such statement will be charged with an *ad valorem* duty of 2s. 6d. per £100; but this duty will not be payable, if or so far as it is shown that it has been paid on the trust deed or otherwise.(*a*)

Bonus Debentures allotted to Directors.

A director of a company accepting bonus debentures or debenture stock, which were issued *ultra vires* by such company to its promoters or any other person, in order that they might be transferred to such director, will be held to be a trustee of such debentures or debenture stock for the company and he will be liable to pay to the company the value of the bonus debentures or debenture stock received by him.(*b*)

Directors liable to make good loss caused by the issue of Debentures without consideration.

Directors allotting debentures or debenture stock, which the allottee agrees to transfer and does transfer to persons without consideration, are parties to an *ultra vires* transaction and are liable to make good the loss occasioned to the company by such allotment.(*c*)

(*w*) *Re Jackson & Bassford Ld.* (1906) 2 Ch. 467.

(*x*) *Mills* v. *Northern Railway of Buenos Ayres Co.*, 5 Ch. 621.

(*y*) In re *Hubbard & Co.*, W. N. (1898) 158; 77 L. T. R. 665.

(*z*) *Geisse* v. *Taylor*, (1905) 2 K. B. 658.

(*a*) 62 & 63 Vic., cap. 9, sec. 8.

(*b*) *London Trust Co.* v. *Mackenzie*, 62 L. J. (Ch.) 870; as to the value see *Nant-y-glo Ironworks Co.* v. *Grave*, 12 Ch. D. 738.

(*c*) *London Trust Co.* v. *Mackenzie*, ubi supra.

Debentures may not be issued in lieu of a Dividend "to be paid".

A company, whose articles of association empower its directors with the sanction of the company to declare a dividend "to be paid" to shareholders, has no right without altering the articles to pass a resolution proposing to issue to all the shareholders debentures, which are below par value, instead of paying dividends in cash and the Court will at the instance of any shareholder restrain the directors by injunction from acting on such resolution.(*d*)

Partly paid-up Debentures issued in lieu of partly paid-up Shares.

Partly paid-up debentures or debenture stock of a reconstructed company are sometimes allotted under a scheme of reconstruction to each holder of partly paid-up shares in the original company in lieu of his shares; the payments in respect of such debentures or debenture stock cannot (except with the consent of the creditors of the original company to the scheme) be treated as discharging *pro tanto* the liability upon the shares in the original company.(*e*)

Debentures issued to vendor of business, which is converted into a Company, are valid.

When a business is converted into what is commonly called a one man company (*i.e.*, a company the bulk of whose shares are held by the vendor of the business) such vendor very frequently agrees to take debentures or debenture stock of such company in lieu of part of the purchase money; such a practice, though open to great abuse, is lawful and the securities so issued are valid.(*f*)

Deposit of Debentures by Company as security for uncertain amount or for contingent liability.

Debentures are not unfrequently created for the purpose of depositing the same as security for a contingent liability (*e.g.*, as a security for sums, which the guarantors of the company may be called on to pay) or for a liability of an uncertain amount (*e.g.*, for an account current). In such cases the debentures should either disclose the terms, on which such debentures are held, or should refer to the agreement embodying such terms; for, if the debentures do not disclose such terms or refer to such agreement, the company will be liable to pay to any *bonâ fide* purchaser of such debentures for value without notice the full amount of the principal and interest secured by his debentures, even though the original depositee of such debentures may not have been entitled to any payment from the company.

(*d*) *Wood* v. *The Odessa Water Works Co.*, 42 Ch. D. 636.

(*e*) In re *Imperial Land Co., of Marseilles*, ex parte *Yeaffreson*, 11 Eq. 109.

(*f*) *Salomon* v. *Salomon & Co.* (1897) A. C. 22; 13 Times L. R. 46; 75 L. T. R. 426.

It should, however, not be forgotten, that an agreement to advance money to a company on the security of a deposit of debentures cannot confer a valid option to purchase at a specified price the debentures so deposited or any part of them, as no contract between a mortgagor and mortgagee made at the time of the mortgage and as part of the mortgage transaction (or, in other words, as one of the terms of the loan) can be valid, if it prevents the mortgagor from getting back his property on paying what is due on his security.(*g*) If, however, such an option is given after the mortgage transaction has been completed, even on the day after such completion, the option may be enforceable.(*h*)

Interest on Debentures may be charged to Capital Accounnt.

Where the money secured by debentures or debenture stock is raised for the purposes of construction, it is frequently desirable to charge during the period of construction as part of the expenses of construction, not merely the money actually expended in paying for the construction, but also the interest on such money. This has been held to be permissible; for there is no general law, which compels companies to charge to revenue account interest on money borrowed for the purpose of constructing works or prohibits them from charging it during construction to capital account. In such a case the general rule is that, in the absence of any provision to the contrary in its regulations, a company is entitled to act in the same way as commercial men dealing honestly in their own business and consequently a company may charge interest to capital account.(*i*)

Power to issue Debentures in lieu of Unissued Cancelled Debentures.

Debentures, which are sealed, but remain unissued, may be cancelled and others may be issued in their place.(*j*)

Power to re-issue Debentures

A company, which has power to issue debentures or debenture stock, is authorised by section 104 of the Companies Consolidation Act, 1908, to re-issue the same subject to the following conditions:

Sec. 104 of Comp. Cons. Act, 1908.

"104.—(1) Where either before or after the passing of this "Act a company has redeemed any debentures previously issued, "the company, unless the articles or the conditions of issue ex- "pressly otherwise provide, or unless the debentures have been "redeemed in pursuance of any obligation on the company so to

Power to re-issue redeemed Debentures in certain cases.

(*g*) *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1904) A. C. 323, 329.

(*h*) *Ibid.* at p. 325.

(*i*) *Hinds* v. *Buenos Ayres Grand National Tramways Co.* (1906) 2 Ch. 654.

(*j*) Re *N. Defries & Co. Ld.*, *Bowen* v. *Same Co.* (1904) 1 Ch. 37.

"do (not being an obligation enforceable only by the person to "whom the redeemed debentures were issued or his assigns), shall "have power, and shall be deemed always to have had power, to "keep the debentures alive for the purposes of re-issue, and where "a company has purported to exercise such a power the company "shall have power, and shall be deemed always to have had power, "to re-issue the debentures either by re-issuing the same deben- "tures or by issuing other debentures in their place, and upon "such a re-issue the person entitled to the debentures shall have, "and shall be deemed always to have had, the same rights "and priorities as if the debentures had not previously been "issued.

"(2) Where with the object of keeping debentures alive for "the purpose of re-issue they have either before or after the "passing of this Act been transferred to a nominee of the com- "pany, a transfer from that nominee shall be deemed to be a re- "issue for the purposes of this section.

"(3) Where a company has either before or after the passing "of this Act deposited any of its debentures to secure advances "from time to time on current account or otherwise, the deben- "tures shall not be deemed to have been redeemed by reason only "of the account of the company having ceased to be in debit "whilst the debentures remained so deposited.

"(4) The re-issue of a debenture or the issue of another de- "benture in its place under the power of this section given to, or "deemed to have been possessed by, a company, whether the re- "issue or issue was made before or after the passing of this Act, "shall be treated as the issue of a new debenture for the purposes "of stamp duty, but it shall not be so treated for the purposes of "any provision limiting the amount or number of debentures to "be issued:

"Provided that any person lending money on the security of "a debenture re-issued under this section which appears to be duly "stamped may give the debenture in evidence in any proceedings "for enforcing his security without payment of the stamp duty or "any penalty in respect thereof, unless he had notice or, but for "his negligence, might have discovered, that the debenture was not "duly stamped, but in any such case the company shall be liable "to pay the proper stamp duty and penalty.

"(5) Nothing in this section shall prejudice—

"(*a*) the operation of any judgment or order of a court of "competent jurisdiction pronounced or made before "the seventh day of March nineteen hundred and "seven as between the parties to the proceedings in "which the judgment was pronounced or the order "made, and any appeal from any such judgment or "order shall be decided as if this Act had not been "passed; or

"(*b*) any power to issue debentures in the place of any de- "bentures paid off or otherwise satisfied or extinguished, "reserved to a company by its debentures or the se- "curities for the same."

This section was rendered necessary by several decisions, in which the Court held that, in the absence of an express power, a company, which had issued a series of debentures or debenture stock ranking *pari passu*, would be presumed not to have power, on redeeming such securities, to re-issue them with the same rights attached thereto as the original securities and that, when once redeemed, such securities were spent and gone for all purposes.(*k*)

Rights attaching to re-issued Debentures.

Where debentures or debenture stock forming part of a series ranking *pari passu inter se* are issued and redeemed and thereafter re-issued under section 104 carrying "the same rights and priorities as if they had not previously been issued," such re-issued securities affect the interests of two classes of persons (*viz.*):—

1. The holders of the unredeemed debentures or debenture stock, which ranked *pari passu* with the redeemed debentures and debenture stock, and
2. The incumbrancers ranking after the series of debentures or debenture stock, of which the redeemed debentures or debenture stock formed part.

(*k*) Re *George Routledge & Sons, Ld.* (1904) 2 Ch. 474; Re *W. Tasker & Sons, Ld.* (1905) 2 Ch. (C. A.) 587; Re *Perth Electric Tramways, Hoare* v. *Same Co.* (1906) 2 Ch. 216; Re *Russian Petroleum & Liquid Fuel Co., London General Investment Trust* v. *Russian Petroleum & Liquid Fuel Co.*, (1907) 2 Ch. (C. A.), 540.

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As regards the rights of the holders of the re-issued debentures or debenture stock as against the holders of the unredeemed debentures or debenture stock of the same series, it is clear that under section 104 the re-issued debentures or debenture stock will (except in cases, in which the company's articles or the conditions of issue expressly otherwise provide or in which such securities have been redeemed in pursuance of an obligation on the company to do so) rank *pari passu* with the unredeemed portion of the series, of which they originally formed part.

On the other hand, the respective rights of the holders of debentures or debenture stock re-issued pursuant to section 104 and the incumbrancers (*e.g.*, a second series of debentures or debenture stock) ranking after the series, of which the redeemed debentures or debenture stock formed part, give rise to different considerations. The following questions may arise between these parties:—

(1) If a company issues a first series of debentures of £100,000, and pays off £50,000 of them and subsequently issues a second series of debentures of £20,000, has the company power under section 104 to re-issue the paid off £50,000 of the first series of debentures and to thus postpone the second series to the re-issued first debentures? or

(2) If a company issues a first series of debentures of £100,000 and subsequently issues a second series of debentures of £20,000, and thereupon pays off £50,000 of the first series, can the company re-issue the paid off debentures of the first series and restore them to their position of priority over the second series?

In order to answer these and similar questions, it is necessary to bear in mind, that the power under section 104 to re-issue is, like any other statutory powers (such as the power conferred by section 13 of the Act on companies to alter their articles of association)(*l*) a power, which a company cannot contract itself out of, but which must be exercised, subject to the general principles of

(*l*) *Walker* v. *London Tramways Co.*, 12 Ch. D. 705; *Allen* v. *Gold Reefs of W. Africa Ltd.* (1900) 1 Ch. (C. A.) 656; *Punt* v. *Symons & Co. Ltd.* (1903) 2 Ch. 506.

law and equity, which are applicable to all powers. It follows that a company may by contract (express or implied) or otherwise preclude itself from exercising its power to re-issue debentures as against certain persons;(*m*) thus a company may not exercise such power in such a way as to derogate from its grant or break its contract; for the doctrine that it is not lawful for a person, in whom a power is vested by deed or will, to exercise such power in such a way as to derogate from his grant,(*n*) is equally applicable to a power created by statute.

As a company can by contract preclude itself from exercising its statutory power to re-issue its debentures or debenture stock, it is manifest that persons advancing money to a company on the security of a second series of debentures or debenture stock should insist on the insertion in the second debentures (or in the trust deed securing the second debentures or debenture stock) of an express provision that the company shall not, so long as any portion of the second debentures or debenture stock remains outstanding, re-issue any portion of the first debentures or debenture stock.

Deposit of Debentures as Security for Current or other Account.

The object of sub-section 3 of section 104 of the Act is to preclude a company, which has deposited its own debentures or debenture stock certificates by way of security for a current account or otherwise, from contending at any time during the continuance of such deposit, that such debentures or debenture stock have or has been automatically redeemed by reason of such current or other account having at any time during the continuance of the deposit shown a balance in favour of the company and that consequently such debentures or debenture stock certificates have as from such time ceased to be held by the depositee as a security for any further debts incurred by the company to the depositee.

As a general borrowing power enables a company to issue debentures or debenture stock for the purposes of securing money lent to the company or discharging the company's liabilities, it will be necessary to consider the wider subject of the borrowing powers of joint stock companies.

(*m*) (1900) 1 Ch. 671, 672, 674, 679. *field & Herring's Contract* (1893) 2 Ch.
(*n*) *Hurst* v. *Hurst* 16 Beav. 372; 332.
Re *Cooper*, 27 Ch. D. 565; Re *Bedding-*

Bk. I., Ch. IV., Sec. I. (1a).

SECTION I. *The Borrowing Powers of a Company.*

Borrowing Power of a Corporation created by Charter.

At common law a corporation created by charter has *primâ facie* the power to do with its property all such acts as an ordinary person can do and to bind itself to such contracts as an ordinary person can bind himself to; and, if the charter creating the corporation imposes some direction, which would have the effect of limiting the natural capacity of the corporation, such direction may be enforced through the Attorney-General.(*x*) From this it would follow, that a company incorporated by Royal Charter can issue debentures or debenture stock, whether it has an express limited or unlimited power to do so or not.

When one comes to corporations created by statute, the question is entirely different. Corporations created by statute may have (1) an express borrowing power (unlimited or limited) or (2) an implied borrowing power. It is proposed to deal with these powers in the following pages.

SUB-SECTION I. *Express Borrowing Powers of a Company.*

(*a*) *Unlimited Express Borrowing Powers.*

What Powers are incidental to an unlimited Borrowing Power.

If a company has any such general powers as a power "to borrow or raise or secure the payment of money in such manner as the company shall think fit and in particular by issue of debentures or debenture stock perpetual or otherwise charged upon all or any of the company's property (both present and future) including its uncalled capital,"(*y*) its power of borrowing is unlimited, provided the money is borrowed for the purpose of carrying on the business of the company. However, even less wide and explicit words are sufficient to authorise the issuing of debentures or debenture stock, it having been decided, that, where a company has power to raise money, it has an implied power to secure the repayment of the borrowed money by mortgage(*z*) and that, where a company has power to raise money on mortgage, it has a power to covenant to pay.(*a*) In the case

(*x*) *Sutton's Hospital Case*, 10 Coke 1, 13; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675*n*, 685.

(*y*) See infra, Appendix, Form 32.

(*z*) *Australian Auxiliary Co.* v. *Mounsey*, 4 K. & J. 733; *Bryon* v *Metropolitan Saloon Co.*, 3 De G. & J. 123.

(*a*) *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 674, 678, 681.

of *in re Patent File Company*,(b) it has been decided, that, if a company has property and is by the memorandum of association authorised to "dispose" of it, the company has power to mortgage and give security for a debt.

If a company has a power to borrow and money is borrowed and there be shown an intention to create a charge, the Court will give effect to the intention, although the security given may be informal.(c) However, it must not be gathered from the last sentence, that the Court will always enforce debentures or debenture stock issued or any other charge created by a company without observing the formalities prescribed by the private Act, deed of settlement, or articles of association or other document, under which the company derives its powers. Whether such formalities are or are not essential to the valid exercise of its powers, must depend on the question, whether the clause prescribing such formalities is imperative (in which case it is essential) or directory only (in which case it is not essential). This question is alluded to more fully hereafter.(d)

Borrowing Power of Industrial and Provident Societies.

If authorised by its rules, an industrial or provident society may borrow to an unlimited extent for the purpose of carrying on its business or trade and may secure the moneys so borrowed by the issue of debentures and debenture stock. A society registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vic., cap. 39), is expressly empowered to mortgage its land, if its rules do not direct otherwise.(e)

(b) *Limited Express Borrowing Power.*

Limited power to borrow implies a veto to borrow more than the sum specified.

It frequently happens, that a company has by statute or by its articles of association a limited borrowing power, and in such cases, if money is borrowed by the company on debenture (but no debentures) were sent, the directors having previously resolved to allot debentures to them on the terms of the prospectus. See also in re *Queensland Land and Coal Co., Limited* (1894) 3 Ch. 181; *Pegge* v. *Neath and District Tramways Co.* (1898) 1 Ch. 183.

(b) 6 Ch. 83.

(c) *Strand Music Hall Co.*, 3 De G. J. & S. 147; *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. Div. 43. The Court held in the case of in re *The New Durham Salt Co.*, 35 Sol. Jo. 24, that a valid charge on the entire property of the company subsisted in favour of persons, who had applied for debentures relying on a statement made in a prospectus, that such debentures would be secured on the entire property of the company, and to whom letters of allot-

(d) Bk. I., ch. iv., sec. ii. (3).

(e) Sec. 36. In *Great Northern Railway Co.* v. *Coal Co-operative Society* (1896) 1 Ch. 187, the power of such a society to issue debentures was not contested.

tures or debenture stock, the loans so made to the company over and above the authorised amount are *ultra vires* the company and as such void as against the company.(*f*) Such a limited borrowing power implies a veto to borrow a larger amount.(*g*) In such a case the directors may be personally liable in damages to the holders of debentures or debenture stock for their implied representation, that they had power to bind the company by the issue of such debentures or debenture stock.(*h*)

If a company with a limited borrowing power borrows to an amount exceeding the specified limit, the loan is to the extent of such excess void, even though all the shareholders in the corporation assent to or attempt to ratify such loan, and it is void, because the assent or ratification of all the shareholders cannot make valid as against the company that, which the company has no power to do under the statute or document, subject to the provisions of which it is formed.(*i*) Thus, where the directors of a company, having by virtue of the articles power to borrow money on mortgage and other securities to a limited amount, borrowed money on debentures at a time, when the liabilities exceeded the limit, the Court held, on the company being ordered to be wound up, that the debentures were absolutely void and that the holders could only prove for their claim in the winding up as simple contract creditors.(*j*)

Meaning of Power to borrow sum "not exceeding two-thirds of the uncalled Capital" of a Company.

Where a company had power to borrow a sum "not exceeding two-thirds of the capital of the company for the time being not called up," the Court held, that the company had power to borrow to the extent of two-thirds of the uncalled capital payable in respect of the unissued, as well as in respect of the issued, shares of the company.(*k*)

Right of Subrogation.

Though debentures or debenture stock issued by a company over and above the limited amount, which the company is authorised to borrow, are void, yet the persons advancing moneys

(*f*) *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715; in re *Pooley Hall Colliery Co.*, 21 L. T. R. 690; 18 W. R. 201, W. N. (1869) 255; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 674; 10 App. Cas. 354. *Blackburn Building Society* v. *Cunliffe*, 22 Ch. Div. 61; 9 App. Cas. 857.

(*g*) *Baroness Wenlock* v. *River Dee Co.*, ubi supra; *Chambers* v. *Manchester and Milford Ry. Co.*, 5 B. & S. 588.

(*h*) *Firbank* v. *Humphreys*, 18 Q. B. Div. 54. For the liabilities of directors see infra, Bk. II., ch. vi., sec. i.

(*i*) *Baroness Wenlock* v. *River Dee Co.*, ubi supra. *Ashbury Railway Co.* v. *Riche*, L. R., 7 H. L. 653, 672.

(*j*) Re *Pooley Hall Colliery Co.*, 21 L. T. R. 690; W. N. (1869), p. 255.

(*k*) *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

to the company on securities so issued are, if and so far as these moneys are applied in the discharge of any existing debts of the company, entitled, on the principle of subrogation, to rank as *unsecured creditors* of the company (*i.e.*, are entitled to have the loan treated as valid) but are not entitled to be *subrogated to the securities and priorities* of the company's creditors, whose debts have been discharged in the manner hereinbefore stated.(*l*)

Limit of express Borrowing Power of Building Society.

Before the passing of the Building Societies Act, 1874 (37 & 38 Vic., cap. 42), a building society could have an unlimited express borrowing power.(*m*) Under section 15 of this Act the total amount borrowed by a building society may not at any time exceed (1) in the case of a permanent society, two-thirds of the amount for the time being secured to the society by mortgages from its members (this amount to include principal, interest, fines and generally all instalments not yet accrued due, but secured by mortgage and outstanding)(*n*) and (2) in the case of a terminating society, such two-thirds or a sum not exceeding twelve months' subscriptions on the shares for the time being in force. Within these limits a building society may, if authorised by its rules, borrow and secure the money borrowed by the issue of debentures and debenture stock.(*o*)

SUB-SECTION 2. *Implied Borrowing Power of a Company.*

When a Borrowing Power will be implied.

Some cases proceed on the basis that, where a company or corporation is formed by a statute or otherwise, then from the mere fact of its being made a corporation it has *primâ facie* an implied right to borrow money to any extent, just as an individual might, and that you ought not to cut down that *primâ facie* power, unless you can find in such statute or in the other instrument, from which such company or corporation derives its powers, something either express or by necessary implication, which diminishes that power.(*p*) On the other

(*l*) See re *Wrexham Mold, etc., Ry. Co.* (1899), 1 Ch. (C. A.) 440; *Baroness Wenlock* v. *River Dee Co.* (2), 19 Q. B. Div. 155. In re *Cork and Youghal Railway Co.*, 4 Ch. 748; *Blackburn Building Society* v. *Cunliffe*, 29 Ch. Div. 902; *Bannatyne* v. *MacIver* (1906) 1 K.B. (C. A.) 103. See also post, Bk. II., ch. iii., sec. v. (3).

(*m*) *Murray* v. *Scott*, 9 App. Cas. 519.

(*n*) *Neath Building Society* v. *Luce*, 43 Ch. D. 158.

(*o*) See *Andrew* v. *Swansea Cambrian Building Society*, 50 L. J. Q. B. 428. In this case the Court treated as valid bonds charged on all the funds, assets and effects of the defendant building society, whose directors were empowered by the society's rules to borrow on such terms as they should think fit.

(*p*) Re *Patent File Co.*, 6 Ch. 83.

hand, it is sometimes contended, that, when a company or corporation is formed by statute or otherwise, the company or corporation has *primâ facie* no power whatever to borrow and that you cannot assert, that it has such a power, unless you find in the statute, or in the other instrument, from which it derives its powers, something express or something, which by necessary implication gives it the power.(*q*) "If the one contention is more valid than the other," says Lord Esher,(*q*) "I incline rather to the latter of the two, but it seems to me, that neither of them is valid and that, when you have to consider the borrowing powers of a corporation, which has been framed by statute or otherwise,(*r*) the matter depends entirely upon what is the construction of the statute or document, and you have to see, whether there is a power given to the company either expressly or by reasonable implication".(*s*) In the case of *Baroness Wenlock* v. *The River Dee Company*,(*t*) in which the law relating to the implied borrowing powers of companies was exhaustively dealt with, the facts were as follows: The defendant company was formed to improve the river Dee and the lands adjoining and was empowered by a Special Act of Parliament to borrow £25,000 on mortgage. The directors borrowed £85,000 from and charged such sum on their lands in favour of Lord Wenlock. On the executors of Lord Wenlock bringing an action to enforce such charge, the directors pleaded, that the directors had no authority to make such charge and that the directors were acting *ultra vires* the company in borrowing more than £25,000. The Court there held, that the plaintiff was only entitled to recover £25,000 and so much as had been applied in payment of the debts and liabilities of the company properly incurred.

In the course of his judgment in this case, Lord Esher, M. R., makes the following remarks:(*u*) "If a company or corporation is formed for the purpose of a particular undertaking, which undertaking it is obvious cannot be carried out without the

(*q*) *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, 676*n*.

(*r*) Also companies formed under the Companies Consolidation Act, 1908, or the Companies Act, 1862; the principles applicable to a company incorporated by special Act apply to companies incorporated under the Companies Acts.

Baroness Wenlock v. *River Dee Co.*, 10 App. Cas. 354, 360.

(*s*) Ibid., 354, 362, 363; *Ashbury Railway Carriage and Iron Co.* v. *Riche* L. R., 7 H. L. 653, 693.

(*t*) 36 Ch. Div. 674, 10 App. Cas. 354.

(*u*) Ibid., 677*n*.

expenditure of money, and if by the statute or document no means are given to the company which will give them money in hand, or will give them express power to raise money, it seems to me that a reasonable implication would necessarily arise, that they must have power to borrow, because otherwise the statute, which created them, is a futile document, it would pretend to give them powers to do things, but would give them no means of doing those things. Therefore, if there were no powers in this original statute, or in what has been called the original statute by which the company could have money in hand, or by or under which they could have the means of doing what the statute says they are formed to do, I should have inferred, that they had power to borrow, and in that case I could see nothing to limit that power to borrow. It must have been the same as a power to an individual, or at all events it must have gone to the full extent of what could have been reasonably necessary for the purpose of carrying on the undertaking. But where in the statute or other document, which forms the company, you find that means are put into the hands of the company (that is, either by raising capital, or by calling up more capital, or by a limited power of borrowing, or by any other way, as by a power to sell lands), which may be within reason sufficient for the purpose of enabling them to carry on the undertaking, then it seems to me, that no Court can measure, whether those means will in the event be absolutely sufficient or not. Those means being put in their hands, you cannot infer, that they have at the same time the power to borrow."

The following passage in Bowen, L. J.'s judgment in the case further illustrates what are the borrowing powers of a company incorporated by statute :—(*v*)

"I do not think it is quite satisfactory to say, that you must take the statute, as if it had created a corporation at common law, and then see, whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states, what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or

(*v*) 36 Ch. Div. 685*n*.

less of the qualities, with which a corporation at common law is endowed. Therefore to say, that you must assume, that it has got everything which it would have at common law, unless the statute takes it away is, I think, to travel on a wrong line of thought. What you have to do is to find out, what this statutory creature is and what it is meant to do; and to find out, what this statutory creature is, you must look at the statute only, because there, and there alone is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons, who can act within certain limits, but in order to ascertain, what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and, if you look at the case in that way, you will see, that the legal consequences are exactly the same, as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers, which it otherwise might have had."

In the case of most companies, on whom no express borrowing power has been conferred, a borrowing power will be implied; for most companies cannot be carried on without expenditure of money, and, if no express means are given to them by statute or otherwise, which will give them money in hand or give them power to raise money, a reasonable implication arises, that they must have power, because without such implied power they could have no means of doing that, which was the object, for which they were formed. In such a case there is nothing to limit the implied power to borrow, which would go to the full extent of what is necessary for the purpose of carrying on the undertaking.(*w*)

Borrowing Power implied in the case of all Trading Companies.

A borrowing power is in the absence of express power implied in the case of trading companies. Thus in the case of the *Australian Auxiliary Steam Clipper Company* v. *Mounsey*(*x*) it was held, that a shipping company without any express power in the memorandum or articles of association had power to

(*w*) *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 664, 677*n*; 10 App. Cas. 354.

(*x*) 4 K. & J. 733. See also re *Badger* (1905) 1 Ch. 568, 573-4.

borrow money for the purposes of the company by issuing debentures. A similar point arose in the case of *Bryon* v. *Metropolitan Saloon Omnibus Company*,(*y*) in which it was held, that the raising of money by debentures in the case of a trading company simply established for the conveyance of passengers and luggage by omnibus was within the powers of the company, although no express borrowing power was conferred on it either by the memorandum or articles of association. These two cases are authorities establishing the principle that a trading company has an implied borrowing power, though nothing may be said expressly in the memorandum or articles of association.(*z*) Neither of these two cases was intended to be overruled by anything that was laid down in the *Blackburn Benefit Building Society* v. *Cunliffe & Co.*(*a*) or in the case of *Baroness Wenlock* v. *River Dee Company*,(*b*) as neither of the companies, whose powers were the subject of discussion in these two last-mentioned cases, was a trading company. In the same way a banking company has frequently been held to have an implied borrowing power and such power has been held to have been exercised by the company's directors, so as to bind the company.(*c*)

A company established for the purpose of the sale and purchase of estates and property, the granting of advances on property intended for sale and loans on deposit of securities and the discounting of approved commercial bills was held to be a trading company and, as such, to have an implied power to borrow for the purposes of the business.(*d*)

"It is a well-established rule," says Stirling, L. J. (then J.),(*e*) "as regards trading partnerships, that a partner has an implied power to borrow for the purposes of the partnership. The ground for the rule is, that the exigencies of commerce render such a power necessary, and it seems to me, that the existence of such a power in corporate trading companies may be justified on the same ground."

(*y*) 3 De G. & J. 123.

(*z*) *General Auction Estate and Monetary Co.* v. *Smith* (1891), 3 Ch. 432; in re *Hamilton's Windsor Ironworks.* Ex pte. *Pitman & Edwards*, 12 Ch. D. 707.

(*a*) 22 Ch. Div. 61; 9 App. Cas. 857.

(*b*) 36 Ch. Div. 675*n*.

(*c*) Lindley, p. 289. *Bank of Australia* v. *Breillat*, 6 Moore P. C. 152, 195; 12 Jur. 189; *Maclae* v. *Sutherland*, 3 E. & B. 1, 38. *Royal British Bank* v. *Turquand*, 5 E. & B. 248, and 6 E. & B. 327; *Galloway's Case*, 18 Jur. 88.

(*d*) *General Auction Estate and Monetary Co.* v. *Smith* (1891), 3 Ch. 432, 441.

(*e*) Ibid.

Bk. I., Ch. IV., Sec. I. (2).

When no Borrowing Power will be implied.

It has been previously stated that, where a company has an express limited borrowing power, the Court will not imply any borrowing power beyond the prescribed limit. But the Court will not always imply a borrowing power even in the case of a company, which has no express borrowing power. There are some corporations, which cannot borrow at all, unless they have an express borrowing power, for borrowing is not incidental to the course and conduct of their business.(*f*) Thus the Court held, that a building society, which was constituted before and was not incorporated under the Building Societies Act, 1874 (37 & 38 Vic., cap. 42), had no implied borrowing power and that such a society had in the absence of an express borrowing power no power to borrow at all. Any money paid out of the assets of such society in satisfaction of the moneys borrowed by the directors on behalf of the society was, on the company being wound up, held to be recoverable by the liquidator from the person, to whom it was so repaid ; the reason for such decision being, that such an application of the moneys of the society was unauthorised.(*g*)

Before the Building Societies Act, 1874, such a Society had no implied Borrowing Power.

Implied Borrowing Power of a Building Society since that Act.

A building society constituted under the Building Societies Act, 1874, has borrowing powers under section 15 of that Act, which provides that any society under the Act may receive deposits or loans at interest, the amount so received being limited (1) in the case of a permanent society to two-thirds of the amount for the time being secured to the society by mortgages from its members or (2) in the case of a terminating society to such two-thirds or a sum not exceeding twelve months' subscriptions on shares for the time being in force. Section 1(*h*) of the Building Societies Act, 1894 (57 & 58 Vic., cap. 47), requires, that the rules of societies under the Building Societies Acts shall set forth whether the society intends to borrow money and, if so, within what limits (not exceeding those set forth above). It does not appear to be certain, that the implied power to borrow conferred on building societies, as above mentioned, necessarily carries with it a power to secure by mortgage the money borrowed.(*h*)

(*f* In re *Professional, Commercial and Industrial Benefit Society*, 6 Ch. 856, 861 ; *Blackburn Building Society* v. *Cunliffe*, 22 Ch. Div. 61, 70 ; 9 App. Cas. 857, 866, 868 ; *Blackburn Building Society* v. *Cunliffe*, 29 Ch. Div. 902 ; re *Badger* (1905) 1 Ch. 568, 573-4.

(*g*) *Blackburn Building Society* v. *Cunliffe*, 29 Ch. Div. 902.

(*h*) See a dictum of Lord Blackburn in *Murray* v. *Scott*, 9 App. Cas. 519, 556, to the effect that a power to mortgage is not necessarily implied.

If a building society, which has no or has exhausted its limited borrowing power, borrows, there is no debt and, even, if subsequently such a company acquires a power to borrow and then issues deposit notes, bonds or debentures under its seal to secure the money previously borrowed, the notes, bonds or debentures are not binding on the society; for the debt was void *ab initio* and remains void.(*i*) It would appear to follow from the decisions in *ex parte Watson* and *Blackburn Benefit Building Society* v. *Cunliffe* that, if a company borrows at a time when it has no power to do so, such company cannot by any means repay the sum, which it has received.(*j*)

SUB-SECTION 3. *Restrictions on the Exercise of the Company's Borrowing Powers.*

Restrictions on Company's Power to Issue Debentures or Debenture Stock.

Having discussed which companies have power to issue debentures and debenture stock, the attention of the reader should be drawn to three statutory provisions (*viz.*, sections 82 and 87 of the Companies Consolidation Act, 1908, and section 8 of the Finance Act, 1899), which require a company to observe certain formalities before it *allots* or *issues* its debentures or debenture stock. These provisions do not, however, in any way interfere with the company's right to *offer* such securities *for subscription*.

Section 82 of the Act runs as follows:—

Sec. 82 of Comp. Cons. Act, 1908.

Obligation to file Statement in lieu of Prospectus before first Allotment of Debentures.

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

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

Section 87 of the Act provides as follows:—

Sec. 87 of Comp. Cons. Act, 1908.

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

(*i*) Ex parte *Watson*, 21 Q. B. Div. 301. (*j*) Buckley, p. 227.

Restriction on Exercise of Company's Borrowing Powers.

"(*a*) shares held subject to the payment of the whole amount "thereof in cash have been allotted to an amount not less "in the whole than the minimum subscription; and

"(*b*) every director of the company has paid to the company "on each of the shares taken or contracted to be taken "by him, and for which he is liable to pay in cash, "a proportion equal to the proportion payable on "application and allotment on the shares offered for "public subscription, or in the case of a company "which does not issue a prospectus inviting the public "to subscribe for its shares, on the shares payable in "cash; and

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

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

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

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

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

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

"(5) If any company commences business or exercises bor- "rowing powers in contravention of this section, every person "who is responsible for the contravention shall, without prejudice

"to any other liability, be liable to a fine not exceeding fifty "pounds for every day during which the contravention continues.

"(6) Nothing in this section shall apply to a private com- "pany,(*k*) or to a company registered before the first day of "January nineteen hundred and one, or to a company registered "before the first day of July nineteen hundred and eight which "does not issue a prospectus inviting the public to subscribe for its "shares."

Effect of Sec. 87 of Comp. Cons. Act, 1908.

The effect of section 87, so far as it effects the first issue of a company's debentures and debenture stock, is that, unless the company issuing the same is at the date of such issue entitled (or unless or until such company shall after such date become entitled) to commence business,(*l*) which fact will be proved by a statutory declaration in the form prescribed by section 87 (1 (*c*)), any debentures or debenture stock issued by the company will not be binding on the company and every person, who is responsible for issuing such securities in contravention of section 87, will be liable to a penalty. Though a certificate of the registrar certifying, that the company is entitled to commence business, does not appear to be indispensable to legalise the first exercise of a company's borrowing powers, it will in practice be necessary to obtain such certificate before a company makes its first issue of debentures or debenture stock.

Statement of Amount of Proposed Loan to be delivered to Commissioners.

The other formality above alluded to, which a company is required to observe before issuing debentures or debenture stock, is prescribed by section 8 of the Finance Act, 1899, which provides as follows:—

62 & 63 Vic., cap. 9, sec. 8.

"Section 8 (1) Where any local authority, corporation, com- "pany, or body of persons formed or established in the United "Kingdom propose to issue any loan capital, they shall, before "the issue thereof, deliver to the Commissioners a statement (*m*) "of the amount proposed to be secured by the issue.

Statement of Amount of Proposed Issue.

Stamp on Statement.

"(2) Subject to the provisions of this section every such "statement shall be charged with an *ad valorem* stamp duty of "two shillings and sixpence for every hundred pounds and any

(*k*) See sec. 121 of the Act for a definition of "private company".

(*l*) For a form of such declaration, see infra Appendix, Form 21.

(*m*) For a Form of such statement, see Appendix, Form 25. As to the meaning of "to issue any loan capital," see *Att. Gen.* v. *Regent's Canal and Dock* (1904) 1 K. B. (C. A.) 263.

"fraction of a hundred pounds over any multiple of a hundred "pounds of the amount proposed to be secured by the issue, "and the amount of the duty shall be a debt due to Her "Majesty.

When Statement is exempted from Stamp Duty.

"(3) The duty under this section shall not be charged to the "extent to which it is shown to the satisfaction of the Commis- "sioners that the stamp duty payable in respect of a mortgage "or marketable security has been paid on any trust deed or other "document securing the loan capital proposed to be issued.

Penalty for Non-delivery of Statement.

"(4) If any local authority, corporation, company, or body "of persons neglect to deliver a statement, or fail to pay the "duty in compliance with this section, that local authority, cor- "poration, company, or body of persons, shall be liable to pay to "Her Majesty, in addition to the duty, a sum equal to 10 per "cent. upon the amount of the duty, and a like sum for every "month after the first month during which the neglect or failure "continues.

"(5) In this section the expression 'loan capital' means any "debenture stock, county stock, corporation stock, municipal "stock, or funded debt, by whatever name known, or any capital "raised by any local authority, corporation, company, or body of "persons formed or established in the United Kingdom, which is "borrowed, or has the character of borrowed money, whether it is "in the form of stock or in any other form, but does not include "any county council or municipal corporation bills repayable not "later than twelve months from their date or any overdraft at the "bank or other loan raised for a merely temporary purpose for a "period not exceeding twelve months, and the expression 'local "authority' includes any county council, municipal corporation, "district council, dock trustees, harbour trustees, or other local "body by whatever name called."

SECTION II. *When a Company is Bound by the Directors Borrowing on Behalf of the Company.*

SUB-SECTION 1. *Authority of the Directors to Borrow on Behalf of the Company.*

Authority of Directors.

A company cannot (as we have already seen) borrow, unless it is properly authorised so to do, and, if the directors of a company, which has no borrowing power, borrow, the company is

not liable to repay the moneys so borrowed, and the liquidator of such company can recover the sums paid in discharge of such moneys. (*k*) But, if the company has a limited or unlimited borrowing power, such power may be delegated to the directors by the articles of association or an unauthorised exercise of the company's borrowing power by the directors may be subsequently ratified by the company. (*l*) The articles of association of companies usually contain an article authorising the directors from time to time at their discretion to raise or borrow any sum or sums for the purposes of the company ; such a delegation of the borrowing power enables the directors to borrow to the extent of the company's borrowing power. Where a company has power to borrow, it is not necessary expressly to delegate the borrowing power to directors, if the articles contain a general delegation of the powers of the company to the directors : such general delegation will enable the directors to do anything, which the company can do. (*m*)

A General Delegation of Powers to the Directors sufficient to authorise Borrowing.

If the powers of a company, which has an implied borrowing power, are delegated to its directors, such directors will have authority to borrow so far as and only so far as may be necessary for the transaction of the company's legitimate business in the way, in which such a business is usually carried on, and the company is bound by such borrowing.(*n*)

The borrowing powers can, of course, be limited to any extent by the articles of association.(*o*) If the directors' borrowing powers are limited by regulations, which are registered and therefore accessible to the public, the company will not be liable for any sums borrowed by the directors in excess of their authority as disclosed by those regulations(*p*) except in cases, in which such borrowing is ratified or in which the company's debts have been paid out of the moneys so

Limited Borrowing Powers of Directors.

(*k*) *Blackburn Benefit, etc., Society* v. *Cunliffe*, 29 Ch. Div. 902.

(*l*) *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, 677*n*.

(*m*) In re *Patent File Co.*, 6 Ch. 83. *Anglo-Danubian Steam Navigation Co.*, 20 Eq. 339.

(*n*) *Smith* v. *Hull Glass Co.*, 8 C. B. 668; *Taunton* v. *Royal Insurance Co.*, 2 Hem. & M. 135; ex parte *Pitman & Edwards*, 12 Ch. Div. 707, 712; in re *Cunningham & Co., Limited; Simpson's Claim*, 36 Ch. Div. 532; *Australian Steam Clipper Co.* v. *Mounsey*, 4 K. & J. 733.

(*o*) The Stock Exchange Committee usually require some limitation of the directors' borrowing powers; see Appendix 26 B (3) to the Rules of the London Stock Exchange, supra p. 72.

(*p*) *Balfour* v. *Ernest*, 5 C. B. N. S. 601; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. Div. 696, 711; Lindley, p. 165.

Bk. I., Ch. IV., Sec. II. (1).

borrowed or in which the directors may borrow beyond the limits specified on previously complying with certain directory provisions.

All the world has notice of the general or Special Acts of Parliament and also of the deed of settlement or memorandum and articles of association, under which each company is constituted and which has been registered, and every person dealing with directors, whose powers are limited by any one or more of the documents aforesaid, must see that those limited powers are not exceeded.

How far the debts irregularly incurred by Directors under a Power to Borrow (subject to Preliminary Formalities being observed) are binding on the Company notwithstanding non-observance of such Formalities.

If, on the other hand (as in the case of the *Royal British Bank* v. *Turquand*,(*q*) the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company, before that power can be duly exercised, then a stranger contracting with the directors is not bound to see, that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully, in what they do.(*r*) The facts in the case of the *Royal British Bank* v. *Turquand*(*s*) were as follows: The company's deed registered under 7 & 8 Vic., cap. 110, empowered the directors to borrow on the bonds(*t*) of the company such sums as by a general resolution of the company might be authorised to be borrowed. The directors gave to the bankers of the company a bond for £1000 in the proper form sealed with the seal of the company and signed by two directors as a security for what might be due from the company to its bankers on its current account; this was not authorised by any resolution of the company and the question was, whether the bond was valid or whether the bankers were bound to look further and to ascertain, whether the issuing of the bond had been authorised by the resolution of a general meeting. It was held by the Court of Queen's Bench and by the Court of Appeal, that the bankers were not so bound (the provision for such authorisation being directory)(*u*) and that the excess of

(*q*) 5 E. & B. 248, 6 E. & B. 327, followed in re *Hampshire Land Co.* (1896), 2 Ch. 743, 45 W. R. 136.

(*r*) *Fountaine* v. *Carmarthen Railway Co.*, 5 Eq. 316; *County of Gloucester Bank* v. *Rudry Merthyr Steam, etc., Colliery Co.* (1895), 1 Ch. (C. A.) 629; *Duck* v. *Tower Galvanising Co.* (1901) 2 K. B. 314; *Owen & Ashworth's Claim* (1901) 1 Ch. (C. A.) 115.

(*s*) 5 E. & B. 248; 6 E. & B. 327.

(*t*) Bonds come within the definitions hereinbefore contained of debentures.

(*u*) As to difference between directory and imperative provisions, see Bk. I., ch. iv., sec. ii. (3).

authority amounted merely to a breach of an internal requirement of the company and was a matter between the shareholders and the directors, but that it did not affect the rights of the bankers and that, as the deed of settlement contained a power to the directors to borrow on being authorised to do so by a general resolution of the company, the bankers had a right to infer the fact of a resolution authorising that, which on the face of the document appeared to be legitimately done.(*v*)

Again in the case of *Agar* v. *Athenæum Life Assurance Society*,(*w*) the directors had power to borrow, but only with the consent of an extraordinary general meeting of shareholders; the directors borrowed and issued debentures sealed with the seal of the company and signed by two of themselves and it was held, that the provision requiring such consent was directory (and not imperative) and that these debentures were binding on the company, though no such authority to borrow had been conferred on the directors by a general meeting as was prescribed by the deed of settlement.

Article validating issue notwithstanding irregularity.

The articles of association of a company not unfrequently contain a clause providing, that the debentures and debenture stock issued by the directors shall be binding on the company notwithstanding any irregularity in the issue. Where this is the case, debentures or a debenture stock certificate issued by the directors of the company will be binding on the company, if such securities were *ex facie* properly executed and no violation of the articles of association could be detected by examining such securities.(*x*)

Directors may not assume that Preliminary Formalities have been observed.

Though a person, who (being a stranger to a company) advances money to the company, has (as has been stated above) a right to presume, that the preliminary formalities, which must be observed by the company before it can have power to borrow such moneys, have been observed, a director of a company, who advances money to the company, must be taken to know, whether or not the preliminary formalities have been observed, and cannot recover the money advanced by him to the company, if the preliminary formalities have not been observed. Thus in a

(*v*) *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366, 379; *Clarke* v. *Imperial Gas Light Co.*, 4 B. & Ad. 315; *Hill* v. *The Manchester and Salford Waterworks Co.*, 5 B & Ad. 866.

(*w*) 3 C. B. N. S. 725.

(*x*) *Davies* v. *R. Bolton & Co.* (1894), 3 Ch. 678.

Bk. I., Ch. IV., Sec. II. (1).

recent case(*y*) the directors of a company had a general power to borrow with the assent of a general meeting, but only had power to borrow £1000 without such assent. They issued without previously obtaining the necessary assent thirty-five debentures of £100 to two of the directors in part payment of the purchase money due to them from the company. The company was subsequently ordered to be wound up and a debenture-holder's action commenced for the enforcement of the debentures. All the debentures were held by persons, who were directors of the company, when they took the debentures. The Court held, that the debentures were only valid to the extent of £1000, as the directors must be taken to have known, that the internal requirements of the company had not been observed in the issue of these debentures. The Court made a declaration, that the first ten only out of the thirty-five debentures (according to their numbers) were valid.

Directors' power to take paid-up Shares in part Payment of Debentures.

Directors sometimes try to tempt the shareholders of a company to advance money to the company on its debentures by offering to take such shareholders' shares in part payment of the moneys to be secured by the issue of debentures; persons so advancing money should be careful to ascertain, whether the directors have power to accept payment on such terms; for, in the absence of a clear power, the company would not be bound by a transaction of this kind.(*z*)

Directors have no power to give Bonus of paid-up Shares to Person taking Debentures.

The public are sometimes induced to take debentures of a company by an offer on the part of the directors to give to the person advancing money on such securities one or more fully paid up shares in the company by way of bonus for every debenture, which he takes. The holders of shares so allotted as fully paid will, on the company being wound up, be placed on the list of the contributories for the full amount of their shares; for the company cannot so allot shares as fully paid up by way of bonus.(*a*) Fully paid shares can, however, be allotted as commission for taking up or underwriting debentures or debenture stock.

(*y*) *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156; re *Greymouth Point Elizabeth Railway and Coal Co.*, *Yuill* v. *Same Co.* (1904) 1 Ch. 32.

(*z*) *Edwards* v. *Duplex Electric Light Co., Limited*, 1 Times L. R. 210.

(*a*) In re *Railway Time Tables Publishing Co.*, 62 L. J. Ch. 935. See also in re *Veuve Monnier et ses fils, Limited*, 12 Times L. R 460.

SUB-SECTION 2. *Ratification of Borrowing* ultra vires *the Directors, but* intra vires *the Company.*

Ratification by a Company of the acts of its Directors.

It has been stated, that a company can under certain circumstances ratify an issue of debentures or debenture stock, though the directors of such company may not at the time of the issue have had power to issue the same. It is proposed to state shortly the principles, by which the Court is guided for the purposes of deciding, whether a company has power to ratify the acts of its directors.

What acts of the Directors may be Ratified by the Company.

The Memorandum of Association of a company is, as it were, the Charter, and defines the limitation of the powers of the company. The articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the Charter of incorporation of the company and, so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form, in which the business of the company is to be carried on, and the mode and form, in which changes in the internal regulations of the company may from time to time be made. If the directors of a company relying on the provisions of its articles of association do any act or thing, which goes beyond or is not warranted by the memorandum of association, the question will arise, whether that, which is so done, is *ultra vires*, not only of the directors of the company, but of the company itself. If, on the other hand, the directors do an act or thing, which, though within the memorandum of association, is a violation of the articles of association or in excess of them, the question will arise, whether that is anything more than an act *ultra vires* the directors, but *intra vires* the company.(*b*) Anything, which is beyond the area of the memorandum of association, is *ultra vires* and wholly null and void and cannot be ratified ; but inside that area the shareholders may make such regulations for their own government as they think fit.(*c*)

(*b*) *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R., 7 H. L. 653, 668.

(*c*) *Ashbury Railway Co.* v. *Riche*, ubi supra; *Trevor* v. *Whitworth*, 12 App. Cas. 409, 421, in which latter case the case of *Phosphate of Lime Co.* v. *Green*, L. R., 7 C. P. 43, is observed on; *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. Div. 675, 686*n*.

When Ratification is possible.

It is now proposed to turn to cases, which are *intra vires* as regards the company, but *ultra vires* as regards the directors, that is to say, cases, in which the directors of a company have transgressed their express or implied authority, but have not transgressed the express or implied powers of the company. In these cases the unauthorised transactions of the directors can be ratified by the company and, if so ratified by the company, will be good as against the company;(*d*) for ratification is in law treated as equivalent to a previous authority;(*e*) but, until so ratified, such unauthorised transactions cannot be enforced against the company.

Difference between Ratification of particular act and conferring general power.

There is a wide distinction between ratifying a particular act done in excess of authority, and conferring a general power to do similar acts in future. (*f*)

Thus in the case of *Irvine* v. *Union Bank of Australia*(*g*) the borrowing power of the defendant bank was unlimited, but the borrowing powers of the directors of the defendant bank were limited to one-half of the actually paid-up capital of the bank. Under Article 50 of the Articles of Association of the bank one-half of the votes of all the shareholders given at a general meeting called for the purpose was declared to be competent to enlarge such powers, but upon all other questions or business to be transacted at any meetings a majority of the votes of the shareholders present in person or by proxy should decide. The directors borrowed in excess of their power and the Court held, that it was competent to a majority of the shareholders present (though not a majority of all the shareholders of the company) at an extraordinary meeting convened for the purpose, of which due notice had been given, to ratify the act previously done by the directors in excess of their authority. For such ratification of a particular act did not extend the authority of the directors, so as to authorise them to do similar acts in future. (In order to extend the borrowing powers of the directors in future, it would have been necessary to alter the articles of association.)(*h*) On the facts, the Court held, that the shareholders never did

(*d*) *Grant* v. *United Kingdom Switchback Railways Co.*, 40 Ch. Div. 135; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; *Portuguese Consolidated Copper Mines, Limited*, 45 Ch. Div. 16.

(*e*) *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366, 374.

(*f*) 2 App. Cas. 375.

(*g*) 2 App. Cas. 366.

(*h*) *Grant* v. *United Kingdom Switchback Railway Co.*, 40 Ch. Div. 135.

ratify the borrowing by the directors in excess of their authority and therefore that the sums advanced over and above one-half of the actually paid-up capital were not recoverable from the bank.

A company cannot strictly speaking ratify what has been done by its promoters before it came into existence,(*i*) but a company may (if it is within its powers) adopt such a contract; thus in *Howard* v. *Patent Ivory Manufacturing Company*(*j*) a company was held bound by debentures issued by it pursuant to arrangements made before and adopted after it was formed.

What acts will amount to Ratification.

What acts will amount to ratification by a company of the acts of its directors, is a question, which must in each case be decided on the evidence. The following general rules on the subject have been laid down(*k*) by Lord Esher: "Now, in order to establish a case of ratification, it seems to me, that it was not necessary to prove absolute knowledge on the part of every shareholder. As is pointed out by Lord St. Leonards in *Spackman* v. *Evans*,(*l*) it was not necessary to show, that every shareholder had actual notice. It is said," he observes, "that the absent shareholders in this case are not bound by the arrangement, unless the appellant can prove, that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In *Brotherhood's Case*(*m*) it was held, that they had notice—not that in point of fact the notice was proved. It is impossible to prove that every shareholder had notice or such a knowledge of the facts as amounts to notice. It is sufficient to show, that the facts were made known to the shareholders, into the effects of which they might and ought to have inquired and to which they ought to have objected at the time, unless they intended to adopt the transaction." It is, however, absolutely essential to prove, that the shareholders had notice of the facts, if it is desired to make out a case of ratification.(*n*)

(*i*) *Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16; *Browne* v. *La Trinidad*, 37 Ch. Div. 1, 11; *Howard* v. *Patent Ivory Manufacturing Co.*, 38 Ch. D. 156.

(*j*) 38 Ch. D. 156.

(*k*) *Phosphate of Lime Co.* v. *Green*, L. R., 7 C. P. 43, 52. Though this case can no longer be relied on to establish the proposition, that a company can ratify an act of the directors, which is ultra vires the company (see *Trevor* v. *Whitworth*, 12 App. Cas. 404), yet the remarks made by Lord Esher (then Brett, J.) as to what acts will amount to ratification by a company still represent the law on the subject.

(*l*) L. R., 3 H. L. 171, 222.

(*m*) 31 Beav. 365; 31 L. J. (Ch.) 861.

(*n*) *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; *Blackburn, etc., Building Society* v. *Cunliffe & Co.*, 29

Bk. I., Ch. IV., Sec. II. (2).

If the foregoing principles are applied to the specific case of ratification by a company of an issue of debentures or debenture stock by directors, who had not power to make such issue, the following is the result: A company may ratify such an issue, if the issue is not *ultra vires* the company.

A company may ratify not only an issue, which was irregular, but even an issue, which was fraudulent and, if a company ratifies an issue of debentures or debenture stock, which was originally issued in fraud of the company, the transferee and any subsequent holder of such securities may rely on such ratification. It must, however, be clearly shown, that the company had notice of the fraud and ratified the issue notwithstanding.

If, however, the directors of a company issued debentures or debenture stock in fraud of a company, the company will not, as against a purchaser for value without notice, be held to have ratified such issue merely on the ground, that a transfer of such debentures or debenture stock has been registered and interest been paid to the transferee in respect of such securities. For the ratification by the directors of a company is not the ratification by the company in a case, in which the ratification relates to an act done by the directors in fraud of the company and the person relying on such ratification was privy (or takes through a person, who was privy) to the fraud.(*o*)

Thus in the case of the *Athenæum Life Assurance Society* v. *Pooley*(*p*) debentures under the seal of the company were issued to the defendant in July, 1854, in pursuance of an arrangement made between the defendant and the chairman of the directors, which was a fraud on the company. The debentures were afterwards bought by A in the market, the transfer to A was registered in the books of the company and interest paid to him till July, 1855, but the matter was not brought to the knowledge of the shareholders till December, 1855, when an investigation of the affairs of the company took place and further payment of interest was refused. It was held that the debentures were

Ch. Div. 902, 910; *Grant* v. *United Kingdom Switchback Co.*, 40 Ch. Div. 135; *La Banque Jacques Cartier* v. *La Banque d'Epargne, etc., Montreal*, 13 App. Cas. 111, 118.

(*o*) *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & J. 294; Lindley, 236-7.

(*p*) 3 De G. & J. 294. This case has, however, been observed on in ex pte. *Chorley*, 11 Eq. 157, and *Brunton's Claim*, 19 Eq. 362, and cannot safely be relied on as an authority in favour of a company resisting a claim by a transferee taking from a person, who was privy to the fraud.

void in the hands of the defendant, who was privy to the fraud, and that A, though a *bonâ fide* purchaser for value without notice, yet being only a purchaser of a chose in action not assignable at law, must take it subject to the equities attaching to it and that under the above circumstances neither the registration nor the payment of interest had the effect of a confirmation of A's title. However, a company may, as will be seen hereafter,(*q*) be estopped from denying the validity of an instrument as against a transferee, which it might successfully impeach in the hands of a transferor.

SUB-SECTION 3. *Directory and Imperative Clauses in Statutes and a Company's Regulations.*

Meaning of Directory and Imperative Clauses.

The private act, deed of settlement, memorandum or articles of association of a company and public Acts of Parliament often prescribe, that certain powers (such as the power of a company or its directors to raise money by the issue of debentures or debenture stock) shall only be exercised after observing certain formalities, though the exercise of such power is not declared to be void in case of non-observance of such formalities. It is frequently a difficult question to decide, whether the provision requiring the observance of such formalities is imperative (that is to say, whether the power can only be exercised on observing the prescribed formalities) or whether such provision is directory only (that is to say, whether the power can be exercised even without observing the prescribed formalities). The following cases may to a certain extent serve as guides, though it does not seem possible to extract from them any broad rules, on which the Court proceeds in deciding, whether a clause is imperative or directory.

Directory Clauses.

In the case of a company, whose deed of settlement required that mortgages should be sealed with the company's seal, be signed by two directors and countersigned by the secretary or actuary, a deposit of title deeds with the solicitors of the company accompanied by a memorandum (which was signed by the general manager under the authority of the directors) was held

(*q*) See infra, Bk. I., ch. vi., sec. iii.

not to be binding on the company.(*r*) This decision, however, turned upon a point, which is not mentioned in the report in the *Weekly Notes*, but which the learned judge himself said was the basis of his decision, *viz.*: The solicitors received such deeds on the ground of their being officers of the company. The same learned judge (V. C. Malins) held, that the formalities required by the same company's deed of settlement for a legal mortgage were not required for an equitable mortgage by deposit and that such an equitable mortgage, though it did not comply with the prescribed formalities, was valid.(*s*)

A provision in the deed of settlement empowering the directors of a company to borrow, on their being previously authorised so to do by a general resolution of the company (*t*) or on their previously obtaining the consent of an extraordinary general meeting of shareholders,(*u*) has been held to be directory and debentures issued by such directors have been held to be good notwithstanding that they had been issued without previously obtaining the prescribed authority or consent.

In the case of the *Hansard Publishing Union, Limited*, (*v*) the Court of Appeal held, that a provision in a company's articles of association, that "the common seal of the company should never be affixed to any document except in the presence of a director and in pursuance of a resolution of the board or a committee of the board duly authorised by the board," was directory and that an agreement by the company, to which the seal of the company was affixed by the managing director and another director, was valid against the company, though no such resolution was passed authorising the affixing of the seal.

Section 14 of the Companies Clauses Act, 1845 (8 & 9 Vic., cap. 16), provides, that the transfer of shares or stock shall be by deed duly stamped, in which the consideration shall be truly stated. It has been held, that the parts of the enactment, which require that the transfers should be duly stamped and should correctly state the consideration, are directory only, but that the part, which requires such transfers to be by deed, is imperative.(*w*)

(*r*) *General Provident Assurance Co.*, 38 L. J. (Ch.) 320; W. N. (1869) 58, 17 W. R. 514.

(*s*) *General Provident Assurance Co.*, ex parte *National Bank*, 14 Eq. 507, 513.

(*t*) *Royal British Bank* v. *Turquand*, 5 E. & B. 248, 6 E. & B. 327.

(*u*) *Agar* v. *Athenæum Life Assurance*, 3 C. B. N. S. 725.

(*v*) 8 Times L. R. 280.

(*w*) *Powell* v. *London and Provincial Bank* (1893), 2 Ch. (C. A.) 555.

In the case of *Fountaine* v. *Carmarthen Railway Company* (*x*) the Court held, that section 39 of the Companies Clauses Consolidation Act, 1845, (*y*) which authorises a company subject to its provisions to reborrow money with the authority of a general meeting of the company, is directory and that debentures, which have been re-issued by such a company without such authority, are nevertheless valid.

In another case, in which a company was directed by a private Act of Parliament to carry on its business by twelve directors, of whom five were to be a quorum, it was held, that this clause of the Act was directory only and that calls made by five out of seven directors, there being no more, were valid.(*z*)

Again in the case of *Wright* v. *Horton* (*a*) it was held, that section 43 of the Companies Act, 1862, which directed limited companies to keep registers of all mortgages and charges, was directory and that debentures issued by such a company, but not registered in accordance with such 43rd section, were valid.

Imperative Clauses.

On the other hand, in the case of *Harben* v. *Phillips* (*b*) it was held, that a clause of the articles of association requiring proxy papers to be attested was imperative and that proxy papers not so attested were bad.

A clause in an Act of Parliament, which enacted that transfers of shares or stock should be by deed, has been held to be imperative.(*c*)

SECTION III. *The Issue of Debentures and Debenture Stock at a Discount and the Redemption of such Securities at a Premium and the Redemption of such Securities according to the Results of Periodical Drawings.*

Issue at a Discount.

A company, which is registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, and has a general borrowing power or a power to issue debentures and debenture stock, may issue debentures and debenture stock at a discount,

(*x*) 5 Eq. 316.

(*y*) 8 & 9 Vic., cap. 16. See infra, Bk. III., ch. i.

(*z*) *Thames Haven and Dock Co.*, 4 Man. and Gr. 552.

(*a*) 12 App. Cas. 371. Section 43 of the Act of 1862 is re-enacted by section 100 of the present Act.

(*b*) 23 Ch. Div. 14.

(*c*) *Powell* v. *London and Provincial Bank* (1893) 2 Ch. (C. A.) 555.

that is to say, at less than their nominal value.(*d*) For a company, which has power to issue debentures or debenture stock, may in the absence of any express restrictions pay interest on such securities at the rate of 10, 20 or 30 per cent. or any rate of interest, which it may think fit, and such interest may be paid by way of discount.(*e*) There being nothing illegal in issuing such securities at a discount, directors, to whom such borrowing powers have been delegated, will not incur any personal liability by issuing such securities at a discount.(*f*) But no debenture, which is issued at a discount by such a company, should contain the clause (sometimes found in debentures) giving to the holder an option to call for the allotment to him of fully paid up shares of the same nominal value as the debenture in exchange for such debenture; for such an issue of shares amounts to an issue of shares at a discount and is therefore illegal.(*g*)

Where debentures or debenture stock are or is issued by such a company at a discount, the particulars sent to the registrar pursuant to section 93 of the present Act should include the amount or rate of such discount.

Companies governed by the Companies Clauses Acts, 1845 or 1863, or by the Railway Companies Act, 1867,(*h*) may, if authorised to borrow money or raise money by the issue of debentures or debenture stock, issue such securities at a discount.

Redemption at a Premium.

Debentures or debenture stock are frequently made redeemable at a premium, that is to say, at more than the nominal value.

A provision in a debenture, or in a trust deed securing a series of debentures or debenture stock, for the redemption of the series at a premium is not, it is submitted, open to objection on the ground that it unduly clogs or fetters the company's equity of redemption in the property charged; for the premium is merely an additional remuneration for the use of the money advanced to the company and secured by the debentures or trust deed and is in-

(*d*) *Webb* v. *Shropshire Railways Co.* (1893) 3 Ch. (C. A.) 307.

(*e*) In re *Anglo-Danubian Steam Navigation Co.*, 20 Eq. 339. This case is not conclusive on the law of mortgages. *Mainland* v. *Upjohn*, 41 Ch. D. 126, 142.

(*f*) *Campbell's Case*, 4 Ch. D. 470; *see also Regent's Canal Ironworks Co.*, 3 Ch. Div. 44.

(*g*) *Mosely* v. *Koffyfontein Mines Ld.* (1904) 2 Ch. (C. A.) 108.

(*h*) *Webb* v. *Shropshire Railways Co.* (1893) 3 Ch. (C. A.) 307.

terest in another form.(*i*) There is no decision expressly dealing with the validity of a provision making debentures or debenture stock redeemable at a premium, but the general principle affecting the doctrine of the clogging of the equity of redemption is stated by Lord Davey in the following terms:—

"The principle, as it appears to me, is that, on payment of the principal, interest, and costs, *together with any bonus or anything in the nature of a bonus, which has been properly stipulated for* and has become payable, the mortgage contract comes to an end and the mortgagor is entitled to get his property back, unaltered in character, condition and incidents, and is henceforth released from the burden imposed upon him by the contract." (*j*)

"A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition. But I ask 'security' for what? I think it must be security for principal, interest and costs *and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage.* There are two elements in the conception of a mortgage: first, security for the money advanced; and, secondly, the remuneration for the use of the money. When the mortgage is paid off, the security is at an end and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end." (*k*)

The above-cited passages warrant the conclusion that a provision making debentures or debenture stock redeemable at a premium is not open to objection on the ground that it unduly clogs or fetters the company's equity of redemption.(*l*)

It being established by the herein-before cited cases, that a company, which has a general borrowing power or a power to issue debentures or debenture stock, may legally bind itself to redeem such securities at a larger sum than the sum actually

(*i*) *Bradley* v. *Carritt* (1903) A.C. 253, 260; *Biggs* v. *Hoddinott* (1898) 2 Ch. 307; *Noakes & Co.* v. *Rice* (1902) A.C. 24.

(*j*) *Bradley* v. *Carritt* (1903) A.C. 253, 266.

(*k*) *Noakes & Co.* v. *Rice* (1902) A. C. 24, 33-4.

(*l*) In the cases of *Hooper* v. *Western Counties & S. Wales Telephone Co.*, 41 W. R. 84, 86; W. N. (1892) p. 148; 9 Times L. R. 17; *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374, debentures redeemable at a premium were assumed to be valid.

advanced by the holder to the company, it would seem to follow, that a company can legally bind itself to redeem at a premium debentures or debenture stock issued at a discount. For it is submitted, that a contract to redeem at a premium debentures or debenture stock issued at a discount (in the same way as a contract to redeem at par such securities issued at a discount) amounts to nothing more than a covenant to pay an increased rate of interest, and a company may pay any rate of interest, which it may think fit, if there are no provisions in its regulations restricting such rate.

Provision for the Redemption of Debentures according to the result of Periodical Drawings not within the Lottery Acts.

Since the remarks made by Jessel, M. R., in the case of *Sykes* v. *Beadon*(*l*) doubts have been entertained, whether a provision for the redemption at par in accordance with the result of periodical drawings of a specified proportion of debentures or debenture stock issued at a discount or a provision for the redemption at a premium, in accordance with the result of periodical drawings, of a specified proportion of debentures or debenture stock issued at a discount or at par is void under the Lottery Acts. But it is submitted, that the Lottery Acts do not apply to such provisions. The earlier Lottery Act (10 & 11 Will. III., cap. 17) recites, that several evil-disposed persons . . . have set up many mischievous and unlawful games called lotteries . . . and have thereby unjustly and fraudulently got to themselves great sums of money from children and servants and other unwary persons to the utter ruin and impoverishment of many families and enacts (sec. 1) that all such lotteries and all other lotteries are common and public nuisances and (sec. 2) that from the 29th day of December, 1699, no person or persons whatsoever shall publicly or privately exercise keep open show or expose to be played at drawn at or thrown or shall draw play or throw at any such lottery or any other lottery either by dice lots cards balls or any other numbers of figures or any other way whatsoever. The Act then inflicts a fine of £500 on any person not complying with it. The Act plainly on the face of its preamble (and the enacting part does not depart from the preamble) has reference to gambling transactions only and not to a provision for redemption according to the result of periodical drawings.(*m*)

(*l*) 11 Ch. D. 170, 185, 190.

(*m*) *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 697.

The later Act (42 Geo. III., cap. 119) after reciting, that evil-disposed persons frequently resort to public houses and other places to set up certain mischievous games or lotteries called littlegoes and to induce servants children and other unwary persons to play the said games and thereby fraudulently obtain great sums of money from them (sec. 1) declares all such games or lotteries called littlegoes common and public nuisances and further enacts (sec. 2) that after July 1st 1802 no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show or expose to be played, drawn or thrown at or in either by dice, lots, cards, balls or by numbers or figures or by any other way, contrivance or device whatsoever any game or lottery called a littlego or any other lottery whatsoever not authorised by Parliament or shall knowingly suffer to be exercised kept open shown or exposed to be played drawn or thrown at or in either by dice lots cards balls or by numbers or figures or by any other way whatsoever any such game or lottery in his or her house room or place upon pain of forfeiting for every such offence the sum of £500. This Act has reference to persons, who keep lottery offices, at which the public are invited to pay for lottery tickets.(*n*)

The lottery, which these Acts were intended to suppress, is a distribution of prizes by lot or chance,(*o*) but it is submitted, that neither of these Acts avoids a provision, that a specified proportion of an issue of debentures or debenture stock shall be redeemed in accordance with the result of periodical drawings. This method of redeeming could not be correctly described as a distribution of prizes; in some cases the effect of such redemption may be to compensate the debenture or debenture stock holders for the loss of a high rate of interest, which will cease on these securities being redeemed.

It has been decided by the House of Lords,(*p*) that a building society constituted for the benefit of its members and making certain of them entitled to particular benefits by the process of periodical drawings is not within the Lottery Acts.

In the case of *Smith* v. *Anderson*(*q*) a considerable number (more than twenty) of subscribers paid money to trustees for invest-

(*n*) *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 697.
(*o*) *Taylor* v. *Smetten*, 11 Q. B. D. 207.
(*p*) *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 696, 701, 705.
(*q*) 15 Ch. Div. 247.

ment and by the trust deed it was provided, that a certificate of £100 was to be given to each subscriber for every £90 subscribed and that a specified proportion of the certificates should be redeemed at a premium from time to time in accordance with the result of periodical drawings. On one of the certificate holders taking proceedings on behalf of himself and the other holders to enforce the trusts of the deed, the trustees raised (*inter alia*) the defence, that the provision for redemption at a premium in accordance with the result of periodical drawings of a specified proportion of the certificates, all of which had been issued at a discount, was void under the Lottery Acts. However, the judgment of the Court did not deal with the point raised as to the invalidity of the provisions in the trust deed under the Lottery Acts.(*r*) It would appear from the report of this case in the *Weekly Reporter*(*s*) that the contention, that the provision for the redemption of a portion of the certificates according to the result of periodical drawings was illegal under the Lottery Acts, was abandoned in consequence of the decision of *Wallingford* v. *Mutual Society*.(*t*)

It should further be remarked, that the legislature has expressly provided for the redemption in accordance with the result of periodical drawings of a portion of the debentures or debenture stock issued under the Local Loans Act, 1875 (38 & 39 Vic., cap. 83), secs. 14 and 15 (5),(*u*) and it would be strange, if the Courts were to hold, that a similar provision for the redemption of debentures or debenture stock issued by a company by virtue of its powers under its memorandum of association or deed of settlement is one of "the mischievous games called lotteries" mentioned, which it was intended to suppress by 10 & 11 Will. III., cap. 17, and 42 Geo. III., cap. 119. The fact that the Local Loans Act, 1875, provides for the redemption according to the result of periodical drawings of the debentures or debenture stock issued under that Act, though no proof of the legality of a provision for so redeeming debentures or debenture stock other than those issued under that Act, is nevertheless of

(*r*) The headnote of the report of this case in 43 L. T. R. 330, stating that the Court decided that this provision did not make the arrangement illegal under the Lottery Acts, appears to be inaccurate.

(*s*) 29 W. R. 22.

(*t*) 5 App. Cas. 685.

(*u*) As to which, see Bk. III., ch. iv., infra.

importance as showing, that the legislature does not consider such a provision contrary to public policy.(*v*)

Where Interest is in arrear, drawings should be suspended.

A company issuing debentures ranking *pari passu*, which contain provisions for the payment of interest and for the redemption of a specified proportion of such debentures according to the result of periodical drawings, should, if unable to pay both the interest and to pay off the debentures, which have been drawn, suspend drawings, until the company has paid the arrears of interest on all the debentures; for otherwise the holders of drawn debentures would obtain an advantage over the holders of the debentures not so drawn and would destroy the equality of the debentures *inter se*.(*w*)

Stock Exchange rule as to Securities subject to periodical drawings

By rule 93 of the Stock Exchange Rules bargains relating to securities subject to periodical drawings are required to be settled in securities, which have not been drawn, and a buyer, to whom drawn securities have been delivered by mistake, is required (on receipt of undrawn securities and on allowance being made for any dividend, which he has lost) to deliver such drawn securities or any proceeds received from such drawing to the person, who held such securities at the time of the drawing.

Statutory power to re-issue is not applicable to Debentures redeemable according to periodical drawings.

The general power to re-issue debentures or debenture stock by section 104 of the Companies Consolidation Act, 1908 (see supra, pp. 83-84) does not apply in the case of a series of such securities, which is made redeemable according to the results of periodical drawings.

(*v*) In re *Pyle Works*, 44 Ch. Div. 534, 587.

(*w*) *Hale* v. *Ottoman Railways Co.*, 30 Sol. Jo. 157.

CHAPTER V.

REGISTRATION OF DEBENTURES AND DEBENTURE STOCK AND INSTRUMENTS SECURING THE SAME.

Registration of Mortgages and Charges.

VARIOUS Acts of Parliament prescribing the registration of certain mortgages and charges have from time to time been passed with the double object of (1) giving notice to the world, that such mortgages or charges exist, and (2) giving to the persons entitled to such registered mortgages or charges priority over unregistered mortgages or charges. It is proposed to consider in the following pages such of these enactments as affect the debentures and debenture stock issued by joint stock companies.

SECTION 1.—*Registration of mortgages and charges under sections 93 and 100 of the Companies Consolidation Act, 1908.*

The registration of mortgages and charges prescribed by sections 93 and 100 of the Companies Consolidation Act, 1908 (in the case of companies incorporated in England and Ireland) may be divided into two categories (*viz.*):—

Registration under Secs. 93 and 100 of the Comp. Cons. Act, 1908.

(*a*) the filing with the *Registrar of Joint Stock Companies* of certain prescribed particulars of mortgages and charges created by the company; and

(*b*) the keeping *at the company's registered office* of

(1) copies of mortgages and charges requiring registration under section 93; and

(2) a register consisting of certain prescribed particulars of specific mortgages and charges created by the company (section 100).

The particulars filed with the Registrar as well as the copies and register kept by the company at its office are open to the inspection of the public.(*a*)

Sec. 93 of Comp. Cons. Act, 1908.

Section 93 runs as follows:—

"93.—(1) Every mortgage or charge created after the first

(*a*) See sec. 93 (8) and sec. 101.

"day of July nineteen hundred and eight by a company registered "in England or Ireland and being either—

"(*a*) a mortgage or charge for the purpose of securing any "issue of debentures; or

"(*b*) a mortgage or charge on uncalled share capital of the "company; or

"(*c*) a mortgage or charge created or evidenced by an instru- "ment which, if executed by an individual, would "require registration as a bill of sale; or

"(*d*) a mortgage or charge on any land, wherever situate, or "any interest therein; or

"(*e*) a mortgage or charge on any book debts of the com- "pany; or

"(*f*) a floating charge on the undertaking or property of the "company,

"shall so far as any security on the company's property or "undertaking is thereby conferred, be void against the liquidator "and any creditor of the company, unless the prescribed particu- "lars (*b*) of the mortgage or charge, together with the instrument (if "any) by which the mortgage or charge is created or evidenced, "are delivered to or received by the registrar of companies for "registration in manner required by this Act within twenty-one "days after the date of its creation, but without prejudice to "any contract or obligation for repayment of the money thereby "secured, and when a mortgage or charge becomes void under this "section the money seeured thereby shall immediately become "payable:

"Provided that—

"(i) in the case of a mortgage or charge created out of "the United Kingdom comprising solely property "situate outside the United Kingdom, the delivery "to and the receipt by the registrar of a copy of the in- "strument by which the mortgage or charge is created "or evidenced, verified in the prescribed manner,(*c*) "shall have the same effect for the purposes of this

(*b*) For a form of such particulars, see infra, Appendix, Form 22 (being Form 47 of the forms scheduled to the Order of the Board of Trade of 29th March, 1909).

(*c*) That is to say, certified to be a true copy under the seal of the company or under the hand of some person interested therein otherwise on behalf of the company. (See Order of the Board of Trade dated 29th March, 1900).

"section as the delivery and receipt of the instrument "itself, and twenty-one days after the date on which "the instrument or copy could, in due course of post, "and if despatched with due diligence, have been re- "ceived in the United Kingdom, shall be substituted "for twenty-one days after the date of the creation of "the mortgage or charge, as the time within which the "particulars and instrument or copy are to be delivered "to the registrar; and

"(ii) where the mortgage or charge is created in the "United Kingdom but comprises property outside the "United Kingdom, the instrument creating or pur- "porting to create the mortgage or charge may be "sent for registration notwithstanding that further "proceedings may be necessary to make the mortgage "or charge valid or effectual according to the law of "the country in which the property is situate; and

"(iii) where a negotiable instrument has been given to se- "cure the payment of any book debts of a company, "the deposit of the instrument for the purpose of se- "curing an advance to the company shall not for the "purpose of this section be treated as a mortgage or "charge on those book debts; and

"(iv) the holding of debentures entitling the holder to a "charge on land shall not be deemed to be an interest "in land.

"(2) The registrar shall keep, with respect to each company, a "register in the prescribed form of all the mortgages and charges "created by the company after the first day of July nineteen "hundred and eight and requiring registration under this section, "and shall, on payment of the prescribed fee,(*d*) enter in the "register, with respect to every such mortgage or charge, the "date of creation, the amount secured by it, short particulars of "the property mortgaged or charged, and the names of the "mortgagees or persons entitled to the charge.

"(3) Where a series of debentures containing, or giving by "reference to any other instrument, any charge to the benefit of

(*d*) The prescribed fee is 10s., where the amount of the mortgage or charge does not exceed £200, and is £1, where it does exceed £200. (Order of Board of Trade dated 29th March, 1909.)

"which the debenture-holders of that series are entitled *pari passu* "is created by a company, it shall be sufficient if there are deli- "vered to or received by the registrar within twenty-one days "after the execution of the deed containing the charge or, if there "is no such deed, after the execution of any debentures of the "series, the following particulars:—(*e*)

"(*a*) the total amount secured by the whole series; and

"(*b*) the dates of the resolutions authorising the issue of the "series and the date of the covering deed, if any, by "which the security is created or defined; and

"(*c*) a general description of the property charged; and

"(*d*) the names of the trustees, if any, for the debenture "holders;

'together with the deed containing the charge, or, if there is no "such deed, one of the debentures of the series, and the registrar "shall, on payment of the prescribed fee,(*f*) enter those parti- "culars in the register;

"Provided that, where more than one issue is made of deben- "tures in the series, there shall be sent to the registrar for entry "in the register particulars of the date and amount of each issue, "but an omission to do this shall not affect the validity of the "debentures issued.

"(4) Where any commission, allowance, or discount has been "paid or made either directly or indirectly by the company to any "person in consideration of his subscribing or agreeing to sub- "scribe, whether absolutely or conditionally, for any debentures "of the company, or procuring or agreeing to procure subscriptions, "whether absolute or conditional, for any such debentures, the "particulars required to be sent for registration under this section "shall include particulars as to the amount or rate per cent. of "the commission, discount, or allowance so paid or made, but an "omission to do this shall not effect the validity of the debentures "issued:—

"Provided that the deposit of any debentures as security for "any debt of the company shall not for the purposes of this "provision be treated as the issue of the debentures at a discount.

"(5) The registrar shall give a certificate under his hand of

(*e*) See infra, Appendix, Forms 23 and 24.

(*f*) The prescribed fee is 10s., where the total amount of the whole series does not exceed £200, and is £1, where it does exceed £200. (Order of Board of Trade dated 29th March, 1909.)

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"the registration of any mortgage or charge registered in pursu-
"ance of this section, stating the amount thereby secured, and the
"certificate shall be conclusive evidence that the requirements of
"this section as to registration have been complied with.

"(6) The company shall cause a copy of every certificate of
"registration given under this section to be endorsed on every
"debenture or certificate of debenture stock which is issued by
"the company, and the payment of which is secured by the mort-
"gage or charge so registered :—

"Provided that nothing in this subsection shall be construed
"as requiring a company to cause a certificate of registration of
"any mortgage or charge so given to be endorsed on any debenture
"or certificate of debenture stock which has been issued by the
"company before the mortgage or charge was created.

"(7) It shall be the duty of the company to send to the
"registrar for registration the particulars of every mortgage or
"charge created by the company and of the issues of debentures
"of a series, requiring registration under this section, but registra-
"tion of any such mortgage or charge may be effected on the
"application of any person interested therein.

"Where the registration is effected on the application of some
"person other than the company, that person shall be entitled to
"recover from the company the amount of any fees properly paid
"by him to the registrar on the registration.

"(8) The register kept in pursuance of this section shall be
"open to inspection by any person on payment of the prescribed
"fee, not exceeding one shilling for each inspection.

"(9) Every company shall cause a copy of every instrument
"creating any mortgage or charge requiring registration under this
"section to be kept at the registered office of the company:
"Provided that, in the case of a series of uniform debentures, a
"copy of one such debenture shall be sufficient."

Scotch Companies not affected by sec. 93 of Comp. Cons. Act, 1908.

Section 93 is, it will be observed, not applicable to companies registered in Scotland. The reason why it has been thought unnecessary to require Scotch companies to comply with the stringent regulations as to registration, which section 93 imposes on companies registered in England or Ireland, is that the chief grievance to be remedied by this section (namely the existence of undisclosed floating charges which used frequently to operate harshly against the unsecured creditors of English and

Irish companies) does not exist in the case of Scotch companies, as floating charges are ineffectual in Scotland. (*g*)

Registration of Mortgages on ships.

It may here be stated that, if a debenture or covering deed securing an issue of debentures or debenture stock is intended to create a mortgage or charge upon a ship, the provisions of the Merchant Shipping Act, 1894, as well as section 93 of the Companies Consolidation Act, 1908, must be complied with. (*h*)

Debentures created before 1st. July 1908.

A debenture or covering deed securing an issue of debentures or debenture stock, if "created" before the first day of July, 1908, though not liable to registration under section 93 of the Companies Consolidation Act, 1908, must be registered under section 100 of this Act, if and so far as any property of the company is thereby specifically mortgaged or charged.(*i*)

Conveyances to Trustees of Covering Deed of Property substituted by them for other Property comprised in Covering Deed is not liable to Registration.

A mortgage or charge is only liable to registration under section 93, if it is "created by the *company*"; hence, if a company by a covering deed securing an issue of debentures or debenture stock confers on the *trustees* a power to sell part of the property thereby specifically mortgaged and a power to purchase with the proceeds of sale other property to be conveyed to them on the like trusts, a conveyance (to which the *company* is *not* a party) of property so purchased *to the trustees* upon the trusts of the covering deed, is not liable to registration under section 93, as it is not "*created by the company*". (*j*)

Securing an "issue" of Debentures.

A mortgage or charge must be registered under section 93, if it is created for the purpose of securing any "issue" of debentures (or debenture stock); (*k*) the term "issue" is a popular term (used, it is submitted, in the same sense as the word "series" in section 93 (4)) meaning a group or batch of two or more debentures in precisely the same form and conferring on the holders precisely the same rights. Hence a covering deed securing an issue of debentures or debenture stock created by an English or Irish company registered under the Companies Act, 1862—or the Companies Consolidation Act, 1908—will be liable to registration under section 93, whatever the form of such deed may be or the nature

(*g*) *Clerk* v. *West Calder Oil*, 30th June (1880), 9 R. 1017.

(*h*) *Cunard Steamship Co.*, v. *Hopwood* (1908) 2 Ch. 564. As to registration of mortgages and charges under the Merchant Shipping Act, 1894, see infra, Bk. I., ch. v., sec. iv.

(*i*) As to registration of mortgages and charges created before 1st July, 1908, see. re *Herts and Essex Waterworks* Co., (1909) W. N. 48.

(*j*) *Bristol United Breweries, Ltd.*, v. *Abbott* (1908) 1 Ch. 279.

(*k*) See sec. 285; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564.

of the property thereby charged may be. So likewise, where a covering deed securing an issue of debentures or debenture stock of a company and specifically mortgaging certain property and also containing a floating charge has been registered under section 93, a mortgage of leaseholds by sub-demise subsequently made by the company to the trustees of the covering deed for the purpose of securing the debenture debt (in substitution for other property specifically mortgaged by the covering deed) must be registered under this section; for the effect of such a sub-demise is to create a new specific "mortgage for the purpose of securing" the debenture debt and to substitute such specific mortgage for the floating charge.(*l*)

Agreement to issue Debentures if called upon to do so is not liable to Registration under sec. 93.

An agreement by a company to create and issue debentures or debenture stock at some future date or in some future circumstances, *whenever called upon to do so*, does not create a present right to any mortgage or charge and is, therefore, it is submitted, not liable to registration under section 93, but an agreement creating a *present* equitable right to such securities is liable to registration under that section.(*m*)

Registration where new Debenture is issued in place of paid off one.

The issue of a *new* debenture in the place of one, which has been paid off, constitutes a "creation" of a charge and would consequently appear to be liable to registration under section 93.

Registration in case of re-issue of paid off Debenture.

The re-issue of an original debenture, which has been paid off (though required by section 104 (4) of the Act to be treated as the issue of a new debenture for the purposes of stamp duty) does not, it is submitted, amount to a "creation" of a charge, as the re-issue of the original debentures does not create a new charge, but merely revives the original charge. The point is, however, not free from doubt.(*n*)

Consequences of Non-registration of Debenture or Covering Deed under sec. 93.

The consequences of "creating" or executing (1) debentures containing a charge or (2) a covering deed securing an issue of debentures or debenture stock without complying with the requirements of section 93 will be as follows:—

(1) The mortgage or charge created by the debentures or covering deed will be void as against the liquidator and

(*l*) *Cornbrook Brewery Co.* v. *Law Debenture Corporation* (1903) 2 Ch. 527; (1904) 1 Ch. (C. A.), 103.

(*m*) *Re Jackson* and *Bassford, Ld.* (1906) 2 Ch. 467, 477.

(*n*) Re *New London & Suburban Omnibus Co., Appleyard* v. *Same Co.*, (1908) 1 Ch. 621.

creditors of the company, but good as against the company itself;

(2) the contract to repay the money secured by the debentures or covering deed will be good both against the liquidator and creditors and also against the company itself;

(3) the money secured by the debentures or covering deed, which have or has become void by reason of non-registration, will become immediately payable; and

(4) the company itself and the several persons specified in section 99 of this Act, who knowingly and wilfully authorise the default, will be liable to the penalties specified in section 99.

The "prescribed particulars" should follow form 47 or 47*a* or 48 annexed to the Order of the Board of Trade dated 29th March, 1909.(*o*)

Twenty-one days after the date of its "creation".

Registration of a mortgage or charge under this section must be effected within "twenty-one days" after the date of its creation: this expression will probably be construed as meaning twenty-one *clear* days, as in law there is no fraction of a day.(*p*)

The time limit for registration of a debenture or covering deed under subsection 1 is within "twenty-one days after the date of its creation," whereas the time limit for registration under subsection 3 is "twenty-one days after the execution" of the covering deed or debenture; the expressions "creation" and "execution" of the debentures or covering deed are, it is submitted, synonymous.

Where there is a covering deed, the twenty-one days, within which such deed must be registered, will commence to run (*not* on the day, on which the *individual* debenture or debenture stock holders *receive* their respective securities, but) on the day, on which the *covering deed* is *executed*.(*q*)

Registration under subsec. 1 of sec. 93.

Where registration of a series of debentures is effected by supplying to the registrar particulars pursuant to subsection 1 of section 93,(*r*) it is necessary that, in addition to the registration

(*o*) See infra, Appendix, Forms 22, 23 and 24.

(*p*) *Pugh* v. *Duke of Leeds*, 2 Cowp. 714, 720; *Lester* v. *Garland*, 15 Ves. 257; re *Railway Sleepers Supply Co. Ld.* 29 Ch. D. 204.

(*q*) Re *Spiral Globe Ld. Watson* v. *Same Co.* (1902) 2 Ch. 209; re *New London & Suburban Omnibus Co. Appleyard* v. *Same Co.* (1908) 1 Ch. 621, 629; these decisions, however, turned on section 14 of the now repealed Companies Act, 1900.

(*r*) Registration of debentures or debenture stock forming a series is almost always more conveniently effected under subsection 3 of section 93 than under subsection 1.

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of the covering deed (if there is a covering deed) each individual debenture creating (as debentures generally do) a charge, which is independent of the charge created by the covering deed, should be separately registered within twenty-one days after its creation, and non-registration of any such debenture within twenty-one days will render it void against the other creditors and the liquidator of the company. But, though the charge created by a debenture is void, unless it is registered within twenty-one days after its "creation," a company, which has power to exchange or vary its debentures, may at any time after the creation (*i.e.*, sealing), but before the issue, of a debenture cancel such debenture and issue a fresh one in lieu thereof.(*s*)

The passing of a *resolution* to issue debentures is *not* "creating" a mortgage or charge; (*t*) but a debenture would appear to be "*created*" as soon as the company's seal is affixed to it, though it is not *issued* until some time after.(*u*)

The charge created by a debenture only becomes void under this section, if it remains unregistered after the expiration of twenty-one days after its creation. It was accordingly held in the case of *re Renshaw & Co.* (which was decided, while section 14 of the Companies Act, 1900, was in force) that, where a company issued a debenture and provided by a contemporaneous agreement with the holder, that a new debenture should be issued to him from time to time at intervals of fourteen days and that such debentures should not be registered until certain events, and the holder of the tenth debenture so issued transferred the same to a *bona fide* purchaser for value without notice and such transferee registered such tenth debenture within twenty-one days after the date of the debenture, such debenture was not invalidated by the Act.(*v*) It is submitted that, if section 93 of the Companies Consolidation Act, 1908, had been applicable in the above-mentioned case, the Court would have come to the same conclusion.

Mortgages and Charges on Property situated outside the United Kingdom.

As it is frequently impossible in cases, in which property situated outside the United Kingdom is mortgaged or charged, to send to the Registrar the original instruments creating such mortgage or charge at any time or to send such instruments or copies thereof within twenty-one days after the creation thereof,

(*s*) Re *N. Defries Ld.*, *Bowen* v. *Same Co.* (1904) 1 Ch. 37.

(*t*) Re *Harrogate Estates Ld.* (1903) 1 Ch. 498, 502.

(*u*) Re *E. F. Beattie Ld.* W. N. (1901) 152.

(*v*) Re *Renshaw & Co.* (1908) W. N. 210.

provisoes (i) and (ii) of section 93 (1) specify the manner, in which the requirements of section 93 may be complied with in such cases.

Mortgages and charges on property situated outside the United Kingdom are for the purposes of registration under this section divided into two categories:—

First: Mortgages and charges *created outside* the United Kingdom and comprising *solely property* situated *outside* the United Kingdom. As regards such mortgages and charges, proviso (i) of section 93 (1) of this Act makes two concessions for purposes of registration: *viz.*,

(*a*) a verified copy thereof (in lieu of the original) may be delivered to the registrar; and

(*b*) the time allowed for delivering such copy is extended beyond the period of twenty-one days.

Secondly: Mortgages and charges *created in* the United Kingdom and *comprising* property situated outside the United Kingdom. As regards such mortgages or charges, proviso (ii) of section 93 (1) of this Act authorises the delivery thereof to the registrar notwithstanding that such documents are not fully effectual in the country, in which the property is situated: but the originals of such instruments must, it is submitted, be delivered to the registrar for registration and the time for registration is "twenty-one days after the date of their creation".

For the purposes of registration under subsection 1 the same *particulars* of the mortgages and charges belonging to one or other of the above-named categories should be sent to the registrar as if the mortgages and charges had been created in the United Kingdom and the property mortgaged had been situated in the United Kingdom.

How far provision that Mortgage or Charge not registered under section 93 shall be Void is Applicable to Property situate outside the United Kingdom.

Section 93 purports (*inter alia*) to make mortgages and charges on property situated outside the United Kingdom void against the liquidators and creditors of a company, in the event of the requirements of this section not being complied with. But it must be borne in mind, that the laws of this country, though able to compel companies registered within the United Kingdom to supply certain specific information or to punish such companies and their officers for neglecting to do so, cannot, strictly speaking, give validity to a mortgage or charge on property situated in a foreign country or deprive such mortgage or charge of its validity.

For, whatever may be the laws in this country relating to mortgages and charges, a mortgage or charge created by a company on property situated in a foreign country will, if it satisfies the requirements of the laws of such foreign country, be recognised and given effect to by the Courts of such country, and will not be so recognised or given effect to, if it does not satisfy such requirements. The utmost, therefore, which the laws of this country can do, is to provide that the English Courts shall treat mortgages and charges made by a company registered in the United Kingdom as void, unless the provisions of section 93 are complied with.

The reason why the laws of England cannot effectually provide that a mortgage or charge on property situated in a foreign country shall be treated as void in such country, is that the English Courts cannot enforce their judgments against the property itself, as such property lies outside their jurisdiction, and the Courts of such foreign country, which can enforce their judgments against the property itself, will apply their own laws and not the laws of England. But, though the English Courts have no power to enforce the laws of England *in rem* against property situated outside the United Kingdom, such laws are sometimes given effect to by the exercise of the jurisdiction *in personam*, which the Courts in this country have exercised for several centuries.(*w*)

Hence, if a company registered in England or Ireland by a first mortgage specifically mortgages to trustees residing in the United Kingdom its land in a foreign country for the purpose of securing an issue of debentures or debenture stock, and such trustees perfect their title to such mortgage by complying with the requirements of the laws of such foreign country (*e.g.* by registration in the local registry in such country) but do not deliver the prescribed particulars of such first mortgage to the registrar of Joint Stock Companies in England or Ireland, or otherwise comply with the requirements of section 93 of this Act, such a mortgage, though valid and enforceable by the trustees in the Courts of the country, in which the land is situated, will be treated as void against "the liquidator and any creditor of the company" by an English Court, and such Court will, it is conceived, exercise

(*w*) *Penn* v. *Lord Baltimore*, W. & T. L. C. I., 6th Ed., p. 1047; 7th Ed., p. 755. Ex parte *Pollard* 4 Deac. 27, 40; *British South Africa Co.* v. *De Beers Consolidated Mines* (1910, 2 Ch. (C. A.) 502.

its jurisdiction *in personam* over the trustees in cases, in which it can by so doing give effect to the provisions of section 93 (1).

Meaning of proviso (iv) sec. 93 (1) of Comp. Cons Act, 1908.

Proviso (iv) of section 93 (1) providing that "the holding of "debentures entitling the holder to a charge on land shall not be "deemed to be an interest in land" is ungrammatical and obscure, and it is with the utmost diffidence that the author ventures to interpret it.

This proviso is intended to exempt certain charges created by a company on interests in land from the operation of clause (*d*) of section 93 (1) and accordingly clause (*a*) and the proviso should be read together and will, when so read, run as follows:—

"Every mortgage or charge on any land or any interest therein "(other than the holding of debentures or debenture stock entitling "the holder to a charge on land) shall be void, unless section 93 (1) "is complied with."

The proviso, if literally interpreted, is, it is submitted, capable of either of the following two meanings:—

(1) Company A may borrow money on the security of a deposit of its own debentures entitling the holder to a charge on its land, and such deposit of the debentures shall not be deemed to be a creation of a charge or an interest in land.

The objection to this interpretation is that it is of little or no use, as it would appear only to apply to debentures charged exclusively on a company's land, and debentures are hardly ever confined to the company's land, but are almost invariably charged by way of floating charge on the undertaking and all the assets (including the land) of the company. Such a debenture would but for proviso (iv) be liable to registration (i) as a charge on land or an interest therein, and (ii) as a floating charge on the undertaking or property of the company. As proviso (iv) provides (*not* that the holding of a debenture charged on land shall exempt such debenture from registration under section 93 (1), but merely) that the holding of such a debenture shall not be deemed to be a charge on an interest in land, it follows that a debenture creating a floating charge on the undertaking and assets (including the land) of the company would be liable to registration as a floating charge; or

(2) Company A may borrow money on the security of a de-

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posit of debentures issued by company B, which debentures create a charge on company B's land, and shall not be deemed to create a charge on an interest in land by such a deposit.

It is submitted, that this interpretation is preferable to interpretation (1) though it must be admitted that, if this was the meaning intended by the draftsman of the Act, he was singularly unfortunate in his wording of the clause.

Notice given by Registration of Floating Charge under sec. 93.

Where the security of the holders of a series of debentures or debenture stock consists of or comprises a floating charge on the undertaking or property of the company and registration of such security is effected under section 93, such registration will affect the world with *notice* of the *floating charge*, but *not* with notice of any *special restrictive provisions* contained in such charge, whereby the company is precluded from dealing with its property.(*x*)

Alternative method of Registration under subsec. 3 of sec. 93.

Where it is intended to effect the registration of the debenture or debenture stock holder's securities under *subsection* 1 of section 93, it is, as we have seen, necessary to deliver to the registrar:—

(*a*) the particulars in the prescribed form; and

(*b*) the debentures and (where there is a covering deed) the *original* covering deed or, where the instruments securing the debentures or debenture stock consist of or comprise mortgages or charges solely on property situated outside the United Kingdom, *copies* of such mortgages or charges, if such mortgages or charges are created out of the United Kingdom and comprise solely property situate outside the United Kingdom.

Subsection 3 of section 93 authorises, in lieu of that prescribed by subsection 1, an alternative mode of registration, which is almost always adopted in cases, in which a company creates a series of debentures or debenture stock ranking *pari passu*.(*y*) Where such a series is created, whether secured by a covering deed or not, subsection 3 allows the registration of such debentures or covering deed to be effected by the delivery of the following documents to the registrar for registration:—

I. particulars as to (i) the amount of the series, (ii) the date or dates of the resolution or resolutions authorising the issue or various issues of the series, (iii) the description of

(*x*) Re *Standard Rotary Machine Co.* 95 L. T. R. 829, 834; 51 Sol. Jo. 48; *Wilson* v. *Kelland* (1910) 2 Ch. 306, 313.

(*y*) *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564, 578.

the property charged, and (iv) the covering deed and the trustees thereof (where there is a trust deed) (*z*); and

II. the original deed or deeds securing the series of debentures or debenture stock or (if there is or are no such deed or deeds) one of the debentures or debenture stock certificates. (*a*)

If the original deed or one of the original deeds securing the series is executed outside the United Kingdom and it is consequently not practicable to deliver it to the registrar within twenty-one days after its execution, the registration of such deed should be effected (not under subsection 3, but) under subsection 1 of section 93.

Registration in the alternative mode authorised by subsection 3 will protect the debentures or debenture stock of the series, whether issued before or after the date of the registration. (*b*)

Substituted security covered by Registration under subsec. 3.

Where a covering deed securing an issue of debentures or debenture stock ranking *pari passu* contains a provision, which authorises part of the property specifically mortgaged thereby to be withdrawn, and other property to be substituted for it, and the particulars specified in subsection 3 (including a general description of the property charged) are delivered to the registrar and entered by him on the register, the registration under subsection 3 will protect any substituted property as fully as the original property and without any further registration under this Act. To hold that subsection 3 does not protect the substituted security would be tantamount to holding that the holders of such debentures or debenture stock (who have already advanced their money and held certificates from the registrar as to registration) must perform the difficult, if not impossible, task of seeing that the mortgages or charges of the substituted property are duly registered under this Act under the penalty of losing their security in default of proper registration. (*c*)

Time limit for Registration under sec. 93 (3).

As regards the time limit for registration under subsection 3, it will be noticed that it is twenty-one days after the *execution* of the covering deed, or (if there is no covering deed) of *any* debentures of the series. Hence, in the case of a series of debentures not secured by a covering deed, time will begin to run as soon as any debenture of the series is *executed*, though it may not be *issued* till some time after.

(*z*) For a form of such particulars, see infra, Appendix, Forms 23 and 24.

(*a*) Re *Yolland Husson and Birkett Ld.* (1908) 1 Ch. (C. A.) 152.

(*b*) Re *Harrogate Estates Ld.* (1903) 1 Ch. 498, 503.

(*c*) *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564, 579-580.

Effect of Registrar's certificate of Registration of Mortgage.

The registrar's certificate under section 93 (5) is conclusive evidence that all the requirements of the section as to registration have been complied with and, where such a certificate has been issued, the Court will refuse to go into the question whether such requirements have in fact been complied with; thus, for example, when registration has been effected under subsection 3 of a series of debentures and the registrar's certificate states, that the debentures do constitute a series, the Court will decline to inquire into the question, whether the debenture holders of the series do in fact rank *pari passu*. (*d*) So likewise, if one of the matters required by section 93 to be stated in the particulars (*e.g.*, the date of the resolution creating the series of debentures or debenture stock) is by inadvertence not inserted therein and the registrar issues a certificate stating that the statutory particulars have been duly registered, the certificate will be conclusive. (*e*)

Penalties for default in complying with requirements of Comp. Cons. Act, 1908, as to Mortgages.

Default in :—

(1) Sending the prescribed particulars (sec. 99 (1)); or

(2) complying with any of the requirements of this Act as to the registration of mortgages or charges (sec. 99 (2))

is punishable by fines.

Permission of the delivery of a debenture or debenture stock certificate without an endorsement of the registrar's certificate of registration is likewise punishable by fine (sec. 99 (3)).

The Act does not expressly provide what is to happen in the event of a company making default in fulfilling the statutory duty imposed on the company by section 93 (9) of keeping at its registered office copies of mortgages and charges requiring registration under section 93. The consequence of the non-performance of this statutory duty (or any other statutory duty) will (in the absence of express provision dealing with such default) be that the company be liable (i) to be indicted for so doing, and (ii) perhaps also to pay damages to any member or creditor, who can prove that he has suffered damage by reason of such default. (*f*)

Refusal to allow inspection of the copies of the instruments kept at the company's office is punishable by a fine (sec. 101).

(*d*) Re *Yolland Husson and Birkett Ld.*, *Leicester* v. *Same Co.* (1907) 2 Ch. 471; (1908) 1 Ch. (C.A.) 152; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564.

(*e*) For a form of the registrar's certificate, see infra, Appendix, Forms 27 to 29 and (1907) 2 Ch. 471, 473; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 569-570.

(*f*) See infra, Bk. II., ch. vi., sec. i. (4).

Where through inadvertence default is made in complying with the requirements of section 93, provision is made by section 96 for the rectification of the register as follows :—

Rectification of the Register.

Sec. 96 of Comp. Cons Act, 1908.

"A judge of the High Court, on being satisfied that the "omission to register a mortgage or charge within the time herein- "before required, or that the omission or misstatement of any "particular with respect to any such mortgage or charge, was "accidental, or due to inadvertence or to some other sufficient "cause, or is not of a nature to prejudice the position of creditors "or shareholders of the company, or that on other grounds it is "just and equitable to grant relief, may, on the application of "the company or any person interested, and on such terms and "conditions as seem to the judge just and expedient, order that the "time for registration be extended, or, as the case may be, that "the omission or misstatement be rectified."

Applications under this section (which should be assigned by ballot to a particular judge in the ordinary way) are generally made by originating motion,(*h*) but may be made by originating summons.(*i*) But, if is desired to obtain a decision of the Court on the point as to whether registration under section 93 is or is not essential, the application should be made by an action properly constituted (*i.e.*, by a special case), and not by an application for rectification under section 96.(*j*)

"Accidental or due to inadvertence."

Failure to register has been held under the now repealed section 15 of the Companies Act, 1900 (which is re-enacted by section 96 of the present Act, 1908) to be "accidental or due to inadvertence," where the solicitor, who should have seen to the registration, omitted to do so owing to pressure of business and a fire at his office,(*k*) or where the directors(*l*) were, or the secretary of the company was, imperfectly acquainted with the law as to registration.(*m*)

"Some other sufficient cause.

Where a debenture-holder was advised by his solicitor that registration was unnecessary, the Court held that the omission to register was due "to some other sufficient cause" and rectified the register.(*n*)

(*h*) Re *Bootle Cold Storage & Ice Co.* W. N. (1901) 51; Re *E. & F. Beattie Ld.* W. N. (1901) 152; Re *Tingri Tea Co.* W. N. (1901) 165; Re *Cunard Steamship Co.* W. N. (1908) 160.

(*i*) Re *Legal & General Investment Co.* W. N. (1901) 72.

(*j*) Re *Cunard Steamship Co.* (1908) W. N 160; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564.

(*k*) Re *Tom Tit Cycle Co.*, Fisher's Case (1899) W.N. 35.

(*l*) Re *Jackson & Co. Ld.* (1899) 1 Ch. 348; Re *Cunard Steamship Co.*, (1908) W. N. 160.

(*m*) Re *E. & F. Beattie* (1901) W.N. 152; re *Mendip Press Ld.*, 18 T. L. R. 38.

(*n*) Re *S. Abrahams & Sons* (1902) 1 Ch. 695.

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Form of order made under sec. 96 of the Comp. Cons. Act, 1908.

Adopting the practice followed, when rectifying the register of bills of sale under section 14 of the Bills of Sale Act, 1878, the Court almost invariably inserts into orders made under section 96 of the Companies Consolidation Act, 1908, the following saving words:—

"Provided always that this order is to be without preju-"dice to any rights [other than the rights in respect of (A) the "debentures of the said series *or* (B) the said trust deed] which "may have been or may be acquired against the holders of the "said debentures [*or* against the trustees of the said trust deed] set "forth in the schedule to this order prior to the time when the "last-mentioned debentures [*or* trust deed] shall be actually re-"gistered."(*o*)

Effect of such order.

An order in this form only protects creditors, who have at the date of the order acquired rights against property, but does not protect the unsecured creditors of the company. The Court will not necessarily, though it may in special circumstances, impose terms for the protection of the unsecured creditors.(*p*)

If an order is made under section 96 extending the time for the registration of a debenture-holder's trust deed and containing the saving words in the above form, and the company passes a resolution for voluntary winding up before the actual registration of the trust deed pursuant to such order, rights will notwithstanding subsequent registration be acquired by the unsecured creditors of the company by virtue of the winding up, which involves the administration of the assets of the company for the benefit of all the company's creditors, and these rights of the unsecured creditors will in such a case be held to be protected by the saving words of the order, and the debenture-holders entitled to the benefit of the trust deed will in such a case not be treated as secured creditors.(*q*)

Entry of satisfaction of Mortgages.

Section 97 contains a provision authorising the registrar to enter on the register a memorandum of satisfaction (*r*) of a mortgage or charge, which has been registered under section 93, on evidence proving such satisfaction being produced to him.

(*o*) Re *Jopling Brewery Co.* (1902) 1 Ch. 79; re *Spiral Globe Co.* (1902) 1 Ch. 395; re *S. Abraham & Sons, Ld.* (1902) 1 Ch. 695; re *J. C. Johnson & Co. Ld.* (1902) 2 Ch. (C. A.) 101, 111. See *infra* Appendix Form 30A.

(*p*) Re *Ehrmann Brothers Ld.* (1906) 2 Ch. (C. A.), 697; re *Cardiff's Workmen's Cottages, Ld. Ibid.*, p. 627.

(*q*) Re *Anglo-Oriental Carpet Manufacturing Co.* (1903) 1 Ch. 914.

(*r*) For a form of such memorandum, see infra, App., Form 30.

The registrar is required by section 98 to keep a chronological index of the mortgages and charges registered under section 93.

Chronological Index of Mortgages.

The annual summary, which companies are by section 26 required to send to the registrar, must specify (*inter alia*) the total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar under this Act, or which would have been required so to be registered, if created after the first day of July, 1908.

Annual Summary to specify Registered Mortgages.

Limited companies (whether registered in England, Scotland or Ireland) are by section 100 of the Companies Consolidation Act, 1908, required to keep a register of mortgages and to enter therein all mortgages and charges (without any limit as to date of the execution) *specifically* affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgages or persons entitled thereto.

Registration under sec. 100.

Default on the part of the company to comply with the requirements of the above-mentioned section 100 (like default in complying with the requirements of the corresponding section 43 of the now repealed Companies Act, 1862), does not in any way affect the validity of the mortgage or charge,(*s*) but merely renders (1) any director, manager or other officer of the company knowingly and wilfully authorising or permitting the omission of any entry required to be made in pursuance of section 100 liable to a fine not exceeding £50, and (2) probably renders the company liable to be indicted for failure to perform the statutory duty imposed on it.

Inspection of copies of Registered instruments and of Register of Mortgages.

The copies of the instruments creating a mortgage or charge requiring registration under section 93 of this Act with the registrar of joint stock companies and the register of mortgages kept by a company pursuant to section 100 must (by virtue of section 101 of this Act) be kept open to the inspection of any creditor or member of the company without fee and to other persons on payment of a small fee.

(*s*) Re *General South American Co.*, 2 Ch. Div. 337; re *Globe New Patent Iron & Steel Co.*, 48 L. J. Ch. 295; 27 W. R. 424; 40 L.T.R. 380; *Wright* v. *Horton*, 12 A. C. 371, 382.

k. I., Ch. V., Sec. I.

Section 101 runs as follows:—

Sec. 101 of Comp. Cons. Act, 1908. Right to inspect copies of instruments creating Mortgages and Charges and Company's Register of Mortgages.

"101.—(1) The copies of instruments creating any mortgage "or charge requiring registration under this Act with the registrar "of companies, and the register of mortgages kept in pursuance of "the last foregoing section, shall be open at all reasonable times "to the inspection of any creditor or member of the company "without fee, and the register of mortgages shall also be open "to the inspection of any other person on payment of such fee, "not exceeding one shilling for each inspection, as the company "may prescribe.

"(2) If inspection of the said copies or register is refused, any "officer of the company refusing inspection, and every director and "manager of the company authorising or knowingly and wilfully "permitting the refusal, shall be liable to a fine not exceeding "five pounds, and a further fine not exceeding two pounds "for every day during which the refusal continues; and, in "addition to the above penalty as respects companies registered "in England or Ireland, any judge of the High Court sitting in "chambers, or the judge of the Court exercising the Stannaries "jurisdiction in the case of companies subject to that jurisdiction, "may by order compel an immediate inspection of the copies or "register."

Right to inspect Register of Debentures and to have copy of Trust Deed.

Express provision is made by section 102 of the Act, conferring on debenture (and debenture stock) holders of a company a right (*a*) to inspect the registers of debenture and debenture stock of the company, and (*b*) to have a copy of any trust deed securing such debentures or debenture stock. Section 102 runs as follows:—

Sec. 102 of Comp. Cons. Act, 1908. Right of Debenture-holders to inspect the Register of Debenture-holders and to have copies of Trust Deed.

"102.—(1) Every register of holders of debentures of a com- "pany shall, except when closed in accordance with the articles "during such period or periods (not exceeding in the whole thirty "days in any year) as may be specified in the articles, be open to "the inspection of the registered holder of any such debentures, "and of any holder of shares in the company, but subject to such "reasonable restrictions as the company may in general meeting "impose, so that at least two hours in each day are appointed for "inspection, and every such holder may require a copy of the "register or any part thereof on payment of sixpence for every one "hundred words required to be copied.

"(2) A copy of any trust deed for securing any issue of "debentures shall be forwarded to every holder of any such "debentures at his request on payment in the case of a printed "trust deed of the sum of one shilling or such less sum as may "be prescribed by the company, or, where the trust deed has "not been printed, on payment of sixpence for every one hundred "words required to be copied.

"(3) If inspection is refused, or a copy is refused or not "forwarded, the company shall be liable to a fine not exceeding "five pounds, and to a further fine not exceeding two pounds "for every day during which the refusal continues, and every "director, manager, secretary, or other officer of the company "who knowingly authorises or permits the refusal shall incur the "like penalty."

SECTION II. *Registration under Section 19 of the Stannaries Act, 1887.*

Registration under the Stannaries Act, 1887.

By the Stannaries Act, 1887(*t*) which only applies (section 3) to metalliferous mines and tin streaming works within the Stannaries (of Cornwall and Devon), the following provisions amongst others are enacted:—

Sec. 19 of Stannaries Act, 1887.

Section 19: "All mortgages, mortgage debentures and other "documents whatever, whereby power is given by any company "to any persons to take possession of any mining effects of or on "a mine, shall in addition to any registration thereof now required "by law be registered within twenty-eight days from the date "thereof at the office of the said registrar in a book to be kept "there for that purpose without payment of any fee, and such "book shall be subject to the inspection of all applicants at all "reasonable times and no such mortgage, mortgage debentures or "other document, unless so registered, shall confer any priority "over or title as against the claims of any persons whatever for "work and labour done or services performed in or upon such "mine or for goods and materials supplied to any company by "which the said mine is carried on; such registration shall not "affect any priority in respect of wages under the provisions of "this Act".

(*t*) 50 & 51 Vic., cap. 43.

The provisions alluded to are: A provision (section 4) that miners shall have a first charge upon the mining effects for three months' wages in priority to all claims for rents, royalties, dues or otherwise by lessors or mortgagees or judgment, execution or other creditors or any other persons whatsoever and (section 9) that wages, which would under section 4 be a first charge, shall be paid by an official liquidator or liquidator in priority to all other costs except certain specified costs of the winding-up order.

The result of the above-mentioned sections is, that debentures or debenture stock can be effectually charged by registration within the period specified on the property of the mining companies in the Stannaries (subject only to the prior charge of the wages specified in sections 4 and 9) but that, in default of such registration under this Act, such debentures or debenture stock confer no priority over or title as against claims for work and labour done or services performed or goods and materials supplied.

The registration prescribed by this Act is in addition to any other registration required by law; hence any limited company engaged in or formed for the purpose of working mines within the Stannaries is bound under penalties (like any other limited company) to keep a register of all mortgages or charges affecting its property as prescribed by section 100 of the Companies Consolidation Act, 1908. It should be noticed, that the register, which the Stannaries Act, 1887, requires a company to keep, will contain an entry of the documents creating the charge (*e.g.*, the debenture or debenture stock holders' covering deed or the debentures), whereas the register, which section 100 of the Companies Consolidation Act, 1908, requires a company to keep, will contain a short description of the property mortgaged or charged, the amount of the mortgage or charge created and the name of the persons entitled to the mortgage or charge.(*u*)

SECTION III. *Registration under the Bills of Sale Acts.*

Prior to the decision of *in re The Standard Manufacturing Company* (*v*) it was generally thought, that debentures and de-

(*u*) *Smith's Case*, 11 Ch. D. 579. (*v*) (1891) 1 Ch. (C. A.) 627.

benture or debenture stock holders' covering deeds creating a charge on the chattels of a company incorporated under the Companies Act, 1862, were bills of sale within and had to be registered under section 8 of the Bills of Sale Act, 1878 (41 & 42 Vic., cap. 31). That there was this general opinion with regard to debentures is proved by the fact, that the Bills of Sale Act, 1882 (45 & 46 Vic., cap. 43), which applies to the bills of sale within the definition of the Bills of Sale Act, 1878, given by way of security for the payment of money, specially exempts debentures from the operation of the Act of 1882. The Court assumed in many cases, that debentures and covering deeds were within the scope of the Bills of Sale Act, 1878,(*w*) and many debentures and covering deeds were in fact registered under this Act.

It used to be assumed that Bills of Sale Acts applied to Debentures.

By section 8 of the Bills of Sale Act, 1882,(*x*) it is provided that "every bill of sale (which expression includes any instrument, "by which a right in equity to any charge or security on any "personal chattels shall be conferred) (*y*) shall be duly attested "and shall be registered under the principal Act within seven "clear days after the execution thereof or, if it is executed in any "place out of England, then within seven clear days after the time "at which it would in the ordinary course of post arrive in "England, if posted immediately after the execution thereof; and "shall truly set forth the consideration, for which it was given; "otherwise such bill of sale shall be void in respect of the "personal chattels comprised therein".

Provisions of Bills of Sale Act, 1882.

These provisions are, however, restricted by section 17 of the same Act, whereby it is enacted, that "nothing in this Act shall "apply to any debentures issued by any mortgage, loan or other "incorporated company and secured upon the capital stock or "goods, chattels and effects of such company".

This 17th section has been held in many cases to have protected debentures, (*z*) which were not in the prescribed form and not registered.(*a*) But it was expressly decided in the case of

(*w*) Re *Asphaltic Wood Co.*, 49 L. T. R. 159; *Levy* v. *Abercorris Co.*, 37 Ch. D. 260, 265, and many others.

(*x*) 45 & 46 Vic., cap. 43.

(*y*) 41 & 42 Vic., cap. 31, sec. 4.

(*z*) Including debentures issued by a company incorporated according to the laws of Guernsey (*Clark* v. *Balm Hill Co.* (1908), 1 K. B. 667).

(*a*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215; *Levy* v. *Abercorris Co.*, 37 Ch. D. 260.

Bk. I., Ch. V., Sec. III.

Brocklehurst v. *Railway Printing and Publishing Company* (*b*) and was assumed (though not decided) by the Court of Appeal in *Ross* v. *Army and Navy Hotel Company*,(*c*) that a covering deed (creating a charge on chattels) which was unregistered and which was not in the prescribed form, was void under the Bills of Sale Act, 1882, so far as it purported to affect such chattels, such a deed not being a debenture within the meaning of the Act.

Bill of Sale Acts do not apply to Debentures.

The question of the applicability of the Bills of Sale Acts to debentures was thoroughly gone into in the case of *in re The Standard Manufacturing Company*(*d*) and in that case it was definitely settled,(*e*) that debentures were not within the mischief of the Act of 1878. The ground for this decision is, that an incorporated company's mortgages or charges, for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, cannot belong to the class of secret documents, by which frauds are perpetrated upon creditors by secret bills of sale and that debentures are consequently not within the scope of the Bills of Sale Acts.

Bills of Sale Acts do not apply to Covering Deeds.

Though the Court of Appeal only expressly decided *in re Standard Manufacturing Company* that the Bills of Sale Acts do not apply to debentures, the Court has since held that (notwithstanding the earlier cases, which deal specifically with covering deeds) (*f*) the grounds, on which this decision is based, were equally applicable to a covering deed and that a covering deed, being a charge, for the registration of which provision was made by the Companies Act, 1862, was not a bill of sale and need consequently not be registered under the Bills of Sale Acts.(*g*)

Debentures and Covering Deeds of an Industrial or Provident Society must be registered under Bills of Sale Acts.

There being no provision for the registration of mortgages and charges issued by societies, registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vic., cap. 39), debentures and debenture or debenture stock holders' covering

(*b*) W.N. (1884), p. 70.

(*c*) 34 Ch. Div. 43.

(*d*) (1891) 1 Ch. (C. A.) 627. In the case of *in* re *Hansard Publishing Union*, 8 Times L. R. 280, Lindley, L. J., said: "It is settled that the Bills of Sale Acts do not affect debentures".

(*e*) Adopting *John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332; *Read* v. *Joannon*, 25 Q. B. D. 300.

(*f*) See *Brocklehurst* v. *Railway Printing and Publishing Co.*, W. N. (1884), p. 70; *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. Div. 43.

(*g*) *Richards* v. *Overseers of Kidderminster*, 44 W. R. 505; 12 Times L. R. 340 (1896), 2 Ch. 212. This decision is applicable to mortgages and charges registered under the Comp. Cons. Act, 1908.

deeds, which create a charge on the chattels of such a society, come within the scope of and require registration under the Bills of Sale Acts and, as such a society is not a "company" within any of the accepted meanings of the word, debentures issued by such a society are not protected by section 17 of the Bills of Sale Act, 1882.(*h*) A trust deed of such a society purporting to create a charge on the chattels of the society is a bill of sale and as such liable to registration under the Bills of Sale Acts, but such deed is a bill of sale only, in so far as it affects such chattels; for, in so far as it affects other property, it is not a bill of sale at all; hence a trust deed purporting to create a charge on the chattels and other property of such a society will, if not registered under the Bills of Sale Acts, not be invalidated as to the charges on the property, other than the chattels, of the society.(*i*)

SECTION IV. *Registration under the Merchant Shipping Act*, 1894.

Registration of Mortgages under Merchant Shipping Act, 1894.

When one or more registered ship or ships or a share therein forms or form part of the security of the debenture or debenture stock holders of a company, registration of the mortgage or mortgages thereon should be effected under section 31 of the Merchant Shipping Act, 1894 (57 and 58 Vic., cap 60), which provides as follows:—

Sec. 31 of Merchant Shipping Act, 1894.

"(1) A registered ship or a share therein may be made a "security for a loan or other valuable consideration, and the in- "strument creating the security (in this Act called a mortgage) "shall be in the form marked B in the first part of the First "Schedule to this Act, or as near thereto as circumstances permit, "and on the production of such instrument the registrar of the "ship's port of registry shall record it in the register book.

"(2) Mortgages shall be recorded by the registrar in the order "in time, in which they are produced to him for that purpose, "and the registrar shall by memorandum under his hand notify "on each mortgage that it has been recorded by him, stating the "day and hour of that record."

(*h*) *Great Northern Railway Co.* v. *Coal Co-operative Society*, 12 Times L. R. 30; (1896) 1 Ch. 187.

(*i*) Re *Burdett*, 20 Q. B. Div. 310; re *Yates*, 38 Ch. Div. 112, 118; *Mumford* v. *Collier*, 25 Q. B. Div. 279, 284; *Climpson* v. *Coles*, 23 Q. B. Div. 465, 475; *Cochrane* v. *Entwistle*, 25 Q. B. Div. 116, 119.

Effect of Registration under Merchant Shipping Act, 1894.

The effect of registration of mortgages under the Merchant Shipping Act, 1894, is stated in section 33, which runs as follows:—

Sec. 33 of Merchant Shipping Act, 1894.

"If there are more mortgages than one registered in respect "of the same ship or share, the mortgages shall, notwithstanding "any express, implied, or constructive notice, be entitled in pri- "ority, one over the other, according to the date at which each "mortgage is recorded in the register book, and not according to "the date of each mortgage itself."

The object of registration under this Act is to obtain priority over mortgages, which are not registered in the register book of the ship's port of registry or are registered therein at a later date. Registration under the Merchant Shipping Act, 1894, has therefore a different object from registration under section 93 of the Companies Consolidation Act, 1908, the object of registration under the latter Act being to prevent the avoidance of the mortgage or charge by reason of non-compliance with section 93. Hence, when an issue of debentures or debenture stock is secured by a mortgage or charge on one or more ship or ships, registration must be effected both under the Merchant Shipping Act, 1894, and the Companies Consolidation Act, 1908 (*j*).

Rights of Debenture-holders entitled to Mortgage Registered under Merchant Shipping Act, 1894.

The holders of debentures or debenture stock entitled to a mortgage or charge on a ship, which has not been registered under the Merchant Shipping Act, 1894, will rank after a duly registered legal mortgage of later date, even though the person entitled to such registered mortgage had at the date of his mortgage notice of the existence of the debenture or debenture stock-holders' mortgage or charge (*k*).

Debenture and debenture stock holders entitled to the benefit of a mortgage on a ship or a share therein registered under the Merchant Shipping Act, 1894, will have priority over the charterers thereof, where the charter party contains a provision, which impairs the debenture or debenture stock holders' security, such as a right of pre-emption in favour of the charterers; (*l*) for the

(*j*) Re *Cunard Steamship Co.* (1908) W. N. 160; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 564.

(*k*) *Black* v. *Williams* (1895) 1 Ch. 408.

(*l*) *Marsden* v. *Newton*, in re *Great Eastern Steamship Co.* 29 Sol. Jo. 668.

mortgagor of a ship has only power, under section 34 of the Merchant Shipping Act, 1894 (re-enacting section 70 of the Merchant Shipping Act, 1854) to act as the owner of and deal with his ship, provided he does not materially prejudice or detract from or impair the sufficiency of the security comprised in the mortgage.(*m*)

SECTION V. *Registration under the Middlesex and Yorkshire Registries Acts.*

Registration in the Middlesex and Yorkshire Registries.

A memorial of the securities purporting to create a mortgage or charge in favour of the debenture or debenture stock holders of a company on land situated in Middlesex (*n*) (not including the city of London) or in Yorkshire (*o*) should respectively be registered in the local registry; for in the absence of such registration (1) such mortgage or charge on the land in Middlesex will be postponed to the interest of any purchaser or mortgagee, who claims under an instrument duly registered under the Middlesex Registry Act, provided that he had no actual or constructive notice of such mortgage or charge at the date of such instrument, and (2) such mortgage or charge on the land in Yorkshire will be postponed (except in the case of actual fraud) to the interest of any purchaser or mortgagee claiming under an instrument duly registered, under the Yorkshire Registries Acts, even if such person had actual notice of such mortgage or charge at the date of such instrument.

SECTION VI. *Registration under the Land Transfer Acts, 1875 and 1897.*

Clauses to be inserted in Covering Deed comprising land liable to Registration under Land Transfer Acts, if the Company has not been registered under such Acts.

Where it is intended to secure an issue of debentures or debenture stock of a company by a covering deed creating a mortgage on land situated in a district, in which registration under the Land Transfer Acts (*p*) is compulsory, the following

(*m*) *Collins* v. *Lamport*, 34 L. J. Ch. 196; 13 W. R. 283; *The Fanchon*, L. R. 5 P. D. 173.

(*n*) Under the Middlesex Registry Act (7 Anne, cap. 20).

(*o*) Under the Yorkshire Registries Acts, 1884 and 1885 (47 & 48 Vic., cap. 54, secs. 4 and 14; 48 & 49 Vic., cap. 26).

(*p*) 38 & 39 Vic., cap., 87; 60 & 61 Vic., cap. 65.

clauses should be inserted in the covering deed, if the company has not at the date of such deed been registered in the Land Registry as the proprietor of such land :(*x*)

(*a*) a covenant by the company not to have its name entered in the register without the consent of the trustees of the covering deed,

(*b*) a covenant by the company to hand over to the trustees the land certificate upon any such registration,

(*c*) a provision making the security enforceable on the breach of any convenant and

(*d*) a provision authorising the trustees to forthwith enter a caution on the register under section 60 of the Land Transfer Act, 1875, and binding the company to pay the expenses incident to entering such caution.(*y*)

The trustees should enter such caution forthwith.

Steps to be taken by Trustees, if Company has been so registered.

If the company has been registered under these Acts as the proprietor of any land mortgaged by the covering deed, the land certificate should be handed over to the trustees of the covering deed and the trustees of such deed should be registered as the proprietors of the charge without delay under Rule 121 made under the provisions of the Land Transfer Acts.

Caution entered, if Debentures (not secured by Trust Deed) restrict Company's power of dealing with its land.

Debentures, which are not secured by a covering deed, frequently contain, as has already been stated,(*z*) a restrictive clause precluding the company from creating any mortgage or charge ranking above the debentures. If a company issuing such debentures possesses land, which is liable to compulsory registration under the Land Transfer Acts, the holders of these debentures may in many cases find it advisable to enter a caution on the Land Registry.

(*x*) See Appendix, Form 12, clauses 23*a* and 26(*k*).

(*y*) See sec. 60 of the Land Transfer Act, 1875, and Land Transfer Rules, 1898, Rules 74 to 77.

(*z*) See supra, Bk. I., ch. ii., sec. i. (2*a*).

CHAPTER VI.

HOW AND BY WHOM DEBENTURES AND DEBENTURE STOCK MAY BE TRANSFERRED AND DISPOSED OF.

SECTION I. *Transfer of Debentures and Debenture Stock Payable to Registered Holder.*

Form of Transfer of Debentures to Registered Holder.

DEBENTURES and debenture stock payable to registered holder are transferred by an instrument executed in the manner and by the person or persons specified in the conditions or in the trust deed, subject to which such securities are issued ;(*a*) and, where the regulations of the company expressly provide, that a transfer shall be invalid in case of non-compliance with certain formalities, no valid transfer can be made (as against third parties) without complying with such formalities. Where the securities of the debenture or debenture stock holders provide for the registration of the holders, the registered holder or his legal personal representatives is or are the proper person or persons to transfer the debentures or debenture stock. The conditions usually provide, that such transfer shall be delivered at the registered office of the company with a specified fee and that, on the necessary evidence of identity being produced, the transfer will be registered. On this being done, it is the duty of the officers of the company to register the transfer.(*b*) Sometimes the form of transfer to be used is specified in the securities themselves.

The debenture, debenture stock certificate or covering deed usually states, how the debentures or debenture stock should be transferred and, where this is the case, the transfer must be carried out in the manner prescribed and the company may decline to register a transfer, which is not in the form prescribed.

What is done with the Original Debenture or Certificate on Transfer.

In the case of debentures to registered holder the original

(*a*) For an ordinary form of transfer, see Appendix, Form 3*b*.

(*b*) In re *Hercules Insurance Co.*, *Brunton's Claim*, 19 Eq. 302, 309.

Bk. I., Ch. VI., Sec. I.

debentures are kept by the transferee, whose name is entered in the register kept by the company for that purpose; but the transfers of such debentures usually remain in the hands of the company.

On the other hand, the debenture stock certificate to registered holder(*d*) is handed over to the company to be cancelled and, where it is intended to transfer the whole amount of the debenture stock therein specified, a new certificate is issued to the transferee, whose name is entered in the register of the company. But, where it is intended to transfer only a part and to retain the remainder of the debenture stock specified in a certificate to registered holder, such certificate is handed over to the company for cancellation and a new certificate for the amount transferred is issued to the transferee and a new certificate for the amount retained is issued to the transferor and the transferee and transferor are respectively entered in the register as the holders of the amounts specified in their certificates.

Effect of accepting Notice of Transfer.

If a company, which keeps no book for registering transfers of debentures and which has no form of transfer, accepts notice of a transfer and, though not objecting to the form thereof, does not register such transfer, such company cannot afterwards successfully impugn the validity of the transfer on the ground, that no transfer book was kept and that there were no transfer forms. On becoming aware of the form of the transfer, the company should have objected to it, if it was intended to raise an objection at all.(*e*)

If a company accepts notice of a transfer of debentures or debenture stock and, though not objecting to the transfer, does not register it, it may not set up against the transferee equities, which it might have set up against the transferor, *e.g.*, by proving that the debenture was originally fraudulently issued.(*f*)

A Debenture charged on land is within sec. 4 of the Statute of Frauds.

A debenture charged on land is an "interest in land" within the Statute of Frauds (29 Car. II., cap. 3). Hence, if a company, which has property in land, issues debentures or debenture stock (to registered holder or to bearer) and makes them a float-

(*d*) Such certificate usually contains a footnote stating, that no transfer will be registered, unless accompanied by the certificate. See Appendix, Form II.

(*e*) In re *Colonial and General Gas Co.*, ex pte. *Lishman & Co.*, W. N. (1870) 173.

(*f*) *The Hercules Insurance Co., Brunton's Claim.* 9 Eq. 302.

ing charge(*g*) on the undertaking and all the property of the company, such debentures or debenture stock are for the purposes of section 4 of the Statute of Frauds an "interest in land" and consequently a contract for the sale of such debentures or debenture stock cannot be enforced, unless the contract or some memorandum or note thereof be in writing signed by the party to be charged or by his agent authorised by writing.(*h*)

When a Trustee in Bankruptcy may execute Transfer.

The trustee in bankruptcy may exercise the right of transfer of debentures or debenture stock belonging to the bankrupt.(*i*)

A provision, that the assignee of debentures is only to be entitled to the benefit of the transfer after an entry of such transfer has been made in the books of the company, does not apply to a transfer by act of law; hence the trustee in bankruptcy would be able to transfer such debentures before the transfer was entered in the books of the company.(*j*)

Transfer of Lunatic's Debenture.

The committee of the estate of a lunatic may, on being ordered, authorised or directed by a judge so to do, transfer debentures or debenture stock belonging to the lunatic.(*k*) Where the lunatic is registered as the holder of debentures or debenture stock, the secretary of the company, which issued such securities, may be directed to transfer such securities into the name of such committee and to pay the interest thereon to such committee.(*l*) If the committee himself dies or becomes a lunatic or is out of the jurisdiction of the Court or it is uncertain, whether the committee is living or dead, or he neglects or refuses to transfer such securities, and to receive and pay over the interest thereon as the judge in lunacy directs, then the judge may order some fit person to transfer the securities to or into the name of a new committee or into Court or otherwise and also to receive and pay over the interest thereon in such manner as the judge directs (sec. 133 of the Lunacy Act 1890).(*m*)

(*g*) The meaning of the expression "floating charge" is fully explained, supra, Bk. I., ch. ii., sec. i. (2*a*).

(*h*) *Driver* v. *Broad* (1893), 1 Q. B. (C. A.) 539, 744.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vic., cap. 52, sec. 50).

(*j*) *Lane* v. *Smith*, 14 Beav. 49, 15 Jur. 735.

(*k*) 53 & 54 Vic., cap. 5, sec. 120.

(*l*) In re *Mitchell*, 17 Ch. Div. 515.

(*m*) This section deals with the transfer of "stock," *i.e.*, of any fund, annuity or security transferable in books kept by any company or society or by instrument of transfer alone, or by instrument of transfer accompanied by other formalities (sec. 341), including debentures and debenture stock.

Bk. I., Ch. VI., Sec. I.

Transfer by order of Court of Debentures vested in Lunatic Trustee.

Where debentures or debenture stock are vested in a trustee, who becomes a lunatic, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of such securities or to receive the interest thereon or to sue for such securities. Where such securities are vested in any person or persons as trustee or trustees jointly with a lunatic, such judge may make an order vesting a right to transfer or call for a transfer of such securities or to receive the interest thereon or to sue for such securities either in such person or persons alone or jointly with any other person or persons.

If it is more convenient, the judge may appoint some person (*i.e.*, some proper officer of the company or society, whose securities are to be transferred) to make or join in making the transfer. The person or persons, in whom the right to transfer or call for a transfer of any securities is vested, may execute and do all assurances and things to complete the transfer to himself or themselves or any other person or persons according to the order and the Bank of England and all the companies and their officers and all the other persons shall be bound to obey every order made as aforesaid.(*n*)

Married woman may Transfer Debentures standing in her name.

The fact, that debentures or debenture stock stand in the sole name of a married woman, is *primâ facie* evidence of her being entitled for her separate use, so as to authorise and empower her to transfer the same without the concurrence of her husband.(*o*)

Mortgage by Deposit.

A very usual mode of dealing with debentures or debenture stock certificates is to deposit them by way of security with a person or banker advancing money on them; this is a convenient way of securing a loan, more particularly in a case, in which the borrower intends to repay the money secured within a short time and in which therefore the expense and trouble incidental to the preparation and execution of a regular legal mortgage are not deemed necessary. A depositee of a debenture and debenture stock certificate to bearer is treated by the company and by a purchaser for value without notice as the beneficial owner of such securities, though the depositor is the owner of such securities as between the depositor and depositee. If it is

(*n*) See 53 & 54 Vic., cap. 5. sec. 136.

(*o*) 45 & 46 Vic., cap. 75, secs. 6 and 9.

intended to secure money by the deposit (by way of mortgage) of debentures or of a debenture stock certificate to registered holder, either such securities themselves are in blank or else, where the name of the registered holder is inserted in the securities themselves, a blank transfer is deposited with the depositee together with such securities.

Transfer in blank.

Debentures and debenture stock are frequently transferred by a transfer in blank (*i.e.*, leaving the name of the transferee in blank) and delivery of the debentures or debenture stock certificates to the transferee. This form of transfer is sometimes resorted to, when it is desired to sell the debentures or debenture stock, and in such a case the buyer is impliedly authorised by the seller to deal with the documents as his own and he may either have himself registered as the holder or pass the documents on to a third person, who can likewise deal with them in either way. In such a case the original holder, who remains the legal holder of the securities, is merely a trustee for the buyer or the persons claiming under him.(*p*) However, a transfer in blank is usually given to a mortgagee to secure moneys advanced and together with such transfer the mortgagor usually deposits with the mortgagee the debentures or debenture stock certificates purported to be transferred by the transfer.

The rights conferred on a depositee (and the persons claiming under him) by a deposit of share certificates together with a transfer in blank, which are the same as those conferred by a deposit of debentures or debenture stock certificates to registered holder together with a transfer in blank of such securities, are fully dealt with in the case of *France* v. *Clark*.(*q*) In that case France, who was the registered holder of some shares in a company, signed a transfer of them with the name of the transferee, the date and the consideration all left in blank and deposited this document and his share certificates with Clark as a security for £150. Shortly after, Clark deposited the same documents unaltered with Quihampton as a security for £250 without the knowledge of France. Clark died insolvent and afterwards Quihampton filled in his own name as transferee and sent in the transfer to the company for registration. The company then sent France the usual notice, that they had

(*p*) Lindley, p. 661.

(*q*) 26 Ch. Div. 257.

received the transfer, and France tried to stop the registration of the transfer, which seems, however, to have been effected by the company. France claimed the shares from Quihampton on payment of £150 and interest; on the other hand, Quihampton required £250 and interest on the ground, that he was a *bonâ fide* purchaser for value without notice of France's title. It was, however, decided, that the blank transfer signed by France and the share certificate, which certified that France was the holder, showed that France and not Clark was the owner and that Quihampton could have no title against France except to the extent of what was due from France to Clark. Lord Selborne, who delivered the judgment of the Court in this case made the following remark:—

"The defence of purchaser for valuable consideration without notice by any one, who takes from another without inquiry an instrument signed in blank by a third party and then himself fills up the blanks, appears to us to be altogether untenable".(*r*)

Though a mortgagee, with whom debentures or debenture stock certificates together with a transfer of such securities in blank have been deposited by way of mortgage, may only hold these documents as a security, yet the delivery of such documents to the mortgagee must imply(*s*) an authority to such mortgagee to fill in his name in the transfer and to do whatever may be necessary to complete his title to such debentures or debenture stock; but the mortgagee cannot delegate such authority to a stranger by passing on the documents to him.(*t*) Even after completing his title to the debentures or debenture stock, as aforesaid, the mortgagee himself holds the securities subject to the mortgagor's right of redemption; but, if on completing his title the mortgagee transfers such securities to a *bonâ fide* purchaser for value without notice of his (*i.e.*, the mortgagee's) real title, the depositor will be without redress as against such purchaser; for the purchaser's title to the securities will not be affected by any equities, which may exist between the mortgagor and mortgagee. On the other hand, if a mortgagee, with whom debentures or debenture stock certificates together with a transfer

(*r*) 26 Ch. Div. 257, 262; *Hogarth* v. *Latham*, 3 Q. B. Div. 643, 647; *Hatch* v. *Searles*, 2 Sm. & Giff. 147, 152; *Taylor* v. *Great Indian Peninsular Railway Co.*, 4 De G. & J. 559, 574.

(*s*) Re *Tahiti Cotton Co.*, ex pte. *Sargent*, 17 Eq. 273; *France* v. *Clark*, 26 Ch. Div. 257, 263.

(*t*) *France* v. *Clark*, ubi supra.

in blank have been deposited as a security, passes on these documents in the state in which he received them from the mortgagor, the documents themselves show, that the mortgagee is disposing of what is not his own and the purchaser from him acquires no better title than the mortgagee himself possesses. A blank transfer accompanied by debentures or debenture stock certificates puts the person taking such documents on inquiry, and, if persons will without inquiry take documents, which have on their face anything to put the takers on inquiry, they take them at their own risk, and if those, from whom they take the documents, have not a good title, which they can transfer, then the transferees do not acquire a good title, although at the time, when they take the documents, they do not in fact know of the real title of those, to whom they belong.(*u*)

Transfers in blank are sometimes endorsed on debentures or on a debenture stock certificate.

The committee of the Stock Exchange will not (except under special circumstances) interfere in any question arising from the delivery of securities by transfer in blank.(*v*)

Transfers in blank good against Trustee in Bankruptcy.

A transfer in blank of debentures or debenture stock confers a good title on an assignee as against the assignor's trustee in bankruptcy, notwithstanding that the assignee gives no notice of such assignment to the company until after the commencement of the bankruptcy;(*w*) for a debenture or a debenture stock certificate is a chose in action within section 44, sub-sec. 2 (iii.) of the Bankruptcy Act, 1883 (46 & 47 Vic., cap. 52) (which follows the words of section 15, sub-sec. 5 of the Bankruptcy Act, 1869), and is, as such, excepted from the reputed ownership clause.

Declaration of Trust.

The Court will, of course, give effect to what amounts to a declaration of trust in respect of debentures and debenture stock. Thus in a recent case(*x*) a testator signed a document stating, that he gave a debenture to a person, but that he retained the debenture for the purpose of drawing for his own use the dividends during his life, and requesting his executor to hand over such instrument to such person on his (the testator's)

(*u*) *Williams* v. *Colonial Bank*, 38 Ch. Div. 388, 401; 15 App. Cas. 267.

(*v*) See Rule 103 of the Stock Exchange Rules.

(*w*) Ex pte. *Rensburg*, in re *Price*, 4 Ch. D. 685.

(*x*) *Pettybridge* v. *Barrow*, 28 Sol. Jo. 517.

decease, such document was held to constitute a complete declaration of trust, to which the Court will give effect.

When Company may not set up Equities against Transferees.

As debentures to registered holder usually provide, that the principal and interest thereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, a person, to whom debentures containing such a provision have been transferred in proper form, is entitled to the payment of the whole of such principal and interest, the company not being entitled to set up any equities subsisting between itself and the original or any intermediate holders.(*y*)

In the absence of such a provision, the transferee of a such debenture could not stand in a better position than the transferor.

However, even in cases in which debentures are not made transferable free from equities, the company may be estopped by its conduct (*e.g.*, by registering the transfer) from setting up equities against a transferee, though the company could have successfully set them up against the transferor.(*z*)

Whether a transferee of a debenture is or is not entitled to stand in a better position as against the company, which issued such security, than the transferor depends on the provisions contained in the debenture. Where a debenture provided (i) that the *registered holder* thereof would be regarded as exclusively entitled to the benefit thereof, (ii) that the moneys thereby secured would be paid without regard to any equities, and (iii) that the receipt of the registered holder should be a good discharge for the company, the Court held that the company could *before* the registration of a transfer of a debenture set up against any transferee any equities, which the company had against the transferor, *e.g.*, the company could properly decline to pay to the transferee the amount secured by the debentures transferred, on the ground

(*y*) *Higgs* v. *Northern Assam Tea Co.*, 4 Ex. 387.

(*z*) *Higgs* v. *Northern Assam Tea Co.*, ubi supra; re *South Essex Estuary Co.*, ex pte. *Chorley*, 11 Eq. 157; re *Hercules Insurance Co.*, *Brunton's Claim*, 19 Eq. 302. The question how far a company has a right to set up equities against a transferee of debentures or debenture stock is fully dealt with infra, Bk. I., ch. vi., sec. iii.

that nothing had been paid to the company in respect of such debenture and that the allotment of such debenture had been obtained by the transferor by misrepresentation. (*a*)

Forged Transfer.

A company cannot by registering a forged transfer of debentures or by registering a forged transfer of debenture stock and by issuing a debenture stock certificate to the registered transferee, confer a good title to such securities even on a *bonâ fide* purchaser for value as against the real owner.(*b*)

Effect of the issue of a Debenture Stock Certificate, when the Transfer of the Debenture Stock is Forged.

If a company registers a forged transfer of debenture stock and issues a certificate to the transferee, such company is liable in damages to any person, who afterwards buys such debenture stock on the faith of the implied representation, which the company makes to all the world by issuing the certificate, *viz.* : that the person, in whose name the certificate is made out, is the owner.(*c*) Such damages, are recoverable in an action for damages in respect of the refusal of the company to register him as the owner of such debenture stock. In such an action the company would be estopped from resisting the claim by pleading, that the plaintiff had no right to be so registered on the ground, that the transfer to the transferor was a forgery. (*d*)

But the company would not be estopped from saying, that the transfer was a forgery, as against the person himself, who by producing a forged transfer induced the company to register him as the proprietor of the debenture stock and issue a certificate to him; for the company cannot be said to have made any implied representation to such person, on the strength of which he bought his securities; he bought his securities before the registration and the issue of the certificate. (*e*)

(*a*) Re *Palmer's Decoration and Furnishing Co.* (1904) 2 Ch. 743.

(*b*) *Cottam* v. *Eastern Counties Railway Co.*, 1 J. & H. 243; *Barton* v. *L. and N. W. Ry. Co.*, 24 Q. B. Div. 77.

(*c*) In re *Bahia and San Francisco Railway Co.*, 3 Q. B. 584; *Davies* v. *Bank of England*, 2 Bing. 393; *Webb* v. *Herne Bay Commissioners*, 5 Q. B. 642; *Freeman* v. *Cooke*, 6 A. & E. 469. Within two months after the registration of the transfer of debenture stock, a company must pursuant to section 92 of the Companies Consolidation Act, 1908, have a certificate for such debenture stock ready for delivery.

(*d*) *The Balkis Consolidated Co.* v. *Tomkinson* (1893) A. C. 396. In re *Otto's Kopje Diamond Mines, Limited* (1893) 1 Ch. (C. A.) 618.

(*e*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. Div. 188.

If, however, a company, after having registered a transfer of debenture stock, registers a fraudulent transfer of the same debenture stock and issues a certificate to the person, in whose favour the fraudulent transfer was made, he having sent in the transfer for registration not knowing that it was fraudulent, such person cannot be said to have misled the company into registering him as the owner and issuing the certificate under such circumstances; for in such a case the company had and the transferee had not the means of knowing, that the transfer was an improper one. If on the faith of such certificate such person enters into a contract, which imposes a liability on him, the company will be estopped from denying, that he is entitled to be registered as the owner, and will be liable in damages to him, so far as he may have suffered any loss by relying on such certificate.(*f*)

Measure of Damages.

Where damages are recoverable from the company in the above cases, the measure of such damages is the market price of the debenture stock at the time, when the company ceased to recognise the transferee as the owner of such debenture stock or, if there is no market price at that time, a reasonable compensation for the loss of such debenture stock.(*g*)

Rights of real owner of Debentures, a Forged Transfer of which the Company has Registered.

The real owners of debentures or debenture stock, whose signatures have or one of whose signatures has been forged on a transfer of such securities, have a right to (1) the cancellation of the transfer and of the entry thereof in the company's books, (2) registration of themselves as the owners of the debentures or debenture stock, (3) payment over of the interest received by the transferee (and in the case of debentures delivery of the original instruments by the transferee), and (4) payment of the interest accrued or to accrue due since the last payment of interest to the transferee.(*h*)

If a person forges the signature of one or more of his co-

(*f*) *Balkis Consolidated Co.* v. *Tomkinson* (1893) A. C. 396.

(*g*) In re *Bahia, etc., Railway Co.*, 3 Q. B. 584, 595. *Balkis Consolidated Co.* v. *Tomkinson*, ubi supra.

(*h*) *Cottam* v. *Eastern Counties Railway Co.*, 1 J. & H. 243; *Johnston* v. *Renton*, 9 Eq. 181.

trustees on a transfer of debentures or debenture stock to a purchaser for value, the broker of the forger will, if he purports to act for an undisclosed principal, be liable to recoup the losses occasioned to the purchaser by the forgery.(*i*)

Liability of the Broker of the Person Forging Transfer

The Forged Transfer Acts, 1891 and 1892,(*j*) empower a company or local authority to make compensation by a cash payment out of their funds for any loss arising from a transfer of any stock or securities (this includes debentures and debenture stock) in pursuance of a forged transfer or of a transfer under a forged power of attorney.

Forged Transfer Acts.

It may be here stated, that any person fraudulently forging or altering a debenture or offering, uttering, disposing of or putting off a debenture knowing the same to be fraudulently forged or altered will be guilty of felony and liable to be kept in penal servitude for any term not exceeding fourteen years.(*k*)

Punishment for Forgery of Debentures.

Under certain circumstances the transfer of debentures or debenture stock may be restrained.

Transfer restrained by Distringas.

Any person claiming to be interested in any debentures or debenture stock registered in the books of a company and desiring to restrain the registered holder of such securities from transferring such securities without notice to him (the person so interested) may by virtue of Order XLVI, rule 4 of the Rules of the Supreme Court attain that object by filing an affidavit (as in R. S. C., Appendix B, Form 27) and a notice (as in R. S. C., Appendix B, Form 22) and serving an office copy of such affidavit and a duplicate of such notice on the company; such service has (rule 8) now the same force and effect against the company as a writ of distringas would have had.(*l*) The company is bound, on such affidavit and notice being served on it, to abstain from registering a transfer of such debentures or debenture stock, until it has given due notice to the person, who served the distringas notice, of any request to register a

(*i*) *Royal Exchange Assurance Co.* v. *Moore* N. R., 2 Q. B. 63.

(*j*) 54 & 55 Vic., cap. 43, and 55 & 56 Vic., cap. 36.

(*k*) 24 & 25 Vic., cap. 98, sec. 26.

(*l*) For Form of order made on a writ of distringas under 5 Vic., cap. 5, see Seton, 6th ed., 730; 7th ed., 715.

Bk. I., Ch. VI., Sec. II.

transfer; but the company may not by virtue of such service refuse to register for more than eight days after the request (rule 10). As a rule, on receiving a request to register a transfer, the company's secretary gives notice to the person, who served the distringas notice, or his solicitor informing him, that such request has been made and that, unless an injunction restraining the company from registering such transfer is obtained and served before a specified day (usually within the period of eight days above specified) the company will register the transfer notwithstanding the distringas notice.

Registration of *lis pendens*.

The registration of a *lis pendens* against a transferor of debentures or debenture stock does not affect a *bonâ fide* transferee, if he takes for value and without notice; for the maxim *pendente lite nihil innovetur* only applies to real property and chattel interests in land.(*m*)

Right to transfer Debentures not affected by winding up of Company.

Section 205 of the Companies Consolidation Act, 1908, which avoids transfers of shares after the commencement of the winding up of a company, does not affect the right of a debenture or debenture stock holder to transfer the same and to have such a transfer registered.(*n*)

SECTION II. *Transfer of Debentures and Debenture Stock to Bearer.*

How instruments become negotiable.

Having dealt with the transfer of debentures and debenture stock to registered holder, the transfer of debentures and debenture stock to bearer remains to be considered. Debentures and debenture stock certificates to bearer may be transferred by mere delivery, but whether or not the transferor must show a good title to such instruments, before he can effectually transfer the same, depends on the question, whether such instruments are negotiable or whether any of the incidents of negotiability are attached to such instruments. Any instrument may become negotiable (that is to say transferable by delivery to any *bonâ fide* purchaser for value) either by statute (as in the case of East India

(*m*) *Wigram* v. *Buckley* (1894) 3 Ch. (C. A.) 483, 493.

(*n*) Re *Goy & Co. Ld., Farmer* v. *Same Co.* (1900) 2 Ch. 149, 155.

Bonds under section 4 of 51 Geo. III., cap. 64) or else by law merchant (*i.e.*, by the custom of trade) in this country.(*o*) As debentures and debenture stock certificates to bearer issued by companies incorporated under the Companies Acts, 1862, or the Companies Consolidation Act, 1908, are not made negotiable by any statute, it follows that, if such instruments are negotiable at all, they must be negotiable by law merchant.

SUB-SECTION 1. *Are Debentures or Debenture Stock Certificates to Bearer Negotiable Instruments by Law Merchant?*

What is a Negotiable Instrument.

Before discussing the question, whether debentures or debenture stock certificates to bearer are negotiable instruments by law merchant, it may be well to remind the reader, what is the exact nature of a negotiable instrument.

In Smith's notes on *Miller* v. *Race*,(*p*) where all the most important authorities on the negotiability of instruments are collected, the learned author says: "It may be laid down as a safe rule, that, where an instrument is by the custom of trade transferable in this country,(*q*) like cash, by delivery and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt, but that, if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument nor will delivery of it pass (otherwise than by estoppel) the property of it to the vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt". Of course, a document, which expresses on its face, that it shall pass by transfer and not by delivery, or which contains provisions,

(*o*) It is not sufficient, that the instrument is a negotiable instrument abroad, *Williams* v. *Colonial Bank*, 38 Ch. Div. 388, 403; *Picker* v. *London and County Banking Co.*, 18 Q. B. Div. 515.

(*p*) Smith's L. C., 9th ed., 505; 10th ed., 467; 11th ed., 463.

(*q*) *Williams* v. *Colonial Bank*, 38 Ch. Div. 388, 403.

Bk. I., Ch. VI., Sec. II. (1).

which are inconsistent with a negotiable instrument,(*p*) is not negotiable.

The general rule both of law and in equity is, that no person can acquire a title either to a chose in action or any other property from one, who has himself no title, unless such chose in action or other property falls within that description of property, a good title to which may be acquired by a party taking *bonâ fide* for value notwithstanding any defect in the title of the party, from whom it is so taken.(*q*)

Are Debentures or Debenture Stock Certificates to Bearer negotiable by Law Merchant?

Until quite recently(*qq*) it had never been directly held, that English debentures or debenture stock certificates payable to bearer are negotiable instruments by law merchant. Indeed in the case of *Crouch* v. *Credit Foncier of England*,(*r*) which was decided in 1873, the Court held, that debentures to bearer were not negotiable by law merchant. In that case the defendants, a limited company incorporated under the Companies Act, 1862, had issued debentures payable to bearer "subject to the conditions endorsed on this debenture"; and by the conditions so endorsed the debentures, which were to be paid off by a certain number being drawn at stated periods, were to be paid to the person, who might be the holder at the time of the drawing. One of these debentures having been stolen from the lawful owner and drawn for payment, it was purchased *bonâ fide* by the plaintiff from the thief for value. The plaintiff claimed payment by the company and, on the company refusing to pay, the action was brought. No evidence was offered at the trial, as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; this appears, however, to have been tacitly admitted. The Court there held, that such debentures were not negotiable by express stipulation, because it was incompetent to the defendants as an individual company to give to that, which was not a negotiable instrument at law, the character of negotiability by making it payable to bearer and that they were not negotiable by law merchant, because the custom to treat such instruments as

(*p*) *London and County Banking Co.* v. *London and River Plate Bank*, 20 Q. B. D. 232; *Venables* v. *Baring Bros. & Co.* (1892), 3 Ch. 527, 538.

(*q*) *Crouch* v. *Credit Foncier*, L. R., 8 Q. B. 374, 380; *London and Joint Stock Bank* v. *Simmons* (1892), A. C. 201.

(*qq*) *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898), 2 Q. B. 658; *Edelstein* v. *Schuler & Co.* (1902), 2 Ch. 144.

(*r*) L. R., 8 Q. B. 374.

negotiable, being of recent origin, formed no part of the ancient law merchant and consequently that the plaintiff could not recover.(*s*)

This case has, however, recently been treated as overruled by the decision of the full Court of Exchequer Chamber in the case of *Goodwin* v. *Robarts*,(*t*) in which after stating, that the law merchant is not fixed or stereotyped and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, Cockburn, C. J., continues as follows: "It is true, that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law and (as it were) co-eval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law, that with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties will assume, that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into, the common law, and may thus be said to form part of it." "When a general usage has been judicially ascertained and established," says Lord Campbell in *Brandao* v. *Barnett*(*u*), "it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise."

Further on(*v*) Cockburn, C. J., says with reference to the

(*s*) See also *Venables* v. *Baring Brothers* (1892), 3 Ch. 527, 539, in which Kekewich, J., suggests as an additional reason for the decision in *Crouch* v. *Credit Foncier of England*, that the debentures in the latter case contained conditions, which were inconsistent with a negotiable instrument according to law merchant.

(*t*) L. R., 10 Ex. 337, 346, 1 App. Cas. 476; See also *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898), 2 Q. B. 658.

(*u*) 12 Cl. & F. 787, 805.

(*v*) L. R., 10 Ex. 337, 355.

Bk. I., Ch. VI., Sec. II. (1).

statement, that the custom of treating debentures as negotiable would not have effect, because, being recent, it formed no part of the law merchant: "We cannot concur in thinking the latter ground conclusive. While we quite agree, that the greater or less time, during which a custom has existed, may be material in determining, how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail, because it may not have formed a part of the law merchant so previously recognised and adopted by the Courts. It is obvious, that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin and yet, according to *Gorgier* v. *Mieville*,(*w*) are to be treated as negotiable. We think the judgment in *Crouch* v. *The Credit Foncier*(*x*) may well be supported on the ground, that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking, that, if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it, that it did not form part of what is called 'the ancient law merchant'."

The case of *Goodwin* v. *Robarts* subsequently came before the House of Lords,(*y*) where the decisions of the Court below were upheld, but their Lordships distinguished the case before them from *Crouch* v. *Credit Foncier* and expressed no opinion on the latter decision.

Can an English Instrument made in England under the Seal of an English Corporation be negotiable by Law Merchant?

Several distinguished judges have expressed a doubt, whether an English instrument made in England under the seal of an English corporation can be negotiable by the law merchant; for an instrument, which is in form a promissory note but which is under the seal of a corporation, is *primâ facie* a covenant and not a promise, and as such not negotiable by the law merchant.(*z*) It appears to have been the opinion of Page Wood, L. J., in the case of *ex parte City Bank*(*a*) and of Malins, V. C., in the case of *re Imperial Land Company of Marseilles, ex parte Colborne and Strawbridge*,(*b*) that a corporation fixing its seal to a written promise to pay must be considered as signing the promise and

(*w*) 3 B. & C. 45.
(*x*) L. R., 8 Q. B. 374.
(*y*) 1 App. Cas. 476.
(*z*) *Crouch* v. *Credit Foncier of England*, L. R., 8 Q. B. 374, 382-3. It is not apparent why an instrument under seal should be *incapable* of becoming negotiable by law merchant.
(*a*) 3 Ch. 758, 762, 763.
(*b*) 11 Eq. 478, 490.

not as covenanting under seal to fulfil it. However, although intimating their opinion, neither of the learned judges must be held to have given a decision on this point, as it was not necessary for the purpose of the cases before them.(*c*)

As against these opinions, we find a positive decision by Le Blanc, J., that a promise to pay under the seal of a company cannot be a negotiable instrument by the law merchant,(*d*) and an intimation by Blackburn, J.,(*e*) delivering the judgment of the Court of Queen's Bench, that it is very doubtful, whether an English instrument under the seal of an English corporation can be a negotiable instrument.

An English promissory note under the seal of an English corporation is now a negotiable instrument in England under section 91 of the Bills of Exchange Act, 1882 ;(*f*) debentures and debenture stock certificates to bearer issued in England under the seal of an English company are not made negotiable by any statute, hence these securities could not become negotiable at all, if the doubt above alluded to as to the possibility of an English instrument under the seal of an English company becoming negotiable was well founded. It has, however, recently(*ff*) been definitely decided by the Court, that English debentures to bearer issued in England under the seal of an English trading company *have* for many years past *been circulated as* negotiable instruments passing from hand to hand and consequently that such securities *are* (in the absence of any provision which is inconsistent with negotiability) negotiable by law merchant and that the mere delivery of them will give a good title against all the world to any *bonâ fide* purchaser for value without notice. This decision only applies to debentures to bearer. It is, however, submitted that debenture stock certificates to bearer issued by English trading corporations in England have likewise by custom of trade been extensively circulated as negotiable instruments and are treated as passing from hand to hand by the mere delivery. When the question arises for the decision of the Court,

(*c*) L. R., 8 Q. B. 382; see also 1 Sm. L. C., 9th ed., p. 515, 10th ed., p. 467.

(*d*) *Glyn* v. *Baker*, 13 East 509, 512, 514.

(*e*) *Crouch* v. *Credit Foncier of England*, L. R., 8 Q. B. 374, 382, 383.

(*f*) 45 & 46 Vic., cap. 61.

(*ff*) *Bechuanaland Exploration Co.* v. *London Trading Bank* (1898) 2 Q. B. 658. It is not necessary now to tender evidence of the negotiability of debentures to bearer in the ordinary form issued by English companies. See *Edelstein* v. *Schuler & Co.* (1902) 2 K. B. 144, 155-6.

such custom will have to be proved by calling some competent witnesses to show that such instruments are (and have for some time past been) treated as passing from hand to hand without any investigation of title.

When once the negotiability of debenture stock certificates to bearer has been established (as the negotiability of debentures to bearer has been established to the satisfaction of the Courts), it follows, that any person in possession of them may convey a good title to them, even if he is acting in fraud of the true owner; thus a broker, with whom such securities have been deposited merely for safe custody, will be able to fraudulently deposit them with his bank as cover for his own account and the bank will, if it is a *bonâ fide* purchaser for value without notice, have a good title to them even as against the broker's customer.(*g*)

Until, however, the negotiability of debenture stock certificates to bearer by law merchant has been recognised by a judicial decision, express provision should be made, in order to secure, so far as is possible, the incidents of negotiability for such certificates.

Debentures and Debenture Stock Certificates to Bearer issued by a Foreign Company.

Whether debentures or debenture stock certificates to bearer issued by a foreign corporation are negotiable by law merchant or not, must to a great extent depend on the debentures or debenture stock certificates themselves. But it is now established, that debentures to bearer, which are under the seal of a foreign corporation and which are commonly treated as negotiable in the market, are by the law merchant negotiable instruments, unless there is on the face of the instrument something, which is inconsistent with the negotiability of such instrument. In a recent case(*h*) an American company employed *B. & Co.*, a firm of bankers in London, as their agents for the issue of a series of debentures (or bonds as they are called) under their corporate seal. By each bond the company acknowledges itself to be indebted to two named trustees or "bearer" in a principal sum "which will be due, and the company will pay to the holder of the bond, on the 1st of May, 1903, at the office of *B. & Co.*; and the company further promises" to pay 6 per cent. interest half-yearly at the said office in accordance with the annexed

(*g*) *London and Joint Stock Bank* v. *Simmons* (1892), A. C. 201; *Bentinck* v. *London and Joint Stock Bank* (1893), 2 Ch. 120.

(*h*) *Venables* v. *Baring Brothers & Co.* (1892), 3 Ch. 527; see also *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Edelstein* v. *Schuler & Co.* (1902) 2 K. B. 144, 155-6.

coupons, which were payable to "bearer". It was further stated on the face of the bond, that it and the other bonds of the series were secured by a mortgage of even date made by the company to the trustees upon the company's railroad and property connected therewith. This mortgage contained various provisions for the protection of the bondholders, including a provision that, in case of default in payment of interest for ninety days, the principal on all the bonds should forthwith become due and payable. In 1883 some of the bonds were stolen from *B. & Co.'s* counting house,(*i*) and the firm immediately advertised the loss. In 1891 the agents in Paris for the plaintiff, a banker carrying on business in London and Paris, advanced a sum of money to a customer, who deposited with them as security some of the stolen bonds, neither the plaintiff nor his agents being at the time aware, that the bonds were stolen. *B. & Co.* subsequently gave notice to the plaintiff, that they were stolen, and refused to pay the interest thereon, whereupon the plaintiff brought an action against them and the American company to establish his title to the bonds. Kekewich, J., there held, that the bonds were negotiable instruments according to the law merchant and that notwithstanding the advertisement of the loss the plaintiff had not obtained them under such circumstances, as to disentitle him to claim as a *bonâ fide* holder for value; for, even assuming, that the negligence on the part of the plaintiff had been proved, mere negligence on the part of the transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor is not a good defence to an action on such instrument.(*j*)

SUB-SECTION 2. *Incidents of Negotiability Attached by Estoppel to Debentures and Debenture Stock Certificates to Bearer.*

When a Company will be estopped from denying the right of Bearer to enforce his Security.

An instrument cannot (as has already been stated) become negotiable except by statute or by law merchant, but some of the incidents of negotiability may be annexed to an instrument either by framing it in such a way as to estop the company from

(*i*) It may be here stated, that bankers are not liable for the loss of debentures or debenture stock certificates deposited with them as gratuitous bailees, unless they are guilty of gross negligence, *Giblin* v. *M'Mallen*, L. R., 2 P. C. 317.

(*j*) See also *Raphael* v. *Bank of England*, 17 C. B. 161.

denying, that such instrument has such incidents of negotiability, or by means of an independent contract. It should here be stated that, though some of the incidents of negotiability may be annexed to an instrument, it is not competent according to the common law to the parties to a contract, which is not negotiable by statute or by law merchant, to confer by any express stipulation between them a good title on the transferee of such contract claiming through a person, whose title is defective, even in a case, in which such assignee takes the title *bonâ fide* and for value.(*k*)

One of the incidents of negotiability is the power vested in the bearer to enforce his security in his own name. It would appear, that a bearer of a debenture or debenture stock certificate to bearer has such power. For, although it may be doubtful, whether either of such instruments creates a valid legal obligation except between the company issuing such security and the original holder and consequently whether any subsequent holder can enforce such contract at law,(*l*) yet several cases go to show, that the bearer can enforce the claim in his own name and that the company, having represented to all the world, that the instrument is transferable by delivery and that it will recognise the bearer of such instrument as the owner thereof, will not as against a person, who acted relying on such representation, be allowed to say, that he has not the right to enforce it.(*m*) A company would be estopped from denying, that he has such right on the general principle of law that, if a person makes a representation, in order that it may be acted on by another, and such other does act on such representation, the person making the representation is estopped from denying the truth of what is represented to be the fact.(*n*) A debenture or debenture stock certificate to bearer constitutes a general invitation to all persons,

(*k*) *Crouch* v. *Credit Foncier of England*, L. R., 8 Q. B. 374, 386, 387. As will be seen hereafter, the parties to a contract may be estopped from denying a transferee's right to enforce such contract.

(*l*) In re *Blakely Ordnance Co.*, 3 Ch. 154.

(*m*) In re *Agra and Masterman's Bank*, 2 Ch. 391; in re *Blakely Ordnance Co.*, ubi supra; *Imperial Land Co. of Marseilles*, 11 Eq. 478; *Merchant Banking Co.* v. *Phœnix Bessmer Steel Co.*, 5 Ch. D. 205, 217. See also re *Olathe Silver Mining Co.*, 27 Ch. D. 278, in which a depositee by way of mortgage of debentures to bearer was held to be entitled to petition for the winding up of the company.

(*n*) *Pickard* v. *Sears*, 6 Ad. & E. 469, as explained by *Freeman* v. *Cooke*, 2 Ex. 654. See also in re *Bahia and San Francisco Railway Co.*, L. R., 3 Q. B. 584; *Cornish* v. *Abington*, 4 H. & N. 549.

to whom such instruments may be shown, to alter their position by buying or lending money on the security of such instruments and a promise that, if they or any of them will do so, the company issuing the instrument will pay the sum specified in the same together with interest thereon to the bearer thereof. Each of such instruments may also be treated as an offer by the company to pay such sum to the bearer and, when acted on by any person, a valid and binding legal contract will be constituted in favour of such person and the company will not be allowed to dispute the right of the bearer to the moneys so specified. The cases as to the offer of rewards appear to be sufficient authority to show, that there may be privity of contract in such case.(*o*)

The same principles were applied in the case of *Goodwin* v. *Robarts*.(*p*) In that case scrip had been purchased by the plaintiff and left in the hands of his broker, who fraudulently deposited it with the defendants as security for a loan to himself. The following are the material parts of the scrip: "Received the sum of £20 being the first instalment of twenty per cent. upon £100 stock and on payment of the remaining instalments at the periods specified the bearer will be entitled to receive a definite bond for £100". Lord Cairns' judgment contains the following passage:(*q*) "The question argued in the Courts below was the negotiability of the scrip for a foreign loan like that in the present case, but there appears to me to be a prior consideration as to the title of the plaintiff, which would alone be sufficient to dispose of his claim. The plaintiff bought in the market scrip, which from the form, in which it is prepared, virtually represented, that the paper would pass from hand to hand by delivery only and that any one, who became *bonâ fide* the holder, might claim for his own benefit the fulfilment of its terms from the foreign government. The appellant might have kept this scrip in his own possession and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and, although it is stated, that it remained in

(*o*) In re *Agra and Masterman's Bank*, 2 Ch. 391, 397; *Williams* v. *Carwardine*, 4 B. & Ad. 621, followed by the somewhat analogous cases of *Denton* v. *Great Northern Railway Co.*, 5 E. & B. 860; *Warlow* v. *Harrison*, 1 E. & E. 295, 300. The latest case of contract by advertisement is *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256.

(*p*) 1 App. Cas. 476.

(*q*) Ibid., 489.

Bk. I., Ch. VI., Sec. II. (2).

the agent's hands for disposal or to be exchanged for the bonds, when issued, as the appellant should direct, those, into whose hands the scrip would come, could know nothing of the title of the appellant or of any private instructions he might have given to his agent. The scrip itself would be a representation to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that, if the scrip were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government: still the appellant is in the position of a person, who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value and who has put it in the power of his agent to hand over the scrip with this representation to those, who are induced to alter their position on the faith of the representation so made."(*r*)

The question, how far a company will be allowed to set up or will be estopped from setting up against a bearer of a debenture or debenture stock certificate to bearer equities existing between itself and any prior holder thereof, is discussed in the following pages.

Rules of London Stock Exchange as to:

Before concluding this portion of the chapter, the reader's attention should be called to rules 91, 118, and 119 of the London Stock Exchange Rules, which provide how far the accrued interest on securities (including debentures and debenture stock) sold on the Stock Exchange is included in the price payable for such securities and when coupons belonging to such securities should be delivered to the purchaser with such securities.

These rules run as follows:—

(i) Quotation of Securities Ex-dividend on the Stock Exchange.

"Securities to bearer and registered debentures shall be quoted ex-dividend on the day when the dividend is payable, but securities to bearer with coupons payable only abroad may be quoted ex-dividend on the account day, which shall allow the necessary time for the transmission of the coupon for collection" (Rule 91).

(ii) Interest included in price payable for Debentures bought on Stock Exchange.

"Bargains in bonds and debentures include the accrued interest in the price except in the case of . . . Indian Railway debentures and certain securities of a like character, which are dealt in, so that the accrued interest up to the day, for which the bargain is done, is paid by the buyer" (Rule 118).

(iii) Coupons belonging to Securities bought on Stock Exchange.

"Securities are not deliverable on the account-day without the current coupon.

(*r*) See also *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

"Those marked ex-coupon on the account-day shall be delivered without the coupon.

"When the dividend is payable after the account-day, outstanding bargains shall be settled with the current coupon, otherwise the buyer shall have a right to demand the market value of the coupon.

"In the case of dividends payable only abroad, the secretary of the Share and Loan Department shall fix a price for the coupon in sterling money, which shall be posted on the Stock Exchange, and the dividend shall be accounted for at such price" (Rule 119).

SECTION III. *When a Company has as against a Transferee of Debentures or Debenture Stock a right* (1) *of set off and* (2) *to set up an Irregularity in the issue of such Securities.*

When a Company is estopped from setting up Equities against a Transferee.

Debentures and debenture stock (to bearer or to registered holder), being choses in action, are *primâ facie* assignable subject to all the equities between the original parties to the contract (*s*) but this is a rule, which must yield, when it appears from the nature or terms of the contract, that it must have been intended to be assignable free from and unaffected by such equities.(*t*)

If the debenture or debenture stock certificate or the trust deed shows or the company issuing such securities shows by its dealings and conduct in relation to such securities (*u*) that it was contemplated by the parties to the original contract, that the interest of the holders of such securities would pass free from equities, the company issuing such securities will be estopped from setting up against a subsequent holder equities between the company and the original holder and such securities will, if they are payable to bearer, become what has been called negotiable by estoppel.

In the case of *in re Agra and Masterman's Bank* (*v*) the Agra and Masterman's Bank gave to Dickson Tatham & Co. a letter addressed to them and expressed thus:—

"No. 394. You are hereby authorised to draw upon this bank to the extent of £15,000, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to endorse particulars on the back thereof." Dickson Tatham & Co. drew bills under this letter to the amount

(*s*) In re *Natal Investment Co.*, 3 Ch. 355; in re *Rhôs Hall Iron Co.*, W. N. (1868) p. 223; in re *Nowgong Tea Co.*, W. N. (1868) 56; re *Goy & Co. Ld.* (1900) 2 Ch. 149, 154.

(*t*) In re *Agra and Masterman's Bank*, 2 Ch. 391, 397; re *Goy & Co. Ld.* (1900) 2 Ch. 149, 154.

(*u*) In re *Northern Assam Tea Co.*, ex pte. *Universal Life Assurance Co.*, 10 Eq. 458; in re *Hercules Insurance Co.*, *Brunton's Claim*, 19 Eq. 302.

(*v*) 2 Ch. 391. See in re *Natal Investment Co.*, 3 Ch. 355, 358.

of £6000 and endorsed them to the Asiatic Banking Corporation, who duly endorsed particulars on the letter of credit. The bank was afterwards ordered to be wound up and Dickson Tatham & Co. were indebted to the bank to an amount exceeding what was due under the bills. The Lords Justices held, that the negotiating bills of exchange upon the faith of this letter of credit either constituted a direct contract at law between the persons so taking and holding the bills of exchange and the Agra and Masterman's Bank, who had given the letter of credit, in which case no question as to a set off between the bank and the holders of the letter of credit could arise, or in the alternative, that, if there was not such a legal contract, there was at all events between the Agra and Masterman's Bank and the person receiving the letter of credit from them a contract, which in equity might be assigned and, inasmuch as the letter of credit was to protect and secure bills of exchange payable absolutely according to their tenor, the letter of credit would be unmeaning and inoperative, unless the contract could be assigned free from all equities subsisting between the original parties to it, and that therefore no equity of set off could arise in such a case.

The following cases may serve as illustrations showing when a company will be estopped from setting up equities against (1) a bearer or (2) a registered holder of debentures or debenture stock.

Cases in which a Company has been held to be estopped from setting up Equities against a Bearer of a Debenture or Debenture Stock Certificate to Bearer.

In the case of *in re Blakely Ordnance Company*(*w*) (in which *re Agra and Masterman's Bank* was followed) the company issued to the vendor of its business debentures to bearer under its seal in part payment of the purchase money; some of these debentures were passed by delivery to Z & Co., who were *bonâ fide* purchasers for value. On the company being ordered to be wound up, Z & Co. claimed the right to prove in their own names for the full amount secured by their debentures, but the company contended, that they could only prove subject to equities existing between itself and the vendors. In his judgment, Rolt, L. J., made the following remarks:(*x*) "It may be doubted, whether at law a valid legal obligation was created between the Blakely Company and the bearer, whether there was any legal privity of contract except between the Blakely Company and Messrs. Blakely & Dent (the vendors) or, indeed, whether *quâ* bond or debenture, the instrument was not wholly void at law. But I think it unnecessary to determine these questions. Assume

(*w*) 3 Ch. 154. (*x*) 3 Ch. 159.

the debenture to have been of no avail *quâ* debenture at law at all, or of no avail except as between the Blakely Company and Messrs. Blakely & Dent, still it is evidence in equity of the terms, on which the money became due from the Blakely Company to Blakely & Dent. The right to this money was assignable in equity and, though, in the absence of anything more than a mere assignment, the assignee would take subject to the equities existing between the original parties to the contract, I am of opinion, that there is nothing inequitable in allowing the debtor in an obligation to contract with his creditor, that he will not avail himself of any such equities, that he will pay the amount due on the obligation to the assignee of the creditor (whether he be such assignee by instrument in writing or by mere delivery of the obligation) without regard to any such equities, and I have already said, that, in my opinion, in this case the Blakely Company have so contracted." The Court there held, that Z & Co. could prove in their own names upon their debentures without being subject to any equities existing between the company and Blakely & Dent.

In the case of *Imperial Land Company of Marseilles*,(*y*) some debentures to bearer were purchased for value on the faith of their being made payable to bearer and the point to be decided was, whether they could be enforced by the holder for the time being in his own name or whether he had to take them subject to the equities, which existed between the company and the persons, to whom they were issued originally. Malins, V. C., said in his judgment that the debentures were binding on the company "because it is a representation by the company to all the world, that they will at the expiration pay the sum, for which it is given, to the holder together with interest half-yearly in the meantime. And it would be contrary to every principal and fatal to the existence of such instruments in this and all other companies, if in the hands of every person taking them they are subject to the equities between the company and the original holder: it would be a blow to the mercantile transactions of this country far beyond the value of any protection to be afforded to the members of this company, who, if they were unfortunate, were unfortunate in being betrayed by the persons, to whom they

(*y*) 11 Eq. 478.

committed their interests. Every principle of public policy calls upon me to repudiate the notion, that such documents are to be treated like bonds or choses in action, in which the equities between the parties can be entered into."

Cases in which a Company has been held to be estopped from setting up Equities against a Registered Holder of Debentures or Debenture Stock to Registered Holder.

In the case of *in re General Estates Company, ex parte City Bank*(*z*) the directors of the General Estates Company issued to Hodges for value debentures, by each of which the company undertook to pay to the order of Hodges the sum of £1000 and interest; three of these debentures were transferred to and registered in the name of Herman, who deposited them for value with the City Bank. On the Estates Company being ordered to be wound up, the City Bank claimed to prove for the full amount of the debentures deposited with them, but the Estates Company sought to set up equities existing between Hodges and themselves. However, the Court of Appeal there held (following *in re Agra and Masterman's Bank* and *in re Blakely Ordnance Company*) that the Bank were entitled to prove free from such equities.

The decision of Lord Cairns in *in re Natal Investment Company*,(*a*) which some lawyers found difficult to reconcile with other cases, is explained in *ex parte City Bank*.(*b*) The instrument in question in the former case was a money bond and the words used in it were "to C or his executors, administrators or transferees or to the holder for the time being of this debenture bond," and the Court held, that such words were only equivalent to the word "assigns," which occurs in every money bond and is never understood to represent, that it is assignable at law, but only in equity and therefore only transferable subject to equities; but Lord Cairns did not decide, that, if an instrument is issued, which purports to be legally assignable and which the public have a right to believe to be so, the company can maintain an equitable defence, which they might have against the original owner, so as to defeat the claim of an equitable transferee for value.(*c*)

In another case(*d*) debentures were issued by a company and certain ships were assigned to trustees upon trust to secure "to

(*z*) 3 Ch. 758.

(*a*) 3 Ch. 355: this was a case, not of set off, but of failure of consideration for the debentures transferred.

(*b*) 3 Ch. 758.

(*c*) *Romford Canal Co.*, 24 Ch. D. 85, 91.

(*d*) *Aslatt* v. *Farquharson*, 10 W. R. 458.

the holders for the time being" their nominal amount, some of the debentures were issued to the agents of the company as cash to pay expenses incurred by them on the company's account and were transferred for value by the agents. The Court held, that the transferees were entitled to the proceeds of the ships free from any set off as between the company and its agents on the balance of the account.

In the case of *Higgs* v. *The Northern Assam Tea Company, Limited*,(*e*) the plaintiff, having sold an estate to the defendants, received from them in part payment of the purchase money a large number of debentures, each payable to him or his assigns. Some of these debentures he assigned to C & S, transfers to whom were registered. After the assignment, but previous to the day fixed for payment of the debentures, the plaintiff became indebted to the defendants for unpaid calls on shares held by him in the defendant company. The defendants under the articles of association held a primary lien on the debentures of any member, who might be liable to the company in any amount whatever, and, the debentures assigned to C & S having become due, the defendants sought to set off as against C & S the sums due to them (the defendants) for unpaid calls from Higgs. Baron Bramwell pointed out in his judgment, that the defence to an action by the original owner was a legal set off and considered, whether there was an equity to restrain such a plea. There might be such an equity, he intimated, either from the conduct of the company in originally issuing the debentures in such manner as to induce the belief, that they were legally transferable, or if they had by their subsequent conduct recognised the particular transfer, both of which circumstances concurred in that case.(*f*) The learned judge also held, that the defendant company and Higgs contemplated and intended, that Higgs should assign these debentures, that he could not practically do so, if subject to the equities, which it was sought to set up, and consequently that Higgs and the defendant company contemplated and intended, that Higgs should assign free from those equities, and it was further held, that the defendant company had dealt with C & S on that footing.

The doctrine of estoppel only applies to a representation

(*e*) L. R., 4 Ex. 387.
(*f*) See also in re *Romford Canal Co.*, 24 Ch. D. 85.

concerning an existing fact(*g*) and not to an intention,(*h*) but it is submitted, that a representation, that a debenture or debenture stock certificate is transferable free from equities, is a representation of fact, by which the company issuing such securities will be estopped from setting up any equities existing between itself and the original holder.(*i*)

It must, however, be remembered, that a person cannot rely on the principle of estoppel, if he wilfully shuts his eyes to circumstances, which would give him notice, that he must not so act, or which should at any rate induce him to make inquiries.(*j*)

When a Company may set up Equities against an Equitable Assignee of Debentures or Debenture Stock.

The following rules are established with regard to the right of a company to set off calls, which are made on shares held by the original holder of debentures or debenture stock, as against an equitable assignee of such debentures or debenture stock, which such assignee seeks to enforce. The rules are the same as those, which regulate a debtor's right to set off against the equitable assignees of any chose in action a debt due by the assignor of such chose in action to such debtor.

Any debtor can set off against the claims of the equitable assignees of a chose in action any debt due by the assignor of such chose in action to him (the debtor), if the chose in action and the debt had their origin in the same contract and are closely intertwined with one another,(*k*) so that it would appear from the nature of the transaction, that it was intended between the original parties, that the one should be set off against the other.(*l*)

But except in such cases a debtor cannot after notice of an equitable assignment of a chose in action set off as against the assignee of such chose in action a debt, which accrues due subsequently to the date of notice, even although that debt may

(*g*) *Citizens Bank of Louisiana* v. *National Bank of New Orleans*, L. R., 6 H. L. 352, 360.

(*h*) *Maddison* v. *Alderson*, 8 App. Cas. 467, 473; *Jordan* v. *Money*, 5 H. L. C. 185.

(*i*) In re *Imperial Land Co. of Marseilles*, 11 Eq. 487. See also *Goodwin* v. *Robarts*, 1 App. Cas. 476, in which a scrip certificate was held to contain an implied representation, that any person taking such certificate for value *bonâ fide* would stand to all intents and purposes in the place of the previous owners and to estop any previous owner from denying, that such representation was true.

(*j*) *Lord Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *Williams* v. *Colonial Bank*, 15 App. Cas. 267.

(*k*) *Government of Newfoundland* v. *Newfoundland Railway Co.*, 13 App. Cas. 199, approving of *Young* v. *Kitchen*, 3 Ex. D. 127.

(*l*) *Watson* v. *Mid Wales Railway Co.*, L. R., 2 C. P. 593.

arise out of a liability, which existed at and previously to the date of notice.(*m*)

On the other hand, a debtor may set off against an equitable assignee a debt, which accrued due before notice of the assignment.(*n*)

When an equitable assignee of a debt due by a company seeks to prove for such debt in the winding up of the company, the Court will apply these same rules in deciding, whether the company will be allowed to exercise a right of set off.(*o*)

The recently decided case of *Christie* v. *Taunton Delmard Lane & Company*(*p*) was based on the principles hereinbefore stated. The facts in this case were as follows:—

In January and March, 1890, T, who held shares and debentures in a company, deposited debentures of the aggregate value of £5250 together with a blank transfer thereof with the plaintiffs, who were bankers, to secure a debt. The debentures were not on the face of them payable until the 31st of December, 1890; but by the endorsed conditions, in the event of the winding up of the company, the principal moneys secured by the debentures became immediately due and payable. On the 3rd of November, 1890, a call was made upon T's shares payable on the 20th November. By the articles of the company this call was deemed to have been made at the time, when the resolution to make it was passed. On the 6th of November, 1890, the plaintiffs gave the company notice, that T had deposited the said debentures with them by way of security, and such notice was entered by the company on the register of debentures. On the 12th of November the plaintiffs commenced a debenture-holder's action against the company, and on the 19th of November the company went into liquidation. In the winding up further calls were made upon T's shares. Upon a summons taken out by the plaintiffs in the action and in the winding up the company claimed the right to set off the calls due by T as against the sum due to the plaintiffs upon the debentures. In this case Stirling, L. J. (then J.), held that in respect of the call made before the winding up the company

(*m*) *Watson* v. *Mid Wales Railway*, ubi supra.

(*n*) *Wilson* v. *Gabriel*, 4 B. & S. 243. Re *Smith & Co.* (1901), 1 Ir. R. 73.

(*o*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648, 667, 668; 9 App. Cas. 434; *Christie* v. *Taunton Delmard & Co.* (1893), 2 Ch. 175, 184.

(*p*) Ubi supra.

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were entitled to set off, but in respect of the calls made in the winding up they were not so entitled.

If a Shareholder transfers Debentures or Debenture Stock after the commencement of the winding up, the Company may set off unpaid calls on such shares against the Transferee's claim in respect of such Debentures or Debenture Stock.

This decision in no way conflicts with *ex parte Mackenzie*(*q*) which decides, that, after a company has commenced to be wound up, a shareholder can only assign a debt due to him by the company subject to a right of set off by the company of all calls, which may be made subsequently to the assignment and previously to the payment of the debt, because by section 75 of the Companies Act, 1862 (now section 125 of the Companies Consolidation Act, 1908), a call made subsequently to the winding-up order has reference back and the debt becomes due at the time, when the winding up began.

In the case of *ex parte Mackenzie* the voluntary winding up of the China Steamship Co. began in December, 1866. On 1st March, 1867, a shareholder assigned five debentures (which did not pass by delivery) issued by the company and notice of the assignment was given to the liquidator on the same day. In June, 1867, and February, 1868, calls were made on the assignor for amounts exceeding the amount due on the debentures. It was there decided by Romilly, M. R., that, the calls not having been paid, the assignee of the debentures was not entitled to prove against the company for the sum due on the debentures.

In the case of *in re South Blackpool Hotel Company*(*r*) the company issued seventeen debentures to the promoter thereof in consideration of his paying all the costs, charges and expenses incurred in and about the promotion and formation of the company. The promoter failed to pay some of such costs, charges and expenses. The company was subsequently ordered to be wound up. After the commencement of the winding up, the promoter assigned three of these debentures and the assignee claimed to prove against the company for the full amount due on the debentures. The Court, however, held, that the company was entitled to set off against the sum due on each debenture one-seventeenth part of the costs, charges and expenses, which had not been paid by the promoter, as agreed.

When a Company will be estopped from setting up the irregularity of the issue of Debentures or Debenture Stock against a Transferee.

A company issuing debentures or debenture stock, which it knows are capable of being and probably will be transferred, may sometimes be estopped from setting up the irregularity of the

(*q*) 7 Eq. 240, 246. (*r*) 8 Eq. 225.

issue of such securities against a legal(*s*) or equitable(*t*) transferee of such securities for value without notice of such irregularity, though the company might have been allowed to rely on such irregularity against the allottees themselves of such securities. Thus in the case of *Webb* v. *The Commissioners of Herne Bay*(*u*) the facts were as follows: The Commissioners were incorporated by statute and were empowered to levy rates and to borrow money and for the purpose of securing the moneys so borrowed by them to issue debentures bearing interest and capable of assignment. A person being a commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The Commissioners bought bricks for the purposes of the Act from A (a commissioner) and, in order to pay for such bricks, they executed and delivered to A debentures, which were duly registered, as required by the Act. A assigned them for value to the plaintiffs, who had no notice of the circumstances under which they were issued. The Commissioners having made default in payment of the interest due upon the debentures, it was held, that, assuming the transaction to have been invalid, as the Commissioners had issued the debentures knowing, that they might be assigned, they were estopped from alleging, that the debentures were invalid and that the plaintiffs were entitled to maintain an action of *mandamus* to compel the Commissioners to apply their funds in payment of the interest.

In the case of *in re Romford Canal Company*(*v*) the Court held, that a company will not be allowed to set up the irregularity in the issue of debentures against the equitable transferees thereof for value without notice of such irregularity, and such equitable transferees, who had advanced money on some irregularly issued debentures, were allowed to prove in the winding up; but, being equitable transferees only, they were granted relief on equitable terms and they were allowed to recover (not the nominal amount of the debentures) but only such sum (not being greater than the nominal amount) as each of them might be able to prove he *bonâ fide* advanced upon the security of the debentures received by him.

(*s*) *Webb* v. *The Commissioners of Herne Bay*, L. R., 5 Q. B. 642.

(*t*) In re *Romford Canal Co.*, 24 Ch. D. 85; *Dickson* v. *Swansea Vale Railway Co.*, L. R., 4 Q. B. 44.

(*u*) L. R., 5 Q. B. 642; see also in re *South Essex Estuary Co.*, ex pte. *Chorley*, 11 Eq. 157; *Hulett's Case*, 2 J. & H. 306.

(*v*) 24 Ch. D. 85.

Transferee of Debenture may be in no better position than Transferor.

A transferee of debentures or debenture stock to registered holder, even though he takes such transfer *bona fide* for value without any notice of any defect in the transferor's title, may under certain circumstances stand in no better position than the transferor. Thus in a recent case (*w*) a Company issued to B several registered debentures providing (*inter alia*) that (i) the principal moneys thereby secured would become payable on the passing by the company of a winding-up resolution, (ii) the *registered* holder thereof would be regarded as exclusively entitled to the benefit thereof, (iii) the principal moneys and interest would be paid without regard to any equities, and (iv) the receipt of the registered holder should be a good discharge to the Company. After the passing of a winding-up resolution B transferred his debentures to C, who took *bona fide* for value without notice of any defect in B's title. Notice of the transfer was given to the liquidator, but no demand for registration of the transfer was made. On C claiming the benefit of the debentures in the winding-up and its being shown that B had paid nothing for such debentures and had obtained them from the company by misrepresentation, Buckley, J., held that under the circumstances the company's rights against B prevailed over C's title and that C was not entitled to the benefit of the debentures.

SECTION IV. *Disposition of Debentures and Debenture Stock by Will.*

Distinction between Pure and Impure Personality.

Before the decision of the Court of Appeal in *Attree* v. *Hawe* (*x*) there had been a great conflict of opinion, as to whether debentures and debenture stock issued by railway companies and other public bodies charging the undertaking of such company or body did or did not fall within the provisions of section 3 of the Mortmain Act (9 Geo. II., cap. 36) and could consequently only be given to a charity in the manner prescribed by such Act. This case decided, that debenture stock created under the provisions of the Companies Clauses Act, 1863 (26 & 27 Vic., cap. 118, secs. 22 and 23), was not a "charge or incumbrance affecting lands, tenements or hereditaments" within the meaning of the Mortmain Act, because the debenture stockholder had not power to take the land or enter on the land or in any way interfere with the ownership, possession or dominion of the statutory owners and managers: he simply had a charge on the profits and earnings of the corporation.(*y*) Hence such

(*w*) Re *Palmer's Decoration and Furnishing Co.* (1904) 2 Ch. 743.

(*x*) 9 Ch. Div. 337, 351, in which the decision of *Walker* v. *Milne*, 11 Beav. 507, was approved of.

(*y*) For furthers particulars as to the nature of debenture stock issued under the provisions of the Companies Clauses Act, 1863, see infra, Bk. III., ch. ii.

a security was held to be pure personality and not within "the mischief and the sole mischief, which the legislature set itself to prevent, *viz.*, to prevent the increase of inalienable land through the weakness of or practices upon dying persons or posthumous charity". The principles of this decision, which dealt with a gift of railway debenture stock, were held to apply to debentures charged on the undertaking of railway companies (*z*) and to debentures and debenture stock issued by all other public bodies, with parliamentary powers and duties to perform for the benefit of the public such as waterworks (*a*) or harbour (*b*) companies or bodies constituted for the improvement of towns.(*c*)

Debenture stock certificates issued by a municipal corporation and charged "upon the borough fund, borough rate, the waterworks and gasworks undertakings and the improvements rates and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom and any other revenue, which may be acquired by them" have also been held not to constitute an interest in land within the Mortmain Act.(*d*)

On the other hand, if debentures and debenture stock issued by such a corporation are secured (not by a charge on the undertaking, but) by a specific assignment of some tolls or rates and such tolls or rates constitute an interest in land, then such securities are within the mischief of the Act and cannot be given for charitable purposes by the will of a person dying before the 5th of August, 1891.(*e*) Thus in the case of *in re David, Buckley* v. *Royal National Lifeboat Institution* (*f*) some harbour trustees incorporated by a special Act had power to borrow money on mortgage of the tolls, rates, and dues authorised by the Act. The mortgagees were authorised to enforce payment of arrears of interest by the appointment of a receiver. All rates, dues, and incomes received by the trustees were to be carried to the credit of "The Harbour Fund," and the moneys carried to that credit were to be applied—(1) in pay-

(*z*) *Doe d. Myatt* v. *St. Helens Railway Co.*, 2 Q. B. 364; *Hart* v. *Eastern Union Railway Co.*, 7 Ex. 246.

(*a*) *Holdsworth* v. *Devonport*, 3 Ch. D. 185, which the Court of Appeal must be taken to have approved of in *Attree* v. *Hawe*, 9 Ch. Div. 337; re *Parker, Wignall* v. *Park* (1891) 1 Ch. 682. The cases of *Aston* v. *Lord Langdale*, 4 De G. & S. 402 and *Chandler* v. *Howell*, 4 Ch. D. 651, though not expressly overruled, must be considered overruled.

(*b*) In re *Christmas, Martin* v. *Lacon*, 33 Ch. Div. 332.

(*c*) *Jervis* v. *Lawrence*, 22 Ch. D. 202.

(*d*) In re *Pickard, Elmsley* v. *Mitchell* (1894) 3 Ch. 704; see also re *Yerbery's Estate*, 62 L. T. R. 55; re *Thompson*, 45 Ch. Div. 161.

(*e*) The distinction between pure and impure personality has been abolished in the case of wills of persons dying after that date. See post in this chapter,

(*f*) 41 Ch. D. 168, 43 Ch. Div. 27; see also *Knapp* v. *Williams*, 4 Ves. 430. n., which does not appear to be overruled, though it was observed on in in re *Christmas*, 33 Ch. Div. 332; see also re *Holmes*, 63 L. T. R. 477; W. N. (1890) 169.

ing the interest on moneys borrowed; (2) in maintaining and regulating the harbour and its navigation; (3) in payment of certain rent charges; (4) in payment of sums directed to be set apart to make a sinking fund for paying off mortgages, and the surplus was to be applied for the general purposes of the Act. The trustees borrowed money on the security of debentures for £100 each, by each of which they assigned to the mortgagee such proportion of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the sum of £100 bore to the whole money borrowed, to hold the same to the mortgagee until the £100, with interest, was paid. Among other tolls were tolls, which the trustees were authorised to demand before persons, cattle, and carriages were allowed to pass over certain bridges belonging to the trustees. The Court of Appeal held (affirming North, J.) that these debentures were specific mortgages of a share of the bridge tolls and other tolls and rates arising under the Act and that the bridge tolls, being paid for passing over the bridges on the land of the trustees, were an interest in land and that the debentures were therefore impure personalty and could not be given to a charity by will.

The principles enunciated in *Attree* v. *Hawe* and the cases following that case apply to cases, in which debentures and debenture stock are charged on the profits of undertakings of a public nature; the main ground for deciding such cases as they were decided was, that the holders of such securities could not have been intended to be entitled and were therefore not entitled to take possession of the land belonging to such an undertaking and to put an end to the undertaking. On the other hand, debentures and debenture stock, which are issued by an ordinary trading company and which are charged on the undertaking and all the property of the company, differ materially from debentures and debenture stock charged on the undertaking of a company carrying on a business of a public nature and receiving its power under Acts of Parliament; for the holder of such securities issued by an ordinary trading company has a power under certain circumstances to put an end to the undertaking, on which they are charged, and to take possession of land forming part of such undertaking. It is conceived, that debentures or debenture stock charged on the lands of a trading company formerly came within the Mortmain Act of 9 Geo. II., cap. 36.(*g*)

The Mortmain and Charitable Uses Act, 1888.

The Mortmain Act of 9 Geo. II., cap. 36, is almost entirely repealed by the Mortmain and Charitable Uses Act, 1888.(*h*) But the provisions of the first three sections are re-enacted in a

(*g*) Re *Holmes* 63 L. T. R. 477, W. N. (1890) 169.

(*h*) 51 & 52 Vic., cap. 42.

modified form. The effect of section 4 of the Mortmain and Charitable Uses Act, 1888, is to avoid every testamentary assurance whatsoever of land (*i*) to charitable uses and all other assurances of land to charitable uses save such as are made in accordance with the requirements of the Act.

The Mortmain and Charitable Uses Act, 1891 (54 & 55 Vic., cap. 73), which substitutes a new definition of the term "land,"(*j*) for that contained in the Mortmain and Charitable Uses Act, 1888, has, however, done away with this distinction between pure and impure personalty for the purpose of testamentary gifts to charities made by wills of testators dying after the date of the Act (the 5th of August, 1891).

The Mortmain and Charitable Uses Act, 1891.

The effect of this Act is to authorise testators dying after the passing of the Act to make gifts for charitable purposes by will (*inter alia*) of any debentures or debenture stock charged on real estate; for under this Act impure personalty may be devised for charitable purposes.(*k*)

The provisions of the Apportionment Act, 1870 (33 & 34 Vic., cap. 35), do not apply to the interest due on debentures or debenture stock, as such interest is not one entire thing such as dividends of consols are. Though the arrangement between the company and the debenture or debenture stock holders is, that the interest shall not be payable until the end of each half-year, it has (independently of the provisions of that Act) been the practice in chambers to treat such interest as accruing due *de die in diem*. Hence, if a testator bequeaths debentures or debenture stock to one person for life and afterwards to another and dies before the current interest on such securities is payable, so much only of that interest as accrues due after the death of the testator will belong to the tenant for life; the interest, which has accrued due in the testator's lifetime, must be treated as capital.(*l*)

Apportionment of Interest.

Whether or not debentures or debenture stock are passed by any particular bequest must, of course, always depend on the intention as shown by the whole will of the testator; it may, however, be useful to cite a few cases, in which the Court has had to decide, whether debentures or debenture stock passed

What words in Will pass Debentures or Debenture Stock.

(*i*) The definition of land includes "any estate or interest in land" (sec. 10 (iii)). Hence the distinction drawn in the cases of *Attree* v. *Hawe*, 9 Ch. Div. 337, and in re *David, Buckley* v. *Royal National Lifeboat Institution*, 41 Ch. D. 168, 43 Ch. Div. 27, between debentures or debenture stock charged on the undertaking or on the rates and tolls of a public body (pure and impure personality) still prevails under this Act.

(*j*) By sec. 3 "land" in the Mortmain and Charitable Uses Act, 1888, and this Act shall include tenements and hereditaments corporeal or incorporeal, but not money secured on land or other personal estate arising from or connected with land.

(*k*) In re *Bridger, Brompton Hospital for Consumption* v. *Lewis* (1894) 1 Ch. (C. A.) 297, 301; see also re *Hume, Forbes* v. *Hume* (1895) 1 Ch. (C. A.) 422.

(*l*) In re *Roger's Trust*, 9 W. R. 64, 2 Dr. & S. 338.

Bk. I., Ch. VI., Sec. IV.

under certain bequests. In the case of *in re Nottage, Jones* v. *Palmer* (2),(*m*) in which the testator bequeathed "£500 debenture stock or shares in the S company" to each of his three cousins and "£350 ordinary shares in the S. company" to AB, the Court held that the testator, who had at the time of his death debentures in the S company in his possession, intended by the expression "debenture stock or shares" to describe something, which was different from ordinary shares but which he did not know how to describe, and that (there having never having been any debenture stock in the S company) the testator must be taken to have meant debentures.

A bequest of "all my shares in the H company" has been held not to pass the testator's debenture stock in the H company in a case, in which the testator held shares and debenture stock at the date of the will;(*n*) but, where a testatrix had never had any shares in two specified companies, a bequest of all the testatrix's shares in such companies was held to pass her debenture stock of such companies.(*o*)

In the case of *in re Lane, Luard* v. *Lane*(*p*) a testator bequeathed "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company, which issued such debentures, and converted such debentures into debenture stock. The Court there held, that the will did not pass the debenture stock.

In an Irish case(*q*) a bequest by a testator of stock, shares and debentures in the B Bank, his shares in four other companies, and all other shares in banks or public companies not otherwise disposed of was held not to pass the debentures (other than the debentures in the B Bank) belonging to the testator.

Recognition of executor of deceased Debenture Holder by the Company before Probate permissible.

Before dismissing the subject of wills, it should be stated, that a company, which registers the executors of a deceased holder of debentures or debenture stock issued by such company as the owners of such securities and pays to such executors the interest due in respect of such securities, before such executors have proved the will of such deceased holder, will not thereby render itself liable to the penalties imposed on persons "taking possession of any part of the personal estate or effects of any person deceased";(*r*) for such registration and payment merely amount to a recognition by the company of the title of the executors before probate and there is no objection to such recognition.(*s*)

(*m*) (1895) 2 Ch. (C. A.) 657.

(*n*) In re *Bodman, Bodman* v. *Bodman* (1891) 3 Ch. 135.

(*o*) In re *Weeding, Armstrong* v. *Wilkin* (1896) 2 Ch. 364.

(*p*) 14 Ch. D. 856. See also re *Herring* (1908) 2 Ch. 493, where a bequest of "debentures" was held to pass debenture stock.

(*q*) *Dillon* v. *Arkins*, 17 L. R. Ir., 636.

(*r*) 55 Geo III., cap. 184 sec. 37.

(*s*) *Att.-Gen.* v. *New York Breweries Limited*, 41 Sol. Jo. 454.

CHAPTER VII.

TRUSTEES' POWERS TO INVEST TRUST FUNDS IN DEBENTURES OR DEBENTURE STOCK.

Trustees Statutory Powers to invest Trust Funds in Debentures or Debenture Stock.

THE Trustee Act, 1893,(*a*) makes the following provisions relative to the power of trustees to invest in debentures or debenture stock :—

"A trustee may, unless expressly forbidden by the instrument "(if any) creating the trust, invest any trust funds in his hands, "whether at the time in a state of investment or not (*inter alia*) "as follows: (*g*) in the debenture stock of any railway company "in Great Britain or Ireland incorporated by special Act of "Parliament and having during each of the ten years last past "before the date of investment paid a dividend at the rate of not "less than three per cent. per annum on its ordinary stock,(*b*) (*i*) "in the debenture stock of any railway company in India, the "interest on which is paid or guaranteed by the Secretary of "State in Council of India, (*l*) in the debenture stock of any "company in Great Britain or Ireland established for the supply "of water for profit and incorporated by special Act of Parliament or by Royal Charter and having during each of the ten "years last past before the date of investment paid a dividend of "not less than £5 per centum on its ordinary stock.

"Provided that a trustee may not under the powers of this "Act purchase at a price exceeding its redemption value any "stock mentioned in sub-sections (*g*) (*i*) and (*l*) of section 1, "which is liable to be redeemed within fifteen years of the date "of purchase at par or at some other fixed rate, or purchase any "such stock, which is liable to be redeemed at par or at some "other fixed rate, at a price exceeding fifteen per centum above "par or such other fixed rate" (sec. 2 (2)).

(*a*) 56 & 57 Vic., cap. 53, sec. 1. (*g*), (*i*) and (*l*).

(*b*) Cash under the control of the Court may likewise be invested in the debenture stock of such railway companies. See R. S. C., Or. xxii., r. 17.

"A trustee may retain until redemption any redeemable stock "fund or security, which may have been purchased in accordance' "with the powers of this Act" (sec. 2 (3)).

"The preceding provisions apply as well to trusts created "before as to trusts created after the passing of this Act and the "powers thereby conferred are to be in addition to the powers "conferred by the instrument, if any, creating the trust" (sec. 4).

"A trustee having power to invest in the mortgages or bonds "of any railway company or of any other description of company "may, unless the contrary is expressed in the instrument author- "ising the investment, invest in the debenture stock of a railway "company or such other company as aforesaid" (sec. 5 (2)).

Any trustee having power to invest money in debentures or debenture stock of any railway or other company may (under section 5 (3) of the Trustee Act, 1893),(*c*) unless the contrary is expressed in the instrument authorising such investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875(*d*) (38 & 39 Vic., cap. 83), but a trustee may not, unless authorised by the terms of his trust, apply for or hold a certificate to bearer issued under the authority of the Local Loans Act, 1875 (section 7 (1) of the Trustee Acts, 1893).

Trustees holding trust moneys under a will upon trust to lay out the same in the purchase of lands to be settled in strict settlement may, at the request of the tenant for life, invest such moneys in debentures or debenture stock in accordance with the provisions of section 21 of the Settled Land Act, 1882;(*e*) for it would be absurd to suppose, that that could not be done before the purchase, which a tenant for life could without question do after the lands had been purchased, by selling the land and investing the moneys arising from the sale.(*f*)

(*c*) This section was enacted in substitution for section 27 of the Local Loans Act, 1875. Under the R. S. C., Or. xxii. r. 17, moneys under the control of the Court may be invested in nominal debentures or debenture stock under the Local Loans Act, 1875, provided in each case, that such debentures or debenture stock shall not be liable to be redeemed within a period of fifteen years from the date of investment. Such moneys may also be invested in Inscribed 2½ per cent. Debenture Stock of the Corporation of London.

(*d*) As to this Act, see Bk. III., ch. iv., infra.

(*e*) 45 & 46 Vic., cap. 38, section 21 of this Act provides that money arising under it may be invested on the security of bonds, mortgages, or debentures or in the purchase of debenture stock of any railway company in Great Britain or Ireland incorporated by special Act and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares.

(*f*) In re *Mackenzie's Trusts*, 23 Ch. D. 750.

A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament may under section 5 (5) of the Trustee Act, 1893, invest such trust moneys on the security of mortgage debentures duly issued under the provisions by the Mortgage Debentures Act, 1865 (28 & 29 Vic., cap. 78).(*g*)

Trustees' power to invest Trust Funds in Debentures or Debenture Stock under the express provisions of instrument creating the Trust.

Trustees may, of course, invest trust funds held by them in debentures or debenture stock issued by limited liability or other companies, when the instrument creating the trust expressly authorises them to do so or contains a wide power, which empowers them by implication to so invest the trust funds; thus a power to invest in the debentures or securities of any railway or other public company carrying on business in the United Kingdom has been held to authorise investment in debentures of a limited company incorporated under the Companies Act, 1862.(*h*) On the other hand, a power to invest trust funds in or upon the real securities(*i*) or by way of mortgage of any freehold, copyhold or leasehold hereditaments(*j*) has been held not to authorise investment in railway debentures issued under the provisions of the Companies Clauses Consolidation Act, 1845. Again, a power to invest trust funds in the "bonds, debentures or debenture stock of any company incorporated by Act of Parliament" was held not to authorise trustees to invest in securities of a company incorporated under the Companies Act, 1862.(*k*)

A power to trustees to invest "on such stocks, funds and securities as they should think fit" means as they should honestly think fit. Hence, where trustees A and B with such power invested the trust funds in debentures of a limited company (A receiving a bribe of £300 for making such investment, whereas B *bonâ fide* believed it was a good investment) the Court held, that the estate of A, who had since died, was liable to make good the loss and to refund the £300 as being money received by him on behalf of the estate, but that B was not liable.(*l*)

Where trustees are expressly authorised to retain or invest in

(*g*) As to this Act, see infra, Bk. III., ch. v.

(*h*) Re *Sharp*, *Rickett* v. *Sharp*, 62 L. T. R. 777.

(*i*) *Mant* v. *Leith*, 15 Beav. 525; *Harris* v. *Harris* (1), 29 Beav. 107.

(*j*) *Mortimore* v. *Mortimore*, 4 De G. & J. 472; 28 L. J. Ch. 558.

(*k*) In re *Smith*, *Davidson* v. *Myrtle* (1896), 2 Ch. 590.

(*l*) In re *Smith*, *Smith* v. *Thompson*, W. N. (1895) 144.

Bk. I., Ch. VII. debentures to bearer with coupons attached, they may deal with them in the way usual with prudent business men and may consequently deposit such securities in their joint names with the bankers to the trust upon a simple acknowledgment of the bankers of the receipt thereof.(*m*)

(*m*) Re *De Pothonier*, *Dent* v. *De Pothonier* (1900), 2 Ch. 529.

BOOK II.

THE RIGHTS AND REMEDIES OF DEBENTURE AND DEBENTURE STOCK HOLDERS OF A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1862, OR THE COMPANIES CONSOLIDATION ACT, 1908.

IN this book it is proposed to examine the various rights and remedies, which a debenture or debenture stock holder of a company has—

I. Against the company, (*a*) in respect of misrepresentations, whereby he was induced to advance his money on the securities held by him, and (*b*) in respect of the non-disclosure of any of the particulars prescribed by section 81 of the Companies Consolidation Act, 1908, and (*c*) for the purpose of enforcing his securities.

II. Against the creditors of the company other than the holders of the securities ranking *pari passu* with him.

III. Against the other holders of debentures or debenture stock.

IV. Against the directors of the company, and

V. Against the trustees of the covering deed.

CHAPTER I.

THE RIGHTS AND REMEDIES OF DEBENTURE OR DEBENTURE STOCK HOLDERS AGAINST A COMPANY IN RESPECT OF MISREPRESENTATIONS IN OR OMISSIONS FROM PROSPECTUSES OR NOTICES INVITING SUBSCRIPTIONS FOR SUCH SECURITIES.

Remedies against Company in respect of misrepresentations in or omissions from a Prospectus.

WHEN a company wishes to issue debentures or debenture stock, its directors usually issue (as has already been stated) on behalf of the company a prospectus inviting the public to subscribe for such securities. Where debentures or debenture stock are allotted by the company to a person, who applied for the same on the faith of the statements contained in the prospectus, such person may on discovering, that such statements were false, or that one or other of the particulars specified in section 81 of the Companies Consolidation Act, 1908, has not been disclosed by the prospectus, claim, according to the circumstances of the case, rescission of his contract and return of the purchase money or damages in respect of the mis-statements or non-disclosure.

Of course, in cases of this sort the debenture or debenture stock holder takes proceedings on behalf of himself only (and not on behalf of himself and the other debenture or debenture stock holders) because it may be, that the other debenture or debenture stock holders were not misled by the statements contained in the prospectus or did not apply for their securities relying on such statements.(*a*) It is proposed to consider in the present chapter, (I.) when a misrepresentation and what kind of misrepresentation will enable a debenture or debenture stock holder to obtain (1) rescission and return of the purchase money, or (2) damages in an action for deceit, and (II.) what remedies a

(*a*) *Hallows* v. *Fernie*, 3 Ch. 467, 471; *Gray* v. *Lewis*, 8 Ch. 1035, 1055. However, where several persons claim to have a right to relief "in respect of or arising out of the same transaction or series of transactions" and where "if such persons brought separate actions, any common question of law or fact would arise," such persons may be joined as co-plaintiffs by virtue of Or. 16, r. 1. See *Drincqbier* v. *Wood* (1899) 1 Ch. 393, 396.

debenture or debenture stock holder will have against the company in respect of non-disclosure (in a prospectus) of one or other of the particulars specified in section 81 of the Companies Consolidation Act, 1908.

SECTION I. *Rescission.*

When a Company is rendered liable to an action for Rescission by the misrepresentations of its Agents in a Prospectus.

Lord Hatherley makes the following remarks(*b*) on the effect of misrepresentations made by the agents of a company, when acting on behalf of such company :—

"I think that the following points may be considered as concluded by authority: First that an agent acting within the scope of his authority and making any representation, whereby the plaintiff, with whom he deals on behalf of his principal, is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it, whilst a *restitutio in integrum* is possible. Secondly that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. Thirdly that, if there cannot be *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived."

Though the agent of the company has no implied authority from the company to make fraudulent misrepresentations on its behalf, yet it has been held in the interest of society that, where an agent of a company makes fraudulent misrepresentations relating to a matter, as to which he is agent, in the course and as part of the business, which he is appointed to transact for the company, and induces a person to enter into a contract by such misrepresentations, the company is for all purposes of rescission of such contract bound by such misrepresentations and such person has a right to the rescission of such contract and repayment of any moneys paid to the company in respect of such contract;(*c*) for, if a company authorises an agent to act for it

(*b*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, 331.

(*c*) *Western Bank of Scotland* v. *Addie*, L. R., 1 H. L. Sc. 145; *Henderson* v. *Lacon*, 5 Eq. 249, 261; Lindley, 260, 263; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 711.

in the making of any contract, it undertakes for the absence of fraud in that person in the execution of the authority given.(*d*)

A person, to whom debentures or debenture stock have been allotted, can only succeed in an action for the rescission of the contract with a company to take such securities, if he brings his case within one or other of the following heads: (1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf—as, for example, by a prospectus issued by the authority or sanction of the directors of a company inviting subscriptions for such securities; (2) Where the misrepresentations are made by a special agent of the company, while acting within the scope of his authority—as, for example, by an agent specially authorised to obtain, on behalf of the company, subscriptions for such securities; this head, of course, includes the case of a person constituted agent by subsequent adoption of his acts; (3) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations, even though made without any authority; (4) Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as, for example, if the directors of a company know, when allotting, that an application for such securities is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors.(*e*)

These principles, when specifically applied to the case of debenture and debenture stock holders, warrant the following statement, *viz.*, that, if a person relying on statements made in a prospectus or otherwise by the authorised agents of a company advances to such company money, which is secured by debentures or debenture stock of such company, he is, on discovering such statement to be false, entitled to rescission of the contract.

Amount Recoverable.

The order rescinding the contract orders the company to pay the sum advanced together with interest at 4 per cent. The interest is not ordered to be paid by way of damages, but with

(*d*) *Weir* v. *Bell*, 3 Ex. Div. 32, 238, 245.

(*e*) *Lynde* v. *Anglo-Italian Hemp Co.* (1896), 1 Ch. 178.

the object of restoring the parties as far as possible to their original position.(*f*)

What constitutes such a misrepresentation in a Prospectus as will be a sufficient ground for Rescission.

In order to succeed in an action for rescission, it is not necessary to show, that the misrepresentation was *wilfully* false; it is sufficient to prove, that it was false *in fact*;(*g*) the misrepresentation relied on in such an action may consist of (1) the false statement of a material fact(*h*) or (2) the suppression of a material fact,(*i*) if such suppression renders the statement untrue.(*j*)

Misrepresentation concerning a Fact.

The misrepresentation relied on must, as has been said above, be concerning a fact (as distinguished from a misrepresentation of law), but a representation of fact involving a representation of law is none the less a representation of fact and will as such be a good ground for rescission, if it is false.(*k*)

A representation of the state of a man's mind, such as expectation and belief,(*l*) is a representation of a fact,(*m*) though it would, of course, be very difficult to prove, that such representation was false.

On the other hand, a representation, that something will be done in the future,(*n*) or is expected,(*o*) is, of course, not a representation of fact and is consequently not a good ground for rescission.

Ambiguous Representation.

If a representation is ambiguous and is reasonably capable of bearing the meaning, which the person contracting with the company to advance money on the security of debentures or debenture stock attributes to it, such person will, if the representation was false, have a right to rescind such contract on

(*f*) *Karberg's Case* (1892), 3 Ch. (C. A.) 1, 17.

(*g*) *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 320; *Derry* v. *Peek*, 14 App. Cas. 337, 359; re *Reese River Mining Co., Smith's Case*, 2 Ch. 604; *Redgrave* v. *Hurd*, 20 Ch. Div. 1, 12; *Karberg's Case* (1892), 3 Ch. (C. A.) 1, 13.

(*h*) *Hallows* v. *Fernie*, 3 Ch. 467, 471; *Denton* v. *Macneil*, 2 Eq. 352, 355.

(*i*) As to what will amount to a material fact, see *Oakes* v. *Turquand*, L. R., 2 H. L. 325, 342; *Central Railway of Venezuela* v. *Kisch*, L. R., 2 H. L. 99; *Reese River Co.* v. *Smith*, L. R., 4 H. L. 64; *Carling* v. *London and Leeds Bank*, 56 L. T. R. 115; re *London and Staffordshire Co.*, 24 Ch. D. 149; re *Mount Morgan Co.*, 56 L. T. R. 622; *Glasier* v. *Rolls*, 42 Ch. Div. 436; *Derry* v. *Peek*, 14 App. Cas. 337, and others.

(*j*) See Lindley, p. 88; *McKeown* v. *Boudard Peveril Gear Co.* (1896), W. N. 36.

(*k*) *Beattie* v. *Lord Ebury*, 7 Ch. 777, L. R., 7 H. L. 102; *West London Commercial Bank* v. *Kitson*, 13 Q. B. Div. 360; *Derry* v. *Peek*, ubi supra; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. Div. 693, 709.

(*l*) *Karberg's Case* (1892), 3 Ch. (C. A.) 1, 11.

(*m*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.

(*n*) *Beattie* v. *Lord Ebury*, 7 Ch. 777, 804.

(*o*) *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

proving, that he understood the representation in the sense, in which it was false, and that he had in fact been deceived by it.(*p*)

The construction put on the representations must, however, be reasonable; thus a person has no right to assume, that a debenture imports a charge on the company's property.(*q*) A person, who partly owing to misrepresentations in a prospectus issued by the authorised agent of a company and partly owing to his own mistake enters into a contract with such company to take from such company some of its debentures or debenture stock, will not lose his right to rescind such contract merely by reason of the misrepresentations not having been the only thing, which caused him to enter into the contract.(*r*)

Representations which, though discovered to be untrue before Allotment, are not rectified.

A person, who contracts with a company to take up its debentures or debenture stock relying on material representations in a prospectus (1) which the company discovered to be untrue before the allotment of such securities(*s*) or (2) which were true at the date of the issue of the prospectus containing them but which have owing to the alteration of circumstances become untrue before the date of the allotment to him by the company of such securities, is entitled to rescission and repayment of the amount advanced to such securities with interest.(*t*) In order to bind such person, the company should have called his attention to and rectified the untrue statement.

Holder must repudiate promptly on discovery of misrepresentation.

If a debenture or debenture stock holder wishes to rescind his contract to take up such securities on the ground of misrepresentation, he must promptly repudiate such contract and require repayment of the moneys paid by him to the company on discovering, that the representations, on which he relied, were false. Undue delay after such discovery will disentitle the holder to relief, but reasonable delay will not so disentitle him.(*u*)

(*p*) *Hallows* v. *Fernie*, 3 Ch. 467, 475; *Smith* v. *Chadwick*, 9 App. Cas. 187.

(*q*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.

(*r*) *Edgington* v. *Fitzmaurice*, ubi supra; *Western Bank of Scotland* v. *Addie*, L. R., 1 H. L. Sc. 145, 158; *Nichols' Case*, 3 De G. & J. 387, 420; *Peek* v. *Derry*, 37 Ch. Div. 541, 574; *Arnison* v. *Smith*, 41 Ch. D. 348, 360.

(*s*) *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (1896), 1 Ch. 178.

(*t*) *Traill* v. *Baring*, 4 De J. & S. 318, 329; in re *Scottish Petroleum Co.*, 23 Ch. Div. 413, 438; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 950.

(*u*) *Sharpley* v. *Louth Railway Co.*, 2 Ch. Div. 663; *Scholey* v. *Central Railway Co. of Venezuela*, 9 Eq. 266*n*. Re *Scottish Petroleum Co.*, 23 Ch. Div. 413; *Ogilvie* v. *Currie*, 37 L. J. Ch. 541. As to what will amount to an effectual repudiation, see also *Reese River Co.* v. *Smith*, L. R., 4 H. L. 64; re *Scottish Petroleum Co.*, ubi supra; re *Christineville Rubber Estates* (1911), W. N. 190.

Where investigation is necessary, the time required for such investigation will be allowed.(*v*)

A debenture or debenture stock holder may so act and recognise his position as a holder after discovering the falsity of the representations, that he will be precluded from obtaining rescission.(*w*)

Rescission as to part of the Securities Allotted.

If a person applies to a company for debentures or debenture stock on the faith of representations made in a prospectus, which invited subscriptions for such securities, and, on such securities being allotted to him, sells the whole or a part of such securities at a profit, his transferee cannot (even with the concurrence of the original allottee) obtain rescission of such contract in respect of the securities sold.(*x*) But a person applying to a company for debentures or debenture stock on the faith of statements contained in a prospectus issued by or on behalf of the company, will not on discovering, that one or more of such statements were false, be precluded from rescinding his contract to take such securities, merely because he has transferred a part of his debentures or debenture stock before he was aware, that such statements were false.(*y*)

The fact that a person, who has entered into a contract to take debentures or debenture stock, has failed by reason of delay in an application for rescission thereof on the ground of a misrepresentation, will not preclude him from raising and succeeding in a case on another misrepresentation, if there has been no undue delay in proceeding after discovery of the second misrepresentation.(*z*)

SECTION II. *Action for Deceit (for Damages) against a Company on the Ground of Misrepresentation in a Prospectus.*

Fraudulent Representation necessary in action for Deceit

The second remedy above mentioned, to which debenture and debenture stock holders, who took their securities from a company relying on the misrepresentations concerning material facts(*a*) made by its authorised agents in a prospectus or other-

(*v*) *Central Railway Co. of Venezuela* v. *Kisch*, L. R., 2 H. L. 99. In re *Scottish Petroleum Co.*, 23 Ch. Div. 413; *Imperial Ottoman Bank* v. *Trustees Corporation* (1895), W. N. 23.

(*w*) *Ogilvie* v. *Currie*, 37 L. J. Ch. 541.

(*x*) *Edinburgh United Breweries* v. *Molleson* (1894), A. C. 96.

(*y*) *Maturin* v. *Tredinnick*, 12 W. R. 740; re *Mount Morgan Co.*, 56 L. T. R. 622.

(*z*) Re *The London and Provincial Electric Lighting Co.*, 55 L. T. R. 670. This case is consistent with *Whitehouse's Case*, 3 Eq. 790.

(*a*) As to what amounts to a fact, see supra, Bk. II., ch. i., sec. i.

wise, may resort, is an action for deceit, that is to say, an action for damages. In order to succeed in an action for deceit, *fraud* on the part of the company's agents must be proved; a false (as distinguished from a fraudulent) misrepresentation is not sufficient in the case of an action for deceit. Hence it must be proved, that the agents of the company made the fraudulent misrepresentations relied on (1) knowing them to be false or (2) without belief in their truth or (3) recklessly, that is to say, careless whether they were true or false.(*b*)

How far a Company can be liable in an action for Deceit.

Some eminent judges are indeed of opinion, that no action for deceit would lie against a corporation,(*c*) (at any rate beyond the extent, to which such corporation has profited by such misrepresentations),(*d*) but the contrary has been decided (and it is submitted correctly decided)(*e*) by the Privy Council and by the Exchequer Chamber.(*f*) Whether or not the company derived any benefit from the misrepresentation is only material as showing, whether the agent was or was not acting for the company, but, if he had been so acting within the scope of his employment, the fact that the company was not benefited by such misrepresentation would, it is presumed, be immaterial.(*g*) But a company cannot be made liable in an action for deceit, unless the misrepresentation relied on is made by an agent, who is authorised to make representations on behalf of the company and who makes them for and on behalf of the company.(*h*) Hence, if the person, who makes the misrepresentation relied on, is not authorised to make representations on behalf of the company(*i*) or if he makes the representations for his own purposes, and not for the benefit of the company,(*j*) in either case the company will not be liable in an action for deceit.

A company would appear to be liable in an action for deceit

(*b*) *Derry* v. *Peek*, 14 App. Cas. 337, 359; *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 320; see also *Tackey* v. *McBain* (1912) A. C. 186, 189.

(*c*) *Western Bank of Scotland* v. *Addie*, L. R., 1 H. L. Sc. 158, 166. The dicta embodying the above-mentioned opinion are, however, commented on and dissented from in *Mackay* v. *Commercial Bank, etc.*, L. R., 5 P. C. 394, 413; *Houldsworth* v. *Glasgow Bank*, 5 App. Cas. 317.

(*d*) *British Mutual Banking Co.* v. *Charnwood Railway Co.*, 18 Q. B. D. 714, 719.

(*e*) Lindley, 94, 266.

(*f*) *Mackay* v. *Commercial Bank, etc.*, L. R., 5 P. C. 394; *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex. 259.

(*g*) See Lindley, p. 267.

(*h*) *British Mutual Banking Co.*, v. *The Charnwood Railway Co.*, 18 Q. B. Div. 714.

(*i*) *Barnett, Hoares & Co.* v. *The South London Tramways Co.*, 18 Q. B. Div. 815. In this case the secretary of a company was held not to have power to bind the company by his representations in the absence of express authority.

(*j*) *The British Mutual Banking Co.* v. *The Charnwood Railway Co.*, 18 Q. B. Div. 714.

in respect of fraudulent misrepresentations contained in a prospectus, which has been prepared and issued by the brokers of the company for the purpose of inviting subscriptions for debentures or debenture stock of such company, though the directors of the company, who had instructed the brokers to issue the prospectus, never authorised the brokers to make such misrepresentations.(*k*)

SECTION III. *Action for Damages against a Company for not Disclosing in Prospectus the Particulars Specified in Section 81 of the Companies Consolidation Act, 1908.*

Companies' liabilities for non-disclosure in Prospectus of particulars specified in sec. 10 of the Companies Act, 1900.

It will be seen, on referring to an earlier part of this treatise (*l*) dealing with prospectuses, that certain specified particulars are required by section 81 of the Companies Consolidation Act, 1908, to be disclosed by every prospectus and advertisement inviting the public to subscribe for the debentures or debenture stock of a company registered under that Act or the Companies Act, 1862. But, though this section contains elaborate provisions specifying in detail what prospectuses are required to state, there is no express provision in the Act stating what is to happen, if a prospectus or advertisement is issued, which fails to disclose any one or more of such particulars. It will be seen (for reasons which will be found fully dealt with hereafter),(*m*) that a default in disclosing in a prospectus any one or more of the particulars specified in section 81 of the Companies Consolidation Act, 1908, being a breach of a statutory duty, will be a criminal offence and will render not merely the directors, but also the company itself, liable to be indicted for such offence (*n*) and also liable to pay damages to any persons, who have applied for and obtained the allotment of debentures or debenture stock on the faith of the prospectus and who have suffered damage by reason of the default in disclosing such particulars.(*o*) A person applying for the allotment of debentures or debenture stock in response to a prospectus, which does not comply with section 81, is not by reason of such non-compliance entitled to rescind his contract after such securities have been allotted to him.(*p*)

(*k*) *Weir* v. *Bell*, 3 Ex. D. 238, 245. As to how far an action for deceit will survive to the representatives of a deceased debenture or debenture stock holder, and as to the amount recoverable in an action for deceit, see infra, Bk. II., ch. vi., sec. i. (2).

(*l*) See supra, Bk. I., ch. iii. p. 61.

(*m*) See infra, Bk. II., ch. vi., sec. i.

(*n*) *Rex* v. *Wright*, Burr. 543; *Rex* v. *Harris*, 4 T. R. 202; *Reg* v. *Whitchurch*, 7 Q. B. Div. 534, 536; *Reg* v. *Tyler* (1891) 2 Q. B. (C. A.) 588, 592.

(*o*) *Chamberlaine* v. *Chester and Birkenhead Railway Co.*, 1 Ex. 870; *Pickering* v. *James*, L. R., 8 C. P. 489; *Britton* v. *Great Western Cotton Co.*, L. R., 7 Ex. 130; *Ross* v. *Rugge Price*, 1 Ex. D. 269; *Dormont* v. *Furness Railway Co.*, 11 Q. B. D. 496; *Groves* v. *Wimborne* (1898) 2 Q. B. (C. A.) 402, 415; see also Mayne on Damages, 6th ed., pp. 516-530.

(*p*) See supra, Bk. I., ch. iii.; re *Wimbledon Olympia Ld.* (1910) 1 Ch. 630.

CHAPTER II.

EXPRESS POWERS CONFERRED BY THE COVERING DEED ON DEBENTURE OR DEBENTURE STOCK HOLDERS OR THEIR TRUSTEES FOR ENFORCING THEIR SECURITIES WITHOUT THE ASSISTANCE OF THE COURT.

Express Powers to enforce Securities without assistance of the Court.

THE debenture or debenture stock holders or the trustees of their trust deed usually have several express powers enabling them to enforce their charge on the property comprised in their securities without the assistance of the Court. The most important of these powers are (1) a power of sale and (2) a power to appoint a receiver or a receiver and manager.

Express Power of Sale.

The trust deed usually confers on the trustees an express power to sell the property comprised in such trust deed as soon as the debentures or debenture stock become enforceable; such power of sale is usually converted into a trust for sale on a specified proportion of the debenture (or debenture stock) holders requesting the trustees to sell.(*a*) Unless the debenture-holders have an express power of sale, they will be unable to sell the property comprised in their securities without the assistance of the Court, it having been decided that section 19 of the Conveyancing Act, 1881, does not confer a power of sale on debenture-holders.(*b*) Such an express power of sale is not in any way interfered with by the company, which issued such debentures or debenture stock, being wound up,(*c*) and the exercise of such a power will not be restrained by injunction at the instance of the liquidator of the company, which issued such securities; if the liquidator wishes to prevent such sale, he must redeem.(*d*)

Express Power to appoint a Receiver or a Receiver and Manager.

The debenture or debenture stock holders' trust deed usually also contains a clause enabling the trustees thereof (and deben-

(*a*) See Appendix, Forms 12 and 13. The trust deed usually states, when the securities will become enforceable.

(*b*) *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*c*) In re *Henry Pound Son & Hutchins*, 42 Ch. Div. 402, 421.

(*d*) Re *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150.

tures not secured by a trust deed frequently contain a clause enabling the holder of each of such debentures with the consent of a specified proportion of the other holders of the debentures ranking *pari passu*) to appoint a receiver or, if it is desired to carry on the business of the company issuing such securities, a receiver and manager of the assets of such company, after the principal money secured shall have become due or, to use another expression, after the securities shall have become enforceable.(*e*)

Court will not interfere with Receiver appointed under Express Power.

In the cases, in which the debenture or debenture stock holders have by contract with the company a right to appoint a receiver, the Court will in no way interfere with their receiver taking possession, even if the company is ordered to be wound up, and the Court will give leave to such receiver to take possession of the property comprised in the security notwithstanding the appointment of an official liquidator.(*f*) In a recent case of *re Henry Pound Son & Hutchins*, in which debenture-holders had, in the event of the company being wound up, power to appoint a receiver with ample powers for carrying on the business and disposing of the undertaking and property, an order was made for the winding up of the company and an official liquidator appointed. Thereupon the debenture-holders under their powers appointed a receiver and applied to the Court, that leave might be given to the receiver to take possession of all the company's undertaking and property notwithstanding the appointment of the liquidator. The Court of Appeal granted such leave. Cotton, L. J., made the following remarks in the course of his judgment: "The argument has been this, that in this case, if the receiver is only to have such a power as a receiver appointed by the Court in an action would have, he must be treated for the purposes of this application, as if he were a receiver appointed by the Court. That appears to me to be entirely missing the point. If the Court appoints a receiver at the instance of a mortgagee, the mortgagee not having without the assistance of the Court power to appoint a receiver, then the Court exercises its discretion as to who shall be appointed receiver, and appoints the receiver whom it thinks

(*e*) See Appendix, Forms 12 and 3.

(*f*) In re *Henry Pound Son & Hutchins*, 42 Ch. Div. 402, 419. Such a power must be exercised for the benefit of the holders of the whole series; if it it not so exercised, the Court will appoint another receiver. Re *Maskleyne British Typewriter, Limited, Stuart* v. *Same Co.* (1898), 1 Ch. 133.

best to appoint for the interest of the mortgagee and of the mortgagor, a person, who, having regard to the interests of both parties, the Court considers the best person. And, when a company is being wound up, whether there is a winding up at the time the receiver is appointed by the Court or afterwards, then the Court says, 'It is quite useless to have the expense of two receivers, the liquidator who is, in fact, in some senses a receiver, and another receiver appointed in this action'. There the Court exercises its discretion as to whom it is to appoint. But those cases do not at all apply, in my opinion, where a receiver, who is asking to be let into possession, has not been appointed by the Court, but is appointed by the mortgagees under the exercise of the power given them by the mortgage deed. In such a case it is not left to the Court to determine, who shall be the receiver best for the interest of all parties, but the mortgagee comes and says: 'My deed enables me to appoint AB and I have appointed him and I ask the Court to let him into possession; that being one of the powers, which were given to the receiver by the deed. I do not want a receiver appointed by the Court, but a receiver appointed under the powers conferred by the deed under which I claim.'" Towards the end of the judgment the Lord Justice says as follows: "I think it is the right of the mortgagees or the debenture-holders (I treat them as mortgagees) to take possession of the mortgaged property, the winding up not in any way interfering with that, or with their selling the property, and the liquidator still being enabled for the purpose of the winding up to employ and use in carrying on the business of this company, as he may do for the purpose of the winding up, that, which is not the property of the company, but which is the property of the debenture-holders, that is to say, the mortgagees".

Some of the powers conferred on a receiver, who has been appointed by the debenture or debenture stock holders of a company under their trust deed, will be put an end to by the winding up of the company; thus the Court held in the case of *Henry Pound Son & Hutchins* that a receiver so appointed could not after the making of a winding-up order exercise a power to carry on the business of the company, to make calls or to use the company's name in any proceedings.(*g*)

(*g*) 42 Ch. Div. 402, 421.

This case does not interfere with the line of cases commencing with *Perry* v. *Oriental Hotel Company* (*h*) and ending with *British Linen Company* v. *South American and Mexican Company* (*i*) which simply decide, as will be seen hereafter, that, when an application is made by a debenture or debenture stock holder to the Court to appoint a receiver and another application is made to appoint a liquidator, the Court will take care in order to avoid trouble and expense, that the receiver and the liquidator shall be the same person in every case, where that can properly be done.(*j*)

Receiver appointed under express power in Debenture is Agent of Debenture-holders.

A receiver or receiver and manager appointed by one or more debenture-holder or holders pursuant to an express power in that behalf contained in the debentures will (in the absence of any provision in the debentures expressly making such receiver or receiver and manager an agent of the company) be an agent (not of the company, but) of the person or persons, who appointed him, and such person or persons will accordingly be answerable for all the faults and omissions committed and acts done by such receiver or receiver and manager.(*k*)

If an insolvent debtor transfers his business to a company, which issues debentures empowering the holder to appoint a receiver of the assets thereby charged (including the company's business), and if, after a receiver so appointed has carried on the business of the company, such transfer is set aside as an act of bankruptcy, to which the title of the trustee in bankruptcy relates back, the receiver so appointed (being the agent of the debenture holders appointing him) is liable as a trespasser to account to the trustee in bankruptcy for the assets (if any) of the debtor, which have come into the receiver's hands, or for the value of such assets.(*l*)

How far a Receiver appointed by Trustees of Covering Deed is Agent of Company.

Receivers or receivers and managers appointed by the trustees of a covering deed pursuant to a power vested in such trustees by such deed are generally expressly declared by such deed to be the agents of the company; hence such trustees will not generally be liable for the acts of the receivers or receivers and managers so

(*h*) 5 Ch. 420.
(*i*) (1894) 1 Ch. (C. A.) 108.
(*j*) See also infra, Bk. II., ch. iii., sec. v. (1c).
(*k*) Re *Vimbos Ld.* (1900) 1 Ch. 470; *Robinson Printing Co.* v. *Chic Ld.* (1905) 2 Ch. 123; *Deyes* v. *Wood* (1911) 1 K. B. 806; *Bissell* v. *Ariel Motors*, 27 Times L. R. 73. Re *Goldburg*, ex pte. *Page* (1912) 1 K. B. 606, 610.
(*l*) Re *Goldburg* (No. 2), ex pte. *Page* (1912) 1 K. B. 606.

Bk. II., Ch. II.

appointed, unless such trustees do something to make such receivers or receivers and managers their agents.(*m*)

A receiver, who has been appointed by the trustees under an express power contained in the debenture or debenture stock holders' trust deed and who has (as is usually the case with receivers appointed under such power) far wider powers than those conferred on a receiver by virtue of section 24 of the Conveyancing Act, 1881, is not for all purposes a mere agent of the company, which issued such securities, though the deed states, that a receiver so appointed shall be the agent of the company. Thus the Court held in a recent case, that a receiver appointed by the trustees of the debenture-holders' trust deed was not (for the purpose of deciding whether or no there has been a change of occupation within 32 & 33 Vic., cap. 41) to be treated as an agent of the company, but as an agent of the debenture-holders and that, when he took possession of the premises and carried on the business of the company, there was a change of occupation such as was contemplated by the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vic., cap. 41, sec. 16), and that such receiver was liable to pay in respect of the time subsequent to his taking possession an apportioned part of a rate made before he took possession.(*n*)

The liabilities incurred by the trustees of the debenture or debenture stock holders' trust deed, if they allow a receiver and manager, who has been appointed by them by virtue of a power contained in such trust deed, to continue carrying on the business of the company after such company has been ordered to be wound up, are dealt with hereafter.(*o*)

Notice of appointment of Receiver.

The persons, who appoint a receiver or receiver and manager under an express power contained in their debentures or in a covering deed, should within seven days from the date of such appointment give notice to the registrar, who will enter the fact in the register of mortgages.(*p*)

A receiver or receiver and manager, appointed under an ex-

(*m*) *Owen & Co.* v. *Cronk* (1895) 1 Q. B. (C. A.) 265; *Gosling* v. *Gaskell* (1897) A. C. 575.

(*n*) *Richards* v. *Overseers of Kidderminster* (1896) 2 Ch. 212. For the liabilities of receivers and managers appointed under an express power contained in a covering deed as compared with the liabilities of receivers and managers appointed by an order of Court, see infra, Bk. II., ch. iii., sec. v. (2*d*).

(*o*) See infra, Bk. II., ch. vii.

(*p*) See sec. 94 of the Comp. Cons. Act, 1908. For a form of the notice to be given to the Registrar, see infra, Appendix, Form 34*a*.

Preferential Payments.

press power contained in a debenture or in a covering deed securing a series of debentures or debenture stock, will take possession "on behalf of the debenture holders" within the meaning of section 107 of the Companies Consolidation Act, 1908, and the preferential payments specified in section 209 of that Act will thereupon become payable in priority to any floating charge created by such debentures or covering deed.(*q*)

Section 95 makes the following provision as to the filing of accounts by receivers and managers :—

Accounts to be filed by Receiver appointed under express power. Sec. 95 of Comp. Cons. Act, 1908.

"(1) Every receiver and manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar of companies an abstract in the prescribed form of his receipts and payments(*r*) during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the registrar notice(*s*) to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

"(2) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding fifty pounds."

(*q*) As to these preferential payments, see infra, Bk. II., ch. iv., sec. ii. pp. 341-2.

(*r*) See infra, Appendix, Form 34*b*.

(*s*) For a form of such notice, see infra, Appendix, Form 34*c*.

CHAPTER III.

ENFORCEMENT BY THE COURT OF THE DEBENTURE AND DEBENTURE STOCK HOLDERS' CHARGE AGAINST THE COMPANY.

Bk. II., Ch. III., Sec. I.

Principal means of enforcing Debenture-holders' rights against Company.

IT is stated in the preceding chapter, that debenture or debenture stock holders usually have express rights conferred on them for enforcing their securities. However, even where they have such express rights, they may apply to the Courts to enforce their charges. In the present chapter it is proposed to examine, when and how the rights of debenture and debenture stock holders will be enforced by the Courts against the company, which issued such securities.

The principal means of enforcing such rights are (1) an action to enforce the debentures or debenture stock holders' securities, (2) a petition to wind up the company, which issued the securities, and (3) proof in the winding up of such company. These are dealt with in the following pages in the order above mentioned.

Before discussing the nature of the claim and of the relief given in a debenture (or debenture stock) holder's action, it will be convenient to deal with the following questions: (*a*) who are the proper parties to such an action, (*b*) how far foreign companies are liable to be sued in England, (*c*) when the Court will give leave to commence or continue proceedings for enforcing debentures or debenture stock after the company, which issued such securities, has been ordered to be wound up and (*d*) when such securities become enforceable.

SECTION I. *Parties to an Action to Enforce the Debenture or Debenture Stock Holder's Securities.*

The Holder of a Registered Debenture may sue.

The registered holder of debentures or debenture stock to registered holder (whether such debentures or debenture stock are or are not further secured by a trust deed) may, unless

a contrary intention is shown by the debentures, debenture stock certificates or by the trust deed, respectively enforce his securities by a debenture or debenture stock holder's action.

The Bearer of a Debenture to Bearer may sue.

The bearer of debentures or debenture stock certificates to bearer (whether such bearer is the absolute owner of such securities or merely the depositee thereof by way of mortgage)(*a*) may enforce his securities by a debenture or debenture stock holder's action, though there is not strictly any privity of contract except between the company issuing such securities and the original bearer. The reason, why any bearer of such securities may enforce them, is that, where the Court treats such securities as negotiable by law merchant,(*b*) he has unquestionably the right to enforce his securities, assuming that he is a *bonâ fide* holder for value, but, that even if such securities are not negotiable instruments, they are (as has been stated in an earlier part of this treatise)(*c*) almost invariably so framed as to estop the company issuing them from disputing the right of the bearer to enforce the same. After stating, that the moneys secured by debentures to bearer are assignable in equity, Rolt, L. J., makes the following remarks on such instruments, which are referred to by him sometimes as obligations and sometimes as debentures: "There is nothing inequitable in allowing the debtor in an obligation to contract with his creditor, that he will pay the amount due on the obligation to the assignee of the creditor (whether he be such assignee by instrument in writing or by mere delivery of the obligation) without regard to any such equities . . . and it would be inequitable to deny the assignee of the creditor the full benefit of the contract entered into between the original contracting parties".(*d*)

When an action should be brought on behalf of all the Debenture-holders.

When a debenture or debenture stock holder, whose charge ranks *pari passu* with the charges of the other holders, brings an action against the company, which issued such debentures or debenture stock, or takes out a summons in the winding up of the company or generally commences any proceedings for the purpose of enforcing his securities, which proceedings might, if taken on his behalf only, give him an advantage over the

(*a*) In re *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*b*) As to which point, see supra, Bk. I., ch. vi., sec. ii. (1).

(*c*) See supra, Bk. I., ch. vi., sec. ii. (2).

(*d*) In re *Blakely Ordnance Co.*, ex pte. *New Zealand Banking Corporation*, Ch. 154, 159.

other holders, such action, summons or other proceeding must respectively be commenced or taken out by such debenture or debenture stock holder on behalf of himself and all the other debenture or debenture stock holders; for one debenture or debenture stock holder cannot be allowed to get paid in priority to the other holders, who rank *pari passu* with him, by getting a judgment or an order.(*f*) In cases, in which there are several issues of debentures or debenture stock, the action should be commenced or the summons taken out on behalf of the plaintiff and all other holders of the A or B debentures or debenture stock.

However, it must be understood, that an action for the enforcement of the debentures or debenture stock is entirely for the benefit of the holders and therefore a creditor of a company other than a holder of such securities is not entitled to take out a summons in such action for the purpose of obtaining payment of his debt out of the assets of the company.(*g*)

The class of debenture or debenture stock holders, on behalf of whom the plaintiff sues, should be stated as accurately as possible; thus, when a plaintiff sued "on behalf of himself and all the other holders of debentures of the defendant company and its predecessors in title," the original company having been dissolved and re-incorporated by special Act of Parliament, Kekewich, J., held, that such description was too vague and had to be amended.(*h*)

Where one person is the holder of all the debentures or debenture stock or of the whole of a series of debentures or debenture stock, he should, of course, not sue on behalf of all other holders.(*i*)

The Plaintiff Debenture-holder should be carefully selected.

The debenture or debenture stock holder, who is to act as plaintiff in an action on behalf of himself and all the other holders, should be carefully selected, as, if the plaintiff is not entitled to sue, the action cannot proceed at all(*j*) or, if the company has any right to counterclaim against the plaintiff holder, the trial of the action may be much delayed.(*k*)

(*f*) In re *Uruguay Central Railway Co.*, 11 Ch. D. 372, 381.

(*g*) *Brocklebank* v. *East London Ry. Co.*, 12 Ch. D. 839.

(*h*) *Marshall* v. *South Staffordshire Tramways Co.* (1895) 2 Ch. 36.

(*i*) *Parkinson* v. *Wainwright & Co., Limited*, W. N. (1895), p. 63.

(*j*) *Burt* v. *British Nation Life Assurance Association*, 4 De G. & J. 158, 174.

(*k*) *Huggons* v. *Tweed*, 10 Ch. Div. 359.

Under the Married Women's Property Act, 1882,(*l*) debentures and debenture stock standing in the sole name of a married woman are deemed, unless and until the contrary is shown, to be her separate property (section 6) and she may sue in respect of her separate property without joining her husband as a party (section 1 (2)).

Persons who may sue, though their Securities are defective.

A person, to whom a debenture to registered holder is issued with the name of the obligee in blank, may sue on the same; for such an instrument, though void at law, is treated in equity as conferring the same rights on the holder against the company as if the name of the obligee had been originally inserted, the Court treating that as done, which ought to have been done.(*m*) In the same way a person, to whom debentures or debenture stock of a company have been allotted to secure moneys advanced by him to such company, will, even if such debentures or debenture stock are never actually issued to him, be entitled to take proceedings, as if such securities had been actually issued to him.(*n*) Where a provisional debenture or debenture stock scrip certificate has been issued to a person, who has paid to the company the whole of the moneys to be secured by or under the definitive debentures or debenture stock certificate, such person will be treated in equity as having the same rights of enforcing his securities, as if he was the holder of such definitive debentures or debenture stock certificate.(*o*)

A company may be the plaintiff in a debenture or debenture stock holder's action, if it holds debentures or debenture stock.(*p*)

If the plaintiff in a debenture or debenture stock holder's action becomes a bankrupt during the course of the proceedings, another holder should apply to be substituted in his place.(*q*) If the plaintiff dies, his personal representatives should apply for leave under Order XVII., rule 4 to carry on the proceedings.

The debenture or debenture stock holders, on whose behalf an action is brought, are not plaintiffs within the meaning of

(*l*) 45 & 46 Vic., cap. 75.

(*m*) In re *Queensland Land and Coal Co.*; *Davis* v. *Martin* (1894) 3 Ch. 181. Re *Strand Music Hall Co.*, 3 De J. & S. 147; *Pegge* v. *Neath District Tramways Co.* (1898) 1 Ch. 183.

(*n*) Re *New Durham Salt Co.*, 7 Times L. R. 13; 90 L. T. J. 19.

(*o*) *Thorn* v. *The Nine Reefs, Limited*, 67 L. T. R. 93.

(*p*) *British Linen Co.* v. *South American Co.* (1894) 1 Ch. (C. A.) 108.

(*q*) *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

Bk. II., Ch. III., Sec. I.

Order IV., rule 1, therefore their names and addresses cannot be obtained.(*r*)

The Owner of lost Debentures.

If there is clear evidence, that a debenture or debenture stock certificate has been lost or destroyed (*e.g.*, by fire), the person claiming under such debenture or debenture stock certificate may be plaintiff in a debenture or debenture stock holder's action and may establish his title by secondary evidence of the contents of his security.(*s*)

When Holder may not sue.

In the case of *in re Uruguay Central and Hygueritas Railway Company of Monte Video*(*t*) a company covenanted by its debenture trust deed to pay interest on the debentures to the trustees of the trust deed and each debenture contained in a covenant by the company with the trustees for payment of £100 "to the bearer thereof" and of interest to the "bearer" of the coupons annexed; the Court after stating, that it was clearly not intended that the debentures should be enforceable by a holder, held that neither in respect of principal nor interest was the bearer a creditor in law or in equity, but that his right of action was through the trustees of the trust deed. However, this debenture was an instrument of a very peculiar and special nature.

As a rule, either the debenture itself or the debenture or debenture stock holder's trust deed contains provisions showing an intention, that the holders shall have a right to enforce their securities.

Enforcement of Debentures not ranking *pari passu*.

Where the debentures do not purport to rank *pari passu* with one another, the holders rank according to the priority of the date of issue, and consequently a holder taking proceedings to enforce his security should take them on behalf of himself only and not on behalf of himself and all the other holders.(*u*)

Enforcement by Trustees of the Covering Deed.

Such debentures and debenture stock as are secured by a trust deed can also be enforced by an action brought by the trustees of the trust deed,(*v*) who may under Order XVI., rule

(*r*) *Leathley* v. *MacAndrew*, W. N. (1875), p. 259.

(*s*) *Walsh* v. *The Dublin Port and Docks Board*, L. R. Ir., 7 Ch. 533.

(*t*) 11 Ch. D. 372.

(*u*) *Gartside* v. *Silkstone and Dodsworth Coal and Iron Co.*, 28 Ch. D. 762. See infra, Bk. II., ch. v., sec. i.

(*v*) *Lathom* v. *Greenwich Ferry Co.*, 93 L. T. J. 458; *Carden* v. *Albert Palace Association*, 56 L. J. (Ch.) 166; *Tottenham* v. *Swansea Zinc Ore Co.*, 51 L. T. R., 61 W. N. (1884), p. 54; *Campbell* v. *Compagnie de Bellegarde*, 2 Ch. D. 181; *Robinson* v. *Montgomeryshire Brewery Co.* (1896), 2 Ch. 841.

8(*w*) sue and be sued on behalf of or as representing the property or estate, of which they are trustees, without joining any of the persons beneficially interested in the trust or estate.

In cases, however, in which questions as to the rights and priorities of the debenture or debenture stock holders *inter se* arise, it is clear, that they cannot all be represented by the same trustees;(*x*) in such cases all the parties interested should be made parties or, if they are very numerous, an order should be obtained under Order XVI., rule 9 ordering, that the different classes should be represented by individual holders specified by the Order.

Company to be made defendant.

The company, which issued the debentures or debenture stock, must, of course, be made a defendant in an action to enforce such securities.(*y*)

Trustees should be made defendants.

When a debenture or debenture stock holder commences an action on behalf of himself and all the other holders to enforce their debentures or debenture stock against a company and such debentures or debenture stock are secured by a trust deed, he should add the trustees as defendants in the action.(*z*)

Execution Creditor has no right to defend Debenture-holder's action.

An execution creditor of a company in liquidation is not entitled to defend a debenture or debenture stock holder's action and the Court may decline to give him leave to defend such action.(*a*)

Owner of a Charge ranking above the Debentures should be made a Defendant.

A debenture or debenture stock holder seeking to enforce his security should add as defendant any person claiming to have a prior charge over the debenture or debenture stock holders and, if such holder charges the company with fraud in granting such prior charge, such holder will have a right to inspect the company's communications with its solicitor; for, where fraud is

(*w*) "Trustees, executors and administrators may sue and be sued on behalf of or as representing the property or estate, of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may at any stage of the proceedings order any of such persons to be made parties either in addition to or in lieu of the previously existing parties. This rule shall apply to trustees sued in proceedings to enforce a security by foreclosure or otherwise."

(*x*) *Newton* v. *Earl of Egmont*, 4 Sim. 574, 5 Sim. 130.

(*y*) A company counterclaiming in a debenture or debenture stock holder's action, which was commenced after such company had been ordered to be wound up, will be ordered to find some person to give security for costs. *Strong* v. *Carlyle Press* (No. 2), W. N. (1893) 51. The bond of a foreign company may be a sufficient security (*Aldrich* v. *British Griffin Chilled Iron Co.* (1904) 2 K. B. (C. A.) 850).

(*z*) *Wood* v. *Williams*, 4 Madd. 186; *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

(*a*) In re *Artistic Colour Printing Co.*, 21 Ch. Div. 510.

alleged against a defendant, communications between such defendant and his solicitor as to the subject-matter of the alleged fraud are not privileged from production.(*b*)

Subsequent incumbrancers to be made parties.

Any incumbrancer, whose charge ranks after the debenture or debenture stock holders' charge (whether he be a holder of debentures or debenture stock of a subsequent issue or an ordinary mortgagee) should be made a defendant in a debenture or debenture stock holders' action.(*c*) Instead of the holders of debentures or debenture stock of a subsequent issue the trustees of their covering deed may be made defendants as representing their *cestuis que trustent*, where such subsequent issue is secured by a covering deed.(*d*) Where, on the other hand, such subsequent issue is not so secured, each debenture or debenture stock holder must be made a defendant and not merely some as representatives of the whole issue, for the Court should, as a rule, refuse to authorise a debenture or debenture stock holder to represent the class for the purpose of making a complete foreclosure order.(*e*) So likewise all the holders of a series of debentures, which are not secured by a trust deed, must be made parties to proceedings, whereby a prior mortgagee seeks to foreclose his mortgage on property charged by such debentures.(*ee*)

Where a debenture or debenture stock holder is authorised by the Court to defend any proceedings on behalf of himself and all the other holders, he is not entitled to consent to judgment, but there is no objection to his submitting to judgment.(*f*)

Where a defendant is to be sued in a representative capacity, an order should be obtained authorising him to defend in that capacity and the record should bear the words "authorised by order dated to defend on behalf of himself and all the other debenture or debenture stock holders".(*g*)

(*b*) *Williams* v. *Quebrada Railway Co.* (1895) 2 Ch. 751.

(*c*) *Sadler* v. *Worley* (1894) 2 Ch. 170; *Parkinson* v. *Wainwright & Co.*, W. N. (1895) p. 63; *Welch* v. *National Cycle Works*, W. N. (1886) 97, 196; re *Wilcox & Co.*, *Hilder* v. *Same Co.* (1903) W. N. 64. See also the directions of the Judges to the Masters dated May 1909 (Annual Practice, 1912, p. 259). In practice, however, receivers are sometimes appointed on the application of a first debenture-holder without making subsequent incumbrancers parties.

(*d*) See R. S. C., Or. XVI., r. 8.

(*e*) *Griffith* v. *Pound*, 45 Ch. D. 553. This case does not appear to have been cited in *Fairfield Shipbuilding Co.*, v. *London and East Coast Co.*, W. N. (1895) 64, in which a person was appointed by the Court to defend a foreclosure action on behalf of all the debenture-holders. It is submitted, that *Griffith* v. *Pound* is the correct decision.

(*ee*) *Wallace* v. *Evershed* (1899) 1 Ch. 891.

(*f*) *Rees* v. *Richmond*, 62 L. T. R. 427. The Court may, however, sanction a compromise in such a case under Or. XVI. r. 9(*a*). *Collingham* v. *Sloper* (1904) 3 Ch. (C. A.) 716.

(*g*) *Fairfield Shipbuilding Co. Limited* v. *London and East Coast Co.*, W. N. (1895) p. 64.

Death of defendant Debenture-holder.

If a debenture or debenture stock holder, who has been made a defendant in an action, dies while the action is pending, the Court may, if the will of such deceased holder has not yet been proved, appoint the person nominated executor by such will, to act as his representative, until some person other than such executor has been appointed his legal personal representative.(*h*)

The Dissentient Holder should be made a Defendant.

If the plaintiff knows, when he commences his action, that he does not represent all the debenture or debenture stock holders and that he does not sue on behalf of himself and all of them, he should sue on behalf of himself and all the holders other than the dissentient holders and make all those, who dissent from him, defendants or, if they are numerous, he should (where the Court has power to make the order) apply for an order under Order XVI., rule 9(*i*) enabling one of the dissentients to be sued as representing the dissentients.(*j*)

The Dissentient Holder may apply to be made a Defendant.

If a debenture or a debenture stock holder commences an action on behalf of himself and all the other holders and one or more holders dissent from him, the proper course to be pursued by such dissentient holder or holders is to apply by summons to be added as a defendant or defendants.(*k*) Until the dissentient holder has been made a defendant, he cannot be heard and the Court of Appeal will not assist him, if he applies to it to reverse an order made by the Court below in an action, in which he was not originally and has not subsequently applied to be made a defendant.(*l*)

SECTION II. *Against what Companies a Debenture or Debenture Stock Holder's Charge can be Enforced in an English Court.*

A Foreign Company carrying on business in an office of its own in England is subject to jurisdiction of English Courts.

Foreign (not including Scotch or Irish) corporations (that is to say, corporations established under foreign or colonial law) which have set up an office in England and carry on their business in England, are liable to be sued in an English Court (*m*) and to

(*h*) *Scott* v. *Streatham and General Estates Co.*, W. N. (1891) 153.

(*i*) Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by he Court or a Judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

(*j*) *Frazer* v. *Cooper, Hall & Co.*, 21 Ch. D. 718.

(*k*) *Wilson* v. *Church*, 9 Ch. D. 552.

(*l*) *Watson* v. *Cave* (No. 1), 17 Ch. Div. 19.

(*m*) *The Carron Co.* v. *Maclaren*, 5 H. L. C. 416; *Buenos Ayres Railway Co.* v. *Northern Railway Co.*, 2 Q. B. D. 210.

be served in the same way as an English corporation is.(*n*) For foreign corporations carrying on their business or one of the principal parts of their business in England in an office of their own are resident in and are therefore subject to the laws of this country.(*o*) However, a foreign corporation will not be subject to the jurisdiction of the English Courts merely by reason of such corporation possessing property in this country.(*p*)

Rules relating to service on Companies.

It is provided by Order IX., rule 8 of the Rules of the Supreme Court, that, in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the head officer or secretary of such corporation and, where by any statute provision is made for service of any writ of summons, bill, petition, summons or other process upon a corporation or any body or number of persons, whether corporate or incorporate, every writ of summons may be served in the manner so provided.

When such rules apply to a Foreign Company.

If a foreign corporation (other than a Scotch or Irish one), though not incorporated according to English law, has a place of business and trades in England, it is to be treated as resident in England and service may be made on the head officer, whose knowledge would be that of the corporation,(*q*) but not on a clerk, who performs a merely ministerial office and who does not substantially carry on the business of the corporation.(*r*) However, Order IX., rule 8 does not apply to a purely foreign corporation not having a place of business in England or only having an agent in England.(*s*) The foreign corporation may, on the other hand, agree to a particular mode of service and appoint a particular person to accept service and the authority of such agent will not be revoked by the insolvency of the corporation.(*t*)

Service of Notice of Writ

A foreign corporation may, even though it has no place of

(*n*) *Newby* v. *Van Oppen*, L. R., 7 Q. B. 293, approved of and followed in *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q. B. Div. 519; *Lhoneux, Limon & Co.* v. *Hong Kong & Shanghai Banking Corporation*, 33 Ch. D. 446.

(*o*) *Haggin* v. *Comptoir d'Escompte de Paris*, ubi supra, 522; *Badcock* v. *Cumberland Gap Park Co.* (1893), 1 Ch. 362.

(*p*) *Badcock* v. *Cumberland Gap Park Co.*, ubi supra.

(*q*) *Newby* v. *Van Oppen*, L. R., 7 Q. B. 293; *Palmer* v. *Gould Manufacturing Co.*, W. N. (1884), p. 63; *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q. B. Div. 519.

(*r*) *Haggin* v. *Comptoir d'Escompte de Paris*, ubi supra.

(*s*) *Nutter* v. *Messageries*, 54 L. J. (Q. B.) 527; *Badcock* v. *Cumberland Gap Park Co.* (1893), 1 Ch. 362.

(*t*) *Tharsis Sulphur Co.* v. *Société Industrielle*, 60 L. T. R. 924.

business in England, be served out of the jurisdiction with notice of a writ (but not with a writ) in the same way as a foreign person may be so served.(*u*)

Service on Scotch or Irish Companies.

A Scotch or Irish corporation having its registered office in Scotland or Ireland, but having a place of business and trading in England, cannot be served with a writ of summons within the jurisdiction,(*v*) neither will leave be granted to serve a writ out of the jurisdiction on such corporation.(*w*) Scotch and Irish corporations must respectively be sued in Scotland and Ireland.

Service on English Companies under the provisions of the Companies Act, 1862.

The service on English companies incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, is expressly provided for by section 116 of the last-mentioned Act, which enacts that "a document" (which expression includes any summons, notice, order or other legal process) "may be "served on a company by leaving it at or sending it by post to "the registered office of the company". It being by Order IX., rule 8, provided that, where by any statute provision is made for service of any writ of summons, bill, petition, summons or other process upon any corporation, . . . every writ of summons may be served in the manner so provided, it follows that a writ of summons will be served on an English company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, by leaving it at or by sending it by post to the registered office of such company.

A section corresponding to this 116th section is to be found in the Companies Clauses Act, 1845, 8 & 9 Vic., cap. 16, sec. 135.

Jurisdiction of English Courts *in personam*.

Proceedings are frequently taken in the English Courts against a foreign or colonial company, which is carrying on business in England at an office of its own, or against an English company even when it is desired to enforce a charge created by such company on land situated outside the jurisdiction. For, though in the case of land so situated the Court cannot, as has been said in an earlier part of this treatise, give effect to its orders *in rem*, yet it can enforce such orders by its jurisdiction *in personam*, which the Court of Chancery always has exercised and which the

(*u*) *Westmann* v. *Aktiebolaget Snickarefabrick*, 1 Ex. D. 237; *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; *Westlake's Private International Law*, 3rd ed. 332, 339.

(*v*) *Watkins* v. *Scottish Imperial Insurance Co.*, 23 Q. B. D. 285; *Wood* v. *Anderson Foundry Co.*, 36 W. R. 918; W. N. (1888), p. 180.

(*w*) *Jones* v. *Scottish Accident Insurance Co., Limited*, 17 Q. B. D. 421; see Order XI., r. 1 (*c*).

High Court now exercises.(*x*) The Courts will therefore give effect to a debenture or debenture stock holder's charge on land situated outside of its jurisdiction, against a foreign company, which has an office and is carrying on business in England, or against an English company. The Chancery Court of the County Palatine of Lancaster also exercises its jurisdiction *in personam* and will give effect to a charge on land outside of its local jurisdiction.(*y*)

In *ex parte Pollard*(*z*) Lord Cottenham says as follows: "In this country contracts for sale (whether express or implied) or for charging lands are in certain cases made to operate *in rem*, but in contracts respecting lands in countries not within the jurisdiction of these Courts they can be enforced by proceedings *in personam*, which Courts of Equity here are constantly in the habit of doing, not thereby in any respect interfering with the *lex loci rei sitæ*. If, indeed, the law of the country, where the land is situate, should not permit or enable the defendant to do what the Court here might think it ought to decree, it would be useless and unjust to direct him to do the act; but, when there is no such impediment, the Courts of this country in the exercise of their jurisdiction over contracts made here or in administering equities between parties residing here act upon their own rules and are not influenced by any consideration of what the effects of such contracts might be in the country, where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."(*a*)

SECTION III. *When Leave will be given to Commence or Continue Proceedings for the purpose of Enforcing the Debenture or Debenture Stock Holder's Charge, notwithstanding that an Order has been made to wind up the Company, which created such Charge.*

No proceeding to be commenced after the winding up of a Company.

It is provided by section 142 of the Companies Consolidation Act, 1908, that "when a winding up order has been made, no "action or proceeding shall be proceeded with or commenced

(*x*) *Penn* v. *Lord Baltimore*, Tudor's L. C. Eq. 1047; see supra, Bk. I., ch. ii., sec. 1 (2*e*).

(*y*) In re *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150.

(*z*) 4 Deac. 27, 40; *Duder* v. *Amsterdamsch Trustees Kantoor* (1902) 2 Ch. 132. See also *British South Africa Co.* v. *De Beers Consolidated Mines* (1910) 1 Ch. 354; (1910) 2 Ch. 502; (1912) A. C. 52.

(*a*) As to the power of the Court to appoint a receiver or receiver and manager or to order the sale of lands outside the jurisdiction of the Court, see infra, Bk. II., ch. iii., secs. v. (1*a*), v. (1*b*) and v. (3).

"against the company except by leave of the Court and subject "to such terms as the Court may impose".(*b*)

This section was intended not for the purpose of harassing or impeding or injuring third persons, but for the purpose of preserving the limited assets of the company in the best way for distribution among all the persons, who have claims upon them; neither was this section intended to interfere with the rights of a mortgagee or a debenture or debenture stock holder, who is merely seeking, not to enforce a claim against the company, but to establish his title to his own property.(*c*) A mortgagee or debenture or debenture stock holder is an independent person, to whose rights the Court must have due regard in exercising the power conferred by this section and such rights ought not to be interfered with, because his mortgagors have chosen to become insolvent and to have a winding up.(*d*) Now, as a rule, a mortgagee has a right to realise his security and, of course, as incidental to that, a right to bring an action for foreclosure (and in the same way a debenture or debenture stock holder has a right in certain events to bring an action to enforce his security). Those, who say, that he should be restrained from bringing or proceeding with such an action, must either show some special ground for restraining him or must say: "We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action". That, of course, would be a reason for refusing leave to proceed with an action, if commenced, or for not giving leave to commence a threatened action. But short of that, the Court ought not under section 142 of the Act to interfere with the rights of a mortgagee.(*e*)

Application by a Holder for leave to enforce charge.

Where debentures or debenture stock are secured by a trust deed, the trustees may apply to the Court for leave to have the trusts of such deed enforced notwithstanding a winding-up order.(*f*)

Application by Trustees for leave to enforce Trust Deed.

Section 211 of the Companies Consolidation Act, 1908, provides, that, where any company (being a company registered in England or Ireland) is being wound up by the Court or subject to

Leave to put in force Attachment, Sequestration, Distress or Execution, when given by Court to Debenture-holder.

(*b*) For Forms of order giving leave to commence or continue proceedings, see Appendix, Forms 64 and 65.

(*c*) In re *David Lloyd & Co.*, 6 Ch. Div. 339, 344.

(*d*) See also in re *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, 154.

(*e*) In re *David Lloyd & Co.*, 6 Ch. Div. 339, 343; *Strong* v. *Carlyle Press* (No. 1) (1893), 1 Ch. (C. A.) 268.

(*f*) *Cadiz Waterworks Co.*; see *Palmer's Comp. Prec.*, 5th ed. 829.

"the supervision of the Court, any attachment, sequestration, "distress or execution put in force against the estate or effects of "the company after the commencement of the winding up shall "be void to all intents." (*g*) Sections 142 and 211 of the Companies Consolidation Act, 1908 (like the corresponding sections 87 and 163 of the Companies Act, 1862) must be read together and the Court has power by virtue of these sections to give leave to put in force an attachment, sequestration, distress or execution after the winding-up order. Hence a holder of debentures or debenture stock, who wishes to enforce by distress payment of interest due under such securities after the company has been ordered to be wound up, must obtain the leave of the Court to distrain. In order, however, to obtain such leave under section 142, he must show special circumstances, which justify the Court in depriving the company and its general creditors of the benefit of the express provision of section 211.

As regards any interest accrued due *before* the company has been ordered to be wound up, the Court will not give leave to distrain in respect of the same; such interest must be proved for in the winding up *pari passu* with the other unsecured creditors. Thus in the case of *in re Brown, Bayley and Dixon* (*h*) the trustees of a debenture-holder's trust deed, who had under such deed a power of distress on the chattels of a company in respect of arrears of interest accruing due on such debentures, failed to obtain the leave of the Court, after such company had been ordered to be wound up, to distrain in respect of interest, which had accrued due before the winding-up order.

As regards any interest accruing due *after* the company has been ordered to be wound up, the following rule applies. The Court will only give leave to the debenture or debenture stock holders to enforce by distress the payment of interest due in respect of such securities, if it can be shown either that it would be inequitable that the company in possession should be allowed to shelter itself against distress by virtue of section 211 or that such interest ought to be treated as part of the costs of the winding up. (*i*)

(*g*) In re *Artistic Colour Printing Co.*, ex pte. *Fourdrinier*, 21 Ch. Div. 510.
(*h*) 18 Ch. D. 649.
(*i*) In re *Exhall Mining Co.*, 4. De. G. J. & S. 377; in re *Lancashire Cotton Spinning Co.*, 35 Ch. Div. 656; in re *Higgingshaw Mills and Spinning Co.* (1896) 2 Ch. (C. A.) 544.

It must be borne in mind, that the Court accedes more readily to an application for leave to distrain, when it is made by a landlord than when it is made by a debenture or debenture stock holder.

Leave to Receiver to take possession.

If, before a receiver or receiver and manager of the undertaking of a company has taken possession, such company is ordered to be wound up, the Court will give leave to such receiver or receiver and manager to take possession notwithstanding the winding-up order. Such order is necessary, because, if he were to take possession after a winding-up order without the leave of the Court, he would commit a contempt of Court.(*j*)

How leave is applied for.

Applications for leave to continue or commence proceedings against a company, which has been ordered to be wound up should be made to the judge, who made the winding-up order,(*k*) and should be made by summons in Chambers.(*l*) Leave has, however, been given on application by motion *ex parte*(*m*), but it is against the usual practice to grant such an application *ex parte*.(*n*)

Under the old practice the bill asking for leave under section 87 of the Companies Act, 1862, had to be supported by a short affidavit by the applicant verifying such of the allegations of the bill as were within his knowledge and stating his belief in the truth of the other allegations.(*o*) It is presumed, that the summons or motion for leave under section 142 of the Companies Consolidation Act, 1908, will have to be supported by similar evidence.

SECTION IV. *When a Debenture or Debenture Stock Holder's Charge becomes Enforceable.*

Express provisions making the Debentures enforceable in specified events.

The debentures or the debenture or debenture stock holders' trust deed usually provides, that the security shall be enforceable in the following events (*inter alia*) (1) on the company being ordered to be wound up or passing an effective resolution for the winding up or (2) on the company making default for a specified period in the payment of any part of the principal

(*j*) *Henry Pound Son & Hutchins*, 42 Ch. Div. 402.

(*k*) *Wilson* v. *Natal Investment Co.*, W. N. (1867), p. 68.

(*l*) *Hagell* v. *Currie*, W. N. (1867) 75; Lindley, p. 909.

(*m*) *Williams* v. *Bristol Insurance Co.*, 39 L. J. (Ch.) 504.

(*n*) *Western & Brazilian Telegraph Co.* v. *Bibby*, W. N. (1880) 145, 42 L. T. R. 821.

(*o*) In re *St. Cuthbert's Smelting Co.* (No. 2), W. N. (1866), p. 154.

moneys or interest which becomes due to the holders by virtue of their securities.(*p*)

When Debentures become enforceable in the absence of specific provisions.

It appears, that, even where no such specific provisions are made, a floating charge in favour of the holders of debentures or debenture stock will become by law enforceable :—

(1) If the company is ordered to be wound up by the Court,(*q*) or its business is put an end to (*e.g.*, by the appointment of a receiver or by a voluntary winding up)(*r*) or if the company ceases to be a going concern,(*s*)

(2) When the principal becomes due,(*t*)

(3) If the interest falls in arrear(*u*) (but a debenture, which contains a provision, that the interest on the principal sum secured thereby shall be payable at one of two specified places, and that, upon default in payment of interest, the principal shall immediately become payable, will not become enforceable, unless and until the demand for the payment of interest has been made at one of the specified places and the interest so demanded remains unpaid)(*v*) or

(4) If the company parts otherwise than in the ordinary course of business with substantially the whole of its assets.(*w*)

The assets charged with debentures or debenture stock may be protected by the appointment of a receiver or receiver and manager, if the assets, on which such securities are charged, are jeopardised, even though the principal secured by the debentures or by the trust deed (as the case may be) is not immediately payable by the terms of the security and default has not yet been made in payment of interest.(*x*)

A debenture, which does not purport to be perpetual, but does not specify any date for the repayment of the principal

(*p*) See Appendix, Forms 12, 13 and 3.

(*q*) In re *Panama, etc., Mail Co.*, 5 Ch. 318; *Hodson* v. *Assam Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machines Co.* (1894) 2 Ch. (C. A.) 547.

(*r*) In re *Colonial Trusts Corporation*, 15 Ch. D. 465, 472.

(*s*) *Hubbuck* v. *Helms*, 3 Times L. R., 381; 56 L. T. R. 232, W. N. (1887) 45; *Wissner* v. *Levison & Steiner*, W. N. (1900) p. 152.

(*t*) *Hubbuck* v. *Helms*, ubi supra. In re *Florence Land Co.*, ex parte *Moor* 10 Ch. D. 530, 541.

(*u*) See cases in preceding note and *Bissill* v. *Bradford Tramway Co.*, W. N. (1891) p. 51; *Strong* v. *Carlyle Press* (No. 1) (1893) 1 Ch. (C. A.) 268.

(*v*) *Thorn* v. *City Rice Mills*, 40 Ch. D. 357; re *Escalera Silver Lead Mine Limited*, 25 T. L. R. 87.

(*w*) *Hubbuck* v. *Helms*, ubi supra.

(*x*) *Wildy* v. *Mid Hants Ry. Co.*, 16 W. R. 409; *Thorn* v. *Nine Reefs*, 67 L. T. R. 93; *M'Mahon* v. *North Kent Ironworks Co.*, (1891) 2 Ch. 148; *Murietta* v. *Nevada Land and Cattle Co.*, 93 L. T. J. 442; *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. R. 790, 93 L. T. J. 458; *Edwards* v. *Standard Rolling Co.* (1893) 1 Ch. 574; *Wissner* v. *Levison & Steiner*, W. N. (1900), p. 152; re *London Pressed Hinge Co. Campbell* v. *Same Co.* (1905) 1 Ch. 576; re *New York Taxicab Co., Sequin* v. *Same Co.* [1913] 1 Ch. 1.

moneys secured thereby, will become enforceable, if the holder of such debenture shall give to the company six months' notice demanding payment of such principal moneys and the company shall not on the expiration of such six months pay to the holder the principal moneys secured.(*y*)

The debenture or debenture stock holders' trust deed sometimes provides (*inter alia*), that it will be enforceable "if the company commits a breach of any covenant therein contained"; such a provision has been held not to apply to a breach of every trifling obligation imposed on the company by the trust deed, but has been held to refer only to those provisions, which the company expressly "covenants" to observe.(*yy*)

A debenture, though operative as against the holders of subsequent mortgages by the company as soon as the seal of the company is affixed to it, is not enforceable as against the company before the actual delivery of the debenture, if the money purporting to be secured by such debenture is not paid to the company.(*z*)

A debenture expressly providing that it shall not be enforced, until the holder thereof shall have given a specified notice, can, of course, not be enforced, until such notice has expired.(*zz*)

The principal money, if made immediately payable on an order being made or a resolution being passed to wind up the company, will become forthwith payable on either event happening (*not* only at the option of the debenture holders).(*aa*)

SECTION V. *Action to Enforce the Debenture or Debenture Stock Holder's Securities.*

Title of Writ in a Debenture-holder's action.

Every writ of summons in a debenture-holder's action must be intituled "In the matter of the Company" and, in cases where the company is in process of being compulsorily wound up in the High Court, the action is to be assigned to the judge having jurisdiction in the matter of the winding up.(*a*)

Claim in the Writ where there is no Trust Deed.

When the debentures or debenture stock, which it is sought to enforce, form part of a series ranking *pari passu* and are not secured by a trust deed, the plaintiff debenture or debenture stock holder issues a writ (*b*) on behalf of himself and all the

(*y*) *Hopkins* v. *Worcester and Birmingham Canal Proprietors*, 6 Eq. 437.

(*yy*) Re *Melbourne Brewery and Distillery Co.* (1901) 1 Ch. 453.

(*z*) *Gartside* v. *Silkstone Iron Co.*, 21 Ch. D. 762, 768.

(*zz*) *Stewart Rogers & Co.* v. *British and Colonial Colliery Supply Association*, 79 L. T. R. 494.

(*aa*) Re *Simmer* v. *Jack East, Ltd.* (1913) W. N. 41 explaining; re *General Motor Cab Co.*, 56 Sol. Jo. 573.

(*a*) See Practice Masters' Rule 3 (Nov. 29th, 1895). Presumably this rule also applies to a writ in a debenture stock-holder's action. The Courts of the Chancery Division are the proper courts to enforce debentures or debenture stock (sec. 34 (3) of the Judicature Act, 1873).

(*b*) In the case of *Sadler* v. *Worley* (1894) 2 Ch. 170, the Court made a foreclosure order on originating summons. See also *Oldrey* v. *Union Works, Limited*, W. N. (1895) 77.

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other holders claiming: (1) a declaration that the plaintiff and all the other holders of debentures (or debenture stock) of the defendant company are entitled to a [first] charge on all the undertaking, moneys and property of the defendant company (or whatever the property charged in favour of the holders may be), (2) to have the debentures (or debenture stock) enforced by foreclosure or sale, (3) an account of what is due to the plaintiff and all other holders of debentures (or debenture stock) of the defendant company for principal, interest and costs, and (4) a receiver(*c*) (or a receiver and manager in cases, in which the business of the company is to be carried on for the purpose of realising the assets of the company).(*d*)

Claim in the Writ where there is a Trust Deed.

Where the debentures or debenture stock are further secured by a trust deed, a holder issues a writ on behalf of himself and all other holders against the company and the trustees of the trust deed or the trustees of the trust deed can enforce the debentures or debenture stock by issuing a writ against the company claiming: (1) a declaration that the trusts of the trust deed securing the repayment of the moneys due to the debenture (or debenture stock) holders ought to be performed and carried into execution, (2) to have the trusts of the said trust deed enforced by foreclosure or sale, (3) an account of what is due for principal, interest and costs to the holders of the debentures (or debenture stock), and (4) a receiver(*e*) (or a receiver and manager in cases in which the business of the company is to be carried on for the purpose of realising the assets of the company).

Application in the action and in the winding up.

If after the commencement of an action to enforce debentures or debenture stock charged on the uncalled capital of a company such company is ordered to be wound up, the plaintiff in such action should, if he wishes to have the uncalled capital called up or to obtain payment of any money in the hands of the liquidator of such company, make his application in the winding up as well as in the action.(*f*)

(*c*) See Appendix, Form 35 for a form of a statement of claim. In the case of *Hubbuck* v. *Helms*, 56 L. T. R. 232; 3 Times L. R. 381, the Court gave leave to amend the writ by asking for a receiver, though such amendment changed the nature of the action.

(*d*) The question as to when the Court will appoint a receiver and manager is discussed in sec. v. (2*a*) of this chapter.

(*e*) See Appendix, Form 36 for a form of a statement of claim.

(*f*) *Fowler* v. *Broad's Patent Night Light Co.* (1893), 1 Ch. 724; *Christie* v. *Taunton Delmard & Co.* (1893), 2 Ch. 175; *Harrison* v. *St. Etienne Brewery*, W. N. (1893), p. 108.

Commencement of action after winding up.

The mere fact that an order has been made for winding up a company is not a reason why a debenture or debenture stock holder of the company should refrain from commencing an action to realise his security; but before commencing such action he should obtain the leave of the Court so to do.(*g*)

Leave to serve notice of motion with Writ.

In urgent cases the plaintiff may by an *ex parte* application obtain the leave of the Court or a judge to serve on the defendant company a notice of motion for the appointment of a receiver (or receiver and manager) along with the writ of summons or may obtain such leave at any time after the service of the writ and before the time limited for the appearance of the defendant company. (See Order LII., rule 9.) Such leave is generally applied for by motion in the Chancery Division.

The first remedy, to which the plaintiff debenture or debenture stock holder resorts after the issue of the writ, being usually an appointment by the Court of a receiver or a receiver and manager, it is proposed to consider, when the plaintiff debenture or debenture stock holder has a right to an appointment by the Court of a receiver or receiver and manager and how such appointment is obtained.

SUB-SECTION 1. *Appointment of a Receiver by the Court.*

(*a*) *When the Court will Appoint a Receiver.*

When the Court has power to appoint a Receiver

It is provided by the Judicature Act, 1873, section 25 (8), that a receiver may be appointed by an interlocutory order of the Court in all cases, in which it shall appear to the Court to be just or convenient, that such order should be made, and the order may be made either unconditionally or upon such terms and conditions as the Court shall think just and by section 24 (7) the Court is enabled in every cause or matter pending to grant either absolutely or on reasonable terms all such remedies, as the parties may appear entitled to in respect of any and every legal or equitable claim brought forward therein.

The expression "interlocutory order" includes orders made after as well as before final judgment(*h*) and the power given to

(*g*) In re *Longdendale Cotton Spinning Co.*, 8 Ch. D. 150; in re *David Lloyd & Co.*, 6 Ch. Div. 339; *Strong* v. *Carlyle Press* (No. 1), (1893), 1 Ch. (C. A.) 268; see also supra, Bk. II., ch. iii., sec. iii., and the cases there cited.

(*h*) *Smith* v. *Cowell*, 6 Q. B. Div. 75; *Anglo-Italian Bank* v. *Davis*, 9 Ch. Div. 275.

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the Court by section 25 can be exercised by the Court at the trial of the action as well as upon an interlocutory application.(*i*)

So long as the judgment remains unsatisfied, the action is "pending" within section 24 (7).(*j*) It will thus be seen, that the power of appointing a receiver, which is vested in the Court, is very extensive. "There is no doubt," says Lord Lindley (then L. J.), "that, since the Judicature Acts, receivers by way of equitable execution can be appointed in proper cases by all divisions of the High Court on a motion or summons without the necessity of a fresh action or suit on the judgment".(*k*) The only limit to the power of the Court to appoint a receiver is, that it is only to be exercised, when it appears "just or convenient".(*l*) The meaning of this phrase was considered in *North London Railway Company* v. *Great Northern Railway Company*(*m*) with reference to the granting of an injunction by the Court and it was there decided, that the phrase did not justify the granting of an injunction in a case, in which no injunction could be granted by any Court before the Judicature Acts came into operation. "The same reason obviously applies," says Lord Lindley, "to the appointment of receivers as well as to the grant of injunctions, although receivers are appointed more readily than they were before the passing of the Judicature Acts and some inconvenient rules formerly observed have been very properly relaxed, yet the principles, on which the jurisdiction of the Court of Chancery rested, have not been changed".(*n*)

It is further provided by Order L., rule 15 *a* of the Rules of the Supreme Court, that in every case, in which an application is made for the appointment of a receiver by way of equitable execution, the Court or a judge in determining, whether it is just or convenient, that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment.

(*i*) Re *Prytherch*, *Prytherch* v. *Williams*, 42 Ch. D. 590.

(*j*) *Salt* v. *Cooper*, 16 Ch. Div. 544.

(*k*) *Holmes* v. *Millage* (1893), 1 Q. B. (C. A.) 551, 556.

(*l*) *Gawthorpe* v. *Gawthorpe*, W. N. (1878), p. 91.

(*m*) 11 Q. B. Div. 30.

(*n*) *Holmes* v. *Millage* (1893), 1 Q. B. (C. A.) 551, 557; see also *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173; *Harris* v. *Beauchamp Brothers* (1894), 1 Q. B. (C. A.) 801.

The chief object of obtaining the appointment of a receiver is to protect the property, over which he is appointed a receiver, and to ensure its due application in accordance with the rights of the persons interested in it.(*o*)

The object of obtaining a Receiver.

When the appointment of a Receiver is *ex debito justiciæ*.

A debenture or debenture stock holder (claiming on behalf of himself and all the other holders) or the trustees of the trust deed (*p*) is or are entitled *ex debito justiciæ* to the appointment of a receiver by the Court, whenever the debenture or debenture stock becomes enforceable by a debenture or debenture stock holder's action.(*q*) The Court will, however, also appoint a receiver (or, if necessary, a receiver and manager) where the debenture or debenture stock holders' security is in danger.(*r*)

The Court has jurisdiction to make such an appointment on the application of the holder of debentures or debenture stock secured by a floating charge, if the principal money thereby secured has become due at *any* time *before such application* is made, although at the date of the *issue of the writ* no default had been made in payment of interest and the security was not shown to be in jeopardy and the principal money secured was consequently not due.(*s*)

Where no date for repayment of principal moneys is fixed.

Where a (canal) company charged its rates granted by Act of Parliament with debentures, which did not purport to be perpetual and did not specify any date for the repayment of the sums secured, and the sum secured by one of such debentures was not repaid, though six months' notice was given by a holder of such debenture to the company demanding repayment, the Court appointed a receiver.(*t*)

The Court may appoint Receiver, though the Debenture-holders have power to appoint one.

The Court may appoint a receiver (or a receiver and manager) at the instance of the debenture or debenture stock holders, even though such holders themselves may have an express power of appointing a receiver (or receiver and manager), in the same way as it may appoint a receiver at the instance of an ordinary mortgagee, who has power under section 19 (3) of the Conveyancing Act, 1881, to appoint a receiver.(*u*)

However, in the case of *Thorn* v. *City Rice Mills* (*v*) in which

(*o*) See Lindley, 809. The effects of the appointment of a receiver are dealt with infra, Bk. II., ch. iii., sec. v. (1*b*).

(*p*) *Tottenham* v. *Swansea Zinc Ore Co.*, W. N. (1884) p. 54; 32 W. R. 716; 51 L. T. R. 61; *Campbell* v. *Campagnie Générale de Bellegarde*, 2 Ch. D. 181; *Wilmot* v. *London Celluloid Co.*, 52 L. T. R. 642.

(*q*) As to this see supra, Bk. II., ch. iii., sec. iv.

(*r*) Such appointment may be made, even though neither principal nor interest is in arrear; *Wildey* v. *Mid Hants Railway Co.*, 16 W. R. 409; *Hubbock* v. *Helms*, 56 L. T. R. 232; *Thorn* v. *Nine Reefs*, 67 L. T. R. 93; *McMahon* v. *North Kent Co.* (1891) 2 Ch. 148; *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. R. 790; W. N. (1895) 77; *Edwards* v. *Standard Rolling Stock* (1893) 1 Ch. 574; in re *Victoria Steamboats Lim.*, *Smith* v. *Wilkinson* (1897) 1 Ch. 158; re *London Pressed Hinge Co.* (1905) 1 Ch. 576; re *New York Taxicab Co.* (1912) W. N. 249; [1913] 1 Ch. 1.

(*s*) Re *Carshalton Park Estate Ld.* *Graham* v. *Same Co.* (1908) 2 Ch. 62.

(*t*) *Hopkins* v. *Worcester and Birmingham Canal Proprietors*, 6 Eq. 437.

(*u*) *Tillett* v. *Nixon*, 25 Ch. D. 238.

(*v*) 40 Ch. D. 357; re *Escalera Silver Lead Mine*, 25 T. L. R. 87.

Bk. II., Ch. III., Sec. V. (1a).

Demand for payment at specified place.

the defendant company issued a debenture containing a provision, that the interest on the principal sum thereby secured should be payable at one of two specified places and that upon default in payment of interest the principal should immediately become payable, the Court declined to appoint a receiver of the property comprised in such debenture, before the holder of such debenture had demanded payment of the interest at one of the specified places, on the ground that the principal did not become due, until such demand had been made at one of the specified places.

Receiver of property outside jurisdiction.

The English Court has jurisdiction to appoint a receiver (or a receiver and manager) of real and personal property in a foreign country, when such property is charged by debentures or debenture stock or otherwise.(*w*) As long ago as 1796 Lord Alvanley (*x*) said, that Courts of Equity in England had an equal right to interfere with regard to judgments or mortgages upon foreign land in a foreign country as upon land in England and that the only distinction was that the Court in England could not act upon the land directly but acts upon the conscience of the person living here. After referring to *Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, *Lord Kildare* v. *Eustace*, 1 Eq. Abr. 133, 1 Vern. 75, 135, 419, Lord Alvanley says: (*y*) "Those cases clearly show, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England". Lord Hardwicke lays down the same doctrine.(*z*)

Receivers have been appointed by the Court to receive, convert, get in and remit to this country the rents, profits and proceeds of property in China,(*a*) East India,(*b*) New South Wales,(*c*) West Indies,(*d*) Canada,(*e*) America,(*f*) Brazil,(*g*) Italy,(*h*) Ireland,(*i*) and Jersey.(*j*)

(*w*) *Cranstown* v. *Johnson*, 3 Ves. 170, ex pte. *Pollard*, 4 Deac. 27; ex pte. *Holthausen*, 9 Ch. 722; *Paget* v. *Ede*, 18 Eq. 118; *Mercantile Investment Co.* v. *River Plate Co.* (1892) 2 Ch. 303; *Duder* v. *Amsterdamsch Trustees* (1902) 2 Ch. 132; *British South Africa Co.* v. *De Beers Consolidated Mines* (1910) 1 Ch. 354; (1910) 2 Ch. (C. A.) 502; (1912) A. C. 52. For the appointment by the Court of a receiver and manager of property outside the jurisdiction, see *Murietta* v. *Nevada Land and Cattle Co.*, 93 L. T. J. 442; *Sheppard* v. *Oxenford*, 1 K. & J. 491; *Morton Rose & Co.* v. *Barbadoes Water Supply Co.*, 37 Sol. Jo. 729.

(*x*) *Cranstown* v. *Johnson*, 3 Ves. 170.

(*z*) *Foster* v. *Vassal*, 3 Atk. 589.

(*a*) *Hodson* v. *Watson*, Seton, 7th ed., 779.

(*b*) *Logan* v. *Princess of Coorg*, Seton, p. 779; *Anon* v. *Lindsay*, 15 Ves. 91.

(*c*) *Uuderwood* v. *Frost*, Seton, p. 779.

(*d*) *Bunbury* v. *Bunbury*, Seton, p. 779; 1 Beav. 318, 336.

(*e*) *Tylee* v. *Tylee*, Seton, p. 779.

(*f*) *Hanson* v. *Walker*, Seton, p. 779.

(*g*) *Sheppard* v. *Oxenford*, 1 K. & J. 491, 500.

(*h*) *Hinton* v. *Galli*, 1 Seton, p. 779.

(*i*) *Houlditch* v. *Lord Donegal*, 8 Bli. N. S. 300, 343.

(*j*) *Smith* v. *Smith*, 10 Hare, App. [illegible].

Though the Court has the power to appoint a receiver or receiver and manager of property abroad, it will not do so, if such appointment is useless in the opinion of the Court. Thus in the recent case of *Mercantile Investment and General Trust Company*, v. *River Plate Trust, Loan and Agency Company*,(*k*) North, J., refused to appoint a receiver to get in the rents and profits and proceeds of the sale of the land comprised in the debenture-holder's charge, on the ground, that a receiver would be useless and also that the number of debenture-holders prescribed by the trust deed had not required the trustees to take possession of the land.

Effect of appointment by Foreign Court of Liquidator of Foreign Company.

An English Court will not, after having appointed a receiver of some property in this country belonging to a foreign company, discharge such receiver on a foreign Court appointing a liquidator of the assets of such foreign company, because the appointment of such liquidator cannot be considered to relate back, so as to override the appointment in England of the receiver of the property in England.(*l*)

The Court may appoint a Receiver (but not a Receiver and Manager) of an undertaking of a public nature.

The Court may at the instance of a debenture or debenture stock holder appoint a receiver of the undertaking of a water-works or gas company or any other undertaking of a public nature constituted and deriving its powers under an Act of Parliament, even where such securities do not confer an express power to sell or stop the undertaking, but in such a case the Court will not, even with the consent of the defendant company, appoint a receiver and manager, as the charge on the undertaking in the case of such a company means a charge on the completed work of the company, and the charge gives to the debenture or debenture stock holders a right only to the fruit, as Lord Cairns phrases it,(*m*) of the fruit-growing tree represented by the completed undertaking.

Order appointing Receiver directs preferential payments to be made.

The usual order appointing a receiver contains a direction that the receiver do forthwith out of any assets coming to his hands pay the debts of the company, which have priority over debenture or debenture stock holders under sections 107 and 209 of the Companies Consolidation Act, 1908, and that the receiver be allowed all such payments in his accounts.(*n*)

(*k*) (1892), 2 Ch. 303.

(*l*) *Mason* v. *Société Industrielle & Commerciale des Métaux*, 37 W. R. 735.

(*m*) *Gardner* v. *London, Chatham and Dover Railway Co.*, 2 Ch. 201, 213; *Marshall* v. *South Staffordshire Tramways Co.* (1895) 2 Ch. (C. A.) 36; *Blaker* v. *Herts and Essex Water Co.*, 41 Ch. D 399, 406; *Potts* v. *Warwick and Birmingham Canal*, Kay, 142. As to the Appointment by the Court of a receiver and manager, see infra, Bk. II., ch. iii., sec. v. (2).

(*n*) W. N. (1900) p. 58, see infra, Appendix, Forms 37 and 37A.

Bk. II., Ch. III., Sec. V. (b).

Debenture-holders' Receiver directed to act also as Receiver to other creditors.

In order to save unnecessary expense, the Court sometimes appoints a receiver, who has been appointed in a debenture or debenture stock holder's action, to act also as receiver for other creditors of the company, who wish to contest the validity of such debentures or debenture stock, reserving to such creditors the right to raise such question.(*n*)

Costs of the application for a Receiver.

The Court has a discretion(*o*) to deal with the costs of a motion for a receiver (or a receiver and manager) at the time of the application or the costs may be ordered to be costs in the action.(*p*) The costs of a motion for a receiver (or a receiver and manager) are sometimes reserved until the hearing,(*q*) even though the application is refused.(*r*)

(*b*) *Mode of Application for the Appointment of a Receiver by the Court, and the Effect of such an Appointment.*

The Court only appoints a Receiver if an action is pending.

Except in a very few cases a receiver (or a receiver and manager) will not be appointed under the ordinary jurisdiction of the Court, unless a suit or action is pending, and, if the application for the receiver (or receiver and manager) is made before the action comes on for trial, a claim for a receiver (or a receiver and manager) should be endorsed on the writ of summons.(*s*) The Court has, however, power to appoint a receiver (or a receiver and manager), even if such claim is not so endorsed.(*t*) A receiver (or a receiver and manager) may be appointed in proceedings commenced by originating summons.(*u*)

A receiver (or receiver and manager) may be appointed on an interlocutory application, although there are doubts as to the proper persons having been made parties.(*v*)

Application by motion or summons.

The application for a receiver (or receiver and manager) is usually made by motion to the Court in the Chancery Division, but the appointment of a receiver (or receiver and manager) may by consent and in certain special cases be made on summons in chambers.(*w*)

(*n*) *Minter* v. *Kent and Sussex Land Society*, 11 Times L. R. 197.
(*o*) R. S. C., Order LXV., r. 1.
(*p*) *Tillett* v. *Nixon*, 25 Ch. D. 238.
(*q*) *Chaplin* v. *Young*, 6 L. T. R. 97.
(*r*) *Cooper* v. *Cresswell*, 12 W. R. 299.
(*s*) *Colebourne* v. *Colebourne*, 1 Ch. D. 690.
(*t*) *Norton* v. *Gover*, W. N. (1877) 206.
(*u*) Re *Francke*, 57 L. J. (Ch.) 437; *Gee* v. *Bell*, 35 Ch. D. 160.
(*v*) *Fripp* v. *Chard Railway Co.*, 11 Hare 241, 264.
(*w*) Re *Parker, Cash* v. *Parker*, 12 Ch. D. 293; *Blackborough* v. *Ravenhill*, 16 Jur. 1085; *Gee* v. *Bell*, 35 Ch. D. 160; see also R. S. C., Or. L., r. 6.

If a vacancy occurs by the death of a receiver (or receiver and manager) already appointed or otherwise, such vacancy may be filled up by an order made in chambers.(*x*) If a suit is commenced by summons in chambers, an application for the appointment of a receiver should usually be made by summons.(*y*) In a recent case, in which an action was commenced by originating summons, the judge appointed a receiver on motion and allowed the costs thereof, but stated that in future he should consider, whether an applicant by motion was entitled to the whole of his costs.(*z*)

Ex parte application.

After appearance entered by the defendant the Court will sometimes appoint a receiver (or a receiver and manager) on an *ex parte* application.(*a*)

In very special circumstances the Court may appoint a receiver on motion *ex parte* by the plaintiff before appearance entered by the defendant, upon the plaintiff's undertaking not to deal with the property, over which he is appointed receiver, except under the direction of the Court.(*b*)

If and only if there is danger of loss of property, an interim receiver may be appointed on an *ex parte* application before service of the writ or summons.(*c*)

Rules as to the Receiver giving security

As a rule a receiver (or receiver and manager) must give security.(*d*) If the Court makes an order appointing a receiver (or a receiver and manager) and it is intended, that no security shall be given by him, this should be stated in the order. If the person applying for the appointment wishes the receiver (or receiver and manager) to act at once, before he has given security, such person must undertake to be responsible until the completion of the security, not merely for the receiver's (or receiver and manager's) receipts, but for all sums, for which the receiver (or receiver and manager) would have been liable, if he had given security.(*e*) The Court may, however, decline to accept such an undertaking.(*f*)

(*x*) *Booth* v. *Coulton*, 16 W. R. 683.

(*y*) *Daniel's Chancery Prac.*, 7th ed., p. 1430.

(*z*) In re *Hartley*, 66 L. T. R. 588.

(*a*) *Hick* v. *Lockwood*, W. N. (1883), p. 48.

(*b*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Lucas* v. *Harris*, 18 Q. B. Div. 127, 134; *Minter* v. *Kent, Sussex and General Land Society*, 11 Times L. R. 199; in re *Potts* (1893) 1 Q. B. (C. A.) 648; re *Connolly Brothers, Ld.* (1911) 1 Ch. 732, 742.

(*c*) *H.* v. *H.*, 1 Ch. D. 276.

(*d*) R. S. C., Or. L., r. 16.

(*e*) *Oppert* v. *London Joint Stock Association*, 93 L. T. J. 458; *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. R. 588; 33 Sol. Jo. 396; see Practice Note, W. N. (1900), p. 58.

(*f*) *Game, Harrison & Larner, Ltd.*, v. *The Hop Tea Co., Limited*, 26 L. J. N. 166.

Bk. II., Ch. III., Sec. V. (1b).

Effect of order appointing Receiver without directions as to his giving security.

Where the order appointing a receiver (or receiver and manager) gives him power to take possession of the property, which he is appointed to receive, but does not give any direction as to his giving security, the appointment is complete on his taking possession, even though he is subsequently continued receiver (or receiver and manager) by an order requiring security to be given. Thus in the case of *Morrison* v. *The Skerne Iron-works Company, Limited*,(*g*) an action was brought by a debenture-holder against the defendant company and the trustees of the debenture-holder's trust deed to realise the debentures. On 10th January, 1883, W was appointed interim receiver with power to take possession of the property of the company. By an order of 12th January, 1883, he was continued as receiver, but in neither order was he directed to give security. The receiver entered into possession and remained and was in possession on 18th March, 1888, when a judgment creditor of the company levied execution on the goods and chattels of the company then in the possession of the receiver. The receiver gave notice of his claim on behalf of the debenture-holders and an interpleader issue was directed. On 21st April, 1888, the ordinary judgment in a debenture-holder's action was taken and the receiver was continued and was directed to give security. The judge there held, that the receiver had been duly appointed with power to take possession and that he was therefore validly in possession and that the judgment creditor was not entitled to the goods.

A receiver or receiver and manager appointed by the Court will, in the absence of anything to the contrary in the order appointing him, be required to give security,(*h*) but the order generally provides that he shall give security on or before a specified date.(*i*)

Effect of order appointing Receiver upon his giving security.

Where, on the other hand, the order appoints a receiver (or a receiver and manager) upon his giving security, the appointment is not complete till such security has been given. But an appointment by the Court of a receiver (or receiver and manager) of land upon his giving security is nevertheless equivalent to "a delivery of the land in execution" within 27 & 28 Vic., cap. 112, sec. 1, and is binding on the land at the date of the order, even

(*g*) *Game, Harrison & Larner, Ltd.*, v. *The Hop Tea Co., Limited*, 26 L. J. N. 66.

(*h*) See R. S. C., Or. L., r. 16.

(*i*) See infra, Appendix, Forms 37 and 37A.

though the security has not been given and, if the order is afterwards perfected by the security being given, it relates back to the date, when the order was made.(*j*) Hence in a case, in which such an order appointing a receiver had been made by the Court, Bacon, C. J., made the following remarks :—

"The failure to give security does not invalidate the appointment of the receiver. The proviso, that security is to be given, cannot affect the order that there shall be a receiver ; for, if the receiver fails to perfect his security, the Court will appoint in his place some other person to be receiver who can perfect his security. But the order for a receiver, that is to say, the order, by which the Court takes the subject of the suit into the custody of the law, precludes any other person from laying hands on it, and begins and is operative from the time, when the order is made."(*k*)

As the appointment of a receiver or receiver and manager upon his giving security is not complete (so far at least as third parties are concerned, who were not parties to the action, in which such appointment was made) until security has been given, it was held in a case, in which the Court appointed a receiver of (*inter alia*) certain chattels upon his giving security, that an execution creditor, who took such chattels in execution before the security had been given and possession of such chattels had been taken by the receiver, had not committed contempt of Court.(*l*) The order appointing a receiver or receiver and manager of the undertaking of a company will not be effective as against such third parties until it has been duly drawn up (*e.g.*, after such an order has been made, but before it has been drawn up, the landlord of the company is entitled as against the person, on whose behalf such order was made, to distrain on the assets of the company in respect of arrears of rent).(*m*)

Security and Accounts of Receiver.

The security required to be given by a receiver or receiver and manager generally consists of his recognizance and a joint bond of the receiver (or receiver and manager) and of two or more sureties ;(*n*) sometimes a guarantee society is accepted as

(*j*) Ex parte *Evans* ; in re *Watkins*, 11 Ch. D. 691 ; 13 Ch. Div. 252.

(*k*) 11 Ch. D. 698.

(*l*) *Edwards* v. *Edwards* (No. 2), 2 Ch. Div. 291 ; see also *Defries* v. *Creed*, 34 L. J. Ch. 607.

(*m*) In re *Roundwood Colliery Co.*, *Lee* v. *Roundwood Colliery Co.* (1897), 1 Ch. (C. A.) 373.

(*n*) For a Form of such recognizance and bond, see infra, Appendix, Forms 38 and 39.

Bk. II., Ch. III., Sec. V. (1b).

surety. The amount of the recognizance and bond will vary according to the circumstances of each case and will be fixed in Chambers. The recognizance must be enrolled not later than six months from the date of its acknowledgment. The receiver or receiver and manager appointed by the Court must pass his accounts on the days fixed by the Court or a judge.(*o*) The accounts, which must be drawn up in the prescribed form,(*p*) will be left in the chambers of the judge, to whom the cause or matter is assigned, together with an affidavit(*q*) verifying the accounts and the balances appearing due on the accounts so left or so much thereof as shall be certified as proper to be paid will be paid by the receiver or receiver and manager as he is directed by the judge. If he makes default in leaving any of such accounts or paying any such balance, his salary may be disallowed by the judge or he may be charged with interest at the rate of 5 per cent. per annum on the balance, which he has neglected to pay. A master's certificate stating the result of the receiver's (or receiver and manager's) account is taken from time to time.(*r*)

Effect of appointment of Receiver on floating charge

The effect of a complete order of the Court appointing a receiver (or receiver and manager) of the assets of a company in a debenture or debenture stock holder's action is to crystallise the floating charge (if any) created by such securities or (in other words) to make such charge specific.(*s*) Notice of such appointment should, however, be forthwith given to the agents of the company; for an agent can notwithstanding such an order properly pay away the moneys of the company, unless he has such notice.(*t*)

Interference with the possession of a Receiver.

The Court will not permit a receiver (or receiver and manager), who is appointed by its authority and is its officer, to be interfered with or dispossessed of the property, which he is directed to receive or manage, even although the order appointing him may be perfectly erroneous. If a person desires to obtain possession of property, of which the receiver (or receiver and manager) either has taken or has been directed to take possession, he

(*o*) See R. S. C., Or. LXI., r. 14.

(*p*) For a form of such account, see infra, Appendix, Form 40.

(*q*) For a form of such affidavit, see infra, Appendix, Form 41.

(*r*) See R. S. C., Or. L., rr. 16-22.

(*s*) *Robson* v. *Smith* (1895) 2 Ch. 118; *Government Stock Co.* v. *Manila Railway Co.* (1895) 2 Ch. (C. A.) 551, 557; (1897) A. C. 81. As to the effect of a floating charge, see supra, Bk. I., ch. ii., sec. i. (2*a*).

(*t*) Re *Arauco Co.*, 79 L. T. R. 336. Notice of an order appointing a receiver must be given to the Registrar of Companies. (See sec. 94 of the Companies Consolidation Act, 1908.)

should apply to the Court for permission to take possession, or for an order for delivery of such property.(*u*) Any interference with the possession of a receiver or receiver and manager appointed by the Court will amount to contempt of Court and be punishable by committal.(*v*) Interference with a receiver or receiver and manager may in some cases constitute a contempt of Court, even though the actual possession of the receiver or receiver and manager is not interfered with; thus circulating an advertisement calculated to prejudice a business, which was managed by a receiver and manager appointed by the Court, was held to amount to contempt of Court.(*w*) But an unsecured creditor of a company will not commit a contempt of Court, if he merely enforces payment to him of a debt owing by a foreign firm to the company by proceedings taken in a foreign Court after the appointment by an English Court of a receiver of all the company's assets, which included such debt.(*x*)

As any interference with the possession of a receiver (or receiver and manager) appointed by the Court constitutes a contempt of Court, neither the landlord of a company nor any other person should distrain on the chattels of the company after the appointment by the Court of a receiver or receiver and manager in a debenture (or debenture stock) holder's action without first obtaining the leave of the Court so to do.(*y*)

Affidavit of fitness of Receiver proposed.

Where it is desired, that the Court should appoint a particular person to act as receiver or receiver and manager, the application should be supported by an affidavit of the fitness of the person proposed to so act.

Conduct of Receiver.

Any question as to the propriety of the conduct of a receiver or receiver and manager appointed by the Court should be brought before and be decided by the Court, which appointed him.(*yy*)

(*c*) *Who will be Appointed Receiver by the Court.*

Whom the Court will appoint.

The most fit person proposed should be appointed receiver or receiver and manager,(*z*) but the selection is a matter for the

(*u*) *Ames* v. *The Trustees of the Birkenhead Docks*, 20 Beav. 332, 353; in re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402, 420, 422.

(*v*) *Russell* v. *East Anglian Railway Co.*, 3 M. & G. 104; *Whadcoat* v. *Shropshire Railways Co.*, 9 Times L. R. 589; *Helmore* v. *Smith* (2), 35 Ch. Div. 449; *Defries* v. *Creed*, 34 L. J. Ch. 607, in re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402, 420.

(*w*) *Helmore* v. *Smith* (2), ubi supra.

(*x*) In re *Maudsley Son & Field*, *Maudsley* v. *Same Co.* (1900) 1 Ch. 602.

(*y*) As to when a landlord will obtain such leave, see in re *New City Constitutional Club*, 34 Ch. Div. 646; in re *Harpur's Cycle Fittings Co.* (1900) 2 Ch. 731, and also infra, Bk. II., ch. iv., sec. ii.

(*yy*) Re *Maidstone Palace of Varieties* (1909) 2 Ch. 283.

(*z*) *Lespinasse* v. *Bell*, 2 J. & W. 436.

Bk. II., Ch. III., Sec. V. (1c).

discretion of the Court,(*a*) which will not, when exercised by a judge, be lightly disturbed by the Court of Appeal.(*b*) Usually, however, the nominee of the debenture or debenture stock holders will be appointed receiver or receiver and manager in preference to the one proposed by the company, which issued such securities,(*c*) as the debenture or debenture stock holders' interests demand such appointment.

Where the debenture or debenture stock holder's interest covers the whole assets of the company, which issued such securities, the nominee of the plaintiff debenture or debenture stock holder, will be appointed receiver or receiver and manager in preference to the official receiver.(*d*) Under such circumstances the holders of such securities are entitled to come to the Court and ask for the control and realisation of the assets.

Except in special cases(*e*) a party to an action will not be appointed receiver or receiver and manager without the consent of the other parties to the action.(*f*)

It is very unusual to appoint the official receiver to act as receiver and manager, but the Court is expressly authorised to appoint him receiver in a debenture (or debenture stock) holder's action.(*g*)

When the Court will appoint a liquidator to act as Receiver.

Notwithstanding the debenture or debenture stock holders' *primâ facie* right to ask the Court to appoint their nominee as receiver or receiver and manager,(*h*) it was decided as early as 1870 in *Perry* v. *Oriental Hotels Company*(*i*) that the consequence of a liquidation is that there will be duties to be performed by the liquidator (or since the 1st of January, 1891, by the official receiver in default of a liquidator)(*j*) and by the

(*a*) *Morison* v. *Morison*, 4 M. & Cr. 216, 224.

(*b*) *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420; in re *Joshua Stubbs, Limited* (1891), (C. A.) 1 Ch. 475, 484; *Bartlett* v. *Northumberland Avenue Hotel Co.*, 53 L. T. R. 611, 612.

(*c*) *Stubber* v. *Daniel & Co.*, 93 L. T. Jo. 385; *British Linen Co.* v. *South American Co.* (1894), 1 Ch. (C. A.) 108, 113.

(*d*) *Stamford Banking Co.* v. *Allchin & Co., Limited*, 26 L. J. N. 38.

(*e*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Sargent* v. *Read*, 1 Ch. D. 600.

(*f*) *Allen* v. *Lloyd*, 12 Ch. Div. 447, 451. For order appointing plaintiff see *Budgett* v. *Improved Patent Forced Draught Syndicate*, W. N. (1901), p. 23; in this case the Court only made the order subject to the production of evidence that all the other debenture-holders approved of the appointment of the plaintiff.

(*g*) *British Linen Co.* v. *South American and Mexican Co.* (1894), 1 Ch. (C. A.) 108, 129; see sec. 162 of the Companies Consolidation Act, 1908.

(*h*) *British Linen Co.* v. *South American and Mexican Co.* (1894) 1 Ch. (C. A.) 108, 113.

(*i*) 5 Ch. 420.

(*j*) By virtue of sec. 149 (3) of the Companies Consolidation Act, 1908, the official receiver becomes the provisional liquidator and continues to act as such until he or another becomes liquidator.

receiver, which will be identical, and therefore that, if nothing more appears, the Court will generally appoint the liquidator (or the official receiver) to perform those duties, the reason being, that, if both the receiver appointed in the interest of the debenture or debenture stock holders and the liquidator (or the official receiver) were continued, there would be double expense with a great deal of unnecessary conflict, whereas *primâ facie* it may be supposed, that the liquidator, as the officer of the Court, will be able to render and will, in fact, render equal justice between the parties and do everything, that is necessary as well for the protection of the debenture or debenture stock holders as for the protection of the unsecured creditors.

Thus in the case of *in re Joshua Stubbs, Limited, Barney* v. *Joshua Stubbs, Limited*,(*k*) in which the assets of the company were more than sufficient to cover the debenture debt, it was decided, that as a general rule of convenience where, upon a company having been ordered to be wound up, the plaintiff in a debenture-holder's action applies to the Court for the appointment of a receiver and an application is also made in the winding up for the appointment of a liquidator, the Court will in the exercise of its discretion, appoint a liquidator to act in both capacities, unless there be some special circumstances rendering it undesirable, that he should be appointed, *e.g.*, if he has assumed a position of hostility towards the debenture-holders.(*l*) There is, however, no fixed rule, that the liquidator or official receiver must be appointed receiver or receiver and manager.(*m*) This general rule, being a rule of convenience, may be easily displaced by showing, that the debenture or debenture stock holders' interests will be prejudiced, if it is followed.(*n*)

When the Court will substitute a liquidator to act as Receiver in the place of a Receiver appointed previously.

The Court carries this rule of convenience still further, for it not only will appoint the liquidator or the official receiver to act as receiver or receiver and manager, if the liquidator is appointed or the company has been ordered to be wound up before application is made for a receiver or a receiver and manager; but, if it

(*k*) (1891) 1 Ch. (C. A.) 475; see also in re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402.

(*l*) *Giles* v. *Nuthall*; in re *House Improvement Supply Association*, W. N. (1885), p. 51.

(*m*) *Bartlett* v. *Northumberland Avenue Hotel*, 53 L. T. R. 611; see *British Linen Co.* v. *South American Co.* (1894), 1 Ch. (C. A.) 108, 117.

(*n*) *British Linen Co.* v. *South American Co.*, ibid. 121; see also the case of *Boyle* v. *Bettws Llantwit Co.*, 2 Ch. D. 726, in which the Court declined to appoint a voluntary liquidator to act as receiver.

has already appointed a receiver or receiver and manager in a debenture or debenture stock holder's action and subsequently the company is ordered to be wound up, it will (as a general rule) in the exercise of its discretion discharge the receiver (*o*) (or receiver and manager) (*p*) so appointed and direct the liquidator or the official receiver to act as receiver (or receiver and manager).(*q*) The ground for such an order is that under the winding-up machinery provided by the Companies Consolidation Act, 1908, the liquidator or official receiver can get in such outstanding assets more expeditiously and with less expense than the receiver.(*r*) Thus in the case of *Tottenham* v. *Swansea Zinc Ore Company* (*s*) the Court on motion by the company removed a receiver, who had been appointed in an action brought by the trustees of a debenture-holder's trust deed to enforce the trusts, and appointed the liquidator of the company receiver in the action; he was, however, ordered to keep separate accounts of all he received under the trust deed distinguishing between the property, as to which there was no dispute about its being comprised in the deed, and property, as to which there might be a dispute, whether it was so comprised.(*t*)

But the Court will not in general substitute a liquidator or the official receiver for a receiver (or receiver and manager) or direct him to act as receiver (or receiver and manager) where there is nothing special for the liquidator or the official receiver to do, which is the only reason for displacing the receiver or receiver and manager. Thus in a recent case(*u*) the Court declined to appoint the liquidator to act as receiver, as there was practically nothing for the liquidator to do (his only duty consisting in getting in a sum of £180 from shareholders), so that the only reason for displacing the receiver and appointing the liquidator in his place failed.

Of course, if (in addition to showing, that there is nothing

(*o*) *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716; W. N. (1884), p. 54.

(*p*) *Bartlett* v. *Northumberland Avenue Hotel Co.*, 53 L. T. R. 611.

(*q*) It should be here stated, that the Court will not substitute a liquidator or the official receiver (formerly an official liquidator) in the place of a receiver or a receiver and manager appointed by the debenture or debenture stock holders themselves by virtue of their powers under their trust deed; in re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402.

(*r*) In re *Joshua Stubbs, Limited* (1891), 1 Ch. (C. A.) 475.

(*s*) Ubi supra.

(*t*) See also *Campbell* v. *Compagnie de Bellegarde*, 2 Ch. D. 181.

(*u*) In re *Joshua Stubbs, Limited* (1891), 1 Ch. (C. A.) 475. This case does not appear to be in any way qualified by the decision in *Strong* v. *Carlyle Press*, No. 1 (1893), 1 Ch. (C. A.) 268.

for the liquidator or the official receiver to do) it is proved, that the entire assets of the company are subject to the debenture or debenture stock holders' charge and are not sufficient to satisfy the moneys so secured, the Court will not displace a receiver (or receiver and manager) and substitute the liquidator or the official receiver in his place. Thus in the case of *Strong* v. *Carlyle Press*(*v*) after the presentation of a petition to wind up the defendant company and the appointment of the official receiver to act as provisional liquidator(*w*) the debenture-holders of the company, whose charge extended over all the property of the company, and whose interest was in arrear, commenced an action to enforce their securities, and on the 14th of October, 1892, a receiver with power to manage the business was appointed to act until the winding-up petition was disposed of. On the 25th of October a winding-up order was made, and the official receiver was continued as provisional liquidator. On the 28th of October leave was given to the plaintiffs to go on with their action; and on the same day the receiver was continued, with power to manage the business. On the 24th of November, on the application of the plaintiffs, leave was given to the receiver to discontinue the business. The official receiver thereupon applied to the Court to discharge the receiver and to appoint him (the official receiver) to act as receiver. It appeared that there was no uncalled capital and that the assets were insufficient to cover the debts due to the debenture-holders. Vaughan Williams, L. J. (then J.), considering that, as the business was discontinued, the reason for the appointment of the receiver had ceased, discharged him without giving any direction to protect the debenture-holders' interest. The Court of Appeal reversed the order on the ground, that the debenture-holders, whose interest was in arrear, had a right to a receiver and that the winding up ought not to be allowed to interfere with such right. Kay, L. J., says in the course of his judgment :(*x*) "If these assets are put in the possession of the liquidator, there will be some costs incurred in the winding up, with which the mortgagees have nothing on earth to do, and the liquidator will

(*v*) (1893) 1 Ch. (C. A.) 268.

(*w*) Section 162 of the Companies Consolidation Act, 1908, enacts that, where an application is made to the Court to appoint a receiver on behalf of the debenture-holders or other creditors of a company, the official receiver may be appointed. For Form of Order, see Seton, 5th ed., p. 648.

(*x*) (1893) 1 Ch. (C. A.) 276.

then try, and I suppose *primâ facie* will have a right to retain the costs out of the assets, which belong entirely to the mortgagees. Anything more unfair than that cannot possibly be imagined."

Again the Court will not discharge a receiver (or receiver and manager) and substitute the official receiver in his place, if and in so far as the assets of the company are of such a nature as to require a commercial liquidator for their realisation; for in such a case the official receiver is manifestly not so well qualified to realise such assets as a person accustomed to disposing of assets of such a nature. The Court of Appeal so decided in the case of *British Linen Company* v. *South American and Mexican Company*;(*y*) the facts there were as follows: On 24th July, 1893, a petition for the winding up of the company was presented. On 26th July, 1893, a writ in a debenture-holder's action was issued and on 2nd August the usual winding-up order was made. Touch was appointed receiver and manager in the debenture-holder's action. The official receiver, who was the provisional liquidator of the company, and who had, of course, the conduct of the winding up, applied by motion, that Touch might be discharged from being receiver and manager and that he might be appointed in his place. There was outstanding uncalled capital to the extent of £300,000. The estimated value of the assets of the company was sufficient to cover the debentures leaving a small margin. Vaughan Williams, L. J. (then J.), made the following remarks,(*z*) with which the Court of Appeal concurred: "It seems to me, that, wherever there is a business to be carried on, wherever there are commercial transactions to be entered into, wherever there is buying and selling, wherever there is borrowing of money necessary in order to put the property to be administered in such a condition, that it can be taken into the market, in all those cases, and many other similar cases, the official receiver cannot in the nature of things perform their duties nearly so well as a commercial liquidator can do; and, if I thought, that there was something in the nature of the securities to be realised and the moneys to be collected, which required negotiations and bargainings and compromises, I should think, that that was a function much

(*y*) (1894), 1 Ch. (C. A.) 108. (*z*) Ibid., 119.

better performed by an accountant than by an officer of the Court, even though assisted by a great department like the Board of Trade".

Vaughan Williams, L. J., held, that there was not anything in the nature of the securities, which would render it prejudicial or probably prejudicial to those, who were interested in their realisation, to have the realisation conducted by the liquidator, and discharged the receiver and manager and appointed the official receiver to be receiver, he undertaking to keep a separate account on behalf of the debenture-holders. The debenture-holders appealed and adduced fresh evidence, which satisfied the Court of Appeal, that a considerable part of the assets of the company consisted of securities, which were of such a nature that negotiations, bargainings and compromises would be necessary for the purposes of realisation. The Court of Appeal held, that Vaughan Williams, L. J., had proceeded on correct principles, but that, having regard to the special nature of the above-mentioned securities, the receiver approved by the debenture-holders ought to be appointed with power to realise the same by sale or otherwise, the official receiver being appointed receiver of all the other assets.

General rules as to substitution.

The following rules (merely rules of convenience) would appear to be established by the foregoing cases:—

Where no (or only a very small amount of) uncalled capital of a company, which has been ordered to be wound up, remains outstanding, the Court will not (whether the company's assets subject to the debenture or debenture stock holders' charge are,(*a*) or are not,(*b*) or are more than(*c*) sufficient to cover the sum so charged) discharge a receiver or receiver and manager, who has been appointed by the Court in a debenture or debenture stock holder's action, and appoint the liquidator of the company or the official receiver to act as receiver.

Where, on the other hand, a considerable amount of uncalled capital of a company, which has been ordered to be wound up, remains outstanding and the assets of the company are more than sufficient to cover the sums secured by its debentures or debenture stock, the Court will generally discharge a receiver or

(*a*) *British Linen Co.* v. *South American Co.* (1894), 1 Ch. (C. A.) 108.

(*b*) *Strong* v. *Carlyle Press* (1), (1893), 1 Ch. (C. A.) 268.

(*c*) In re *Joshua Stubbs, Limited*, (1891), 1 Ch. (C. A.) 475.

Bk II., Ch. III., Sec. V. (1*d*).

a receiver and manager appointed in a debenture or debenture stock holder's action and appoint the liquidator of the company to act as receiver or receiver and manager, or else the official receiver, to act as receiver in his place, provided that the debenture or debenture stock holders' interests in the assets of the company, on which the debenture debt is charged, are not in any way prejudiced, and the assets of the company are of such a nature as to be realisable without negotiations, bargainings and compromises.(*d*)

If, on the other hand, the assets of the company are or part thereof is of such a nature, that they cannot be realised without negotiations, bargainings and compromises, the Court will, on the official receiver applying to the Court to displace the debenture or debenture stock holders' receiver or receiver and manager and to appoint him to act in his place, direct the receiver or receiver and manager to continue to act as receiver or receiver and manager of such parts of the securities as are of such a nature, but will appoint the official receiver to act as receiver of the residue of the assets of the company, provided always, that the debenture or debenture stock holders' interests are not in any way prejudiced by the official receiver acting as receiver.(*e*)

The Court will not direct the liquidator of a company or the official receiver to act as receiver or receiver and manager in the place of a receiver or receiver and manager appointed under an express power in the debenture or debenture stock holder's trust deed. If, however, a holder of such securities exercises such an express power otherwise than for the benefit of the holders of the entire series of such securities ranking *pari passu* with him, the Court will appoint another receiver or manager.(*f*)

(*d*) *Powers, Liabilities and Rights of a Receiver.*

The powers of a Receiver appointed by the Court.

Having discussed, when the Court will appoint a receiver and whom it will appoint, the next point to be considered is: what are the powers, liabilities and rights of the receiver, when so appointed?

(*d*) In re *Joshua Stubbs, Limited*, ubi supra, 481; *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420; *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716; *British Linen Co.* v. *South American Co.*, ubi supra.

(*e*) *British Linen Co.* v. *South American and Mexican Co.*, ubi supra.

(*f*) In re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402. In re *Maskeleyne British Typewriter Limited*, *Stuart* v. *Same Co.* (1898), 1 Ch. 133.

Where the undertaking charged is in the nature of a public undertaking (such as waterworks, gasworks, tramways, canal or railways), receiving its powers from an Act of Parliament, the receiver appears only to have the power of receiving the fruits of the undertaking as a going concern.(*g*)

A receiver of an undertaking (other than an undertaking of the nature mentioned in the preceding sentence), who is appointed by the Court on the application of a debenture or debenture stock holder or of the trustees of either of them, has power to take possession and sell the mortgaged property, and it is his duty to exercise such power.(*h*) If the company is ordered to be wound up before possession is taken by the receiver, he should obtain the leave of the Court under section 142 of the Companies Consolidation Act, 1908, to take possession as receiver, notwithstanding the winding-up order. The receiver can take possession of the company's assets, on which there is a floating charge, immediately on his appointment, because the charge ceases to be a floating one, as soon as the receiver is appointed.(*i*)

The Court may, in a case of emergency empower a receiver appointed in a debenture or debenture stock holder's action to borrow money as a first charge on the undertaking in priority to the debentures or debenture stock for the preservation of the property.(*j*)

A receiver may be ordered to take such proceedings as are necessary for getting in calls and for that purpose to use the liquidator's name, and, if necessary, the name of the company.(*k*)

As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him by a party to the action. There may, no doubt, be exceptional cases, in which a receiver can bring an action, in his own name—when, for instance, he is the holder of a bill of exchange. In that case he can maintain an action, not because he is a receiver, but because he is the holder of the bill.

(*g*) *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201; *Blaker* v. *Herts and Essex Waterworks*, 41 Ch. D. 399.

(*h*) The appointment of a receiver puts an end to the business of a company; if it is desired that the business should be continued until the sale or liquidation, a receiver and manager should be appointed. For the powers conferred by the Court on receivers and managers, see infra, Bk. II., ch. iii., sec. v. (2*d*).

(*i*) As to this see supra, Bk. II., ch. iii., sec. iii., and Bk. II., ch. ii., sec. i.(2*a*).

(*j*) *Greenwood* v. *Algesiras* (Gibraltar) *Ry. Co.* (1894) 2 Ch. (C. A.) 205.

(*k*) *Harrison* v. *St. Etienne Brewery Co.*, W. N. (1893) p. 108; re *Westminster Syndicate Ld.*, 99 L. T. R. 924; (1908) W. N. 236. See Appendix, Form 58. The Court has power to order a receiver or manager appointed by it to commence or continue any proceedings. *Viola* v. *Anglo-American Cold Storage Co.* (1912) 2 Ch. 305.

Bk. II., Ch. III., Sec. V. (1d).

So, too, if he is possessed of chattels as receiver, and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them, quite independently of the fact, that he is a receiver. And there may be other cases, in which, having an independent cause of action, the fact that he is receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver.(*l*)

Powers of Receiver appointed under Trust Deed.

The powers of a receiver appointed by the debenture or debenture stock holders or their trustees under an express power contained in the trust deed vary according to the terms of such deed.

Liabilities of a Receiver.

Of course, the receiver is liable to account (1) to the debenture or debenture stock holders for the sums received by him in his capacity of receiver, when he has been appointed by such holders or (2) to the Court, when he has been appointed by the Court.(*m*)

The landlord cannot hold the debenture or debenture stock holder's receiver personally responsible for the payment of the rent and the performance of the covenants in the original lease, but he must look to the mortgagor (the company which issued such securities) who was his original tenant.(*n*)

Payment of preferential debts.

It is the duty of a receiver, who has been appointed on behalf of the holders of debentures or debenture stock secured by a floating charge or who takes possession of any property so charged on behalf of the holders of such securities, to pay the rates, wages and salaries specified in section 209 of the Companies Consolidation Act, 1908, out of any property of the company coming to his hands in priority to any claim for principal or interest in respect of such debentures or debenture stock.(*o*)

Security to be given by Receiver.

As regards the liability of a receiver (or a receiver and manager) appointed by the Court to give Security, Order L.,

(*l*) In re *Sacker*, 22 Q. B. Div. 179, 185.

(*m*) *Owen & Co.* v. *Cronk* (1895) 1 Q. B. (C. A.) 265.

(*n*) *Hay* v. *Swedish and Norwegian Railway Co. Ld.*, 8 Times L. R. 775; see also *Hand* v. *Blow* (1901) 2 Ch. (C. A.) 721, in which the Court held, that a receiver of leasehold property mortgaged by sub-demise is not liable to pay rent to the head landlord. See also *Justice* v. *James*, 15 T. L. R. 181.

(*o*) See sec. 107 of the same Act which is fully set out infra, Bk. II., ch. iv., sec. ii., p. 341. Sec. 107 does not affect companies registered in Scotland.

rule 16, provides: "Except as provided in the next following rule, where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security,(*p*) to be allowed by the Court or a judge and taken before a person authorised to administer oaths, duly to account for what he shall receive as such receiver, and to pay the same as the Court or judge shall direct, and the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary or allowance".

The Rights of a Receiver.

As regards a receiver's right to remuneration and reimbursement of the expenses incurred by him, the rule, on which the Court has always acted, is that a receiver (or receiver and manager) is entitled to his just charges and expenses incurred in the management of the estate, of which he has been appointed receiver (or receiver and manager) and he is entitled to those charges in priority to the debenture or debenture stock holders,(*pp*) the payment of such charges not being dependent on the sufficiency of the estate to bear all the costs. The receiver (or receiver and manager) is an officer of the Court and the Court is bound to see, that he is paid without regard to the sufficiency of the estate to meet the claims upon it. However, the costs of the realisation (*i.e.*, the actual sale)(*q*) of the assets of the company (including the costs of an abortive attempt to sell) have priority even over the remuneration and costs of a receiver.

In a case of *Batten* v. *Wedgwood Coal and Iron Company*(*r*) a suit was instituted by a debenture-holder on behalf of himself and the other debenture-holders against the defendant company and the trustees of a deed (by which the leasehold collieries and plant of the company were assigned to trustees to secure the payment of the debentures) to enforce the security and a receiver and manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, the plaintiff having the conduct of the sale, and the purchase money

(*p*) If, after being appointed until judgment or further order, a receiver or receiver and manager is continued at the hearing, he must give fresh security; *Brinsley* v. *Lynton and Lynmouth Hotel Co.*, W. N. (1895) 53.

(*pp*) Re *Glasdir Copper Mines Ld.*, *English Metallurgical Co.* v. *Same Co.* (1906) 1 Ch. (C. A.) 365; re *A. Boynton Ld.* (1910) 1 Ch. 519.

(*q*) See *Lathom* v. *Greenwich Ferry Co.*, W. N. (1895) p. 77; see, however, *Perry* v. *Oriental Hotels Co.*, 12 Eq. 126.

(*r*) 28 Ch. D. 317 (followed in re *London United Breweries, Ld.* (1907) 2 Ch. 511). See also *Strapp* v. *Bull & Co.* (1895) 2 Ch. (C. A.) 1; *Bertrand* v. *Davis*, 31 Beav. 436. It seems doubtful whether a receiver or manager has a lien on the assets of the company; see *Bertrand* v. *Davis*; see also remarks of Jessel, M. R., ex pte. *Izard*; in re *Bushell* (No. 1), 23 Ch. Div. 75, 78.

was paid into Court. The fund was insufficient. The original plaintiff became bankrupt in the course of the proceedings and another debenture-holder was substituted for him as plaintiff. On the further consideration of the suit it was held, that the costs and other expenses must be paid out of the said fund in Court in the following order: (1) the plaintiff's costs of the realisation of the property including the costs of an abortive attempt to sell, (2) the balance due to the receiver and manager (including his remuneration and his costs of the suit), (3) the costs, charges and expenses of the trustees of the deed, and (4) the two plaintiffs' costs in the suit *pari passu*.

Receiver's right to retain costs properly incurred by him.

The receiver (or receiver and manager) is entitled to retain out of the funds collected by him his costs, charges and expenses properly incurred in the discharge of his ordinary duties and in extraordinary services, which have been sanctioned by the Court.(*s*) Sometimes, however, if a receiver (or receiver and manager) is successful, he may be entitled to be indemnified as to the costs incurred by him in bringing or defending an action, even though he has not previously obtained the sanction of the Court;(*t*) but, as a general rule, a receiver (or receiver and manager) should not incur extraordinary expenses without the sanction of the Court.(*u*)

Remuneration of Receiver.

There is no uniformly settled scale, on the basis of which a receiver's remuneration can be calculated; the amount must depend on the circumstances of each case.(*v*) The allowance was formerly £5 per cent., but £3 per cent. is now very commonly given.(*w*) A receiver is entitled, if he acts without remuneration, to be allowed in his accounts all premiums paid by him to a guarantee society for acting as his surety, but must pay such premiums himself, if he receives a remuneration.(*x*)

Where a receiver is appointed under an express power contained in a trust deed, which authorises the appointment of a receiver with power to take possession of and sell all the property of the company and to carry on the business and to make any arrangements or compromise, and after realising the property

(*s*) *Malcolm* v. *O'Callaghan*, 3 M. & C. 52, 58; re *Glasdir Copper Mines Ld.* (1906) 1 Ch. (C. A.) 365. See also *Boehm* v. *Goodall* (1911) 1 Ch. 155.

(*t*) *Bristowe* v. *Needham*, 2 Ph. 190. But a receiver is not entitled to an indemnity against costs incurred by him in defending an action charging him with fraud while acting as receiver. (Re *Dunn*, *Brinklow* v. *Singleton* (1904) 1 Ch. 648.

(*u*) See ex pte. *Isard*, 23 Ch. Div. 75, 80.

(*v*) *Day* v. *Croft*, 2 Beav. 488; *Prior* v. *Bagster*, 57 L. T. R. 760; W. N. (1887) 194.

(*w*) See Seton, 7th ed. 739. The amount may be fixed by order of the Court. See Appendix, Form 62.

(*x*) *Harris* v. *Sleep* (1897) 2 Ch. 80.

charged by the trust deed pays off the moneys secured thereby and retains by way of remuneration part of the moneys so realised, the Court will not, on a summons taken out by the liquidator in the winding up of the company, fix the remuneration of the receiver and order him to pay over the balance; for in such a case the receiver is the agent (not of the company, but) of the persons appointing him. Such moneys can only be recovered in a separate action in the ordinary way.(*y*)

Receiver not to be made party.

Where a receiver had been appointed at the instance of a debenture-holder of a company and the landlord of the company, which had after such appointment been ordered to be wound up, applied to the Court for leave to distrain or re-enter, it was held that the receiver was improperly made party to such application and the applicant, though successful, was ordered to pay the receiver's costs.(*z*)

It is not the practice of the Court to give the conduct of an action to a receiver.(*a*)

Continuation of Receiver.

A receiver appointed on an interlocutory application before decree need not be continued by the decree, unless he is appointed only until the trial of the action.(*b*) And so, where a receiver has been appointed generally in an action, it is unnecessary to insert in the minutes of order to be taken on further consideration a direction to continue the receiver.(*c*)

SUB-SECTION 2. *Appointment by the Court of a Receiver and Manager.*

The object of the appointment of a Receiver and Manager.

The object of obtaining the appointment of a receiver (as has been stated before) is to protect property and to insure its due application in accordance with the rights of the persons interested in it. The object of obtaining the appointment of a manager or receiver and manager (as he is frequently called), on the other hand, is to continue the business, until the sale or liquidation of such business. A receiver, unless he is also appointed manager, has no power to carry on the business.(*d*) A receiver is not

(*y*) In re *Vimbos Limited* (1900), 1 Ch. 470

(*z*) *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.*, 20 Ch. Div. 260.

(*a*) In re *Hopkins*, 19 Ch. Div. 61, 62.

(*b*) *Cruse* v. *Smith*, 24 Sol. Jo. 121.

(*c*) *Underwood* v. *Underwood*, 37 W. R. 428; for further particulars on receivers see *Kerr on Receivers*.

(*d*) In re *Manchester and Milford Railway Co.*, 14 Ch. Div. 645, 653. For order appointing a receiver and manager see Appendix, Forms 37 and 37

Bk. II., Ch. III., Sec. V. (2a).

necessarily the same person as a manager appointed to carry on a business, but the same person is usually appointed receiver and manager.

When the Court appoints a receiver and manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the Court, and upon any question arising as to the character or details of the management, it is the Court, that must direct and decide. The circumstance, that in any particular case the persons appointed were previously the managers employed by the company, is immaterial. When appointed by the Court, they are responsible to the Court, and no orders of the company, or of the directors, can interfere with this responsibility. "Now, I apprehend," says Lord Cairns,(*e*) "that nothing is better settled than, that this Court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an interim management, its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends."

(*a*) *When the Court will Appoint a Receiver and Manager.*

The Court can appoint a Receiver and Manager of a Private or Trading Company.

In all cases, in which the business of a private or trading company(*f*) charged with debentures or debenture stock would go to ruin, if the company ceased to work, the Court will, on such debentures or debenture stock becoming enforcible, appoint a receiver and manager (instead of a receiver only) at the instance of the debenture or debenture stock holders or their trustees. In a case of *Peek* v. *Trinsmaran Iron Company*,(*g*) the holders of debentures, whereby the effects of the defendant company were charged with the moneys secured, commenced an action against the defendant company for the usual accounts and for foreclosure

(*e*) *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201, 212; see also *Whitley* v. *Challis* (1892), 1 Ch. (C. A.) 64, 69.

(*f*) The Court will not appoint a manager of an undertaking of a public nature deriving its powers from an Act of Parliament; *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201; *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36.

(*g*) 2 Ch. D. 115; see also *Lathom* v. *Greenwich Ferry Co.*, W. N. (1893) 77, in which the Court appointed a manager of a ferry company.

and then moved for the appointment of a receiver and manager, and Jessel, M. R., made the order asked for, saying, that, though there was no authority showing, that the Court had power to appoint a manager on an interlocutory application, he considered, that the plaintiffs were entitled to a manager on principle, because they were entitled to secure the property comprised in their securities in the only way, in which it could be made secure, as otherwise it might go to ruin. The Court made the order for a receiver and manager, though the "business" was not charged in express terms by the debentures. The Court will not, however, appoint a receiver and manager of a business, if the business was not comprised by express terms or by implication in the security.(*h*)

Chitty, L. J. (then J.), followed the case of *Peek* v. *Trinsmaran Iron Company*, with which he expressed his concurrence.(*i*) This case was, however, reluctantly followed by Kay, L. J. (then J.), in *Makins* v. *Percy Ibbotson & Son*,(*j*) in which case the manager was appointed, the applicant undertaking to advance a sum not exceeding £500 to meet the workmen's wages and current expenditure, to answer for the receipts of the proposed receiver and manager pending his giving security, and to realise the property as soon as possible. North, J., also followed *Peek* v. *Trinsmaran Iron Company* with hesitation.(*k*)

The Court will not appoint a Receiver and Manager of a business of a public nature deriving its powers under an Act of Parliament.

Though the Court frequently appoints receivers and managers of companies carrying on a private business or trade, it refuses to appoint a receiver or manager of an undertaking of a public nature, such as a waterworks, tramways,(*l*) canal or gas company, formed under and receiving its powers from an Act of Parliament and previously to the passing of 30 & 31 Vic., cap. 127, the Court could not appoint a receiver and manager of a railway company. The following are the reasons in Lord Cairns' words:(*m*) "When Parliament, acting for the public interest,

(*h*) *Whitley* v. *Challis* (1892), 1 Ch. (C. A.) 64; see also *County of Gloucester Bank* v. *Rudry Merthyr Colliery* (1895), 1 Ch. (C. A.) 629.

(*i*) *Campbell* v. *Lloyd's Bank, Limited* (1891), 1 Ch. 136*n*; 58 L. J. Ch. 424.

(*j*) (1891), 1 Ch. 133.

(*k*) *Edwards* v. *Standard Rolling Stock Syndicate* (1893), 1 Ch. 574. The Court may, notwithstanding that the debenture or debenture stock holders' charge has not crystallised, appoint a receiver and manager, if the property charged is in jeopardy; see in re *Victoria Steamboats Co.*, *Smith* v. *Wilkinson*, 45 W. R. 135, 75 L. T. R. 374, (1897) 1 Ch. 158; re *London Pressed Hinge Co.* (1905) 1 Ch. 576; re *New York Taxcab Co.* (1912) W. N. 249; [1913] 1 Ch. 1.

(*l*) *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.* (1895) 2 Ch. (C. A.) 36.

(*m*) *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201, 212.

Bk. II., Ch. III. Sec. V. (2a).

authorises the construction and maintenance of a railway, both as a highway for the public and as a road, on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind and it confers and imposes them upon the company, which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not, by agreement, hand over the management of the railway to the debenture-holders. It is impossible to suppose, that the Court of Chancery can make itself or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible, when it is obvious, that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said, that the railway company did not object to the order for a manager. This may well be so. But in the view I take of the case the order would be improper, even if made on the express agreement and request of the company."

Acting on these principles the Court refused in that case to appoint a receiver and manager at the instance of a debenture-holder saying in short, that, what the debenture gave, was a charge on the undertaking; that the undertaking meant the completed work of the company, when constructed, and the charge gave to the debenture-holder a right to the fruit (as Lord Cairns phrases it) of the fruit-bearing tree represented by the complete undertaking.

This case was followed in a recent case of *Blaker* v. *Herts and Essex Waterworks Company*,(n) in which the Court declined to appoint a receiver and manager of a waterworks company.

The principle of *Gardner's Case* applies to all tramway companies governed by the Tramways Act of 1870, whether the promoters are local authorities or private individuals or companies formed under the Companies Act, 1862, or the Companies Consolidation Act, 1908, or companies created by special Act of Parliament. Hence the holders of debentures or

(n) 41 Ch. D. 399.

debenture stock issued by a tramway company are only entitled to the appointment of a receiver, but not to the appointment of a manager or to a sale of the tramways and undertaking.(*o*)

The Court can appoint a Manager of a Railway Company under 30 & 31 Vic., cap. 127.

Now the Court has (as will be seen hereafter)(*p*) power under section 4 of 30 & 31 Vic., cap. 127, to appoint a manager of a railway company,(*q*) but the principles laid down in *Gardner* v. *London, Chatham and Dover Railway Company* are applicable to all companies formed under an Act of Parliament and carrying on a business of a public nature except railways, which are especially excepted by 30 & 31 Vic., cap. 127.

Tolls of Market

Where an Act of Parliament authorises a corporation to mortgage the tolls of a market, the Court has jurisdiction to appoint a receiver of them, though no such express power is given by the Act, but the Court will not appoint a manager of a market, as the powers of management must be exercised by the corporation itself.(*r*)

Appointment of Receiver where Manager applied for.

The Court frequently appoints a receiver, where an application for a receiver and manager is made and the Court has no power or declines to appoint a receiver and manager.(*s*)

Management limited by order to six months.

The order appointing the receiver and manager often directs, that the business of the company shall not be carried on for a longer period than six months without the leave of the judge in chambers and that, if any further time should be required, an application for further time must be made before the expiration of the said six months.(*t*)

(*b*) *Mode of Application for the Appointment of a Receiver and Manager by the Court and the Effect of such an Appointment.*

Mode of application.

The appointment of a receiver and manager is obtained in the same way as the appointment of a receiver; for the general

(*o*) *Marshall* v. *South Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36 (disapproving of *Bartlett* v. *West Metropolitan Tramways Co.* (1893), 3 Ch. 437; *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730, in which a receiver and manager was improperly appointed), followed in *Pegge* v. *The Neath Tramways Co.* (1895), 2 Ch. 508.

(*p*) Bk. III., ch. iii.

(*q*) In re *East and West India Docks Co.*, 38 Ch. Div. 576. For Form of order see Seton, 6th ed., 769; 7th ed. 736.

(*r*) *De Winton* v. *Mayor of Brecon*, 26 Beav. 533, 542.

(*s*) *Gardner* v. *London, Chatham and Dover Railway Co.*, 2 Ch. 201; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399; *Game, Harrison & Larner, Limited*, v. *The Hop Tea Co., Limited*, 26 L. J. Notes 167; *De Winton* v. *The Mayor of Brecon*, 26 Beav. 533.

(*t*) *Day* v. *Sykes, Walker & Co.*, 55 L. T. R. 763. For Form of order continuing manager, see *Davies* v. *Vale of Evesham Preserves*, 99 L. T. J. 238; W. N. (1895) 105, and infra, Bk. II., ch. iii., sec. v. (3).

Bk. II., Ch. III., Sec. V. (2c).

orders of the Court, which apply to receivers, apply also to managers.(u)

Interference with possession of Manager.

Where the Court has taken possession by the appointment of a receiver and manager of a business, if any one, whoever he be, acts in a manner, which interferes with the proper conduct or management of the business, it holds that person as guilty of contempt of Court and liable to imprisonment for that contempt.(v)

Effect of appointment by the Court of a Manager.

Though every entry by a mortgagee does not operate as a dismissal of the servants of the mortgagor from his employment, it was held in a recent case, that the appointment of a receiver and manager at the instance of a debenture-holder of a company operated to discharge the servants of such company, and a servant so discharged was as against the company entitled to damages for wrongful dismissal, if the proper period of notice was not given to such servant; if, however, from the time, when the employment ceased, onwards for a period equal to the time agreed on for notice of dismissal such servant has had employment of equal value to that, which he has lost, he has sustained no damage.(w)

Manager should arrange for supply of electric light.

Section 19 of the Electric Lighting Act, 1882 (45 & 46 Vic., cap. 56) provides that no person within the area supplied with electric current by an electric lighting company is entitled to a supply of current by the company, unless and until the company has entered into a contract with him to that effect. Hence, if a receiver and manager of the business of a hotel company is appointed by the Court, he should forthwith make a fresh contract with the company for the supply of electric light, as the company will be entitled to cut off such light in the absence of such a contract.(x)

The observations on the effect of the appointment of a receiver are equally applicable to the appointment of a receiver and manager.(y)

(c) *Who will be Appointed Receiver and Manager by the Court.*

Whom the Court will appoint to act as Manager.

Generally the board of directors are more familiar with the management and more competent to manage a railway than any

(u) R. S. C., Or. LXXI., r. 1. For the mode of applying for the appointment of a receiver, see supra, Bk. II., ch. iii., sec. v. (1b).

(v) *Helmore* v. *Smith* (2), 35 Ch. Div. 449; *Russell* v. *East Anglian Railway Co.*, 3 M. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 332, 350; *Whadcoat* v. *Shropshire Railways Co.*, 9 Times L. R. 589; see supra, Bk. II., ch. iii., sec. v. (1b).

(w) *Reid* v. *Explosives Co.*, 19 Q. B. Div. 264.

(x) *Husey* v. *London Electric Supply Corporation* (1902) 1 Ch. (C.A.). 411.

(y) As to these, see supra, Bk. II., ch. iii., sec. v. (1b).

other persons, hence, as a general rule, either one or several of the directors or the secretary are or is appointed managers or manager, so as to keep the management in the board of directors.(*z*)

However, Kekewich, J., said in a recent case,(*a*) that he had the strongest objection to appointing a chairman of a company (not a railway company) its receiver and manager, because a chairman easily forgets, that his power as receiver and manager is of a restricted character, and that he has other interests to consider than those of the shareholders. If a person has been appointed receiver, who from being connected with other companies cannot hold a sufficiently independent position in the management of the company, the Court may either remove him or else associate with him some independent person, who is interested in the success of the company, to act as joint receiver and manager.

The remarks made in an earlier part of the present chapter (*b*) as to who will be appointed receiver by the Court and as to when the official receiver or the liquidator of a company, which has been ordered to be wound up, will be appointed to act as receiver in the place of a receiver appointed by the Court at the instance of the plaintiff in a debenture or debenture stock holder's action, apply also to receivers and managers.

(*d*) *Powers, Liabilities and Rights of Receivers and Managers.*

The powers of Receivers and Managers appointed by the Court.

A receiver and manager appointed by the Court has power to, and should, carry on the business, of which he is appointed receiver and manager, according to the general course of business adopted by the particular trade, but he should not enter into anything like speculative transactions.(*c*) The powers of the receiver and manager will vary in each case according to the nature of the business.

Special powers conferred on Managers by order of Court.

The Court has given leave to receivers and managers to do the following things: to borrow a sum of money ranking above the debentures,(*d*) to raise money to pay off prior incumbrances,(*e*) to issue certificates in respect of money raised,(*f*)

(*z*) In re *Manchester and Milford Ry. Co.*, 14 Ch. Div. 645, 655. As to the remuneration of a director, who is appointed by the Court to act as receiver and manager, see re *South Western of Venezuela Ry. Co.* (1902) 1 Ch. 701.

(*a*) *Marshall* v. *South Staffordshire Tramways Co., Times Newspaper* 5th August, 1893.

(*b*) See supra, sec. v. (1*c*).

(*c*) *Taylor* v. *Neate*, 39 Ch. D 538; re *British Power Traction & Lighting Co.* (1907) 1 Ch. 528, 535.

(*d*) Re *Brighton Hotels, Limited*, see infra, Appendix, Form 43.

(*e*) *Lathom* v. *Greenwich Ferry Co.*, W. N. (1895) 77; 72 L. T. R. 790.

(*f*) *Hay* v. *Swedish and Norwegian Ry. Co., Limited, Palmer* III. (10th Ed.) p. 633.

to issue debentures in respect of money borrowed,(*g*) to appoint an agent or attorney in a foreign country,(*h*) to pay certain rates for which the overseers of the parish have distrained,(*i*) to borrow money,(*j*) to give a power of attorney to an attorney to take the necessary steps for the purpose of recovering a sum of money lying at a bank abroad,(*k*) to discontinue the business, of which they were appointed receivers and managers,(*l*) or to go abroad to negotiate the sale of the undertaking.(*m*)

Even for the purpose of an advantageous sale, the Court will not, as a general rule, give leave to raise a sum for the purpose of carrying on the business of a company and to give priority to the sum so raised over existing debenture or debenture stock holders' charges. It sometimes happens, that some things must be done or payments made to prevent the property charged from being destroyed; in urgent cases of this sort, the Court may sanction the raising of money and charging such money in priority to debenture or debenture stock holders' charges. In a recent case,(*n*) a receiver and manager having been appointed in a debenture-holder's action, an application was made, that such receiver and manager might be authorised to raise the sum of £1000 (which was to be made a first charge on all the property comprised in the debentures) in order that he might carry on the business for the purpose of a sale. There was evidence, that the value of the property would be very greatly depreciated by the closing of the theatre. Kekewich, J., held, that there was no evidence, that any expenditure would result in substantial good to the debenture-holders or that there was any prospect of an advantageous sale sufficient to justify any expenditure at all and declined to sanction the raising of the money.

The Court will not, as a rule, direct or authorise a receiver and manager appointed by the Court in a debenture or debenture stock holders' action to disregard forward contracts made by the company, as it is his duty to preserve the goodwill of the company's business and the disregard of such contracts would be inconsistent with such duty; but the Court will in no case authorise a receiver and manager to disregard such contracts in the absence

(*g*) *Pontifex* v. *Pontifex & Wood, Limited*, ibid., *p.* 633.

(*h*) Re *Dominion Brewery Co., Consolidated Trust Limited*, v. *Same Co.*, see infra, Appendix, Form 42.

(*i*) In re *Dry Docks Corporation of London*, 39 Ch. Div. 306; in re *Marriage, Neave & Co.* (1896) 2 Ch. (C. A.) 663.

(*j*) *Milward* v. *Avill & Smart, Ld.*, W. N. (1897) p. 162, where it was held that a power to borrow a specified sum authorises reborrowing of sums paid off.

(*k*) *Smith* v. *Mortgage Co. of Mexico*, 99 L. T. J. 419.

(*l*) *Strong* v. *Carlyle Press* (No. 1) (1893) 1 Ch. (C. A.) 268.

(*m*) *Morton Rose & Co.* v. *Barbadoes Water Supply*, 97 L. T. J. 422.

(*n*) *Securities Properties Investment Co.* v. *Brighton Alhambra, Ld.*, W. N. (1893) p. 15, 68 L. T. R. 249; re *Thames Ironworks Shipbuilding Co.* (1912) W. N. 66.

of evidence that nothing could ever come to the mortgagor (*i.e.*, the company).(*o*)

Persons dealing with a receiver and manager appointed by the Court should, before entering into any contract, the terms of which are in any way unusual or special, consult their legal advisers, as to whether the receiver has power to enter into the proposed arrangement without the leave of the Court. For, if the receiver has no power to enter into such a contract and has not obtained such leave of the Court, the debenture holders will not be bound by such contract. The Court of Appeal recently had before them a case, in which the facts were as follows:—

A receiver and manager of the assets of a brewing company was appointed by the Court in a debenture holders' action and by a letter (signed by him as the receiver of such brewing company) requested a shipping company to carry a quantity of beer to Malta consigned to the brewing company and this was done under a bill of lading, which purported to give to the shipping company a lien on the beer shipped, not only for the freight due in respect thereof, but also in respect of any previously unsatisfied freight due from the "shippers or consignees" to the shipping company. The shipping company refused to deliver the beer, unless certain unsatisfied freight due to them from the brewing company previously to the appointment of the receiver was paid; the Court of Appeal (Moulton, L. J., dissenting) held that the shipping company was not entitled to a lien for such unsatisfied freight as was claimed, because (1) the bill of lading had not the effect of giving such a lien, and (2) the receiver had no power to give such a lien without the leave of the Court and such leave had not been obtained.(*p*)

Liability of Receiver and Manager appointed by the Court—(i) to pay poor rates.

Independently of the provisions of sections 107 and 209 of the Companies Consolidation Act, 1908 (re-enacting the provisions of the Preferential Payments in Bankruptcy Act, 1897) a receiver and manager of a company appointed by the Court in a debenture or debenture stock holders' action will, if he takes possession of the land of such company, so as to create a change of occupation within section 16 of the Poor Rate Assessment and Collection Act, 1869,(*q*) be liable to be entered in the rate book as the person, who succeeds to, or comes into the occupation of, the lands of the company, and to pay so much of the rates made in respect of the company's lands

(*o*) Re *Newdigate Colliery Ld.*, *Newdigate* v. *Same Co.* (1912) 1 Ch. (C. A.) 468.

(*p*) *Whinney* v. *Moss Steamship Co.* (1910) 2 K. B. 813; [1912] A. C. 254.

(*q*) 32 & 33 Vic., cap. 41. See infra, Bk. II., ch. iv., sec. ii.

Bk. II., Ch. III., Sec V. (2d).

as is proportionate to the time of his occupation within the period, for which the rate was made.(*o*)

(2) to pay gas rates,

A receiver and manager of a company (whether he is appointed by the Court in a debenture or debenture stock holder's action or by the trustees of a covering deed) is, of course, only liable to pay for the gas supplied to him, while he is himself in occupation of the premises previously occupied by the company. Unless, however, he is prepared to submit to the gas supply being cut off from such premises, he will also have to pay the arrears due in respect of the gas supplied to such company where the Special Act of Parliament of the Gas Company incorporates (as is frequently the case) the Gasworks Clauses Act, 1847 (10 & 11 Vic., cap. 15), and the right, which is conferred on a gas company by sec. 16 of that Act to stop the gas supply from entering the premises of a person neglecting to pay the rent due for gas supplied to him, is not interfered with by the Special Act.(*p*)

(3) to pay expenses incurred by him in carrying on the business of the Company.

Primâ facie, when a receiver and manager of the business of a company appointed by the Court orders goods in the course of such business, he pledges his personal credit for such goods, he looking for indemnity to the assets of the company. Hence, where there is nothing to rebut this inference, he will be personally liable for such goods. This is the position, which a receiver and manager appointed by the Court accepts, when he undertakes the management of the business of a company as a going concern in the absence of any express stipulation. But, when the question as to his liability as between himself and a third person arises, one must look at that person's position too. If it can be shown, that the third person accepted an order on the express terms, that the receiver and manager should not be personally liable, then the person so accepting the order could not make him personally liable.(*q*)

Receiver and Manager appointed by the Court should not let his interests clash with his duties.

A receiver and manager, being an officer of the Court, should not place himself in a position, in which his interests clash with his duties. Hence it was decided in a recent case,(*r*) that

(*o*) In re *Marriage, Neave & Co., North of England Trustee, etc., Corporation* v. *Marriage, Neave & Co.* (1896), 2 Ch. (C. A.) 663.

(*p*) *Paterson* v. *Gas Light and Coke Co.* (1896), 2 Ch. (C. A.) 476.

(*q*) *Burt, Boulton & Co.* v. *Bull* (1895), 1 Q. B. (C. A.) 276; *Owen & Co.* v. *Cronk*, ibid., 265; Re *British Power Traction and Lighting Co.* (1906), 1 Ch. 497, 505.

(*r*) In re *Eastern and Midlands Railway Co.*, 90 L. T. J. 20.

a receiver and manager should not enter into partnership with the company, of which he is appointed manager, and use his own steamboat in conjunction with their traffic and issue through tickets for the use of the company's railways and his own steamboat.

Liability to give security.

A receiver and manager appointed by the Court is under the same liability to give security as a receiver,(*s*) but under special circumstances it may be dispensed with.(*t*)

Liability of Receiver and Manager appointed under Trust Deed, (1) to pay poor rates,

If a receiver and manager of a company is appointed by the trustees of such company's debenture or debenture stock holders' covering deed, under the terms of which the company is to remain in possession of its lands until the happening of certain events and thereupon possession is to be given up, and such receiver and manager actually does take possession of such lands and carries on the business of such company, such taking of possession will constitute a change of occupation within sec. 16 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vic., cap. 41), and such receiver and manager will be liable to the overseers of the parish for so much and so much only of the rate made in respect of the lands of the company as is proportionate to the time of his occupation within the period, for which the rate was made, and the overseers of the parish will not be entitled to put in distress on the goods in the hands of such receiver and manager to enforce payment of more than such proportionate part of such rates.(*u*)

(2) to pay expenses incurred by him in carrying on the business of the Company.

Where a receiver and manager is appointed under an express power contained in the debenture or debenture stock holders' trust deed, the terms of such deed must be examined in order to decide, whether such receiver or receiver and manager will be personally liable for expenses incurred in carrying on the business of the company. Thus, if the trustees of such a deed under an express power contained in such deed appoint a receiver and manager of the business of the company, which issued such securities, such receiver and manager is in fact an agent of the trustees for the purpose of carrying on the business; hence, if he acts and is known to act as agent for the

(*s*) *Rutherford* v. *Wilkinson*, Seton, 684.

(*t*) See supra, Bk. II., ch. iii., sec. v. (1*d*).

(*u*) *Richards* v. *Overseers of Kidderminster* (1896), 2 Ch. 212. This case was decided before the passing of the Preferential Payments in Bankruptcy Act 1897. As to the overseers' right of distress, see infra, Bk. II., ch. iv., sec. ii.

Bk. II., Ch. III., Sec. V. (2d).

trustees, he will not be liable for any expenses incurred or any act done as agent in carrying on such business. Of course, a receiver and manager so appointed may, even though he is merely an agent, by his acts makes himself personally liable to those, with whom he deals, but in the absence of such acts he will not be personally liable for acts incident to the carrying on of the business. Payment of money by such receiver and manager into the account of the trustees before he had notice, that the money had been wrongly obtained, will not render him personally liable.(*v*)

A receiver and manager of leasehold premises, which are mortgaged to trustees by sub-demise for securing an issue of debentures or debenture stock, is not liable to pay rent or damages for dilapidations to the head-landlord, there being no privity of contract or privity of estate between the head-lessor and the sub-lessees (*i.e.*, the trustees) or a receiver and manager appointed by the trustees or on their application.(*w*)

Payment of preferential debts.

It is the duty of a receiver and manager, who is appointed on behalf of the holders of debentures or debenture stock secured by a floating charge on the assets of a company registered in England or Ireland or who takes possession of any of its property so charged on behalf of the holders of such securities, to pay the rates, wages and salaries specified in section 209 of the Companies Consolidation Act, 1908, out of any property of the company coming to his hands in priority to any claim for principal or interest in respect of such debentures or debenture stock.(*x*)

Rights of Receiver and Manager.

In the case of a receiver and manager there is no scale of remuneration, each case must be decided on its own merits.(*y*)

Where the Court has appointed a receiver and manager, it will as against all parties, for whose benefit the possession has been held, refuse to permit its officers to be discharged, until the amount due to them has been paid.(*z*)

The rights of a receiver and manager appointed by the Court to be indemnified as to costs have been summed up in a recent case (*a*) as follows:

(*v*) *Owen & Co.* v. *Cronk* (1895) 1 Q. B. (C. A.) 265. See also *Bissell* v. *Ariel Motors*, 27 T. L. R. 73.

(*w*) *Hand* v. *Blow* (1901) 2 Ch. (C. A.) 721.

(*x*) See section 107 of the Companies Consolidation Act, 1908, which is fully set out infra, Bk. II., ch. iv., sec. ii., p. 341. Section 107 does not extend to Scotland.

(*y*) *Prior* v. *Bagster*, W. N. (1887) 194; 57 L. T. R. 760; see supra, Bk. II., ch. iii., sec. v. (1*d*).

(*z*) *Fraser* v. *Burgess*, 13 Moo. P. C. 346.

(*a*) Re *British Power Traction Co. Halifax Joint Stock Banking Co.* v. *Same Co.* (1906) 1 Ch. 497; (1907) 1 Ch. 528. See also re *Glasdir Copper Mines*,

Where no special provision is made for meeting liabilities incurred by a receiver and manager appointed by the Court, it is his duty to enter into proper contracts on his own responsibility for carrying on the business, and it is his right to be indemnified out of the assets against liabilities properly incurred in the execution of his duty. Expenses and liabilities *bona fide* incurred in the ordinary course of business will *prima facie* be treated as having been properly incurred. A receiver and manager, who is authorised by the Court to borrow a limited sum for the general purposes for the business, is not necessarily deprived of his general right to indemnity, but he is not entitled to incur liabilities to an unlimited extent without the leave of the Court and require them to be met out of the assets. If the sum provided is insufficient, he should apply to the Court, and, if he incurs liabilities beyond the limit without making such application, he will not be entitled to be indemnified against them, unless he can show that, having regard to the circumstances, he was justified in incurring them without first obtaining such leave. In such a case it is not sufficient to show that the liabilities were incurred *bona fide* and in the ordinary course of business.

The costs and remuneration of a receiver and manager are paid in priority to the costs of the trustees of the debenture or debenture stock holders' trust deed and also to the costs of the plaintiff in the debenture or debenture stock holders' action, but the costs and expense (including the costs of an abortive sale) of the realisation of the property comprised in the debentures or the trust deed have priority over the costs and remuneration of the receiver and manager.(*b*)

If a director of a company is appointed by the Court to act as receiver and manager on behalf of the holders of the debenture or debenture stock holders of the company, the fact, that he is remunerated for acting in that capacity, does not disentitle him to his remuneration as director from time to time of his appointment as receiver until the commencement of the winding up of the company.(*c*)

A receiver and manager appointed by the Court (being, as has been stated above, an officer of the Court) should, whenever there is a dispute as to the propriety of his conduct as such re-

English Electro-Metallurgical Co. Ld. v. *Same Co.* (1906) 1 Ch. (C. A.) 365; re *A. Boynton Ld.* (1910) 1 Ch. 519.

(*b*) *Batten* v. *Wedgewood Coal & Iron Co.* 28 Ch. D. 317; re *London United Breweries Ld.* (1907) 2. Ch. 511.

(*c*) Re *South Western of Venezuela Railway Co.* (1902) 1 Ch. 701.

Bk. II., Ch. III., Sec. V. (2d).

ceiver and manager, be sued in the Court, which appointed him; for the Court will not allow its own officer to be sued in another Court in respect of acts done in discharge of his office.(*d*)

Bankruptcy of Receiver and Manager.

If a receiver and manager appointed by the Court incurs liabilities in the proper management of the property, which was given to him to manage and subsequently becomes a bankrupt, the Court will see that those creditors are satisfied by payment direct to such creditors out of the funds in Court and the Court will direct an inquiry with a view to payment to the creditors of the receiver after the discharge of the costs of realisation (if any) and such creditors of the receiver will thus be placed precisely in the same position, in which they would have been, if the receiver had paid them and then come for his indemnity against the company's estate.(*e*)

A receiver and manager may, on ceasing to act in such capacities, set up a business similar to the one of which he has acted as manager.(*f*)

The costs of the application for the appointment of a receiver and manager are dealt with in the same way as the costs of the application for a receiver.(*g*)

Difference between a Receiver appointed by the Court and a Receiver appointed under a Trust Deed.

Before concluding this portion of the chapter it is proposed to state shortly, what are the main points of difference between a receiver or a receiver and manager appointed by the Court and a receiver or receiver and manager appointed under an express power contained in the debenture or debenture stockholders' trust deed.(*h*)

A receiver or receiver and manager of a company appointed by the Court:—

(1) Is an officer of the Court, derives his powers from and is accountable to the Court only (and is not an agent of the company or of the debenture or debenture stock holders).(*i*)

(2) May not be disturbed in the possession of the property of the company, as such disturbance will constitute a contempt of Court.(*j*)

(3) Will usually be discharged by the Court and replaced by

(*d*) Re *Maidstone Palace of Varieties Ld., Blair* v. *Same Co.* (1909) 2 Ch. 283.

(*e*) Re *London United Breweries Ld. Smith* v. *Same Co.* (1907) 2 Ch. 511, 515.

(*f*) In Re *Irish* 40 Ch. D. 49.

(*g*) See Bk. II., ch. iii., sec. v. (1*d*).

(*h*) As to such express power, see supra, Bk. II., ch. ii., and Appendix, Form 12.

(*i*) *Burt, Boulton & Co.* v. *Bull* (1895) 1 Q. B. (C. A.) 276; *Parsons* v. *Sovereign Bank of Canada* [1913] A. C. 160, 167.

(*j*) *Helmore* v. *Smith* (No. 2), 35 Ch. Div. 449.

the liquidator of the company, on such company being ordered to be wound up,(*k*) and

(4) Is (in the absence of an express stipulation to the contrary) personally liable to the creditors of the business, he trusting to be indemnified out of the funds in hand (or in Court) or the other assets of the company.(*l*)

On the other hand, a receiver or receiver and manager appointed by the trustees under an express power in the debenture or debenture stockholders' trust deed :—

(1) Is an agent of and accountable to the company or the trustees of the debenture or debenture stockholders, according to the circumstances of the case (*m*) (but not an officer of the Court).

(2) May be disturbed in the possession of the property of the company without rendering the person so disturbing him liable to attachment for contempt of Court.

(3) Will not be discharged and replaced by a liquidator of the company, on such company being ordered to be wound up,(*n*) and

(4) Will not, if he purports to act as receiver, be personally liable in respect of expenses incurred by him in carrying on the business of the company.(*o*)

SUB-SECTION 3. *Steps to be taken and orders made in a Debenture or Debenture Stock Holder's Action.*

Steps to be taken, if defendant Company does not enter appearance.

If the defendant company does not enter an appearance to the writ within the time specified therein for appeareance, the plaintiff should forthwith file an affidavit of service of the writ and thereupon file his statement of claim. After the expiration of the time for delivering the defence, the plaintiff may set down the action on motion for judgment.

Steps to be taken, if defendant Company enters appearance.

If the defendant company enters an appearance, the plaintiff should within fourteen days from the date of the entry of such appearance take out a summons for directions (under Order XXX.).

Preliminary accounts and inquiries.

The following preliminary accounts and inquiries are fre-

(*k*) In re *Joshua Stubbs, Limited* (1891), 1 Ch. (C. A.) 475; see supra sec. v. (1*c*) of this chapter.

(*l*) *Owen & Co.* v. *Cronk* (1895) 1, Q. B. (C. A.) 265; *Burt, Boulton & Co.* v. *Bull* (1895) 1 Q. B. (C. A.) 276; *Boehm* v. *Goodall* (1911) 1. Ch. 155.

(*m*) *Owen & Co.* v. *Cronk*, ubi supra; *Gaskell* v. *Gosling* (1896) 1 Q. B. (C. A.) 669 (1897) A. C. 575.

(*n*) In re *Henry Pound, Son & Hutchins*, 42 Ch. Div. 402.

(*o*) *Owen & Co.* v. *Cronk*, ubi supra; *Gaskell* v. *Gosling*, ubi supra. For further particulars on the subject of receivers and managers, see *Kerr On Receivers* and Daniel's *Ch. Pr.*, 7th ed., pp. 1409-1459.

Bk. II., Ch. III., Sec. V. (3).

quently ordered by the Court to be taken and made on the summons for directions or (if they are not ordered by such summons) on a summons taken out under Order XV.:(*p*)

(*a*) If there is no Trust Deed.

I. If the debentures or debenture stock, which it is sought to enforce, are not secured by a trust deed:

(1) An account of what is due for principal and interest to the plaintiff and the other holders of debentures or debenture stock and

(2) An inquiry of what the property comprised in and charged by the debentures or debenture stock consists and in whom the same is vested.

(*b*) If there is Trust Deed.

II. If the debentures or debenture stock, which it is sought to enforce, are secured by a trust deed:—

(1) An account of what is due for principal and interest to the plaintiff and the other holders of debentures or debenture stock, and

(2) An inquiry of what the property subject to the trust deed consists.

Steps to be taken, if defendant Company appears but does not deliver defence.

If the defendant company enters an appearance, the order made on the summons for directions sometimes directs the plaintiff to deliver a statement of claim and the defendant company to deliver its defence within a specified time, or sometimes directs that there shall be no pleadings.

The plaintiff will deliver his statement of claim, if he is ordered to do so.

If, as frequently happens, the defendant company does not deliver its defence within the time limited, the plaintiff may set down the action on motion for judgment.(*q*)

If, on the summons for directions being taken out, the Master orders the action to be tried without pleadings, he should direct that the evidence shall be taken by affidavit.(*r*)

How preliminary accounts and inquiries are taken and made.

The order made on the summons for directions may, besides giving directions as to pleadings and as to the taking of the preliminary accounts and inquiries, specify the persons who shall supply the necessary evidence for the purpose of working out these accounts and inquiries, and the manner, in which the debenture or

(*p*) See infra, Appendix, Form 44.

(*q*) Counsel's minutes should be left with the judge on such an application. *Re Automatic Machines Ld.* (1902) W. N. 236.

(*r*) Re *Gutta Percha Corporation*, *Thornton* v. *Same Co.*, W. N. (1899), p. 251.

debenture stock holders shall be invited to send in their claims (*i.e.*, whether by circular or by advertisement, and, if by advertisement, in which papers the advertisement is to be inserted).(*s*)

In response to this invitation each person holding any of the securities in question sends in his claim (*t*) to the person specified in the invitation. These claims may be admitted or disputed and must, if disputed, be supported by evidence.

On the evidence required by the Master (or by the Registrar in the winding up, if the company has been ordered to be wound up) being completed, he will draw up a certificate answering the accounts and inquiries.

Master's Certificate as to Receiver's security.

If an interim receiver (or receiver and manager) is appointed by the Court on an interlocutory application, the Master (or the Registrar in Companies Winding Up) will, upon such receiver (or receiver and manager) duly giving security to the satisfaction of the Court, prepare a certificate stating (1) that the security has been proved by the Court, (2) that certain specified dates have been fixed for the delivery of the receiver's (or receiver and manager's) accounts in chambers, and (3) that the receiver (or receiver and manager) is to pay the balance certified from time to time to be due on the passing of his accounts as the Court shall direct.

Time of management of Receiver extended.

If a receiver and manager has been appointed by an interlocutory order without limiting the time, during which he is to act, he need not be expressly continued at the hearing of the action. If, on the other hand, the date, until which he is to act, is fixed by such interlocutory order and it is desired to continue him, the proper form of order is to extend the time, during which he is to act as manager, until a specified date.(*u*)

Accounts and inquiries directed on the trial of the action.

When the debenture or debenture stock holder's action comes on for trial (no preliminary accounts or inquiries having been directed to be taken or made) the Court usually makes one of the following orders and directs the following accounts and inquiries to be taken and made according to the circumstances of each case:—

(A) In the case of debentures not secured by a trust deed: The

(*s*) For Forms of advertisement, see Appendix, Forms 54, 55 and 56.

(*t*) For a Form of such a claim, see Appendix, Form 67.

(*u*) *Underwood* v. *Underwood*, 37 W. R. 428, 60 L. T. R. 384; *Davies* v. *Vale of Evesham Preserves*, 43 W. R. 646, W. N. (1895) 105. For a form of such an order, see Appendix, Form 66.

Bk. II., Ch. III., Sec. V. (3).

Court [declares that the plaintiff and other holders of debentures (or A debentures, if there are several sets) are entitled to a [first] charge(*v*) on the property comprised in such debentures for securing repayment of the principal money and interest in the said debentures mentioned and] directs the following accounts and inquiries to be taken and made (1) an account of what is due for principal and interest to the plaintiff and other holders of debentures and what persons are the holders of the same,(2) an inquiry of what the property comprised in and charged by the debentures consists; sometimes the order also directs an inquiry in what way the property comprised in and charged by the debentures can best be realised for the benefit of the plaintiff and other holders, and whether a sale or mortgage of the same is necessary or desirable.(*w*) (As will be seen hereafter, the order frequently contains (1) a direction to sell with the approval of the Court the property comprised in the debentures and to pay the proceeds into Court, or (2) a foreclosure order.)

(B) In the case of debentures secured by a trust deed: The Court [after making a declaration of charge] declares that the trusts of the trust deed ought to be performed and carried into execution and orders and adjudges the same accordingly and then follow the directions as to the inquiries and accounts to be made and taken.(*x*)

(C) In the case of an action brought by a holder of debenture stock: The Court [after making a declaration of charge] declares that the trusts of the trust deed ought to be performed and carried into execution and orders the following accounts and inquiries: (1) an inquiry what debenture stock has been issued by the defendant company since the date of the trust deed, (2) an account of what is due for principal and interest to the holders of such stock distinguishing the amount due for interest in respect of overdue coupons, (3) an inquiry who are now the holders of such stock and of the overdue coupons, and

(*v*) The Court has declared that debentures, which were charged on a company's mines situated in South Africa, were a first charge on such mines; *Statham* v. *London and Fagersfontein Mining Co.*, see Palmer I., p. 852; see also *Bower* v. *Foreign and Colonial Gas Co.*, W. N. (1877), p. 222.

(*w*) For other inquiries, which are directed to be made, see Appendix, Forms 46, 48, 49 and 50. It was formerly, but is not now, the practice to insert an inquiry as to preferential debts (see re *Meaby & Co.*, W. N. (1898) 58; re *Birmingham Breweries, Ld.* W. N. (1899) 93; re *Wolverhampton District Brewery*, W. N. (1899) 229). The order appointing the receiver now provides for the payment of these debts, W. N. (1900) 58. See infra, Appendix, Form 37.

(*x*) For the particulars as to the usual inquiries and accounts, see Appendix, Forms 46 and 49.

sometimes (4) an inquiry in what way the property comprised or charged by the said indenture can best be realised for the benefit of the plaintiff and the other holders of debenture stock.(*y*)

Inquiries as to incumbrances other than the Debentures.

The present practice, where no incumbrance other than the debentures or the trust deed securing the debentures or debenture stock, which it is sought to enforce, is known, is to order:—

"An inquiry what other incumbrances affect the property "comprised in or charged by the [debentures or the] trust "deed or any and what part or parts thereof."

If any such other incumbrances are disclosed by the inquiry, application will be made to add the following account and inquiries:—

(1) In whom such other incumbrances are vested,

(2) An account of what is due to such other incumbrancers respectively, and

(3) An inquiry what are the priorities of such other incumbrances and the said [debentures or] trust deed respectively and what property other than that comprised in or charged by the said [debentures or] trust deed is comprised in such other incumbrances.(*z*)

When a declaration of charge is inserted in order.

It will be noticed, that the above-mentioned orders in debenture and debenture stock holders' actions contain a declaration, that the plaintiff and the other holders of the debentures or debenture stock are entitled to a [*first*](*a*) charge on the property comprised in such securities. It has recently been decided, that it is the practice to insert in an order in such an action (even if heard as a short cause) a declaration of charge in all cases, in which the action is commenced before the company, which issued such debentures or debenture stock, has been ordered to be wound up. V. Williams, L. J. (then J.), expressed his reluctance to insert a declaration, because, when an inquiry as to the validity of the debentures (or debenture stock) of a company is suggested, the Court is frequently hampered by the existence of such a declaration, which may be held to establish beyond recall the validity, though not the priority, of the debentures (or debenture stock).

(*y*) For fuller particulars as to inquiries directed in a debenture stockholder's action, see Appendix, Form 49.

(*z*) *Re Addressograph Ld., Backhouse* v. *Same Co.* (1909) W. N. 206. See infra, Appendix, Form 46.

(*a*) North, J., and some other judges have inserted a declaration that the holders are entitled to a "first charge" (*Cockshott* v. *Doré Gallery*, Palmer III. (8th ed.), p. 443; *Bartlett* v. *Carlton Engineering Co.*, ibid.), but the usual order only contains a declaration that they are entitled to a "charge"; *Brinsley* v. *Lynton and Lynmouth Hotel Co.*, W. N. (1895) 53.

Bk. II., Ch. III., Sec. V. (3).

The declaration of charge should be omitted from the order where there are debentures or debenture stock holders, whose securities do not form part of the series represented by the plaintiff and who are not parties to the action.(*b*)

If a declaration of charge is desired in a debenture or debenture stock holder's action, which is to be tried as a short cause, the application for the order comprising such declaration should be supported by proper evidence.(*c*)

In the case of a debenture or debenture stock holder's action commenced after the company has been ordered to be wound up, such a declaration is not inserted as a matter of course and the Court may decline to make such declaration without the assent of the liquidator of the company or the official receiver.(*d*)

A judge has no power to make such a declaration in chambers. Hence, when an application was recently made by summons in chambers for judgment in the form settled in *Sadler* v. *Worley*,(*e*) Kekewich, J., required the application to be mentioned in Court.(*f*)

Declaration that Debenture is enforceable though the day fixed for payment has not arrived.

Where the company, which issued some debentures or debenture stock, is ordered to be wound up before the day mentioned in such security for the payment of the principal moneys has arrived, a holder of either of such securities is entitled (over and above the usual order for inquiries and foreclosure or sale) to a declaration that upon the occurrence of the winding up the holders became entitled to realise their securities for the full amount secured by their respective securities, notwithstanding that the day mentioned therein for payment of principal had not arrived, and the Court will direct an account of what is due for principal and interest to the time of actual payment on that footing.(*g*)

Declaration that the Debenture-holders are entitled to stand in the position of judgment creditors.

In order that debenture or debenture stock holders may avail themselves of any part of the company's property, which may not be included in their securities, the Court may declare, that the plaintiff and other holders are entitled to stand in the

(*b*) Re *Prince & Baugh Ld. Bedell* v. *Same Co.* (1902) W. N. 96.

(*c*) Re *Kitson Empire Lighting Co., Higgs* v. *Same Co.* (1910) W. N. 154.

(*d*) *Marwick* v. *Lord Thurlow*, (1895) 1 Ch. 776; 72 L. T. R. 463, overruling *Charlwood* v. *Leasehold Investment Co.*, W. N. (1895) 47; 36 Sol. Jo. 316; in the case of *Parkinson* v. *Wainwright & Co.*, W. N. (1895) 63 North, J., made a declaration.

(*e*) As to this order see Appendix, Form 52.

(*f*) *Halifax and Huddersfield Union Banking Co.* v. *Radcliffe, Limited*, W. N. (1895) 63.

(*g*) *Wallace* v. *Universal Automatic Machines Co.* (1894) 2 Ch. (C. A.) 547.

Position of judgment creditors for the whole amount and may also appoint a receiver of the property not included in their security so as to protect the holders against any other possible judgment creditors.(*h*)

As has been already stated, the orders directing the above-mentioned accounts and inquiries frequently contain a direction to sell.(*i*)

Order for sale.

The Court may, on the application of the plaintiff in a debenture or debenture stock holder's action, make an order for the sale of the undertaking charged, if the undertaking is not of a public nature, but cannot order the sale of the undertaking of a waterworks or tramway company or of any other undertaking formed for public purposes under statutory powers. The Court will not order a sale of such an undertaking of a public nature in a debenture or debenture stock holder's action, though the undertaking of any company (other than a railway company) may be wound up and the undertaking thereof be sold by the liquidator of the company in the winding up under section 267 of the Companies Consolidation Act, 1908 (re-enacting sec. 199 of the Companies Act, 1862.(*j*)

The Court may direct land situated outside the jurisdiction to be sold, if such land is comprised in the debenture or debenture stock holder's securities.(*k*)

Order LI., rule 1 B, of the Rules of the Supreme Court provides as follows:—

"In debenture-holders' actions, where the debenture-holders are entitled to a charge by virtue of their debentures or of a trust deed or otherwise and the plaintiff is suing on behalf of himself and other debenture-holders, and where the judge in person is of opinion, that there must eventually be a sale, he may in his discretion direct a sale before judgment and also after judgment, before all the persons interested are ascertained, whether served or not."

(*h*) *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730; see Seton, p. 1954.

(*i*) See Appendix, Forms 48 and 49. But the Court will not without the author's consent order the sale of the benefit of an agreement relating to the publication of a book, and will restrain a receiver from so selling such an agreement, if he attempts to do so; see *Griffiths* v. *Tower Publishing Co.* (1897) 1 Ch. 21.

(*j*) Re *Crystal Palace Co.*, *Fox* v. *Same Co.* (1911) W.N. 74, 104; *Marshall* v. *South Staffordshire Tramways Co.* (1895) 2 Ch. (C. A.) 36 (disapproving *Bartlett* v. *West Metropolitan Tramways Co.* (1894) 2 Ch. 286); see also *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399. As to the power of winding up a tramway company, see in re *Borough of Portsmouth Tramways Co.* (1892) 2 Ch. 362.

(*k*) *Barry* v. *Sao Pedro Brazil Gas Co.*; see Palmer, 5th ed., p. 620.

Bk. II., Ch. III., Sec. V. (3).

When a sale is ordered, the order directs the proceeds of the sale to be paid into Court to the credit of the action.

If the property comprised in the security, is not ordered to be sold at or before the trial of action, such property may be ordered to be sold on the further consideration of the action coming on and the proceeds of such sale are ordered to be paid into Court to the credit of the action.

Order for sale with approbation of judge.

In an action claiming the realisation of the first debenture holders' security the company, all the second debenture holders and some of the third debenture holders were made defendants. The statement of claim stated that the coal mine of the company was in danger of being destroyed by flooding and that the receiver and manager, who had been appointed, had not sufficient money to keep the mine in working order. All the defendants in their defences admitted the allegations of the claim. An affidavit verifying the allegations had been filed by the receiver (as required in an earlier case by Cozens-Hardy, J.). (*l*) The plaintiff moved for judgment on admissions and for an immediate order for sale under Or. LI. r. 1 b. Swinfen-Eady, J., ordered the sale with the approbation of the judge, so that, on the application to approve any contract for sale, the absent third debenture holders could thus be brought in. A declaration of charge, which was the foundation of the jurisdiction to sell under Or. LI. r. 1 b, was inserted in the judgment.(*m*)

Vesting order of property sold by Receiver made after dissolution of Company.

In a recent case, the Court made an order in a debenture holders' action appointing a receiver and gave judgment in the ordinary form. The receiver entered into a conditional contract for the sale of certain freehold and copyhold premises, which were subject to the debenture holders' charge. Before such contract was carried out, the company, which had gone into voluntary liquidation, was dissolved under the provisions of section 142 of the Companies Act, 1862. Under the circumstances Farwell, L.J., (then J.) held that (notwithstanding the decision of Buckley, J., in re *Taylor's Agreement Trusts*) (*n*) he had under sections 26 and 35 of the Trustee Act, 1893, power to make and made an order vesting in the purchaser the freeholds and the right to sue on the covenant to surrender the copyholds.(*o*)

(*l*) In re *Day and Night Advertising Co.* 48 W. R. 362.

(*m*) Re *Crigglestone Coal Co. Ld.* *Stewart* v. *Same Co.* (1906) 1 Ch. 523.

(*n*) (1904) 2 Ch. 737.

(*o*) Re *Richard Mills & Co.* (Brierley Hill) *Ld.*, *Smith* v. *Same Co.* (1905) W. N. p. 36.

The Court may order a sale out of Court, but then the order should be prefaced with a declaration, that the judge is satisfied, that all persons interested in the estate to be sold are before the Court or are bound by the sale.(*d*)

Foreclosure order.

The order directing the inquiries and accounts hereinbefore mentioned may, instead of directing a sale of the property comprised in the debenture or debenture stock holders' securities, sometimes order foreclosure.(*e*)

Foreclosure is, however, not generally available, where debentures or debenture stock are secured by a trust deed.(*f*) On the other hand, where debentures or debenture stock are secured, not by a trust deed, but merely by an equitable charge (such as a floating charge) on the assets of the company, the Court will, if requested to do so by all the holders of the securities, which it is sought to enforce, make a foreclosure order ;(*g*) foreclosure (and not sale) being, as a rule, the relief to which an equitable mortgagee is entitled.(*h*) However, even where the securities, which it is sought to enforce, are merely secured by an equitable charge such as a floating charge on the property of the company, the Court will not make a foreclosure order without the consent of all the holders of the series. For the result of making such an order without the consent of all the holders might be to vest in them property, which they or some of them do not wish or intend to take as their own. But in such cases, if the property charged with such floating charge is unsaleable in the market, the Court may, though compelled to decline to make a foreclosure order, be willing to order a sale under the

(*d*) *Cumberland Union Banking Co.* v. *Maryport Hematite Co.* (1892), 1 Ch. 92; see R. S. C., Or. LI., r. 1A.

(*e*) *Sadler* v. *Worley* (1894), 2 Ch. 170; *Welch* v. *The National Cycle Works Co., Limited*, 55 L. T. R. 673; 21 L. J. Notes 82; W. N. (1886), p. 97, 196. For the Form of such a foreclosure order, see Appendix, Forms 52 and 53.

(*f*) *Schweitzer* v. *Mayhew*, 31 Beav. 37; *Sampson* v. *Pattison*, 1 Hare 533; *Jenkin* v. *Row*, 5 D. & J. 107. See Fisher on Mortgages, 5th ed., pp. 479, 480.

(*g*) *Sadler* v. *Worley*, ubi supra; *Welch* v. *National Cycle Works Co.*, ubi supra.

(*h*) *James* v. *James*, 16 Eq. 153; in re *Owen* (1894), 3 Ch. 220. These cases are consistent with *Carter* v. *Wake*, 4 Ch. D. 605, which decides, that a depositee of debentures by way of mortgage (being a pledgee of chattels) is only entitled as against the depositor to an order for sale (and not to a foreclosure order) in respect of such securities. This decision is, of course, equally applicable to debenture stock certificates. Kekewich, J., states in *Sadler* v. *Worley*, ubi supra, that *Carter* v. *Wake* may be found to be inconsistent with some other decisions.

direction of the Court or to vest such property in the plaintiff and those acting with him, if they make a reasonable proposal.(*i*)

Foreclosure is not likely to be asked for and will not be successfully asked for except where the security is deficient. In such a case this remedy is peculiarly appropriate and has a value to the debenture (or debenture stock) holders, which can attach to no other.

Where a foreclosure order has been made in a debenture or debenture stock holder's action, any person holding an incumbrance ranking after and charged on the property comprised in such debentures or debenture stock may apply for a sale. This he can do without any special reservation of liberty to apply for that purpose, hence such reservation need not be inserted in the order.(*j*) If, however, the Court makes an order for sale on the application of such subsequent incumbrancer, a reserve price will be fixed large enough to cover what was due to the debenture (or debenture stock) holders, and the person so applying will be ordered to give security for the costs of the sale.(*k*)

A foreclosure order may be made, whether the proceedings for the enforcement of the debenture or debenture stock holders' securities are commenced by writ or by originating summons.(*l*)

On the expiration of the time fixed by the foreclosure order, during which the debentures or debenture stock could be paid off, the foreclosure order will be made absolute like a foreclosure order made in an ordinary mortgagee's action.(*m*)

If no order directing the preliminary accounts and inquiries to be taken and made has been made before the trial of the action, the plaintiff should, as soon as judgment has been

(*i*) In re *Continental Oxygen Co.*; *Elias* v. *Continental Oxygen Co.*, 13 Times L. R. 224; W. N. (1897) 16; (1897) 1 Ch. 511.

(*j*) *Sadler* v. *Worley* (1894), 2 Ch. 170, 175, 176.

(*k*) *Sadler* v. *Worley*, ubi supra; *Woolley* v. *Colman*, 21 Ch. D. 169.

(*l*) *Oldrey* v. *Union Works, Limited*, W. N. (1895) 77; *Sadler* v. *Worley*, ubi supra.

(*m*) *Welch* v. *The National Cycle Works Co., Limited*, W. N. (1886) 196; 55 L. T. R. 673. In this case, the plaintiff (a holder of first debentures), having failed in an attempt to carry out an order for sale, the Court on further consideration stayed the proceedings for sale and made a foreclosure order with the consent of the defendants, who held the remaining first debentures and the second debentures.

obtained ordering such accounts and inquiries, take out a summons to proceed with the accounts and inquiries.

Advertisement for the purpose of taking the account.

For the purpose of taking the account of what is due for principal and interest to the plaintiff and the other holders of debentures or debenture stock, a Master of the Supreme Court will in exercise of his power publish (*a*) an advertisement (*b*) inviting the holders to send in their claims inserted in the *London Gazette* and such London or country papers as he thinks proper, and thereupon the amounts owing by the company to the holders of such securities are, where it is necessary, proved by affidavit.

Circular notices sent to Debenture-holders for the purpose of taking the Account.

In addition to such advertisement a circular notice of the order made in the action (*c*) is, as a rule, sent by post by the Master to each debenture or debenture stock holder, whose address is known, requiring such holder to send in the particulars of his claim for principal and interest. Pursuant to such notices each holder will at the time specified in the advertisements and notice produce to the receiver or receiver and manager or sometimes to the plaintiff's solicitor:

(1) his debentures [or debenture stock certificate].
(2) his name and address.
(3) the particulars of his claims, including the amount claimed for principal and interest.
(4) the number of his debentures, or the amount of his debenture stock, and
(5) the name and address of his solicitor.

Such claims as are supported by the production of the securities and particulars required by the advertisements and circular notices need not be further proved except in the case of persons, who are expressly required to prove the same by affidavit.

Master's Certificate.

The Master embodies the accounts and inquiries, which he is directed to take and make, in a certificate.(*d*)

(*a*) As to Master's power to issue advertisements, see Order LV., 1, 16.

(*b*) See Appendix, Forms 54, 55 and 56; see also Daniel's Chancery Forms, 7th ed., p. 785.

(*c*) See Rules of the Supreme Court, App. L. Form 9*a*. Judgment is not in ordinary cases served on the debenture or debenture stock holders in such actions, full discretion being reserved to serve the judgment formally, if it is thought advisable. See the directions of the judges of the Chancery Division to the Masters dated May, 1896. See Annual Practice, 1912, p. 259.

(*d*) See Appendix, Form 51. If the certificate finds in answer to the inquiries directed, that the plaintiff in the action is indebted to the company in a specified sum in respect of uncalled capital on his shares, the Court has jurisdiction to try the question of his liability and to vary the certificate without waiting for the liability to be ascertained by separate proceedings. But the Court declined in a recent case to decide the question, as some of the shareholders, whose case was the same as the plaintiffs, were not before the Court, *Madeley* v. *Ross, Sleeman & Co.*, 102 L. T. J. 364; W. N (1897) 16; (1897) 1 Ch. 505.

Amount provable where Debenture is issued by way of collateral security.

Persons holding debentures or debenture stock by way of collateral security may prove for the full amount, provided that they do not receive more than the amount advanced by them and interest thereon.(*e*) A person, who had an option at any time to call for a specified number of debentures, was held to be entitled to prove in a debenture holder's action *pari passu* with the other holders of debentures of the same series, even though he did not call for such debentures until after judgment in such action had been given.(*f*)

The right of subrogation.

In ascertaining, how much is due to the holders of debentures or debenture stock, which turn out to have been issued *ultra vires*, the Master will not necessarily find, that the holders are not entitled to any sum in respect of such securities, for sometimes the holders of debentures or debenture stock, which were issued *ultra vires*, may avail themselves of the right of subrogation as against the company, which issued such debentures or debenture stock. For, though debentures and debenture stock issued by a company, which originally had and still has no express or implied borrowing power, or which has exhausted its limited borrowing power, are void, yet, if the money advanced by the holder of such debentures or debenture stock to a company, which was acting *ultra vires* in issuing such securities, has been employed in payment of debts or liabilities properly payable by the company, such debenture or debenture stock holder is entitled upon the principle of subrogation to recover from the company such parts of the moneys lent as were so employed, together with interest thereon from the date of such employment,(*g*) whether such debts or liabilities existed at the time of the advance or accrued due subsequently.(*h*) However, such debts or liabilities must be of such a nature as to be enforceable against the company.

(*e*) Re *Queensland Land Co.*, *Davis* v. *Martin*, 71 L. T. R. 115. In this case, after declaring that the persons holding the debentures as collateral securities were entitled to stand in equity in the same position as they would have been in, if their debentures had originally contained the name of the obligee, and that such persons were entitled to prove in respect of their debentures *pari passu* with the other debenture holders, the Court declared that the persons holding the debentures by way of collateral security were not to receive by virtue of their debentures any greater sum in the whole than was due to them for principal and interest in respect of the advances, for which they held such debentures as security.

For the amount provable in respect of collateral security, see infra, Bk. II., ch. iii., sec. vii.

(*f*) *Pegge* v. *Neath and District Tramways Co.* (1898) 1 Ch. 183.

(*g*) *Troup's Case*, 29 Beav. 357.

(*h*) Re *Wrexham Mold, etc., Ry. Co.* (1899) 1 Ch. (C. A.) 440; *Baroness Wenlock* v. *River Dee Co.* (2), 19 Q. B. Div. 155; in re *Cork and Youghal Ry. Co.*, 4 Ch. 748.

The onus of proving, that the moneys lent were so employed, is on the lender. This equitable doctrine is perfectly consistent with the general rule of law, that persons, who have no borrowing powers, cannot by borrowing contract debts to the lenders because the transaction has not really added to the liabilities of the company, but has merely brought about a change of the creditor.(*i*)

Inquiry ordered where there is a right of subrogation.

Where the debenture or debenture stock holders have a right of subrogation,(*j*) the Court will also direct an inquiry whether any and what part or parts of the sums advanced by the debenture or debenture stock holders to the company were employed in payment of any debts or liabilities of the company properly payable by the company and have not been repaid to such debenture or debenture stock holders.

Recovery of arrears of interest.

If a Master certifies in a debenture holders' action the amounts due to the various debenture holders for principal, but forbears to compute any interest, because the security is believed to be insufficient, and orders are made directing payments to be made to the debenture holders on the principal sums certified to be due to them and it subsequently turns out, on the principal sums being paid to the debenture holders, that there is a sufficient surplus to pay all the arrears of interest, the debenture holders will, notwithstanding the above mentioned order, be entitled to receive all the arrears of interest before any surplus is paid to the company.(*k*)

Set off against amount provable for Debenture.

If one of the persons proving in respect of his debentures or debenture stock in an action is at the time of such proof indebted to the company, such debt must be deducted from the amount due on his debentures or debenture stock. The principle, on which such deduction is made, is stated by Stirling, L. J. (then J.), in the following passage from the judgment in *Re Goy & Co.*(*l*):

"It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the

(*i*) *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. Div. 61; *Neath Building Society* v. *Luce*, 43 Ch. D. 158, 164; in re *Magdalena Steam Navigation Co.*, 3 L. T. R. 147.

(*j*) *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. Div. 155, 36 Ch. Div. 675, 684*n*.

(*k*) Re *Calgary & Medicine Hat Land Co., Pigeon* v. *Same Co.* (1908) 2 Ch. (C. A.) 652.

(*l*) (1900) 2 Ch. 149, 153, followed in re *Brown & Gregory Ld.* (1904) 1 Ch. 627.

Bk. II., Ch. III., Sec. V. (3).

same fund. Under such circumstances the Court in effect says to the person claiming to be paid "You have in your hands that which is applicable to the payment,—pay yourself". This has been done on the distribution of the residuary estate of a testator, where a person entitled to a share is also indebted to the estate.(*m*) Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held, that the creditor could not take any dividend, until all calls due on the shares were paid.(*n*) In *Re Milan Tramways Company*, ex parte *Theys*,(*o*) Cotton, L. J., said, that "probably the principle was applicable to a fund, to which debenture holders were entitled".

Amount recoverable where Debenture-holder is a Debtor of the Company.

If a holder of debentures or debenture stock, for the enforcement of which proceedings have been taken, owes money to the company, the amount recoverable in the action in respect of such securities must be retained and carried to a separate account, pending the ascertainment of the amount of such debt.(*p*)

Where a holder of debentures or debenture stock, which are or is not expressly made transferable free from equities, transfers the same after the appointment of a receiver in an action brought to enforce such securities, any debt owing by such transferor to the company should, even as against the transferee, be retained out of the sums payable in respect of the securities so transferred.(*q*)

Amount provable on re-issued Debentnres.

The holder of debentures or debenture stock properly re-issued pursuant to section 104 of the Companies Consolidation Act, 1908, can prove in an action for the same amount as if the re-issued securities had not been previously issued.

Delivery of Cheque for Interest to Debenture-holder does not operate as release of security.

The delivery of a cheque drawn by a company for the principal or interest secured by its debentures or debenture stock does not operate as a conditional payment of such principal or interest, so as to release the security, and the Court has held that the indorsement of such a cheque will not preclude the holder of such debentures or debenture stock from relying on his security or from proving in a debenture or a debenture stock holders' action for the full amount of the principal and interest secured thereby, except so far as the same shall have been actually paid in cash.(*r*)

(*m*) *Willes* v. *Greenhill*, 20 B. 376; *Re Akerman* (1891) 3 Ch. 212; re *Watson* (1896) 1 Ch. 925.

(*n*) Re *Auriferous Properties* (1898) 2 Ch. 428.

(*o*) 25 Ch. Div. 587, 593.

(*p*) Re *Rhodesia Goldfields Ld., Partridge* v. *Same Co.* (1910) 1 Ch. 239.

(*q*) Ibid.

(*r*) Re *J. Defries & Sons Ld., Eichholz* v. *Same Co.* (1909) 2 Ch. 423.

Amount provable by transferee of Debentures.

A *bona fide* transferee of debentures or debenture stock for value without notice taken under a transfer executed after judgment in a debenture or debenture stock holder's action may, even though the company had a right of set off against the transferor, prove for the full amount of the securities transferred to him, if it is expressly provided by the debentures or by the trust deed that the transferee shall take free from equities.(*s*) If, however, such securities are transferred to a person as trustee for the transferor's creditors, the transferee can stand in no better position than the transferor and will consequently be required to bring into account all sums owing by the transferor to the company before such transferee will be allowed to prove for the amount of the securities transferred to him.(*t*)

Amount provable by Depositee.

A depositee of debentures or a debenture stock certificate by way of security may prove in the action for the full nominal amount of the debentures or the certificate so deposited, provided that the amount actually received by the depositee does not exceed the sum secured by the deposit and the interest agreed to be paid in respect thereof.(*u*)

Debenture-holder's action tried as a short cause.

A debenture or debenture stock holder's action may, of course, like any other action, be tried as a short cause. Where this is desired, the Master may, on the summons for directions being taken out under Order XXX. of the Rules of the Supreme Court, with the consent of all the parties to the action, order the action to be set down as a short cause without pleadings and the Judge can, on the action coming on for hearing, make the order without any statement of claim.(*v*) The Master should, however, not set down such an action as a short cause to be tried without pleadings, unless the company appear before him on the hearing of the summons and state that they will appear before the Judge at the hearing and will consent to the order.(*w*) In such a case the Master's order should direct the evidence to be taken by affidavit.(*x*)

(*s*) Re *Goy & Co.* (1900) 2 Ch. 149. But see re *Palmer's Decoration & Furnishing Co.* (1904) 2 Ch. 743, where the *unregistered* transferee of debentures, the issue of which had been obtained by misrepresentations on the part of the transferor, was held *not* to be entitled to the benefit of the debentures free from equities.

(*t*) Re *Brown & Gregory Ld., Andrews* v. *Same Co.* (1904) 1 Ch. 627; (1904) 2 Ch. (C. A.) 448.

(*u*) *Robinson* v. *Montgomeryshire Brewery Co.* (1896) 2 Ch. 841; re *Vint* (1905), 1 Ir. R. 112.

(*v*) The majority of the judicial authorities hold that a statement of claim need not be required in such a case (re *Pringle & Co. Ld.* (1903) W. N. 207; re *Cadogan & Hans Place Estate Ld.* (1906) W. N. 112; re *Kitson Empire Lighting Co.* (1910) W. N. 154; dissenting from re *Dupont Ld.* (1906) W. N. 14, in which Eady, J., held that a statement of claim must be required in such a case.

(*w*) Re *Kitson Empire Lighting Co.* (1910) W. N. 154.

(*x*) Re *Gutta Percha Corporation Ld.* (1899) W. N. 251.

Copies of the affidavits should be left with the papers for the use of the Judge.(*y*) Where such an action is tried as a short cause and a declaration of charge is desired, the motion for judgment should be supported with proper evidence.(*z*)

Order directing calling up of uncalled capital after winding-uo drder.

If a company is ordered to be wound up after an action has been commenced for enforcing the debentures or debenture stock charged on its uncalled capital and a receiver has been appointed, the plaintiff in such action must, in order to enforce the charge on the uncalled capital, take out a summons in the action and in the winding up asking either (1) that the liquidator may be ordered to take the proper steps for calling up and enforcing the payment of such uncalled capital on being sufficiently indemnified by the applicant,(*a*) or (2) that the receiver may, on undertaking to leave the books of the company in the possession of the liquidator and indemnifying him against costs, be ordered to take the proceedings necessary for getting in the uncalled capital and for that purpose to use the name of the liquidator, or, if necessary, of the company.(*b*)

Order directing sale by auction of a claim against directors in respect of misfeasance.

Where the holders of the debentures or debenture stock, which constitute a floating charge on the whole assets of the company, are not willing to provide for the costs of misfeasance proceedings to be taken against the directors (or any other persons, who may be liable to such proceedings) the Court may, on an action to enforce such securities being commenced, make an order in such action directing the claim against such directors (or other persons) to be sold by auction.(*c*)

Orders on further consideration.

As has been stated above, where the Court makes a foreclosure order, the order will after the expiration of a fixed time be made absolute on further consideration.

Where the Court orders a sale, the proceeds thereof will in pursuance of the order be paid into Court and, on the Master's certificate being filed, the further consideration of the action will

(*y*) Re *Church Stretton Mineral Waters Co. Ld.* (1904) W. N. 48.

(*z*) Re *Kitson Empire Lighting Co.* (1910) W. N. 154.

(*a*) *Fowler* v. *Broad's Patent Night Light Co.* (1893) 1 Ch. 724; see Appendix, Form 57. However, the sanction of the Court or of the committee of inspection to employ a solicitor and to bring legal proceedings should be obtained by the liquidator before taking any steps under this order. Re *London Metallurgical Co.*, 41 Sol. Jo. 491; (1897) 2 Ch. 262.

(*b*) *Harrison* v. *St. Etienne Brewery Co.*, W. N. (1893) 108; re *Westminster Syndicate Ld.* (1908) W. N. 236. See Appendix, Form 58.

(*c*) *Wood* v. *Woodhouse & Rawson, Limited*, W. N. (1896) 4. As to misfeasance proceedings, see infra, Bk. II., ch. vi., sec. ii.

again come on and an order will be made providing for the payment of the costs and expenses of realisation and of the action and the distribution of the balance (after the payment of such costs and expenses) among the debenture (or debenture stock) holders, and the discharge of the receiver or receiver and manager on his passing his final accounts, or sometimes the passing of his final accounts is dispensed with.(*d*)

Applications for orders on the further consideration of any cause or matter, where the order to be made is for the distribution of a fund among creditors or debenture-holders, should be made by summons under Or. LV., rule 2 (16).

Order directing company to appoint Plaintiff's Nominee as Company's Attorney.

The Court may in a proper case, on the application of the plaintiff in a debenture or debenture stock holders' action, in which a receiver has been appointed, order the defendant company (1) to revoke a power of attorney authorising a specified person to take possession of a foreign mine belonging to the company, and (2) to execute another power of attorney appointing the plaintiff's nominee to be the attorney of the company for the purpose of taking possession of such mine on behalf of the receiver, the plaintiff undertaking to indemnify the company in respect of the acts of the new attorney.(*e*)

Transfer of Debenture-holder's action to the winding up judge.

"Where an order has been made in the High Court for the winding-up of a company, the judge shall have power, without further consent, to order the transfer to him of any action, cause or matter pending in any other Court or Division brought or continued by or against the company, and any action or proceeding by a mortgagee or debenture-holder of the company against the company for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the company's assets or property, which is pending in the High Court or before any judge thereof shall without further order be transferred to the judge of the High Court."(*f*)

Order XLIX. r. 5a, provides as follows:—

"Upon a winding up order being made against a company, all chamber proceedings in any action against such company, at the instance or on behalf of debenture holders, pending before the judges, to whom for the time being company business is as-

(*d*) See Appendix, Forms 59 and 61. For a Master's certificate apportioning the funds in Court see Appendix Form 60.

(*e*) Re *Huinac Copper Mines Ld.*, *Matheson & Co.* v. *Same Co.* (1910) W. N. 218.

(*f*) See Companies (Winding Up) Rules 1909, Rule 42 (1).

Bk II., Ch. III., Sec. V. (4).

signed, shall be dealt with by the registrar in companies' winding up."

The transfer is usually effected at the instance of the official receiver without the intervention of the parties to the action, but notice of the application for the transfer is given to the plaintiff's solicitor.

Where any action is transferred to the judge, who for the ime being exercises the jurisdiction of the High Court to wind up companies, the Registrar may under the general or special directions of the judge, hear, determine and deal with any application, matter or proceeding, which, if the action had not been transferred, would have been determined in chambers.(*g*)

In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act or by transfer or otherwise, the Registrar shall, in addition to his powers and duties under the Companies Winding-up Rules, 1909, have all the powers and duties of a Master, Registrar, or Taxing Master.(*h*)

After judgment in a debenture or debenture stock holder's action the plaintiff may discontinue the action, if he has no notice that any other holder claims to have the benefit of the judgment.(*i*)

SUB-SECTION 4. *In what Order the Plaintiff Debenture or Debenture Stock Holder's and other Costs are Paid.*

Order of priority in which the costs of a Debenture-holder's action are paid.

The costs and expenses hereinafter specified are payable in priority to the debenture or debenture stock holder's charges in the following order out of the moneys produced by the sale of the property comprised in the debenture or debenture stock holder's securities:—

(1) The costs properly incurred by the plaintiff or plaintiffs in realising the assets of the company comprised in the debenture or debenture stock holder's charges including the costs of an abortive attempt to sell.(*j*) (The assets must be realised by some one, in order that they may be distributed, and whoever has realised them and brought the proceeds under the control of the Court has really constituted the fund, which has to be distributed for the

(*g*) See Rule 42 (2) of the Companies (Winding Up) Rules, 1909.

(*h*) See Rule 4 (3) of the Companies (Winding Up) Rules, 1909.

(*i*) Re *Alpha & Co. Ld.* (1903) 1 Ch. 203.

(*j*) *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

benefit of the receiver and every one else, who is entitled.)(*k*) It may not always be easy to decide, whether certain costs are comprised in the costs of realisation; the following are costs of realisation: An annual sum payable by a ferry company to the conservators of the Thames by way of rent, auctioneer's fees, and the fees for the survey necessary for preparing conditions of sale and so on.(*l*)

(2) The balance due to the receiver or receiver and manager including the remuneration and his costs in the suit.

(3) The costs, charges and expenses of the trustees of the trust deed (in cases, in which there is a trust deed).(*m*)

(4) The plaintiff's costs in the action, and, in case another debenture or debenture stock holder was substituted as plaintiff in the place of the original plaintiff, the costs of the original and the substituted plaintiff rank *pari passu*.(*n*) If the assets charged in favour of the class of debenture or debenture stock holders, on whose behalf the proceedings are taken, are *insufficient* to satisfy the sums so charged and belong *exclusively* to such holders, the plaintiff in such proceedings is entitled to costs as *between solicitor and client*. He is entitled to costs as between solicitor and client, because he has been instrumental in securing, for the benefit of such class, assets, which belong exclusively to such class, and it is inequitable, that such assets should be distributed among such class without completely indemnifying the plaintiff, and such a complete indemnity can only be given by allowing costs as between solicitor and client.(*o*) If, on the other hand, the assets charged in favour of the class of debenture or debenture stock holders, on whose behalf the proceedings are taken, are either *sufficient* to satisfy the sums so charged or are *not exclusively* the property of such class, the

(*k*) In re *Marine Mansions*, 4 Eq. 601, 611; *Perry* v. *Oriental Hotels Co.*, 12 Eq. 126, 134; in re *Professional Life Assurance Co.*, 3 Ch. 167, 175; re *Regents Canal Ironworks Co.*, 3 Ch. Div. 411, 427; in re *Staffordshire Gas and Coke Co.* (1893) 3 Ch. 523, 528; *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. R. 790, 793, W. N. (1895) 77.

(*l*) *Lathom* v. *Greenwich Ferry Co.*, ubi supra.

(*m*) For Form of order where the company and the trustees appear by the same solicitors as defendants in a debenture or debenture stock holder's action and the company's costs are not allowed, see *Mortgage Insurance Corporation* v. *Canadian Agricultural Coal Co.* (1901) 2 Ch. 377, 382. See also infra, Appendix, Form 63.

(*n*) *Batten* v. *Wedgewood Coal and Iron Co.*, 28 Ch. D. 317, followed in *Strapp* v. *Bull, Sons & Co.* (1895) 2 Ch. (C. A.) 1.

(*o*) Re *New Zealand Midland Ry. Co.*, *Smith* v. *Lubbuck* (1901) 2 Ch. (C. A.) 357; re *A. Boynton Ld.* (1910) 1 Ch. 519, 525; re *London United Breweries Ld.* (1907) 2 Ch. 511, 516.

Bk. II., Ch. III., Sec. V. (4).

plaintiff will only be entitled to *party and party costs;* for in such last-mentioned cases the debenture or debenture stock holders can only be entitled to party and party costs as against the company and any other persons, who are interested in such assets.(*p*)

Charge in favour of Plaintiff's Solicitor on property recovered in Debenture-holder's action.

Where the assets charged realise more than the amount due to the debenture or debenture stock holders and the plaintiff in the proceedings is therefore only entitled to party and party costs, the Court has jurisdiction by virtue of section 28 of the Solicitors Act, 1860 (23 and 24 Vic. cap. 127) to give to the solicitor employed in such proceedings a charge upon the property recovered or preserved through his exertions for his "taxed costs, charges and expenses of or in reference to such . . . proceedings". However, as this statute was passed for the benefit of solicitors (and not of their clients), the Court will, as a rule, only exercise it, if it can be shown that the plaintiff in the proceedings, in which the property has been recovered, is unable to pay the costs or part of them. This power was exercised in a recent case,(*q*) in which the facts were as follows:—

A solicitor, acting for the plaintiff in a debenture-holder's action and a receiver and manager appointed therein, took various proceedings for the benefit of the debenture-holders with the sanction of the Court and in the result property was recovered and the funds paid into Court were sufficient to pay the debenture-holders in full and to leave a large balance. The plaintiff in the action being unable to pay the difference between the party and party costs and the solicitor and client costs, the Court declared that the solicitor was entitled to a charge on the balance for such difference.

Claim of Creditor advancing money to manager.

If a receiver and manager appointed by the Court in a debenture or debenture stock holders' action in the course of performing his functions as manager borrows money for the purpose of carrying on the business of the company without pledging his personal credit and the amount eventually realised turns out to be insufficient to satisfy (i) the costs of realisation of the assets, (ii) the remuneration of the receiver and manager, and (iii) the moneys so borrowed, in such a case the costs of realisation and

(*p*) Re *New Zealand Midland Ry. Co.*, *Smith* v. *Lubbuck* (1901) 2 Ch. (C. A.) 365, 370; re *Queen's Hotel Co., Cardiff Ld.*; re *Vernon Tin Co.* (1900) 1 Ch. 792.

(*q*) Re *W. C. Horne & Sons Ld.*, *Horne* v. *Same Co.* (1906) 1 Ch. 271, following *Harrison* v. *Cornwall Minerals Ry. Co.*, 32 W. R. 748; 53 L. J. Ch. 596.

the remuneration of the receiver will rank above the claim for the moneys lent.(*r*)

The costs of preservation.

The question, how far the costs of the preservation (as distinguished from the costs of the realisation) of the property comprised in the debenture or debenture stock holders' securities will have priority over the debentures or debenture stock, is one of some difficulty. In the case of *Perry* v. *Oriental Hotels Company*,(*s*) the Court treated the costs of the preservation of the property, which is comprised in the debenture-holders' securities, on a level with the charges of realisation and decided that, though as between the debenture-holders and the company the costs of the preservation of the property charged with such securities are payable by the company, yet, if the assets of the company are not sufficient to meet the costs of preservation, the liquidator of the company is entitled as against and in priority to the debenture-holders to be paid such costs out of the property charged. This case was, however, not followed in *Lathom* v. *Greenwich Ferry Company*,(*t*) and does not appear to have been acted upon in other cases. Though it was not necessary for the decision, James, L. J., seems to suggest in *ex parte Grissell*,(*u*) that the costs of preservation will, if incurred for the purpose of repairing the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take charge of the property, have priority over the debenture-holders' charge. In such a case the costs of preservation come under the head of salvage.(*v*)

Costs of Debenture-holder's action when Debentures do not rank *pari passu*.

If a holder of debentures or debenture stock not forming part of a series ranking *pari passu* takes proceedings to enforce his securities and it eventually turns out, on the whole of the property of the company being sold, that he is not entitled to any share of the proceeds of sale, such proceeds having been entirely absorbed by the holders of debentures or debenture stock ranking above him, yet, if the proceedings taken by the plaintiff have in the opinion of the Court been for the benefit of the persons interested in such proceeds, the plaintiff will be

(*r*) Re *A. Boynton Ld., Hoffmann* v. *Same Co.* (1910) 1 Ch. 519.

(*s*) 12 Eq. 126.

(*t*) 72 L. T. R. 790, W. N. (1895) 77.

(*u*) 3 Ch. Div. 411, 427.

(*v*) In re *Staffordshire Gas and Coke Co.* (1893) 3 Ch. 523, 528. This case is overruled by in re *Bolton & Co.* (1895) 1 Ch. (C. A.) 333, but not on this point. See also re *W. C. Horne & Sons Ld.* (1906) 1 Ch. 271.

entitled to the costs of the action other than such (if any) as have been incurred by him in support of his own security only.(*w*)

Costs of defendants.

The defendant company in a debenture or debenture stock holder's action is not entitled to costs, unless the action fails; neither are the holders of second or third debentures, who have been made defendants in such an action, entitled to their costs, but they must look to the surplus assets of the company, if there is any such surplus after satisfying the claims of the first debenture or debenture stock holders' in respect of their securities and costs.(*x*)

SECTION VI. *The Winding up of a Company on the Application of a Debenture or Debenture Stock Holder or the Trustees of either of them.*

Who may present a winding-up petition for enforcing Debentures.

A winding-up order may, as a general rule, be obtained by a debenture or debenture stock holder or the trustees of the covering deed of either of them (even if such deed has not been executed till after the presenting of the petition, provided that the trustees have acted and been acknowledged by the company) (*y*) or by a depositee by way of mortgage of debentures to bearer (*z*) or of a debenture stock certificate to bearer under the same circumstances as would warrant the making of such an order on the application of any other creditor, and such order may be obtained by such persons (even after the appointment of a receiver) (*a*) without giving up their securities or losing any rights.(*b*) If, however, the securities show clearly, that the trustees only (and not the holders of the securities) are to have the right of enforcing them, the Court will not make a winding-up order at the instance of a debenture or debenture stock holder. Thus in the case of the *Uruguay Central and Hygueritas Railway Company* (*c*) a debenture trust deed contained a covenant by the company to pay the interest on the debentures to the trustees and each debenture contained a covenant by the company with

(*w*) *Carrick* v. *Wigan Tramway Co.*, W. N. (1893) 98, following *Batten* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612.

(*x*) *Re Clayton Engineering Co. Ld.*, *Boddington* v. *Same Co.* (1904) W. N. 28.

(*y*) In re *Anglo-French Co-operative Society, Ld.*, 23 Sol. Jo. 951; 67 L. T. J. 413.

(*z*) In re *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*a*) In re *Borough of Portsmouth Tramways Co.* (1892) 2 Ch. 362.

(*b*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681; Lindley, p. 843.

(*c*) 11 Ch. D. 372; re *Dunderland Iron Ore Co.* (1909) 1 Ch. 446.

the trustees for payment of £100 to the bearer thereof and of interest to the bearer of the coupons annexed to the bonds; it was held, that the bearer was not an equitable or legal creditor of the company as to principal or interest, so as to be entitled to present a winding-up petition, his right of action being only through the trustees. The debenture in this case, which was a very peculiar document, was held to show a clear intention, that it should not be enforced by the bearer.

A Debenture-holder may petition even after having obtained judgment against the Company in a Debenture-holder's action.

When a debenture (or debenture stock) holder obtains a judgment in a debenture (or debenture stock) holder's action against the company, which issued his securities, and then petitions for its winding up, he does not seek to enforce his security, but comes as a judgment creditor of the company, and may, like any ordinary creditor, present a petition to wind up the company, and obtain an order upon it.(*d*) On this ground, Stirling, L. J. (then J.), refused to follow *in re Exmouth Dock Co.*(*e*) and *in re Herne Bay Waterworks Co.*(*f*) which decided, that, where debenture-holders were empowered by Act of Parliament to enforce payment of principal and interest by the appointment of a receiver, the Court should not make at their instance a winding-up order, until a receiver had been actually appointed and had failed to obtain payment.

However, in a recent case,(*g*) in which the whole of the assets had been assigned to trustees on behalf of the debenture-holders and such trustees had taken possession of the assets, the Court dismissed a winding-up petition by a debenture-holder, who had obtained a judgment against the company in respect of interest due under his debentures, on the ground that a winding-up order would cause unnecessary expense and that there were no assets to meet such expense.

When a holder of Debentures issued *ultra vires* may petition.

A claim for money borrowed by a company *ultra vires* will not support a winding-up petition.(*h*) But, if a company borrows money *ultra vires* and issues debentures or debenture stock to the person advancing the money and such money is employed to pay debts, which would be recoverable at law from the company, such person may petition for the winding up of the

(*d*) In re *Borough of Portsmouth Tramways Co.* (1892) 2 Ch. 362.
(*e*) 17 Eq. 181.
(*f*) 10 Ch. D. 42.
(*g*) In re *The Gurrington Slate Quarries*, 25 Sol. Jo. 430.
(*h*) In re *National Building Society*, 5 Ch. 309.

company(*i*), for (as we have seen in an earlier section of this chapter)(*j*) in such a case the debenture or debenture stock holder becomes, on the principle of subrogation, a creditor of the company for the money so advanced and employed.

Effect of a winding-up order.

The effect of a winding-up order is (by virtue of section 142 of the Companies Consolidation Act, 1908) to render it necessary for any person, who wishes to take any proceedings against the company ordered to be wound up, to apply to the Court for leave to take such proceedings.(*k*) A further effect of such an order (section 211 of the same Act) is to avoid any attachment, sequestration, distress or execution put in force against the property of the company.(*l*) Another effect of a winding-up order is to transfer the power to make calls from the directors to the official receiver or the liquidator of the company ordered to be wound up.(*m*)

Debenture-holder may petition without giving up his securities.

A debenture or debenture stock holder may present a winding-up petition without giving up or valuing his securities; for the bankruptcy rule, which provides that a secured creditor can only petition in bankruptcy, if he gives up his security or if he values it and founds his petition on the balance of the debt after setting off the value of the security, does not apply to the winding up of a company.(*n*)

In the following pages it is proposed to examine briefly,(*o*) when a debenture or debenture stock holder or the trustees of the covering deed of either of them is or are entitled to a winding-up order against (1) a company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, and (2) a company not so registered.

(*i*) In re *German Mining Company*, 4 De G. M. & G. 19; in re *Cork and Youghal Railway Co.*, 4 Ch. 748.

(*j*) Sec. v. (3), pp. 265-266.

(*k*) As to when the Court will give such leave, see supra, Bk. II., ch. iii., sec. iii.

(*l*) Sections 87 and 163 of the Companies Act, 1862 (which are re-enacted by sections 142 and 211 of the Companies Consolidation Act, 1908) have always been read together and the joint effect of these sections has been held to be to empower the Court to authorise a distress, but such distress will only be authorised, if there are special circumstances rendering it inequitable, that the company should be allowed to shelter itself against such distress by section 163. In re *Exhall Coal Mining Co.*, 4 D. J. & S. 377; in re *Lancashire Spinning Co.*, 35 Ch. Div. 656. The trustees of a debenture holder's trust deed, which contained a power of distress for arrears of interest, were not allowed by the Court to distrain, on the company being wound up, for arrears of interest due before the commencement of the winding up; in re *Brown, Bayley & Dixon*, 18 Ch. D. 649.

(*m*) *Fowler* v. *Broad's Night Light Co.* (1893) 1 Ch. 724.

(*n*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*o*) For further particulars on the winding up of companies, the reader is referred to Buckley and Lindley.

SUB-SECTION 1. *Winding up of Companies registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908.*

Compulsory winding-up by Court.

Any company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, may by virtue of the provisions of section 129 of the last-mentioned Act be compulsorily wound up by the Court on the application by petition of a debenture or debenture stock holder (or generally any creditor) of a company under the following circumstances:

Sec. 129 of Comp. Cons. Act, 1908. Circumstances in which Company may be wound up by Court.

"129. A company may be wound up by the court—

"(i) if the company has by special resolution resolved that the "company be wound up by the court:

"(ii) if default is made in filing the statutory report or in "holding the statutory meeting:

"(iii) if the company does not commence its business within a "year from its incorporation, or suspends its business for "a whole year:

"(iv) if the number of members is reduced, in the case of a "private company, below two, or, in the case of any "other company, below seven:

"(v) if the company is unable to pay its debts:

"(vi) if the Court is of opinion that it is just and equitable(*p*) "that the company should be wound up."

The expression "unable to pay its debts" used in clause (v) of section 129 is explained by section 130 of the Act, which provides as follows:—

Sec. 130 of Comp. Cons. Act, 1908. Company when deemed unable to pay its debts.

"130. A company shall be deemed to be unable to pay its "debts—

"(i) if a creditor, by assignment or otherwise, to whom the "company is indebted in a sum exceeding fifty pounds "then due, has served on the company, by leaving the "same at its registered office, a demand under his hand "requiring the company to pay the sum so due, and the "company has for three weeks thereafter neglected to "pay the sum, or to secure or compound for it to the "reasonable satisfaction of the creditor; or

(*p*) The expression "just and equitable" must be interpreted as relating to matters *ejusdem generis* as those contained in the previous clauses of the section (ex parte *Spackman*, 1 M. & G. 170; 18 L.J. (Ch.) 261; in re *Suburban Hotel Co.* 2 Ch. 737; re *Anglo-Greek Steam Co.* 2 Eq. 1; re *European Life Assurance Society*, 9 Eq. 122) but has recently been treated as sufficiently wide to comprise a case in which a winding up order was asked for the purpose of (1) putting an end to a deadlock in a company's affairs (re *Sailing Ship Kentmare Co.* (1897) W. N. 58) or (2) facilitating the carrying into effect of a scheme of arrangement (re *Australian Joint Stock Bank* (1897) W. N. 48).

"(ii) if in England or Ireland, execution or other process issued "on a judgment decree or order of any court in favour of "a creditor of the company is returned unsatisfied in "whole or in part; or

"(iii) if, in Scotland, the induciæ of a charge for payment on "an extract decree, or an extract registered bond, or an "extract registered protest have expired without payment "being made; or

"(iv) if it is proved to the satisfaction of the court that the "company is unable to pay its debts, and, in determining "whether a company is unable to pay its debts, the court "shall take into account the contingent and prospective "liabilities of the company."

Clause (iv) of section 130 enables a debenture or debenture stock holder to petition for a winding up, even though no principal or interest is actually payable; formerly the Court used to refuse to order the winding up of a company on a petition of a holder of debentures or debenture stock, unless some principal or interest was presently payable.(*q*)

Court may have regard to wishes of creditors and contributories in all matters relating to winding up.

If a debenture or debenture stock holder presents a petition to wind up the company, which issued his security, regard will be had to the wishes of the other holders and other creditors opposing the petition, and the Court may under section 145 of the Companies Consolidation Act, 1908, refuse to make a winding up order. Even in a case, in which a debenture or debenture stock holder would, as a rule, be entitled to a winding-up order, an exception will generally be made to the rule and a winding-up order refused, if a vast majority in number and value of the holders oppose the winding-up petition.(*r*) The Court will consider, not merely the number of the opposing holders and the value of their debts, but will also have regard to the reasons, which they adduce for opposing such petition.(*s*) However, in a recent case (*t*) a company was ordered to be wound up on the application of a debenture-holder, notwithstanding the opposition of a very large majority of the debenture-holders, who alleged that a winding-up order would be disastrous to the creditors of the company.

(*q*) Re *Melbourne Brewery & Distillery* (1901) 1 Ch. 453.

(*r*) In re *Uruguay Central Railway Co.*, 11 Ch. D. 372; in re *Chapel House Colliery Co.*, 24 Ch. Div. 259; in re *Great Western Coal Consumers Co.*, 21 Ch. D. 769; re *Crigglestone Coal Co.* (1906) 2 Ch. (C. A.), 327, 332.

(*s*) In re *Great Western Coal Consumers Co.*, ubi supra.

(*t*) In re *International Commercial Co., Limited;* see *Times* Newspaper, 20th Jany, 1897.

If a very large majority of debenture or debenture stock holders think, that their interests would be better promoted by delay, and delay appears to the Court reasonable under the circumstances, it may order the petition to stand over for a specified period.(*u*)

Right as against a Company to compulsory winding up before commencement of voluntary winding up.

Before the commencement of the voluntary winding up of a company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, an ordinary creditor of such a company will (as a general rule) (*v*) be entitled *ex debito justiciæ* as against the company to an order for the compulsory winding up of the company, if he cannot get paid, without the winding up.(*w*) It is not (as a rule) a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not, that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively, that no case could occur, in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding up.(*x*) This is a general, but not a universal rule.(*y*)

There is no reason, why a debenture or debenture stock holder, whose debt is payable and who has exhausted all his remedies except a winding-up petition without obtaining payment of his debt, should be in a worse position than an ordinary creditor, who has got no security upon the undertaking. The remedy given to him to enforce his security upon the undertaking as a going concern, does not deprive him of his remedy as a creditor, who has obtained a judgment for his debt, but cannot obtain payment.(*z*)

Right as against a Company to compulsory winding up after commencement of voluntary winding up.

Even after the commencement of a voluntary winding up of a company the Court will under certain circumstances order such company to be wound up either compulsorily or under the supervision of the Court. Thus, where the affairs of the company required a thorough investigation and the assets and interests concerned were enormous, the Court made a compulsory winding-up order, though the company was being voluntary wound up and the company petitioned for the continuance of the voluntary

(*u*) In re *Western of Canada Oil, Lands and Works Co.*, 17 Eq. 1; in re *Great Western Coal Consumers Co.*, 21 Ch. D. 769.

(*v*) In re *Uruguay Central Ry. Co.*, 11 Ch. D. 372, 383.

(*w*) In re *Western of Canada Oil, Lands and Works Co.*, 17 Eq. 1, 6; *The Company of the Free Fishermen of Faversham*, 36 Ch. Div. 329, 339.

(*x*) *Bowes* v. *Hope Life Assurance Co.*, 11 H. L. C. 389, 402; *General Company for promotion of Land Credit*, 5 Ch. 363, 380; L. R. 5 H. L. 176; re *Crigglestone Coal Co.* (1906) 2 Ch. (C. A.) 327, 331.

(*y*) In re *Chapel House Colliery Co.*, 24 Ch. Div. 259, 268.

(*z*) In re *Borough of Portsmouth Tramway Co.* (1892) 2 Ch. 362.

winding up under the supervision of the Court.(*a*) The Court will order a compulsory winding up even at the request of a creditor, who presents a second petition. if the first petition is not *bonâ fide* and the affairs of the company require a close investigation.(*b*) Again, where a petitioner allowed his petition to stand over at the request of the company, which was in voluntary liquidation, and afterwards discovered that the company had executed a bill of sale of all its effects to one of its directors, the Court ordered the company to be compulsorily wound up.(*c*)

If the voluntary winding up of a company has been going on for a long time and no dividend has been paid to the creditors, and the petitioner is a creditor of the company to the extent of considerably more than one-half of its debts, the company may be ordered to be wound up compulsorily.(*d*)

Section 197 of the Companies Consolidation Act, 1908, which re-enacts section 145 of the Companies Act, 1862, provides, that voluntary the winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up. Section 197 will apply even where the voluntary winding up has commenced after the presentation of the petition.(*e*)

The Court will not make a compulsory order, when a voluntary winding up is pending, unless it is satisfied, that the petitioning creditor will be prejudiced by the continuance of the voluntary winding up; but if a creditor can make out a probable case of the assets of the company having been improperly dealt with, he will show that he will be prejudiced by the voluntary winding up and will accordingly be entitled to a compulsory order.(*f*)

If a company is being voluntarily wound up and a creditor's petition for the compulsory winding up is opposed by a large majority of the creditors of such company, the Court will generally have regard to the wishes of the creditors and dismiss the petition (*g*) or order the petition to stand over.

(*a*) In re *Barned's Banking Co.*, 14 W. R. 722; 14 L. T. R. 451.

(*b*) In re *United Service Co.*, 7 Eq. 76.

(*c*) In re *London and Provincial Starch Co.*; ex parte *Adams*, 16 L. T. R. 474.

(*d*) In re *Manchester Queensland Cotton Co.*, 15 W. R. 1070; 16 L. T. R. 583.

(*e*) In re *New York Exchange*, 39 Ch. Div. 415.

(*f*) In re *New York Exchange*, ibid. 422, 423; *Universal Drug Supply Association*, W. N. (1874) 125; 22 W. R. 675.

(*g*) In re *Langley Mill Co.*, 12 Eq. 26; in re *Horbury Bridge Co.*, W. N. (1879) 51; see sec. 201 of the Comp. Cons. Act, 1908.

When the Court orders the petition to stand over.

The Court frequently orders a petition to stand over for a fixed time, where it is unwilling to make a winding-up order or to dismiss the petition.(*h*) Thus the Court ordered a debenture-holder's petition to stand over (for about three months) at the request of the majority of the other holders of the same issue of debentures, there being reason to believe, that the debts would be paid.(*i*) Where all the assets of a company were vested in trustees upon trust for debenture-holders, who had a first charge on them, and it was not suggested, that the sale of such assets would produce sufficient to pay the debenture-holders in full and the majority of the debenture-holders and other creditors of the company opposed a petition presented by a holder of a small amount of such debentures (his debt consisting of the interest, which had accrued due on such debentures), the Court ordered such petition to stand over for six months, the company undertaking (1) not to consent to a winding-up order on the petition of any other creditor or to a voluntary winding up, (2) to give notice to the petitioner of the presentation of any other petition for a winding up, and (3) to consent that on the presentation of any such other petition the present application might be renewed notwithstanding the suspension.(*j*)

Where a petition has been presented by a creditor of a company and is opposed by the debenture or debenture stock holders of the company or has been presented by one of such debenture or debenture stock holders and it is uncertain whether the company has any assets, which are not comprised in the debenture or debenture stock holder's securities and consequently whether a winding-up order can be of any use, the Court frequently directs an inquiry and orders the petition to stand over until after the inquiry.(*k*) Thus in the case of *in re Olathe Silver Mining Co.*(*l*) a depositee by way of mortgage of debentures to bearer, the interest on which was in arrear, petitioned for the winding up of the company, which issued such securities, but Pearson, J., not being satisfied, that all the assets were included in the debenture-holders' trust deed,

(*h*) See sections 141 and 219 of the Companies Consolidation Act, 1908.

(*i*) In re *Western of Canada Oil Co.*, 17 Eq. 1.

(*j*) In re *St. Thomas's Dock Co.*, 2 Ch. D. 116, 117; 34 L. T. R. 228; followed in in re *Joseph Bull & Co.*, 36 Sol. Jo. 557; see also in re *Great Western Coal Consumers Co.*, 21 Ch. D. 769.

(*k*) Re *Bahia Central Sugar Factory*, 34 Sol. Jo. 156; re *Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*l*) Ubi supra.

Bk. II., Ch. III., Sec. VI. (1).

which might be applicable to the payment of the company's general creditors, directed an inquiry in Chambers, whether there were any and what assets other than those comprised in the debenture deed available for the general creditors, and referred it to Chambers to appoint a provisional liquidator with all the powers of an official liquidator, but he was to take no steps without the direction of the judge in Chambers beyond taking possession of the property of the company within the jurisdiction of the Court, including their books and papers and ordered the petition to stand over, until the inquiry had been answered.

If a debenture or debenture stock holder (or any other creditor of a company) obtains a judgment against, and presents a petition for the winding up of, such company and an allegation is made that he obtained his judgment by fraud, he need not go into the evidence in support of his claim as a preliminary to his right to an order; but such petition may be ordered to stand over, on the respondent company undertaking to take the necessary steps to set aside the judgment.(*m*)

Where the amount due to the petitioning creditor (a debenture-holder) was very small and there was a reasonable hope of an arrangement being made to carry on the company, the Court ordered the petition to stand over.(*n*)

If the company undertakes to pay the debt of the petitioning creditor, the Court will order the petition to stand over.(*o*)

When the Court makes a supervision order.

Sometimes, when the petition prays for a compulsory winding up of a company already in voluntary liquidation, the Court may, having regard to the nature of the assets of the company and the circumstances of the case, order the voluntary winding up to be continued under the supervision of the Court.(*p*)

If a resolution for a voluntary winding up of a company has been passed at any time before the petition for a compulsory winding up comes on to be heard, sections 145 and 201 of

(*m*) *Bowes* v. *The Hope, etc., Society*, 11 H. L. C. 389.

(*n*) In re *Brighton Hotel Co.*, 6 Eq. 339.

(*o*) In re *The General Rolling Stock Co., Limited*, 13 W. R. 423; 34 Beav. 34.

(*p*) In re *Owen's Patent Wheel Co.*, 29 L. T. R. 672; 22 W. R. 151; W. N. (1873) 226; in re *West Hartlepool Ironworks Co.*, 10 Ch. 618; in re *New York Exchange Co.*, 39 Ch. Div. 415. As creditors and contributories are now authorised to make applications to the Court in a voluntary winding up (see sec. 93 of the Act), the Court was for several years disinclined to make supervision orders on the ground that no material advantage was obtained thereby. Now the Court is less disinclined to make such orders. As compared with a voluntary winding up, a winding up under supervision has, at any rate, the following advantages: (i) The order stops all actions (secs. 140, 142, 200, 203) and (ii) the costs of the liquidation are subject to taxation (see *Buckley*, p. 446).

the Companies Consolidation Act, 1908, make it the duty of the Court to have regard to the wishes of the creditors and to the value of the debt due to each creditor in determining, whether there shall be a compulsory winding up or whether the voluntary winding up shall be continued under supervision.(*q*)

Though a creditor may be entitled as against a company to a compulsory winding-up order *ex debito justiciæ*, he may not be so entitled as against the other creditors of such company.(*r*)

When a petition asks for a compulsory winding up of a company, the Court will (as has been already stated) take into consideration, whether the majority of the creditors of such company are in favour of or against the compulsory winding up or of a winding up under the supervision of the Court,(*s*) and will generally be guided by the opinion of such majority. Thus, where a voluntary liquidator of a company does not realise the assets with due diligence, a creditor, who is supported by the majority of the creditors of such company, is entitled to a compulsory winding-up order *ex debito justiciæ*.(*t*). But, where a debenture-holder's petition had stood over for three months at the request of the majority of the other debenture-holders and nothing had been done, the Court made a compulsory winding-up order notwithstanding the opposition of the majority of the debenture-holders.(*u*)

Under certain circumstances, even if a company be not in voluntary liquidation, the Court may dismiss a petition for a compulsory winding up, if a very large majority of the creditors so desire.(*v*)

When a shareholder presents a petition to wind up a company, the Court must have regard to the wishes of the debenture and debenture stock holders (as well as the other creditors) of such company in deciding, whether it will make a compulsory

(*q*) In re *West Hartlepool Ironworks Co.*, ubi supra.

(*r*) In re *West Hartlepool Co.*, ubi supra; in re *Uruguay Central Ry. Co.*, 11 Ch. D. 372; in re *Chapel House Colliery Co.*, 24 Ch. Div. 259.

(*s*) In re *Oriental Commercial Bank*, 14 L. T. R. 775; 15 L. T. R. 8; in re *Lonsdale Vale Ironstone Co.*, 16 W. R. 601; see, however, in re *General Rolling Stock Co., Limited*, 13 W. R. 423, in which the Court made a compulsory winding-up order on the application of a creditor, to whom the company owed £7500, though such application was opposed by creditors of the company representing debts to the amount of £350,000.

(*t*) In re *Tramway Wheel Foundry Co.*, W. N. (1873) 160.

(*u*) In re *Western of Canada Oil, Lands and Works Co.*, 17 Eq. 1.

(*v*) In re *Uruguay Central Ry. Co.*, 11 Ch. D. 372, 383.

Bk. II., Ch. III., Sec. VI. (1).

or a supervision order or whether it will dismiss the petition; but, when such a petition is not based on the insolvency of the company, little weight ought to be given to the voices of such debenture or debenture stock holders or the other creditors, for they are perfectly secured.(*w*)

When the Court will dismiss a winding-up petition.

The Court will refuse to order a company to be wound up compulsorily, if it appears, that the petitioning creditor will be in no better position by obtaining such order; (*x*) for it is an abuse of the process of the Court to set the machinery of the Court in motion, when it is established, that it cannot in any degree accomplish that, for which it was established by the legislation.(*y*)

It must, however, be borne in mind, that the debenture or debenture stock holders or the other creditors of a company will not be able to successfully oppose a petition for the compulsory winding up of such company on the ground, that no reasonable benefit can accrue to the petitioner from the making of such order, unless the persons so opposing clearly make out their case.(*z*)

Section 141 (1) of the Companies Consolidation Act, 1908, provides that the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.(*a*) It follows, that the Court will not decline to make a compulsory winding-up order, merely because there are no assets of the company beyond those, which are comprised in the securities of the debenture or debenture stock holders opposing the petition, if it is clear that there is a reasonable prospect of there being assets. Neither will the Court decline to make such an order solely on the ground, that no money payment will result from the making thereof. If the circumstances are such as to suggest, that an investigation into the circumstances under section 215 of the Companies Consolidation Act, 1908, may possibly turn out to the advantage of the unsecured creditors, that alone is a sufficient ground for making a compulsory order.(*b*)

(*w*) In re *General Phosphate Corporation, Limited*, 28 L. J. Notes 560.

(*x*) In re *St. Thomas's Docks*, 2 Ch. D. 116, 119; *Uruguay Central Ry. Co.*, 11 Ch. D. 372.

(*y*) In re *Chapel House Colliery Co.*, 24 Ch. Div. 259, 270; re *Royal Courts of Justice Chambers Co.*, 4 Times L. R. 517.

(*z*) Re *Crigglestone Coal Co.* (1906) 2 Ch. (C. A.) 327, 338.

(*a*) This section substantially embodies the decisions of re *Crigglestone Coal Co.* ubi supra; re *Chic Ld.* (1905) 2 Ch. 346; re *Alfred Melsom & Co. Ld.* (1906) 1 Ch. 841.

(*b*) In re *Krasnapolsky Restaurant Co.* (1892) 3 Ch. 174; re *Crigglestone Coal Co.* (1906) 2 Ch. at p. 332.

Before the provision in section 141 was enacted the Court used generally to dismiss a petition praying for the compulsory winding up of a company, if all the assets of the company were comprised in the debenture or debenture stock holders' securities and were of an insufficient value to satisfy the moneys so secured and the majority of the debenture or debenture stock holders opposed the petition; for no useful object could (it was said) be served by making a winding-up order, there being nothing for a liquidator to receive.(*c*) "Where the assets of the company are not sufficient to pay the debentures," said Vaughan Williams, L. J. (then J.),(*d*) "a debenture-holder's action is the only liquidation. A more unsatisfactory mode of liquidation for outside creditors than a debenture-holder's action cannot be conceived. The trade creditors have no *locus standi*, no right to interfere or be heard."

Petition against a Company after dissolution.

After the expiration of two years from the dissolution of a company carried out in the manner specified by section 195 of the Companies Consolidation Act, 1908, the Court has, it would appear, no power to make a winding-up order of such company. Hence, in the absence of fraud, a petition presented more than two years after the dissolution of a company by a debenture or debenture stock holder or any other creditor of the company and praying for the compulsory winding up or for a winding up under the supervision of the Court will be dismissed.(*e*)

Petition founded on collusive judgment.

Where it can be shown, that a judgment, on which a petition to wind up a company is based, has been obtained by collusion, such petition will be dismissed, even though no steps have been taken to set aside the judgment.(*f*)

If the debt is *bonâ fide* disputed, no winding-up order will be made.

If a debt claimed by a creditor is *bonâ fide* disputed, a winding-up petition is not the proper method of obtaining payment thereof and attempts so to enforce payment of such debts will be discouraged by dismissing the petition with costs.(*g*) If the debt is *bonâ fide* disputed, and there is no evidence of insolvency

(*c*) In re *Atalanta Gold and Silver Consolidated Mines*, 35 Sol. Jo. 9. If, however, the company sought to be wound up is a private company, the Court will not dismiss the petition without having full information as to what has become of the assets of the company and being satisfied that nothing can be obtained for the unsecured creditors of the company by impeaching its debentures or debenture stock; see in re *London Health Electrical Institute*, 41 Sol. Jo. 275; 13 Times L. R. 208; W. N. (1896) 170.

(*d*) In re *Edgbaston Brewery Co. Limited*, 68 L. T. R. 341.

(*e*) In re *Pinto Silver Mining Co.*, 8 Ch. Div. 273. *Coxon* v. *Gorst* (1891) 2 Ch. 73. See sec. 223 of the Companies Consolidation Act, 1908.

(*f*) In re *United Stock Exchange*, W. N. (1884) 251.

(*g*) In re *Catholic Publishing Co.*, 33 L. J. (Ch.) 325; in re *Rhydydefed Colliery Co.*, 3 De G. & J. 80; in re *Imperial Guardian Life Assurance Society*, 9 Eq. 447; in re *London and Paris Banking Co.*, 19 Eq. 444.

Bk. II., Ch. III., Sec. VI. (1).

and the company denies its insolvency, the petition will be dismissed.(*h*). In cases, in which the debt is *bonâ fide* disputed by the company and there is evidence of insolvency, the proper course is to order the petition to stand over, until the debt has been established in an action.(*i*) The Court will, however, only order the petition to stand over, if it is shown, that the debt is disputed on some substantial ground.(*j*)

Though the Court will not, as a general rule, decide at the hearing of the petition, whether the petitioner's debentures or debenture stock are or is valid or not, if the validity of such securities is disputed, the Court will in a proper case decide disputes at the hearing and make a winding-up order. Thus, where a petition to wind up a company was presented by a debenture-holder and the company admitted the validity of the debentures, but contended, that the interest was only payable out of profits, the Court decided the dispute at the hearing and made the winding-up order without waiting till the debt had been established at law.(*k*)

A creditor, whose debt is *bonâ fide* disputed, may be restrained by injunction from presenting a petition to wind up a company not shown to be insolvent.(*l*)

Presentation of a second petition.

A creditor of a company, who has notice (by advertisement or otherwise) that a petition to wind up has been presented, is not justified in presenting a second petition or in going on with such second petition after he has received notice except in a case, in which the first petition was not *bonâ fide* or was collusive.(*m*) A petition was held to be collusive in a case, in which the company indemnified the petitioner against costs.(*n*) According to the ordinary practice of the Court a creditor presenting a second petition in ignorance of a prior petition is entitled to his costs up to the time, when he has notice of the prior petition, but, if he then proceeds, he will not be allowed the costs incurred by him after such notice, unless he has good reason to believe, that the other petition was not *bonâ fide* or collusive, in which case he

(*h*) In re *London and Paris Banking Co.*, ibid. 448.

(*i*) In re *Catholic Publishing Co.*, 33 L. J. (Ch.) 325; in re *Universal Bank*, 14 W. R. 906; 14 L. T. R. 691; *Bowes* v. *Hope, etc., Society*, 11 H. L. C. 389.

(*j*) In re *King's Cross Industrial Dwellings Co.*, 11 Eq. 149.

(*k*) Re *Imperial Silver Quarries Co., Limited*, 16 W. R. 1220.

(*l*) *Cadiz Waterworks Co.* v. *Barnett*, 19 Eq. 182; *Niger Merchant Co.* v. *Capper*, 25 W. R. 365; *Cercle Restaurant Castiglione Co.* v. *Lavery*, 18 Ch. D. 555.

(*m*) In re *Humber Ironworks Co.*, 2 Eq. 15.

(*n*) In re *General Financial Bank*, 20 Ch. Div. 276; in re *Sheringham Development Co.*, W. N. (1893) p. 5.

will be held to have been justified in proceeding and may be allowed his costs.(*o*)

Carriage of an order made on one of several petitions.

Where several petitions are presented for the winding up of a company, the practice is to make one order on all the petitions and to give the carriage of the order to the petitioner, whose petition had been presented first, even though it was advertised after (*p*) or was served after the other petitions.(*q*) Thus in a recent case (*r*) a debenture-holder presented a petition before, but served it after, S. & Co. served their petition. Both petitions were advertised in the same *London Gazette*, but the debenture-holder's petition had not been advertised in a daily paper seven clear days before the hearing, as required by the Companies Act, 1862. A compulsory order was made on both petitions, the carriage of the order being given to the debenture-holder.

To which Court a petition to wind up a registered Company will be presented.

According to the situation of the registered office of a company and to the amount of its paid up capital, the petition will be presented to the High Court or a County Court.

"Where the amount of the share capital of a company paid up "or credited as paid up exceeds £10,000, a petition to wind up "the company shall be presented to the High Court, or, in the "case of a company whose registered office is situated within the "jurisdiction of either of the Palatine Courts of Lancaster or "Durham, either to the High Court or to the Palatine Court "having jurisdiction.

"Where the amount of the capital of a company paid up or "credited as paid up does not exceed £10,000, and the registered "office of the company is situated within the jurisdiction of a "County Court having jurisdiction under this Act, a petition to "wind up the company shall be presented to that County "Court." (*s*)

The effect of subsection 5 of Section 131 of the Act is, that the Metropolitan County Courts (having no jurisdiction in bankruptcy) have no jurisdiction under the Companies Consolidation Act, 1908, and that the districts of such County Courts are

(*o*) In re *General Financial Bank*, ubi supra; in re *Building Societies Trust, Limited*, 44 Ch. D. 140.

(*p*) In re *London and Australian Agency Corporation, Limited*, 29 L. T. R. 417.

(*q*) In re *The Universities Co-operative Association, Limited*, 25 Sol. Jo. 929.

(*r*) Ibid.

(*s*) See sec. 131 (2) and (3) of the Companies Consolidation Act, 1908. Sec. 131 (5) of the same Act empowers the Lord Chancellor to exclude any County Court from having jurisdiction under this Act and to attach the district of the Court excluded to the High Court or any other County Court.

Bk. II., Ch. III., Sec. VI. (2).

attached to the High Court for the purposes of jurisdiction under this Act.(*t*)

SUB-SECTION 2. *Winding up of Unregistered (including Foreign) Companies.*

Unregistered Companies which the Court can wind up.

Part VIII. of the Companies Consolidation Act, 1908, provides for the "winding up of unregistered companies" as defined by section 267 (that is to say):—

"Any partnership, association or company,(*u*) consisting of "more than seven members" (*v*) other than a railway company incorporated by Act of Parliament (*w*) or a company registered under the Joint Stock Companies Acts or the Companies Act, 1862, or the Companies Consolidation Act, 1908.

Winding up of unregistered Companies.

The winding up of unregistered companies is regulated by section 268 of the Act, which provides as follows:—

Sec. 268 of Comp. Cons. Act, 1908.

"268.—(1) Subject to the provisions of this part of this Act, "any unregistered company may be wound up under this Act, and "all the provisions of this Act with respect to winding up shall "apply to an unregistered company, with the following exceptions "and additions:—

"(i) An unregistered company shall, for the purpose of deter- "mining the Court having jurisdiction in the matter "of the winding up, be deemed to be registered in "that part of the United Kingdom where its principal "place of business in situate; or if it has a principal "place of business situate in more than one part of the "United Kingdom, then in each part of the United King- "dom where it has a principal place of business; and the "principal place of business situate in that part of the "United Kingdom in which proceedings are being in-

(*t*) In re *Court Bureau* (No. 2) W. N. (1891) p. 15.

(*u*) The term "company" has no strictly technical meaning, but involves two ideas, viz. (i) that the association is of persons so numerous as not to be aptly described as a firm, and (ii) that the consent of all the other members of the association is not required to the transfer of a member's interest therein (re *Stanley* (1906) 1 Ch. 131, 134).

(*v*) There must be at least eight members at the commencement of the winding up and representatives of deceased members, trustees of bankrupt members and past members are *not* "members" for the purposes of this section (re *Bowling & Welby's Contract* (1895) 1 Ch. (C. A.) 663; re *Bolton Benefit Loan Society*, 12 Ch. D. 679). The eight "members" need not necessarily be *shareholders* (re *South London Fish Market* Co., 39 Ch. Div. 324, 335).

(*w*) As to the question whether the Court has power to wind up a registered railway company, see infra, Bk. III., ch. iii.

"stituted shall, for all the purposes of the winding up, be "deemed to be the registered office of the company:—

"(ii) No unregistered company shall be wound up under this "Act voluntarily or subject to supervision:

"(iii) The circumstances in which an unregistered company "may be wound up are as follows (that is to say):—

"(*a*) If the company is dissolved, or has ceased to carry "on business, or is carrying on business only for "the purpose of winding up its affairs;

"(*b*) If the company is unable to pay its debts;

"(*c*) If the court is of opinion that it is just and equit- "able that the company should be wound up:

"(iv) An unregistered company shall, for the purposes of this "Act, be deemed to be unable to pay its debts:—

"(*a*) If a creditor, by assignment or otherwise, to whom "the company is indebted in a sum exceeding fifty "pounds then due, has served on the company, by "leaving at its principal place of business, or by "delivering to the secretary or some director, "manager, or principal officer of the company, or "by otherwise serving in such manner as the court "may approve or direct, a demand under his hand "requiring the company to pay the sum so due, and "the company has for three weeks after the service "of the demand neglected to pay the sum, or to "secure or compound for it to the satisfaction of the "creditor;

"(*b*) It any action or other proceeding has been "instituted against any member for any debt or "demand due, or claimed to be due, from the "company, or from him in his character of "member, and notice in writing of the institu- "tion of the action or proceeding having been "served on the company by leaving the same at "its principal place of business, or by delivering "it to the secretary, or some director, manager, "or principal officer of the company, or by "otherwise serving the same in such manner as "the Court may approve or direct, the company "has not within ten days after service of the

"notice paid, secured, or compounded for the "debt or demand, or procured the action or "proceeding to be stayed, or indemnified the "defendant to his reasonable satisfaction against "the action or proceeding, and against all costs, "damages, and expenses to be incurred by him "by reason of the same;

"(*c*) If in England or Ireland execution or other "process issued on a judgment, decree, or order "obtained in any court in favour of a creditor "against the company, or any member thereof "as such, or any person authorised to be sued as "nominal defendant on behalf of the company, "is returned unsatisfied;

"(*d*) If in Scotland the induciæ of a charge for "payment on an extract decree, or an extract "registered bond, or an extract registered protest, "have expired without payment being made;

"(*e*) If it is otherwise proved to the satisfaction of "the Court that the company is unable to pay "its debts:

"(v) The Court having jurisdiction to wind up a railway "company under the Abandonment of Railways Act, "1850, and the Abandonment of Railways Act, 1869, "and the Acts amending them, shall be the High "Court in England or Ireland, or the Court of Session "in Scotland, according as the railway was authorised "to be made in England, Ireland, or Scotland, and the "special provisions of those Acts shall apply to the "winding up with the substitution of references to this "Act for references to the Companies Acts, 1862 and "1867:

"Provided that, subject to general rules and to orders "of transfer made, as respects England, under the authority "of the Supreme Court of Judicature Act, 1873, and as "respects Ireland under the authority of the Supreme "Court of Judicature (Ireland) Act, 1877, "the jurisdic- "tion of the High Court in England or Ireland under this "provision shall be exercised by the Chancery Division "of that Court:

"(vi) A petition for winding up a trustee savings bank may be "presented by the National Debt Commissioners, or by a "commissioner appointed under the Trustee Savings

"Banks Act, 1887, as well as by any person authorised "under the other provisions of this Act to present a "petition for winding up a company:

'(vii) In the case of a limited partnership the provisions of "this Act with respect to winding up shall apply with "such modifications (if any) as may be provided by rules "made by the Lord Chancellor with the concurrence "of the President of the Board of Trade, and with the "substitution of general partners for directors.

"(2) Nothing in this part of this Act shall affect the operation "of any enactment which provides for any partnership, association, "or company, being wound up, or being wound up as a company "or as an unregistered company, under any enactment repealed "by this Act, except that references in any such first-mentioned "enactment to any such repealed enactment shall be read as re-"ferences to the corresponding provision (if any) of this Act."

The railway companies excepted from the operation of section 268 must be companies, whose principal object is the construction of a railway; hence a company, whose principal object is the construction of docks, is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks.(*x*)

Public Companies incorporated by special Act of Parliament may be wound up by the Court.

The fact that the company, which it is sought to wind up, is incorporated by Act of Parliament and that the construction of the works, which were the object of its formation, or the continuance of the working of the company would be to the public advantage is no reason for refusing to make a winding-up order,(*y*) though the Court would refuse to make an order for the sale of the undertaking in a debenture or debenture stock holder's action against such company.(*z*) Hence a ferry company,(*a*) and a tramway company,(*b*) and a canal company,(*c*) each of which was incorporated by special Act of Parliament, and a telegraph company,(*d*) and a waterworks company,(*e*) have respectively been ordered to be wound up. The Court may make a winding-up order, when it considers it just and equitable,

(*x*) In re *Exmouth Docks Co.*, 17 Eq. 181.

(*y*) In re *Barton-upon-Humber and District Water Co.*, 42 Ch. D. 585; in re *Borough of Portsmouth Tramway Co.* (1892) 2 Ch. 362; in re *Bradford Navigation Co.*, 10 Eq. 331, 5 Ch. 600; in re *Wey and Arun Junction Canal Co.*, 4 Eq. 197.

(*z*) *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*a*) In re *Isle of Wight Ferry Co.*, 2 H & M. 597.

(*b*) In re *Brentford Tramway Co.*, 26 Ch. D. 527; in re *Borough of Portsmouth Tramway Co.* (1892) 2 Ch. 362.

(*c*) Re *The Proprietors of the Basingstoke Canal*, 14 W. R. 956.

(*d*) In re *Electric Telegraph of Ireland*, 22 Beav. 471.

(*e*) In re *Barton-upon-Humber and District Water Co.*, ubi supra.

Bk. II., Ch. III., Sec. VI. (2).

even though the Act of Parliament, by which the Company was incorporated, contemplated its existence in perpetuity.(*f*) In order to fully wind up and sell the property of a company incorporated by special Act of Parliament for the purpose of carrying on a business, it is not unfrequently necessary to make an application to Parliament, which is previously sanctioned in Chambers.(*g*) The Court will not, however, order a company of the nature above described (any more than it will order a company registered under the Companies Consolidation Act, 1908, or the Companies Act, 1862) to be wound up, if no good can result from the making of such order.(*h*)

Industrial, Provident and Building Societies may be wound up.

A society registered under the Industrial and Provident Societies Act, 1893 (*i*) and a building society incorporated under the Building Societies Act, 1874 (*j*) may be wound up as unregistered companies.

Whether the Court having jurisdiction to wind up such societies will be the High Court (or the Palatine Court) or a County Court will (as in the case of a registered company) (*k*) depend upon the amount of the society's capital, which is paid up or credited as paid up. If such amount exceeds £10,000, the petition will be presented to the High Court, or, in the case of a society within the jurisdiction of either of the Palatine Courts of Lancaster and Durham, either to the High Court or to the Palatine Court having jurisdiction.

If, on the other hand, the amount does not exceed £ 0,000 and the principal place of business of the society is situated within the jurisdiction of a County Court having jurisdiction under section 131 of the Companies Consolidation Act, 1908, the petition will be presented to that County Court.

A building society may be ordered to be wound up compulsorily or under the supervision of the Court.(*l*)

An English Court has also power under subsection 1 of section 268 to wind up any company, which is incorporated and

(*f*) In re *Wey and Arun Canal Co.*, ubi supra.

(*g*) In re *Barton-upon-Humber and District Water Co.*, ubi supra; in re *Bradford Navigation Co.*, 10 Eq. 331, 5 Ch. 600.

(*h*) In re *The Company or Fraternity of the Free Fishermen of Faversham*, 36 Ch. Div. 329.

(*i*) 56 & 57 Vic., cap. 39, sec. 58. Before this Act the County Court had the exclusive jurisdiction to wind up industrial and provident societies; see in re *London and Suburban Bank* (1892) 1 Ch. 604; in re *Ferndale Industrial Society* (1894) 1 Q. B. 828.

(*j*) 37 & 38 Vic., cap. 42, sec. 32 (4) 57 & 58 Vic., cap. 47, sec. 8.

(*k*) See supra, Bk. II., ch. iii., sec. vi. (1).

(*l*) See Building Societies Act, 1874 (37 & 38 Vic., cap. 42), sec. 32.

carries on business in a foreign country (such as India (*m*) Australia (*n*) or New Zealand (*o*)), but has a branch office and assets in England. It may be wound up by an English Court, even if not registered in England. If there were no such jurisdiction, the English creditors could not obtain payment of their debts. A foreign company formed in a foreign country, which chooses to carry on business, have assets, and contract debts, in this country, comes within the spirit as well as the letter of section 268.

Foreign Companies may be wound up by the Court.

It does not follow, that the Court has no power to wind up a company, because the Court has no power to make an order to dissolve such company.(*p*)

Upon principles of international comity, the Court here would have regard to and would be influenced by a winding up in a foreign country, but the mere existence of a winding-up order made by a foreign Court does not take away the rights of the Courts in this country to make a winding-up order here. The object of winding up a foreign company in England is to secure the English assets, until it is seen, that proceedings are taken in the liquidation in the foreign country, in which the company is formed, to make English assets available for the English creditors *pari passu* with the creditors in the foreign country.(*q*) If there are any assets in England, there is no reason why English creditors ought to be left to recover their debts in a winding up of the company in a foreign country, their debts having been contracted here.(*r*)

There is, however, no jurisdiction under the Companies Consolidation Act, 1908, to wind up a foreign company, which carries on business in England by means of agents but which has no branch office of its own here.(*s*)

SUB-SECTION 3. *The Costs Incident to a Winding-up Petition.*

General rules as to costs of winding-up petition.

The following are the general rules laid down by Lord Lindley,(*t*) as to the payment of the costs incident to a winding-up petition:—

(*m*) In re *Commercial Bank of India*, 6 Eq. 517.

(*n*) In re *Matheson Brothers, Limited*, 27 Ch. D. 225.

(*o*) In re *Commercial Bank of South Austra ia*, 33 Ch. D. 174; in re *Mercantile Bank of Australia* (1892) 2 Ch. 204.

(*p*) In re *Matheson Brothers, Limited*, ubi supra.

(*q*) Ibid.

(*r*) In re *Commercial Bank of South Australia*, 33 Ch. D. 174.

(*s*) In re *Lloyd Gcnerale Italiano*, 29, Ch. Div. 219.

(*t*) See Lindley, pp. 889-890; see sec. 141 (2) of the Companies Consolidation Act, 1908.

1. The costs of a petition, on which a winding-up order is made, are borne by the company; these costs include the costs of the petitioner and of the company, and the costs of all other persons, if any, properly served with the petition.(*u*)

2. The costs of a petition, which is dismissed, are borne by the petitioner, unless the Court is of opinion, that the petition was justifiable, in which case the dismissal will be without costs. If dismissed with costs, such costs include those of the company, and of all persons, if any, served with the petition.(*v*)

3. With respect to persons, who appear to support or oppose a petition, although not served with it, the usual practice is: (A) to allow one set of costs to those contributories, and one set to those creditors, who upon reasonable grounds (without being served) appear on the petition and support the view, which ultimately prevails, *i.e.*, support a successful or oppose an unsuccessful petition. (Thus in a recent case,(*w*) in which debenture-holders, who were the plaintiffs in an action against a company to enfore their securities, had given notice of opposition to a petition by a creditor for a compulsory winding-up order and on the hearing of the petition a supervision (and not a compulsory) order was made, the Court held the debenture-holders entitled to their costs); (B) to give no costs to those who (not being served) support an unsuccessful or oppose a successful petition; but (C) to make a petitioner pay the costs of persons, who appear to answer and succeed in refuting unfounded charges made against them.

Notice of support.

Persons intending to appear at the hearing of the winding-up petition, must clearly state in their notice to the company, whether they will support or oppose the petition, or, if the company is in voluntary liquidation, whether they intend to support the compulsory winding up or a voluntary winding up under supervision. Unless this is clearly stated, the persons so appearing will not be allowed their costs.(*x*)

When Petitioner's costs rank above the costs of the Liquidator.

"Where the assets are deficient even for the payment of costs, the costs of the petition to wind up are entitled to priority

(*u*) In re *Humber Ironworks Co.*, 2 Eq. 15.

(*v*) In re *Marlborough Club Co.*, 1 Eq. 216.

(*w*) In re *Dore Gallery, Limited*, 35 Sol. Jo. 480; W. N. (1891) p. 98. As to the priority of debenture and debenture stock holders' charge over costs of obtaining winding-up order, see in re *Anglo-Austrian Printing Co., Brabourne* v. *Same* (1895) 2 Ch. 891, and infra, Bk. II., ch. iv., sec. i.

(*x*) *Woodrow* v. *Hooper & Co., Limited*, 37 Sol. Jo. 286; (1893) W. N. 38.

over the other costs, and even over those of the liquidator."(*y*) The petitioner is the person, who has brought the matter before the Court and obtained the order to wind up, and his costs are a first charge upon the estate.(*z*) Where, however, on the petition of a creditor an order is made continuing the voluntary winding up of a company under the supervision of the Court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioner's costs of obtaining the order, but the petitioner's costs are payable in priority to the costs incurred by the liquidator subsequently to the order.(*a*) Bk. II., Ch. III., Sec. VI. (4).

When Petitioner ordered to pay costs.

If a creditor knows before he presents his petition for a winding-up order, that such order will be utterly useless to him, the petition will be dismissed with costs.(*b*)

Where the petition for a compulsory winding up presented by a creditor, to whom the company owed £80, was opposed by creditors to the extent of £20,000, who had held a meeting, at which a resolution for voluntary liquidation had been passed, and the Court was satisfied, that that was the best course, the Court dismissed the petition; and, as what the Court considered a reasonable offer had been made by the company to the petitioner after the presentation of the petition, the order only gave the petitioner his costs up to the time, when such offer was made.(*c*)

Costs of second petition.

If two petitions are presented and the second petition is beneficial to the creditors, the second petitioner will be entitled to his costs.(*d*)

SUB-SECTION 4. *Enforcement of Debenture or Debenture Stock Holder's Charge by a Summons in the Winding up or by Summons in a Debenture or Debenture Stock Holder's Action and in the Winding up.*

Summons in the winding up.

A debenture or debenture stock holder or the trustees of either of them may, instead of proceeding by a separate action,

(*y*) See Lindley, p. 1166; in re *New York Exchange Co.* (1893), 1 Ch. 371; in re *Freehold Land and Brick-making Co.*, 9 Eq. 367, 369.

(*z*) In re *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

(*a*) In re *New York Exchange* (1893), 1 Ch. 371.

(*b*) In re *Chapel House Colliery Co.*, 24 Ch. Div. 259.

(*c*) In re *Langley Mill Steel and Ironworks Co.*, 12 Eq. 26.

(*d*) In re *Commercial Bank of South Australia*, 33 Ch. D. 174.

apply by summons in the winding up of a company to enforce his or their rights under his or their debentures or trust deed (as the case may be).(*e*) But, when once such summons is taken out, the person so taking it out has by his own summons submitted to have his rights determined in the winding up and, if he compromises the claims, which he seeks to enforce by the summons, with the liquidator on certain terms, the Court will, while the summons is still pending, have jurisdiction (under section 24, sub-section 7, of the Judicature Act, 1873) to enforce the compromise against him in the winding up.(*f*)

If a debenture or debenture stock holder (or the trustees of the trust deed) applies (or apply) to the Court by summons in the winding up instead of by a separate action to enforce his or their securities, the costs of the realisation,(*g*) and, it would appear, also the costs of preservation(*h*) of the assets of the company comprised in his or their securities will have priority over the debenture debt.

Application in a Debenture-holder's action and in the winding up.

If after the commencement of an action seeking to enforce the debentures or debenture stock charged on the uncalled capital of a company such company is ordered to be wound up compulsorily or under the supervision of the Court, the plaintiff in such action (whether he be a debenture or debenture stock holder or the trustees of the trust deed) should, if it is desired to have the uncalled capital called up, take out a summons in the winding up and in the action asking that the liquidator of the company be ordered to take the proper steps for making the call and enforcing it, on the applicant giving the liquidator a sufficient indemnity against costs ; the form of indemnity will be settled in Chambers, in case the parties cannot agree.(*i*)

As a general rule, it is better, that the person, in whose name proceedings are taken, should be *dominus litis* and *primâ facie*, where proceedings are to be taken in the name of a liquidator,

(*e*) In re *Marine Mansions Co.*, 4 Eq. 601 ; in re *General South American Co.*, 2 Ch. D. 337.

(*f*) In re *Gaudet Frères Steamship Co.*, 12 Ch. D. 882.

(*g*) In re *Marine Mansions Co.*, 4 Eq. 601.

(*h*) In the limited sense mentioned in ex parte *Grissell*, 3 Ch. Div. 411, 427, see supra, Bk. II., ch. iii., sec. v. (4).

(*i*) *Fowler* v. *Broad's Patent Night Light Co.* (1893), 1 Ch. 724. However, an order authorising the liquidator in general terms to get in uncalled capital does not relieve the liquidator from the obligation imposed on him by sec. 151 (1) of the Companies Consolidation Act, 1908, to obtain the sanction of the Court or of the committee of inspection to employ a solicitor and to bring legal proceedings. In re *London Metallurgical Co.*, 41 Sol. Jo. 491.

application should be made, that the liquidator should take the proceedings himself. In a recent case,(*j*) however, on the application by summons in a debenture-holder's action and in the winding up by the plaintiff debenture-holder an order was made, that, on the receiver undertaking to leave the books of the company in the possession of the liquidator and indemnifying him against costs, the receiver should take the proceedings necessary for getting in calls and should for that purpose use the liquidator's name and, if necessary, the name of the company.

SECTION VII. *Proof by Debenture or Debenture Stock Holders or their Trustees in the Winding up of a Company.*

Proof in the winding up.

On a company being ordered to be wound up (whether on the application of a debenture or debenture stock holder or of some other creditor of the company), the whole of the moneys secured by the debentures or debenture stock or such part thereof as still remains due will be provable in the winding up of the company.(*k*)

Who may prove in the winding up in respect of Debentures.

As a general rule, a bearer of a debenture to bearer or of a debenture stock certificate to bearer,(*l*) or the registered holder of debentures or debenture stock to registered holder or, where the debentures or debenture stock are secured by a covering deed, the trustees of such covering deed may prove in the winding up in respect of the moneys secured by such debentures or debenture stock. The transferee of debentures payable to a person, "his executors, administrators or registered assigns," was in the case of *Lishman's Claim*,(*m*) held to be entitled to prove in the winding up of the company, though the transfer was not registered, the company having omitted to keep books for the registration of debentures and the secretary having told the transferor and transferee that registration was unnecessary.

Persons, to whom a company has issued debentures ranking *pari passu* with other debentures by way of collateral security for

(*j*) *Harrison* v. *St. Etienne Brewery Co.*, W. N. (1893) p. 108; re *Westminster Syndicate Ld.* (1908) W. N. 236. See Appendix, Form 58.

(*k*) For particulars as to proof, see rules 88 to 101 of the Companies (winding up) Rules, 1909; *Wallace* v. *Universal Automatic Machine Co.* (1894) 2 Ch. (C. A.) 547, 553.

(*l*) In re *Blakely Ordnance Co.*; ex parte *New Zealand Banking Corporation*, 3 Ch. 154; ex parte *Colborne and Strawbridge*, 11 Eq. 478.

(*m*) 23 L. T. R. 40.

Bk. II., Ch. III., Sec. VII.

moneys advanced, are entitled to prove *pari passu* with the other holders.(*n*)

Proof in respect of irregularly issued Debentures.

Where there is nothing on the face of a debenture or debenture stock certificate (whether to bearer or to registered holder) showing, that there was some irregularity in the issue of such security, the original holder thereof or the person, to whom the same has been properly transferred, may prove in the winding up in respect of the sum specified in such security, even though it is subsequently discovered, that such security was irregularly issued owing to some preliminary formality not being observed.(*o*)

Proof by scrip holders.

A holder of scrip for debentures or debenture stock may, like any other creditor of a company, prove in the winding up for the instalments paid by him to the company in respect of the debentures or debenture stock mentioned in the scrip certificate and, after a winding-up order has been made, the holder may decline with impunity to pay any further instalments, as the forfeiture clause (usually contained in a scrip certificate) ceases to take effect after the company has been ordered to be wound up.(*p*)

Unsecured holders.

The holders of debentures or debenture stock, which are void by reason of their constituting a fraudulent preference(*q*) or which are not secured, stand in the same position as ordinary unsecured creditors and their only remedy is to prove in the winding up of the company for the moneys due to them.

Secured holders.

A secured debenture or debenture stock holder, on the other hand, is not confined to the remedy of proving or indeed bound to prove at all in the winding up of the company for his debt; if he wishes, he may rest entirely on his security.(*r*)

Proof by secured creditor in the winding up of a solvent Company.

In the case of a *solvent* company a secured creditor (which expression includes the holders of secured debentures or debenture stock or the trustees of their trust deed) may prove for the full amount of his debt retaining his security till payment, (*s*) for the bankruptcy rules do not apply to a solvent company.

(*n*) In re *Regents Canal Ironworks Co.*, 3 Ch. Div. 43, 24 W. R. 687, 45 L. J. Ch. 620.

(*o*) In re *Hampshire Land Co.*, 45 W. R. 136 (1896), 2 Ch. 743; see also supra, Bk. I., ch. iv., sec. ii. (1), and Bk. I., ch. vi., sec. iii.

(*p*) *Ellerby's Claim*, 20 W. R. 855.

(*q*) *Gas Light Improvement Co.* v. *Terrell*, 10 Eq. 168. As to when the issue of debentures or debenture stock constitutes a fraudulent preference, see supra, Bk. I., ch. iv.

(*r*) *Wallace* v. *Universal Automatic Machines Co.* (1894), 2 Ch. (C. A.) 547.

(*s*) *Kellock's Case*, 3 Ch. 769.

Where an *insolvent* English or Irish company is being wound up, section 207 of the Companies Consolidation Act, 1908 (which is a modified re-enactment of section 10 of the Judicature Act, 1875) is applicable.

Proof by secured Creditor in the winding-up of an *insolvent* Company.

Section 207 provides as follows:—

Sec. 207 of Comp, Cons. Act, 1908.

"207. In the winding up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

Application of Bankruptcy rules in winding up of insolvent English and Irish Companies.

It will be observed, that this section is only applicable, if the company being wound up *is* insolvent, whereas section 10 of the Judicature Act, 1875, was applicable in the case of a company, "whose assets *may* prove to be insufficient for the payment of its "debts and liabilities".

How far the bankruptcy rules are applicable in a winding up.

It must, however, be borne in mind, that this section (as was formerly the case with section 10 of the Judicature Act, 1875), does not state, that all the bankruptcy rules shall apply to the case of a company in liquidation, but only that certain specified rules shall apply. The section means simply, that the rules in bankruptcy apply so far as relates to the proof and receipt of dividends out of the assets of the company. "It appears to me," says Jessel, M. R.,(*y*) "that the right construction of the section is nothing more than this, that persons may in the winding up of a company make such claims against the assets of a company as are provable under the law of bankruptcy."

"The object of the 10th section [of the Judicature Act, 1875] was, in my opinion, this," says Lush, L. J.,(*z*) "before that enactment a creditor, who had not realised his security, could prove against the assets of his deceased debtor for the whole debt and receive a dividend. He could then realise his security and,

(*y*) In re *Albion Steel Co.*, 7 Ch. D. 547, 549.

(*z*) In re *Withernsea Brickworks*, 16 Ch. Div. 337, 343.

if he received in the whole more than twenty shillings in the pound, he paid over the excess. The same rule prevailed in the winding up of a company. In bankruptcy the rule was different. The creditor could only prove for the balance of his debt after deducting the value of his security. The whole object of section 10, as it appears to me, was to make this rule in bankruptcy applicable to the administration of the assets of deceased persons and to winding up."

Thus, as will be seen hereafter, the rules as to mutual credits and set off in bankruptcy have been held to be imported into the winding up of companies.(*a*)

Fraudulent preference.

The provisions of the bankruptcy laws declaring that certain acts shall constitute a fraudulent preference in the case of individuals, are expressly made applicable to companies in the event of their being wound up. Hence it was decided, that debentures or debenture stock issued by a company in the absence of pressure and in contemplation of the winding up of such company were invalid as constituting a fraudulent preference under section 164 of the Companies Act, 1862,(*b*) if a petition for winding up the company was presented within three months after the issue of such securities. Such securities will not, however, constitute a fraudulent preference, if they are issued under pressure and in order to provide, that the company may not be wound up.(*c*) But debentures or debenture stock issued by an insolvent company to a director cognisant of the state of the company's affairs in payment of a debt due by the company to him may be set aside as a fraudulent preference, even if the director has pressed for payment, because a director cannot, while he holds his office, properly exercise pressure.(*d*) If a director wishes to exercise pressure, he must first cease to be a director and then he may press for payment. The Court will not at the instance of debenture or debenture stock holders of a company in liquidation set aside any transaction on the ground, that it is a fraudulent preference, because the doctrine of fraudulent preference will not be enforced for the benefit of

(*a*) *Mersey Steel Co.* v. *Naylor & Co.*, 9 Q. B. Div. 648; 9 App. Cas. 434; *Lee and Chapman's Case*, 30 Ch. Div. 216.

(*b*) This section has been re-enacted by section 210 of the Companies Consolidation Act, 1908.

(*c*) In re *Inns of Court Hotel Co.*, 6 Eq. 82; in re *Patent File Co.*, 6 Ch. 83; see also *Seligman* v. *Prince & Co.* (1895) 2 Ch. (C. A.) 617.

(*d*) *Gas Light Improvement Co.* v. *Terrell*, 10 Eq. 168.

a single creditor or class of creditors, but only for the benefit of the general body of creditors.(*e*)

The circumstances, under which debentures or debenture stock are issued, are material for the purpose of ascertaining whether the issue of such securities did or did not constitute a fraudulent preference. Thus, where a company agreed with a director, who had guaranteed an overdraft from the company's bankers, that the company would, whenever called upon by him so to do, give him security by the issue of debentures for the amount, for which he was liable, and the director purposely waited till the company was insolvent and then required the company to issue a debenture to him pursuant to such agreement, the Court held that the issue of such debenture constituted a fraudulent preference and that the debenture was consequently void.(*f*)

For the purpose of deciding whether a transaction does or does not amount to a fraudulent preference, the Court must look at the motive and not at the result.(*g*)

A transaction may sometimes be avoided as a fraudulent preference in a winding up, though the same transaction would not be a fraudulent preference in a bankruptcy. Thus a set off of mutual debts within three months of the bankruptcy of an individual does not constitute a fraudulent preference, but such a set off within three months of a presentation of a petition to wind up a company may constitute a fraudulent preference, and the reason, why a set off does not in the former case and does in the latter case constitute a fraudulent preference, is that the right of set off continues in bankruptcy, but not in winding up.(*h*)

Which bankruptcy rules are inapplicable to winding up.

However, as has been already stated, not all the bankruptcy rules apply. Thus the rule, which provides, that a fully secured creditor, who retains his security, shall not present a petition in bankruptcy(*i*) does not apply to the winding up of a company and a fully secured debenture or debenture stock holder may present a winding-up petition, while retaining his security.(*j*) It has also been decided, that the bankruptcy rules as to order

(*e*) *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147, following re *Zucco*, ex parte *Cooper*, 10 Ch. 510.

(*f*) Re *Jackson & Bassford Ld.* (1906) 2 Ch. 467.

(*g*) Re *Stenotyper Ld.*, *Hastings Brothers* v. *Same Co.* (1901) 1 Ch. 250, 255.

(*h*) In re *Washington Diamond Co.* (1893) 3 Ch. (C. A.) 95; see also *Habershon's Case*, 5 Eq. 286.

(*i*) Sec. 6 (2) of the Bankruptcy Act, 1883 (46 & 47 Vic., cap. 52).

(*j*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681; Lindley, p. 843.

and disposition do not apply to a company in liquidation. In the case of *in re Crumlin Viaduct Works Company*,(*k*) the directors of the company issued debentures to the extent of £12,000, which purported to charge the undertaking, lands, property and effects of the company both present and future. On the company being ordered to be wound up, the liquidator sold in pursuance of an order (*inter alia*) the unfixed chattels belonging to the company for the sum of £1521 8s. 5d., which was received by the liquidator. The debenture-holders contended, that they were entitled to this sum under their debentures, but the liquidator contended, that the rule as to order and disposition applied to the case of a company in liquidation, and consequently that the money was payable to the liquidator for the benefit of the creditors in general. The question was raised by a summons taken out by the liquidator claiming, that the money might be carried to the general account of the liquidation for the benefit of the general creditors. Jessel, M. R., decided, that the rule as to order and disposition did not extend to deprive the debenture-holders of their security.

Courses open to a Debenture or Debenture Stock-holder, when a Company is ordered to be wound up.

Under the bankruptcy rules the person entitled to prove in respect of debentures or debenture stock has (like any other secured creditor) four courses open to him, when the company, which issued such securities, has been ordered to be wound up, namely:—(*l*)

(1) To rely entirely on his security, and not to prove at all.(*m*) (This course is frequently adopted, when the debenture or debenture stock holders' charge covers all the property and uncalled capital of the company, and consequently nothing could be gained by proving);

(2) To give up his security and prove for the entire debt;

(3) To value his security and prove for the balance. (The liquidator may, if he thinks it necessary for the benefit of the general creditors, redeem the security, on payment to the debenture or debenture stock holder so assessing it, at the assessed value or, if dissatisfied with the value, may require the sale of the property. The debenture or debenture stock holder may, like any other secured creditor, by notice require the liquidator

(*k*) 11 Ch. D. 755; approved by the Court of Appeal in *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. Div. 128.

(*l*) Schedule II. of the Bankruptcy Act, 1883, rules 9 to 12.

(*m*) *Wallace* v. *Universal Automatic Machine Co.* (1894) 2 Ch. (C. A.) 547.

to elect, whether he will redeem and, if the liquidator does not redeem within six months after receiving such notice, the equity of redemption in the property comprised in such securities will, vest in such debenture or debenture stock holder); or

(4) To realise his securities and prove for the balance.(*n*)

Amount provable in respect of principal moneys secured.

By virtue of sec. 207 of the Companies Consolidation Act, 1908, the holders of debentures or debenture stock may prove for such an amount as would be provable, if the company had been a debtor and had been adjudicated a bankrupt. Such amount is provable immediately on the company being ordered to be wound up, even where there is no express provision made, that such moneys shall become due on the company being wound up.(*o*)

As hereinbefore stated, the whole of the principal sum secured is provable, if the securities of the debenture or debenture stock holders are delivered up to the liquidator. Where such securities are not so delivered up, the principal sum provable is the balance of the principal moneys secured after deducting therefrom either (1) the sum, at which the property comprised in the debenture or debenture stock holders' securities has been valued, or (2) the proceeds of sale of such property.

The sums above stated to be provable in the winding up of a company are liable to be reduced by any sums, which the company may be entitled to set off against the sums sought to be proved.(*p*)

A holder of debentures or debenture stock, which have been issued *ultra vires* and are therefore invalid, is not entitled to prove for the sums, which such securities purport to secure, but he is entitled to prove for so much of such sums as he can prove to have been properly applied in the payment of sums recoverable from the company and the Court will, where necessary direct an inquiry on this head.(*q*)

The holders of debentures or debenture stock, which are or is secured by a floating charge and issued by a company within three months of the commencement of its winding up and are or is invalid by reason of section 212 of the Companies Consolidation

(*n*) In re *Colonial Trusts Corporation*, 15 Ch. D. 465, 473; in re *Kit Hill Tunnel*, 16 Ch. D. 590.

(*o*) *Wallace* v. *Universal Automatic Machine Co.* (1894) 2 Ch. (C. A.) 547, 553.

(*p*) As to a company's right to set off as against a transferee of debentures or debenture stock, see supra, Bk. I., ch. vi., sec. iii.

(*q*) In re *Cork & Youghal Railway Co.*, 4 Ch. 748; Lindley, pp. 295, 1006.

Bk. II., Ch. III., Sec. VII.

Act, 1908, may nevertheless prove in the winding up as unsecured creditors for the amount of their securities, though the floating charge is invalid.

If a debenture or a debenture stock holder elects to rest solely on his security and therefore does not value the same and prove for the balance, he may, on such security turning out to be deficient, prove for the balance of his debt, provided that no dividend, which has already been paid, shall be disturbed.(*r*)

Amount provable in respect of transferred Debentures.

A holder for value of debentures or debenture stock, without notice of any impropriety in the issue of such securities may, as a rule, prove for the full amount of principal and interest specified in such instruments, even though such holder purchased such instrument from the original holder for a less sum than was paid to the company by such original holder. But this is not so, if such holder is a director of (or any other person standing in a fiduciary position towards) the company, which issued such securities; for in such a case the rule will apply, which forbids a trustee to make a profit by buying up an incumbrance on the trust estate. Acting on this principle and on the ground that the debentures of a company had been fradulently issued to promoters and that knowledge of the fact had to be imputed to a director of such company, Malins, V. C., held that a director, who bought up such debentures at a heavy discount, after the commencement of the winding up, could not be allowed to get more in the winding up than the price paid for such debentures and interest thereon.(*s*)

The amount provable on Debentures, when issued by way of collateral security.

The holder of secured debentures or debenture stock, which are issued by a company (acting within its powers) by way of collateral security to secure an advance of money, and which form part of a series purporting to rank *pari passu*, may prove for the full amount secured by his securities *pari passu* with the other holders of such securities, even though the nominal value of his securities exceeds the sum advanced, provided that the total amount received by such holder on so proving does not exceed the whole amount, which it was intended to secure by such collateral security.(*t*) But, if the debt of a company is

(*r*) In re *Kit Hill Tunnel*, 16 Ch. D. 590.

(*s*) In re *Imperial Land Co. of Marseilles*, ex parte *Larking*, 4 Ch. Div. 566.

(*t*) In re *Regents Canal Ironworks Co.*, 3 Ch. Div. 43; see also ex parte *Newton*, 16 Ch. Div. 330 and *Robinson* v. *Montgomeryshire Brewery Co.* (1896) 2 Ch. 841.

secured by several documents involving only the personal liability of the company itself as *e.g.*, by acceptances for the amount of the debt and by unsecured debentures issued by the company as collateral securities for the same debt, the creditor can only prove for the sum, that is actually due to him, and cannot prove in respect of the acceptances and debentures separately.(*u*)

Interest provable where no interest is expressly reserved.

Rule 97 of the Winding-up Rules, 1909, makes the following provision with regard to proving for interest in cases, in which no interest has been expressly made payable:—

"On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding-up order or resolution, the creditor may prove for interest at a rate not exceeding four per centum per annum to that date from the time, when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and, if payable otherwise, then from the time, when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment."

This rule does not preclude proof for interest in other cases than in those specifically mentioned.

Interest provable where interest is expressly reserved.

In cases, in which interest has been expressly made payable (and the debenture and debenture stock holders' securities almost invariably expressly provide for the payment of interest) the following rule with reference to proving for interest in the winding up of an insolvent company has been laid down by Malins, V. C.(*v*)

"The rule is clearly settled, that in a compulsory winding up debts bearing interest can only be proved for the debt and so much of the interest as is actually due at the commencement of the winding up. Whatever day is fixed upon in the case of a winding up under supervision, the interest will be calculated for proof till that day without prejudice to a claim for subsequent interest, if it should turn out, that there is a surplus available for the purpose."

A compulsory winding up commences at the date of the presentation of the petition.(*w*) On the other hand, when a

(*u*) In re *Blakeley Ordnance Co., Metropolitan and Provincial Banks Claim*, 8 Eq. 244.

(*v*) Ex parte *Colborne and Strawbridge*, 11 Eq. 478, 497, following *Warrant Finance Company's Case*, 4 Ch. 643; see also *Hughes's Claim*, 13 Eq. 623.

(*w*) Sec. 139 of the Companies Consolidation Act, 1908.

voluntary winding up is followed by a supervision order, the winding up will be deemed to commence on the date of the resolution confirming the winding up (*x*), the supervision order being merely a continuation of the voluntary winding up.(*y*)

Where a petition for winding up is presented and nothing more is done, and then resolutions are passed for a winding up and subsequently an order is made upon the petition so presented for continuing the winding up under supervision, the commencement of the winding up dates from the date of the resolution confirming the winding up.(*z*)

A secured creditor (including a debenture or debenture stock holder or the trustees of either of them) of a company, which is in liquidation, is not entitled after exhausting his security without satisfying his debt to apply the proceeds of the security in payment first of interest, which accrued due subsequent to the winding up, and then in reduction of principal and to prove in the winding up for the balance of the principal. His proof must be limited to what was due for principal and interest at the commencement of the winding up after deducting therefrom the proceeds of sale or realisation received in respect of the security.(*a*) He appears, however, to be entitled to keep down the interest accruing after the date of the winding up out of profits realised from the security since the winding up.(*b*)

A resolution to wind up voluntarily an insolvent company will stop interest from running, as section 207 of the Act applies.(*c*)

Effect of a judgment on the rate of interest.

A debt secured by debentures or debenture stock (like any other debt) is merged in a judgment for the payment of the debt, hence from the date of the judgment the interest will not be the

(*x*) *Dawe's Case*, 6 Eq. 232; *Weston's Case*, 4 Ch. 20; ex parte *Colborne and Strawbridge*, 11 Eq. 478, 499. See, however, in re *Colonial Trusts Corporation*, 15 Ch. D. 465, which decides, that the voluntary winding up under supervision commenced with the appointment of the provisional liquidator, and not with the confirmatory resolution. North, J., declined to follow this case in in re *West Cumberland Iron and Steel Co.*, 40 Ch. D. 361, on the ground that he had no power to alter the date of the commencement fixed by sec. 130 of the Companies Act, 1862 (now sec. 183 of the Companies Consolidation Act, 1908).

(*y*) Ex parte *Colborne and Strawbridge*, ubi supra; in re *Emperor Life Assurance Society*, 31 Ch. D. 78; *Weston's Case*, 4 Ch. 20; *Dawe's Case*, 6 Eq. 232; *Hodgkinson* v. *Kelly*, 6 Eq. 496; in re *West Cumberland Iron and Steel Co.*, ubi supra.

(*z*) *Hodgkinson* v. *Kelly*, 6 Eq. 496.

(*a*) *Quartermaine's Case* (1892) 1 Ch. 639, following ex parte *Ramsbottom*, 2 *Mont. & A.*, 79; ex pte. *Penfold*, 4 *De G. & Sm.*, 282; in re *Savin*, 7 Ch. 760.

(*b*) *Quartermaine's Case* (1892) 1 Ch. 639, 641. *Yate Lee on Bankruptcy*, 3rd ed., p. 629.

(*c*) Re *Thomas Salt & Co.* (1908) W. N. 63; 98 L. T. R. 558 (notwithstanding the dictum of Malins, V. C., to the contrary in ex parte *Colborne and Strawbridge*, 11 Eq. 478, 498).

sum fixed by the security, but four per cent. Thus in the case of *in re European Central Railway Co.*, (*d*) a limited company in the year 1867 issued debentures, by which it bound itself to pay a principal sum one year after the date of issue with interest at six per cent. until repayment thereof and charged its undertaking with the payment of the principal sum and interest. Soon after the year had expired a debenture-holder brought an action against the company and recovered judgment for the principal debt, interest at the rate of £6 per cent. and costs. The company was ordered to be wound up in 1868, and the debenture-holder was admitted to prove for the judgment debt (including the six per cent. interest to the date of the judgment) and four per cent. from the date of the judgment down to the winding up of the company. The debenture-holder claimed to prove for an additional two per cent. on the original amount of the debenture, from the date of the judgment. The Court of Appeal held, however, that the original debt was merged in the judgment, and that the claimant was only entitled to interest on the judgment debt at four per cent.

Statute of Limitations.

The Statute of Limitations ceases to run against the creditors of a company as from the date of the winding up of the company, hence a debenture or debenture stock holder or their trustees, whose debt is not statute barred at the date of the winding-up order, will not be barred by any delay after such date.(*e*) But a debt, which is barred before the winding up of the company, cannot be proved in the winding up.(*f*)

Amending proof.

If a secured creditor omits by inadvertence to value his security and proves for the whole sum due to him without deducting the value of the security, he should on discovering his mistake apply by motion to the Court for leave to amend the proof by inserting his security and putting a value on the same and to prove for the balance after deducting such value.(*g*)

Costs of proof.

It is provided by rule 94 of the Companies (Winding-up) Rules, 1909, that a creditor shall bear the costs of proving his debt, unless the Court otherwise orders. If, however, the company disputes a debt and, on being unsuccessful in litigation

(*d*) 4 Ch. Div. 33; see also ex parte *Fewings*, 25 Ch. Div. 338; *Economic Life Assurance Society* v. *Usborne* (1902) A. C. 147, 151.

(*e*) In re *General Rolling Stock Co.*, 7 Ch. 646.

(*f*) *Mitchell's Claim*, 6 Ch. 822.

(*g*) In re *Henry Lister & Company, Limited*, ex parte *Huddersfield Banking Co.* (1892) 2 Ch. 417; see also rule 135 of the Companies (Winding-up) Rules, 1909.

Bk. II., Ch. III., Sec. VII.

in respect of such debt, is ordered to pay the costs, such costs are payable in full out of the assets of the company.(*h*)

Preferential payments in Bankruptcy Act, 1888.

Section 209 of the Companies Consolidation Act, 1908, provides that in a winding up there shall be paid in priority to all other debts (including any debentures and debenture stock of the company secured by a floating charge) :—

(1) All parochial or other local rates due from the company at the date of the commencement of the winding up and having become due and payable within twelve months next before that date and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date and not exceeding in the whole one year's assessment, (2) all wages and salaries (not exceeding £50) of any clerk or servant in respect of services rendered to the company during four months before the said date, (3) all wages of any workman or labourer (not exceeding £25) payable for time or piece work in respect of services rendered to the company during two months before the said date, and (4) any compensation which has accrued due before that date under the provisions of the Workmen's Compensation Act, 1906.(*i*)

Rates.

Except so far as priority is given by section 209 to rates owing by a company, neither rates accrued due before the commencement of the winding up of a company (*j*) nor rates assessed before the winding up for a period, during the course of which the winding up commences,(*k*) have any priority in the winding up over other debts and the whole of such rates must be proved for *pari passu* with the other claims against such company.(*l*) A rate made after the commencement of the winding up upon premises, of which the liquidator retains beneficial occupation (that is to say, for the convenience of the winding up) is payable in full as part of the expenses of carrying on the business.(*m*) The true test is not, whether or no the liquidator's occupation

(*h*) Ex parte *Smith* re *Bank of Hindostan*, 3 Ch. 125; *Bailey & Leetham's Case*, 8 Eq. 94; re *Wenborn & Co.*, (1905) 2 Ch. 423.

(*i*) See infra, Bk. II., ch. iv., sec. ii., p. 300.

(*j*) In re *Art Engraving Company, Limited*, W. N. (1889) p. 38.

(*k*) For the Court has not power to apportion the rates under the Apportionment Act, 1870, and to order payment in full of so much of the rates as is attributable to the period subsequent to the winding up; in re *Wearmouth Crown Glass Co.*, 19 Ch. D. 640.

(*l*) In re *Dry Docks Corporation of London*, 39 Ch. Div. 306, 313; see Fry, L. J.'s remarks.

(*m*) In re *International Marine Co.*, 28 Ch. Div. 470; in re *National Arms Co.*, ibid. 474; in re *Dry Docks Corporation of London*, 39 Ch. Div. 306, 313.

was beneficial in that he did or did not derive any profit by such occupation,(*n*) but whether there has been a beneficial occupation within the ordinary meaning of these words in cases as to rating.(*o*)

SECTION VIII. *How far a Person holding Shares in and also Debentures or Debenture Stock of a Company has a Right to set off the Debt secured by such Debentures or Debenture Stock against Calls made on such Shares in the Winding up of such Company.*

Set off of Debenture debt by a holder against calls made by the Liquidator of a Limited Company is not (as a rule) allowed.

A contributory of a limited company has no right at common law, after such company has gone into liquidation, to set off a debt due to him from the company against calls made on him by the liquidators of such company. Hence, in the absence of special provisions by statute, debenture and debenture stock holders, who are also shareholders of a company in liquidation, have no right to set off their debenture debt against any calls made by the liquidator of the company. "Speaking roughly," says Lord Lindley (then L. J.),(*p*) "a set off is *not* allowed in the case of an action or claim between *limited* companies (in liquidation) and contributories and *is* allowed between *unlimited* companies (in liquidation) and contributories."

Section 123 of the Companies Consolidation Act, 1908, provides, that in the event of a company formed under the Act being wound up, every present and past member (*q*) of such company shall be liable (subject to the qualifications thereinafter mentioned) to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories amongst themselves. This liability is not, as has been supposed, in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company, and, when we look further into the Act, it will be seen, that it is a liability to contribution to be

(*n*) As was held in the cases of in re *West Hartlepool Iron Co.*, 34 L. T. R. 570; in re *Watson, Kipling & Co.*, 23 Ch. D. 500.

(*o*) In re *National Arms Co.*, 28 Ch. Div. 478, 482, followed in re *Blazer Fire Lighter, Limited* (1895) 1 Ch. 402.

(*p*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. Div. 648, 667.

(*q*) "Past member" here designates a member who, though no longer a present member, has not ceased to be a member for a period of one year prior to the commencement of the winding up.

enforced by the liquidator.(*r*) It is quite true, that a call made before the winding up is a debt due to the company, but that does not affect the liability to contribution created by section 123. As this liability to contribute does not constitute a debt to the company, a contributory cannot set off a debt due from the company to him against such liability to contribute.(*s*)

There is no provision at all in the Companies Consolidation Act, 1908, giving to contributories of limited companies in liquidation a right to set off except as between the contributories themselves. Hence, except when the rights of contributories *inter se* are being adjusted, a debenture or debenture stock holder, who is also a shareholder of a limited company in liquidation (whether such liquidation is voluntary, under the supervision of the Court or compulsory) (*t*) cannot set off his debenture debt against the amount unpaid on his shares, whether the amount so owing became due by calls made before (*u*) or after the commencement of the liquidation.(*v*) Such debenture or debenture stock holder must pay the calls in full and either prove for his debt *pari passu* with other creditors or else secure the repayment of his debt by enforcing his securities. Where, however, a contributory of a limited company, who is also a holder of debentures or debenture stock issued by such company, becomes bankrupt in the course of the winding up of the company, section 38 of the Bankruptcy Act, 1883 (*w*) applies and according as the sums secured by such debentures or debenture stock amount to more or to less than any calls, which may be made on the bankrupt, the trustee of the bankrupt may, where such sums amount to more than the calls, prove in the winding up for the balance, or, when such sums amount to less than the calls, set off such sums against the calls and pay the balance to the liquidator of the company, whether the claim is made in the bankruptcy or in the winding up.(*x*) A bankrupt debenture or debenture stock holder will, however, not be entitled under section 38 of the Bankruptcy Act, 1883, to set off the moneys, owing under such securities, against the claims made by the com-

Set off by Trustee of bankrupt Debenture-holder of the Debenture debt against call made by the Liquidator of a Limited Company.

(*r*) In re *Whitehouse & Co.*, 9 Ch. D. 595, 599, disapproving of *Brighton Arcade Co.* v. *Dowling*, L. R., 3 C. P. 175.

(*s*) In re *Whitehouse & Co.*, ubi supra.

(*t*) In re *Whitehouse & Co.*, ubi supra; see also Buckley, pp. 386, 387.

(*u*) *Calisher's Case*, 5 Eq. 214; *Barnett's Case*, 19 Eq. 449.

(*v*) *Grissell's Case*, 1 Ch. 528; *Black & Co.'s Case*, 8 Ch. 254.

(*w*) 46 & 47 Vic., cap. 52.

(*x*) In re *Duckworth*, 2 Ch. 578; ex parte *Strang*, 5 Ch. 492. If, however, the contributory is a company in liquidation, there is no right of set off. In re *Auriferous Properties Limited* (1898) 1 Ch. 691.

pany against him, unless the moneys owing under the said securities are owing *to the bankrupt.* Hence, if a receiver of the debentures or debenture stock belonging to a person, who subsequently becomes bankrupt, is appointed by way of equitable execution, the bankrupt (being no longer entitled to the payment of the sums secured by the debentures or debenture stock) will not be entitled to set off the money owing under the said securities against calls of the company made on the bankrupt (*y*).

When a Debenture debt may be set off against calls made on the shares of an Unlimited Company.

A contributory of an unlimited company will be allowed to set off a debt due by the company to him against a call made on him in some cases, in which he would not be allowed to set off such debt, if the company was a limited one. Section 165 of the Companies Consolidation Act, 1908, specially provides, that the Court may, in the case of an unlimited company, allow a contributory of such a company to set off against any calls made on him by the Court any moneys due to him on any independent dealing or contract with the company (but not any moneys due to him as a member of the company in respect of any dividend or profit). The reason why such set off is allowed, even though the creditors of the company have not been paid, is evidently that a contributory of an unlimited company is liable to contribute to any amount, until all the liabilities of the company are satisfied, and, therefore, it signifies nothing to the creditors, whether a set off is allowed or not. But with respect to a member of a company with limited liability, if a set off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts.(*z*) However, the calls, against which the Court may under section 165 allow creditors (including the debenture and debenture stock holders) of an unlimited company to set off debts due to them by such company, must have been made by such company before (*a*) the commencement of the liquidation of the company.

There are (as has already been stated) some sections in the Companies Consolidation Act, 1908, which expressly relate to set

(*y*). Ex parte *Peak Hill Goldfields Ld.* (1909) 1 K. B. (C. A.) 430.

(*z*) *Grissell's Case*, 1 Ch. 528, 536.

(*a*) In re *West of England Bank*, ex parte *Branwhite*, W. N. (1879) 86; 27 W. R. 646, 47 L. J. (Ch.) 463; 40 L. T. R. 652, disapproving of *Gibbs and West's Case*, 10 Eq. 312, which is also inconsistent with in re *Whitehouse & Co.*, 9 Ch. D. 595; see Buckley, pp. 386, 388.

Set off of Debenture debt by a holder against a debt (other than a call) due to a Company.

off between a company in liquidation and its contributories, but there is no enactment expressly relating to set off between a company in liquidation and non-contributories. As between an insolvent company and non-contributories, the rules as to set off, which are applicable in bankruptcy, are by virtue of section 207 of of the Companies Consolidation Act, 1908, equally applicable in the winding up of such company.(*b*) Thus, if a debenture or debenture stock holder owes a debt (other than a call made on shares) to a company, which is ordered to be wound up, he may set off the debenture debt against such debt due to the company.

Set off may constitute a fraudulent preference.

At any time before the winding up of a company the moneys, which are secured by the debentures or debenture stock of such company and which are actually due, may be set off against any calls, which are made on any shares in such company belonging to the holder of such debentures or debenture stock, and such a set off will be unimpeachable, if it was not made in contemplation of the insolvency of the company. But, if the money secured as aforesaid is not actually due and is set off against such calls in contemplation of the winding up of the company, such as a set off will, on the company being ordered to be wound up within three months from the date of such set off, be impeachable on the ground of fraudulent preference.(*c*)

SECTION IX. *Injunction Restraining a Company from Misapplying Property Charged with Debentures or Debenture Stock.*

Injunction restraining Company from misapplying property charged by debentures, when granted at the instance of a Debenture-holder.

If a company binds itself by express contract not to dispose of the property charged in favour of its debenture or debenture stock holders otherwise than in the ordinary course of its business, any holder may, on the company attempting to deal with any part of the property otherwise than in the manner specified, obtain an injunction restraining the company from dealing with such property otherwise than in accordance with such contract.(*d*) But, even where there is no express stipulation by the company not to deal with the property charged otherwise than in the ordinary course of its business, the debenture or debenture stock holders of such company may in some cases obtain an injunction restraining the misapplication of the property charged in their

(*b*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. Div. 648; 9 App. Cas. 434; *Lee and Chapman's Case*, 30 Ch. Div. 216.

(*c*) *Habershon's Case*; in re *Masons Tavern Co.* 5 Eq. 286.

(*d*) *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604.

favour. Thus in the case of *Mercantile Investment Co.* v. *River Plate Trust Co.*(*e*) an American company issued debentures charged on land in Mexico and secured by a trust deed, which empowered such company to sell the land so charged; such land remained vested in the company. Subsequently such company conveyed the whole of its property (including such land) and undertaking to an English company subject to the charge existing in favour of the debenture-holders, the English company undertaking to pay the principal moneys and interest secured by such debentures. The English company was registered as the owner of the land in Mexico and sold a portion of such land and claimed a right to dispose of such lands and of the proceeds of such parts thereof, as had been sold, without regard to the interests of the debenture-holders. Thereupon the plaintiff company commenced proceedings for the enforcement of the outstanding debentures claiming (*inter alia*) a receiver of such proceeds of sale. North, J., did not appoint a receiver, for the reasons stated in his judgment, but intimated, that the English company and its directors would be liable, if they misapplied the proceeds of such sale without making due provision for the debenture-holders' claims, and that they could be restrained from so applying any part of the proceeds of the land, which ought to go to satisfy such claims.

The Court will not, however, at the instance of an unsecured debenture or debenture stock holder (who stands in the same position as a simple contract creditor) restrain the company, which issued such debentures or debenture stock, from dealing with its assets, as it thinks fit; for he has no right to interfere with the internal arrangements of the company.(*f*)

Injunction against purchaser of the whole of the property of the Company

It should here be stated, that a person purchasing from a company its undertaking and practically the whole of its assets, which are, to his knowledge, subject to a floating charge in favour of debenture or debenture stock holders at the time of the purchase, will be restrained by injunction on the application of one of the debenture or debenture stock holders from dealing with such property otherwise than in the ordinary course of business carried on by the company, for, as the effect of such a sale is to render such debentures or debenture stock immediately

(*e*) (1892) 2 Ch. 303, 315.

(*f*) *Mills* v. *Northern Railway of Buenos Ayres*, 5 Ch. 621.

enforceable, the holders of such securities are entitled to have the property charged in their favour preserved.(*g*)

SECTION X. *Debenture and Debenture Stock Holder's Right to Object to and to Oppose the Reduction of the Capital and the Alterations in the Memorandum of Association of the Company which issued their Securities.*

Debenture-holder's right to oppose reduction of capital of Company.

Sections 49 and 50 of the Companies Consolidation Act, 1908 (which substantially re-enact sections 13 and 11 of the Companies Act, 1867), empower the holders of debentures or debenture stock of a company to object to the confirmation by the Court(*h*) of the reduction of the capital of such company.

These sections run as follows:—

Sec. 49 of Comp. Cons. Act, 1908. Objections by creditors, and settlement of list of objecting creditors.

"49.—(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

"(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

"(3) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount; (that is to say):—

(*g*) *Hubbuck* v. *Helms*, 56 L. T. R. 232, W. N. (1887) 45.

(*h*) It is not obligatory on the judge to confirm the reduction, even if he is satisfied that the creditors are duly protected; see *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. Div. 287, 303; re *Welsbach Incandescent Gas Light Co.* (1904) 1 Ch. 87, 101.

"(i) If the company admits the full amount of his debt or "claim, or, though not admitting it, is willing to provide "for it, then the full amount of the debt or claim;

"(ii) If the company does not admit or is not willing to pro- "vide for the full amount of the debt or claim, or if the "amount is contingent or not ascertained, then an amount "fixed by the Court after the like inquiry and adjudication "as if the company were being wound up by the Court."

Sec. 50 of Comp. Cons. Act, 1908. Order confirming reduction.

"50. The Court, if satisfied, with respect to every creditor of "the company who under this Act is entitled to object to the "reduction, that either his consent to the reduction has been "obtained, or his debt or claim has been discharged or has deter- "mined, or has been secured, may make an order confirming the "reduction on such terms and conditions as it thinks fit."

Settling list of Creditors.

The provision in the above-mentioned section 49 (2) (re-enacting part of section 13 of the Companies Act, 1867) requiring the Court to "settle a list of creditors so entitled to object" is imperative and the Court has no power to dispense with the settling of such list, even though there is evidence before the Court proving that the company has no unsatisfied debts. On the other hand, the provision in the same section requiring the Court to "ascertain as far as possible, without requiring an application "from any creditor, the names of those creditors and the nature "and amount of their debts or claims" is not imperative, but directory only and may accordingly be dispensed with in a proper case.(*i*)

Notice of advertisement of reduction.

Persons, who hold debentures to bearer and whose names (being necessarily unknown to the company) cannot be entered on the list of creditors, will receive notice by advertisement and may, if they think fit, claim to be entered on the list of creditors within the time fixed by the Court and, if they fail to do so, may find themselves excluded from the right of objecting to the reduction.(*j*) There is a special form of notice by advertisement to the holders of debentures to bearer.(*k*)

A creditor, who was on the list and who, though having an opportunity of opposing the reduction, did not oppose, but remained

(*i*) Re *Lamson Store Service Co.* (1895) 2 Ch. 726.

(*j*) Re *Crédit Foncier of England*, 11 Eq. 356. See, however, re *Patent Ventilating Granary Co.*, 12 Ch. D. 254.

(*k*) Re *General Bank for Promotion of Agricultural & Public Works*, 17 W. R. 304; 38 L. J. Ch. 168.

Bk. II., Ch. III., Sec. X.

passive, was held *not* to be a creditor, who "does not consent" within the meaning of section 14 of the Companies Act, 1867 (which is re-enacted by section 49 (3) of the present Act), but was treated by Bacon, V. C., in re *Crédit Foncier of England* (*l*) as assenting to the reduction. But Fry, J., refused to follow this decision in the case of re *Patent Ventilating Granary Co.* (*m*) and required either the production of a consent brief on behalf of the creditors or the deposit of the amount of the debts owing to such creditors in Court.

Debenture-holder's right to oppose the alteration of Memorandum of Association, under Sec. 9 of the Comp. Cons Act, 1908.

By virtue of section 9 of the Companies Consolidation Act, 1908, a company registered under that Act or the Companies Act, 1862, may alter its memorandum of association, but such alteration is not to take effect until confirmed by the Court on petition.

Section 9 (3) provides that before confirming any such alteration the Court must be satisfied:—

"(*a*) That sufficient notice has been given to every holder of "debentures [or debenture stock] of the company and to any persons "or class of persons whose interest will in the opinion of the "Court be affected by the alteration; and

"(*b*) That, with respect to every creditor who in the opinion "of the Court is entitled to object, and who signifies his objection "in manner directed by the Court, either his consent to the "alteration has been obtained or his debt or claim has been "discharged or has determined, or has been secured to the "satisfaction of the Court.

"Provided that the Court may, in the case of any person or "class of persons, for special reasons, dispense with the notice "required by this section."

The alterations, which the Court is authorised to confirm, are specified in section 9. Hence, if a proposed alteration does not fall within section 9, the Court will decline to confirm it, whether the debenture or debenture stock holders concur in or oppose the application.(*n*) Where the proposed alteration does fall within section 9, a debenture or debenture stock holder may oppose the application to confirm such alteration; however, the Court may confirm such alteration notwithstanding such opposition.(*o*)

(*l*) 11 Eq. 356, 361.

(*m*) 12 Ch. D. 254. For a detailed account of the necessary steps to be taken for the purpose of objecting to a reduction, see Simonson On Reduction of Capital.

(*n*) In re *Government Stock Investment Co.* (No. 1) (1891) 1 Ch. 649.

(*o*) In re *Government Stock Investment Co.* (No. 2) (1892) 1 Ch. 597.

CHAPTER IV.

THE RIGHTS AND REMEDIES OF DEBENTURE OR DEBENTURE STOCK HOLDERS AGAINST THE OTHER CREDITORS OF A COMPANY AND *VICE VERSA*.

Contents of the chapter.

IN the present chapter it is proposed to consider shortly the most important rights and remedies (1) of debenture or debenture stock holders of a company against the other creditors of such company, and (2) of such creditors against such debenture or debenture stock holders.

SECTION I. *The Rights and Remedies of Debenture or Debenture Stock Holders against the Creditors of the Company other than such Holders.*

When a Debenture becomes operative against subsequent mortgagees of Company.

A mortgage debenture is operative against the holders of subsequent charges by the company, as soon as the seal of the company is affixed to it, though the person, whose charge is secured by a debenture, cannot sue the company upon such debenture before the payment to the company of the moneys secured by and the actual delivery of the debenture.(*a*)

Priority of Debentures over the general creditors of a Company.

The holders of debentures or debenture stock issued by a company and constituting a floating charge on its assets or a charge on its undertaking,(*b*) will, on the company being ordered to be wound up or going into voluntary liquidation, or on a receiver or receiver and manager being appointed by the Court, be entitled to have the moneys secured by such debentures or debenture stock satisfied out of the assets of the company (including the uncalled capital, where the uncalled capital is comprised in the charge)(*c*) in priority to the claims of the

(*a*) *Gartside* v. *Silkstone Iron Co.*, 21 Ch. D. 762, 768.

(*b*) As to this, see supra, Bk. I., ch. ii., sec. i. (2*a*).

(*c*) See supra, Bk. I., ch. ii., sec. i. (2*c*).

general unsecured creditors of the company other than such creditors as are entitled to preferential payment under section 209 of the Companies Consolidation Act, 1908,(*i*) provided that the requirements of section 93(*j*), of that Act as to the registration of the debenture or debenture stock holders' securities have been complied with and that the floating charge created in favour of the holders of the debentures or debenture stock is not invalid under section 212 of that Act.(*k*)

A power in the trustees of the debenture or debenture stock holders' trust deed to carry on the business, which is charged with the repayment of the debenture debt, does not give to the general creditors a claim chargeable in priority to such debentures or debenture stock. This was decided by the case of *in re The Anglo-American Leather Cloth Co., Limited.*(*l*) In that case the company issued debentures, which provided, that the company should not thereby be prevented from dealing with their property for the purposes of the company. These debentures were further secured by a trust deed, whereby the business premises of the company and the plant, machinery and effects in or upon the premises or used in connection therewith were assigned upon trust to permit the company to hold and enjoy the premises and carry on their business therein and therewith until default and after default to sell, etc., with a power to the trustees to sell the same and the goodwill as a going concern. The deed also contained a covenant by the company, that all lands, etc., and machinery and effects, which they should thereafter acquire should be included in the security, and a proviso, that the company should not be precluded on purchasing any lands from mortgaging them to raise or secure the purchase money, and a further covenant, that the sum to be secured by the debentures should be a first charge upon the property assigned subject to any mortgage under the proviso. The company subsequently went into liquidation. V. C. Hall (whose judgment was affirmed by the Court of Appeal) held, that the power to carry on business did not operate to give to the general creditors a claim for goods supplied chargeable against the property comprised in the deed in priority to the debenture-holders and made a declaration that the persons entitled to the

(*i*) See infra, Bk. II., ch. iv., sec. ii., p.

(*j*) See supra, Bk. I., ch. v., sec. i., p.

(*k*) See supra, Bk. I., ch. ii., sec. i., (2*a*), p.

(*l*) 42 L. T. R. 504; 43 L. T. R. 43.

benefit of the debenture trust deed were entitled to a charge on all the property of the company as it was at the commencement of the winding up (other than the book debts of the company) in priority to all other claims.

Priority of Debentures created after 1st Jan., 1901, over other Mortgages and charges.

Subject (as regards mortgages and charges created by a company between the 1st day of January, 1901, and the 1st day of July, 1908), to compliance with the requirements of section 14 of the Companies Act, 1900, and (as regards mortgages and charges created by the company after the 1st day of July, 1908) to compliance with the requirements of section 93 of the Companies Consolidation Act, 1908, the mortgages and charges belonging to one or other of the categories specified in these sections and created by a company after the 1st day of January, 1901, will have priority according to priority of date. Hence, if duly registered, a debenture created, or a debenture and debenture stock holders' trust deed executed, by a company after the first day of January, 1901, will (i) where the assets are *specifically mortgaged* by such debenture or trust deed, rank *above* all mortgages or charges, which are liable to registration and which are created by the company after the date of such debenture or trust deed, and will (ii) where the assets are subject to a *floating charge* created by the debentures or trust deed, rank *below* all mortgages or charges created by the company in the ordinary course of its business after the creation of such debentures or the execution of such trust deed.

Priority of Debentures created before 1st, Jan. 1901, over other Mortgages and charges.

The determination of the question whether a debenture or a trust deed securing an issue of debentures or debenture stock respectively created or executed by a company before 1st January, 1901, will rank above or below other mortgages or charges created by the company, will depend upon the application of the ordinary rules of law and equity regulating the priority of mortgages. Thus, if such an issue of debentures or debenture stock is secured by a legal mortgage (which is, as we have seen above, almost invariably the case where there is a trust deed) such trust deed will rank above any prior equitable charge, if the holders of the debentures or debenture stock had at the date of the issue of their securities no notice of such equitable charge (the rule in such a case being that, where the equities are equal,(*m*) the legal estate prevails).(*n*)

(*m*) *Pilcher* v. *Rawlins*, 7 Ch. 259.

(*n*) "Equality of equities" is an expression meaning that no circumstance exists, which affects the conduct of one of the rival claimants and makes it less meritorious than the other. Equitable owners, who are upon an equality in this respect, may struggle for the legal estate,

When and how Debentures charged on equitable estate of Company's property may obtain priority over earlier equitable charges on such property and *vice versâ*.

Where an issue of debentures or debenture stock created before 1st January, 1901, is only secured by an equitable charge on the property of the company, such charge will, as a general rule, rank after an earlier equitable charge or interest in such property (the rule in such a case being *qui prior est tempore, potior est jure*).(*o*) However, the holders of debentures or debenture stock constituting an equitable charge on the assets of a company to secure moneys advanced to such company may, if they made such advance without having notice of any equitable charge or interest of an earlier date and subsequently discovered the existence of such prior equitable charge or interest, obtain priority over such equitable charge or interest by getting in the legal estate. Of course, if a person holding an equitable incumbrance on a part or the whole of the assets of a company advances his money to the company without notice of the existence of any debentures or debenture stock previously issued by the company and constituting an equitable incumbrance on the assets of the company, such subsequent incumbrancer can in his turn gain priority over the debenture or debenture stock holders by getting in the legal estate.(*p*)

Priority of charge on debt due to Company is obtained by giving notice of such charge to the debtor.

Where debentures or debenture stock created before 1st January, 1901, are secured by a charge on a debt due to the company, such charge will, on notice thereof being given to the person owing such debt, be perfected and will rank in priority to any earlier charge on or interest in such debt, if no notice of such earlier charge or interest has been given to such debtor and if the debenture or debenture stock holders have no notice at the date of the issue of their securities. In the same way, if a debt due to a company is charged in favour of the debenture or debenture stock holders, who refrain from giving notice of their charge on such debt to the debtor, and such debt is subsequently charged in favour of another person, who has no notice of the debentures or debenture stock holders' charge, such other person will, on giving notice of his charge to such debtor, rank prior to the debenture or debenture stock holders.(*q*)

and he who obtains it, having both law and equity upon his side, is in a better position than he, who has equity only. *Bailey* v. *Barnes* (1894) 1 Ch. (C. A.) 25, 36.

(*o*) *Rice* v. *Rice*, 2 Drew 73.

(*p*) *Taylor* v. *Russell* (1892) A. C. 244; *Bailey* v. *Barnes* (1894) 1 Ch. (C. A.) 25.

(*q*) *English and Scottish Investment Trust* v. *Brunton* (1892) 2 Q. B. (C. A.) 1, 700. For a full discussion of the rules, by virtue of which an assignee of an equitable interest in a chose in action without notice of any existing prior assignment may gain priority over such prior assignment by giving notice to the person, who has the legal dominion over the subject of the assignment, see *Ward* v. *Duncumbe* (1893) A. C. 369.

Priority of Debentures over Trustee in bankruptcy of vendor to Company.

The conversion of a private business into a company and the sale of such business to the company may sometimes be a dishonest device resorted to by the owner of the business, when he is in financial difficulties, for the purpose of denuding himself of his property and thus defrauding his creditors and may amount to an act of bankruptcy under section 4 (1 (*b*)) of the Bankruptcy Act, 1883 (46 & 47 Vic., cap. 52) and such sale may be declared void as against the trustee in bankruptcy of the vendor. But, even when such a conversion and sale do amount to an act of bankruptcy, debentures and debenture stock issued by the company *bonâ fide* for value to persons, who have no notice of the fraud, will be perfectly good and a charge on (*inter alia*) the business in favour of the holders of such debentures or debenture stock will give to the holders of such securities priority over the trustee in bankruptcy of the original owner of such business, so far as the assets of the company (other than such business) charged in favour of the holders of the debentures or debenture stock are insufficient to satisfy the claims of the holders of such securities. On the other hand, the holders of any such debentures or debenture stock, taking with notice (or taking through persons who had notice) of the fraud under the above circumstances, cannot enforce their charge on the business of the company against the trustee in bankruptcy of the original owner of the business.(*r*)

When Debenture-holders are entitled to chattels on land comprised in their security.

Under certain circumstances the rights of debenture or debenture stock holders to chattels, which are attached to the land of the company issuing such securities, may raise points of considerable difficulty. The general proposition of law is well established that a mortgagee is entitled as against the mortgagor to all fixtures, whether they are placed upon the land before or after the date of the mortgage (*s*) and whether the land comprised in the mortgage is freehold or leasehold.(*t*) It has also been decided that a mortgagee taking possession of the land mortgaged (whether it be freehold (*u*) or leasehold) (*v*) is entitled to all the chattels then attached to the land even as against a person, who has let

(*r*) Re *Slobodinsky, ex pte. Moore* (1903) 2 K. B. 517.

(*s*) *Walmesley* v. *Milne*, 7 C. B. (N.S.) 115; *Ackroyd* v. *Mitchell*, 3 L. T. (N. S.) 236; *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Cullick* v. *Swindell*, L. R. 3 Eq. 249; *Climic* v. *Wood*, L. R. 4 Ex. 328; *Gough* v. *Woods & Co.* (1894) 1 Q. B. (C. A.) 713, 721.

(*t*) *Ex pte Barclay*, 5 D. M. & G. 403.

(*u*) *Hobson* v. *Gorringe* (1897) 1 Ch. (C. A.) 182.

(*v*) *Reynolds* v. *Ashby & Son Ld.* (1903) 1 K. B. (C. A.) 87; (1904) A. C. 466.

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the chattels to the mortgagor subject to the provisions of a hire purchase agreement stipulating (*inter alia*) that the chattels shall not belong to the mortgagor until all the instalments payable in respect of the chattels shall have been satisfied. The right of the lessor of such chattels as against the mortgagee to seize such chattels pursuant to his power under the hire purchase agreement before the mortgagee of the land has gone into possession is, it would appear, still open to doubt.

Right of Debenture-holders to remove tenants' fixtures after determination by Company of its lease.

After the appointment of a receiver by the Court on behalf of the holders of debentures or debenture stock secured by a floating charge on the assets (including certain tenant's fixtures) of a company, such company cannot by a voluntary act (*e.g.*, by going into voluntary liquidation and thereby determining the lease of the premises to which such fixtures are attached) deprive the debenture or debenture stock holders of the benefit of their charge on the fixtures. The holders of such securities are as against the landlord of the company entitled to a reasonable time to remove the fixtures after the determination of the lease in the manner hereinbefore mentioned, and the Court will in such a case give to the receiver a reasonable time for removing the fixtures, if the landlord raises any objection to his removing them without an application being made to the Court for the purpose.(*w*)

Debenture-holders entitled to arrears of rent in respect of specifically mortgaged property.

If any land, which is specifically mortgaged by the trust deed securing debentures (or debenture stock), is subject to a lease, all arrears of rent due in respect of such land at the time when the trustees of the trust deed take possession of such land or when a receiver or receiver and manager of such land is appointed, form part of the specifically mortgaged property and belong to the debenture (or debenture stock) holders; (*x*) for a mortgagor is in possession and receives the rents of the mortgaged property only by leave of the mortgagee, and the mortgagee is the reversioner expectant on leases of the mortgaged property and is entitled on taking possession of the mortgaged property, to all arrears of ren in respect of leases made before the date of the mortgage or made with the authority of the mortgagee subsequently.(*y*)

Compensation moneys payable under the provisions of the Lands Clauses Consolidation Act, 1845, or the Licensing Act, 1904 (4 Edw. VII., cap. 23) in respect of property, which is

(*w*) Re *Glasdir Copper Works Ld. Electro-Metallurgical Co.* v. *Same Co.* (1904) 1 Ch. 819.

(*x*) Re *Ind Coope & Co., Fisher* v. *Same Co.*, (1911) 2 Ch. 223.

(*y*) *Moss* v. *Gallimore*, 1 Doug. 279; *Rogers* v. *Humphreys*, 4 Ad. & El. 299; Re *Ind Coope & Co., Fisher* v. *Same Co.* (1911) Ch. 223.

specifically mortgaged by the debenture or debenture stock-holders' trust deed, must be paid to the trustees of such deed and not to the company; for these moneys are and are treated as part of the property mortgaged (*z*) and the trustees may accordingly apply such moneys for any one or more of the purposes, for which they are by the trust deed authorised to apply the "purchase money" or "capital moneys" in their hands.(*a*)

Debenture-holders are entitled to compensation moneys paid for specifically charged property.

The holders of debentures and debenture stock charged on all the undertaking and property (present and future) of a company are entitled as against the general creditors of such company to any moneys recovered by misfeasance proceedings taken by the liquidator of the company against its directors under section 215 of the Companies Consolidation Act, 1908.(*b*) The costs incurred by the liquidator in recovering such moneys are, it would appear, payable out of the moneys so recovered, but the costs of the winding-up order, after which the misfeasance proceedings are commenced, are not payable out of the moneys recovered, though such misfeasance proceedings could not have been taken, unless the company had been ordered to be wound up.(*c*) In a recent case,(*d*) in which the debenture-holders were opposed to misfeasance proceedings being taken at the expense of the assets covered by the debentures and also to abandoning the claims of the debenture-holders to any sums recovered in the proceedings, the Court ordered that the claim against the directors and auditors in such proceedings should be sold by auction.

Debenture-holders are entitled to moneys recovered by misfeasance proceedings.

All distinction between meritorious and non-meritorious creditors as to the right, upon the abandonment of certain undertakings, to share in the deposit made by the promoters in order to obtain from the Board of Trade the provisional order authorising such undertakings, has since the passing of the Parliamentary Bonds and Deposits Act, 1892,(*e*) ceased to exist. Hence the holders of debentures and debenture stock are, on such undertakings being abandoned, entitled to part of the moneys so deposited *pari passu* with other creditors (whether meritorious or non-meritorious) of the company.(*f*)

Debenture-holders share Parliamentary deposits *pari passu* with the general creditors of a Company.

(*z*) *Pile* v. *Pile*, 3 Ch. Div. 36; *Law Guarantee & Trust Society* v. *Mitcham & Cheam Brewery Co.* (1906) 2 Ch. 98; *Noakes* v. *Noakes & Co. Ld.* (1907) 1 Ch. 64; *Dawson* v. *Braime's Tadcaster Breweries Ld.* (1907) 2 Ch. 359; re *Bladon* (1911) 2 Ch. 350.

(*a*) Re *Bentley's Yorkshire Breweries Ld.* (1909) 2 Ch. 609.

(*b*) See infra, Bk. II., ch. vi., sec. ii.

(*c*) In Re *Anglo-Austrian Printing Union*, *Brabourne* v. *Same* (1895) 2 Ch. 891.

(*d*) *Wood* v. *Woodhouse & Rawson, Limited*, W. N. (1896) 4.

(*e*) 55 & 56 Vic., cap. 27.

(*f*) Ex parte *Bradford and District Tramways Co.* (1893) 3 Ch. 463.

When Debenture-holder ranks above judgment creditor of a Company.

The Court will (as has already been stated) appoint a receiver or receiver and manager of the assets of a company, if it can be shown, that the security of the debenture or debenture stock holders of such company is in jeopardy (*e.g.*, if there are judgments against the company) and the Court may appoint such receiver or receiver and manager, even though such securities have not become due under the terms of the securities.(*r*) But, until a winding-up order has been made or the company stops business or the necessary steps have been taken to have a receiver or receiver and manager of such company appointed, a judgment creditor of a trading company will be allowed to enforce his security notwithstanding any opposition on the part of the holders of debentures or debenture stock charged by such company on its undertaking by way of floating charge. Thus a holder of debentures or debenture stock charged by way of floating charge on the undertaking of a company cannot, while the company is carrying on its business and when no steps have been taken to wind up the company or to get a receiver appointed, require payment to him (the debenture or the debenture stockholder) of a particular debt owing by a third person to the company after a garnishee order absolute has been obtained by a judgment creditor of the company attaching such debt; for, until the company has ceased to carry on its business or a receiver thereof has been appointed, the security continues to be a floating one, and so long as the security remains a floating one, the company may deal with its property in the ordinary course of business, as if the debentures or debenture stock had not been issued. If a garnishee order absolute has been obtained attaching a particular debt, before the company has ceased to carry on business or a receiver has been appointed, the garnishee must pay the debt to the judgment creditor notwithstanding any notice from a debenture or debenture stock holder requiring payment of such debt to him.(*s*) But immediately after the

(*r*) *Edwards* v. *Standard Rolling Stock Co.* (1893) 1 Ch. 574; re *London Pressed Hinge Co.* (1905) 1 Ch. 576; see supra, Bk. II., ch. iii., sec. iii. A holder of a debenture issued under the provisions of the Companies Clauses Consolidation Act, 1845, and in the form of Schedule C to that Act has a right to an injunction restraining a judgment creditor from taking possession of the lands and chattels of the company, which issued such security; see infra, Bk. III., ch. i.

(*s*) *Robson* v. *Smith* (1895) 2 Ch. 118; followed in *Robinson* v. *Burnell's Vienna Bakery Co.* (1904) 2 K.B. 624.

commencement of the winding up of the company or the appointment of a receiver, the floating charge created in favour of the debenture or debenture stock holders of such company becomes crystallised and thereupon a judgment creditor of the company will not be allowed to take possession of the assets of the company. Even though a receiver, who is ordered to give security, takes possession of the property of the company without giving such security, a judgment creditor of such company will not be allowed to levy execution on the goods in the possession of the receiver.(*t*)

A debenture or debenture stock holder, who has taken proceedings against the company to enforce the debenture or debenture stock holders' charge, may protect his interest as well as the interests of the other holders against any creditor, who may get judgment against the company, by obtaining a declaration that he and the other holders are entitled to stand in the position of judgment creditors for the aggregate sum of the debentures or debenture stock and the interest then due, and by the appointment of a receiver of the property of the company not included in the debenture or debenture stock holders' securities.(*u*)

Priority of Debentures over execution Creditors of a Company.

The holders of (and the persons entitled to) debentures and debenture stock constituting a floating charge on the assets of a company are, on such securities becoming crystallised, entitled to priority not only over ordinary judgment creditors, but even over execution creditors of such company. "After the decision of *in re Standard Manufacturing Company*," (*v*) says Lord Lindley (then L. J.), "it seems tolerably plain and settled that the right of the holders of debentures must prevail even as against the execution creditor, at least before sale." (*w*) In the case of *in re Opera, Limited*, a sheriff was at the time of the presentation of a winding-up petition of a company in possession of goods of the company, which he had seized under writs of *fi. fa.*; these goods were covered by debentures charging all the company's undertaking

(*t*) *Morrison* v. *The Skerne Ironworks, Limited*, 60 L. T. R. 588, 33 Sol. Jo. 396.

(*u*) *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730.

(*v*) (1891) 1 Ch. (C. A.) 627, 640-1; followed also in *McIntyre, Hogg & Co.* v. *E. C. Gittens, Limited*, 98 L. T. J. 182; see also *Simultaneous Colour Printing Syndicate* v. *Fowraker* (1901) 1 K. B. 771; *Marshall* v. *Rogers & Co.*, 14 Times L. R. 217; *Duck* v. *Tower Galvanising Co.* (1901) 2 K. B. 314.

(*w*) In re *Opera, Limited* (1891) 3 Ch. (C. A.) 260, 263; followed in *Taunton* v. *Sheriff of Warwickshire* (1895) 2 Ch. (C. A.) 319: see also *Davey & Co.* v. *Williamson & Son* (1898) 2 Q. B. 194; re *London Pressed Hinge Co.* (1905) 1 Ch. 576, 583.

and property as a floating security for the debenture debt. Subsequently to the presentation of the petition the sheriff gave up possession of the goods, and, on a winding-up order being made, the goods were sold by the official liquidator, who retained the proceeds. Thereupon the sheriff took out a summons asking, that the liquidator might be ordered to pay to him (the sheriff) out of the proceeds of sale the sums, for which the sheriff had levied execution. The Court of Appeal held that the debenture-holders (and not the sheriff) were entitled to the proceeds of sale and accordingly dismissed the summons.

Even after the property taken in execution has been sold, the debenture and debenture stock holders' right to the proceeds prevails over the execution creditors, at any rate, until such proceeds have been handed over to the execution creditors.(*x*)

The cases of *in re Opera, Limited*, and *Taunton* v. *Sheriff of Warwickshire*, expressly leave undecided the question as to what the position of debenture-holders would be after the property charged has been sold and the proceeds handed over to the execution creditors.

As soon as a floating charge on the assets of a company securing the debentures or debenture stock issued by such company has ceased to float,(*y*) the Court will on the application of a holder of such debentures or debenture stock grant an injunction restraining an execution creditor from proceeding with his execution, if such assets have not yet been taken in possession of on behalf of such execution creditor,(*z*) or, if the sheriff has already taken possession thereof, an injunction restraining the sheriff from selling such assets.(*a*)

An execution put in force against the assets of a company after the commencement of the winding up of such company is void to all intents and is therefore void against the debenture and debenture stock holders of such company.(*b*)

(*x*) *Taunton* v. *Sheriff of Warwickshire*, ubi supra.

(*y*) As to this, see supra, Bk. I., ch. ii., sec. i. (*2a*).

(*z*) *Legg* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid Hants Railway*, 16 W. R. 409.

(*a*) *Taunton* v. *Sheriff of Warwickshire* (1895) 2 Ch. (C. A.) 319.

(*b*) Re *Artistic Colour Printing Co.*, ex parte *Fourdrinier*, 21 Ch. Div. 510; see also sec. 211 of the Companies Consolidation Act, 1908.

In the following cases a company's debentures, which had crystallized, were held to rank above the garnishors of a debt owing to the company:—

Priority of Debentures over garnishor.

In *Geisse* v. *Taylor* (*v*) execution had been put in by a garnishor against garnishees (a limited company) who, after the making of the garnishee order, but before the execution, had issued a debenture covering all their assets and property. Upon execution being put in, the debenture-holder appointed a receiver and claimed the goods under his debenture. It was there held, that the debenture holder's security had become specific and that he was entitled to rank above the garnishor.

In *Norton* v. *Yates* (*w*) judgment was obtained by an unsecured creditor against a company, which had some years previously issued debentures charging all its property, and on the same day on which the judgment was obtained, the judgment creditor obtained and served a garnishee order nisi upon garnishees; two days later (before any payment had been made under the garnishee order) a receiver and manager was appointed in a debenture-holder's action; it was held, that the debenture holder's charge had become specific and that the receiver was entitled to the money in priority to the judgment creditor.

In *Cairney* v. *Back* (*x*) judgment had been obtained against a company on 15th June, and a garnishee order nisi served on the company's bankers on the same day; on 25th June the garnishee order was made absolute, and on 29th June a receiver was appointed by a debenture holder of the company under the power contained in his debenture. The garnishee order absolute had not resulted in seizure and it was held that, as the garnishee order absolute did not transfer to the garnishor the property in the garnished debt (*y*), the debenture holder was entitled to the money in priority to the judgment creditor.

Priority of Debentures charged on ship over the charterers thereof.

Debenture or debenture stock holders having a charge on a ship will have priority over the charterers thereof, where the

(*v*) (1905) 2 K. B. 658.
(*w*) (1906) 2 K. B. 112.
(*x*) (1906) 2 K. B. 746.
(*y*) See also re *Combined Weighing & Advertising Machine Co.*, 43 Ch. Div. 99.

charter party contains a provision, which impairs the debenture or debenture stock holders' security, such as a right of pre-emption in favour of the charterers;(*c*) for the mortgagor of a ship only has power (under the Merchant Shipping Act, 1894)(*d*) to act as the owner of and to deal with his ship, provided he does not materially prejudice and detract from or impair the sufficiency of the security comprised in the mortgage.(*e*)

On the other hand, debentures or debenture stock will, if secured by an equitable charge on ships, rank after a legal mortgage of such ship in the statutory form executed at a later date and duly registered before such equitable charge has been converted into a legal mortgage in the statutory form and registered and such legal mortgage will have priority, even if the legal mortgagee had notice of the charge created by such debentures or debenture stock at the date of his mortgage.(*f*)

Priority of Debentures over Liquidator's costs of carrying on business.

The liquidator of a company, which has charged all its assets (including uncalled capital) in favour of debenture or debenture stock holders, should not carry on the business of such company, unless his expenses are provided for; for the costs of carrying on the business of a company are not payable as costs of preservation out of the property comprised in the debenture or debenture stock holders' securities. The costs of carrying on the business of a company, even though such business ultimately realises more than it would have realised, had the business not been carried on, are not costs of preservation, which the liquidator of the company can claim to have recouped out of the assets charged in favour of the company's debenture or debenture stock holders.(*g*) Hence, if debentures or debenture stock charged on the assets of a company are outstanding, when such company is ordered to be wound up, the liquidator should not carry on the business himself, but should get a debenture or debenture stock holder to commence a debenture or debenture stock holder's action. In such a case the liquidator is (as has

(*c*) *Marsden* v. *Newton*; in re *Great Eastern Steamship Co.*, 29 Sol. Jo. 668.

(*d*) 57 & 58 Vic., cap. 60, sec. 34, which is a re-enactment with slight verbal alterations of 17 & 18 Vic., cap. 104, sec. 70.

(*e*) *Collins* v. *Lamport*, 34 L. J. (Ch.) 196; 13 W. R. 283; *The Fanchon*, L. R., 5 P. D. 173.

(*f*) *Black* v. *Williams* (1895) 1 Ch. 408; *Barclay & Co.* v. *Poole* (1907) 2 Ch. 284.

(*g*) Ex parte *Grissell*, 3 Ch. Div. 411; in re *Omerod, Grierson & Co.*, W. N. (1890) 217; in re *Marine Mansions Co.*, 4 Eq. 601. As to how far the costs of realisation and preservation rank above the debenture or debenture stock holders' charge, see supra, Bk. II., ch. iii., sec. v. (4).

been stated) generally appointed receiver and manager and his expenses would thus be provided for.

Priority of Debentures over rates after charge has ceased to float.

Rates payable by a company, which has created a floating charge on its undertaking in favour of its debenture or debenture stock holders, form part of its working expenses and are therefore payable out of its assets, so long as the charge continues to float.(*h*) But, as soon as a receiver or receiver and manager has taken possession of the assets of the company on behalf of the debenture or debenture stock holders, the charge created in their favour becomes specific and ranks prior to the rates (other than those hereinafter expressly excepted) due by the company at the date, at which such possession was taken.(*i*) But all parochial and other local rates due from a company at the date of the appointment of a receiver or of the taking possession of property on behalf of the debenture or debenture stock holders or at the date of the commencement of the winding up, and having become due and payable within twelve months next before that time(*j*) now rank above a floating charge.(*k*)

SECTION II. *The Rights and Remedies of the Creditors (other than the Debenture or Debenture Stock Holders) of a Company against such Debenture or Debenture Stock Holders.*

Priority over debentures obtained by creditor of a Company by virtue of his right of set off.

Under certain circumstances a general creditor of a company may, even after a floating charge in favour of the debenture or debenture stock holders of such company has ceased to float,(*l*) set off a debt due from the company to him against a debt due from him to the company and by so doing obtain priority over the debenture or debenture stock holders of the company. Thus it has been decided, that a person, who becomes a creditor of a company, having notice of the existence of a floating charge in favour of its debenture or debenture stock holders, has notwithstanding such notice a right to set off a liquidated sum due from the company to him against a liquidated sum due from him to the company, if both such debts are due before the charge has

(*h*) In re *National Arms and Ammunition Co.*, 28 Ch. Div. 474; in re *Blaser Fire Lighter, Limited* (1895) 1 Ch. 402.

(*i*) Re *British Fuller's Earth Co., Gibbs* v. *Same Co.*, 17 Times L. R. 232.

(*j*) See secs. 107 and 209 of the Companies Consolidation Act, 1908, and infra, pp. 341-343.

(*k*) *Richards* v. *Overseers of Kidderminster* (1896) 2 Ch. 212; see supra, Bk. II., ch. iii., sec. vii. For a receiver and manager's liability to pay rates, see supra, Bk. II., ch. iii., sec. v. (2*d*). For the overseer's right to distrain for rates notwithstanding the appointment of a receiver and manager, see infra, Bk. II., ch. iv., sec. ii.

(*l*) As to when a floating charge will cease to float see supra, Bk. I., ch. ii., sec. i. (2*a*).

ceased to float, and such right of set off is binding on the company and the debenture or debenture stock holders. In the same way a holder of debentures or debenture stock forming part of a second series, which is expressly made to rank after a first series, may set off any sum, which has accrued due to him in respect of his second debentures or debenture stock against a trading debt incurred by him to the company, while the first series of debentures or debenture stock continues to be a floating security.(*m*)

When a purchaser of property subject to equitable charge created by Debentures gains priority over such Debentures.

If the whole or part of a company's assets which are subject to an equitable charge in favour of such company's debenture or debenture stock holders, is purchased for value and the legal estate in the assets purchased is vested in the purchaser, he having no notice of such equitable charge at the time of the purchase, such purchaser will take free from such equitable charge. Thus in the case of *Bower* v. *Foreign and Colonial Gas Company*(*n*) debentures (in form absolute assignments of all the undertaking and assets of the company) were issued to the plaintiff by the Foreign and Colonial Gas Company, which sold its undertaking to the New Gas Company, the latter having had no notice of the debentures. The plaintiff, being unable to obtain payment of his debentures, brought an action against both companies claiming a declaration, that he was entitled under his debentures to an equitable charge upon the whole of the property of the Foreign and Colonial Gas Company in priority to the New Gas Company. The Court held, that the debentures created an equitable charge on the Foreign and Colonial Gas Company's property, but dismissed the action as against the New Gas Company.

Priority of a specific mortgagee over Debenture-holders.

Where a company issues debentures or debenture stock charged on its assets by way of floating security, such company may, so long as the charge continues to float (*o*) deal with its assets in the ordinary course of its business and may therefore, in the absence of any provision to the contrary, create a charge on a specific asset or on specific portions of its assets ranking

(*m*) *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896) 2 Ch. (C. A.) 93; *Edward Nelson & Co.* v. *Faber and Co* (1903) 2 K. B. 367. See also re *Ind Coope & Co. Ld., Fisher* v. *Same. Co.* (1911) 2 Ch. 223, 234-5.

(*n*) W. N. (1877) 222. See also re *Arauco Co. Ld.* 79 L. T. R. 336.

(*o*) As to this, see supra, Bk. I., ch. ii., sec. i. (2*a*).

prior to such floating charge.(*p*) In the case of *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, (*q*) the directors of the defendant company in pursuance of their powers issued debentures purporting to be a first charge on the undertaking, the hereditaments and effects of the company. The directors afterwards, in consideration of the sum of £4000 advanced to and applied for the purposes of the company, deposited with the plaintiff the title deeds of the colliery which formed part of the property of the company, and by a written agreement charged the property of the company comprised in the deeds with payment to the plaintiff of the £4000 and interest. It was held, that the mortgage, being in the ordinary course of and for the purpose of the business of the company, was not subject to the claim created by the debentures and the first charge referred to in the debentures was fully satisfied by being a first charge against the general assets of the company, when the claim under the debentures would arise. An order was made declaring that the charge of the plaintiff was prior to the debentures.

A clause in the instrument creating a floating charge in favour of debenture or debenture stock holders and providing, that notwithstanding such charge the company shall be at liberty in the course of and for the purpose of its business to employ and deal with its property until default shall be made for a specified period in the payment of interest, has been held to enable a holder of such debentures or debenture stock to stop the business of the company after the expiration of the specified period from the date of the default. But, so long as the company is allowed by such debenture or debenture stock holders to go on dealing with its assets, such dealings will be binding on the company and will be good as against such debenture or debenture stock holders, *e.g.*, if the company creates a charge on

(*p*) *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. R. 174; in re *Hamilton's Ironworks*, 12 Ch. D. 707; in re *Sombrero Phosphate Co.*, W. N. (1870) 261; *Buzzard* v. *Threfalls Brewery Co.*, 88 L. T. J. 396; *Hubbuck* v. *Helms*, 56 L. T. R. 232; *Government Stock, etc., Co.* v. *Manila Railway Co.* (1895) 2 Ch. (C. A.) 551; (1897) A. C. 81; re *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604; re *Ind Coope & Co.* (1911) 2 Ch. 223, 234-5.

(*q*) 29 Ch. D. 715. See also in re *Castell & Brown, Ld.*, *Roper* v. *Same Co.* (1898) 1 Ch. 315; re *Valletort Sanitary Steam Laundry, Ld.* (1903) 2 Ch. 654; re *Standard Rotary Machine Co.*, 51 Sol. Jo. 48.

a specific asset or on specific portions of its assets purporting to rank in priority to such debentures or debenture stock, such charge will have priority over such debentures or debenture stock.(*r*)

Priority of specific mortgage on after acquired property over floating charge.

If a company executes a trust deed for the purpose of securing an issue of debentures or debenture stock comprising (*inter alia*) a floating charge and such company subsequently purchases land upon the terms that part of the purchase-money shall be left on mortgage and be secured by a legal mortgage, such mortgage will (notwithstanding any provision in such trust deed prohibiting the creation of mortgages ranking in priority to or *pari passu* with such issue) rank above such issue, whether the vendor of such land had or had not notice of the trust deed or debentures.(*s*) But in such a case, if section 93 of the Companies Consolidation Act, 1908, is applicable, such a mortgage must be registered under that section.

Priority of specific mortgage over floating charge notwithstanding restrictive provision in floating charge.

It may here be mentioned, that registration under section 93 of debentures (or of a trust deed securing a series of debentures or debenture stock) containing a floating charge and a restrictive provision precluding the company from creating any mortgage or charge ranking *pari passu* with or prior to such debentures or debenture stock *will* give constructive notice of the floating *charge*, but *not* notice of such *restrictive provision*. Hence a person *bonâ fide* making an advance to the company and obtaining a specific mortgage for the same without actual notice of such restrictive provision will obtain priority over such debentures or debenture stock.(*t*)

Priority of specific mortgage on debt over floating charge.

If a company, after issuing a series of debentures or debenture stock, which is secured by a floating charge on all its assets (including the debts owing to the company), creates in the ordinary course of its business a specific mortgage or charge on a particular debt, such specific mortgage or charge will (as we have seen) be good against all the world and it will not be open to the debenture or debenture stock holders or their trustees or to a receiver appointed by them to obtain priority over such specific mortgage or charge by giving notice of the floating charge to the debtor.(*u*)

(*r*) *Government Stock, etc., Co.* v. *Manila Railway Co.* (1895) 2 Ch. (C. A.) 551; (1897) A. C. 81.

(*s*) *Wilson* v. *Kelland* (1910) 2 Ch. 306.

(*t*) *Wilson* v. *Kelland* (1910) 2 Ch. 306; re *Standard Rotary Machine Co.* 95 L. T. R. 829, 834. See also *English and Scottish Investment Trust* v. *Brunton* (1892) 2 Q. B. (C A.) 1,700.

(*u*) *Ward* v. *Royal Exchange Shipping Co.* 58 L. T. R. 174, 178; re *Ind Coope & Co. Fisher* v. *Same Co.* (1911) 2 Ch. 223, 234-5.

Subject to compliance with the requirements of the statutes as to registration, an equitable mortgagee of part or of the whole of the assets of a company will have priority over debentures or debenture stock subsequently issued by the company and charged by way af equitable security on the assets comprised in the earlier equitable mortgage (the rule in such a case being: *qui prior est tempore potior est jure*).(*v*) Where, however, the debenture or debenture stock holders had no notice of the equitable charge at the date of the issue of their securities, the priority of the earlier equitable mortgage may be lost, if the debenture or debenture stock holders get in the legal estate of the property comprised in the earlier equitable mortgage; for, where the equities are equal, the legal estate prevails. On the other hand, an equitable mortgagee of part or the whole of the assets of a company may obtain priority over debentures or debenture stock previously issued by such company by getting in the legal estate of the property charged in his favour, provided that he had not at the date of his mortgage notice of the charge created by such debentures or debenture stock.(*w*)

Where equitable mortgage of Company ranks above Debentures.

Unless the prescribed particulars are filed with the Registrar of Joint Stock Companies for registration (in the manner prescribed by section 93 of the Companies Consolidation Act, 1908) within twenty-one days after the date of their creation, the charges or mortgages created by debentures or by covering deeds securing an issue of debentures or debenture stock will, as has been stated in an earlier part of this treatise,(*x*) be void against the liquidator and the other creditors of the company. Hence the holders of debentures or debenture stock, in respect of which the provisions of section 93 of the Companies Consolidation Act, 1908, have not been complied with, will rank after any mortgage or charge, which does not require registration under this Act or which requires such registration and which has been duly registered in the prescribed manner.

Priority of mortgages and charges registered under the Comp. Cons. Act, 1908, over unregistered Debentures and Debenture stock.

A mortgage of a ship of a company will, if such mortgage is in the statutory form and is duly registered under the Merchant Shipping Act, 1894,(*y*) rank above an equitable charge on such

Priority of registered mortgage of ship over unregistered equitable charge of Debenture-holders.

(*v*) *Rice v. Rice* 2 Drew. 73.

(*w*) *Taylor* v. *Russell* (1892) A. C. 244; *Bailey* v. *Barnes* (1894) 1 Ch. (C. A.) 25. As to what will amount to notice, see supra, Bk. II., ch. iv., sec. i.

(*x*) See supra, Bk. I., ch. v., sec. i.

(*y*) 57 & 58 Vic., cap. 60, sec. 33 (re-enacting sec. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vic., cap. 104)). See supra, Bk. I., ch. v., sec. iv.

Bk. II., Ch. IV., Sec. II.

ship in favour of the debenture or debenture stock holders of such company, even though such debentures or debenture stock may have been issued before the date of such mortgage and such mortgagee had notice of such equitable charge at the date of his mortgage.(*z*)

Priority of solicitor's lien over Debenture-holder's charge.

Debentures or debenture stock, which constitute a floating charge on the assets of a company, will not prevent a solicitor employed by such company from acquiring a solicitor's lien on the deeds and papers of the company. Neither will a proviso (frequently inserted in debentures) stating, that *the company shall not* be at liberty to *create* any mortgage or charge in priority to the debentures, interfere with a solicitor's lien on the documents of the company, which has issued such securities. So long as the debenture continues to be a floating security, the debenture-holder cannot interfere with the company's business being carried on in the ordinary way or prevent the solicitor employed by the company in the ordinary course of its business from acquiring the ordinary solicitor's lien. The lien, being a right given by general law, has been held *not* to be a charge or, at any rate, not a charge *created* by the *company*. Hence a solicitor is not precluded by such a proviso from asserting his lien in priority to the debenture-holders.(*a*) But a solicitor to a company, who acts both for the company and the debenture or debenture stock holders of the company, may not set up against such holders his lien for costs (due to him by the company) on the title deeds, which were originally held by him as solicitor for the company but subsequently as solicitor for the holders; for, if the company and the debenture or debenture stock holders had been represented by separate solicitors, it would have been the duty of the solicitor acting on behalf of the debenture or debenture stock holders to see, that his clients obtained possession of the title deeds, and, as the solicitor acting for both parties must be presumed to have performed his duty to both his clients, he will be taken to have retained possession

(*z*) *Black* v. *Williams* (1895) 1 Ch. 408.

(*a*) *Brunton* v. *Electrical Engineering Corp.* (1892) 1 Ch. 434. This case was held not to fall within the authority of in re *Snell*, 6 Ch. D. 105; in re *Mason and Taylor*, 10 Ch. D. 729. As to solicitor's right against receiver to retain costs paid by company to solicitor, see re *British Tea Table*, *Pearce* v. *Same Co.*, 101 L. T. R. 707.

of the title deeds on behalf of the debenture or debenture stock holders and will therefore not be allowed to assert his lien on such title deeds for costs due to him by the company.(*b*)

Rights of Company's landlord against the Debenture-holders.

Before the commencement of the winding up the landlord of a company may, as against the holders of the debentures and debenture stock charged in the ordinary way by way of floating security on all the property (including the chattels) of such company, enforce payment of any arrears of rent by distraining on the chattels in the possession of the company. If, on the other hand, such a distress is "put in force against the estate or "effects of the company after the commencement of the winding "up of the company," it is void to all intents,(*c*) and therefore it is also void against the debenture and debenture stock holders of the company, though, but for such winding up, the distress would have been good against such debenture and debenture stock holders.(*d*) However, if, after a company has been ordered to be wound up, the landlord of such company obtains the leave of the Court to distrain, and accordingly puts in distress on chattels, which do not in fact form part of the estate and effects, but are in the possession of the company, such distress will be good. Hence in a recent case,(*e*) in which a company had issued debentures charged on all its property, including its furniture and other chattels, the Court held, that, on such company being ordered to be wound up, the landlord of such company had as against the debenture-holders a right of distress on the furniture and other chattels in the possession of the company, as the debenture-holders' charge was much greater than the value of the furniture and other chattels, which were practically the only assets of the company, and such furniture and other chattels could not be considered to form part of the

(*b*) In re *Snell*, 6 Ch. D. 105.

(*c*) Sec. 211 of the Companies Consolidation Act, 1908.

(*d*) In re *Artistic Colour Printing Co.*, ex parte *Fourdrinier*, 21 Ch. Div. 510. The Court will, however, after a winding-up order has been made, give the landlord leave under sec. 142 of the Companies Consolidation Act, 1908 (re-enacting section 87 of the Companies Act, 1862) to distrain, if the rent, in respect of which he wishes to distrain, forms part of the expenses of the winding up or if it is inequitable to allow the company to avail itself of sec. 211 (see in re *Oak Pitts Colliery Co.*, 21 Ch. Div. 322), *e.g.*, if he cannot prove for his rent in the winding up. (In re *Lundy Granite Co.*, 6 Ch. 462, *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.)

(*e*) In re *New City Constitutional Club*, ex pte. *Pursell*, 34 Ch. Div. 646; in re *Harpur's Cycle Fittings Co.* (1900) 2 Ch. 731.

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"estate and effects of the company," within section 163 of the Companies Act, 1862 (now re-enacted by section 211 of the Companies Consolidation Act, 1908). The fact, that the debenture-holders offer at the trial to release their security and stand in the position of general creditors of the company, does not affect the rights of the landlord.

Having dealt with the landlord's right to enforce payment of rent by levying distress on the chattels of a company before or after the winding up, a few words should be said as to whether a landlord will be permitted to proceed with his distress, if such distress, though levied, is not completed by sale before the commencement of the winding up. If, after the passing of a resolution for the voluntary winding up of a company, but before the passing of the confirmatory resolution, the landlord of the company distrains on the chattels of the company, the Court will not restrain such landlord from proceeding with his distress on the application of a holder of debentures or debenture stock constituting a floating charge on such chattels, if such charge had not ceased to float (*f*) at the date of the distress being put in or (in other words) if the debenture or debenture stock holders' charge had not definitely attached to such chattels, so that, as between the landlord and the holders, those chattels became the chattels of the latter before the landlord seized them. Hence, where a landlord distrained on the chattels of a company after an order appointing a receiver of the assets of a company had been made in a debenture-holder's action, but before such order had been made effective, and before the commencement of the winding up of such company, the Court of Appeal held that the distress of the landlord was valid as against the debenture-holders.(*g*)

Landlord's rights against receiver.

Where a receiver or receiver and manager of the assets of a company has been appointed in a debenture or debenture stock holders' action, a landlord, who wishes to distrain on the chattels in the possession of such company, should apply by summons in such action for leave to distrain on such chattels, and, if the company is subsequently to the taking out of such summons

(*f*) As to this, see supra, Bk. I., ch. ii., sec. i. (2*a*).

(*g*) In re *Roundwood Colliery Co.*, *Lee* v. *Roundwood Colliery Co.* (1897) 1 Ch. (C. A.) 373.

ordered to be wound up, the application for such leave should be intituled in the action and in the winding up.(*h*) In such a case it is irregular to make the receiver a party, and he should not be served except in a case of personal misconduct.(*i*)

After a company has gone into liquidation, the landlord of the premises leased to the company, but taken possession of by a receiver, who has been appointed on behalf of the holders of debentures or debenture stock issued by such company, should apply to such receiver for the rent for the time, during which he (the landlord) is kept out of possession by the receiver; he should not apply to prove in the liquidation of such company in respect of such rent.(*j*)

A receiver or receiver and manager appointed by the Court will not be personally liable to the landlord for rent in respect of premises occupied by him as such receiver or receiver and manager, if he expressly informs the landlord that he is occupying the same in that capacity.(*k*)

If after the appointment of a receiver or receiver and manager by the Court on behalf of the holders of debentures or debenture stock secured by a floating charge on the company's assets (including by implication tenant's fixtures) such company by a voluntary act (*e.g.* by going into voluntary liquidation) determines a lease of some premises occupied by the company, the Court may notwithstanding the determination of the lease give a reasonable time to such receiver or receiver and manager to enable him to remove the tenant's fixtures from the premises; for it has been repeatedly held by the Court that a tenant cannot by surrendering his interest to his landlord deprive a person, who has by reason of a mortgage or sale to him by the tenant acquired a right in reference to the fixtures attached to the surrendered premises, of the right so acquired and that such person is as against the landlord entitled to remove such fixtures during a reasonable time.(*l*)

(*h*) *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.*, 20 Ch. Div. 260; in re *New City Constitutional Club Co.*, 34 Ch. Div. 646; *Green* v. *Thomas*; *Times* newspaper, 3rd Aug., 1895.

(*i*) *General Share and Trust Co.* v. *Witley Brick and Pottery Co.*, ubi supra.

(*j*) In re *The London Celluloid*, 31 Sol. Jo. 10.

(*k*) *Justice* v. *James*, 15 Times L. R. 181.

(*l*) Re *Glasdir Copper Works Ld.*, *English Electro-Metallurgical Co.* v. *Same Co.* (1904) 1 Ch. 819.

The Court will not order the receiver or receiver and manager of a company appointed in a debenture or debenture stock holder's action after the commencement of a voluntary winding up, but before a compulsory winding-up order, to pay to the landlord rent, which accrued due before the appointment of such receiver (or receiver and manager). The landlord must prove for such rent in the winding up of the company.(*i*)

Again the Court will not order a receiver or receiver and manager, who has been appointed in an action to enforce the debentures or debenture stock of a company secured (*inter alia*) by a mortgage of leasehold property by subdemise, to pay to the head-landlord the rent or any damages for dilapidations payable under the head-lease; for the receiver (or receiver and manager) is not liable at law or in equity to pay such rent or damages, which are recoverable by the head-lessor from the head lessee (*i.e.*, the company).(*j*)

Priority of statutory penalties imposed on Tramway Companies over Debentures.

Tramway companies, which are formed under a provisional order made by the Board of Trade in pursuance of the Tramways Act, 1870,(*k*) or under an Act of Parliament, are not unfrequently liable to penalties under the provisions of such provisional order or Act in case of non-fulfilment of certain duties, which are imposed upon them. Section 56 of the Tramways Act, 1870, provides, that the penalties imposed on Tramway Companies shall be levied by distress under the Summary Jurisdiction Act, 1848,(*l*) and in a recent case, notwithstanding the appointment of a receiver and manager of the undertaking(*m*) in a debenture-holder's action, the Court gave leave to a County Council, who had not been made parties to the action, to levy distress for such penalties.(*n*)

In future, only a receiver of the tolls (and not a receiver and manager) of such a tramway company will be appointed at the instance of debenture or debenture stock holders of such a company. If it is desired to distrain on the property of the company after the appointment of such receiver, the Court will give leave to distrain(*o*) notwithstanding such appointment, and in

(*i*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250, 29 W. R. 349.

(*j*) *Hand* v. *Blow* (1901), 2 Ch. (C. A.) 721.

(*k*) 33 & 34 Vic., cap. 78.

(*l*) 11 & 12 Vic., cap. 43, sec. 19.

(*m*) The order, though wrong (see *Marshall* v. *S. Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36), was binding on the parties to the action, as it was not appealed against.

(*n*) *Pegge* v. *Neath District Tramways Co.* (1895), 2 Ch. 508.

(*o*) *Eyton* v. *Denbigh, Ruthven, etc., Ry. Co.*, 6 Eq. 14, 488.

so doing the Court will not be handing over the property of the company to its creditors, but merely recognising a statutory right to distrain, with which the Court cannot interfere.(*p*)

Rates enforceable by distress may obtain priority over Debentures even after the appointment of a receiver.

Even after a receiver of the undertaking of a company has been appointed in a debenture or debenture stock holder's action, the charge created by such securities may, where the statutory power of the overseers of a parish to enforce payment of rates by distraining on the goods of the company becomes exercisable, be postponed to the rates, which are payable in respect of the premises occupied by the company, and which the company has made default in paying. The overseers of a parish are entitled under section 2 of the Poor Relief Act, 1601 (43 Eliz., cap. 2), to levy the arrears of the poor rates payable in respect of the premises occupied by a company by distress and sale of the company's goods, and the overseers of a parish situated in the metropolis have by virtue of sec. 161 of the Metropolis Management Act, 1855 (18 & 19 Vic., cap. 120), a like power of distress to enforce payment of the sewers rate, lighting rate and general rate leviable by such overseers.

Such right of distress is not interfered with by an equitable charge on such goods in favour of the debenture or debenture stock holders of such company; for the goods remain the goods of such company notwithstanding such charge and may therefore be distrained on for rates due by the company. However, if a company in the occupation of certain hereditaments is assessed in a rate and subsequently ceases to occupy such hereditaments, the goods of the company will, by virtue of section 16 of the Poor Rate Assessment and Collection Act, 1869,(*q*) only be liable to be distrained on for so much of the rates as is proportionate to the time of its occupation within the period, for which the rate was made. What amounts to such cessation (or change) of occupation within this last Act has been the subject of several decisions of the Court.(*r*) Thus North, J., decided that, where a receiver and manager was appointed by the trustees of a debenture-holder's covering deed, which provided (*inter alia*)

(*p*) *Pegge* v. *Neath District Tramways Co.*, ubi supra.

(*q*) 32 & 33 Vic., cap. 41. Priority over the debenture and debenture stock holders' floating charge is now given to certain local and parochial rates by sec. 209 of the Companies Consolidation Act, 1908. See infra, pp. 341-343.

(*r*) In re *Marriage, Neave & Co., North England Trustee and Assets Corporation* v. *Marriage, Neave & Co.* (1896) 2 Ch. 663.

that in certain events a receiver and manager appointed thereunder should have power to take immediate possession of the property of the company, and entered into possession of the premises of the company and commenced to carry on the business of such company, there was a change of occupation within sec. 16.(*s*) Rigby, L. J., suggests that, if an order in a debenture or debenture stock holder's action is made appointing a receiver and manager, and containing a direction for the delivery up of possession of the lands of the company, and such receiver and manager actually does go into possession of such lands under such order, it may well be, that such a taking of possession might operate as a change of occupation.(*t*) Where, however, the appointment of the receiver and manager by the Court does not contain any direction whatever for the delivery up of possession of the lands of the company to such receiver, and such receiver does not take possession of such lands, but merely enters on such lands for the purpose of receiving and managing the income and business of the company, there is no change of occupation within sec. 16, and the company's goods may be distrained on for the rates notwithstanding the appointment of such receiver and manager, and the Court will give leave to the overseers of the parish to distrain notwithstanding such appointment.(*u*)

The case of *Paterson* v. *Gas Light and Coke Co.*(*v*) is perfectly consistent with the foregoing authorities, for this case only decided, that a gas company was entitled under section 16 of the Gasworks Clauses Act, 1847 (10 & 11 Vic., cap. 15), to cut off the gas supply, if the receivers and managers, who had been appointed in a debenture-holder's action, did not pay or give an undertaking for the payment of arrears due to the gas company in respect of gas supplied to the company, the assets of which the receivers and managers had been appointed to receive and manage as hereinbefore mentioned. This case leaves undecided the question whether a receiver and manager appointed by the Court as aforesaid will (independently of the provisions in the Gasworks Clauses Act, 1847, and the Special Act of the Gas

(*s*) *Richards* v. *Overseers of Kidderminster* (1896) 2 Ch. 212. This case was decided before the passing of the Preferential Payments in Bankruptcy Act, 1897, which is now re-enacted by sec. 209 of the Companies Consolidation Act, 1908.

(*t*) In re *Marriage, Neave & Co.*, ibid., 677.

(*u*) Ibid., 663.

(*v*) (1896) 2 Ch. 476.

Company) be held to have a right as occupier to demand a supply of gas without paying arrears due in respect of gas.(*w*)

Preferential debts ranking above floating charge.

Sections 107 and 209 of the Companies Consolidation Act, 1908, which practically re-enact the Preferential Payments in Bankruptcy Act, 1907, give priority in certain conditions to certain rates, taxes, wages, salaries and certain sums payable by way of compensation over debentures and debenture stock secured by a floating charge.

Section 107 provides as follows:—

Sec. 107 of Comp. Cons. Act, 1908.

"107.—(1) Where, in the case of a company registered in "England or Ireland, either a receiver (*x*) is appointed on behalf "of the holders of any debentures of the company secured by a "floating charge, or possession is taken by or on behalf of those "debenture holders of any property comprised in or subject to "the charge, then, if the company is not at the time in course of "being wound up, the debts which in every winding up are under "the provisions of Part IV. of this Act relating to preferential pay-"ments to be paid in priority to all other debts, shall be paid "forthwith out of any assets coming to the hands of the receiver "or other person taking possession as aforesaid in priority to any "claim for principal or interest in respect of the debentures.

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

"(2) The periods of time mentioned in the said provisions of "Part IV. of this Act shall be reckoned from the date of the "appointment of the receiver or of possession being taken as "aforesaid, as the case may be.

"(3) Any payments made under this section shall be recouped "as far as may be out of the assets of the company available for "payment of general creditors."

When sec. 107 of Comp. Cons. Act, 1908, applies.

The Preferential Payments in Bankruptcy Act, 1897 (like the above-mentioned section 107) only gave priority to the debts therein specified in the conditions therein set forth. The Court therefore decided the case of *Smith* v. *Law Guarantee Society*(*y*), in which no one of such conditions was fulfilled, without reference to the provisions of the above-mentioned Act. In this case the Commissioners of Inland Revenue claimed payment of income tax out of funds held by the trustees of a covering deed in priority to the claims of the holders of the debentures secured by such deed. This deed provided that the trustees should appropriate the proceeds of sale of certain securities in the first place towards payment of all arrears of interest on the debentures and secondly

(*w*) (1896) 2 Ch. 476.

(*x*) This section applies, it is submitted, to a receiver or receiver and manager, whether appointed (i) by the Court, or (ii) by virtue of an express power contained in a debenture or a covering deed. At any rate, if a receiver or receiver and manager appointed by virtue of such an express power takes possession on behalf of the debenture or debenture stock holders, the section applies, re *Barnby's Ld.*, *Fallows* v. *Barnby's Ld.* (1899) W. N. 103.

(*y*) (1904) 1 Ch. 500; (1904) 2 Ch. (C. A.) 569.

Bk. II., Ch. IV., Sec. II.

towards the payment of the principal; the total so realized by the trustees not being sufficient to pay the full amount of the principal owing to the debenture holders, the Court held that each of the debenture-holders could elect whether he would take his share in his proportion of the sum realized as principal or as interest and that no income tax was payable in respect of such parts as were elected to be taken as principal.

Sec. 209 of Comp. Cons. Act, 1908.

The provisions of Part IV. of this Act relating to "preferential payments" referred to in section 107 of the Act are contained in section 209, which runs as follows:—

Preferential payments.

"209.—(1) In a winding up there shall be paid in priority to "all other debts—

"(*a*) All parochial or other local rates due from the company "at the date hereinafter mentioned, and having become "due and payable within twelve months next before "that date, and all assessed taxes, land tax, property or "income tax assessed on the company up to the fifth "day of April next before that date, and not exceeding "in the whole one year's assessment;

"(*b*) All wages or salary (*z*) of any clerk or servant (*a*) in re- "spect of services rendered to the company during four "months before the said date, not exceeding fifty pounds; "and

"(*c*) All wages of any workman or labourer not exceeding "twenty-five pounds, whether payable for time or for "piece work, in respect of services rendered to the "company during two months before the said date: "Provided that where any labourer in husbandry has "entered into a contract for the payment of a portion "of his wages in a lump sum at the end of the year of "hiring, he shall have priority in respect of the whole "of such sum, or a part thereof, as the Court may decide "to be due under the contract, proportionate to the "time of service up to the said date; and

"(*d*) Unless the company is being wound up voluntarily "merely for the purposes of reconstruction of or amal- "gamation with another company, all amounts (not "exceeding in any individual case one hundred pounds) "due in respect of compensation under the Workmen's

(*z*) This includes a salary payable by way of commission (re *Earle's Shipbuilding & Engineering Co. Barclay & Co.* v. *Same Co.* (1901) W. N. 78; re *Klein* (1906) W. N. 148.)

(*a*) Whether a secretary of a company is a "clerk or servant" within this section is a question of fact depending upon the functions discharged by him (*Cairney* v. *Back* (1906) 2 K. B. 746). A managing director is not a "clerk or servant" (re *Newspaper Proprietary Syndicate, Hopkinson* v. *Same Co.* (1900) W. N. 140). An artist engaged to sing during an opera season at £30 per performance may be a "servant" (re *Winter German Opera Ld.* 23 T. L R. 662).

"Compensation Act, 1906, the liability wherefor accrued "before the said date, subject nevertheless to the pro- "visions of section five of that Act.

"(2) The foregoing debts shall—

"(*a*) Rank equally among themselves and be paid in full, "unless the assets are insufficient to meet them, in "which case they shall abate in equal proportions; and

"(*b*) In the case of a company registered in England or "Ireland, so far as the assets of the company available "for payment of general creditors are insufficient to "meet them, have priority over the claims of holders "of debentures under any floating charge created by "the company, and be paid accordingly out of any "property comprised in or subject to that charge.

"(3) Subject to the retention of such sums as may be neces- "sary for the costs and expenses of the winding up, the foregoing "debts shall be discharged forthwith so far as the assets are sufficient "to meet them.

"(4) In the event of a landlord or other person distraining or "having distrained on any goods or effects of the company within "three months next before the date of a winding-up order, the "debts to which priority is given by this section shall be a first "charge on the goods or effects so distrained on, or the proceeds "of the sale thereof:

"Provided that in respect of any money paid under any such "charge the landlord or other person shall have the same rights "of priority as the person to whom the payment is made.

"(5) The date herein-before in this section referred to is—

"(*a*) in the case of a company ordered to be wound up com- "pulsorily which had not previously commenced to be "wound up voluntarily, the date of the winding-up order; "and

"(*b*) in any other case, the date of the commencement of the "winding up."

The entire poor and district rates, which are due at the commencement of the winding up of a company, or at the date of the appointment of the receiver or of the taking of possession on behalf of the debenture or debenture stock holders and the apportioned part of the water rates, which are due at such date, must by virtue of sections 107 and 209 be paid in priority to debentures or debenture stock secured by a floating charge; but any sums paid out of the assets, which are subject to the floating charge, must be recouped out of the general assets of the company, if any are available.(*b*)

(*b*) Re *Mannesman Tube Co., Von Siemens* v. *Same Co.* (1901) 2 Ch. 93.

Orders appointing a receiver or receiver and manager provide, as has been stated above, for the payment of the preferential debts out of any assets, which come into their hands.(*f*)

Priority of persons holding a lease as Trustees for a Company over holders of Debentures charged on the undertaking of such Company.

Persons holding the lease of a company's premises as trustees for such company have a right as against and in priority to the holders of debentures or debenture stock issued by such company and charged by way of floating security on all the property of the company to be indemnified in respect of moneys, which they cannot help paying to the lessor, and which the lessor can extort from them by action,(*g*) and they have a lien on the fixtures situated on such premises for the moneys so expended or paid, and such lien ranks prior to the debenture or debenture stock holders' charge.(*h*) But such priority is limited to such compulsory payments; hence, if they make any other payments at the request of the company (such as a payment of money for the purpose of keeping up the mines of the company), such payments are not entitled to priority over such charges or to the general creditors; they rank *pari passu* with the simple contract creditors.(*i*)

Priority of receivers' and managers' charges over Debentures.

The question, how far the costs incurred by and the remuneration of receivers or receivers and managers appointed in a debenture or debenture stock holder's action will have priority over such debentures or debenture stock, has already been fully dealt with.(*j*)

Priority over Debentures obtained under local laws.

Priority over the debenture or debenture stock holders' charge may frequently be obtained by adverse claimants by reason of the local laws of the country, in which any land comprised in such charge is situated. Thus, if the laws of a country require, that any charge on land should be registered, and give priority over any unregistered charge to any subsequent charge, which is duly registered, a mortgagee, whose security is of a later date than the debenture or debenture stock holders' charge, but is registered, will get priority over such charge, if it is not registered.(*k*)

(*f*) Practice Note. W.N. (1900), p. 58. See supra, Bk. II., ch. iii., sec. v. (4). See infra, Appendix, Forms 37 and 37A.

(*g*) In re *Pooley Hall Colliery Co.*, 21 L. T. R. 690, 18 W. R. 201.

(*h*) In re *Exhall Mining Co.*, W. N. (1866), p. 141, 35 Beav. 449.

(*i*) In re *Pooley Hall Colliery Co.*, ubi supra.

(*j*) See supra, Bk. II., ch. iii., sec. v. (1*d*).

(*k*) *Norton* v. *Florence Land and Public Works Co.*, 7 Ch. D. 332. A purchaser for value or a mortgagee of land situated (1) in Yorkshire or (2) in Middlesex will by registering in the first case under the Yorkshire Registries Acts, 1884 and 1885 (47 & 48 Vic., cap. 54, 48 & 49 Vic., cap. 26), and in the second case (if he has no notice of any prior charge) by registering under the Middlesex Registry Act (7 Anne, cap. 20), gain

An incumbrancer on immovable property situated in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not on the application of debenture or debenture stock holders having a charge on such immovable property be restrained by an English Court from prosecuting such proceedings; at all events such incumbrancer will not be so restrained, if the debenture or debenture stock holders seeking to restrain him may appear before the tribunal of the country, in which the land is situated, and assert their right.(*l*)

Where the debentures or debenture stock of a company purport to be charged on the uncalled capital of a company, priority over such charge may sometimes be obtained by adverse claimants by reason of the laws of the country, in which the shareholders liable to pay the calls reside. Thus in the case of *in re Queensland Mercantile and Agency Company*.(*m*) the Union Bank held debentures constituting a charge on the uncalled capital of the Queensland Company, which was domiciled in Queensland. After such capital had been called up, but before it had been paid, the Australasian Investment Company (a Scotch company) commenced an action against the Queensland Company in Scotland for damages and arrested the calls on the Queensland Company's shares held in Scotland; the holders of such shares had no notice of the debentures. The Queensland Company was ordered to be wound up in Queensland and also in England. An order was made in the English winding up restraining the Australasian Investment Company from prosecuting the action in Scotland, but without prejudice to the security, if any, which they had acquired upon the amounts payable on the Scotch shares by the proceedings in Scotland; and an order was also made by the Court of Session in Scotland recalling the arrestments and restraining the proceedings in Scotland, but subject to the further order of the Court. It was in evidence, that under the Scotch law the charge contained in the debentures was ineffectual until notice thereof

priority over the holders of debentures or debenture stock secured by an unregistered charge on such land. As to these Acts, see supra, Bk. I., ch. v., sec. v.

(*l*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*m*) (1892), 1 Ch. (C. A.) 219.

had been given to the shareholders liable to pay the calls and that the arrestment was equivalent to an assignment with notice to the debtor and took priority over an earlier assignment, of which no notice had been given to the debtor, and further that according to the Scotch law and the *jus gentium*, as administered in Scotland, the Scotch arrestments would, under the circumstances, have priority over the assignment by the debentures. The Court of Appeal held (affirming the decision of North, J.), that the question of priority on the proceeds of the Scotch shares must be regulated by the law of Scotland and that the Court was bound to have regard not only to the municipal law of Scotland, but to the administration of the *jus gentium* by the Scotch Courts. The Australasian Investment Company was, therefore, held to have the first charge on such proceeds in priority to the debentures held by the Union Bank.

CHAPTER V.

THE RIGHTS AND REMEDIES OF DEBENTURE AND DEBENTURE STOCK HOLDERS *INTER SE*.

IN the present chapter it is proposed to examine the rights of debenture and debenture stock holders *inter se*.

Invalid Debentures cannot compete with valid.

Of course, one debenture or debenture stock holder cannot compete with or get priority over the other holders, unless his securities are valid.(*a*)

Debentures to registered holders in blank

The holder of debentures to registered holder in blank or of a debenture stock certificate to registered holder in blank has as good a claim as any debenture or debenture stock certificate could give to him, except that his claim is equitable; that being so, it follows, that in equity such debentures or debenture stock certificates are as good as though the name of the obligees had been duly inserted. It has been decided, that debentures to registered holder in blank are not only good as against the company, which issued them, but that the holder thereof will even as against the other holders of the same series, rank *pari passu* with them, if such debentures form part of a series ranking *pari passu*.(*b*)

SECTION I. *The Rights and Remedies* inter se *of Debenture or Debenture Stock Holders who are not expressly made to rank* pari passu.

When Debentures do not rank *pari passu*

Where the debenture or debenture stock holders' securities do not show an intention, that they shall take effect *pari passu*, the holders do not rank *pari passu*, but take in priority according to the date of the issue of the debentures or debenture stock certificates, or, if they are issued on the same day, according to the

(*a*) As to the validity of debentures or debenture stock, see supra, Bk. I., ch. iv.

(*b*) In re *Queensland Land Co.*; *Davis* v. *Martin* (1894), 3 Ch. 181; in re *Strand Music Hall*, 3 De G. J. & S. 147; *Pegge* v. *Neath and District Tramways Co.* (1898) 1 Ch. 183.

Bk. II., Ch. V., Sec. I.

time of the day at which they were issued;(*c*) for the purpose of ascertaining in which order such instruments were issued the number borne by them is material.(*d*) The principles, on which the priority of such debentures or debenture stock *inter se* is ascertained, are the same as those applied to ordinary deeds, and are as follows:—

"The law stands this way that, when two deeds are executed on the same day, the Court must inquire which was in fact executed first, but that, if there is anything in the deeds themselves to show an intention either, that they shall take effect *pari passu* or even that the later deed shall take priority to the earlier, in that case the Court will presume, that the deeds were executed in such order as to give effect to the manifest intention of the parties".(*e*)

Second series of Debentures.

The rule just laid down with regard to separate debentures applies equally to several series of debentures or debenture stock, that is to say, unless the debentures or the trust deed clearly show an intention, that the company shall have a right to issue a second series of debentures or debenture stock ranking *pari passu* with the first series, the second series will rank subsequent to the first series.(*f*)

In a recent case(*g*) a second series of debentures purporting to be "subject to the debentures which have been already issued by the company . . . or such of them as are now outstanding" was issued by a company before all the debentures of the first series had been taken up. The words "debentures which have been already issued" were held to mean the whole first series of (not the individual) debentures and the words "or such of them as are now outstanding" were held to mean such of the debentures as, having been issued, had not been paid off (these latter words being directed against a re-issue of debentures which had been paid off). Hence in this case all the second series of debentures was postponed to all the first series, whenever issued, except such of them as had been re-issued.

(*c*) *James* v. *Boythorpe Colliery Co.*, W. N. (1890), p. 28; in re *Joseph Wright & Co.*, 4 Times L. R. 105.

(*d*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.*, 21 Ch. D. 762.

(*e*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.*, ubi supra 767; see also *Bower* v. *Foreign and Colonial Gas Co.*, W. N. (1877) 222.

(*f*) *Smith* v. *English and Scottish Trust*, W. N. (1896) 86, 40 Sol. Jo. 717.

(*g*) *Lister* v. *Henry Lister & Son, Limited*, W. N. (1893) 33; 9 Times L. R. 296, 41 W. R. 330.

Where individual debentures (not ranking *pari passu* with any other debentures) have priority over other individual debentures, such priority will only be lost by waiver; what will amount to waiver is a matter of fact, which will depend upon the circumstances of each case. Thus the mere fact, that a company issues new debentures and that the old debentures are allowed to remain in the custody of such company, is not enough to enable the Court to come to the conclusion, that there was an intention to waive the priority given by such old debentures, when the debentures themselves remain uncancelled. The fact, that "renewed 10th July, 1879," was written on the counter-foils of the debenture book of a company and that the owner of five old debentures of such company allowed five new debentures to be issued to him in lieu of the old debentures, which latter remained uncancelled, was in a recent case (*h*) held not to warrant the Court in coming to the conclusion, that it was intended to deprive the holder of the five new debentures of the priority conferred on him by his five old debentures over other debentures issued by the company after the five old debentures. The Court, being of the opinion, that the real object of the issue of the new debentures was to give time to the company, held, that the owner of the five new debentures was entitled to priority over the debentures issued by the company after the five old debentures.

Waiver of priority.

Where debentures or debenture stock are or is re-issued pursuant to the power contained in sec. 104 of the Companies Consolidation Act, 1908 (see supra, p. 83), the holders of the re-issued securities will have the same rights and priorities, as if such securities had not been previously issued.

Re-issued Debentures.

SECTION II. *The Rights and Remedies* inter se *of Debenture and Debenture Stock Holders who are expressly made to rank* pari passu *with one another.*

A holder of debentures or debenture stock forming part of a series, which purports to rank *pari passu*, must, as has already been stated,(*i*) take proceedings on behalf of himself and the other holders of the same series; for he cannot be allowed to be paid in priority to the holders of the same series;

Equality between Debenture-holders ranking *pari passu* maintained by the Court.

(*h*) In re *Joseph Wright & Co.*, 4 Times L. R. 105.

(*i*) Bk. II., ch. iii., sec. i.

hence the Court will not give judgment in favour of one such holder, as the Court would by so doing put such a holder in a better position than the other holders.(*j*) Not only will a holder of debentures (or debenture stock) ranking *pari passu* with the rest of the issue not be allowed to gain priority by taking proceedings on his own behalf (instead of on behalf of the holders of the whole series) but the company, which issued such securities, will likewise not be entitled to destroy the equality of the securities *inter se*. Thus in the case of *Hale* v. *Ottoman Railway Co.*(*k*) a company issued debentures ranking *pari passu* with the rest of the issue and containing provisions for the payment of interest and for the redemption of a specified proportion of such debentures according to the result of periodical drawings; on the interest payable on such debentures falling into arrear and its appearing, that the company, though able to pay the current interest and the amounts payable on the drawn debentures, was not able both to pay such arrears and the current interest and to pay off the debentures, which had been drawn, the Court directed the company to suspend the periodical drawings until the whole of such arrears of interest had been paid; for otherwise the holders of drawn debentures would obtain an advantage over the holders of the debentures, which had not been drawn, and the equality of the debentures *inter se* would thus be destroyed.

A holder of debentures or debenture stock forming part of an issue, which purports to rank *pari passu* and to be held free from equities, may, if he takes *bonâ fide* and for value under a duly executed transfer (even though such transfer is executed after judgment in a debenture or debenture stock holder's action) prove for his debentures or debenture stock free from equities *pari passu* with the other holders.(*l*) But, if such securities are transferred to a person as trustee for the transferor's creditors, the transferee can stand in no better position than the transferor and will consequently be required to bring into account all sums owing by the transferor to the company before such transferee will be

(*j*) In re *Uruguay Central Railway Co.*, 11 Ch. D. 372; *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730.

(*k*) 30 Sol. Jo. 157; 20 L. J. N. 195.

(*l*) Re *Goy & Co.*, *Farmer* v. *Goy & Co.* (1900) 2 Ch. 149; but see re *Palmer's Decoration & Furnishing Co.* (1904) 2 Ch. 743.

allowed to prove for the amount of the securities transferred to him as above mentioned.(*m*)

Series of Debentures may rank *pari passu* though the Debentures are not all issued on the same terms.

Persons taking up a part of an issue of debentures or debenture stock ranking *pari passu* with the remainder of the issue have, in the absence of an express provision, no equity to prevent the directors from issuing the remainder of the issue on such terms as they may think advisable, provided only that the directors act *intra vires*, and all the debentures or debenture stock forming part of such issue will rank *pari passu*, though some of them were issued on more favourable terms than others. In the case of *in re Regents Canal Ironworks Company* (*n*) the company issued sixty debentures (part of an issue of one hundred) at £95 for £100 and afterwards issued the remaining forty debentures by way of collateral security to secure the sum of £8000. The Court there held, that the company had power to issue the forty debentures by way of collateral security and that the holders of the first sixty debentures had no right under their securities to complain of the terms, on which the directors thought fit to issue the forty debentures. The Court ordered, that an account should be taken of what was due to the holder of the forty debentures (in exactly the same way as what was due to the holders of the other sixty debentures) and that the amount so certified to be due should, so far as might be wanted, be applied in payment of what was due in respect of the £8000 and interest.

Validity of Debentures may be disputed by holders of Debentures of same series.

It has been suggested, that the holders of debentures and debenture stock purporting to rank *pari passu* with the rest of the series are estopped from disputing the validity of debentures or debenture stock purporting to form part of such series. It is, however, now settled, that holders ranking *pari passu* take on the footing, that all those, who are rightly holders, but not those whom the company has wrongfully admitted to be holders, shall rank *pari passu* with them. "If," says Cotton, L. J., "after issuing debentures the company issued others, they could not by estoppel bind those, who had previously acquired rights against them. The company might bind themselves by an admission, but a man cannot bind by his admission

(*m*) Re *Brown & Gregory Ld.*, *Andrews* v. *Same Co.* (1904) 1 Ch. 627; (1904) 2 Ch. 448.

(*n*) 3 Ch. Div. 43.

Pt. II., Ch. V., Sec. II.

those, who do not claim under him, but who before admission had acquired a right."(*o*)

Power in Trustees to sell at request of majority of holders.

If a covering deed enables the debenture or debenture stock holders' trustees to sell the property charged by such deed at the request of a majority of the holders, on default being made in the payment of principal or interest, a debenture or debenture stock holder cannot compel the trustees by action or otherwise to enforce the charge by sale of such property against the wish of the majority of the holders.(*p*)

When the majority of the holders has power to bind the minority.

The majority of the holders of an issue of debentures or debenture stock ranking *pari passu* with one another has (prior to the company being wound up) no power to bind the minority of the holders, unless express provision is made to that effect by the trust deed or otherwise. In the absence of such express provision, the only way in which a majority of debenture or debenture stock holders can bind the minority, is to take proceedings under the provisions of section 120 of the Companies Consolidation Act, 1908, which are dealt with at length at the end of this chapter.

Implied power of Company to pay off portion of series ranking *pari passu*.

Where an entire series of debentures or debenture stock purporting to rank *pari passu* is made repayable on one and the same specified date, but contains no express provision conferring on the company a power to pay off one part of the series before the other, the question, whether the company has or has not by implication such a power, will depend upon the exact terms of the instrument or instruments creating such series. If such instrument (or instruments) does (or do) *not expressly confine* the equality *inter se* of the holders of the series of such debentures or debenture stock *to the mortgages or charges*, to the benefit of which such holders are entitled, but provides or provide *generally* that the series shall rank *pari passu* "in all respects," it is difficult to see how the company could successfully contend that they have power to redeem one portion of the series before the other. If, on the other hand, the clause making the series rank *pari passu* merely provides (as such a clause frequently does) that the holders of the series shall be entitled *pari passu inter se* to the benefit of certain mortgages or charges, whereby the series is secured, there does not appear to be any valid reason why the company should be incapable of redeeming one portion of the series before the other.

After discussing the above question Sir F. Palmer suggests (*q*)

(*o*) *Mowatt* v. *Castle Steel and Iron-works Co.*, 34 Ch. Div. 58, 63.

(*p*) *Kempe* v. *Jones*, W.N. (1884) 214.

(*q*) See *Palmer's Company Precedents III.* (Debentures), p. 144.

"that section 104 of the Companies Consolidation Act, 1908,(r) "appear to recognise very clearly a company's power thus "to redeem part of a series". It is respectfully submitted, that this section merely recognises that a company *may* have power to redeem part of a series (not that a company *has* by implication such a power); this section would therefore appear not to be of any material assistance for the purpose of deciding the question whether the Court has or has not such a power in the absence of any express provision.

SUB-SECTION I. *Express Powers in the Trust Deed Enabling the Majority to bind the Minority of the Debenture or Debenture Stock Holders.*

Express power to bind the minority.

Where debentures or debenture stock are secured by a trust deed,(s) it is now very usual to insert certain clauses, which enable the trustees of the trust deed or the company to convene meetings (t) of the holders and which enable a meeting so convened to sanction any modification or compromise of the rights of the holders, on a resolution (u) being passed to that effect by a majority consisting of not less than a specified proportion of the holders of such securities.(v) Sometimes debentures, which are not secured by a trust deed, contain a clause empowering a specified majority of the holders of the series to modify or alter the rights of all the holders.

Whether or not a minority of debenture or debenture stock holders is bound by a resolution of a meeting of the holders, must depend on the true construction of the instrument, which gives to the majority the power to bind the minority.

Power to bind a minority strictly construed.

Powers given to a majority to bind a minority must be exercised strictly in accordance with the terms of the deed conferring such powers. "For such powers," says Lord Lindley (then L. J.),(w) "are always liable to abuse and, whilst full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to strengthen them and make them applicable to cases not included in those, which they were apparently intended to meet. To take

(r) Re-enacting the provisions of section 15 of the Companies Act, 1907.

(s) For Forms of trust deeds, see Appendix, Forms 12 and 13.

(t) For a Form of a notice convening a meeting, see Appendix, Form 68.

(u) For a Form of resolution sanctioning a modification of rights, see Appendix, Form 69.

(v) For the advantage of a trust deed, see supra, Bk. I., ch. ii., sec. iii.

(w) *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (1893) 1 Ch. (C. A.) 484*n*, 489.

Bk. II., Ch. V., Sec. II. (1).

the language of the clause, 'the power to release the mortgaged premises' does not include a power to release the defendant company. The power to modify the rights of the debenture-holders against the company does not include a power to relinquish all their rights. A power to compromise their rights presupposes some dispute about them or difficulties in enforcing them, and does not include a power to exchange their debentures for shares in another company, where there is no such dispute or difficulty. It is a mistake to suppose, that a power to compromise a claim for money becomes a power to accept less than 20s. in the pound, if the debt is undisputed and the debtor can pay. A power to compromise does not include a power to make presents." Such a power may not be exercised unfairly or oppressively; hence a majority cannot by virtue of such a power validly sanction the division of the proceeds of sale of the company's entire assets among some only of their number (*u*).

Meaning of power "to sanction any modification or compromise of the rights of Debenture-holders against the Company or its property".

In a case of *Follitt* v. *Eddystone Granite Quarries*,(*v*) a company issued debentures, each of which, under the provisions therein or in the debenture-holder's covering deed contained constituted a first charge upon the undertaking and property of the company, and was held upon the condition that a general meeting of the debenture-holders should have the power, by extraordinary general resolution passed by a majority of not less than three-fourths of the persons voting "to sanction any modification or compromise of the rights of the debenture-holders, against the company or against its property," so as to bind all the debenture-holders, whether present or not. A meeting of the debenture-holders was afterwards held, at which an extraordinary resolution was duly passed sanctioning a loan to the company of £5000, and resolving that "such loan shall take priority over the existing debentures, and shall be a first charge upon the company's properties". A similar resolution was then passed by the shareholders, and, in pursuance of these resolutions, a mortgage was executed, whereby the company charged all its property to secure £5000, advanced by C, and the trustees for the debenture-holders postponed their security in favour of C's mortgage. It was there held, that the resolution sanctioning the loan, and giving priority to the mortgage, by which the sum advanced was secured, was valid, and the

(*u*) *Goodfellow* v. *Nelson Line Ld.* (1912), 2 Ch. 324; re *New York Taxicab Co.* (1913), 1 Ch. 1.

(*v*) (1892), 3 Ch. 75.

transaction a "modification" of the rights of the debenture-holders within the condition and binding upon a dissentient minority.

Under a power conferred on the debenture or debenture stock holders "to sanction any modification or compromise of the rights of the debenture or debenture stock holders against the company or the property (comprised in the debentures or debenture stock holder's trust deed)" the majority will have power to sanction a scheme against the wishes of a minority, whereby the holders will accept preference(*w*) or ordinary(*x*) shares in a new company instead of their debentures or debenture stock or accept debenture stock instead of debentures(*y*) or to postpone the date of payment of the money secured by the debentures or debenture stock.(*z*)

When a power "to compromise the rights of Debenture-holders against the Company or against its property" comes into play.

In a recent case(*a*) in pursuance of a power to "sanction any compromise of the rights of debenture-holders against the company or against its property" contained in a debenture trust deed a majority of the debenture-holders of an American company sufficient to make it binding on the minority passed a resolution, that all the rights of the debenture-holders of such American company should be compromised by the acceptance in lieu of such debentures of paid up preference shares in an English company, which had purchased the undertaking, lands and property of the American company, including some land in Lower California (Mexico) and had covenanted to indemnify the American company against its debts. The plaintiffs, who were debenture-holders, dissenting from such resolution abstained from attending the meeting, at which it was passed, and subsequently brought an action against the American company for the interest due on their debentures. The American company resisted the claim by setting up the resolution, which they submitted was binding on the plaintiffs, but which the plaintiffs contended was invalid and not binding on them. In this case

(*w*) *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (1893), 1 Ch. (C. A.) 484*n*.

(*x*) *Sneath* v. *Valley Gold, Limited* (1893), 1 Ch. (C. A.) 477, which was followed in the case of *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Co.* (1894), 1 Ch. 578.

(*y*) *Potteries, Shrewsbury, etc., Ry. Co.* v. *Minor*, 6 Ch. 621; re *Joseph Stocks and Co. Ld., Willey* v. *Stocks and Co.* 54 Sol. Jo. 31; 26 T. L. R. 41; (1912), 2 Ch. 134; *Northern Assurance Co.* v. *Farnham United Breweries* (1912), 2 Ch. 125.

(*z*) *Finlay* v. *Mexican Investment Co.* (1897) 1 Q. B. 517.

(*a*) *Mercantile Investment, etc., Co.* v. *International Co. of Mexico* (1893) 1 Ch. (C. A.) 484*n*.

Bk. II., Ch. V., Sec. II. (1).

the debenture-holders did not become creditors of the English company, though they had a charge on the land in Lower California (Mexico); the evidence did not show, that the debenture-holders had any difficulty in obtaining payment of their interest; this resolution to exchange the debentures for fully paid up preference shares was passed, merely because the English company wished it. There being no dispute as to the rights of the debenture-holders and no difficulty in enforcing those rights, the Court of Appeal held, that the power to compromise did not come into play. Under the circumstances the Court declared, that the resolution passed by the debenture-holders was invalid and not binding on the plaintiffs and judgment was entered for the plaintiffs. The English company assisted in the defence of this action and paid the costs, on the defence failing. Through want of registration in Mexico, where the lands were situated, the debenture-holders had never acquired a valid charge on such lands in accordance with the law of the country, and the registration of the English company's title was not completed until after judgment in the action hereinbefore mentioned. In a second action(*b*) the plaintiffs suing on behalf of all the debenture-holders sought to enforce against the English company and the lands assigned to them by the American company the charge, which the debentures originally purported to give on such lands. Romer, J., held, that the English company were not estopped by the judgment in the former action from adducing evidence to show, that through the non-registration of the debenture-holders' charge and otherwise, circumstances had arisen, which were sufficient to bring the powers of compromise into operation. And the learned judge further held, that in fact the difficulties in the way of the debenture-holders enforcing their rights were of so substantial a character, that the power to compromise came into operation and that the resolution passed in pursuance of such power was binding on the plaintiffs. The action was dismissed.

Meaning of power to "assent to any modification of the provisions" of a Debenture

In the case of *re Dominion of Canada Freehold Estate and Timber Company*,(*c*) debentures had been issued, which did not in themselves create any charge upon the property or undertaking

(*b*) *Mercantile Investment, etc., Co.* v. *River Plate Trust, etc., Co.* (1894), 1 Ch. 578, following *Sneath* v. *Valley Gold, Limited* (1893), 1 Ch. (C. A.) 477.

(*c*) 55 L. T. R. 347.

of the company, but were secured by a trust deed, which created an effectual security upon that property. The deed contained power to call meetings of the debenture-holders, and the meetings were to have power "to assent to any modification of its provisions". The company fell into difficulties. A meeting of debenture-holders, notice of which had been given by advertisement, passed a resolution, the effect of which was, that they agreed to let in persons who were willing to advance money. Such persons were to receive a rent charge, which was to stand in priority to the debentures. A considerable sum was raised in that way. Afterwards a resolution was passed to wind up the company voluntarily and the scheme was opposed by a Mr. Lee, who raised the question, whether the owners of the rent charge had priority. After stating that notice by advertisement was sufficient and that the resolution was passed, Chitty, L. J. (then J.), makes the following remarks in the course of his judgment: "I think, that such a resolution was authorised by the deed, because one of the difficulties, that there always is in dealing with matters of this kind, when the company gets into difficulty and when more money is required, is to deal with the debenture-holders as a class. That is a difficulty, which the Legislature itself felt, when it passed the Act of 1870, allowing a majority and a sufficient majority—that is to say, not a mere absolute majority, but a majority much larger than that—to bind the minority. Then it was known, that, before the legislation of 1870, any particular individual could hold out against a scheme, however meritorious and however beneficial it might be, in order that he might get, generally speaking, some special advantage for himself, or because he was a person, who did not even take a fair view of the advantages to be gained. It was for the purpose of preventing that obstruction, that the Legislature passed the Joint Stock Companies Arrangement Act, 1870 (*cc*); and it was, in my judgment, for a similar purpose that the parties to this deed said the prescribed majority might bind the minority, and I think the words are large enough. Having regard also to the subject-matter and the nature of the questions, which are likely to arise, I think, that the deed did in fact authorise the debenture-holders themselves, by the required majority, to resolve to postpone their security to a new security to be created for the common benefit of them all." Further on the learned judge says: "I

(*cc*) Now sec. 120 of the Companies Consolidation Act, 1908.

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think, that this matter is within the scope of the authority conferred by the trust deed itself, and that all the debenture holders were bound by the resolution of the majority".

Meaning of power to "assent to an arrangement".

Under a "power to assent to any arrangement or compromise "proposed to be made between the company and the debenture "holders provided that it is one which the Court would have "jurisdiction to sanction under the Joint Stock Companies Ar- "rangement Act, 1870, or any modification thereof," the requisite majority of debenture holders were held to have power to bind the minority by an arrangement, under which a guarantee of the debenture debt and interest was released and the interest payable to the debenture holders was increased.(*x*)

Meaning of power to bind "all the holders as effectually as if they were competent to consent and had consented thereto in writing for valuable consideration".

A power merely enabling a specified majority of the debenture or debenture stock holders by a resolution carried at a meeting "to bind all the holders of the debentures or debenture stock as effectually as if all such holders were competent to consent and had consented thereto in writing for valuable consideration" (and not specifically authorising any modification of the rights of the holders) does not authorise such a meeting to pass a resolution, which, if passed, would be inconsistent with the rights given to the debenture or debenture stock holders under the provisions of the trust deed. Hence, it was held, by the Court of Appeal in a recent case,(*y*) that such a majority could not bind a dissentient minority by a resolution to apply otherwise than in accordance with the trusts moneys, which had been paid by the company to the trustees of the trust deed and which were under the terms of such deed to be applied in payment to the debenture stock holders of the interest on their debenture stock. What resolutions would be authorised by such a power appears to be open to some doubt. Esher, M. R. suggests, that a resolution passed under this power must relate to something not provided for by the trust deed.

Debenture-holder bound by resolution even after he has obtained judgment.

A debenture or debenture stock holder, who has obtained judgment on his security against the company, which issued his debentures or debenture stock, still remains a debenture or debenture stock holder notwithstanding the judgment and may be bound by the requisite majority of holders at a meeting sanctioning a scheme, which provides that each holder shall

(*x*) *Shaw* v. *Royce Ld.* (1911) 1 Ch. 138.

(*y*) *Hay* v. *Swedish and Norwegian Ry. Co.* 5 Times L. R. 460; W. N. (1889) p. 95.

receive debenture stock instead of debentures or *vice versâ* or preference shares or ordinary shares instead of the securities on which he got his judgment. If such scheme is one, which the majority of holders has power to sanction, the debenture or debenture stock holder who has obtained judgment, may be restrained from taking proceedings under it. Thus in the case of *Potteries, Shrewsbury and North Wales Railway Co.* v. *Minor*,(*z*) after the defendant, a debenture-holder of a railway company, had obtained judgment on his debentures against the company for principal, interest and costs, the company filed a scheme of arrangement under the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127),(*a*) which was assented to by the requisite majority (three-fourths in value) (*b*) of the debenture holders (but not by the defendant) and was duly confirmed and enrolled. The scheme provided, that each debenture-holder should receive in lieu of his principal money and arrears of interest the like nominal amount of debenture stock. The defendant having afterwards proceeded to issue execution on his judgment, the company filed a bill to restrain him. The Court there held, that the defendant, although he had obtained judgment, was still a debenture-holder, and therefore bound by the scheme and must be restrained from taking proceedings under his judgment.

Notice of meetings.

Notice, that a meeting of debenture or debenture stock holders will be convened to pass a resolution sanctioning certain modifications of or compromises in respect of the debenture or debenture stock holders' rights, must be given to the holders and such notice should specify the substance of the resolution to be proposed; but it is not necessary to set out in such notice all the points, which the ingenuity of a lawyer can raise, *e.g.*, it would be sufficient to state in such notice, that the holders' charge is to be postponed to another charge.(*c*)

As a rule, the debenture or debenture stock holders' trust deed provides, that at least a specified number of days' notice of the meeting will be given to the debenture or debenture stock holders and that notice will be given in some cases by circular, in others by advertisement in certain specified papers. When the debentures are payable to bearer, no other scheme can be provided for giving notice of such meeting than by advertisement.(*d*) In the absence of any express provision on the sub-

(*z*) 6 Ch. 621.
(*a*) See infra, Bk. III., ch. iii.
(*b*) See sec. 10.
(*c*) In re *Dominion of Canada Freehold Estate and Timber Co.*, 55 L. T. R. 347, 352.
(*d*) *Follitt* v. *Eddystone Granite Quarries* (1892) 3 Ch. 75, 84; re *Dominion of Canada Freehold Estates Co.*, 55 L. T. R. 347, 351.

Bk. II., Ch. V., Sec. II. (2).

ject, notice by advertisement to holders of debentures payable to bearer is sufficient.(*e*)

Who may attend and vote at the meetings convened under express power.

Where a specified majority of the holders of a series of debentures or debenture stock have an express power (whether under the debentures or the trust deed) to bind a dissentient minority by resolution passed at a meeting of the holders of such securities, every holder is entitled to attend and vote at a duly convened meeting of such holders, and it is immaterial whether a holder so attending is the owner or is a transferee for the purpose of mortgage or (in the cases of bearer securities) is merely the depositee of such securities by way of equitable charge. Thus in a recent case (*f*) a bank, with whom a company deposited their own debentures of the face value of £55,000, to secure an overdraft of £25,000, was held by Parker, J., to be entitled to attend and vote at a meeting of the holders of the series of debentures (of which the above-mentioned debentures of the face value of £55,000 formed part) convened pursuant to the provisions of the trust deed securing such series for the purpose of modifying such trust deed in such a manner as to enable the directors of the company to pay off the overdraft of £25,000, to accept the surrender of the above-mentioned debentures of the value of £55,000, and to re-issue the surrendered debentures.

SUB-SECTION 2. *Power of a Majority to bind a Minority of Debenture or Debenture Stock Holders by virtue of Section 120 of the Companies Consolidation Act, 1908.*

Scheme of arrangement sanctioned by the Court under this Act.

In cases, in which the securities do not themselves contain any clause giving power to convene a meeting of the debenture or debenture stock holders and enabling a specified majority to bind the minority, the company may, if it is desired to modify or compromise (*g*) the rights of the holders and the holders do not all assent to such modification or compromise, avail itself of the provisions of section 120 of the above-mentioned Act, which is substantially a re-enactment of section 2 of the Joint Stock Companies Arrangement Act, 1870, as amended by the Companies Acts, 1900 and 1907.

Section 120 runs as follows :—

(*e*) *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (1893) 1 Ch. (C. A.) 484*n*, 488.

(*f*) Re *Kent Collieries Ld.*, *Day* v. *Same Co.*, 23 Times L. R. 559.

(*g*) But a compromise in proceedings concerning a trust, to which one or more holders of debentures or debenture stock forming part of a series ranking *pari passu* is or are a party or parties, may be made binding on the non-assenting (but not on the dissenting) holders of such securities, who are not parties, by the Court sanctioning such compromise under Or. XVI., r. 9*a*; *Collingham* v. *Sloper* (1894) 3 Ch. (C. A.) 716.

Sec. 120 of Comp. Cons. Act, 1908.

Power to enter into scheme of arrangement.

"120.—(1) Where a compromise or arrangement is proposed "between a company and its creditors or any class of them or "between the company and its members or any class of them, the "Court may, on the application in a summary way of the company "or of any creditor or member of the company or, in the case of "a company being wound up, of the liquidator, order a meeting "of the creditors or class of creditors, or of the members of the "company or class of members, as the case may be, to be sum-"moned in such manner as the Court directs.

"(2) If a majority in number representing three-fourths in "value of the creditors or class of creditors, or members or class "of members, as the case may be, present either in person or by "proxy at the meeting, agree to any compromise or arrangement, "the compromise or arrangement shall, if sanctioned by the Court,(*h*) "be binding on all the creditors or the class of creditors, or on "the members or class of members, as the case may be, and also "on the company or, in the case of a company in the course of "being wound up, on the liquidator and contributories of the "company.

"(3) In this section the expression "company" means any "company liable to be wound up under this Act."

Meaning of the expression "class of creditors".

It is not easy to define exactly what is meant by the expression "class of creditors" used in this section. It has been held that classes of secured creditors come within the section and the Court has accordingly ordered under the provisions of this Act, that meetings of debenture (or debenture stock) holders, of unsecured creditors and of shareholders should be held to consider schemes of arrangement before sanctioning the same.(*i*) Debenture (or debenture stock) holders should, as a rule, be summoned and vote in one class, even though they do not rank *pari passu* (*j*) unless their interests are so conflicting, that they cannot consult together with a view to their common interest.(*k*)

When the Court will sanction a scheme under this Act.

Under this section a meeting of debenture or debenture stock holders may be convened and, if a majority in number representing three-fourths in value of such holders present either in person or

(*h*) "The Court" empowered by sec. 120 to sanction a scheme of arrangement is the Court having jurisdiction to wind up the company (sec. 285), that is to say, (i) where the share capital of the company credited as paid up exceeds £10,000, any judge of the Chancery Division of the High Court (re *Essex and Suffolk Equitable Insurance Society* (1909) W. N. 102), or (ii) where such share capital does not exceed £10,000, the County Court (sec. 131).

(*i*) *Slater* v. *Darlaston Steel and Iron Co.*, W. N. (1877) 139; in re *Dynevor Dyffryn and Neath Abbey Collieries Co.*, 11 Ch. Div. 605.

(*j*) In re *Dynevor Dyffryn and Neath Abbey Collieries Co.*, 11 Ch. Div. 605, 610.

(*k*) *Sovereign Life Assurance Co.*, v. *Dodd* (1892) 2 Q. B. (C. A.) 573, 583.

by proxy agree to any arrangement or compromise with the company, the Court may sanction it. For it has been decided, that the power given by this section to sanction a scheme of arrangement between a company in liquidation and its creditors extends to debenture-holders (*l*) and enables the Court to sanction a scheme, even though it deprives debenture-holders of their security wholly or in part (*m*) or compels the debenture-holders of a company (i) to accept debentures of a new company in substitution for their debentures of the old company,(*n*) or (ii) to accept fully paid shares in a new company in lieu of their debentures of the old company,(*o*) or (iii) to release a guarantee of the debenture debt and interest in consideration of an increase of the rate of interest payable in respect of their debentures.(*p*) The Court is, however, never bound to sanction a scheme, which it thinks unjust to any person.(*q*)

In exercising the power of sanctioning a scheme, the Court has to see "that the minority is not being overridden by a majority having interests of its own clashing with those of the minority, whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one, as to which persons acting honestly and viewing the scheme laid before them in the interests of those, whom they represent, take a view, which can be reasonably taken by business men. The Court must look at this scheme and see, whether the Act has been complied with, whether the majority are acting *bona fide* (*r*) and whether they are coercing the minority in order to promote interests adverse to those of the class, whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say, that he could not approve of it."(*s*)

Where there is an honest and fair arrangement, which is sanctioned by the great body of the debenture or debenture stock holders and other creditors, the Court will not be astute to find technical defects in the proceedings.(*t*) But, if a

(*l*) In re *Tunis Railway Co.*, 10 Ch. D. 270 *n*; in re *Western of Canada Oil Lands and Works Co.*, W. N. (1874) p. 148.

(*m*) In re *Empire Mining Co.*, 44 Ch. D. 402; in re *Alabama, etc., Railway Co.* (1891) 1 Ch. (C. A.) 213; re *Orleans Motor Co.* (1911) 2 Ch. 41.

(*n*) Re *Canning Jarrah Timber Co., Western Australia Ld.* (1900) 1 Ch. (C. A.) 708.

(*o*) Re *Labuan and Borneo Ld., Peirson* v. *Same Co.*, 18 Times L. R. 216.

(*p*) *Shaw* v. *Royce Ld.* (1911) 1 Ch. 138.

(*q*) *Craig's Case* (1895) 1 Ch. (C. A.) 267, 278.

(*r*) In re *Wedgwood Coal and Iron Co.*, 6 Ch. D. 627.

(*s*) In re *Alabama, etc., Co.*, ubi supra; in re *English, Scottish and Australian Bank* (1893) 3 Ch. (C. A.) 385; *Edinburgh American Land Co.* v. *Lang's Trustees* (1909) S. C. 488.

(*t*) In re *Dynevor Dyffryn and Neath Abbey Collieries Co.*, 11 Ch. Div. 605, 609.

judgment creditor delays issuing execution on the representation of the company, that they will pay and will not present a winding-up petition, the Court will not, on such company presenting a winding-up petition and obtaining an order thereon, sanction an arrangement, which has been agreed to by the creditors (including the debenture and debenture stock holders) subject to the sanction of the Court required by section 120 of the Companies Consolidation Act, 1908. In such a case the Court will give leave to the judgment creditor to issue execution.(*u*)

The Court may sanction a scheme of arrangement between a company and its debenture or debenture stock holders against the wishes (or without calling a meeting) of the shareholders of the company, if the entire assets of the company are proved to be insufficient to satisfy the sums secured by the issued debentures or debenture stock; for in such a case the shareholders have no longer any real interest in the assets of the company.(*v*)

The Court will not sanction a compromise or arrangement under this Act, unless such compromise or arrangement is made subject to the sanction of the Court.(*w*)

Who is entitled to vote at meetings summoned under this Act.

Debenture and debenture stock holders, who are also shareholders, are nevertheless entitled to vote as creditors at a meeting of creditors called under the provisions of section 120 of the above-mentioned Act, and in the same class with creditors, who are not shareholders.(*x*)

Where a scheme of arrangement is resolved on at a meeting of debenture (or debenture stock) holders summoned under the provisions of this Act, the holders of debentures or debenture stock certificates passing by delivery are not entitled to vote, unless they produce their securities at or before the meeting.(*y*)

Proxies.

Proxies given by debenture (or debenture stock) holders to vote at a meeting of debenture (or debenture stock) holders summoned under this Act must be given to a member of the same class; hence proxies given by them to the Official Liquidator were held to be bad.(*z*)

Unreasonable opposition to scheme.

If a debenture or debenture stock holder unreasonably opposes a petition to the Court to sanction a scheme of arrange-

(*u*) In re *Richards & Co.*, ex parte *Crawshay*, 11 Ch. D. 676.

(*v*) Re *Tea Corporation Ld., Sorsbie* v. *Same Co.* (1904) 1 Ch. (C. A.) 12; re *Brownfields Guild Pottery Society* (1898) W. N. 80.

(*w*) In re *Land Mortgage Bank of Florida*, W. N. (1896) 48.

(*x*) In re *Madras Irrigation Co.*, W. N. (1881) 172; 25 Sol. Jo. 742; re *Central Bahia Ry. Co.*, 18 Times L. R. 533.

(*y*) In re *Wedgwood Coal and Iron Co.*, 6 Ch. D. 627, 634.

(*z*) In re *Madras Irrigation and Canal Co.*, ubi supra.

ment, which has been sanctioned by the requisite majority of creditors, the Court may refuse to allow him his costs out of the assets of the company.(*a*)

When scheme should be opposed.

Debenture or debenture stock holders, who intend to oppose the sanction of a scheme by the Court, should appear in Court to oppose it; if they do not appear, they cannot afterwards appeal against an order confirming the scheme without the leave of the judge, who made the order.(*b*)

Filing of agreement to allot fully paid-up shares in lieu of Debentures.

Where all the debenture or debenture stock holders of a company agree to accept fully paid-up shares of a company in lieu of their debentures or debenture stock, or where a resolution to accept such an allotment is carried by the requisite majority in such a manner as to bind the minority (whether by virtue of their express powers under their securities or by virtue of the powers conferred by section 120 of the Companies Consolidation Act, 1908), the company should (pursuant to section 88 (1(b)) of that Act) within one month from the allotment of such shares file with the Registrar (i) a duly stamped contract constituting the title of the allottees to such allotments, and (ii) a return stating the number and nominal amounts of the shares so allotted, the extent, to which they are to be treated as paid up, and the consideration, for which they have been allotted.

This Act does not apply to the Colonies.

The Joint Stock Companies Arrangement Act, 1870, was held not to extend to the Colonies, hence where an English Court sanctioned a scheme of arrangement thereunder, whereby the creditors of an English company carrying on business in a colony were to receive 12½ per cent. of their debts in cash and debenture stock for the remaining 87½ per cent., it was held that a creditor residing in such colony could enforce payment of his debt by proceedings in such colony and that the above scheme did not constitute a good defence to such proceedings.(*c*)

It is submitted that the grounds, on which the Court so decided, are equally applicable in the case of a scheme of arrangement sanctioned by the Court under section 120 of the Companies Consolidation Act, 1908, and that the Court would accordingly hold that section 120 does not extend to the Colonies.

(*a*) In re *Tunis Railway Co.*, 10 Ch. D. 270*n*.

(*b*) In re *Securities Insurance Co.* (1894), 2 Ch. 410.

(*c*) *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (1898) A. C. 349. For a detailed account of the various steps to be taken under section 120 of the present Act and the necessary Forms, see *Simonson's Reconstruction* 2nd ed. pp. 67-82.

CHAPTER VI.

THE RIGHTS AND REMEDIES OF DEBENTURE OR DEBENTURE STOCK HOLDERS AGAINST THE DIRECTORS OF THE COMPANY, WHICH ISSUED SUCH SECURITIES, AND THE RIGHTS AND REMEDIES OF SUCH DIRECTORS AGAINST THE HOLDERS.

Remedies against directors.

THE rights and remedies of a debenture or debenture stock holder against the directors of the company, which issued his securities, may be roughly divided into (1) rights and remedies in respect of misrepresentations or non-disclosure of material facts, whereby the holder was induced to take his securities, and (2) rights and remedies in respect of the misapplication by the directors of property comprised in his securities.

SECTION I. *The Rights and Remedies of Debenture and Debenture Stock Holders against the Directors in Respect of Misrepresentations or Non-Disclosure.*

Grounds on which a director may be made liable in respect of misrepresentation or non-disclosure.

If a person is induced to subscribe for debentures or debenture stock by the misrepresentations made in a prospectus or otherwise by the directors of a company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, or a company having power to issue such securities under the provisions of the Companies Clauses Act, 1845,(*a*) or the Companies Clauses Act, 1863,(*b*) or the Railway Companies Act, 1867,(*c*) the directors, who made or authorised the making of such misrepresentations, may be made severally liable to the person, who sustains damage in consequence of such subscription, on the following grounds:—

(1) Breach of warranty(*d*) (for the directors issuing de-

(*a*) See infra, Bk. III., ch. i.
(*b*) See infra, Bk. III., ch. ii.
(*c*) See infra, Bk. III., ch. iii.
(*d*) Sec. 43 of the Building Societies Act, 1874 (37 & 38 Vic., cap. 42), expressly renders the directors or committee of management of a building society personally liable for any moneys borrowed and received by them on behalf of such society in excess of the limits prescribed by this Act.

Bk. II., Ch. VI., Sec. I. (1).

bentures or debenture stock warrant by implication, that they have power to issue the same on behalf of the company, and are liable in damages, if they have no such power at the time of the issue), or

(2) Fraudulent misrepresentations made by one or more of the directors of a company (whether by a prospectus or otherwise) concerning material facts with intent to deceive, whereby the persons, to whom they are made, are in fact induced to subscribe for debentures or debenture stock of such company.

A person, who receives a prospectus inviting subscriptions for the debentures or debenture stock of a company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, and who subscribes for such securities pursuant to such invitation, may (in addition to the remedies above referred to) also avail himself of the provisions of (i) section 84 of the Companies Consolidation Act, 1908 (in the event of untrue statements being made in the prospectus), and (ii) section 81 of the same Act (in the event of the prospectus not specifying one or more of the particulars required by that section to be disclosed by a prospectus).

SUB-SECTION I. *Action for Damages against the Directors for Breach of Warranty.*

General principles.

As regards the first ground for the relief of debenture or debenture stock holders against the directors of the company, which issued their securities (namely, an action for damages for breach of warranty) the following principles apply:—

Express warranty of power to issue Debentures.

Where the directors of a company expressly state in the body of or in an endorsement on a debenture or debenture stock certificate, that the sum secured by such instrument is within the amount authorised to be raised, they are personally liable in damages for breach of warranty, if such statement is incorrect. Thus in a recent case,(*e*) in which a director of a company endorsed on debenture stock certificates issued by the company to the plaintiffs to secure a loan, the following words "within the amount authorised to be issued under the company's Act of Parliament," the issue being in fact in excess of the limit, the Court held, that the director was personally liable to the plaintiffs in damages for breach of warranty.

(*e*) *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. R. 360.

Implied warranty of power to issue Debentures.

But it is not necessary, that the directors issuing debentures or debenture stock should expressly state, that they have power to bind the company by such issue, for, where an agent makes a contract on behalf of his principal, he impliedly warrants, that he has authority to bind the principal, and, if it turns out, that he has no authority to bind his principal, and the principal repudiates the obligation and loss is thereby occasioned, then an action on that warranty can be maintained.(*f*)

Applying these principles to a director issuing debentures or debenture stock it has been decided, that each director asserts by issuing or authorising the issue of the debentures or debenture stock certificates to the person, whose debt is secured by either of such instruments, that he and his co-directors have power to bind the company by such instruments. It must be taken that the directors, when they make such implied assertion, undertake that it is true and that they are severally personally liable in damages for breach of warranty, if it turns out, that they had no such power to bind the company by reason of the company never having had any power to issue such securities or having exhausted such limited power, as they originally had.(*g*) The fact, that the directors themselves do not know, that they have no power to bind the company, is immaterial. The persons, to whom such directors issue the debentures or debenture stock, are justified in assuming, that the directors have power to bind the company by the issue of such securities.(*h*)

The directors will be equally liable, whether the debentures or debenture stock are given to secure money advanced or else in lieu of payment for work done for the company. Thus in the case of *Firbank's Executors* v. *Humphreys*,(*i*) Firbank (who died before the case came on for hearing in the Court of Appeal, thereby necessitating the substitution of his executors as plaintiffs) entered into a contract with a company to make a railway and the directors of the company induced the plaintiff

(*f*) *Beattie* v. *Lord Ebury*, 7 Ch. 777, 800.

(*g*) *Collin* v. *Wright*, 7 E. & B. 301; 8 E. & B. 647, 657; *Richardson* v. *Williamson* L. R. 6 Q. B. 276; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Dickson* v. *Reuter's Telegram Co.*, L. R. 3 C. P. D. 1; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. Div. 696, 717. See also *Starkey* v. *Bank of England* (1903) A. C. 114; *Yonge* v. *Toynbee* (1910) 1 K. B. (C. A.) 215.

(*h*) *Firbank's Executors* v. *Humphreys*, 18 Q. B. Div. 54.

(*i*) 18 Q. B. Div. 54.

Bk. II., Ch. VI., Sec. I. (1).

to abstain from pressing for cash due to him by the company under such contract and to continue the works for the company, on the company agreeing to give him £18,400 debenture stock and security for the balance due under the original contract. Pursuant to this agreement the directors of the company gave him certificates for £18,400 debenture stock and thereupon the plaintiff forbore to press the company for cash and he proceeded to finish the line. The company was afterwards wound up, and it was then discovered, that, when the above agreement was made and the certificates were given, the company had already issued the whole of the debenture stock, which the company could then lawfully issue; whence it follows, that the company could not then lawfully issue any more, and that the certificates given by the directors for the £18,400 debenture stock were valueless. It further appeared, that the company could not pay its unsecured creditors anything; but its debenture stock always was worth 20s. in the pound. Under these circumstances the plaintiff claimed to make the directors personally responsible for the value, which the £18,400 debenture stock purported to be given to him would have had, if it had been validly issued. The Court held, that by issuing the debenture stock certificates the defendant directors in truth had represented, that they had authority to bind the company by the issue of such stock, and that they were liable in damages.

Measure of damages.

The damages payable by directors in an action by a debenture or debenture stock holder for breach of warranty are arrived at by considering the difference in the position, in which such holder would have been, had the representation been true, and the position, in which he actually is in consequence of its being untrue; in other words, the difference between what the debentures or debenture stock would have been worth to the holder, had the representation been true, and what he can get from the company by virtue of his debentures or debenture stock. Thus, where the directors had falsely represented, that they had power to issue debentures or debenture stock, which would constitute a first charge on the property of the company and such charge would have been a good security, whereas such debentures or debenture stock without such first charge were worth nothing, the Court held, that the damages payable by the directors in an

action for breach of warranty were the full amount of the debentures or debenture stock.(*j*)

When directors not liable in action for breach of warranty.

Of course, the directors of a company are not liable to the debenture or debenture stock holders of such company in an action for breach of warranty, unless it can be clearly shown, that the company had at the date of the issue no power to issue such securities. Thus in a recent case(*k*) the plaintiffs contracted to supply goods to a company to be paid as to £600 in first mortgage debentures of the company. The contract was made at a board meeting of the company, at which the defendant was chairman and which was attended by the plaintiffs' representative. At the date of the contract the defendant knew, that the whole of the first mortgage debentures of the company had been issued except £4950, which were deposited with the bankers of the company as security for the company's overdraft under an arrangement, by which the company could at any time withdraw any of the debentures, on paying the nominal amount thereof in cash. On the company being wound up, the plaintiffs tried to make the defendant personally liable for the £600 on the ground, that his acts amounted to a representation, that the company could issue the debentures at a time, when he knew, that they had no debentures available for the purpose. However, the Court held, that the defendant was not liable, as there were debentures, which might have been made available for the purpose of the contract.

Directors not liable for misrepresentations of secretary.

Misrepresentations made by the secretary of a company do not constitute a good ground for an action for breach of warranty against the directors of the company personally; for the secretary is the servant, not of the directors, but of the company.(*l*)

Action for breach of warranty survives to personal representative.

As an action for damages for breach of warranty is an action to recover damages for a wrong done to the personal estate of the person, to whom the warranty was given, it follows that the maxim *actio personalis moritur cum persona* does not apply to such a case and that the right of action of such person survives to his legal personal representatives.(*m*)

(*j*) *Firbank's Executors* v. *Humphreys*, ubi supra; see also *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. R. 360.

(*k*) *Elkington & Co.* v. *Hürter* (1892), 2 Ch. 452.

(*l*) *Smith* v. *Reed*, 2 Times L. R. 442.

(*m*) *Twycross* v. *Grant*, 4 C. P. Div. 40; *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakey* v. *Dalton*, 35 Ch. D. 700; see also *Williams On Executors*, 9th ed., p. 698.

SUB-SECTION 2. *Action for Deceit against the Directors.*

Action for deceit.

Persons, who apply to a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, for its debentures or debenture stock relying on representations contained in prospectuses or notices issued by or on behalf of such company will, on discovering that such representations were false, generally have a more efficient remedy against the directors of such company under section 84 of the Companies Consolidation Act, 1908,(*n*) than by instituting an action for deceit against them. As, however, this Act does not apply to all misrepresentations made in prospectuses or notices issued by directors and it may consequently sometimes be desirable that persons so applying for debentures or debenture stock should proceed against directors by an action for deceit, it will be convenient to state, what is the nature of an action for deceit and when such action will lie.

Action for deceit must be based on fraudulent misrepresentations of facts.

Where a prospectus or notice containing one or more fraudulent misrepresentations concerning material facts is issued by or authorised to be issued by one or more directors of a company with the intention of inducing by such representations the persons, into whose hands such prospectus or notice will come, to subscribe for the debentures or debenture stock of such company, any person, who has subscribed for such debentures or debenture stock relying on such misrepresentations and suffers damage thereby, is entitled to recover damages from such director or directors in an action for deceit.(*o*) Such an action will, however, fail, if the directors can show, that they honestly believed, that the misrepresentations relied on were true.(*p*) If it is proved, that the directors intended by their misrepresentations to induce the public to purchase such securities in the open market, such directors will be liable in an action for deceit to any person, who suffers damage by so purchasing such securities relying on such representations.(*q*)

(*n*) As to the remedies under sec. 84, see infra, Bk. II., ch. vi., sec. i. (3).

(*o*) *Peek* v. *Gurney*, L. R. 6 H. L. 377; *Smith* v. *Chadwick*, 9 App. Cas. 187; *Knox* v. *Hayman*, 67 L. T. R. 137; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459; *Peek* v. *Derry*, 14 App. Cas. 337; *Glasier* v. *Rolls*, 42 Ch. Div. 436; *Arkwright* v. *Newbold*, 17 Ch. Div. 301, 320; *Cackett* v. *Keswick* (1902) 2 Ch. (C. A.) 456, 463; *Tackey* v. *McBain* (1912) A. C. 186, 189.

(*p*) *Angus* v. *Clifford* (1891) 2 Ch. (C. A.) 449; see also cases in the preceeding note.

(*q*) *Andrews* v. *Mockford* (1896) 1 Q. B. (C. A.) 372.

In order to make directors liable in such an action, it is necessary to show, that the misrepresentation made by them or their agents at their instigation(*r*) was made fraudulently, that is to say, either (1) knowing that it was false and intending to deceive or (2) without belief in the truth of the representation or else (3) recklessly without caring or inquiring, whether it was false or true.(*s*) Such fraudulent misrepresentation must consist in an active misstatement of facts; mere non-disclosure of material facts is not sufficient to render the directors liable.(*t*)

The misrepresentation relied on in an action for deceit must be a misrepresentation of a material existing fact;(*u*) a statement of law, which turns out to be incorrect, will not be a good ground for such an action against the directors.

Fraudulent representation need not be sole cause of taking securities.

The plaintiff debenture or debenture stock holder in an action for deceit against a director may succeed, even though the fraudulent misrepresentation relied on was not the only cause of his taking his securities; he need only show, that the misrepresentation was actively present in his mind, when he decided to take the securities.(*v*)

Misrepresentation may be held to be fraudulent, if not corrected, on truth being discovered.

A plaintiff debenture or debenture stock holder (who brings an action for deceit against directors for fraudulent misrepresentation in a prospectus) may establish fraud by showing, that, though the directors *bonâ fide* believed at the date, when they issued the prospectus, that the representation made therein was true, they found out before the issue of the debenture or debenture stock to the plaintiff, that such representation was untrue, and nevertheless remained silent.(*w*) For, "where there is a duty or an obligation," says Lord Bramwell, "to speak, and a man in breach of that duty or obligation holds his tongue and does not speak and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason, why he did not speak, was

(*r*) *Weir* v. *Bell*, 3 Ex. Div. 238.

(*s*) *Edgington* v. *Fitzmaurice*, ubi supra; *Derry* v. *Peek*, 14 App. Cas. 337; *Weir* v. *Bell*, 3 Ex. Div. 238; *Eaglesfield* v. *Londonderry*, 4 Ch. Div. 693; *The West London Commercial Bank* v. *Kitson*, 13 Q. B. Div. 360; *Arnison* v. *Smith*, 41 Ch. Div. 348.

(*t*) *Peek* v. *Gurney*, L. R., 6 H. L. 377, 403.

(*u*) *Rashdall* v. *Ford*, 2 Eq. 750. As to what amounts to a misrepresentation of fact, see supra, Bk. II., ch. i., sec. i.

(*v*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459; *Arnison* v. *Smith*, 41 Ch. Div. 348.

(*w*) *Brownlie* v. *Campbell*, 5 App. Cas. 925, 950.

that he had nothing to say, I should be inclined to hold, that that was fraud".

Ambiguous representation.

If the statement complained of (in an action for deceit) taken in connection with the context is ambiguous and capable of two meanings, the plaintiff must prove, that he interpreted the words in the sense, in which they were false, and has in fact been deceived by them.(*x*)

Action for deceit brought by person deceived only on behalf of himself.

A debenture or debenture stock holder, who has been deceived by fraudulent misrepresentations made by or on behalf of the directors of the company, which issued his securities, asks for relief in an action for deceit on behalf of himself only, and not on behalf of himself and all the other holders; for the other holders may not have been deceived by the misrepresentations, which misled him.(*y*)

Damages must be proved.

Of course, unless the plaintiff has suffered damage owing to his being deceived by the misrepresentation relied on, there will be no right of action.(*z*)

The foregoing rules are illustrated by the following cases:—

In the case of *Edgington* v. *Fitzmaurice*,(*a*) the directors of a company issued a prospectus inviting subscriptions for debentures, and stating, that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The plaintiff advanced to the company the sum of £1500 on some of the debentures, under the erroneous belief, that the prospectus offered a charge upon the property of the company, and stated in his evidence, that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent; it was held by the Court of Appeal (affirming the decree of Denman, J.), that the misstatement of the objects, for which the debentures were issued, was a material misstatement of fact, influencing the conduct of the plaintiff, and rendered the directors liable in an action for deceit, although the plaintiff was also influenced by his own erroneous belief, and the Court gave

(*x*) *Smith* v. *Chadwick*, 9 App. Cas. 187; *McConnel* v. *Wright* (1903) 1 Ch. (C. A.) 546, 551.

(*y*) *Turquand* v. *Marshall*, 6 Eq. 112, 131.

(*z*) *Pasley* v. *Freeman*, 2 Sm. L. C. 74, 81 (9th ed.); *Smith* v. *Chadwick*, 9 App. Cas. 187, 195.

(*a*) 29 Ch. Div. 459.

judgment against the directors for £1500, less £45 received by the plaintiff as interest on the debentures.

In the case of *Arnison* v. *Smith*,(*b*) the plaintiffs took debenture stock in a company, in reliance on a statement in a prospectus issued by the directors, that £200,000 of share capital had been subscribed, when it had in fact only been allotted in fully paid-up shares to the contractor. £20 per cent. of the amount subscribed for was to be paid on allotment and the rest by instalments, with an option to pay up in full on allotment and receive a discount. After allotment the directors sent to the allottees along with their stock certificates a circular, which among statements about other matters, stated the truth as to the matter misrepresented, but did not admit the misrepresentation, nor inform the allottees, that they could retire and get back their money. After this, the allottees, who had paid up in full, received their discount and those, who had not, went on paying up the remaining £80 per cent. by instalments. The concern having proved a failure, the plaintiffs sued the directors to recover damages for misrepresentation. The Court held, that the misrepresentation was of such a nature, that the Court would infer, that it induced the plaintiff debenture stock holders to enter into the contract, and that the plaintiffs were entitled to damages. The Court further held, that the effect of the misrepresentation was not done away with by the circular, as such circular did not admit, that the prospectus contained a misrepresentation, and further that the plaintiff debenture stock holders, who went on to pay in full after receiving the circular, could recover damages for the loss of the money paid by them after as well as in respect of what they had paid before the receipt of such circular. The Court left the question open as to how the case would have stood, if the circular had admitted the misrepresentation and informed the plaintiff debenture stock holders, that they could have their money back. The Court gave judgment, that the plaintiffs should recover against the defendants damages in respect of the misrepresentations, such damages to consist in the difference between the sum paid by the plaintiffs for their debenture stock and the value thereof at the date of the allotment.(*c*)

(*b*) 41 Ch. Div. 348.

(*c*) Seton, 7th ed., 2257.

Statute of limitations.

An action for deceit (being an action on the case) will be statute barred under section 3 of 21 Jac. I., cap. 16, unless it is commenced within six years from the time, when the cause of action accrued. This provision is made subject to the following exception, that, if the plaintiff in such an action can prove, that he did not in fact discover and had no reasonable means of discovering the fraud and that the existence of such fraud was fraudulently concealed by the defendant, until within six years, from the time, when the cause of action accrued, time will not commence to run, until the date of such discovery.(*d*)

Directors not liable in action for deceit for misrepresentation made by the brokers of Company.

The directors of a company are not liable to the debenture or debenture stock holders of such company in an action for deceit in respect of misrepresentations, which the brokers of the company made in a prospectus issued on behalf of the company knowing such representations to be false, but which the directors did not know to be false.(*e*)

Director not released by bankruptcy from liability to pay damages for fraudulent misrepresentations.

As section 37 (1) of the Bankruptcy Act, 1883, provides, that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy, it follows that damages in an action for deceit against a director for fraudulent misrepresentation are not provable in his bankruptcy. The discharge of a director would not, it appears, release him from any liability to damages for fraudulent misrepresentation.(*f*)

How far representatives of deceased director are liable in an action for deceit

Though the maxim *actio personalis moritur cum persona* applies to a claim for damages in respect of fraudulent misrepresentation,(*g*) yet the executors or administrators of a director, who makes the misrepresentation, may be liable to the extent, to which the estate of such director has benefited by such misrepresentation. Such executors or administrators will, however, only be liable in cases, in which the property, or the proceeds or value of property belonging to a third person has been appropriated by the deceased director and added to his own estate and moneys, but not in cases, in which there is nothing, among the assets of the deceased director, which in law

(*d*) *Gibbs* v. *Guild*, 9 Q. B. Div. 59; *Bulli Coal Mining Co.* v. *Osborne* (1899), A. C. 351.

(*e*) *Weir* v. *Bell*, 3 Ex. Div. 238.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vic., cap. 52) (sec. 30 (2)); see *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122.

(*g*) *Peek* v. *Gurney*, L. R., 6 H. L. 377, 393.

or in equity belongs to a third person, and the damages done to such third person are unliquidated and uncertain.(*h*)

Action for deceit survives to representatives of deceased Debenture-holder.

On the death of a debenture or debenture stock holder, in whom there is vested a right of action for fraudulent misrepresentation against the directors of the company, which issued such securities, this right of action will, if it can be shown that an inquiry has accrued to the personal estate of such debenture or debenture stock holder owing to such misrepresentation, survive to his executors or adminstrators. In such case the maxim *actio personalis moritur cum persona* does not apply.(*i*)

Joinder of several co-plaintiffs.

Several persons, who have received copies of a prospectus containing untrue statements and who have subscribed on the faith of such statements, may be joined as co-plaintiffs in an action for deceit against the directors.(*j*)

SUB-SECTION 3. *Directors' Liability under Section 84 of the Companies Consolidation Act, 1908.*

Compensation under sec. 84 of Comp. Cons. Act, 1908, for misrepresentations in prospectus.

One of the most efficient remedies of the holders of debentures or debenture stock of companies incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, against the directors (or promoters) of such companies in respect of untrue statements made in prospectuses or notices, which are issued on behalf of such companies and which invite subscriptions for such securities, is provided by section 84 of the Companies Consolidation Act, 1908, which runs as follows:—

Sec. 84 of Comp. Cons. Act, 1908. Director's liability for statements in prospectus.

"84.—(1) Where a prospectus invites persons to subscribe "for shares in or debentures of a company, every person who is a "director of the company at the time of the issue of the prospectus, "and every person who has authorised the naming of him and is "named in the prospectus as a director or as having agreed to "become a director either immediately or after an interval of time, "and every promoter of the company, and every person who has "authorised the issue of the prospectus, shall be liable to pay "compensation to all persons who subscribe for any shares or "debentures on the faith of the prospectus for the loss or damage

(*h*) *Phillips* v. *Homfray*, 24 Ch. Div. 439, 454-5; *Hambly* v. *Trott*, Cowp. 376; *Kirk* v. *Todd*, 21 Ch. Div. 484, 488; in re *Duncan*, *Terry* v. *Sweeting* (1899) 1 Ch. 387.

(*i*) *Twycross* v. *Grant*, 4 C. P. D. 40.

(*j*) *Drincqbier* v. *Wood* (1899) 1 Ch. 392. See also R. S. C., Or. XVI., r. 1.

Bk. II., Ch. V., Sec. I. (3).

"they may have sustained by reason of any untrue statement "therein, or in any report or memorandum appearing on the face "thereof, or by reference incorporated therein or issued therewith, "unless it is proved—

"(*a*) With respect to every untrue statement not purporting "to be made on the authority of an expert or of a "public official document or statement, that he had "reasonable ground to believe, and did up to the "time of the allotment of the shares or debentures, "as the case may be, believe, that the statement was "true; and

"(*b*) With respect to every untrue statement purporting to "be a statement by or contained in what purports to "be a copy of or extract from a report or valuation of "an expert, that it fairly represented the statement, or "was a correct and fair copy of or extract from the "report or valuation. Provided that the director, "person named as a director, promoter, or person who "authorised the issue of the prospectus, shall be liable "to pay compensation as aforesaid if it is proved that "he had no reasonable ground to believe that the per- "son making the statement, report, or valuation was "competent to make it; and

"(*c*) With respect to every untrue statement purporting to "be a statement made by an official person or con- "tained in what purports to be a copy of or extract "from a public official document, that it was a correct "and fair representation of the statement or copy of "or extract from the document:

"or unless it is proved—

"(i) that having consented to become a director of the "company he withdrew his consent before the issue of "the prospectus, and that it was issued without his "authority or consent; or

"(ii) that the prospectus was issued without his knowledge or "consent, and that on becoming aware of its issue he "forthwith gave reasonable public notice that it was "issued without his knowledge or consent; or

"(iii) that after the issue of the prospectus and before allot- "ment thereunder, he, on becoming aware of any untrue

"statement therein, withdrew his consent thereto, and "gave reasonable public notice of the withdrawal, and "of the reason therefor.

"(2) Where a company existing on the eighteenth day of "August one thousand eight hundred and ninety, has issued "shares or debentures, and for the purpose of obtaining further "capital by subscriptions for shares or debentures issues a pro- "spectus, a director shall not be liable in respect of any statement "therein, unless he has authorised the issue of the prospectus, or "has adopted or ratified it.

"(3) Where the prospectus contains the name of a person as "a director of the company, or as having agreed to become a "director thereof, and he has not consented to become a director, "or has withdrawn his consent before the issue of the prospectus, "and has not authorised or consented to the issue thereof, the "directors of the company, except any without whose knowledge "or consent the prospectus was issued, and any other person who "authorised the issue thereof, shall be liable to indemnify the "person named as aforesaid against all damages, costs, and ex- "penses to which he may be made liable by reason of his name "having been inserted in the prospectus, or in defending himself "against any action or legal proceedings brought against him in "respect thereof.

"(4) Every person who by reason of his being a director, "or named as a director or as having agreed to become a director, "or of his having authorised the issue of the prospectus, becomes "liable to make any payment under this section may recover "contribution, as in cases of contract, from any other person who, "if sued separately, would have been liable to make the same "payment, unless the person who has become so liable was, and "that other person was not, guilty of fraudulent misrepresentation.

"(5) For the purposes of this section—

"The expression 'promoter' means a promoter who was a "party to the preparation of the prospectus, or of the "portion thereof containing the untrue statement, but does "not include any person by reason of his acting in a "professional capacity for persons engaged in procuring "the formation of the company:

"The expression 'expert' includes engineer, valuer, "accountant, and any other person whose profession gives "authority to a statement made by him."

Object and effect of sec. 84 of the Comp. Cons. Act, 1908.

The object of section 84 is to remove the defect, which formerly existed in the law and was brought to light by the case of *Derry* v. *Peek* (*k*) whereby it was decided that at law a director could only be made liable for damages (in an action for deceit) caused by untrue statements in a prospectus inviting subscriptions, if such untrue statements were made *fraudulently*. Section 84 seeks to remedy this defect by imposing upon those, who issue prospectuses, the statutory duty not to make statements in prospectuses until they have taken reasonable care to satisfy themselves that such statements are true.(*l*) The remedy under this section (which is in addition to, and not in substitution for, the existing remedies under the general law) is a new action on the case (*i.e.*, for damages) given to such persons as have subscribed for, and suffered damage by reason of their subscribing for shares, debentures or debenture stock in reliance on statements in a prospectus, which are subsequently discovered to have been untrue.

Joinder of several plaintiffs to enforce compensation under sec. 84.

Where several persons have subscribed for shares, debentures or debenture stock on the faith of the untrue statements in the same prospectus, they may be joined together as co-plaintiffs to recover compensation under section 84.(*m*)

Compensation under sec. 84 recovered by executor.

If a person entitled to compensation under section 84 dies the right of action passes to his personal representatives.(*n*)

Prospectuses affected by sec. 84.

It is open to considerable doubt, whether this section is only applicable to prospectuses issued to "the *public*" (as to the meaning of "the public" see supra, p. 61) or whether it applies to *all* prospectuses, which "invite *persons* to subscribe for shares or debentures". Section 285 provides that "unless the context otherwise requires . . . prospectus means any prospectus, notice, circular, advertisement or other invitation, offering to the *public* for subscription or purchase any shares or debentures of a company". Bearing in mind that the provisions of section 84 impose heavy liabilities and must consequently be construed strictly, it is submitted, on the whole, that the correct interpretation of this section will *restrict* its application to prospectuses issued to the *public*, as it cannot be said that the "context otherwise requires".

(*k*) 14 A. C. 337; see also *Tackey* v. *M'Bain* (1912) A. C. 186, 189.

(*l*) *Greenwood* v. *Leather Shod Wheel Co.* (1900) 1 Ch. (C. A.) 421, 434; *Thomson* v. *Clanmorris* (1900) 1 Ch. 718, 727; *M'Connel* v. *Wright* (1903) 1 Ch. (C. A.) 546, 558.

(*m*) R. S. C., Or. XVI., r. 1; *Drincqbier* v. *Wood* (1899) 1 Ch. 393; *Stroud* v. *Lawson* (1898) 2 Q. B. (C. A.) 44.

(*n*) *Twycross* v. *Grant*, 4 C.P. Div. 40.

But it may be argued on the other side that, if it had been intended, that the term "prospectus" should have the meaning given to it by section 285 (*i.e.*, to confine it to prospectuses issued to the public) the expression "a prospectus invites *persons* to subcribe" (which is not found elsewhere in this Act) would not have been used here, but that some such expression as "where a prospectus is issued" would probably have been used. Another argument, which to some extent supports the construction giving the wider meaning to the word prospectus, is that the words "where a prospectus invites persons to subscribe for shares in or "debentures of a company" defining the class of cases, to which the enactment applies, are found both in section 3 of the Directors Liability Act, 1890, and in section 84 of the Companies Consolidation Act, 1908, and that the user of the identical words in a section of a Consolidation Act as are found in a section of a repealed Act, which is in substance re-enacted, would *prima facie* suggest the inference that the provision in the Consolidation Act was intended to apply to the cases as the corresponding sections in the repealed Act.

What plaintiff must prove.

In order to make out a case for compensation under section 84, the plaintiff must prove:—

(A) "Untrue statement".

(A) that he received a prospectus containing one or other of the following "untrue statements" (that is to say):—

(1) As to fact.

(1) a statement of fact, which is, in the opinion of the Court *material* (*o*) (as to what is "material," see supra, p. 63) and which is untrue *in fact*, (*p*) [a statement may be "untrue" within the meaning of section 84, if it is misleading] (*q*) and either that the defendant had at the time of the allotment no reasonable ground to believe or that he did not in fact believe the statement to be true, or

(2) As to expert's report.

(2) a material statement, which (though purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert) does not fairly represent the statement or is not a correct or fair copy of or extract from the report or valuation, and that the defendant had no reasonable ground to believe that

(*o*) *McConnel* v. *Wright* (1903) 1 Ch. (C. A.) 546, 558.

(*p*) *Greenwood* v. *Leather Shod Wheel Co.* (1900) 1 Ch. (C. A.) 421, 434; *Broom* v. *Speak* (1903) 1 Ch. (C. A.) 586, 602.

(*q*) *Drincqbier* v. *Wood* (1899) 1 Ch. 393, 407; *Greenwood* v. *Leather Shod Wheel Co.* (1900) 1 Ch. at p. 434.

Bk. II., Ch. V., Sec. I. (3).

the expert making the statement, report or valuation was competent to make it [as regards untrue statements as to an expert's report it would appear that no liability would arise under section 84, if a prospectus fairly represents a statement made by an expert or is a correct and fair copy of or extract from his report or valuation and the defendant had reasonable ground to believe that the expert was competent to make it, even though the defendant may know that the expert's statement, report or valuation was incorrect], or

(3) As to official document.

(3) A material statement, which (though purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public document) is not a correct or fair representation of the statement or copy of or extract from the document, and

(B) Subscription for shares.

(B) That the plaintiff "subscribed for," *i.e.*, applied for and accepted the allotment, of the shares, debentures or debenture stock (*r*) on the faith of the prospectus, and

(C) Damages.

(C) That the plaintiff has sustained loss or damage by reason of the untrue statement; the date of the allotment of the shares, debentures or debenture stock being the material date for ascertaining whether (and how much) loss or damage has been sustained.

When remedy under sec. 84 is statute barred.

As soon as a person has "subscribed" for shares, debentures or debenture stock on the faith of the prospectus containing an "untrue statement," the cause of action accrues and time will begin to run from that date. The period, during which compensation under section 84 may be recovered, is six years from the date of the subscription; after the expiration of that period the remedy will be barred by section 3 of 21 Jac. I. cap. 16.(*s*)

Section 3 of the Civil Procedure Act, 1833 (3 & 4 Will IV., cap. 42), which provides that "all actions for penalties, damages "or sums of money given to the party grieved by any statute' must be brought within two years after the cause of action, has been held only to apply to penal actions (*i.e.*, actions for penalties, damages or sums of money in the nature of penalties) (*t*), and are therefore not applicable to compensation under section 84 of the Companies Consolidation Act, 1908.

(*r*) *Ross* v. *Estates Investment Co.*, 3 Ch. 632; *Arnison* v. *Smith*, 41 Ch. Div. 348, 357.

(*s*) *Thomson* v. *Clanmorris* (1900) 1 Ch. 718, 726-7, 729.

(*t*) *Ibid.*

If the plaintiff satisfies the Court on the above matters, he will succeed in his claim, unless one or other of the following defences can be made out:—

Defences to claim under sec. 84.

(i) The defendant had reasonable ground to believe (*u*) and did in fact believe the untrue statements to be true, or

(ii) The untrue statement was a correct and fair representation of a statement by or contained in a copy of or extract from a report or valuation of an expert and it has not been proved that the defendant had no reasonable ground to believe that the expert was competent to make such report or valuation, or

(iii) The untrue statement was a correct and fair representation of a statement made by an official person or contained in a copy of or extract from a public official document, or

(iv) Before the issue of the prospectus the consent to become a director was withdrawn by the defendant and the prospectus was issued without the defendant's authority or consent, or

(v) The prospectus was issued without the defendant's knowledge or consent and he forthwith gave reasonable notice, that it was so issued, on becoming aware thereof, or

(vi) On becoming aware of untrue statement after the issue of the prospectus and before allotment the defendant gave reasonable public notice withdrawing his consent to such statement and of the reason therefor.

Against whom claim can be made under sec. 84 (1).

The persons, against whom a claim may be made under section 84 (1), are:

(*a*) A director (*v*) at the date of the prospectus,

(*b*) A person, who authorised the naming of him and is named in the prospectus (1) as a director, or (2) as having agreed to become a director,

(*c*) A promoter, who was a party to the prospectus or the portion containing the untrue statement, (*w*) and

(*d*) Any person, who has authorised the issue of the prospectus.

Where substantially the relief claimed by a subscriber for

(*u*) The Court may order the defendant to deliver particulars of the grounds of his belief, *Alman* v. *Oppert* (1901) 2 K. B. (C. A.) 504.

(*v*) *i.e.* any person occupying "the position of director by whatever name called" (Sec. 285 of Comp. Cons. Act, 1908).

(*w*) As to meaning of "promoter," see supra, p. 377.

Bk. II., Ch. V., Sec. I. (3).

shares, debentures or debenture stock against a company, its directors and the personal representatives of deceased directors is relief in respect of a prospectus containing untrue statements, they may all be properly joined as co-defendants in one action, though the relief claimed against the various defendants may differ, *e.g.*, the relief claimed against the company may be rescission, whereas the relief against the directors or other defendants or some of them may be (*a*) damages in an action for deceit, or (*b*) damages for failure to comply with the provisions of section 81 of this Act, or (*c*) compensation under section 84 of this Act.(*w*)

Joinder of several co-defendants and causes of action.

Liability of executors of deceased director to pay compensation under sec. 84.

It is open to doubt, whether the maxim of *actio personalis moritur cum persona* is applicable to a claim for compensation payable by virtue of the statutory liability created by section 84 (*x*) *i.e.*, whether compensation can be recovered from the personal representatives of a deceased person, who was liable under that section. It is, however, submitted that such a claim, being one for unliquidated damages, the Court will hold that it cannot be recovered from the personal representatives of a person liable under section 84.(*y*)

Bankruptcy of person liable to pay compensation under sec. 81.

It is doubtful whether a claim for compensation under section 84 is provable in bankruptcy; but, whether it is or is not provable, it is improper, when a person has become liable to pay compensation under this section, to make his trustee in bankruptcy a defendant in proceedings to recover compensation.(*z*)

"Reasonable public notice."

What will be "reasonable public notice" within clauses (ii) and (iii) of section 84 (1) will vary according to the circumstances of each case. But a person, who would otherwise be liable under section 84 (1), will not discharge himself of the burden thrown on him, if he merely proves that, having become aware of the issue of the prospectus, he deliberately abstained from inquiring as to its contents and refrained from giving any notice. He should endeavour to ascertain what statements have been made, for which he is responsible, and then, if he finds that some of the statements publicly put forward are untrue, forthwith repudiate them.(*a*)

(*w*) *Frankenburg* v. *Great Horseless Carriage Co.* (1900) 1 Q. B. (C. A.) 504.

(*x*) Ibid. at p. 510.

(*y*) *Kirk* v. *Todd*, 21 Ch. D. 484, 488; *Phillips* v. *Homfray*, 24 Ch. D. 454; re *Duncan*, *Terry* v. *Sweeting* (1899) 1 Ch. 387.

(*z*) *Greenwood* v. *Humber & Co.* (Portugal) *Ld.* 6 Mans. 42; (1898) W. N. 162.

(*a*) *Drincqbier* v. *Wood* (1899) 1 Ch. 393, 406.

Indemnity under subsec. 3 of sec. 84.

A person who :—

(1) is named in a prospectus, *either*

(*a*) as a director, *or*

(*b*) as having agreed to become a director, *and*

(2) has either

(*a*) not consented to become a director, *or*

(*b*) withdrawn his consent after giving the same, *and*

(3) has not authorised or consented to the issue of the prospectus,

is entitled under subsection 3 to be indemnified by :

(*a*) any director, with whose knowledge or consent the prospectus was issued, *and*

(*b*) any other person, who has authorised the issue of the prospectus.

Contribution under sec. 84 (4) may be recovered from executors.

As contribution under subsec. 4 of section 84 from other persons can be recovered by a person, who has become liable under subsec. 1, "as in cases of contract," a claim for contribution under that subsection (which re-enacts section 5 of the Directors Liability Act, 1890) is a claim to enforce a contract and can therefore be enforced against the personal representatives of a deceased person, who has become liable under section 84; for in such a case the maxim of *actio personalis moritur cum persona* is not applicable.(*b*)

Contribution among guilty persons.

A guilty person, who becomes liable to pay compensation under section 84 by fraudulently making untrue statements in a prospectus, is precluded by subsection 4 from recovering contribution from a person, who had the statement inserted in the prospectus innocently. But, if several persons become liable to pay compensation under this section by fraudulent misrepresentations, they can still recover contribution from each other.(*c*)

SUB-SECTION 4. *Directors' Liabilities for not disclosing in a Prospectus the Particulars Specified in Section* 81 *of the Companies Consolidation Act,* 1908.

Liability of director for default in complying with requirements of sec. 10 of Companies Act, 1900.

The directors of a company may render themselves liable in damages, not merely (as hitherto) if they make untrue statements in a prospectus or advertisement inviting the public to subscribe for debentures or debenture stock, but also if they omit to disclose certain matters, which are required by section 81 of the Companies

(*b*) *Shepheard* v. *Bray* (1906) 2 Ch. 235, 253-4.

(*c*) *Gerson* v. *Simpson* (1903) 2 K. B. (C. A.) 197.

Consolidation Act, 1908, to be stated. But, though this section, which is set forth in an earlier part of this treatise (*d*), contains elaborate provisions specifying in detail all the particulars, which must be disclosed by such a prospectus, there is no express provision in the Act stating what is to happen, if such a prospectus is issued, which fails to comply with these provisions.

As, however, default in disclosing in such a prospectus any one or more of the particulars specified in section 81 will be a breach of a statutory duty or obligation imposed on the directors of the company and on the other persons responsible for the prospectus (and probably also the company), and the statute creating such duty or obligation does not provide any express remedy, in case default is made in performing the same, the consequences of such a default would appear to be twofold, *viz.*:—

(*a*) The directors and other persons responsible for the prospectus (and probably also the company) will be guilty of a misdemeanour at common law and will accordingly be liable to be indicted for the same,(*e*) and

(*b*) The directors and other persons responsible for the prospectus (and probably also the company) will be liable in damages to any persons, who have applied for shares, debentures or debenture stock on the faith of the prospectus and who have suffered damage by reason of the default in disclosing the necessary particulars.

Section 81 is, it is submitted, clearly intended for the protection and benefit of persons, who receive a prospectus and apply for shares, debentures or debenture stock on the faith of such prospectus, and, as the Act does not give any express remedy in the event of failure to comply with section 81, it follows, that such persons are entitled to recover from the directors and other persons responsible for the prospectus such damages as are shown to have been caused to them by such default.(*f*) For, "where a "statute provides for the performance by certain persons of a

(*d*) See supra, Bk. I., ch. iii. p. 61.

(*e*) *Rex* v. *Wright*, 1 Burr. 543; *Rex* v. *Harris*, 4 T. R. 202; *Reg.* v. *Whitchurch*, 7 Q. B. Div. 534, 536; *Reg.* v. *Tyler* (1891) 2 Q. B. (C. A.) 588, 592, 597.

(*f*) *Chamberlaine* v. *Chester and Birkenhead Railway Co.*, 1 Ex. 870; *Pickering* v. *James*, L. R., 8 C. P. 489; *Britton* v. *Great Western Cotton Co.*, L. R., 7 Ex. 130; *Ross* v. *Rugge-Price*, 1 Ex. D. 269; *Dormont* v. *Furness Railway Co.*, 11 Q. B. D. 496; *Groves* v. *Wimborne* (1898) 2 Q. B. (C. A.) 402; *Brookes* v. *Hansen* (1906) 2 Ch. 129; re *South of England Natural Gas & Petroleum Co.* (1911) 1 Ch. 573. See *Mayne On Damages*, 6th ed., pp. 516-530.

"particular duty and some one belonging to a class of persons, "for whose benefit and protection the statute imposes the duty, "is injured by failure to perform it, *primâ facie*, and, if there be "nothing to the contrary, an action by the person so injured will "lie against the person, who has so failed to perform the duty." (*g*)

Omissions for which damages are recoverable under sec. 81.

In order to succeed in proceedings for damages for non-compliance with section 81, the plaintiff must satisfy the Court (1) that the omission was material (*i.e.*, not trivial) and that he would or might not have applied for the debentures or debenture stock, had he been acquainted with the omitted matters,(*h*) and (2) that he has sustained damage by reason of his having so applied.(*i*) The Court has to look at the whole of the evidence and say whether the fair inference to be drawn is that the plaintiff would or might not have applied for the debentures or debenture stock, if he had known of the omitted matter.(*j*) If the Court would draw such an inference and damage is proved, the plaintiff will be entitled to succeed.

Measure of damages recoverable under sec. 81.

The principle, on which damages recoverable by reason of non-compliance with section 81 are to be calculated, is the same as in the cases of compensation recoverable under section 84 or damages in an action for deceit for an untrue statement in a prospectus. In all these cases the action is not for breach of contract and therefore no damages in respect of prospective gains, which the person contracting was entitled by his contract to expect, come in, but it was an action of tort—it is an action for a wrong, whereby the plaintiff was tricked out of certain money in his pocket; it therefore follows that *prima facie* the highest limit of his damages is the whole extent of his loss and that loss is measured by the money, which was in his pocket and is now in the pocket of the company; but, in so far as he has got an equivalent for that money, that loss is diminished.(*k*) The amount recoverable in such a case is the difference between the price paid by the subscriber (for the debentures or debenture stock subscribed for) and the actual value (not necessarily the market price) of such securities on the day of the allotment.(*l*)

(*g*) *Groves* v. *Wimborne* (1898) 2 Q. B. (C. A.) 402, 415.

(*h*) *Nash* v. *Calthorpe* (1905) 2 Ch. (C. A.) 237, 251; *Cackett* v. *Keswick* (1902) 2 Ch. 456, 463.

(*i*) *Nash* v. *Calthorpe* (1905) 2 Ch. (C. A.) 237; *Macleay* v. *Tait* (1906) A. C. 24.

(*j*) *Nash* v. *Calthorpe* (1905) 2 Ch. at. p. 256.

(*k*) *McConnel* v. *Wright* (1903) 1 Ch. (C. A.) 546, 554.

(*l*) *McConnel* v. *Wright* (1903) 1 Ch. (C. A.) 546, 553-4, 558; *Broome* v. *Speak* (1903) 1 Ch. 586, 605; *Cackett* v. *Keswick* (1902) 2 Ch. (C. A.) 456, 468.

Non-disclosure by a prospectus of any of the particulars specified in section 81 of the Companies Consolidation Act, 1908, will *not* entitle a holder of debentures or debenture stock, who applied for his securities in response to a prospectus, to rescind his contract.(*m*)

SECTION II. *Remedies of a Debenture and Debenture Stock Holder against the Directors of a Company in respect of misapplication by them of Property comprised in such Securities.*

Misapplications by the director of assets charged with Debentures.

Debenture and debenture stock holders have under certain circumstances remedies against directors in respect of the misapplication of property, on which they have a charge. For, though the directors of a company are not trustees for the debenture or debenture stock holders (or indeed for any creditors) (*n*), yet the debenture and debenture stock holders have as against the directors certain rights, which the directors cannot disregard with impunity.

Injunction restraining Directors from misapplying moneys.

The directors of a company are personally liable, if they misapply the proceeds of the sale of land, which is charged with repayment of a debenture debt, without making due provision for the debenture or debenture stock holders' claim. The rule applies equally whether the land so charged is within or outside the jurisdiction of the English Courts. The fact, that a charge on land in a foreign country is void by the law of such country, unless registered, does not free the directors in this country from the personal liability to account to the debenture or debenture stock holders for the proceeds of the sale of land comprised in their securities, though such securities were not so registered in the foreign country. Where land (whether situated within or outside the jurisdiction of the English Courts) belonging to a company is charged by debentures or debenture stock, the directors of such company can, on the application of any holder, be restrained by injunction from misapplying any part of the proceeds of such land, which ought to go to satisfy such debenture or debenture stock holders' claims.(*o*) But a holder of debentures or debenture stock, the interest on which has been paid out of the capital of the company, is not entitled to an injunction restraining the distribution of profits among its shareholders, until the interest

(*m*) Re *Wimbledon Olympia Ld.* (1910) 1 Ch. 630; followed in re *South of England Natural Gas & Petroleum Co.* (1911) 1 Ch. 573.

(*n*) *Bentinck* v. *Cape Breton Co., Limited*, 36 Sol. Jo. 328.

(*o*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan, and Agency Co.* (1892) 2 Ch. 303.

so paid has been recouped out of its profits; for such interest may be properly paid out of capital or profits or both.(*p*) Neither will the directors of a company, which is authorised by its memorandum of association to sell its business, undertaking and assets or any part thereof and to subscribe for, take and hold shares in any company, be restrained by the Court at the instance of a debenture or debenture stock holder of such company from transferring a part of its undertaking for the purpose of reconstruction or amalgamation, so long as a part of the business still remains to be carried on by the company; for such a transfer, being *intra vires*, is not open to any objection.(*q*)

When Debenture-holders may compel Directors to repay moneys misapplied by them.

A holder of debentures or debenture stock constituting a charge on the undertaking and property of the company may take proceedings on behalf of himself and all the other holders to compel the directors, who have misapplied the moneys of the company, to make good to the assets of the company the moneys so misapplied.(*r*) As the company must be made a defendant in such proceedings as well as the directors, whom it is sought to make liable, care should be taken to commence them before the company has been dissolved. For, after a company has sold and transferred its assets, and has been wound up and dissolved under section 195 of the Companies Consolidation Act, 1908, a holder of debentures or debenture stock issued by such a company cannot succeed in proceedings seeking to compel the directors thereof to make good to the assets of the company moneys misapplied by them in *ultra vires* payments, *e.g.*, brokerage or commission, even though such moneys were comprised in his securities. For the directors standing, as they do, in a fiduciary position towards the company(*s*) but not towards the debenture or debenture stock holders, such holders could (if at all) only enforce payment of the moneys misapplied as aforesaid by suing through the company. But the company being dead, cannot be made a party to any proceedings neither can anybody sue through it.(*t*)

Misfeance proceedings against directors.

Section 215 of the Companies Consolidation Act, 1908, which authorises misfeasance proceedings to be taken against the directors of a company in liquidation, provides as follows:—

(*p*) *Bosanquet* v. *St. John's d'El Rey Mining Co.*, 77 L. T. R. 206; *Bloxam* v. *Metropolitan Ry. Co.* 3 Ch. 337, 350.

(*q*) Re *Borax Co.*, *Foster* v. *Borax Co.* (1901) 1 Ch. (C. A.) 326.

(*r*) *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147.

(*s*) In re *German Mining Co.*, ex parte *Chippendale*, 4 D. M. & G. 19.

(*t*) *Bentinck* v. *Cape Breton Co.*, *Limited*, 36 Sol. Jo. 328.

Bk. II., Ch. VI., Sec. II.

Sec. 215 of Comp. Cons. Act, 1908.

"215.—(1) Where in the course of winding up a company it "appears that any person who has taken part in the formation or "promotion of the company, or any past or present director, mana- "ger, or liquidator or any officer of the company (*u*), has mis- "applied or retained or become liable or accountable for any "money or property of the company, or been guilty of any mis- "feasance or breach of trust in relation to the company, the Court "may, on the application of the official receiver, or of the liquid- "ator, or of any creditor or contributory, examine into the con- "duct of the promoter, director, manager, liquidator, or officer, "and compel him to repay or restore the money or property or "any part thereof respectively with interest at such rate as the "Court thinks just, or to contribute such sum to the assets of the "company by way of compensation in respect of the misapplication, "retainer, misfeasance, or breach of trust as the Court thinks just.

"(2) This section shall apply notwithstanding that the offence "is one for which the offender may be criminally responsible.

"(3) Where in the case of a winding up in England an order "for payment of money is made under this section, the order "shall be deemed to be a final judgment within the meaning of "paragraph (*g*) of subsection (1) of section four of the Bankruptcy "Act, 1883.

"(4) So much of this section as refers to promoters, and to "property of a company other than money, shall not apply to a "winding up in Scotland or Ireland."

When money recovered by misfeasance proceedings taken by liquidator belongs to Debenture-holders.

Debenture and debenture stock holders of a company may avail themselves of the provisions of this section. But, even if the liquidator of a company takes proceedings under this section, the moneys recovered from the directors of the company by such proceedings will, subject to the payment of the costs of recovering such moneys (not including in such costs the costs of the winding up petition), belong to the debenture or debenture stock holders, if such securities are charged on all the undertakings and property both present and future of such company.(*v*)

It sometimes happens that, though the directors of a company might be made liable under misfeasance proceedings, the holders of the debentures or debenture stock charged on the whole of the

(*u*) As to when an auditor of a company is an "officer of the company" within this section, see re *Western Counties Steam Bakeries Co.* (1897) 1 Ch. (C. A.) 617.

(*v*) In re *Anglo-Austrian Printing Co.*; *Brabourne* v. *Same Co.* (1895) 2 Ch. 891.

assets of such company are not willing to run the risk of taking proceedings or eventually possibly losing part of the moneys comprised in their security. In such a case the Court, being unable to compel them to take these proceedings, has in a recent case ordered the claim against the directors to be sold by auction. (*w*)

SECTION III. *Rights and Remedies of Directors as against the Debenture or Debenture Stock holders of a Company.*

Moneys advanced by Directors to Company in course of business rank prior to Debenture constituting floating charge.

If a company borrows money from its directors in the ordinary course of business for the purpose of the company, such directors may, notwithstanding that debentures or debenture stock forming a floating charge on the whole of the property of the company had at the date of such loan been issued, repay themselves the sums so borrowed out of moneys paid to them on behalf of the company, while the company is still a going concern. Thus in the case of *Willmott* v. *London Celluloid Company*,(*x*) Bayley and Hanbury, two of the directors of the defendant company, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burned down and the insurance company admitted their liability to pay £3000 in respect of the damage. Bayley and Hanbury then held a directors' meeting (two forming a quorum) and passed resolutions for commencing actions against the company for the moneys advanced and for instructing a firm of solicitors to appear and consent on behalf of the company to immediate judgment. The actions were accordingly brought and immediate judgment was taken by consent and thereupon (the company being at the time practically insolvent) Bayley and Hanbury obtained the £3000 from the insurance company under garnishee orders. The company had issued debentures, which were in form a first charge upon all the property of the company (both present and future) subject to the condition, that the charge should be a floating security. In December, 1884, the holder of some of these debentures brought an action on behalf of himself and the other holders against the company and Bayley and Hanbury claiming (1) the repayment by Bayley and Hanbury of the £3000, and (2) the usual relief in a debenture-holder's action. Shortly afterwards the defendant company was ordered to be wound up. The Court held that, the transaction complained of, being in fact a payment of a just debt,

(*w*) *Wood* v. *Woodhouse & Rawson, Limited*, W. N. (1896) 4.

(*x*) 34 Ch. Div. 147.

Bk. II., Ch. VI., Sec. III.

while the company was still a going concern, was a dealing by the company in the course of business within the condition of the debentures, and therefore dismissed the claim for the repayment by Bayley and Hanbury of the £3000.

Directors may advance moneys to Company on Debentures.

The debentures or debenture stock of a company may be allotted to the directors of such company on the same terms as they are allotted to the public; hence they may be allotted to them below par, when they are offered to the public below par.(*y*) Debentures or debenture stock so allotted to and held by such directors are good, though they are not registered in accordance with the requirements of section 100 of the Companies Consolidation Act, 1908. Hence unsecured creditors will not be able (at any rate, in the absence of concealment by the directors of the existence of their securities) to successfully dispute the validity of debentures or debenture stock, which have been issued to directors, on the ground of non-compliance with section 100. The sole penalty, which this section imposes, is a penalty of £50 on every director, manager or other officer, who knowingly and wilfully authorises or permits the omission of an entry of the charge.(*z*)

Though the debentures and debenture stock of a company may be issued to a director at a discount, when such securities are issued to the public at a discount, a director of a company may not, it would appear, realise a profit by buying at a discount debentures or debenture stock from the person, to whom such securities were issued, and by proving in the winding up of the company for the full sum secured by such instrument. For a director, standing, as he does, in a fiduciary position towards the company, may not make a profit by buying up an incumbrance on the trust estate.(*a*)

Directors holding lease as Trustees for a Company.

Directors holding the lease of a company's premises as trustees for such company are entitled to be repaid in priority to the company's debenture and debenture stock holders all moneys, which such directors could have been compelled to pay and have paid in respect of such lease.(*b*)

(*y*) *Campbell's Case*, 4 Ch. D. 470.

(*z*) *Wright* v. *Horton*, 12 App. Cas. 371, following in re *Globe New Patent Iron and Steel Co.*, 48 L. J. (Ch.) 295, and overruling in re *Wynn Hall Coal Co.*, 10 Eq. 515; ex parte *Valpy & Chaplin*, 7 Ch. 289; and in re *Native Iron Ore Co.*, 2 Ch. D. 345; see also supra, Bk. I, ch. v., sec. i.

(*a*) In re *Imperial Land Co. of Marseilles*, ex parte *Larking*, 4 Ch. Div. 566. Directors, standing, as they do, in a fiduciary position towards the company, may now by virtue of the provisions of the Trustee Act, 1888, plead the Statute of Limitations; see in re *Lands Allotment Co.* (1894) 1 Ch. (C. A.) 616.

(*b*) In re *Pooley Hall Colliery Co.*, 18 W. R. 201, L. T. R. 690; in re *Exhall Coal Mining Co.*, 14 L. T. R. 280, 35 Beav. 449; see supra, Bk. II., ch. iv., sec. ii.

CHAPTER VII.

THE RIGHTS AND REMEDIES OF DEBENTURE AND DEBENTURE STOCK HOLDERS AGAINST PERSONS ACTING AS TRUSTEES OF THE MONEYS ADVANCED BY SUCH HOLDERS AND AGAINST THE TRUSTEES OF THE COVERING DEED AND *VICE VERSÂ*.

The rights of Debenture-holders against persons holding moneys advanced by such holders upon trusts, which can no longer be carried out.

WHERE it becomes impossible for a company to carry out the main objects, for which it was formed, the debenture or debenture stock holders of such company are entitled to the return of such part of the money secured by such instruments as has been paid to and is held by persons, who act as trustees for the debenture or debenture stock holders upon trusts, which can no longer be carried out. Thus in a recent case,(*a*) a foreign railway company issued debentures or obligations charged on their railway and the sums so secured were paid to three trustees, who held the same in trust (*inter alia*) to make certain specified payments and to pay the balance to the contractors, who were to construct the railway. Owing to litigation and consequent delay in realising the obligations it became impossible with the then present or prospective resources of the company to carry out the undertaking. At the suit of a minority of the holders of the obligations the Court administered such part of the moneys as still remained in the hands of the trustees on the footing, that such funds ought to be applied in the first place in saving and realising the property charged as far as possible and then distributed *pro rata* among the holders of the obligations.(*b*) "There can be no doubt," says North, J., "that, if it cannot be applied for the purposes of the trust, it must not be left in Court, either to remain there or to be applied in redeeming such of the obligations as may be first drawn, but ought to be divided *pari passu* among the holders of the obligations,(*c*) and in deciding, whether or not the trust can be carried out, the Court is bound

(*a*) *Collingham* v. *Sloper* (1893), 2 Ch. 96.

(*b*) For Order, see infra, Appendix, Form 70.

(*c*) *Collingham* v. *Sloper* (1893), 2 Ch. 96, 108.

to consider the question, not what the possible resources may be, but what the prospective resources at present are and from which there can be a reasonable hope, as a matter of business, that the line could be completed" (*i.e.*, the trust be carried out).(*d*) Further on his Lordship continues: "The conclusion I come to is, that the obligation-holders are entitled to say, that there is no prospect whatever of completing the purposes of the trust, and therefore that the resulting trust (if that is what it is to be called) in their favour ought to be given effect to, subject to the payment of whatever are the proper charges on it, which have not been satisfied".(*e*) Thereupon we find the following observations: "The statement of claim asks for a return of the money and distribution of the remaining fund and nothing else; but I do not think I should discharge my duty in this case, if I were merely to make a declaration, that the parties were entitled to a return of the funds without going on further to deal with the whole matter, including the security and particularly so for this reason; that I am not satisfied, that the obligation-holders have a right to have their funds returned except subject to the application of such part of them as ought properly to be applied for preventing the security becoming wholly and absolutely useless".

The liabilities and rights of the Trustees of the covering deed.

The trustees of the debenture or debenture stock holders' covering deed are under the same liabilities towards, and are entitled to the same rights and remedies against, such holders as ordinary trustees are towards and against their *cestuis que trustent*. The liabilities of the trustees will in each case depend to a great extent on the provisions in the covering deed. It is usual to insert in such deed a wide indemnity clause in favour of the trustees.

The costs, charges and expenses of the trustees of a covering deed rank prior to the plaintiff's costs in a debenture or debenture stock holder's action, but after the costs of the realisation of the property comprised in such securities and also after the costs and the remuneration of any receiver or receiver and manager appointed in such action.(*f*)

(*d*) *Collingham* v. *Sloper* (1893), 2 Ch. 96, p. 109; see *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176; 13 Ch. Div. 1. In the latter case, the cancellation of a concession made the carrying into effect of the trusts impossible, and the Court decided, that the bondholders were entitled to the return of the moneys in the hands of the trustees.

(*e*) *Collingham* v. *Sloper* (1893), 2 Ch. 96, 114.

(*f*) *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317; *Mortgage Insurance*

Trustees appointing a receiver and manager under an express power conferred on them by the covering deed should be careful not to make the receiver so appointed their agent instead of the agent of the company. However, the trustees of the debenture or debenture stock holders' trust deed will not, after the company has been ordered to be wound up, be personally liable for the acts and defaults of a receiver and manager of the assets of the company appointed by them, unless the trustees authorise such receiver and manager to act as their agent; for if a receiver and manager so appointed is the agent of the company, before it is wound up, he will not, in the absence of some sort of authority on the part of the trustees, become their agent and render them personally liable for his acts and defaults, merely because the company has been ordered to be wound up.(*g*)

Neither the trustees, to whom leasehold premises are mortgaged by sub-demise by a company for the purpose of securing an issue of its debentures or debenture stock, nor a receiver or receiver and manager, appointed by them are liable to pay to the landlord the rent or any damages for dilapidations payable under the head-lease; for there is no privity of estate or privity of contract between the head-landlord and the trustees. In such a case the head-landlord may be able to distrain on the goods, which are on the leasehold premises, or may be able to eject the persons in possession of such premises, but he can only recover the rent and damages for dilapidations from the lessees (the company), not from the sub-lessees.(*h*)

Removal of a Trustee.

A trustee of a covering deed will not be removed by the Court, unless a sufficient ground for the removal is made out. The mere fact, that the majority or even a very large majority of the debenture (or debenture stock) holders desire, that a trustee should be removed, is not a sufficient ground; neither will the Court remove a trustee merely because his credit had been impaired, unless it can be shown, that the interest of the debenture (or debenture stock) holders has suffered or is likely to suffer by the trustee continuing to act as such.(*i*)

(*g*) *Gosling* v. *Gaskell* (1897), A. C. 575.

(*h*) *Hand* v. *Blow* (1901), 2 Ch. (C. A.) 721.

(*i*) *Assets Realisation Co.* v. *Trustees Executors and Securities Corporation*, 44 W. R. 126.

Corporation v. *Canadian Agricultural Coal Co.* (1901), 2 Ch. 377, 381. See also supra, Bk. II., ch. iii., sec. v. (*d*).

Remuneration of Trustees of Debenture-holders' Trust Deed.

As a rule, express provision is made by the debenture or debenture stock holders' trust deed that the company shall pay a specified remuneration to the trustees thereof,(*l*) but, in the absence of such an express provision, the trustees are not entitled to the payment of any remuneration out of the property comprised in the trust deed.(*m*)

The remuneration of such trustees varies according to the provisions in the trust deed appointing them. In a recent case (*n*) the trustees were, upon the true construction of the trust deed, held to be entitled to receive their remuneration, until the trusts of the trust deed had been wound up, notwithstanding that a receiver and manager had been appointed by the Court in a debenture holder's action.

(*l*) See infra, Appendix, Form 12, clause 27.

(*m*) Re *Accles Ld.*, *Hodgson* v. *Accles Ld.* (1902) W. N. 164.

(*n*) Re *Piccadilly Hotel Ld.*, *Paul* v. *Same Co.* (1911) 2 Ch. 534.

CHAPTER VIII.

HOW DEBENTURES AND DEBENTURE STOCK BELONGING TO A JUDGMENT DEBTOR MAY BE ATTACHED TO SATISFY THE JUDGMENT DEBT.

Modes of enforcing a judgment debt against the judgment debtor's debentures.

THIS chapter is intended to point out shortly, how a person, who has obtained a judgment or order for the payment of money, can enforce payment of the money so ordered to be paid by seizing or attaching any debentures or debenture stock (whether issued by a trading or public company or by a local authority) or any interest in any debentures or debenture stock, to which the judgment debtor may be entitled.

It is proposed to consider in the following pages, how far (1) a garnishee order, (2) a writ of sequestration, (3) a writ of *fi. fa.* or (4) the appointment of a receiver by the Court will enable a judgment creditor to attach the judgment debtor's debentures or debenture stock, in order to satisfy his judgment. It is submitted for the reasons hereinafter stated, that numbers (2) and (4) afford the most effectual means of enforcing such judgment.

Garnishee order.

The ordinary mode, in which a judgment creditor attaches a debt, is by obtaining a garnishee order under Order XLV., rule 1. This rule runs as follows:—

"The Court or a judge may, upon the *ex parte* application of any person, who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order together with the costs of the garnishee proceedings; and by the same or any subsequent order

it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay to the person, who has obtained such judgment or order, the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order together with the costs aforesaid".

Applications for a garnishee order are made by an *ex parte* summons.

The debts attached by such an order must be "owing or accruing" from the garnishee, hence it has been decided, that a debt due, though not immediately payable, may be attached by such an order.(*a*)

It must, however, be recollected, that a garnishee order does not transfer the security, by which the debt garnished is secured, but merely takes away from the judgment debtor the right to receive such debt and gives to the judgment creditor the right to receive it and, when the garnishee order is made absolute, it enables the judgment creditor to recover payment from the garnishee.(*b*)

A judgment creditor, having attached a debt due to the judgment debtor under a garnishee order, does not become entitled to retain it, unless he has received the debt before the bankruptcy of the judgment creditor.(*c*) Hence the attachment of a debt secured by debentures or debenture stock by means of a garnishee order would appear to be unsatisfactory.

Writ of sequestration

Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order is, at the expiration of the time limited for the performance thereof, entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of the person refusing or neglecting to obey such judgment or order;(*d*) debentures and debenture stock belonging to such a person will therefore be liable to sequestration.

(*a*) *Tapp* v. *Jones*, L. R., 10 Q. B. D. 591; *Webb* v. *Stenton*, 11 Q. B. Div. 518.

(*b*) *Chatterton* v. *Watney*, 17 Ch. Div. 259, 262.

(*c*) *Butler* v. *Wearing*, 17 Q. B. D. 182; see 46 & 47 Vic., cap. 52, sec. 45.

(*d*) R. S. C., Or. XLIII., r. 6.

However, the mere issue of a writ of sequestration by a judgment creditor and service of notice thereof on the company, which issued the debentures or debenture stock held by the judgment debtor, will not create a charge on such debentures or debenture stock or constitute the judgment creditor a secured creditor within the meaning of the Bankruptcy Act, 1883.(*e*) If a sale of the judgment debtor's debentures or debenture stock is desired (and this would appear to be the most effectual way of enforcing the judgment), application should be made to the Court for permission to sell.(*f*) Such an application is made by summons or motion (*g*) and must usually be on notice.(*h*)

Where a judgment debt can be enforced by the issue of a writ of sequestration and the judgment debtor is the holder of debentures or debenture stock, the issue of such a writ offers this great advantage as compared with the other methods of enforcing payment of the judgment debt, that after the seizure and sale of such securities the execution is completed within the meaning of the Bankruptcy Act, 1883,(*i*) and that the judgment creditor will be entitled to retain the benefit of his execution, if it is "completed" before a receiving order is made against or before notice of the presentation of any bankruptcy petition by or against the judgment debtor.

It should, however, here be stated that, where a simple judgment for the payment of a sum of money has been recovered against a debenture or debenture stock holder of a company, it is doubtful, whether a writ of sequestration can be properly issued.(*j*)

Writ of *fi. fa.*

It is now proposed to consider, how far a writ of *fieri facias* (commonly called a writ of *fi. fa.*) will enable a person, who has obtained a judgment or order against a debenture or debenture stock holder, to attach such securities.

"Every person, to whom any sum of money or any costs shall be payable under a judgment or order, shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fi. fa.* or one or more writ or writs of *elegit*

(*e*) Ex parte *Nelson*, in re *Hoare*, 14 Ch. Div. 41.

(*f*) *Shaw* v. *Wright*, 3 Ves. 22, 24; *Mitchell* v. *Draper*, 9 Ves. 208; *Cowper* v. *Taylor*, 16 Sim. 314; *Knight* v. *Knight*, 4 W. R. 771.

(*g*) *Turner* v. *Clifford*, W. N. (1870) 199; *Warham* v. *Broughton*, 1 Ves. 184.

(*h*) *Mitchell* v. *Draper*, 9 Ves. 208.

(*i*) 46 & 47 Vic., cap. 52, sec. 45.

(*j*) Ex parte *Nelson*, in re *Hoare*, 14 Ch. Div. 41; *Hulbert & Crowe* v. *Cathcart* (1894), 1 Q. B. 244, 246.

to enforce payment thereof, subject nevertheless as follows: (*a*) if the judgment or order is for payment within a period therein mentioned, no such writ shall be issued until after the expiration of such period, and (*b*) the Court or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit." (*k*)

The Judgments Act, 1838,(*l*) provides, that "by virtue of any "writ of *fi. fa.* the sheriff or other officer having the execution "thereof may and shall seize and take any money or bank notes "and any cheques, bills of exchange, promissory notes, bonds, "specialities or other securities for money belonging to the person, "against whose effects such writ of *fi. fa.* shall be sued out," and the sheriff or other officer is directed to hold any such cheques, bills of exchange, promissory notes, bonds, specialities or other securities for money as a security or securities for the amount by such writ of *fi. fa.* directed to be levied or so much thereof as shall not have been otherwise levied or raised, and the sheriff or other officer is authorised to sue in the name of the sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived, and payment to such sheriff or other officer by the person liable on any of the securities mentioned with or without suit is made a good discharge of the moneys so paid.

It would appear to be somewhat doubtful, whether debentures or (at any rate) debenture stock certificates come within the meaning of "bonds, specialities or other securities for money".(*m*) However, even if such debentures or debenture stock belonging(*n*) to the judgment creditor were liable to be seized under a *fi. fa.*, this method of enforcing the judgment is open to grave objections. For, as the sheriff or other officer executing a writ of *fi.*

(*k*) R. S. C., Order XLII., r. 17. A writ of *fi. fa.* has now the same force as it used to have before the rules. See Or. XLIII., r. 1.

(*l*) 1 & 2 Vic., cap. 110, sec. 12. Debentures and debenture stock certificates could not, it appears, have been seized under a writ of *fi. fa.* at common law, under which only goods and chattels could be seized.

(*m*) "Other securities for money" means other securities of a similar nature to those expressly mentioned. *Rollason* v. *Rollason*, 34 Ch. D. 496. A policy of life assurance has been held to be a security for money within this section. *Stokoe* v. *Cowan*, 29 Beav. 637; see, however, *Alleyne* v. *Darcy*, 5 Ir. Ch. Rep. 56; in re *Sargent's Trusts*, L. R., 7 Ir. 66.

(*n*) In order to be liable to be seized under a writ of *fi. fa.*, the securities must be in the hands of the judgment debtor; if the securities are in the hands of a third person, when the writ of *fi. fa.* is being executed, the sheriff or other officer cannot seize them under the writ. *Robinson* v. *Peace*, 7 Dowl. P. C. 93.

fa. under the provisions of the Judgments Act, 1838, appears to have no power to sell such securities, the judgment creditor will not be entitled to retain the benefit of his execution as against the trustee in bankruptcy of the judgment debtor, if a receiving order is made against such judgment debtor before the execution is completed (*i.e.*, before the moneys secured by such debentures or debenture stock have been paid to the judgment creditor).(*o*)

As will be seen hereafter, an execution against an equitable interest in land will be "completed" by the appointment of a receiver. It is therefore submitted, that, where a judgment creditor seeks to enforce his judgment debt against the debentures or debenture stock belonging to the judgment debtor, the Court will, if such securities constitute an equitable charge on any land, exercise its jurisdiction to appoint a receiver of the property charged.

Appointment of a receiver by the Court by way of equitable execution.

Before the Judicature Act, 1873,(*p*) the Court of Chancery exercised a jurisdiction in aid of judgments at law, when the debtor had some equitable interest, which was not capable of being reached by execution at law, but which could be reached in equity, and that jurisdiction was most frequently exercised by the appointment of a receiver. However, the Court only exercised this jurisdiction in cases, in which the judgment debtor had an equitable interest in property, which could have been reached at law, if he had had the legal interest in it instead of the equitable interest only.(*q*)

The High Court has now power under the Judicature Act, 1873,(*r*) to appoint a receiver "in all cases, in which it shall appear to the Court to be just or convenient" (that is to say) not only where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a receiver should be made. Thus in the case of *in re Pope* (*s*) the Court held, that the Court had power to grant a receiver, even though the judgment creditor could by *elegit* have got possession of the land of the judgment debtor, and the ground for this decision was that, if the judgment

(*o*) 46 & 47 Vic., cap. 52, sec. 45.
(*p*) 36 & 37 Vic., cap. 66.
(*q*) *Smith* v. *Cowell*, 6 Q. B. Div. 75; ex parte *Evans*, 13 Ch. Div. 252; *Salt* v. *Cooper*, 16 Ch. D. 544; *Manchester and Liverpool, etc., Banking Co.* v. *Parkinson*, 22 Q. B. Div. 175; in re *Dickinson*, ex pte. *Charrington & Co.*, 22 Q. B. Div. 191; in re *Shephard*, 43 Ch. Div. 138; *Cadogan* v. *Lyric Theatre* (1894), 3 Ch. (C. A.) 341.
(*r*) 36 & 37 Vic., cap. 66, sec. 25 (8).
(*s*) 17 Q. B. Div. 749.

creditor had got possession, he would have done so subject to being interfered with by a prior mortgagee and that would have thrown great difficulty in the way of his working out his possession by *elegit* and the interest, which he could get by *elegit*.

"There is," says Kay, L. J. (then J.),(*t*) "a long series of decisions, which show, that in the case of land or in the case of personal property the Court will, if it thinks it is expedient so to do, appoint a receiver at the instance of a judgment creditor. Moreover, the cases extend to this, that, where the issue of an *elegit* or *fi. fa.* would be probably ineffectual, the Court will appoint a receiver without putting the judgment creditor to the necessity of issuing the *elegit* or *fi. fa.*"

The application for the appointment of a receiver should be made in the action, in which the judgment sought to be enforced was recovered.(*u*)

It has been stated above, that neither a garnishee order nor the issue of a writ of *fi. fa.* enables a judgment creditor to effectually enforce his judgment against the debentures or debenture stock belonging to the judgment debtor and that it is doubtful, whether a writ of sequestration can be properly issued to enforce a simple judgment to pay money. It is therefore submitted, that the case of a judgment creditor, who seeks to enforce such a judgment by attaching the debentures or debenture stock belonging to the judgment debtor, is one of those cases, in which the Court will hold that it is just or convenient to exercise its jurisdiction to appoint a receiver of such debentures or debenture stock and of the equitable charge created by such securities.

The enforcement of a judgment by the appointment of a receiver has the following great advantage, that, if such appointment is made before notice of the presentation of any bankruptcy petition by or against the judgment debtor or of the commission of any available act of bankruptcy by the judgment debtor, the judgment creditor will be entitled as against the trustee in bankruptcy of the judgment debtor to retain the benefit of the charge, whereby such debentures or debenture stock are secured, so far as such charge affects land; for execution against an equitable interest in land is "completed" by the appointment of a receiver.(*v*)

(*t*) Re *Whitely*, *Whitely* v. *Learoyd*, 56 L. T. R. 846, 847.

(*u*) *Smith* v. *Cowell*, 6 Q. B. Div. 75; *Flegg* v. *Prentis* (1892), 2 Ch. 428.

(*v*) 46 & 47 Vic., cap. 52, sec. 45.

It would appear, that the Court has no jurisdiction, after appointing at the instance of a judgment creditor a receiver of the charge on a company's undertaking, whereby a judgment debtor's debentures or debenture stock are secured, to order a sale of such a charge at the instance of such judgment creditor; for the Court has no jurisdiction to order the sale of property, other than land or some interest in land, after a receiver of such property has been appointed on the application of a judgment creditor.(*w*)

Appointment by the Court of a receiver of judgment debtor's interest in Debentures deposited by way of charge.

Where a judgment debtor has deposited his debentures or debenture stock certificates by way of equitable mortgage, the judgment creditor is entitled to a receiver of the debentures or debenture stock (as the case may be) and of any money, which may be receivable by the judgment debtor in respect of the debentures or the debenture stock certificates pledged, in case the depositee should realise his security.(*x*)

Stop order.

Where a judgment debtor is interested in or entitled to any debentures or debenture stock in Court standing to the general credit of any cause or matter or to the account of any class of persons, the judgment creditor should obtain a stop order on such securities(*y*) (*i.e.*, an order preventing any transfer or sale of or other dealing with such securities or any part thereof without notice to the person obtaining such order).(*z*) The application for such an order must now generally be made by summons.(*a*)

The object of obtaining a stop order is to give effectual notice to the Court of the applicant's claim and the effect of such an order is to secure priority for the person obtaining such order over a person, who is entitled to an earlier charge on the property comprised in the order but who has not obtained a stop order. A stop order operates in favour of the person obtaining such an order in the same way as a notice of an incumbrance to the trustees of a settlement operates in favour of the incumbrancer giving such notice.(*b*)

(*w*) 27 & 28 Vic., cap. 112, sec. 4; *Flegg* v. *Prentis* (1892), 2 Ch. 428; *De Peyrecave* v. *Nicholson*, 42 W. R. 702.

(*x*) *Hamilton* v. *Brogden*, W. N. (1891) 36; 35 Sol. Jo. 296.

(*y*) *Hopewell* v. *Barnes*, 1 Ch. D. 630; *Warburton* v. *Hill*, Kay, 470.

(*z*) See R. S. C., Or. XLVI., rr. 12-13.

(*a*) *Wrench* v. *Wynne*, 17 W. R. 198; *Walsh* v. *Watson*, 22 W. R. 676, W. N. (1874) 125; see also Seton, 408. See, however, re *Toogood*, 56 L. T. R. 703, where the Court held, that an application for a stop order should be made by petition, where a fund exceeding £1000 had been paid into Court under the Trustee Relief Act and there had been no prior application in the matter of that fund.

(*b*) *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460; *Mack* v. *Postle* (1894), 2 Ch. 449; *Stephens* v. *Green* (1895), 2 Ch. (C. A.) 148.

Charging order

The High Court has jurisdiction under section 14 of the Judgments Act, 1838,(*o*) and Order XLVI., Rule 1, of the Rules of the Supreme Court, to make a charging order on "any stock or "shares of or in any public company," but these provisions are not applicable to debentures (or, it is submitted, to debenture stock), as these securities are not "stock or shares".(*p*)

(*o*) 1 & 2 Vic., cap. 110, section 14. *Ld.* (1904) 2 K. B. (C. A.) 446.
(*p*) *Sellar* v. *Charles Bright & Co.*

BOOK III.

DEBENTURES AND DEBENTURE STOCK ISSUED BY COMPANIES OR LOCAL AUTHORITIES BY VIRTUE OF STATUTORY PROVISIONS.

IN the present book it is proposed to examine the nature of and the rights and remedies conferred on the holders of (1) debentures issued subject to the provisions of the Companies Clauses Consolidation Act, 1845, by a company other than a railway company, (2) debenture stock issued subject to the provisions of the Companies Clauses Act, 1863, by a company other than a railway company, (3) debentures and debenture stock issued by railway companies subject to the Companies Clauses Consolidation Act, 1845, and the Companies Clauses Act, 1863, respectively, (4) debentures and debenture stock issued subject to the provisions of the Local Loans Act, 1875, and (5) debentures issued subject to the provisions of the Mortgage Debenture Acts, 1865 and 1870.

CHAPTER I.

THE NATURE OF DEBENTURES SUBJECT TO THE PROVISIONS OF THE COMPANIES CLAUSES CONSOLIDATION ACT, 1845, AND THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH SECURITIES.

To which Companies the Act applies.

ALL the clauses and provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vic., cap. 16), apply to every(*a*) joint stock company, which has been incorporated by a Special Act of Parliament since May, 1845, for the purpose of carrying on any undertaking, save so far as they may be expressly varied or excepted by the Company's Special Act, and such clauses and provisions are deemed (save as aforesaid) to form part of such Special Act and must be construed together therewith as forming one Act.(*b*)

The Companies Clauses Consolidation Act, 1845, does not speak of "debentures," but of mortgages and bonds; however, the forms of such mortgages and bonds set forth in the Schedules C and D(*c*) to the Act contain all the elements, which are necessary to constitute debentures (within the meaning of the word as explained in an earlier part of this treatise),(*d*) and they are commonly called debentures.(*e*)

The following provisions are made by sections 38 to 55 of the Companies Clauses Consolidation Act, 1845, with respect to the borrowing of money by such a company on "mortgage or bond" and the rights and remedies of the holders of such mortgages or bonds:—

Power to borrow on Debentures.

Section 38: "If the company be authorised by the Special "Act to borrow money on mortgage or bond, it shall be lawful

(*a*) *Wilson* v. *Caledonian Railway Co.*, 5 Ex. 822. This Act does not apply to Scotland (sec. 163). There is, however, a corresponding Scotch Act, 8 & 9 Vic., cap. 17.

(*b*) See sec. 1 of this Act. Companies so incorporated for carrying on a business of a public nature are frequently called "public companies" as distinguished from ordinary trading companies.

(*c*) As to which, see infra, Appendix Forms 71 and 72.

(*d*) See Bk. I., ch. i., sec. i., supra.

(*e*) *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215, 219; *Bowen* v. *Brecon Ry. Co.*, 3 Eq. 541.

"for them, subject to the restrictions contained in the Special "Act, to borrow on mortgage or bond such sums of money as "shall from time to time by an order of a general meeting of the "company be authorised to be borrowed, not exceeding in the "whole the sum prescribed by the Special Act, and for securing "the repayment of the money so borrowed with interest, to "mortgage the undertaking and the future calls on the share-"holders or to give bonds in manner hereinafter mentioned".

Before issuing any mortgage debentures or bonds under this Act, the company should pursuant to section 8 of the Finance Act, 1899,(*f*) deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue.

The authorisation by an order of a general meeting of the company, though prescribed by this 38th section, is not essential to the validity of the mortgage debentures or bonds issued by the company.(*g*) For the portion of the section directing such authorisation has been held to be directory, and, where a company has power to issue securities, an irregularity (that is to say, non-compliance with a directory formality) in the issue cannot be set up against even the original holder, if he has a right to presume *omnia rite acta*.(*h*)

Of course, a company incorporated by a Special Act of Parliament cannot borrow beyond the limits (if any) prescribed by its Special Act any more than a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, can borrow beyond the limits prescribed by its memorandum of association. Hence any mortgage debentures or bonds issued, after the borrowing power limited by the Special Act has been exhausted, are void as being *ultra vires*,(*i*) but the holders of such securities will be entitled to sue the company for or to prove for the moneys advanced on such securities and applied in payment of debts owing by the company.(*j*).

Affixing the seal

If the secretary of a company incorporated by and deriving its borrowing powers under a Special Act of Parliament affixes the seal of the company to a mortgage debenture or bond without having previously obtained the authority of a quorum

(*f*) 62 & 63 Vic., cap. 9. Section 8 of this Act is set out supra, p. 85.

(*g*) *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316.

(*h*) For the distinction between directory and imperative clauses, see Bk. I., ch. iv., sec. ii. (3), supra.

(*i*) Re *Wrexham, Mold, etc., Ry. Co.* (1899), 1 Ch. (C. A.) 440; *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316; *Baroness Wenlock* v. *River Dee Co.*, 10 A. C. 354.

(*j*) See supra, Bk. I., ch. iv., sec. i. (1*b*), and Bk. II., ch. iii., sec. v. (3).

Bk. III., Ch. I.

of directors assembled at a board meeting, such mortgage debenture or bond will not be binding on the company.(*k*)

Power to issue at a discount.

The mortgage debentures and bonds authorised to be issued under section 38 of this Act may be issued at a discount.(*l*)

Power to re-borrow.

Section 39: "If, after having borrowed any part of the "money so authorised to be borrowed on mortgage or bond, "the company pay off the same, it shall be lawful for them again "to borrow the amount so paid off, and so from time to time; "but such power of re-borrowing shall not be exercised without "the authority of a general meeting of the company, unless the "money be so re-borrowed in order to pay off any existing "mortgage or bond".

The authorisation of a general meeting to re-borrow is not essential to the validity of the mortgage debenture or bond issued to secure the money re-borrowed.(*m*)

Evidence of authority to borrow.

Section 40: "Where by the Special Act the company shall "be restricted from borrowing any money on mortgage or bond, "until a definite portion of their capital shall be subscribed or "paid up, or where by this or the Special Act the authority "of a general meeting is required for such borrowing, the "certificate of a justice that such definite portion of the capital "has been subscribed or paid up, and a copy of the order of "the general meeting of the company authorising the borrowing "of any money, certified by one of the directors or by the "secretary to be a true copy, shall be sufficient evidence of the "fact of the capital required to be subscribed or paid up having "been so subscribed or paid up, and of the order for borrowing "money having been made; and upon production to any justice "of the books of the company and of such other evidence as "he shall think sufficient, such justice shall grant the certificate "aforesaid".

Debentures to be stamped and in forms specified.

Section 41: "Every mortgage and bond for securing money "borrowed by the company shall be by deed under the common "seal of the company duly stamped and wherein the considera-

(*k*) *D'Arcy* v. *The Tamar, etc., Railway Co.*, L. R., 2 Ex. 158, 14 L. T. R. 626. This case is not applicable to companies registered under the Companies Acts; see *County of Gloucester Bank* v. *Rudry, etc., Colliery Co.* (1895), 1 Ch. (C. A.) 629.

(*l*) *Webb* v. *Shropshire Railway Co.* (1893), 3 Ch. (C. A.) 307; see supra, Bk. I., ch. iv., sec. iii.

(*m*) *Fountaine* v. *Carmarthen Railway Co.*, 5 Eq. 316.

"tion shall be truly stated; and every such mortgage deed "or bond may be according to the form in the schedule (C) "or (D) to this Act(*n*) annexed or to the like effect".

How far provisions of Sec. 41 are imperative.

The direction in this section requiring every mortgage debenture and bond to be by deed is imperative.(*o*) On the other hand, the portion of this section requiring, that every mortgage debenture or bond shall be duly stamped and that the consideration shall be truly stated therein, is directory (and not absolutely obligatory) and non-compliance with the directory portion of the section does not avoid such mortgage debenture or bond. The consideration is required to be truly stated for the purpose of the stamp and the real object of this portion of section 41 is to see, that the revenue gets its fair share of money out of the transaction.(*p*)

Stamps.

The mortgage debentures and bonds issued under the provisions of the Companies Clauses Consolidation Act, 1845, are liable to the same stamp duties as debentures, which are issued by a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908.(*q*)

Securities issued under this Act not to be payable to bearer.

Mortgage debentures and bonds issued under the provisions of this Act may not, it would appear, be made payable to bearer, as section 46 of this Act requires such securities to be transferred by deed.

Mortmain Act.

A mortgage debenture in the form of Schedule C to the Act, not being an interest in land within the Mortmain Act (9 Geo. II., cap. 36), was held to be pure personalty and could even before the Mortmain and Charitable Uses Act, 1891,(*r*) be left by will for charitable purposes.(*s*)

Rights of mortgage Debenture-holders in the form of Schedule C to this Act.

Section 42: "The respective mortgagees shall be entitled "one with another to their respective proportions of the tolls, "sums and premises comprised in such mortgages, and of the "future calls payable by the shareholders, if comprised therein, "according to the respective sums in such mortgages mentioned "to be advanced by such mortgagees respectively, and to "be repaid the sums so advanced, with interest, without any

(*n*) See Appendix, Forms 71 and 72.

(*o*) *Powell* v. *London and Provincial Bank* (1893), 2 Ch. (C. A.) 555, 560.

(*p*) *Landowners West of England, etc., Co.* v. *Ashford*, 16 Ch. D. 411, 438.

(*q*) As to these, see supra, Bk. I., ch. ii., sec. iv.

(*r*) 54 & 55 Vic., cap. 73.

(*s*) In re *Mitchell's Estate*, 6 Ch. D. 655. For further particulars of the effect of this Act, see Bk. I., ch. vi., sec. 4, supra.

"preference one above another by reason of priority of the "date of any such mortgage, or of the meeting at which the "same was authorised".

Though a portion of this section requires, that the moneys realised thereunder for distribution shall be divided among the mortgage debenture-holders in proportion or according to the respective sums mentioned in the mortgage debentures, a mortgage debenture will not be void, merely because the mortgage debenture *itself* does not show in terms the amount advanced on such security, if such amount is otherwise ascertainable. This portion of the section is directory.(*t*)

The mortgagees mentioned in section 42 of this Act are the holders of mortgage debentures according to the form in Schedule C to this Act. These mortgage debentures give to the holder a charge (*inter alia*) on the undertaking of the company.

Meaning of a charge on the "undertaking" under this Act.

The meaning of the expression "the undertaking" is fully explained by Lord Cairns in the following passage:(*u*) "Moneys are provided for, and various ingredients go to make up, the undertaking: but the term 'undertaking' is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the 'undertaking' is made the subject of a mortgage. Whatever may be the liability, to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot under their mortgages, or as mortgagees, by

(*t*) *Landowners West of England, etc., Co.* v. *Ashford*, 16 Ch. D. 411, 439.

(*u*) *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201, 217.

seizing, or calling on this Court to seize the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion, or reduce it into its original elements, when it has been completed."

Hence it was decided in *Gardner* v. *London, Chatham and Dover Railway Company*,(*v*) that the holder of mortgage debentures in the form of Schedule C to the Companies Clauses Consolidation Act, 1845, charged on the undertaking of a railway company was not entitled to any specific charge upon the company's stock or surplus lands and was consequently not entitled to the appointment of a receiver of the proceeds of sale of such surplus lands or the interim rents of such surplus lands. The law, as laid down in that case, was the law before the passing of the Railway Companies Act, 1867.(*w*) This Act is dealt with hereafter, but it will suffice here to say, that the holders of mortgage debentures, bonds or debenture stock are not by virtue of section 23 of the Railway Companies Act, 1867, entitled to any specific charge or lien on the surplus lands or the proceeds of sale or the surplus lands of a railway company, so as to entitle them to payment out of such proceeds in priority to judgment creditors, on whose application such surplus lands have been sold.(*x*)

The rights of the holders of Debentures in form of Schedule C to the Act against judgment creditors of Company.

The title of a holder of a mortgage debenture in the form of Schedule C to the Companies Clauses Consolidation Act, 1845, is paramount to that of any judgment creditor of the company, which issues such a security. Hence in the case of *Legg* v. *Mathieson*(*y*) the Court restrained a judgment creditor on the application of a debenture-holder from taking possession of some lands and chattels of the company, which had issued such debentures. The learned judge there said: "The title of prior mortgagees in this Court is paramount to any judgment creditors. It is true, the writ of *elegit* has vested in the defendant the land and chattels of the company, and, but for the injunction, he might doubtless have entered into possession and have interrupted traffic. But, if the plaintiff has a prior claim, as he unquestionably has, it is a matter of course, for this Court at the instance of the prior mortgagee to interfere by

(*v*) 2 Ch. 201.
(*w*) 30 & 31 Vic., cap. 127; see infra, Bk. III., ch. iii.
(*x*) In re *Hull, Barnsley and West Riding Junction Ry. Co.*, 40 Ch. Div. 119.
(*y*) 2 Giff. 71.

injunction to prevent the subject-matter of the mortgage being withdrawn or dealt with by any subsequent incumbrancer. There must be a declaration that the defendant under his *elegit* has no right to the land or works and an injunction in conformity with that declaration." This case was followed in the case of *Wildy* v. *Mid Hants Railway Company*,(*z*) in which the injunction was granted, even though the time fixed for the payment of the sum secured by the debentures had not yet arrived.

The rights *inter se* of the holders of Debentures in form of Schedule C to the Act.

If a holder of mortgage debentures in the form of Schedule C takes proceedings on behalf of himself and the other holders to enforce their securities, the Court cannot give him judgment for the sums secured by his mortgage debentures only, as that would be putting him in a better position than the other holders of mortgage debentures, but the Court may declare, that the mortgage debenture-holders are entitled to stand in the position of judgment creditors for the sum secured by the whole issue of mortgage debentures and interest due at the date of the order.(*a*)

The question, whether the holder of a mortgage debenture in the form of Schedule C to the Act is entitled, after the appointment of a receiver in an action instituted on behalf of all the holders of such debentures, to sue out execution otherwise than as trustee for himself and the other holders on a judgment, which he has obtained at law in respect of the debt created by his mortgage debentures, is one of considerable difficulty. In the case of *Bowen* v. *Brecon Railway Company*,(*b*) Wickens, V. C., held, that a holder of such a mortgage debenture could not issue execution otherwise than as a trustee for himself and all the other holders, but directed an inquiry, whether it would be for the benefit of the mortgage debenture-holders, that any proceedings should be taken by the receiver for the purpose of making the judgment available for them. This case has, however, been questioned and cannot safely be relied on.(*c*) But (whether the decision of *Bowen* v. *Brecon Railway Company* is right or not) it would appear, that, if a holder of a mortgage debenture in the form of Schedule C to this Act gets paid under his execution by the company, which issued such mortgage debenture, before any one

(*z*) 16 W. R. 409.
(*a*) *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730.
(*b*) 3 Eq. 541.
(*c*) Re *Potteries, Shrewsbury and North Wales Ry. Co.*, 5 Ch. 67, 69.

of the other holders of mortgage debentures intervenes or comes into competition with him, he may keep the money, which has been so paid to him.(*d*)

Application of calls after issue of Debentures.

Section 43: "No such mortgage (although it should comprise "future calls on the shareholders) shall, unless expressly so pro- "vided, preclude the company from receiving and applying to "the purposes of the company any calls to be made by the "company".

Rights of the holders of bonds in the form contained in Schedule D.

Section 44: "The respective obligees in such bonds shall, "proportionally according to the amount of the moneys secured "thereby, be entitled to be paid, out of the tolls or other "property or effects of the company the respective sums in such "bonds mentioned, and thereby intended to be secured, without "any preference one above another by reason of priority of date "of any such bond, or of the meeting at which the same was "authorised or otherwise howsoever".

The holders of bonds in the form contained in Schedule D to the Act are not assignees of the undertaking and tolls, they are only declared to be "entitled to be paid out of the tolls or other property" in the manner stated in the Act. Lord Truro says:(*e*) "The meaning and intention then of the 44th section, I apprehend, was to prevent any argument, that the rights and remedies of the bond creditors therein referred to as having certain particular remedies, were limited to those remedies, and the effect of it was to show, that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the company, in common with all the general creditors of the company, as well as being entitled to any particular remedies, which might be given to them in terms".

A bond creditor seeking to enforce his bonds can, even after he has obtained judgment against the company, which issued such bonds, only issue execution on his judgment as a trustee for all the holders; for "it would clearly be against the very words of the section (44)," says Wickens, V. C.,(*f*) "to say, that any bond creditor is to be preferred to another in respect of

(*d*) *Fountaine* v. *Carmarthen Ry. Co.*, 5 Eq. 316, 324.

(*e*) *Russell* v. *The East Anglian Ry. Co.*, 3 M. & G. 104, 143.

(*f*) *Bowen* v. *Brecon Ry. Co.*, 3 Eq 541, 548. The authority of this decision has, however, been shaken by in re *Potteries, Shrewsbury and North Wales Ry. Co.*, 5 Ch. 67.

his judgment"; for one bond creditor is not to have advantage over another by reason of priority of date or otherwise howsoever.

Merger of bond debt in judgment.

If a holder of such a bond (or of a mortgage debenture) gets judgment, his bond (or debenture) debt is merged in the judgment, and he will as from the date of such judgment only be entitled to interest at the rate of £4 per cent. per annum, even though a higher rate of interest is payable under the bond (or mortgage debenture).(*g*)

The rights of a judgment creditor of a Company against the holders of bonds in the form of Schedule D to this Act

As the holder of such a bond has no lien or specific charge on the estate or effects of the company, the goods and chattels of such company are as against such bond-holder liable to be seized under a writ of *fi. fa.* at the suit of a judgment creditor.(*h*)

Register to be kept.

Section 45: "A register of mortgages and bonds shall be "kept by the secretary and within fourteen days after the date "of any such mortgage or bond an entry or memorial specifying "the number and date of such mortgage or bond and the sums "secured thereby, and the names of the parties thereto, with "their proper additions, shall be made in such register; and such "register may be perused at all reasonable times by any of the "shareholders, or by any mortgagee or bond creditor of the "company, or by any person interested in any such mortgage or "bond without fee or reward".

Right to inspect register enforced.

If any person entitled to inspection under this section is not permitted by the directors to exercise such right (including therein the right to take copies) the Court will restrain the directors from interfering with him in the exercise of such right, or compel the company to give effect thereto.(*i*)

Transfer to be stamped.

Section 46: "Any party entitled to any such mortgage or bond "may from time to time transfer his right and interest therein to "any other person; and every such transfer shall be by deed "duly stamped, wherein the consideration shall be truly stated; "and every such transfer may be according to the form in the "schedule (E)(*j*) to this Act annexed or to the like effect".

Transfer to be registered.

Section 47: "Within thirty days after the date of every

(*g*) In re *European Central Ry. Co.*, 4 Ch. Div. 33; re *Economic Life Assce. Socy.* v. *Usborne* (1902) A. C. 147.

(*h*) *Russell* v. *East Anglian Ry. Co.*, 3 M. & G. 104, 125.

(*i*) *Holland* v. *Dickson*, 37 Ch. D. 669; *Mutter* v. *Eastern and Midland Railway Co.*, 38 Ch. Div. 92; *Davies* v. *Gas, Light, and Coke Co.* (1909) 1 Ch. 248. Sec. 55 of this Act also provides that the company's books of account shall be open to the inspection of the holders of its mortgage debentures or bonds.

(*j*) See Appendix, Form 73.

"such transfer, if executed within the United Kingdom, or "otherwise within thirty days after the arrival thereof in the "United Kingdom, it shall be produced to the secretary, and "thereupon the secretary shall cause an entry or memorial "thereof to be made in the same manner as in the case of "the original mortgage; and after such entry every such transfer "shall entitle the transferee to the full benefit of the original "mortgage or bond in all respects; and no party, having made "such transfer, shall have power to make void, release, or "discharge the mortgage or bond so transferred, or any money "thereby secured; and for such entry the company may de- "mand a sum not exceeding the prescribed sum, or, where "no sum shall be prescribed, the sum of two shillings and "sixpence; and until such entry the company shall not be "in any manner responsible to the transferee in respect of such "mortgage".

Stamps on transfers.

Transfers of mortgage debentures or bonds issued under and subject to the provisions of the Companies Clauses Consolidation Act, 1845, are liable to the same stamp duties as are imposed on transfers of debentures, which are issued by companies incorporated under the Companies Consolidation Act, 1908.

On a mortgage debenture or bond being transferred, the proper person to sue on it is the transferee.(*l*)

Transfer in blank.

The direction in section 46, that a transfer of such mortgage debentures or bonds shall be duly stamped and shall contain a true statement of the consideration is directory, but the direction that the transfer shall be by deed is imperative. It being essential to the validity of a transfer, that it shall be by deed, it follows, that a transfer in blank is void at law, for such an instrument with the blanks is not a deed.(*m*) Though such an instrument cannot have any greater validity as a deed in equity than at law, yet it gives a right to call for a legal transfer as an agreement constituting in equity a transfer of the ownership.(*n*)

Registration of transfers of mortgage debentures or bonds

(*k*) As to these stamp duties, see supra, Bk. I., ch. ii., sec. iv.

(*l*) *Vertue* v. *East Anglian Railway Co.*, 5 Ex. 280; 6 Railway C. 252.

(*m*) *Powell* v. *London and Provincial Bank* (1893), 2 Ch. (C. A.) 555, 560. This case deals with the transfer of shares (sec. 14 of this Act) but is equally applicable to the transfer of mortgages and bonds (sec. 46). As to transfers in blank generally, see supra, Bk. I., ch. vi., sec. i.

(*n*) *Morris* v. *Cannan*, 4 D. F. & J. 581.

in the name of the transferee under section 47, though necessary in order to complete the title of the transferee as between himself and the company,(*o*) only gives complete effect to a prior valid transfer, but does not make effectual a document, which was as between the legal transferor and transferee inoperative and of no effect before such registration.(*p*)

It would, however, appear, that, if after execution and delivery of a transfer in blank the blanks are filled in and the transfer is re-delivered by the transferor to the transferee or (what amounts to a re-delivery) the transferor shows by his conduct, that he acknowledges the transfer, as filled in, as his deed and wishes it to be acted upon, then the transfer so filled in, delivered and registered will be perfect and confer the legal title on the holder.(*q*)

Payment of interest.

Section 48: "The interest of the money borrowed upon any "such mortgage or bond shall be paid at the periods appointed "in such mortgage or bond, and, if no period be appointed "half-yearly, to the several parties entitled thereto, and in "preference to any dividends payable to the shareholders of "the company".

Transfer of interest.

Section 49: "The interest on any such mortgage or bond "shall not be transferable, except by deed duly stamped".

Repayment of principal.

Section 50: "The company may, if they think proper, fix "a period for the repayment of the principal money so borrowed "with the interest thereof, and in such case the company shall "cause such period to be inserted in the mortgage deed or "bond; and upon the expiration of such period the principal "sum, together with the arrears of interest thereon shall, on "demand, be paid to the party entitled to such mortgage or "bond; and, if no other place of payment be inserted in such "mortgage deed or bond, such principal and interest shall be "payable at the principal office or place of business of the "company".

Where a day for the repayment of the principal sum is fixed, such principal sum becomes as from such date a debt, for which an action may be brought and, if such sum be not

(*o*) *Does* v. *Jones*, 5 Ex. 15; *Lane* v. *Smith*, 14 Beav. 49.

(*p*) *France* v. *Clark*, 26 Ch. Div. 257, 263; *Powell* v. *London and Provincial Bank* (1893) 2 Ch. (C. A.) 555, 566.

(*q*) *Goodright* v. *Strathan*, 1 Cowp. 201; *Hudson* v. *Revett*, 5 Bing. 368; *Powell* v. *London and Provincial Bank* (1893) 2 Ch. (C. A.) 555; *Bishop of Crediton* v. *Bishop of Exeter* (1905) 2 Ch. 455.

repaid on the date so fixed, it will continue to carry interest, even though no express provision to that effect is contained in the mortgage debenture or bond.(*r*)

Repayment of principal where no time is fixed.

Section 51: "If no time be fixed in the mortgage deed "or bond for the repayment of the money so borrowed, the "party entitled to the mortgage or bond may, at the expiration "or at any time after the expiration of twelve months from "the date of such mortgage or bond, demand payment of the "principal money thereby secured, with all arrears of interest, "upon giving six months' previous notice for that purpose; "and in the like case the company may at any time pay off "the money borrowed, on giving the like notice; and every such "notice shall be in writing or print, or both, and if given by "a mortgagee or bond creditor shall be delivered to the secretary "or left at the principal office of the company, and if given "by the company shall be given either personally to such "mortgagee or bond creditor or left at his residence, or if such "mortgagee or bond creditor be unknown to the directors, or "cannot be found after diligent inquiry, such notice shall be "given by advertisement in the *London* or *Dublin Gazette* "according as the principal office of the company shall be in "England or Ireland, and in some newspaper as after-"mentioned".(*s*)

Interest to cease on expiration of notice to pay off principal.

Section 52: "If the company shall have given notice of "their intention to pay off any such mortgage or bond at a "time, when the same may lawfully be paid off by them, then "at the expiration of such notice all further interest shall cease "to be payable on such mortgage or bond, unless, on demand "of payment made pursuant to such notice, or at any time "thereafter, the company shall fail to pay the principal and "interest due at the expiration of such notice on such mortgage "or bond".

When payment of arrears of interest or principal and interest may be enforced by appointment of a Receiver.

Section 53: "Where by the Special Act the mortgagees "of the company shall be empowered to enforce the payment "of the arrears of interest, or the arrears of principal and "interest due on such mortgages, by the appointment of a "receiver, then, if within thirty days after the interest accruing "upon any such mortgage has become payable and after demand

(*r*) *Price* v. *Great Western Railway Co.*, 16 M. & W. 244.

(*s*) See sec. 138 of this Act.

Bk. III., Ch. I.

"thereof in writing the same be not paid, the mortgagee may "without prejudice to his right to sue for the interest so in arrear "in any of the Superior Courts of Law or Equity require the "appointment of a receiver by an application to be made as "hereinafter provided; and, if within six months after the "principal money owing upon any such mortgage has become "payable and after demand thereof in writing the same be not "paid, the mortgagee without prejudice to his right to sue "for such principal money, together with all arrears of interest, "in any of the Superior Courts of Law or Equity may, if "his debt amount to the prescribed sum, alone or, if his "debt does not amount to the prescribed sum, he may in "conjunction with other mortgagees, whose debts, being so "in arrear after demand as aforesaid, shall together with his "amount to the prescribed sum, require the appointment of "a receiver, by an application to be made as hereinafter pro-"vided".

Appointment of Receiver.

Section 54: "Every application for a receiver in the cases "aforesaid shall be made to two justices and on any such "application it shall be lawful for such justices by order in "writing, after hearing the parties, to appoint some person to "receive the whole or a competent part of the tolls(*t*) or sums "liable to the payment of such interest or such principal and "interest, as the case may be, until such interest, or until such "principal and interest, as the case may be, together with all "costs, including the charges of receiving the tolls or sums "aforesaid, be fully paid; and, upon such appointment being "made, all such tolls and sums of money as aforesaid shall "be paid to and received by the person so to be appointed; "and the money so to be received shall be so much money "received by or to the use of the party, to whom such interest "or such principal and interest, as the case may be, shall be "then due, and on whose behalf such receiver shall have been "appointed; and after such interest and costs, or such principal, "interest, and costs, have been so received, the power of such "receiver shall cease".

Jurisdiction of Justices does not affect jurisdiction of High Court to appoint Receiver.

This power given to two justices to appoint a receiver by virtue of section 54 is independent of and in no way interferes

(*t*) Not merely the profits; see *Griffin* v. *Bishop's Castle Railway Co.*, 15 W. R. 1058.

with the inherent jurisdiction of the Court of Chancery to appoint a receiver.(*u*)

Court will not appoint manager of undertaking under this Act.

As will be seen hereafter,(*v*) section 4 of the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127), gives the Court power to appoint a receiver and manager of the undertaking of a railway company under certain circumstances. But before the date of that Act, the Court declined to appoint a receiver and manager of a railway company,(*w*) and except in the case of a railway company the Court will not now appoint a receiver and manager of an undertaking, which a company has been empowered by Parliament, acting for the public interest, to form and maintain for a public purpose.(*x*)

Court will not order sale.

Neither will the Court order the sale in a debenture-holder's action of an undertaking, which has been acquired by a company under statutory powers for public purposes ;(*y*) thus the undertaking of a tramway company will not be ordered to be sold in a debenture-holder's action.(*z*) However, if such company is wound up by the Court, the company's property may be sold in the winding up by the liquidator

Winding up

A holder of mortgage debentures or bonds in the forms respectively contained in Schedules C and D, who enforces his rights as holder of such mortgage debentures or bonds (as the case may be), is not by so doing deprived of his rights as an ordinary creditor.(*a*) Hence he may in a proper case petition for the winding up of the company ; for any company (except a railway company incorporated by Act of Parliament) may be wound up by the Court under sec. 268 of the Companies Consolidation Act, 1908 ; thus a tramway company,(*b*) a canal company,(*c*) and a waterworks company (*d*) (all

(*u*) *Fripp* v. *Chard Ry. Co.*, 11 Hare 241.

(*v*) See Book III., ch. iii., infra.

(*w*) *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201. The cases of *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730 ; *Bartlett* v. *West Metropolitan Tramways Co.* (1894), 2 Ch. 286, in which the Court appointed a receiver and manager of the undertaking of a tramways company, must be treated as overruled by *Marshall* v. *South Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36.

(*x*) For reasons, see *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201 ; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399 ; *De Winton* v. *Mayor of Brecon*, 26 Beav. 533, and supra, Bk. II., ch. iv., sec. 5 (2*a*).

(*y*) *Marshall* v. *S. Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36, 50 ; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*z*) Debenture holders have no right under the Tramways Act, 1870 (33 & 34 Vic., cap. 78), to a sale of the undertaking.

(*a*) In re *Borough of Portsmouth Tramways Co.* (1892), 2 Ch. 362.

(*b*) Ibid.

(*c*) Re *Bradford Navigation Co.*, 10 Eq. 331.

(*d*) In re *Barton-upon-Humber Water Co.*, 42 Ch. D. 585. For the winding up of public companies, see supra, Bk. II., ch. iii sec. vi. (2).

incorporated by Special Acts of Parliament) have been ordered to be wound up by the Court.

Other rights and remedies against the Company.

Besides the above-mentioned rights and remedies of the holders of the mortgage debentures or bonds against the company, which issued such securities, the holders are (according to the circumstances of the case) entitled to rescission or damages in an action for deceit in cases, in which they were induced by misrepresentations made on behalf of the company to advance moneys on the security of such mortgage debentures or bonds, in the same way as persons advancing moneys under similar circumstances on the security of debentures or debenture stock issued by companies, which are incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, are entitled to such relief. These are fully dealt with in an earlier part of this treatise.(*e*)

Remedies against the Directors.

The directors of a company issuing mortgage debentures or bonds under the provisions of the Companies Clauses Consolidation Act, 1845, will be liable to the holders of such securities in an action for breach of warranty or in an action for deceit (as the case may be) under the same circumstances, under which the directors of a company registered under the Companies Act, 1862, or the Companies Consolidation Act, 1908, would be liable to its debenture-holders in such action.(*f*)

(*e*) Bk. II., ch. i., supra.

(*f*) For action for breach of warranty and action for deceit, see supra, Bk. II., ch. vi., sec. i. (1) and (2).

CHAPTER II.

THE NATURE OF DEBENTURE STOCK ISSUED SUBJECT TO THE PROVISIONS OF THE COMPANIES CLAUSES ACT, 1863, AND THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH SECURITIES.

The nature of Debenture stock issued under the above Act.

THE debenture stock issued under and subject to the Companies Clauses Act, 1863 (26 & 27 Vic., cap. 118), does not create a debt except as to the annual interest; the capital cannot be called in or paid off; it is a right to a perpetual annuity payable out of the concern. There is no conveyance or assignment of anything to the stockholder or to any trustee for him. There is an entry in the books of the concern, that there is so much debenture stock, on which there is so much to be paid half-yearly to the holders, just like an entry of National Debt in the great books at the Bank of England.(*a*) This kind of debenture stock differs essentially from the debenture stock issued by a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908,(*b*) and from mortgage debentures and bonds (issued subject to the provisions of the Companies Clauses Consolidation Act, 1845), all of which secure the repayment of the sums advanced as well as the payment of the interest.(*c*)

Debenture stock subject to the provision of this Act differs materially from ordinary stock in the following respects: A holder of such debenture stock is a creditor of the company with a security (securing the interest payable to him) on the assets of the company, though he has not all the rights of an ordinary secured creditor, and receives a fixed rate of interest, whatever the profits of the company may be, but he is not a member of the company. A holder of ordinary stock, on the other hand,

(*a*) *Attree* v. *Hawe*, 9 Ch. Div. 337, 349.

(*b*) As to the definition of this kind of debenture stock, see supra, Bk. I., ch. i., sec. ii.

(*c*) In re *Burry Port and Gwendreath Railway Co.*, 33 W. R. 741, 52 L. T. R. 842.

is a member of the company and has the right of participating in the dividends or net profits of the company.(*d*)

Debenture stock not within Mortmain Act.

In *Attree* v. *Hawe* (*e*) debenture stock created under the provisions of this Act (constituting, as it does, merely a charge on the net profits and earnings of the corporation) has been held not to give any "interest in land" to the holder within the Mortmain Act (9 Geo. II., cap. 36).

Statement of amount of issue to be delivered to Commissioners.

Before issuing any debenture stock under this Act the company should pursuant to section 8 of the Finance Act, 1899,(*f*) deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue of such stock.

The rights of the holders of debenture stock subject to the provisions of the Companies Clauses Act, 1863, are regulated by sections 22 to 35 (Part III.) of that Act.

The creation and issue of Debenture stock.

Section 22: "Where any company incorporated either before "or after the passing of this Act for the purpose of carrying "on any undertaking, is authorised by any special Act hereafter "passed, and incorporating this part of this Act to create and "issue debenture stock; then and in every such case the "company, with the sanction of such proportion of the votes "of the shareholders and stockholders entitled to vote in that "behalf at meetings of the company present (personally or by "proxy) at a meeting of the company specially convened for "the purpose, as is prescribed in the Special Act, and, if no "proportion is prescribed, then of three-fifths of such votes, may "from time to time raise all or any part of the money, which "for the time being they have raised or are authorised to raise, "on mortgage or bond, by the creation and issue at such times, "in such amounts and manner, on such terms, subject to such "conditions and with such rights and privileges, as the company "thinks fit, of stock to be called debenture stock instead of "and to the same amount as the whole or any part of the "money, which may for the time being be owing by the "company on mortgage or bond or which they may from time "to time have power to raise on mortgage or bond, and may

(*d*) In re *Bodman*, *Bodman* v. *Bodman* (1891), 3 Ch. 135, 138.

(*e*) 9 Ch. Div. 337, followed in in re *Pickard Elmsley* v. *Mitchell* (1894), 3 Ch. (C. A.) 704. As to how far the Mortmain Act applies to debenture stock and as to what words in a will pass debenture stock, see supra, Bk. I., ch. vi., sec. iv.

(*f*) 62 & 63 Vic., cap. 9. Section 8 of this Act is set out supra, p. 99.

"attach to the stock so created such fixed and perpetual "preferential interest [not exceeding the rate prescribed in the "Special Act, and, if no rate is prescribed, then not exceeding "the rate of four pounds per centum per annum](*g*) payable "half-yearly or otherwise and commencing at once, or at any "future time or times, when and as the debenture stock is "issued, or otherwise, as the company thinks fit".

The debenture stock authorised to be issued under the provisions of this Act may be issued at a discount.(*h*)

Companies authorised to issue debenture stock by virtue of this Act may issue the same by way of collateral security.(*i*)

The Companies Clauses Act, 1869 (32 & 33 Vic., cap. 48), provides (by section 3) that: "Any company having power to "raise money on mortgage or bond by virtue of any Act of "Parliament, but not having power to create and issue debenture "stock, may create and issue debenture stock subject to the "provisions of Part III. of the Companies Clauses Act, 1863 "(relating to debenture stock), and Part III. of the said Act, "as amended by this Act, shall be deemed to be incorporated with "the Special Act of every such company," and further provides (by section 4) that: "Money borrowed by a company for the purpose "of paying off and duly applied in paying off bonds or mortgages "of the company given or made under the statutory powers of the "company shall, so far as the same is so applied, be deemed money "borrowed within and not in excess of such statutory powers".(*j*)

Debenture stock charged on undertaking.

Section 23: "Debenture stock, with the interest thereon, "shall be a charge upon the undertaking of the company prior "to all shares or stock of the company, and shall be transmissible "and transferable in the same manner and according to the same "regulations and provisions as other stock of the company, and "shall in all other respects have the incidents of personal estate".

Priority of interest on Debenture stock

Section 24: "The interest on debenture stock shall have "priority of payment over all dividends or interest on any shares "or stock of the company, whether ordinary or preference or "guaranteed, and shall rank next to the interest payable on

(*g*) The words in brackets are repealed by 32 & 33 Vic., cap. 48, sec. 1.

(*h*) *Webb* v. *Shropshire Railway Co.* (1893), 3 Ch. (C. A.) 307.

(*i*) *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. R. 360.

(*j*) Sections 3 and 4 of 32 & 33 Vic., cap. 48, were, so far as railway companies were concerned, anticipated by sections 24 and 26 of 30 & 31 Vic., cap. 127; see infra, Bk. III., ch. iii.

Sr. III., Ch. II. "the mortgages or bonds for the time being of the company "legally granted before the creation (*i.e.*, the resolution authorising the issue)(*k*) of such stock; but the holders of debenture "stock shall not, as among themselves, be entitled to any "preference or priority".

The meaning of the latter portion of this section is that the holders of the debenture stock issued by the company under each Special Act shall rank *pari passu* with one another, but not that all the holders of debenture stock issued by the same company under several Special Acts shall rank *pari passu*.(*l*)

Payment of arrears enforced by the appointment of a Receiver.

Section 25: "If within thirty days after the interest on any "such debenture stock is payable the same is not paid, any "one or more of the holders of the debenture stock holding, "individually or collectively, the sum in nominal amount "thereof prescribed in the Special Act, and, if no sum is "prescribed, then a sum equal to one-tenth of the aggregate "amount, which the company is for the time being authorised "to raise by mortgage, by bond, and by debenture stock, or "the sum of ten thousand pounds, whichever of the two last-"mentioned sums is the smaller sum, may (without prejudice "to the right to sue in any Court of competent jurisdiction for "the interest in arrear) require the appointment in England "or Ireland of a receiver, and in Scotland of a judicial factor".

Mode of appointing a Receiver.

Section 26: "Every such application for a receiver shall be "made to two justices, and every such application for a judicial "factor shall be made to the Court of Session; and on any such "application the justices or Court (as the case may be) by order "in writing, after hearing the parties, may appoint some person, "to receive the whole or a competent part of the tolls or sums "liable to the payment of the interest until all the arrears of "interest then due on the debenture stock, with all costs, in-"cluding the charges of receiving the tolls or sums, are fully "paid; and upon such appointment being made, all such tolls "or sums shall be paid to and received by the person so "appointed; and all money so received shall be deemed so much "money received by or to the use of the several persons inter-"ested, in the same, according to their several priorities.

(*k*) See infra, section 30 of this Act.

(*l*) In re *Mersey Ry. Co.* (1895), 2 Ch. (C. A.) 287. For the rights *inter se* of the holders of debenture stock and mortgage debentures, see infra, sec. 30 of this Act.

"The receiver or judicial factor shall distribute rateably and "without priority among all the proprietors of debenture stock "to whom interest is in arrear, the money which so comes to his "hands, after applying a sufficient part thereof in or towards "satisfaction of the interest on the mortgages and bonds of the "company.

"As soon as the full amount of interest and costs has been so "received, the power of the receiver or judicial factor shall cease, "and he shall be bound to account to the company for his acts "or intromissions or the sums received by him, and to pay over "to the company any balance that may be in his hands."

Jurisdiction of Justices does not affect jurisdiction of the High Court to appoint Receiver.

This power given by section 26 of this Act to two justices to appoint a receiver (like the power given by section 54 of the Companies Clauses Consolidation Act, 1845, to two justices to appoint a receiver for the purpose of enforcing payment of the arrears of interest or arrears of principal and interest due on mortgage debentures subject to the provisions of that Act)(*m*) is independent of and in no way interferes with the inherent jurisdiction of the Court of Chancery to appoint a receiver.

Except in the case of a Railway Company Court will not appoint Receiver and Manager.

As will be seen hereafter,(*n*) section 4 of the Railway Companies Act, 1867 (30 & 31 Vic., cap. 127), gives the Court power under certain circumstances to appoint a receiver and manager of the undertaking of a railway company in favour of judgment creditors. But before the Railway Companies Act, 1867, the Court declined to appoint a receiver and manager of a railway company and the Court will not now (except in the case of a railway company) appoint a receiver and manager of an undertaking, which a company has been authorised by Parliament to form and maintain in the interest of the public.(*o*)

Arrears may be recovered by action.

Section 27: "If the interest on debenture stock is in arrear "for thirty days next after any of the respective days whereon "the same is payable, the holder for the time being thereof may "(without prejudice to his power to apply for the appointment "of a receiver or judicial factor) recover the arrears with costs "by action or suit against the company in any Court of "competent jurisdiction".(*p*)

(*m*) *Fripp* v. *Chard Ry. Co.*, 11 Hare 241.

(*n*) See Bk. III., ch. iii., infra.

(*o*) For reasons, see supra, Bk. III., ch. i., *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.* (1895), 2 Ch. (C. A.) 36.

(*p*) The liability to pay interest on debenture stock subject to the provisions of this Act, being statutory, will not be

Bk. III., Ch. II.

Register of Debenture stock to be kept by Company.

Section 28: "The company shall cause entries of the debenture "stock from time to time created to be made in a register to be "kept for that purpose, wherein they shall enter the names and "addresses of the several persons, and corporations from time "to time entitled to the debenture stock, with the respective "amounts of the stock to which they are respectively entitled; "and the register shall be accessible for inspection and perusal "at all reasonable times to every mortgagee, bondholder, "debenture stockholder, shareholder, and stockholder of the "company, without the payment of any fee or charge".

The right of inspection of the register directed by this section to be kept by the company includes a right to take copies.(*q*) Any interference with such right will be enforced by an injunction restraining the directors from interfering with the exercise at all reasonable times of this right, or by an order giving effect to the same.(*r*)

Certificate.

Section 29: "The company shall deliver to every holder of "debenture stock a certificate stating the amount of debenture "stock held by him; and all regulations or provisions for the "time being applicable to certificates of shares in the capital of "the company shall apply, *mutatis mutandis*, to certificates of "debenture stock".

The regulations or provisions alluded to in this section are those set forth in sections 11, 12 and 13 of 8 & 9 Vic., cap. 16.

Mortgage Debentures or bonds granted before the creation of Debenture stock not affected by such Debenture stock.

Section 30: "Nothing herein or in the Special Act author- "ising the issue of debenture stock contained shall in any way "affect any mortgage or bond at any time legally granted "by the company before the creation(*s*) of such stock, or any "power of the company to raise money on mortgage or bond, "but the holders of all such mortgages and bonds shall, during "the continuance thereof respectively, be entitled to the same "priorities, rights and privileges in all respects as they would "have been entitled to, if the Special Act authorising the issue "of debenture stock had not been passed".

Relative priorities *inter se* of Debenture stockholders and Mortgage Debenture-holders.

Sections 23 and 24 of this Act provide, that the holders of

statute-barred until after the expiration of twenty years from the date, on which such interest accrued due. In re *Cornwall Minerals Ry. Co.* (1897), 2 Ch. 74.

(*q*) *Holland* v. *Dickson*, 37 Ch. D. 669; *Mutter* v. *Eastern and Midlands Ry. Co.*, 38 Ch. Div. 92; *Davies* v. *Gas, Light, and Coke Co.* (1909) 1 Ch. 248.

(*r*) *Holland* v. *Dickson*, ubi supra.

(*s*) The "creation" means the resolution authorising the issue of the debenture stock; re *The Burry Port and Gwendreath Valley Railway Co.*, 52 L. T. R. 842, 33 W. R. 741, W. N. (1885) 119.

debenture stock subject to the provisions of the Act shall be a charge on the undertaking (*i.e.*, the earnings)(*t*) of the company and that the holders of such debenture stock shall rank *pari passu* and sections 42 and 44 of the Companies Clauses Consolidation Act, 1845, provide, that the holders of mortgage debentures(*u*) and bonds issued under that Act shall respectively rank *pari passu*. Section 30 of the Companies Clauses Act, 1863, provides, that mortgage debentures and bonds issued before the creation of debenture stock shall rank above such debenture stock; but this section does not deal with the relative priorities of the holders of mortgage debentures or bonds issued after the creation of debenture stock under powers previously existing on the one hand and the holders of such debenture stock on the other hand. If 1, 3 and 5 are debenture stock and 2, 4 and 6 are mortgage debentures, how are 1, 3 and 5 to take *pari passu* and yet rank before 2, 4 and 6? Kay, L. J., suggests that, if the earnings of the company are insufficient to satisfy the interest due to the holders of mortgage debentures and of debenture stock issued in the order above-mentioned, the only practical mode of maintaining equality *inter se* is to divide such income among both classes *pari passu*(*v*) (*i.e.*, rateably according to the amount of interest due to each holder).

Holders of Debenture stock not to vote at meeting of company.

Section 31: "Debenture stock shall not entitle the holders "thereof to be present or vote at any meeting of the company "or confer any qualification, but shall, in all respects not otherwise by or under this Act or the Special Act provided for, "be considered as entitling the holders to the rights and powers "of mortgagees of the undertaking other than the right to "require repayment of the principal money paid up in respect "of the debenture stock".

Application of money raised.

Section 32: "Money raised by debenture stock shall be "applied exclusively either in paying off money due by the "company on mortgage or bond or else for the purposes, to "which the same money would be applicable, if it were raised "on mortgage or bond instead of debenture stock".

Separate accounts of Debenture stock.

Section 33: "Separate and distinct accounts shall be kept

(*t*) As to the meaning of "undertaking," see supra, Bk. III., ch. i.

(*u*) Mortgage debentures subject to the provisions of the Companies Clauses Consolidation Act, 1845, are likewise made a charge on the undertaking of the company; see Schedule C to the Act (Appendix, Form 71, infra).

(*v*) In re *Burry Port and Gwendreath Railway Co.*, ubi supra.

"by the company showing, how much money has been received "for or on account of debenture stock and how much money "borrowed or owing on mortgage or bond, or which they have "power so to borrow, has been paid off by debenture stock "or raised thereby instead of being borrowed on mortgage or "bond".

Extinction of borrowing powers.

Section 34: "The powers of borrowing and reborrowing "by the company shall, to the extent of the money raised by "the issue of debenture stock, be extinguished".

Other remedies of the holders of debenture stock issued under this Act.

The holders of debenture stock issued by a company under the provisions of the Companies Clauses Act, 1863, may (like the holders of debentures or debenture stock issued by a company incorporated under the Companies Act, 1862, or the Companies Consolidation Act, 1908, and like the holders of mortgage debentures or bonds issued under the provisions of the Companies Clauses Consolidation Act, 1845),(*w*) according to the circumstances of the case, be entitled (1) as against the company to an order winding up the company,(*x*) or, if the contract to advance money on such debenture stock was entered into in reliance on any misrepresentations made on behalf of the company, to rescission and return of the deposit or to damages in an action for deceit,(*y*) and (2) as against the directors of the company to damages in an action for breach of warranty or in an action for deceit.(*z*)

Persons advancing money to enable Company to pay interest on Debenture stock are not entitled to be subrogated to their rights.

Persons, who advance money to a company and thereby enable the company to pay the interest due in respect of a first issue of debenture stock issued by the company under the provisions of this Act, are ordinary unsecured creditors and are not entitled as against a subsequent issue of debenture stock to be subrogated to the rights of the first debenture stock holders, whose interest has been so paid, and to thus obtain priority over the second debenture stock holders.(*a*)

(*w*) See supra, Bk. III., ch. i.

(*x*) See supra, Bk. II., ch. iii., sec. vi. (2).

(*y*) See supra, Bk. II., ch. i.

(*z*) See supra, Bk. II., ch. vi., sec. i.

(*a*) In re *Wrexham, Mold and Connah's Quay Railway Co.* (1898), 2 Ch. 663, (1899) 1 Ch. (C. A.) 440.

CHAPTER III.

THE NATURE OF DEBENTURES AND DEBENTURE STOCK ISSUED BY RAILWAY COMPANIES, AND THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH SECURITIES.

Prohibition against borrowing before making statement specified in Schedule to Act.

BEFORE a railway company issues mortgage debentures, bonds or debenture stock, it must comply with section 10 of the Railway Companies Securities Act, 1866 (29 & 30 Vic., cap. 108), which declares, that it shall not be lawful for any railway company at any time to borrow any money on mortgage or bond or to issue any debenture stock under any Act of the then present session or passed after the end of the half-year, to which its then last registered loan capital half-yearly account related,(*a*) unless and until it has first deposited with the Registrar of Joint Stock Companies in England a statement, certified and signed by the company's registered officer as a true statement specifying the particulars described in Part II. of the first schedule to this Act. These particulars are shortly (1) the Act authorising the borrowing, (2) the amount which the company is thereby authorised to borrow, (3) whether or not by such Act the obtaining of a certificate of a justice or sheriff or the assent of a meeting of the company has been made a condition precedent to the exercise of the borrowing power, (4) the date, at which such condition has been fulfilled, (5) the amount borrowed on mortgage or bond and the debenture stock actually issued and still outstanding at the end of the half-year and (6) the amount remaining to be borrowed.

Declaration to be indorsed on mortgages, bonds and debenture stock certificates issued by a Railway Company.

Section 14 of the Railway Companies Securities Act, 1866, further provides that: "There shall be put (by indorsement or "otherwise) on every mortgage deed or bond made or given after "the 21st day of January, 1867, by a railway company for securing

(*a*) Section 5 of this Act directs, that after the end of each half-year every railway company shall make an account of its loan capital authorised to be raised and actually raised up to the end of that half-year. This account is referred to in this Act as the loan capital half-yearly account.

"money borrowed by the company and on every certificate given "after that day by a railway company for any sum of debenture "stock issued by the company,(*b*) a declaration in the form given "in the second schedule to that Act(*c*) or to the like effect with "such variations as circumstances require. Every such declara- "tion shall be signed by two directors of the company specially "authorised and appointed by the board of directors to sign such "declarations and by the company's registered officer."

If a railway company fails to comply with the directions of either of these sections, it is liable to a penalty (sections 11 and 15). It will be observed, that the Act does not declare, that the debentures or debenture stock certificates issued by a railway company without first complying with sections 10 and 14 shall be void, but merely inflicts a penalty on such company for non-compliance with those sections.

Statement of amount of loan to be delivered to Commissioners.

Before issuing any mortgage debentures, bonds or debenture stock, a railway company should pursuant to section 8 of the Finance Act, 1899,(*d*) deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue.

Issue of Debentures and Debenture stock by a Railway Company.

A railway company may issue mortgage debentures and bonds in the manner, for the purposes and subject to the provisions specified in its Special Act of Parliament or (in the absence of any provisions to the contrary) in the Companies Clauses Consolidation Act, 1845.

A railway company may issue debenture stock in the manner, for the purposes and subject to the provisions specified in its Special Act of Parliament. However, a railway company, which has power to issue mortgage debentures or bonds, may issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, even though such provisions are not expressly incorporated in the Special Act.(*e*)

Section 26 of the Railway Companies Act, 1867, provides, that money borrowed by a railway company for the purpose of paying off and duly applied in paying off bonds or mortgages

(*b*) For a Form of a debenture stock certificate issued by a railway company, see infra, Appendix, Form 75.

(*c*) For such declaration, see Appendix, Form 74, infra.

(*d*) 62 & 63 Vic., cap. 9. Section 8 of this Act is set out supra, p. 99.

(*e*) See 30 & 31 Vic., cap. 127, sec. 24 (Railway Companies Act, 1867); in re *Mersey Railway Co.* (1895), 2 Ch. (C. A.) 287.

of such company given or made under the statutory powers of the company shall, so far as the same is so applied, be deemed money borrowed within and not in excess of such statutory powers.

A railway company may issue debentures and debenture stock at a discount.(*f*)

Issue under the Regulation of Railways Act, 1889.

Whenever a railway company is ordered by the Board of Trade to provide any appliances or execute any works, or incur any expenditure under the provisions of the Regulation of Railways Act, 1889,(*g*) which would properly be chargeable to capital account, such company may, on furnishing to the Board of Trade an estimate of the cost of providing such appliances, executing such works and carrying out such order generally and on the Board of Trade fixing and determining the amount, which will properly be capital expenditure, from time to time issue debentures or debenture stock in priority to or ranking *pari passu* with any existing debentures or debenture stock of such company bearing interest at a rate not exceeding five per cent. per annum to an amount not exceeding the sum so fixed and determined, and any money so raised must be applied in carrying out such requirements of the Board of Trade and to no other purpose whatsoever and no other authority save the certificate of the Board of Trade is requisite to authorise and validate the issue of such debentures or debenture stock.

Meaning of "Railway Company" within the Railway Companies Act, 1867.

The Railway Companies Act, 1867 (30 & 31 Vic., cap. 127), which regulates and defines the rights and remedies of the holders of debentures and debenture stock issued by railway companies, applies to every company constituted by Act of Parliament for the purpose of constructing, maintaining and working a railway either alone or in conjunction with any other purpose ;(*h*) hence it has been held to apply not only to railway companies, but also to companies such as a dock company with power to construct a short line connecting the dock with other railways, though the railway was not the primary object of the company.(*i*)

Effect of Sec. 4 of the Railway Companies Act, 1867.

By section 4 of this Act after enacting, that the engines, tenders, carriages, trucks, machinery, tools, fittings, materials

(*f*) *Webb* v. *Shropshire Railway Co.* (1893), 3 Ch. (C. A.) 307, 320.
(*g*) 52 & 53 Vic., cap. 57, sec. 3.
(*h*) Section 3.
(*i*) Re *East and West India Dock Co.*, 38 Ch. Div. 576; *Great Northern Railway Co.* v. *Takourdin*, 13 Q. B. Div. 320.

and effects constituting the rolling stock and plant used and provided by a railway company for the purposes of the traffic on their railway should not, after their railway or any part thereof has been open to the public, be liable to be taken in execution at law or in equity after the passing of this Act,(*j*) it is provided, that a creditor, who has recovered judgment against a railway company, may obtain the appointment of a receiver and, if necessary, the appointment of a receiver and manager of the undertaking on application by petition in a summary way to the Court of Chancery. This section further enacts, that all money (*jj*) received by such receiver or receiver and manager shall, after making due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein.

This section deprives all the judgment creditors of a railway company (including its debenture or debenture stock holders, who have obtained judgment against it) of the right to take in execution the rolling stock or plant of the company, but substitutes a new remedy, which is independent of the fact whether the company has or has not any rolling stock or plant, to be taken in execution ;(*k*) such new remedy is an application for an order appointing a receiver or receiver and manager of the undertaking of the company.

Debenture-holder's interest in the rolling stock.

Though the effect of this section is to deprive a debenture or debenture stock holder, who has got judgment against a railway company, of the right, which he would otherwise have had, to issue execution on the rolling stock and plant, yet such holder has an interest in such rolling stock and plant.

Sir G. Jessel makes the following remarks on the nature of a debenture-holder's interest in the rolling stock of railway companies (*l*) :—

"I am not going to say, that debenture-holders have not

(*j*) This section is now perpetual; see 38 & 39 Vic., cap. 31, sec. 1.

(*jj*) This includes the proceeds of sale of rolling stock (re *Liskeard and Caradon Ry. Co.* (1903) 2 Ch. 681).

(*k*) Re *East and West India Dock Co.*, 38 Ch. Div. 576; re *Mersey Railway Co.*, 37 Ch. Div. 610, 617; re *Manchester and Milford Railway Co.*, 14 Ch. Div. 645.

(*l*) *Yorkshire Railway Wagon Co.* v. *Maclure*, 21 Ch. Div. 309, 314. See also re *Liskeard and Caradon Ry. Co.* (1903) 2 Ch. 681.

some sort of security over the rolling stock, though what its precise nature may be is another matter. It may be, that they have this kind of security, that is, a security on the rolling stock for the time being—because it is always changing, it is not like a mortgage—subject to the right of the railway company not only to use it in the ordinary course of business, but to replace it in the ordinary course of business; that is to say, they may sell or part with or use those wagons, engines, locomotives, and so on, and replace them by others either of a better description or otherwise, so that they may part with them for any reasonable purpose in the ordinary course of business. If there is a new invention, and they find they can buy some better locomotives, they may part with the old stock, or, if they become useless, and they can hire a better class of locomotives, I should say, that they might part with them in the ordinary course of business. But, as at present advised, I do not think they could sell the whole of the rolling stock to pay the debts, which were subsequent in priority to the debentures. I think that is the answer to any notion of this contract affecting the rights of the debenture-holders. If it were not a contract in the ordinary course of business, if it were a mere mode of raising money for the purpose of paying debts, which ranked below the debenture-holders, the only result would be, that people, who bought the rolling stock, would buy subject to the incumbrance of the debenture-holders. The result would be, that the Wagon Company would buy with a bad title."

Rolling stock is only protected, if "used for the traffic of the Company".

It should be noticed, that the rolling stock and plant protected by this section is rolling stock and plant "used and provided by a railway company for the purposes of the traffic on their railway". The Court has held that, if a railway has once been open for public traffic and is subsequently closed, the rolling stock and plant of such railway company is protected by this section and cannot be taken into execution.(*m*)

Appointment of Receiver or Manager under the Railway Companies Act, 1867.

Any person, who has recovered judgment against a railway company, is entitled under section 4 to the appointment of a receiver, and, if necessary, a receiver and manager. The appointment of a receiver and manager is necessary within this section,

(*m*) *Midland Wagon Co.* v. *Potteries Ry. Co.*, 6 Q. B. D. 36.

if the railway company is carrying on business and is to be continued as a going concern.(*n*)

The Court cannot appoint a receiver or a receiver and manager of the undertaking of a railway company under section 4, if such company has never commenced to acquire the lands or construct the line authorised by the Special Act; for in such a case there is no undertaking, of which a receiver or manager can be appointed.(*o*)

When a receiver and manager is appointed by the Court under this Act, he must be appointed receiver and manager of the whole of the undertaking and not merely of the railway belonging thereto.(*p*)

In exercising the jurisdiction afforded by section 4, the Court will take a broad view of the present position and exigencies of the company and act for the benefit of all the creditors and will not consider itself fettered by any contract, which may have been previously entered into between the railway company and any other person, although it will in the exercise of its discretion have regard thereto. The Court will not at the instance of debenture-holders discharge an order made on the application of a judgment creditor appointing a receiver and manager of a railway company at a salary, even though such debenture-holders allege, that the company is not financially in a position to pay such salary. The debenture-holders have no voice in the management of the company, while it is a going concern, notwithstanding that they have a statutory right to the appointment of a receiver, when their interest is in arrear. Hence they have no right to dictate, which manager shall be appointed or what salary shall be paid to him.(*q*)

When a receiver and manager has been appointed under the 4th section at the instance of a judgment creditor, another receiver and manager will not be appointed at the instance of another judgment creditor, as a judgment creditor gains no

(*n*) In re *Manchester and Milford Ry. Co.*, 14 Ch. Div. 645. As to whom the Court will appoint receivers, see this case and supra, Bk. II., ch. iii., sec. v. (1*c*) and (2*c*).

(*o*) In re *Birmingham and Lichfield Junction Ry. Co.*, 18 Ch. D. 155.

(*p*) In re *East and West India Docks Ry. Co.*, 38 Ch. Div. 576.

(*q*) In re *Hull, Barnsley and West Riding Junction Ry. and Dock Co.*, 57 L. T. R. 82.

priority by obtaining a receivership order and the appointment of a second receiver and manager would confer no benefit on the second judgment creditor and would only inflict expense on the company.(*r*)

Evidence required in support of Application.

The only evidence required in support of an application under this fourth section by a judgment creditor for the appointment of a receiver and manager is an affidavit, that he is such a creditor and that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its business and conducting its own traffic in the ordinary way.(*s*)

Priority of Working Expenses.

The last portion of section 4 provides (as has been before stated) for the application and distribution of the money received by the receiver or receiver and manager after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking.

The words of this section clearly show, that the receiver and manager is to have full power of managing and carrying on the business of the company.(*t*)

Meaning of "Working Expenses".

Which expenses will come within the expression "working expenses or other proper outgoings" must be decided according to the circumstances of each particular case. Thus in a recent case, in which a railway company had purchased rolling stock on the terms of paying for it by a series of instalments at fixed times (such stock not becoming the property of the company until the complete payment of all the instalments), it was held that such instalments, as they became due, as well as overdue instalments were "working expenses" and were payable by the receiver and manager of the undertaking in priority to the holders of debenture stock charged on part of the undertaking.(*u*)

On the other hand, the costs incurred by a railway company (1) in defending an action by a contractor against the company to recover his commission and (2) in attending an arbitration were held not to be "proper outgoings in respect of the undertaking" within section 4; but the Court ordered the costs so incurred after the appointment of a receiver to be paid out of the moneys in the hands of the receiver in priority to the claims

(*r*) In re *Mersey Ry. Co.*, 37 Ch. Div. 610.

(*s*) *Manchester and Milford Ry. Co.*, 14 Ch. Div. 645.

(*t*) Ibid.

(*u*) In re *Eastern and Midland Ry. Co.*, 45 Ch. Div. 367; see also in re *Cornwall Minerals Ry. Co.*, 48 L. T. R. 41.

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of the debenture stock holders, such costs having been incurred for their benefit.(*v*)

Accounts and inquiries directed on Application under Section 4.

Applications under this fourth section are regulated by the General Orders of 2nd June, 1868,(*w*) which provide (Order 31) that every order appointing a receiver or manager under section 4 shall direct such accounts and inquiries as the Court may think fit for ascertaining the debts of the company and the rights and priorities of the persons interested in the moneys to come to the hands of such receiver and manager.

The priority of Debentures, Bonds and Debenture Stock issued by a Railway Company.

The following provision is made by the Railway Companies Act, 1867, for securing to the holders of mortgage debentures, bonds and debenture stock issued by a railway company priority over the other creditors of such company:—

Section 23: "All money borrowed or to be borrowed by a "company on mortgage or bond or debenture stock under the "provisions of any Act authorising the borrowing thereof shall "have priority against the company and the property from time "to time of the company over all other claims on account of any "debts incurred or engagements entered into by them after the "passing of this Act: provided always, that this priority shall "not affect any claim against the company in respect of any "rent charge granted or to be granted by them in pursuance of "the Lands Clauses Consolidation Act, 1845,(*x*) or the Lands "Clauses Consolidation Acts Amendment Act, 1860,(*y*) or in "respect of any rent or sum reserved by or payable under any "lease granted or made to the company by any person in "pursuance of any Act relating to the company which is entitled "to rank in priority to, or *pari passu* with the interest or "dividends on the mortgages, bonds, and debenture stock; nor "shall anything hereinbefore contained affect any claim for land "taken, used or occupied by the company for the purposes of "the railway, or injuriously affected by the construction thereof, "or by the exercise of any powers conferred on the company".

The effect of Section 23.

The moneys raised by a railway company by issuing mortgages, bonds or debenture stock do not by virtue of section 23 become a charge on the company's assets. The holders of such securities

(*v*) In re *Wrexham Mold and Connah's Quay Ry. Co.* (1900) 1 Ch. (C. A.) 261.

(*w*) As to which, see 3, Ch. XLII.

(*x*) 8 & 9 Vic., cap. 18. See *Eyton* v. *Denbigh, Ruthven, etc., Ry. Co.*, 7 Eq. 439.

(*y*) 23 & 24 Vic., cap. 106.

have indeed priority, but they only have priority in cases, in which the free assets of the company or free moneys released by the sale of the company's property are being distributed or administered with reference to priorities; hence it has been decided, that the holders of such securities are not entitled to payment out of the proceeds of sale of surplus lands in priority to the company's judgment creditor, on whose application the lands were sold. It has further been held, that section 23 does not give to creditors of a railway company in respect of mortgage debentures, bonds or debenture stock any specific lien or charge, which they did not possess before the Act.(*z*)

Section 23 may come into operation on the following occasions:—

"The first," says Lord Lindley (then L. J.),(*a*) "is when a receiver is obtained under section 4. The concluding words of that section state, that the receiver is to apply what he receives in payment of the creditors according to their priorities; and interest payable to the debenture-holders would, I apprehend, come before interest payable to other creditors. Another case is, when a railway company is being wound up under the joint operation of the Railway Companies Abandonment Act and the winding-up clauses of the Companies Act, 1862, which are applicable to railways, when they have first been abandoned. In such cases it is quite obvious, that section 23 has a most important application. The third case is, when arrangements have been made under schemes, which are provided for by this same Act of 1867, and certain consents have to be got. In working out these schemes attention must be paid to priorities, and then again, section 23 comes in and says what position the debenture-holders are to be considered as occupying."

Winding up of Railway Company.

Section 268 of the Companies Consolidation Act, 1908, which enables the Court to wind up unregistered companies, expressly excludes unregistered railway companies(*b*) incorporated by Act of Parliament from the operation of the section, and it would appear to be doubtful, whether a railway company incorporated by Act can be registered under the Companies Consolidation Act, 1908, and then wound up under the same Act.(*c*) An unregistered

(*z*) In re *Hull, Barnsley and West Riding Ry. Co.*, 40 Ch. Div. 119. See also re *Liskeard and Caradon Ry. Co.* (1903) 2 Ch. 681.

(*a*) 40 Ch. Div., 119, 131.

(*b*) For the purpose of this section, "railway company" only means a company, whose principal object is the construction of a railway. *Exmouth Docks Co.*, 17 Eq. 181.

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railway company may, however, be wound up under sec. 268 of the Companies Consolidation Act, 1908, if it is duly authorised to abandon the whole of its railway.(*d*)

Scheme of Arrangement of Railway Company.

Under the provisions of sections 6 to 22 of the Railway Companies Act, 1867, the directors of a railway company, which is unable to meet its engagements with its creditors, may prepare a scheme of arrangement between such company and its creditors. Prior to the date of this Act, such companies, if they desired to raise further capital to meet their engagements, were forced to go to Parliament for a Special Act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained, and Parliament, in dealing with such applications, was in the habit of considering, how far the arrangements proposed as to such new capital were assented to or dissented from by those, who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of sections 6 to 22 of the present Act, is to dispense with a special application to Parliament of the kind described, and to give a parliamentary sanction to a scheme filed in the Court of Chancery, and confirmed by that Court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem generis*.(*e*)

Under these sections of the Act, the directors of a railway company, which is unable to meet its engagements with its creditors, may prepare a scheme of arrangement between the company and its creditors and file the scheme (notice of which filing is to be published in the *London Gazette*, under section 8) with a declaration under the seal of the company stating, that it is unable to meet its engagements (section 6). After the filing of such scheme the Court may restrain any action against the company on such terms as the Court thinks fit (section 7). After such publication (as aforesaid) of such notice no execution, attachment or other process against the property of the company is available without the leave of the Court (section 9).

The Court may under sections 7 and 9 of this Act restrain proceedings by creditors or unpaid landowners during the

(*c*) Lindley, p. 835; this was, however, done in the case of *Ennis and W. Clare Ry. Co.*, 3 L. R. Ir. 94.

(*d*) 32 & 33 Vic., cap. 114, sec. 4.

(*e*) In re *Cambrian Railways Company's Scheme*, 3 Ch. 278, 294.

maturing of the scheme. This jurisdiction (as regards landowners) is not taken away by the provision in section 23 of the Act, that nothing "hereinbefore contained" shall affect the claims of landowners; the word "hereinbefore" in that section being (upon the true construction of the clause) not referable to all the preceding sections of the Act, but only to the preceding part of the same section. The Court will, however, not restrain proceedings by a creditor or unpaid landowner, unless the scheme makes reasonable provision for the payment of the claims of creditors and landowners.(*f*) Sections 7 and 9 of the Act give only an interim power to the Court with respect to proceedings taken by creditors between the date of the filing and enrolment of the scheme; for the power is given to the Court to enable the company to protect its property pending the scheme, if there is a reasonable expectation of obtaining the requisite assents. After the date of the enrolment the company cannot obtain an injunction either against general creditors or creditors bound by the scheme and after such date it is unnecessary for a judgment creditor to apply for leave to proceed with an execution.(*g*)

Assent by Debenture and Debenture Stock Holders to scheme.

Section 10: "The scheme shall be deemed to be assented "to by the holders of mortgages or bonds issued under the "authority of the company's special Acts, when it is assented to "in writing by three-fourths in value of the holders of such "mortgages or bonds, and shall be deemed to be assented "to by the holders of debenture stock of the company, when "it is assented in writing by three-fourths in value of the "holders of such stock".

The owner of debentures or debenture stock of a railway company may, even after he has got judgment against such company, be bound by the assent of the requisite majority of the holders of debentures or debenture stock to a scheme.(*h*)

Other assents.

Similar provisions are made by sections 11, 12 and 13 respectively enabling the holders of three-fourths in value of the rent charges, the guaranteed or preference shares and the ordinary shares of a railway company to bind the holders of the remaining one-fourth by their assent to such a scheme.

(*f*) In re *Cambrian Railways Company's Scheme*, ubi supra.

(*g*) *Potteries, Shrewsbury and N. Wales Ry. Co.*, 5 Ch. 67.

(*h*) *Potteries, Shrewsbury and N. Wales Railway Co.* v. *Minor*, 6 Ch. 621.

Assent of the leasing Company.

Section 14 of this Act provides, that, "where the company "preparing a scheme under this Act are lessees of a railway, the "scheme shall be deemed assented to by the leasing company, "when it is assented to as follows:—

"In writing by three-fourths in value of the holders of "mortgages, bonds, and debenture stock of the leasing com-"pany;

"If there is only one class of guaranteed or preference share-"holders of the leasing company, then in writing by three-fourths "in value of that class, and if there are more classes of guaranteed "or preference shareholders in the leasing company than one, "then in writing by three-fourths in value of each such class;

"By the ordinary shareholders of the leasing company at an "extraordinary general meeting of that company specially called "for that purpose."

Assents necessary.

Not one of these sections expressly states, that such assents are necessary, but it may be inferred, that such assents are necessary,(*i*) from the fact that section 15 of this Act provides, that the assent of any class of holders of the securities or shares above mentioned will not be requisite, in case the scheme does not prejudicially affect any right or interest of such class.

When a scheme is once assented to in writing by the necessary majority of each class, such scheme is binding on the minority, unless it can be shown, that the assent of the majority was obtained by fraud.(*j*)

Schemes which the Court will confirm.

Sections 16 to 18 provide for the confirmation by the Court and enrolment of the scheme.

On the assent of the different classes being given, the Court will generally confirm a scheme, which is beneficial to all parties. Thus the Court confirmed a scheme, under which the company was empowered to issue debenture stock to an amount in excess of their powers under their Act and to pay their creditors in such stock,(*k*) in another case the Irish Court confirmed a scheme to convert mortgages into irredeemable debenture stock.(*l*) The Court cannot, however, dispense with any of the prescribed assents and will decline to confirm any scheme,

(*i*) In re *Cambrian Railways Company's Scheme*, 3 Ch. 278, 284.

(*j*) In re *East and West Junction Railway Co.*, 3 Eq. 87.

(*k*) Re *Teign Valley Railway Co.*, 17 L. T. R. 201.

(*l*) Re *Irish North Western Railway Co.*, Ir. R. 2 Eq. 425.

if the necessary assents have not been previously obtained.(*m*) Neither can the Court sanction a scheme giving to the debenture stock holders of a railway company the privilege of voting at the meetings of the company; for section 31 of the Companies Clauses Act, 1863, expressly provides, that they shall not have such privilege.(*n*)

General creditors not bound by scheme.

A scheme of arrangement filed under this Act is only binding on those, who have actually assented or are deemed under the provisions of the Act to have assented to such scheme, but the general creditors of a railway company are not bound by the provisions (*o*) of or entitled to take any benefit under the provisions of such scheme.(*p*)

Though a general creditor is not bound by a scheme, he might nevertheless be injured by the passing of such scheme; hence he has a right to appear and oppose the scheme and, if his opposition is reasonable, the Court will not confirm the scheme.(*q*)

Persons advancing money and thereby enabling Company to pay interest on Debenture stock are not entitled to be subrogated to rights of stock holders.

Persons advancing money to a railway company and thereby enabling the company to pay the interest due in respect of its first issue of debenture stock are ordinary unsecured creditors and are not entitled as against the holders of a subsequent issue of debenture stock to be subrogated to the rights of the first debenture stock holders, whose interest has been paid as hereinbefore stated, and thus to obtain priority over the subsequent debenture stock holders.(*r*)

Where a scheme contains a clause attempting to bind general creditors, the Court will require the consent in writing of every such general creditor, before it confirms the scheme.(*s*)

Proceeds of sale of glebe lands may be invested in Railway Debenture stock.

The proceeds of sale of glebe lands may by virtue of section 4 (2) of the Glebe Lands Act, 1888, (*t*) be invested by the Board of Agriculture in the debenture stock of any railway company in

(*m*) In re *Neath and Brecon Railway Co.* (1892) 1 Ch. (C. A.) 349.

(*n*) In re *Stafford and Uttoxeter Railway Co.*, 41 L. J. Ch. 777, W. N. (1872) p. 165.

(*o*) In re *Cambrian Railways Scheme*, 3 Ch. 278; approved of in re *Bristol and North Somerset Railway Co.*, 6 Eq. 488; in re *East and West Indian Dock Co.*, 44 Ch. Div. 38.

(*p*) *Stevens* v. *Mid Hants Railway Co.*, 8 Ch. 1064.

(*q*) Re *Somerset and Dorset Railway Co.*, 18 W. R. 332.

(*r*) In re *Wrexham, Mold and Connah's Quay Ry. Co.* (1898) 2 Ch. 668; (1899) 1 Ch. (C. A.) 440.

(*s*) In re *Bristol and North Somerset Railway Co.*, 6 Eq. 448.

(*t*) 51 & 52 Vic., cap. 20.

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Great Britain or Ireland incorporated by Special Act of Parliament and having at least ten years next before the date of investment paid a dividend on its ordinary stock or shares. Such investment must be made in the name of the Ecclesiastical Commissioners.

Trustee's power to invest in railway Debenture stock.

The statutory power of trustees under the Trustees Act, 1893, to invest in the debenture stock of (i) railway companies in Great Britain and Ireland incorporated by special Act of Parliament, and (ii) railway companies in India the interest on which is guaranteed by the Secretary of State in Council of India is fully dealt with in an earlier part of this treatise.(*u*)

Debentures, Bonds and Debenture Stock issued by Indian Railway Companies.

Special provision is made by the Indian Railway Companies Act, 1868,(*v*) empowering the Great Indian Peninsula Railway Company,(*w*) the East Indian Railway Company, the Madras Railway Company, the Bombay, Baroda and Central Indian Railway Company and the Oude and Rohilkhand Railway Company respectively to raise all or any part of the money, which for the time being the company has raised or is authorised to raise on mortgage or bond, by the issue of debenture stock. Before such debenture stock is issued it is necessary to obtain the sanction of the Secretary of State in Council of India and of three-fifths of the votes of the shareholders and stockholders present in person or by proxy at an extraordinary meeting of the company summoned for the purpose. The debenture stock issued under the provisions of this Act may be irredeemable or redeemable and the interest be variable. The peculiar characteristic of the debenture stock issued under this Act (as distinguished from the debenture stock issued by public companies under the Companies Clauses Act, 1863,(*x*) and the Railway Companies Act, 1867 (*y*) is that such stock may be redeemable. With this exception the debenture stock issued under the Indian Railway Companies Act, 1868, is subject to the same provisions and confers the same rights on the holders as the debenture stock issued by the Companies Clauses Act, 1863. Section 2 of the Indian Railway Companies Act, 1868, substantially embodies (with the necessary

(*u*) See supra, Bk. I., ch. vii.

(*v*) 31 Vic., cap. 26.

(*w*) The East Indian Loan (Great Indian Peninsula Railway Debentures) Act, 1901 (1 Ed. VII., cap. 25) provides for the redemption of the debentures issued by the Great Indian Peninsula Railway Company

(*x*) See supra, Bk. III., ch. ii.

(*y*) As to which, see supra, Bk. III., ch. iii.

alterations to meet the case of redeemable debenture stock) sections, 23, 24, 28, 29, 30-34 of the Companies Clauses Act, 1863.(*z*)

Power of Secretary of State to issue Debentures for purposes of Indian railways.

The Secretary of State for India has power under the East India Loans (Railways) Act, 1905 (5 Edw. VII., cap. 19) to raise £20,000,000 by the creation and issue (*inter alia*) of debentures or bonds to be applied (*a*) in the construction, extension and equipment of railways in India, (*b*) in the repayment of the principal of any bonds or debentures issued by such company under the guarantee of the Secretary of State, or (*c*) in the discharge of any obligations incurred or arising by reason of the purchase by the Secretary of State of any railway in India or on the determination of the contract of any such company with the Secretary of State. In addition to the before mentioned power the Secretary of State for India has a further power under the East India Loans (Railways and Irrigation) Act, 1910 (10 Edw. VII., cap. 5) to raise £25,000,000 to be applied for one or more of the purposes hereinbefore mentioned and specified in the Act of 1905.

Stock Exchange rule as to India-Railway Debentures.

Bargains in Indian Railway Debentures made on the London Stock Exchange do not include accrued interest in the price (see Rule 118).

Bondholders of Canadian Railway may enforce their securities by sale of under taking.

It has been stated above, that mortgage debentures, bonds and debenture stock regulated by the Companies Clauses Consolidation Act, 1845, or by the Companies Clauses Act, 1863, and issued by a railway company incorporated by an English private Act of Parliament cannot be enforced by sale of the undertaking of the company.(*a*) But this law is not applicable to a railway company incorporated by an Ontario statute and it has accordingly been held,(*b*) that bonds secured by a mortgage on a railway, which was incorporated by an Ontario statute and declared by a Dominion statute to be a work for the general advantage of Canada, could be enforced by an order for sale of the railway in a suit by the trustees for the bond holders to enforce a mortgage and that such order could be made by virtue of sections 14, 15, 16 of the Dominion Act, 46 Vic., cap. 24, and re-enacted by the Dominion Railway Act, 1888 (51 Vic., cap. 29).

(*z*) As to which, see supra, Bk. III., ch. ii.

(*a*) See supra, p. 369.

(*b*) *Central Ontario Ry.* v. *Trusts & Guarantee Co.* (1905) A. C. 576.

CHAPTER IV.

THE NATURE OF DEBENTURES AND DEBENTURE STOCK ISSUED BY LOCAL AUTHORITIES, AND THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH SECURITIES.

Borrowing power of Local Authority regulated by Local Loans Act, 1875.

SUBJECT to any express provisions made by any special Act or Acts, the power of local authorities in England to raise money by the issue of debentures or debenture stock is regulated by, and the nature of such instruments and the remedies of the holders thereof are specified in, the Local Loans Act, 1875 (38 & 39 Vic., cap. 83),(*a*) and the Acts amending it.

Meaning of "Local Authority" within the Act.

A local authority is defined by section 34 of this Act as meaning "the justices of any county, liberty, riding, parts or "division of a county in general or quarter sessions assembled, "the council of any municipal borough, also any authority "whatsoever having power to levy a rate, as in this Act defined, "also any prescribed authority". Now, however, since the

Administrative business of County Justices now transferred to County Council.

administrative business of the justices of a county in quarter sessions assembled (including their borrowing power) has been transferred to the County Council by section 3 of the Local Government Act, 1888,(*b*) the County Council are the county authority for the purposes of the Local Loans Act. Section 69 (8) of the Local Government Act, 1888, expressly provides that, where a County Council are authorised to borrow money on loan, they may raise such loan by the issue of stock under the Local Government Act, 1888, or of debentures or annuity certificates under the Local Loans Act, 1875.

Purposes for which a County Council may exercise its borrowing powers.

Section 69 of the Local Government Act, 1888, specifies the purposes, for which a County Council are authorised to exercise their borrowing powers, and the limits of such borrowing powers. The section runs as follows:—

(*a*) This Act does not apply to Scotland or Ireland (sec. 2).

(*b*) 51 & 52 Vic., cap. 41.

Borrowing by County Council with the consent of the Local Government Board.

(1) "The County Council may from time to time, with the "consent of the Local Government Board, borrow, on the "security of the county fund, and of any revenues of the "Council, or on either such fund or revenues, or any part "of the revenues, such sums as may be required for the follow-"ing purposes, or any of them, that is to say:—

(*a*) "For consolidating the debts of the county; and

(*b*) "For purchasing any land or building any building, which "the Council are authorised by any Act to purchase or build; and

(*c*) "For any permanent work or other thing which the County "Council are authorised to execute or do and the cost of which "ought in the opinion of the Local Government Board to be "spread over a term of years; and

(*d*) "For making advances (which they are hereby authorised "to make) to any persons or bodies of persons, corporate or un-"incorporate, in aid of the emigration or colonisation of inhabi-"tants of the county, with a guarantee for repayment of such "advances from any local authority in the county, or the "Government of any colony; and

(*e*) "For any purpose for which quarter sessions or the County "Council are authorised by any Act to borrow, but neither the "transfer of powers by this Act nor anything else in this Act "shall confer on the County Council any power to borrow "without the consent above mentioned, and that consent shall "dispense with the necessity of obtaining any other consent "which may be required by the Acts relating to such borrowing, "and the Local Government Board, before giving their consent, "shall take into consideration any representation made by any "ratepayer or owner of property rated to the county fund.

(2) "Provided that where the total debt of the County Council, "after deducting the amount of any sinking fund, exceeds or, if "the proposed loan is borrowed, will exceed the amount of one-"tenth of the annual rateable value of the rateable property in "the county, ascertained according to the standard or basis for "the county rate, the amount shall not be borrowed except in "pursuance of a provisional order made by the Local Govern-"ment Board and confirmed by Parliament.

Borrowing by county Council without the Consent of the Local Govern-ment Board.

(3) "A County Council may also from time to time, without "any consent of the Local Government Board, during the period, "which was fixed for the discharge of any loan raised by them

"under this Act or transferred to them by this Act, borrow on "the like security such amount as may be required for the "purpose of paying off the whole or any part of such loan, or if "any part of such loan has been repaid otherwise than by capital "money for re-borrowing the amount so repaid, and for the "purpose of this section 'capital money' includes any instal- "ments, annual appropriations and sinking fund and the proceeds "of the sale of land or other property, but does not include "money previously borrowed for the purpose of repaying a loan.

(4) "All money re-borrowed shall be repaid within the "period fixed for the discharge of the original loan, and every "loan for re-borrowing shall for the purpose of the ultimate dis- "charge be deemed to form part of the same loan as the original "loan, and the obligations of the Council with respect to the "discharge of the original loan shall not be in any way affected "by means of the re-borrowing.

(5) "A loan under this section shall be repaid within such "period, not exceeding thirty years, as the County Council with the "consent of the Local Government Board, determine in each case.

(6) "The County Council shall pay off every loan either by "equal yearly or half-yearly instalments of principal, or of "principal and interest combined, or by means of a sinking fund "set apart, invested and applied in accordance with the Local "Loans Act, 1875, and the Acts amending the same.

(7) "Where a loan is raised for any special county purpose, "the Council shall take care that the sums payable in respect of "the loan are charged to the special account to which the "expenditure for that purpose is chargeable.

(8) "Where the County Council are authorised to borrow any "money on loan, they may raise such money either as one loan "or several loans, and either by stock issued under this Act or "by debentures or annuity certificates(*c*) under the Local Loans "Act, 1875, and the Acts amending the same or, if special "reasons exist for so borrowing, by mortgage in accordance with "sections 236 and 237 of the Public Health Act, 1875.

(9) "Provided that, where a County Council have borrowed "by means of stock, they shall not borrow by way of mortgage "except for a period not exceeding five years.

(*c*) It will be observed, that this section does not authorise a County Council to issue debenture stock.

(10) "Where the County Council borrow by debentures, "such debentures may be for any amount not less than five "pounds.

(11) "The provisions of this section which authorise advances "in aid of the emigration or colonisation of inhabitants of the "county and borrowing for these advances, except the provisions "respecting the total debt, shall extend to the Councils of "boroughs mentioned in the third schedule to this Act.

(12) "Nothing in this section shall be taken to empower the "Cheshire County Council to borrow on the security of any "revenue estimated to accrue from the surplus funds of the "River Weaver Navigation."

A Parish Council would appear to be a "local authority" for the purposes of the Local Loans Act, 1875, for a Parish Council (having power under section 11 of the Local Government Act, 1894,(*d*) to issue a demand note for the payment of their expenses out of the poor rate) is an "authority having power to levy a rate" (the expression to "levy a rate" being defined by section 34 of the Local Loans Act, 1875, as meaning to issue and enforce a precept, certificate or other document requiring payment from some authority or officer).(*e*)

A Parish Council is a "Local Authority" for the purposes of Local Loans Act, 1875.

The provisions of the Local Loans Act, 1875, relating to the issue and to the nature of debentures and debenture stock issued under this Act and to the remedies of the holders of such securities are dealt with in this chapter.

Section 31: "Any local authority, notwithstanding any "provision in any other Act passed before the Local Loans "Act, 1875 (which came into operation on the 1st of January, "1876), may, if it thinks fit, borrow in manner provided by "this Act any loan which it is authorised to borrow. Any "local authority may from time to time in like manner re-borrow "money for the purpose of discharging any loan lawfully con-"tracted by them, provided that the time for repayment of "any money so borrowed shall not be extended beyond the "unexpired portion of the term, for which the original loan was "contracted, unless with the sanction of the Local Government "Board, and in no case shall be extended beyond the prescribed "period".

Borrowing and re-borrowing by Local Authorities under the provisions of the Local Loans Act, 1875.

(*d*) 56 & 57 Vic., cap. 73.

(*e*) See Macmorran's Local Government Act, 1894, p. 88.

When money borrowed by a Local Authority may be secured as provided by the Local Loans Act, 1875.

A County Council is (as has been stated above) expressly authorised by the Local Government Act, 1888, to issue debentures subject to the provisions of the Local Loans Act, 1875. But any local authority, as above defined, may borrow in the manner provided by the Local Loans Act, 1875, any money, which it is authorised to raise, even though no express authority is given to it to issue debentures or debenture stock under this Act. Hence, whenever any local authority has obtained the leave of the Local Government Board under section 233 of the Public Health Act, 1875,(*f*) to borrow or re-borrow money for defraying any costs, charges or expenses incurred in or to be incurred by them in the execution of the sanitary Acts or of the Public Health Act, 1875, or for the purpose of discharging any loans contracted under any of such Acts, the money so borrowed or re-borrowed may be secured in the manner provided by and subject to the provisions of the Local Loans Act, 1875.

Money borrowed for purposes of Public Health Act, 1875.

Moneys borrowed by a Parish Council for purposes of Local Government Act, 1894.

In the same way a Parish Council, coming (as is stated above) within the definition of a local authority for the purposes of the Local Loans Act, 1875, may, on obtaining the consent of the County Council and of the Local Government Board, issue debentures or debenture stock subject to the provisions of this Act to secure moneys, which a Parish Council is authorised to borrow for the purposes set forth in section 12 of the Local Government Act, 1894.(*g*) This section provides as follows:—

Purposes for which a Parish Council may exercise its borrowing powers.

(1) "A Parish Council for any of the following purposes, "that is to say:—

(*a*) "For purchasing any land or building any buildings, "which the Council are authorised to purchase or build; and

(*b*) "For any purpose for which the Council are authorised "to borrow under any of the adoptive Acts;(*h*) and

(*c*) "For any permanent work or other thing which the "Council are authorised to execute or do, and the cost of

(*f*) 38 & 39 Vic., cap. 55.

(*g*) 56 & 57 Vic., cap. 73.

(*h*) The adoptive Acts are (sec. 7) (*a*) the Lighting and Watching Act, 1833 (3 & 4 Will. IV., cap. 90); (*b*) the Baths and Washhouses Acts, 1846 to 1882 (8 & 9 Vic., cap. 74 to 45 & 46 Vic., cap. 30); (*c*) the Burial Acts, 1852 to 1885 (15 & 16 Vic., cap. 85 to 48 & 49 Vic., cap. 21); (*d*) the Public Improvements Act, 1860 (23 & 24 Vic., cap. 30); and (*e*) the Public Libraries Act, 1894 (55 & 56 Vic., cap. 53).

"which ought, in the opinion of the County Council and the "Local Government Board, to be spread over a term of years; "may, with the consent of the County Council and the Local "Government Board, borrow money in like manner and subject "to the like conditions as a local authority may borrow for "defraying expenses incurred in the execution of the Public "Health Acts and sections 233, 234 and 236 to 239 of the "Public Health Act, 1875, shall apply accordingly, except "that the money shall be borrowed on the security of the "poor rate and of the whole or part of the revenues of the "Parish Council, and except that as respects the limit of "the sum to be borrowed, one-half of the assessable value shall "be substituted for the assessable value for two years."

"Prescribed period" for repayment.

The last words of section 31 of the Local Loans Act, 1875, provide, that the time for the repayment of the moneys borrowed or re-borrowed and secured in the manner specified by this Act shall not be extended beyond the prescribed period. Hence debentures or debenture stock issued to secure the repayment of moneys to be borrowed under the provisions of the Public Health Act, 1875, should not be made repayable more than sixty years from the date of the issue (sec. 234 (4)); where such securities are issued for the purpose of discharging a previous loan, the time fixed for the repayment should not extend beyond the unexpired portion of the period, for which the previous loan was sanctioned, but in no case is such time to be extended beyond the period of sixty years from the date of the previous loan (sec. 234 (6)).

The prescribed period, beyond which the repayment of a sum secured by a debenture, which is issued by a County Council, may not be extended, is thirty years.(*i*)

A local authority should, before issuing any debentures or debenture stock, deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue.(*j*)

The Local Loans Act, 1875, makes the following provisions with reference to the debentures and debenture stock issued under it:—

Definition of Borrowing under the Act.

Section 4: "A local authority shall be deemed to borrow "subject to the provisions of this Act, whenever it raises a loan

(*i*) 51 & 52 Vic., cap. 41, sec. 69 (5). (*j*) 62 & 63 Vic., cap. 9, sec. 8.

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"by the issue of debentures or debenture stock or annuity "certificates, purporting to be created under its powers, or partly "in one way and partly in another; subject to this proviso, that "where a loan is directed to be raised by debentures or debenture "stock or annuity certificates under this Act, the prescribed "mode only shall be adopted".

Nature of and regulations as to Debentures under this Act.

Section 5: "A debenture under this Act shall be an instrument "taking effect as a deed, and charging the local rate or property "in such debenture specified with payment, as in the debenture "mentioned, of the principal sum and interest therein specified.

"Where a debenture under this Act charges property other "than the local rate, and it is intended that in default of pay- "ment of the principal sum due on such debenture, or of the "interest thereon, the property is to be sold, a statement to that "effect shall be inserted in the debenture.

"The principal sum may be made payable to the bearer of "the debenture, or to a person to be named therein, his executors, "administrators or assigns.

"A debenture in which the principal sum is made payable "to the bearer shall be transferable by delivery.(*k*)

"A debenture in which the principal sum is made payable to a "person named therein, his executors, administrators or assigns, is "in this Act referred to as a nominal debenture, and shall be trans- "ferable by writing in manner directed by the local authority.(*l*)

"There may be attached to a debenture under this Act, or "be thereafter issued in respect thereof, or partly in one way "and partly in the other, coupons making the interest as therein "mentioned payable to the bearer of each coupon, or to the "person named in each coupon or his order, or the interest on "a debenture may be made payable to the owner for the time "being of such debenture, or may be otherwise made payable in "such manner as in the said debenture mentioned.

"A coupon making the interest therein mentioned payable "to the person named therein or to his order is in this Act "referred to as a coupon payable to order.

(*k*) For the meaning of the expression transferable by delivery, see infra the remarks on section 6 of this Act.

(*l*) A local authority issuing securities may by virtue of the Forged Transfers Acts, 1891 and 1892 (54 & 55 Vic., cap. 43, and 55 & 56 Vic., cap. 36), make compensation out of its funds for any loss caused by a forged transfer of such securities. For a Form of a nominal debenture issued under this Act, see Appendix, Forms 76 and 77.

"A debenture under this Act shall not be issued for a less "sum than the prescribed(*m*) sum, or, where no sum is prescribed, "than twenty pounds."

Nature of and regulations as to Debenture Stock under this Act.

Section 6: "A debenture stock may be created and issued "by a local authority having power to raise a loan or any part "thereof by the issue of debenture stock. Such debenture "stock shall be of a nominal amount, not exceeding the amount "of money authorised to be raised by such stock, and shall, "unless otherwise provided by the conditions of issue, be redeem-"able at par at the option of the local authority at such times "and upon such conditions as the local authority may declare at "the time of the issue thereof.

"The title of any person to any share in debenture stock "shall be evidenced by the entry in the register as in this Act "mentioned of the name of such person as owner of such share.

"Debenture stock shall bear such rate of interest, to be "payable at such times as the local authority may declare at "the time of issue of the stock.

"Debenture stock and the interest thereon shall be a charge "on the local rate or property specified at the time of the issue "thereof, in the same manner as if it were a principal sum and "interest charged thereon by deed.

"Where debenture stock and the interest thereon is a charge "on property other than the local rate, and it is intended that "in default of the payment of the interest thereon, or for the "purpose of raising the money required for the redemption of "the stock, the property is to be sold, a declaration to that "effect shall be made by the local authority at the time of the "issue of the stock, and shall be deemed to form one of the "conditions of such issue.

"Debenture stock shall have all the incidents of personal "estate,(*n*) and shall, subject to the provisions of this Act, "be transferable by writing in manner directed by the local "authority.

(*m*) The minimum value of debentures issued by a County Council is £5 (see 51 & 52 Vic., cap. 41, sec. 69 (10)).

(*n*) Debenture stock, which was charged on the rates and the revenue of all landed and other property of a local authority and which was distributable, transmissible and transferable as and was in other respects to have the incidents of personal estate, has been held not to be an interest in land within the Mortmain Act (9 Geo. II., cap. 36, sec. 3). In re *Pickard, Elmsley* v. *Mitchell* (1894), 2 Ch. 88, (1894) 3 Ch. (C. A.) 704; see supra, Bk. I., ch. vi., sec. iv.

"The interest on any share of debenture stock shall be "recoverable by the owner of such share in the same manner in "all respects as if such interests were an annuity of like amount "secured to him by an annuity certificate under this Act.

"The owner of any share in debenture stock shall not be en- "titled to require payment of the nominal amount of stock held "by him, except at the time and upon the conditions declared "by the local authority at the time of the issue of such stock.

"The conditions of issue of debenture stock shall be declared "by the local authority at the time of such issue, and a printed "copy of such conditions shall be supplied to every owner of "debenture stock requiring the same, and shall be entered in the "register of such stock.

"The local authority may, if it thinks fit, on the application "of the owner of any share in debenture stock, grant to him a "certificate of title to his share in such stock, or any part of "such share, with coupons attached entitling the bearer of the "coupons to the interest on the share or part of a share specified "in such certificate.

"A certificate of title to a share in debenture stock under "this section (in this Act called a stock certificate to bearer)(*o*) "shall entitle the bearer to the stock therein described, and to "the interest thereon, and shall be transferable by delivery.

"Any share in stock in respect of which a stock certificate to "bearer has been issued, shall so long as such certificate is out- "standing, cease to be dealt with through the medium of the "register.(*p*)

"Debenture stock, in respect of which a stock certificate to "bearer has not been issued, is in this Act referred to as nominal "debenture stock."

Which Local Authorities may issue Debenture Stock under this Act.

The first paragraph of section 6 would appear (notwithstanding section 31 of this Act) to restrict the power to issue debenture stock under this Act to local authorities, which are expressly authorised by their special Act or Acts to issue debenture stock.

(*o*) The expression stock certificate to bearer used in sections 108 and 109 and in the schedule of the Stamp Act, 1891, includes debenture stock certificates issued under the provisions of the Local Loans Act, 1875. As to the stamp duties payable on stock certificates to bearer, see supra, Bk. I., ch. ii., sec. iv.

(*p*) The bearer of a debenture stock certificate to bearer may (sec. 20 of this Act) convert his debenture stock to nominal debenture stock.

"Transferable by delivery."

Sections 5 and 6 of this Act respectively state, that a debenture to bearer and a debenture stock certificate to bearer issued under the provisions of this Act shall be "transferable by delivery". This expression is open to two constructions: it may mean (1) that the true owner of such securities can transfer them by delivery without executing a written transfer or (2) that any holder (even if he is not the true holder) of such securities can give a good title thereto by delivering them to a *bonâ fide* purchaser for value without notice (that is to say, that such securities are negotiable instruments).(*q*)

It is manifest, on the one hand, that the object of making these securities "transferable by delivery" was to facilitate the transfer thereof and that the latter construction of the expression "transferable by delivery" would be more favourable to this object than the former construction would be. It must, on the other hand, be borne in mind, that there is no indication of any intention on the part of the legislature, that certain incidents, which are invariably attached to negotiable instruments, should be attached to the debentures and debenture stock certificates issued under this Act (*e.g.*, that a *bonâ fide* purchaser for value of such instruments from a thief should have a good title thereto as against the true owner, from whom they were stolen). It should further be stated, that the term negotiable was well known at the time of the passing of the Local Loans Act, 1875, and that it is not apparent, why this term should not have been used, if it was the intention of the Act to render such securities negotiable in the full sense of the word.

There is a well-known instance of an Act of Parliament,(*r*) which has generally been construed as rendering certain instruments (bonds) issued by a corporation (the East India Company) negotiable.(*s*) But it will be found, on referring to 51 Geo. III., cap. 64, sec. 4, that the Act does not merely state, that the bonds shall be "transferable by delivery," but also provides, that such bonds shall be absolutely vested as well in law as in equity in the person, to whom the same should be so transferred (*i.e.*, by delivery), and that such person, his executors, administrators or assigns might maintain his

(*q*) As to the nature of negotiable instruments, see supra, Bk. I., ch. vi., sec. ii. (1).

(*r*) 51 Geo. III., cap. 64, sec. 4.

(*s*) See 1 Sm. L. C. (9th ed.), 504.

or their action for the principal and interest secured thereby in like manner as the obligee named in such bond might maintain an action thereon.

Assuming that 51 Geo. III., cap. 64, has been correctly interpreted as rendering East India bonds negotiable, it would nevertheless not be safe to assume, that debentures and debenture stock certificates to bearer issued under the Local Loans Act, 1875 (which simply states, that such instruments shall be transferable by delivery), may be treated as negotiable instruments.

It may here be mentioned, that the expression "transferable by delivery" used in the Local Authorities Loans (Scotland) Act, 1891 (54 & 55 Vic., cap. 34, sec. 41 (1) and (13), with reference to stock certificates issued by Scotch local authorities under that Act appears to be treated in the Act as equivalent to negotiable.

Priority of loans.

Section 8: "All sums for the time being due or authorised "to be raised on or in respect of any securities issued in respect "of the same loan by a local authority under this Act shall "be paid without any preference the one over the other by "reason of the priority of date of any such securities.

"Where more than one loan has been raised under this "Act by the same local authority, the sums for the time being "due or authorised to be raised on or in respect of any securities "issued in respect of each loan shall take priority according "to the date of such loan.

"Where any sum of money is authorised to be borrowed "in manner provided by this Act, such sum may, unless it is "otherwise prescribed, be raised under this Act as one loan "or several loans, as may be deemed most convenient by the "borrowing authority, so that the aggregate amount authorised "to be borrowed be not exceeded.

"The date of each loan shall, with a view to the priority "of the loan and to the period within which such loan is to "be discharged, and for the other purposes of this Act, so "far as relates to that period, be fixed by the local authority, "and may be so fixed irrespectively of the dates of the "particular securities issued in respect of such loan, so that "the period within which the loan is required to be discharged "be not exceeded."

The local authority will not receive notice of any trust in respect of any security issued by such authority under this Act (section 9).

Notice of trusts not receivable.

Persons receiving any security under this Act to secure moneys advanced by them to a local authority are not bound to inquire into the application of such money (section 10).

Remedy by *mandamus* for non-payment of money.

Section 11: "The local authority shall pay or raise all "sums for the time being due or authorised to be raised on "or in respect of any security issued by them under this Act "and, if default is made in payment of any sum so due, such "sum shall be deemed to be a specialty debt due to the person "entitled thereto from the local authority of such a nature "that a *mandamus* will be granted to enforce the payment "thereof; and an action may be brought accordingly, in which "a *mandamus* may be claimed".(*t*)

Remedy by appointment of Receiver for non-payment of money.

Section 12: "Where a local authority makes default for "a period of twenty-one days in paying an amount of not less "than five hundred pounds (whether in one sum or separate "sums) for the time being due on or in respect of any security "issued under this Act, the persons entitled to the said amount, "or any of such persons, may, instead of or in addition to "bringing an action or actions, apply to the County Court "for the appointment of a receiver, and any receiver so appointed "(subject to any direction, which may be given by the Court) "shall from time to time raise, as hereinafter mentioned, by "or out of the local rate or property charged, sufficient money "to pay the amount, the payment of which is so in default, "and all sums due while he is receiver on or in respect of any "such security, together with all costs, charges and expenses "incurred in or about the appointment of such receiver and "the execution of his duties under this section, including a "proper remuneration for his trouble, and shall render to the "defaulting authority the balance, if any, remaining in his hands "after making the said payments.

(*t*) The Court held before the passing of this Act, that the holders of debentures issued by a corporation under its Special Act and charged on its rates could enforce payment of the interest due in respect of such debentures by *mandamus* directing the proceeds of the rates to be applied in satisfaction of such interest or, if necessary, by a *mandamus* directing a rate to be levied for the express purpose of paying such interest. *Webb* v. *Herne Bay Commissioners*, L. R., 5 Q. B. 642.

"Where the amount so due or authorised to be raised is "charged on the local rate, the receiver may raise the money "he is authorised to raise under this section by means of the "local rate, and for that purpose shall have the same power "as the defaulting authority of levying the local rate and the "receiver shall have such access to and use of the documents "of the defaulting authority relative to the local rate as he "may require.

"Where the amount so due or authorised to be raised is "charged on any property, other than the local rate, the receiver "may raise the sum which he is authorised to raise under this "section by receipt of the rents and profits of the property, "and if the security involves a power of sale, as in this Act "mentioned, by sale of the property in such manner and subject "to such conditions of sale and otherwise as the Court may "direct.

Appointment of Receiver by the County Court.

"A County Court may appoint a receiver under this section "with respect to any local rate levied, or any property situate "wholly or partly within the jurisdiction of such Court, and "may remove such receiver and appoint another in his stead, "and so from time to time; and may make such orders and "give such directions as to the powers and duties of the receiver, "and otherwise as to the disposal of the moneys received by "him, as may be thought fit for carrying this section into "effect."

Application to County Court for Receiver.

An application under this section in the County Court for the appointment of a receiver will be made by petition and the same procedure will be followed and the same fees be paid and costs be allowed as on any other petition to the Court, in which the subject matter of the petition exceeds £100. The Court, to which such petition will be presented, will be the Court of the district, in which the local authority exercises its authority.(*u*)

How moneys borrowed under this Act are to be discharged.

Section 13: "Every loan borrowed in manner provided "by the Act shall be discharged within the prescribed period(*v*) "from the date thereof, and, if no period is prescribed within

(*u*) See County Court Rules, 1903, Or. L. rr. 6 and 8.

(*v*) The period prescribed by the Public Health Act, 1875 (38 & 39 Vic., cap. 55, sec. 234 (4)), is sixty years, and the period prescribed by the Local Government Act, 1888 (51 & 52 Vic., cap. 41, sec. 69 (5)), is thirty years.

"the period of twenty years from the date thereof, which period "of twenty years shall for the purposes of this Act be included "under the term 'prescribed period' and such discharge shall "be secured by one or more of the following methods; that "is to say:—

"By the issue of annuity certificates limited to expire within "the prescribed period; or,

"By the issue of debentures made payable in such a manner "that in each year such number of debentures will become "due and be paid off as will secure the repayment of the whole "sum secured by such debentures by equal annual instalments "extending over the whole of the prescribed period, or ove "a less time than the prescribed period; or,

"By the annual appropriation, as in this Act mentioned, "of a fixed sum to the discharge of a certain portion of such "loan; or,

"By the establishment of a sinking fund and the application "thereof in the manner in this Act mentioned, notwithstanding "that a sinking fund may not have been prescribed by the "Special Act authorising the loan."(*w*)

Discharge of loan by appropriation of annual sum.

Section 14: "Where a fixed annual sum is appropriated "to the discharge of a loan, or part of a loan, the local authority "shall raise in every year an equal sum of money of such "amount as will, at or before the expiration of the prescribed "period, pay off the whole of such loan or part of a loan, "and the interest thereon. The local authority shall in each "year pay out of such fixed sum the interest due on the loan "or part of a loan during the current year, and appropriate "the residue of such sum, in the case of money borrowed "on debentures, to the payment off of a corresponding amount "of the principal sum secured by such debentures, and in the "case of money borrowed by the issue of debenture stock "to the redemption of a corresponding amount of such stock.

"The debentures or portion of debenture stock to be paid "off in every year shall be ascertained in such manner as "may have been fixed at the time of the issue of the debentures "or debenture stock, or may thereafter have been arranged. "Where the debentures or portion of debenture stock to be paid

(*w*) See 48 & 49 Vic., cap. 30, sec. 4.

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"off are or is determined by lot, the lots shall be drawn in "presence of the local authority, and any owners of debenture "or debenture stock who choose to be present; the local "authority shall cause not less than one month's previous "notice of the time and place at which lots are to be drawn "to be given by advertisement, published once at the least "in each of four successive weeks in some newspaper cir- "culating in the district within which the local authority has "jurisdiction.

"Any fractional sum remaining of such residue as aforesaid, "after payment of the debentures or debenture stock, payable "as aforesaid, shall be carried to the credit of the annual sum "to be raised in the ensuing year. All expenses incurred "by the local authority in respect of any drawings by lot "or otherwise in respect of the discharge of a loan shall be paid "out of the current revenue of the local authority."

Discharge of loan by sinking fund.

Section 15: "Where a sinking fund is prescribed for any "loan or part of a loan, the local authority shall create a sinking "fund as hereinafter mentioned; that is to say:—

(1) "Such equal yearly or half-yearly sums shall be paid "into the sinking fund in each year as, being accumulated "at compound interest at the prescribed rate or, if no rate "is prescribed, at such rate as in the opinion of the local "authority (regard being had to the securities in which they "are authorised to make investments) will at the expiration "of some period not longer than the prescribed period, be "sufficient, after payment of all expenses, to discharge such loan "or part of a loan; and,

(2) "The first of such payments shall be made within one "year from the date of the loan; and,

(3) "All sums paid into the sinking fund shall be, as soon "as may be, invested by the local authority in the prescribed "manner and, if no manner is prescribed, or if, a manner hav- "ing been prescribed, the Local Government Board shall assent, "in securities in which trustees are by law for the time being "authorised to invest, or in debentures, debenture stock, or "annuity certificates issued under this Act, and any such in- "vestments may be from time to time varied or transposed, "and all dividends and other annual sums received in respect "of such investments shall, as soon as may be after they are

"received, be paid into the sinking fund and invested by the "local authority in like manner; and,

(4) "The local authority may from time to time apply the "sinking fund or any part thereof in or towards the discharge of "the loan or part of a loan for which it was created, and until "such loan or part is wholly discharged shall not apply the "same for any other purpose;

(5) "The debentures or portion of debenture stock, to the "payment of which such sinking fund is for the time being "applicable, shall be ascertained in such manner as may have "been fixed at the time of the issue of the debentures or deben-"ture stock or may thereafter have been arranged. Where the "debentures or portion of debenture stock to be paid off are or "is to be determined by lot, the lots shall be drawn and notice "shall be given in manner hereinbefore in this Act mentioned.

(6) "Any surplus of the sinking fund remaining after the "discharge of the loan or part of a loan, for the discharge of "which it was created, shall be paid into some other sinking "fund under the control of the local authority, or, if there is no "such fund, shall be applied to any purpose, to which such loan "is applicable, or otherwise, as the local authority may, with the "assent of the Local Government Board, think expedient;

(7) "Where any part of the sinking fund is invested in any "securities of the local authority, or is applied in paying off any "part of the loan before the prescribed period, the interest which "would otherwise be payable on such securities or on such part "of the loan shall be paid into the sinking fund and invested in "manner provided by this Act;

(8) "If the annual income of the sinking fund is not less than "the annual interest payable on so much of the loan or part of "the loan in respect of which it was created as remains undis-"charged, the equal annual sums required by this section to be "paid into the sinking fund may cease to be so paid."

Section 16 provides for an annual return as to the sinking fund to be made to the Local Government Board.(*x*)

Section 17: "Coupons in respect of any debenture or stock "certificate to bearer under this Act may be issued comprising "the interest payable during the whole period of years for which

Issue of coupons.

(*x*) Such return should be made in the form prescribed by a General Order of the Board of the 14th of November, 1878.

"the debenture or stock certificate is in force, or any less period, "and at the expiration of any such less period fresh coupons "may be issued in respect of the debenture or stock certificate, "or such debenture or stock certificate may be exchanged for "another debenture or stock certificate with coupons for a further "period".(*y*)

Endorsement and crossing of coupons.

Section 18: "A coupon payable to order, which when "presented for payment purports to be endorsed by the person "named therein, shall be a sufficient authority to the person "paying the money to pay the amount due in respect of such "coupon to the bearer thereof, and it shall not be incumbent on "the person paying such coupon to prove that such endorsement "or any subsequent endorsement was made by or under the "direction or authority of the person who is named in the "coupon, or to whom the coupon was made payable by any "endorser.

"Where a coupon bears across its face an addition in written, "printed or stamped letters of the name of any banker or of "the words 'and company' in full or abbreviated between two "transverse lines, such addition shall be deemed to be a "material part of the coupon, and have the force of a direction "to the person by whom such coupon is to be paid that the same "is to be paid only to or through the banker named, or, if none "is so named, to or through some banker, and the same shall "be payable only to or through the banker named or some "banker."

Coupons issued under this Act to be deemed to be attached to security.

Section 19: "Any coupons issued in respect of any debenture "or stock certificate to bearer under this Act shall for the "purpose of the Acts relating to stamp duties be deemed to have "been attached to and issued with such security".(*z*)

Conversion of Debenture Stock Certificate to bearer into nominal Debenture Stock.

Section 20: "The bearer of a stock certificate to bearer may, "on delivery to the local authority of his certificate and of all "unpaid coupons belonging thereto, require the local authority "to enter him in the register of the local authority as an owner "of the share of stock described in the stock certificate to "bearer, and thereupon that stock shall become nominal de-

(*y*) Local authorities have power under section 30 of this Act to make rules as to the issue of coupons.

(*z*) All coupons for interest on marketable securities are now exempted from stamp duty, whether they are issued with or subsequently to the security; see 54 & 55 Vic., cap. 39, Schedule "Bill of Exchange," 57 & 58 Vic., cap. 30, sec. 40.

"benture stock and the interest thereon shall be payable as if no "stock certificate to bearer had been issued in respect of that "share of stock".

Execution and supply of securities under this Act.

Section 22: "Every debenture, stock certificate to bearer, "and annuity certificate under this Act shall be deemed to be "well executed, if under the common seal of the local authority, "where that authority is a body corporate, and if signed by two "or more members of the local authority, where the local "authority is not a body corporate, or if otherwise executed in "such manner as the Local Government Board may direct on "the application of any local authority, whether corporate or "unincorporate.

"The Commissioners of Inland Revenue may, when required "by any local authority, and on payment of such sum as may, "with the sanction of the treasury, be agreed upon, supply such "authority with debentures, stock certificates to bearer, coupons, "and annuity certificates under this Act in such form and of "such materials as the local authority may direct."

Register of nominal securities.

Section 23: "The local authority issuing nominal debentures, "nominal debenture stock, or nominal annuity certificates under "this Act, shall cause a register of such securities to be kept "in one or more book or books, and there shall be entered "in such register:—

(1) "The names and addresses and the descriptions of the "owners for the time being of every such security, with a state- "ment of the securities held by each person registered; and

(2) "The date at which the name of any person was entered "in the register in respect of any such security.

"The register under this section shall be evidence of any "matters by this Act directed or authorised to be inserted "therein."

This register is open to the inspection of any person on payment of a fee not exceeding one shilling (sec. 24).

Rectification of register.

Section 25: "If the name of any person is without sufficient "cause entered in or omitted from the register, or if default "is made or unnecessary delay takes place in making any entry "in such register, the person aggrieved or the local authority "may apply to the Court for an order that the register may "be rectified.

"The Court may either refuse the application with or without

"costs to be paid by the applicant, or may, if satisfied of "the justice of the case, whether there has or has not been any "default on the part of the registrar, make an order for the "rectification of the register, and make such order as to the "payment of the costs of the application or of damages to "the person aggrieved as to the Court may seem just.

"The Court may, in any proceeding under this section, "decide any question relating to the title of any party to such "proceeding to have his name entered in or omitted from the "register, and generally any question which it may be necessary "or expedient to decide for the rectification of the register.

"The Court for the purposes of this section means any "of Her Majesty's Superior Courts of Law or Equity, or any "Court to which the jurisdiction of such Courts may be trans-"ferred, and, where the value of any security or securities to "which the application relates does not exceed £50, shall "include a County Court and this jurisdiction by this Act "given to a Superior Court may be exercised in a summary "manner by a judge or judges of such Court sitting in Chambers "or otherwise."

Proceedings for rectification in the County Court.

When the proceedings under this section are taken in a County Court, the application should be made by petition to the Court of the district, in which the local authority exercises its authority, and the same procedure should be followed and the same fees will be paid and the same costs be allowed as in any other petition to the County Court, in which the subject matter of the petition exceeds £20 and does not exceed £100.(*a*)

Issue of securities under sanction of Local Government Board.

Section 26: "Any local authority about to raise a loan "by the issue of any securities under this Act may apply to "the Local Government Board to authorise the issue of such "securities under official sanction.

"The Local Government Board, before granting their official "sanction to such issue, shall require the local authority to "furnish in such form, and with such particulars, and supported "by such evidence as the Local Government Board may require, "such returns of the financial condition of such authority "and borrowing powers of such authority and of the indebted-

(*a*) See County Court Rules, 1903, Or. L. rr. 6 to 8.

"ness of such authority, whether incurred before or after the "passing of this Act, and such other particulars as will enable "the Local Government Board to ascertain the facts required "by this section to be stated in relation to such issue, and "the Local Government Board may make such examination "or inquiries for ascertaining the said matters and the accuracy "of such returns as they may think expedient, and they shall "not give their sanction, unless they are satisfied with the "information given and the result of the inquiries made.

"The issue of any securities under official sanction shall be "authenticated by an official stamp on such securities or other- "wise as the Local Government Board may from time to time "direct.

"The sanction of the Local Government Board given in "respect of any securities shall be conclusive evidence that the "local authority, by whom such securities may be issued, had "power to issue the same, and that the same had been duly "issued, and are as to form and otherwise in conformity with "this Act.

"The owner of any security issued under official sanction "shall on request made by him to the Local Government Board "be furnished with a statement of the following particulars; that "is to say:—

"Where a security is charged on a rate, of the rateable value, "at the date of the issue of such security, of the property subject "to the rate, and where the security is a charge on property, of "the estimated value of such property; also of

"The relative priority of the loan, in respect of which such "security is issued, and of the other loans (if any) of the "borrowing authority; and such statement shall be evidence "of the particulars therein stated."

Public Works Loan Commissioners may take securities under Act.

Section 28: "When the Public Works Loan Commissioners "are authorised to grant any loan to a local authority under "any Act, passed either before or after the passing of this "Act, and are satisfied with the sufficiency of the rates or "other property on which such loan is charged to defray the "loan, they may, notwithstanding anything contained in any "other Act of Parliament, take debentures, debenture stock "or annuity certificates under this Act as a security for such "loan".

Power of trustees to invest in securities issued under the Local Loans Act.

Power to invest trust moneys in debentures and debenture stock issued under this Act is conferred on trustees in the following cases by section 5 (3) of the Trustee Act, 1893(*b*):

"A trustee having power to invest money in the debentures "or debenture stock of any railway or other company may, "unless the contrary is expressed in the instrument authorising "the investment, invest in any nominal debentures or nominal "debenture stock issued under the Local Loans Act, 1875".

Prior to the passing of the Trustee Act, 1893, trustees could not, unless expressly authorised, invest trust funds in debentures or debenture stock issued by a local authority, which had not for ten years paid a dividend on its stock; for there was no authority under section 21 of the Settled Land Act, 1882, and section 27(*c*) of the Local Loans Act, 1875, to invest trust funds in debentures or debenture stock issued by a local authority, unless such local authority had for ten years next before the date of the investment paid a dividend on its stock.(*d*)

Though the Trustee Act, 1893, authorises trustees to invest trust funds as mentioned in section 5 (3), it provides by section 7 of the same Act, that a trustee shall not, unless authorised by the terms of his trust, apply for or hold any certificate to bearer issued under the authority of the Local Loans Act, 1875. This provision does not impose on the local authority any obligation to inquire, whether a person applying for a stock certificate to bearer is or is not a trustee, or subject the local authority to any liability in the event of their issuing a stock certificate to bearer to a trustee, or invalidate any stock certificate to bearer issued.

The transfer and transmission of nominal securities.

The transfer and transmission of the nominal securities issued under the Local Loans Act, 1875, are regulated (section 29) by the rules contained in the schedule to the Act which runs as follows:—

(1) "A number of persons, not exceeding such number as

(*b*) 56 & 57 Vic., cap. 53. It should here be stated, that under sec. 38 (1*b*) of the Industrial and Provident Societies Act, 1893 (56 & 57 Vic., cap. 39), a society registered under this Act is authorised to invest any part of its capital in nominal debentures or debenture stock authorised by or under any Act of Parliament passed or to be passed of any local authority as defined by sec. 34 of the Local Loans Act, 1875.

(*c*) This section is repealed by 56 & 57 Vic., cap. 53, and a wider power of investment is given to trustees by sec. 5 (3) of that Act.

(*d*) In re *Maberley*, *Maberley* v. *Maberley*, 33 Ch. D. 455. For the power of trustees to invest in securities issued under this Act, see supra, Bk. I., ch. vii.

"may from time to time be directed by the local authority, may "be registered as joint owners of the same nominal security, with "right of survivorship between them.

(2) "Unless otherwise directed by a general rule of the local "authority, the instrument of transfer of any nominal security "issued by a local authority shall be executed both by the "transferor and transferee, and the transferor shall be deemed "to remain owner of such security until the name of the trans-"feree is entered in the register in respect thereof.

(3) "The transfer books of nominal securities may be closed "at such times, not exceeding twice in each year, and not "exceeding fourteen days at each time of closing, as the local "authority may direct.

(4) "The executors or administrators of a deceased owner "of a nominal security shall be the only persons recognised "by the local authority as having any title to such security.

(5) "Any person becoming entitled to a nominal security "in consequence of the death or bankruptcy of any owner, "or in consequence of the marriage of any female owner, may "be registered as owner upon such evidence being produced "as may from time to time be required by the local au-"thority.

(6) "Unless otherwise directed by a rule of the local "authority, any person who has become entitled to a nominal "security in consequence of the death or bankruptcy of any "owner, or in consequence of the marriage of any female owner, "may, instead of being registered himself, elect to have some "person to be named by him registered as a transferee of such "security.

(7) "The person so becoming entitled shall testify such "election by executing to his nominee an instrument of transfer "of such security.

(8) "The instrument of transfer shall be presented to the "local authority, accompanied with such evidence as the local "authority may require to prove the title of the transferor, "and thereupon the local authority shall register the transferee "as owner.

(9) "In the construction of this schedule the term 'nominal "security' means any nominal debenture, nominal debenture "stock, or nominal annuity certificate."

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Power of a Local Authority to make general rules.

Section 30: "The local authority may from time to time "with the consent of the Local Government Board, make, and "when made, add to, rescind or alter, such rules as they think "fit with respect to the following matters:—

(1) "The issue of coupons, the registry of securities, the "mode of transferring securities not transferable by delivery, "the fees, if any, to be charged in respect of registry and other-"wise in respect of any security issued by them under this "Act; and,

(2) "With respect to any matter or thing required for the "purposes of carrying into effect this Act, and not inconsistent "therewith.

"The local authority may also by such rules as aforesaid add "to, rescind or alter any of the rules in the schedule hereto.

"Any general rules made by the local authority in pursuance "of this section shall, so far as they are consistent with this "Act, have the same force as if they were enacted therein.

"Provided, that any rules made, added to, rescinded or "altered in pursuance of this section shall not affect any "securities issued in respect of any loan, the date of which "is prior to the date of such making, addition, rescission or "alteration."

Forgery of securities.

By section 32 of this Act the provisions contained in 24 & 25 Vic., cap. 98, for the punishment of forgery are made applicable to debentures, debenture stock certificates and coupons issued by a local authority under this Act.

Loss of securities.

Section 33: "If any security issued under this Act is lost, "mislaid or destroyed, the local authority shall, on such "indemnity being given as they may require, and on payment "of the expense of the issue, issue a fresh security in the place "of the security so lost, mislaid, or destroyed".

Section 34: "For the purposes of this Act:—

Definition of:— "Prescribed".

"'Prescribed' means prescribed by any Act passed either "before or after the passing of this Act authorising a local "authority to borrow money;

"Local Authority."

"'Local authority' means the justices of any county, liberty, "riding, parts or division of a county in general or quarter "sessions assembled, the council of any municipal borough, also "any authority whatsoever having power to levy a rate, as in this "Act defined, also any prescribed authority;

"'Municipal borough' means any borough for the time being "subject to the Act of the session of the 5th and 6th year of the "reign of King William IV., cap. 76, intituled an Act to provide "for the regulation of Municipal Corporations in England and "Wales, and any Acts amending the same; "Municipal Borough."

"A 'rate' means a rate the proceeds of which are applicable "to public local purposes and leviable on the basis of an "assessment in respect of property, and includes any sum which, "though obtained in the first instance by a precept, certificate or "other document requiring payment from some authority or "officer, is or can be ultimately raised out of a rate, and the levy "of a rate includes the issue and enforcement of any such "precept, certificate or document as aforesaid, and expressions "relating to the levy and assessment and making of a rate shall "be construed accordingly; "Rate."

"'Local rate' means any rate as before defined which a local "authority have power to levy or charge by way of mortgage or "otherwise; "Local Rate."

"'Security' means any debenture, debenture stock, annuity "certificate, coupon or stock certificate to bearer issued under "this Act." "Security."

CHAPTER V.

THE NATURE OF DEBENTURES SUBJECT TO THE PROVISIONS OF THE MORTGAGE DEBENTURE ACTS, 1865 AND 1870, AND THE RIGHTS AND REMEDIES OF THE HOLDERS OF SUCH SECURITIES.

General scope of the Acts.

BY the Mortgage Debenture Act, 1865 (28 & 29 Vic., cap. 78) (hereinafter referred to as the Principal Act), and the Mortgage Debenture (Amendment) Act, 1870 (33 & 34 Vic., cap. 20) (hereinafter referred to as the Amendment Act), facilities are given to such companies as fulfil certain requirements and comply with certain terms and conditions laid down by these Acts, to raise money by issuing transferable mortgage debentures, which are secured by a charge upon such one or more of certain specified classes of real securities in England and Wales as the company may happen to hold as security for money advanced by it. These securities are deposited with the Registrar of the office of the Land Registry (established by 25 & 26 Vic., cap. 53), and are registered in that office as are also the debentures founded thereon.

These Acts also contain elaborate provisions to prevent a company, which intends to avail itself thereof, from issuing such debentures, until it has secured such debentures in the manner prescribed, and from interfering with the rights of the owners of the securities, on which the debentures issued under these Acts are founded.

It has not been thought desirable to set out the provisions of these Acts at length, as it is, owing to the limited nature of the business permitted to a company availing itself of the provisions of these Acts and to the stringent regulations as regards the capital of such company, very unlikely that companies will in future issue debentures under these Acts. Indeed, the author has been informed, upon making inquiries at the office of the Land Registry, that only one company (the Lands Securities

Company, Limited) has up to the present time done so, and that company has lately gone into liquidation.

What Companies may avail themselves of the provisions of these Acts.

The Principal Act and the Amendment Act, which are to be construed together as one Act (sec. 1 Amendment Act), extend and apply to, and the powers thereby conferred may be exercised by, all such companies incorporated under the Companies Act, 1862, or under any Act of Parliament as may at any time be entitled to advance money on land (sec. 2 Principal Act).

A company must, in order to be entitled to avail itself of the provisions of these Acts, also comply with the following provisions (sec. 3 Princ. Act) :—

First : "It must under its Act of Parliament or memorandum "of association, be limited to one or more of the following "objects :—

(1) "The making of advances of money upon any of the "following securities :—

(*a*) "Lands, messuages, hereditaments and real property, and "all estates and interests therein ;

(*b*) "Rates, dues, assessments, and compositions upon the "owners or occupiers of lands or real property imposed by or "under the authority of any Act of Parliament, public or private, "royal charter, commission of sewers or drainage, or other suf- "ficient legal authority ;

(*c*) "Charges and securities upon or affecting lands, messuages, "hereditaments and real property, executed, made, given or issued "under the authority of any Act of Parliament, public or private.

(2) "The borrowing of money on transferable mortgage de- "bentures or on one or more of the securities above-mentioned.

Second : "It must have a paid-up capital of not less than "£100,000.

Third : "Each share must be of the nominal value of not "less than £50, of which not less than one-tenth or more than "one-half must have been paid up."

The effect of the second and third provisions of this section is to exclude all companies, whose subscribed capital is less than £200,000, from the benefits of these Acts, and even a company with that capital is excluded, unless £100,000 of its subscribed capital remains unpaid.

Subject to the above provisions being complied with, any company, which has already been constituted under the Com-

panies Act, 1862, or the Companies Consolidation Act, 1908, for the purpose of making advances on real securities and whose memorandum of association includes (but is not limited to) the objects above specified, may by altering its memorandum (*a*) by special resolution, so as to limit its objects and business to those specified above, and amending its articles accordingly and discharging all business obligations (if any) previously entered into, which are outside its object as altered, become entitled to the benefits of these Acts (sec. 3 Princ. Act).

Power of Company to borrow under this Act.

Subject to the provisions and restrictions of these Acts, the company (*b*) may from time to time borrow money upon mortgage debentures to be issued by it under the authority of this Act (sec. 4 Princ. Act). On a company ceasing to be entitled to avail itself of these Acts, it will nevertheless have the powers and be subject to the provisions of these Acts with respect to all debentures then issued and outstanding, but no debentures may be issued or renewed by such company upon any ground or pretence whatever after it shall have ceased to be so entitled (sec. 48 Princ. Act).

Nature of securities upon which Debentures may be founded.

The securities, upon and in respect of which debentures may be founded and issued under the authority of these Acts, must be securities affecting property in England and Wales and of the following descriptions :—

(*a*) Lands, messuages, hereditaments or real property or some estate or interest therein ;

(*b*) Rates, dues, assessments or impositions upon the owners or occupiers of lands, messuages or real property imposed by or under the authority of any Act of Parliament, public or private, royal charter, commission of sewers or drainage, or other sufficient legal authority ;

(*c*) Charges upon or affecting lands, messuages, hereditaments or real property executed, made, given or issued under the authority of any Act of Parliament, public or private.

But from the securities described in paragraph (*a*) must be excepted securities upon mines or mineral property, quarries, leaseholds and factories, mills, and other buildings or works for manufacturing purposes, and also upon leasehold estates

(*a*) This power to alter the memorandum of association is not affected by the Companies Consolidation Act, 1908.

(*b*) "The company" means any company to which this Act applies and which shall for the time being be availing itself of the provisions of this Act (sec. 2 Princ. Act).

determinable upon a life or lives, and not renewable, or held for a term, of which at the date of the security less than fifty years shall be unexpired, or which are held at a rent beyond one-fourth part of the annual value of the property leased as estimated at the date of the security given to the company and verified by the statutory declaration of a surveyor (sec. 4 Amend. Act).

What a Company must do before issuing Debentures under these Acts.

Before any company can avail itself of these Acts, it must file in the office of the Land Registry a return under the hand of at least one of its directors and its secretary containing the following and such other particulars as the Registrar may require (sec. 6 Amend. Act):—

(*a*) The amount of its nominal capital;

(*b*) Amount per share and aggregate amount paid up on the shares;

(*c*) Its assets or property at the date of the return and how invested;

(*d*) The names, addresses and occupations of its directors and auditors;

(*e*) Its registered office.

It must produce at the office of the Land Registry the securities upon which it wishes to issue its debentures, in order that such securities may be registered (sec. 6 Princ. Act) in a proper register to be kept there (sec. 7 Princ. Act). Upon production to and deposit with the Registrar of the securities and all deeds and instruments relating thereto, together with (1) a schedule of the securities and deeds delivered to the company when the company advanced the money (sec. 10 Princ. Act), (2) a certificate under the common seal of the company in the form prescribed (sec. 9 Princ. Act) as to the nature of the securities to be deposited with the Registrar, and (3) a surveyor's declaration in the form prescribed by these Acts (sec. 10 Princ. Act and sec. 5 Amend. Act) showing that the value of the security exceeds by certain proportions the money advanced by the company, the Registrar may enter into the proper register all necessary particulars of such securities, but the Registrar may not register any deed or instrument relating to or affecting any property not situated in England or Wales (sec. 9 Princ. Act).

The securities and all deeds and documents relating thereto

Bk. III., Ch. V. are retained by the Registrar until withdrawn in the manner provided by these Acts (sec. 10 Princ. Act).(*b*)

Limit of amount of issue of Debentures.

Upon the securities so registered the company may found and issue its debentures, but the total amount of principal secured by the debentures must never at any one time exceed the total amount of its registered securities, and never exceed ten times the amount of its subscribed share capital for the time being uncalled (sec. 11 Princ. Act).

The aggregate of all principal sums remaining secured by the registered securities, together with the aggregate amount or value (to be ascertained by an actuary, sec. 14 Amend. Act) of any annuities, shall for the purposes of these Acts be deemed to be the total amount for the time being of the registered securities of the company (sec. 25 Princ. Act).

Re-issue.

The company may not re-issue the same debenture, whether cancelled, lost or destroyed (sec. 29 Princ. Act), but may from time to time issue new debentures in lieu of those paid off, provided that it keeps within the above limits as to amount (sec. 13 Princ. Act). When a debenture is produced by the company to the Registrar discharged or cancelled, such discharge shall be entered by him in the proper register (sec. 17 Amend. Act).

Nature of the charge.

All the registered securities of the company are charged with the payment of all principal and interest from time to time payable in respect of all the mortgage debentures of the company issued and outstanding and are not applicable to any other purpose and may not be dealt with in any way by the company until discharged from registration, provided that the company may receive, apply and give a discharge for all instalments payable under the deed creating the security or any annuity or interest receivable in respect of such security, unless a receiver has been actually appointed (sec. 7 Amend. Act).

Rights of holders *inter se*

The holders of the debentures are entitled to the benefit of the registered securities *pari passu* according to the proportion

(*b*) The Court held (relying on section 10 of the Principal Act) in the case of *Somerset* v. *Land Securities Co., Ltd.* (1894), 3 Ch. (C. A.) 464, that it has no power to order such Registrar to deliver up such securities and deeds to a receiver appointed in a debenture-holder's action or to a liquidator in the winding up of the company, unless the securities deposited with the Registrar have been redeemed or sold.

of the moneys secured by the debentures held by them respectively (sec. 15 Princ. Act).

Regulations to be observed by Company.

Quarterly returns.

The company is required, so long as it issues or has outstanding any debentures under these Acts, to make quarterly returns (on specified quarter days, sec. 22 Princ. Act) to the Registrar to be verified by the statutory declaration of two of its directors and its manager, secretary or accountant (sec. 21 Princ. Act). Such quarterly returns must be in Form C of the schedule to the Principal Act, and contain the names and addresses of the company's directors, the company's registered address (sec. 12 Amend. Act), and also certain particulars, which are intended to show that the company has observed all the provisions of and the limits prescribed by these Acts as to the amount and value of its registered securities, the state of its capital and the number and amount of its debentures outstanding (sec. 23 Princ. Act). Where the principal money secured to the company by a mortgage is repayable by periodical payments and such principal is expressly distinguished from interest, the value of such principal money shall, for the purposes of such quarterly returns, be deemed to be the amount of the principal money (sec. 13 Amend. Act); in all other cases the value of annuities and other periodical payments to be comprised in the quarterly returns will be assessed by an actuary approved by the Registrar (sec. 14 Amend. Act).

Register of securities charged and of Debentures issued.

The company is required to keep a "register of securities" containing a specific description of its securities registered at the Land Registry (sec. 27 Princ. Act), a book containing a list of its debentures, with particulars as to the number and date of issue of each debenture, the amount of principal secured thereby, and the names, descriptions and residence of the person to whom it is issued (sec. 31 Princ. Act), and a transfer book (sec. 38 Princ. Act).

Form of Debenture.

Every debenture must be by deed under the common seal of the company stamped as a mortgage for the amount secured, signed by at least two of its directors, countersigned by its manager, secretary or accountant, and in accordance with Form B(*c*) in the schedule to the Amendment Act (sec. 15 Amend. Act) and must provide for the payment of any principal sum

(*c*) See Appendix, Form 78.

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(being not less than fifty pounds) either at a fixed time named therein (being not less than six months nor more than ten years from the date thereof) or at any time (on six calendar months' previous notice being given by either the company or the holder) with interest thereon in the meantime at such rate as may be agreed, payable half-yearly or otherwise (sec. 16 Amend. Act).

Each debenture must be numbered and no other debenture may bear the number of a previously issued debenture (sec. 29 Princ. Act). It is further provided, that certain particulars shall be endorsed on each debenture as to the state of the company's capital, the amount of its registered securities and the registered office of the company, but any inaccuracy or omission in such endorsement will not affect or invalidate the debentures (sec. 30 Princ. Act).

Registration of Debentures by Registrar.

Each debenture must be produced by the company to the Registrar, who will enter into the register of debentures (kept in the office of the Land Registry, sec. 32 Princ. Act) the number and all particulars of the debenture, and will endorse on the debenture the day on which it was produced for registration, and the page of the book in which the entry thereof is made; and without such endorsement no debenture will be a charge under these Acts on the registered securities of the company (sec. 33 Princ. Act). The endorsement is conclusive evidence that the debenture is duly registered (sec. 34 Princ. Act); no notice of any trust in respect of any debenture may be received by the company or the Registrar (sec. 35 Princ. Act).

Transfers.

The debentures may be transferred by endorsement in the Form E in schedule to the Principal Act or to the like effect (sec. 37 Princ. Act). Such transfer must be produced (within thirty days after its date or, if executed outside the United Kingdom, within thirty days after arrival thereof in the United Kingdom) to the company's secretary to be entered in a transfer book on payment of the transfer fee, and after the entry the transferee shall be entitled to the full benefit of the original debenture, so far as it is then in force, and until entry the company need not recognise the transferee. No person having made a transfer can make void, release or discharge the mortgage debentures (sec. 38 Princ. Act).

Stamps.

The debentures issued under these Acts and the transfers thereof are liable to the stamp duties imposed by the Stamp Acts.(*d*)

Inspection of Registers and Returns.

Subject to the regulations and to payment of the proper fees any person may inspect and make copies of and extracts from the register of securities, the register of mortgage debentures and the returns made by the company to the Registrar (sec. 11 Amend. Act).

Remedies of Debenture-holders.

Any person entitled to any debenture of the company may enforce the payment of any interest (if such interest remains unpaid for seven days after it has accrued due and payment thereof has been demanded in writing) or principal (if such principal remains unpaid for three weeks after it has accrued due and payment thereof has been demanded in writing) by applying to the High Court of Chancery by petition, or by summons at Chambers for the appointment of a receiver, and the Court may appoint a receiver to act on behalf of the applicant and other persons entitled to the company's debentures (secs. 41, 42, 44 Princ. Act). Such an application will not prejudice or affect such person's right to sue for such principal or interest, as the case may be, in any Court of law or equity (sec. 43 Princ. Act).

The Court may remove any receiver and appoint another in his place and so on from time to time, and may make such orders as to his powers and duties and otherwise as to the disposal of the moneys received by him as may be thought fit (sec. 45 Princ. Act), and may limit any of the powers of such receiver or stay the order for the appointment of a receiver altogether or for a time on such terms and conditions as it shall deem fit (sec. 47 Princ. Act).

Subject to any such orders or directions, the receiver is entitled to receive or recover the whole or any competent part of all moneys payable to the company upon its registered securities and also any moneys standing to the account of the company's debentures until the principal and interest due on all the debentures issued by the company, together with all costs and proper charges of the receiver, have been paid. Upon such

(*d*) As to the provisions of the Stamp Act, 1891 (the Stamp Act now in force), see supra, Bk. I., ch. ii., sec. iv.

appointment being made and notice thereof being given to the several persons liable on such registered securities, all such moneys shall be paid to the receiver, who must apply the same first in the payment of all costs (including the proper charges of the receiver) and then in payment of interest or principal and interest (as the case may be) due on such debentures. After such payments have been made the power of the receiver ceases (sec. 46 Princ. Act).

Sections 8, 9 and 10 of the Amendment Act deal with the rights and remedies of the company and the owners of the registered securities when either of them wish upon redemption thereof to have them discharged from registration, the interests of the debenture-holders being in every case carefully guarded.

A penalty of £500 is imposed on any person concerned in the issue of debentures purporting to be issued under the authority of these Acts by a company not entitled to issue them, or in the issue of the same beyond the lawful amount (sec. 49 Princ. Act), and such penalties can be recovered by any person (sec. 50 Princ. Act). The Registrar and his assistants are protected from personal liability (sec. 51 Princ. Act). Companies availing themselves of these Acts are not exempted from any provisions of the Joint Stock Companies Acts which may be applicable to them (sec. 52 Princ. Act).

A trustee having a general power to invest trust moneys in the security of shares, stock, mortgages or bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament may invest such trust moneys in or upon the security of mortgage debentures duly issued under and in accordance with the provisions of these Acts.(*e*)

(*e*) 56 & 57 Vic., cap. 53, sec. 5 (5) re-enacting sec. 40 of the Principal Act.

APPENDIX.

In the following Forms, clauses which may be omitted or which are only inserted in special cases, are enclosed in square brackets, thus [ ].

FORMS OF DEBENTURE ISSUED IN THE YEARS 1649 AND 1652 TO OFFICERS AND SOLDIERS TO SECURE THE ARREARS OF PAY DUE TO THEM.

FORM 1. (*See* p. 2.)

Form 1.

All lawful deductions made there remaineth due from the Commonwealth to , his executors, administrators and assigns until the day of the date hereof, the sum of which said sum of is to be paid to the said , his executors, administrators or assigns upon the day of which shall be in the year of our Lord 1649.

But if the said , his executors, administrators or assigns do before that time become a purchaser of any of the land or particulars enacted to be sold for security of the said debt, that in such case allowance shall be made thereof according to the said Act, if the same be required, and the Commonwealth to be thenceforth discharged of the said debt or so much thereof as shall be defalked upon such purchase. (Scobel's *Acts and Ordinances*, 1649, cap. 63.)

FORM 2. (*See* p. 2.)

Form 2.

All lawful deductions made there remaineth due to his executors, administrators or assigns for service done under the command of in England from the in the year until the in the year the sum of , and there remaineth likewise due to

the said , his executors, administrators or assigns for service done in Ireland until the day of the date hereof the sum of in all the sum of which is to be satisfied to the said , his executors, administrators or assigns out of the rebel lands, houses, tenements and hereditaments in Ireland or other lands, houses, tenements and hereditaments there in the dispose of the Commonwealth of England. (Scobel's *Acts and Ordinances*, 1652, cap. 14.)

Form 3.

FORM 3. (*See* p. 38.)

DEBENTURE TO REGISTERED HOLDER.

THE COMPANY, LIMITED.

(*Incorporated under the Companies' Consolidation Act*, 1908.)

Share Capital: £100,000, divided into 100,000 shares of £1 each.

Issue of 1000 debentures of £100 each [made under the authority of clause 70 of the Articles of Association of the Company, and a resolution passed by the directors on the 10th day of December, 1912, and] (*z*) carrying interest at the rate of 4 per cent. per annum, payable on the 1st day of January and the 1st day of July in each year..

No. £100.

1. The Company, Limited (hereinafter called the Company), acknowledges that it is indebted to A B, of , in the sum of £100, and hereby covenants to pay on the day of [or on such other date as the said principal sum shall become payable under the conditions endorsed hereon] to the said A B, or other the registered holder hereof for the time being the said principal sum of £100. [*Where there are no coupons attached, add:* and to pay to the said A B or other registered holder hereof interest thereon in the meantime at the rate of 4 per cent. per annum, by equal half-yearly payments on the day of and the day of in each year, the first of such half-yearly payments to be made on the day of next.] [*Where coupons are attached, add:* and in the meantime to pay by way of interest on the said principal sum to the bearer of every coupon hereto annexed the sum of money therein specified at the time and place therein mentioned on the bearer previously presenting such coupon at the registered office of the company.]

2. The company hereby charges its undertaking (*a*) and all its property both real and personal, present and future, (*b*) including its uncalled capital for the time being (*c*) with the said principal sum and interest hereby secured.

(*z*) These particulars enclosed in brackets must be stated, if a quotation on the London Stock Exchange is desired. See *supra* p. 73.

(*a*) See p. 15.
(*b*) See p. 27.
(*c*) See p. 29-30.

Form 3.

[*Where the debenture is secured by a trust deed, add:*—

2*a*. The holder of this debenture is entitled *pari passu* with the other holders of the debentures referred to in the conditions endorsed hereon to the benefit of an indenture dated the day of , 1912, and made between the company of the one part and E F and G H of the other part (hereinafter referred to as the said trust deed), by virtue of which deed certain property is assured to trustees with powers and stipulations for the security of the holders of the said debentures.]

3. The obligations of the company and the charge on the company's property created by this debenture are subject to the conditions endorsed hereon.

Given under the common seal of the company this day of , 1912.

The common seal of the company was affixed hereto in the presence of .....} Directors. .....}

(C.S.)

CONDITIONS.

Series of Debentures.

1. This debenture is one of a series of 1000 debentures (hereinafter called the said debentures) in like form each for securing the principal sum of £100 and interest thereon at the rate of 4 per cent. per annum.

Floating charge

2. The said debentures are all to rank *pari passu inter se* as a floating charge on the property hereby charged and so that the company may dispose of and deal with any of its property in the ordinary course of business(*d*).

Register.

3. The company will keep at its registered office a register of the said debentures and of the holders for the time being of each of the said debentures.

Whom company will register as owner.

4. The company will not register as the holder of this debenture any person other than the person to whom it is issued, and persons legally claiming through such original holder, and will not enter in the register any notice of a trust or equity, provided that, if two or more persons are at any time registered as the joint holders of this debenture, the company will recognise a notice to enable any one of such persons to give effectual receipts for any principal moneys [*if the interest is not made payable on presentation of coupons, add:* and interest] payable in respect hereof.

Joint holders.

(*d*) Where it is intended to prevent the company from selling or mortgaging even in the ordinary course of business, there should be a special clause, unless there is a trust deed. As to the effect of a floating charge, see *supra*, pp. 15 to 26.

Form 3.

Transfer.

5. This debenture shall be transferred by instrument in writing. On any transfer of this debenture a fee of two shillings and sixpence shall be paid to the company and the transfer shall be registered, on the directors of the company being reasonably satisfied as to the identity and title of the person purporting to make the transfer.

[*Where no coupons are attached, add:—*

Registration of transfer postponed.

6. The company will decline to register any transfer of this debenture during the seven days immediately preceding the day of or the day of (*the days on which interest is payable*) in each year.]

No regard paid to equities.

7. The principal moneys and interest hereby secured will be paid by the company, subject only to any equities which may from time to time subsist between the company and the person [or persons], who is [or are] the registered holder [or holders] at the time when such payment becomes due, but without regard to any equities between the company and any other holder than as aforesaid. The receipt for the said principal moneys or interest signed by the registered holder or holders for the time being or by the survivor or survivors of several joint holders of this debenture shall be a good discharge against all persons whomsoever for the principal moneys or interest specified in such receipt.

[*If coupons are attached, omit "or interest" in last sentence, and add:* and the surrender of each coupon by the bearer thereof shall operate as a good discharge against all persons whomsoever for the sum therein specified.]

Option to convert into debenture to bearer.

[8. The registered holder or the joint registered holders of this debenture shall be entitled, on previously leaving or sending an application in writing at or to the office of the company and on surrendering this debenture together with the unpaid coupons belonging thereto, to the issue of a debenture to bearer in lieu of this debenture. Such debenture to bearer shall provide for the payment of the principal moneys and future interest on the same days as are fixed by this debenture for such payments and that the receipt of the bearer for the same shall be a good discharge to the company as against all persons whomsoever. The person leaving or sending the application aforesaid shall pay to the company the stamp duty payable in respect of the new debenture to bearer and also a fee of two shillings and sixpence.(*e*).]

Notice of payment off.

9. The company shall have power at any time, upon giving to the registered holder of this debenture or his legal personal representatives not less than six calendar months' previous notice expiring upon either of the days

(*e*) Where there is a trust deed, the form of a debenture to bearer can be set out in the schedule to the deed and referred to in the conditions.

fixed for the payment of interest, to pay off the principal moneys secured by this debenture. The registered holder of this debenture shall accept such payment and interest up to the date so fixed for payment in full discharge of all claims under this debenture. The surrender of this debenture [and all the unpaid coupons belonging thereto] shall be a condition precedent to his right to be paid.

When principal moneys become payable.

10. The principal moneys hereby secured shall become immediately payable in each of the events following :—

(*a*) If the company shall make default in the payment of any interest owing in respect of this debenture for *three* calendar months after the same shall have become due and the company shall, before such default shall have been made good, be required by a demand in writing under the hand of the registered holder hereof for the time being to pay the said principal moneys.

(*b*) If an order shall be made by any competent Court or an effective resolution shall be passed by the company for winding up the company, or

(*c*) If the company shall commit a breach of any of these conditions.

Modification of the rights of debenture holders.

11. The rights of the holders of the said debentures against the company or the company's property or any part thereof may be modified or released by arrangement between the company and *one-half* or upwards in number of the debenture holders holding *three-fourths* or upwards in value of the said debentures for the time being outstanding [*where provisions are made for convening meetings of the debenture holders* (*as in Form* 4*a*), *add :* or by an extraordinary resolution of the debenture holders at a meeting called and held according to the conditions hereon endorsed, *or, if these provisions are contained in the trust deed, substitute for "conditions endorsed hereon" :* provisions specified in the Fourth Schedule to the said trust deed.](*f*)

How notice is given.

12. Notices may be served by the company on the holder of this debenture by sending them through the post in a prepaid letter addressed to the registered holder at his registered address, or, in the case of joint holders, to the person first named in the register.

When notice deemed served.

13. Any notice served by post shall be deemed to have been served two clear days after the time when the letter containing the same shall have been posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and posted.

Place of payment.

14. The principal moneys and interest secured by this debenture shall be payable at the registered office of the company, or at the

(*f*) See *supra*, p. 73. Sometimes an express power to appoint a receiver is conferred on a specified proportion of the debenture holders or on each holder with the consent in writing of a specified proportion of the holders. Such a power should expressly provide that a receiver so appointed shall be the agent of the company.

Bank, No. Street, the bankers of the company.

[*Provisions for summoning meetings of the debenture holders are sometimes endorsed on the debentures, such meetings have power to bind the minority of the debenture holders by their resolutions. See Form 4a.*]

Form 3a.

FORM 3*a*. (*See* p. 11.)

COUPON.

THE COMPANY, LIMITED.

Interest Coupon.

Debenture, No. Interest Coupon, No.

For two pounds being the half-year's interest due on the day of 1912, and payable at the Bank [*insert address*] or at the registered office of the company (less income tax).

£2. , Secretary.

Form 3b.

FORM 3*b*. (*See* p. 145.)

ORDINARY TRANSFER OF DEBENTURE TO REGISTERED HOLDER.

I, A B, of , in consideration of the sum of £ paid to me by C D, of , do hereby transfer to the said C D [*e.g., ten debentures for £50 each, numbers 1 to 10 inclusive, forming part of a series issued by the Company, Limited, for securing in the aggregate the sum of £ and standing in my name in the register of debentures kept by the Company, Limited*]. To hold the same unto the said C D subject to the several conditions on which I hold the same at the time of the execution hereof, and I, the said C D, do hereby agree to take the said debentures subject to the same conditions.

As witness our hands this day of 1912.

[*Signatures of the transferor, transferee and attesting witness.*]

Form 4.

FORM 4. (*See* p. 36.)

DEBENTURE TO BEARER.

THE COMPANY, LIMITED.(*a*)

Issue of 1000 debentures of £100 each, bearing interest at the rate of 4 per cent. per annum.

No. £100

(*a*) As to the particulars required, where a quotation on the London Stock Exchange is desired, see *supra*, pp. 73, 476.

Form 4.

1. The Company Limited (hereinafter called the company) acknowledges that it is indebted to A B of in the sum of £100 and hereby covenants to pay on the day of [or on such other date as the said principal sum shall become payable under the conditions endorsed hereon] to the said A B or to the bearer hereof on presentation of this debenture the said principal sum of £100 and in the meantime to pay by way of interest [*continue as in clause* 1 *of Form* 3, *and add clause* 2 *of Form* 3].

[*Where the debenture is further secured by a trust deed, add :—*

2*a*. The bearer of this debenture is entitled *pari passu* with the other holders of the debentures referred in the conditions endorsed hereon to the benefit of an indenture [*as in clause* 2*a of Form* 3, *add clause* 3 *of Form* 3].

CONDITIONS.

Series of Debentures.

1. This debenture is one of a series [*as in condition* 1 *of Form* 3].

[*Where the debenture contains a charge, add :—*

Floating charge.

2. The said debentures are all to rank *pari passu* [*as in condition* 2 *of Form* 3].

No regard to equities.

3. The principal moneys and interest hereby secured will be paid by the company subject only to any equities [*as in condition* 7 *of Form* 3, *substituting* "*bearer*" *for* "*registered holder*," *and omitting the words in brackets and also the last sentence*].

Notice of payment off.

4. The company shall have power at any time after the day of to pay off the principal moneys secured by this debenture upon giving six calendar months' previous notice by advertisement in the *Times*, such notice to expire upon either of the days fixed for the payment of interest. The bearer of this debenture shall accept such payment and interest up to the date so fixed for payment in full discharge of all his claims under this debenture.

When principal moneys become payable.

5. The principal moneys hereby secured shall become immediately payable [*as in condition* 10 *of Form* 3, *substituting* "*bearer*" *for* "*registered holder*"].

[*If desired, the following condition may be added :—*

Option to convert into registered Debenture.

6. Upon the application in writing of any bearer of this debenture the company will, on his previously surrendering this debenture together with the coupons relating to future interest, issue to him in lieu thereof a debenture for securing a like sum of principal money bearing the same rate of interest payable both as to principal and interest on the days herein specified but expressed to be payable to the person applying for the same by name or the registered holder for the time being and subject to conditions similar to the conditions endorsed on this debenture with such modifications as the directors of the company shall think necessary

Form 4.

in consequence of the debenture being no longer payable to bearer. The person applying to the company to issue such new debenture shall pay to the company a fee of two shillings and sixpence and the stamp duty payable in respect of the new debenture.](g)

This Debenture to be treated as negotiable.

7. This debenture shall be treated as a negotiable instrument.(h)

Receipt of bearer of Debentures and coupons good discharge.

8. The receipt of the bearer of this debenture is to be a good discharge for the principal moneys secured hereby as against all persons whomsoever and the surrender of each coupon by the bearer thereof shall operate as a good discharge for the sum of money therein specified as against all persons whomsoever.

Payment only to be made on delivery of Debenture or coupons.

9. Payment of principal moneys will only be made against delivery of this debenture and all coupons for interest after the date of such payment and payment of interest will only be made against delivery of the coupons or (when all the coupons have been paid) on production of this debenture.

10. [*Insert condition* 11 *of Form* 3.]

Place of payment.

11. The principal moneys and interest secured by this debenture shall be payable at the registered office of the company or at the Bank, No. Street, the bankers of the company.

Form 4a.

FORM 4a. (*See* p. 43.)

REGULATIONS RELATING TO MEETINGS OF DEBENTURE HOLDERS.(i)

The meetings of the holders of debentures of this series shall be subject to the following provisions :—

Summoning of meetings.

1. A meeting of the debenture holders may be convened by the company [*where there is a trust deed, add :* or by the trustees of the above trust deed, *or where there is no trust deed, add :* or by *five* holders of debentures of this series] whenever it shall be deemed expedient.

Notice of meetings.

2. Seven days' notice at the least specifying the place, the day and the hour of meeting and the general nature of the business to be trans-

(g) Where there is a trust deed, the form of a debenture to registered holder can be set out in the schedule to the deed and referred to in this condition.

(h) This condition is found in most debentures to bearer and has therefore been here inserted, though an instrument cannot be made negotiable by contract. (See p. 158.)

(i) These regulations are sometimes endorsed on the debentures or sometimes inserted in a schedule to the trust deed. It will be observed, that they are much less detailed than the similar provisions in Table A, which are frequently adopted in the case of debentures. It must be borne in mind, that the only actual legal power of a meeting of debenture holders is to modify the holders' rights in cases where the debenture gives such power to modify by resolution at a meeting. All other proceedings at such meeting require no formality.

acted thereat shall be given to the debenture holders in the manner hereinafter mentioned. Form 4a.

3. No business shall be transacted at any such meeting, unless a quorum of debenture holders is present at the time, when the meeting proceeds to business. A quorum shall consist of not less than *five* debenture holders holding in the aggregate debentures of the nominal value of not less than £ (*or a specified proportion of the outstanding debentures*). Quorum necessary.

4. If within one hour from the time appointed for the meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week, at the same time and place, and, if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die*. Adjournment in absence of quorum.

5. [The chairman to preside at every such meeting shall be a person appointed by the trustees of the above trust deed. If at any such meeting the chairman so appointed is not present within fifteen minutes after the time appointed for holding the meeting or if no such chairman has been appointed], the debenture holders present shall choose some one of their number to be chairman. Chairman of meeting.

6. The chairman may with the consent of the meeting adjourn any meeting from time to time and from place to place. Adjournment.

7. An extraordinary resolution of the meeting within the meaning of this debenture [*or where the regulations of the meetings are in trust deed, substitute for "this debenture": the above trust deed*] shall be a resolution passed at a meeting of the debenture holders duly convened and held at which a clear majority in value of the whole of the debenture holders present in person or by proxy and carried by a majority consisting of not less than three-fourths of the persons voting thereat on a show of hands, and, if a poll is demanded, then by a majority consisting of not less than three-fourths in value of the votes given on such poll.(*i*) Extraordinary resolution.

8. No extraordinary resolution shall be passed without a poll and the poll shall be taken as the chairman directs. Poll.

9. At any such poll every debenture holder shall be entitled to one vote for each debenture held by him. Vote.

10. Votes may be given either personally or by proxy. The instrument appointing a proxy shall be in writing under the hand of the appointor and shall be attested by a witness. The instrument appointing a proxy shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting, at which the person named in such instrument proposes to vote. [Debentures to bearer must be deposited with the instrument of proxy.] Proxy.

11. If two or more persons are registered as the joint holders of any debenture, the person whose name stands first in the register shall be entitled to vote in respect hereof. Vote of joint holders.

12. Notice of any meeting may be given to the holders of the said How notice is to be given to holders of Debentures

(*i*) As to this clause, see *supra*, p. 73. This clause should be inserted where a quotation on the London Stock Exchange is desired.

Form 4a.

debentures by advertisements in the *Times* and one other *London* daily newspaper.

Holder of Debenture to bearer may vote on producing instrument.

[13. The holder of any debenture or debentures to bearer shall be entitled to vote in respect thereof on producing the same.]

Minutes of meetings.

14. Minutes of all resolutions and proceedings at every such meeting shall be duly kept, and the signature of the chairman of the meeting to any minute recording a special resolution passed thereat or other proceeding thereat shall be *prima facie* evidence of the fact.

Form 5.

FORM 5. (*See* p. 114.)

DEBENTURE REDEEMABLE ACCORDING TO RESULT OF PERIODICAL DRAWINGS.

(*Issued by the South African Mining Company, incorporated under Colonial laws.*)

THE COMPANY, LIMITED.

Promise to pay principal

Issue of First Mortgage Debentures for £ sterling bearing interest at six per cent. payable half-yearly.

No. £ .

1. The Company, Limited [of in the colony of , a joint stock company registered in the said colony with limited liability under the provisions of the Act No. of 1861, and incorporated under the provisions of Act No. of 1888 of the Parliament of the said colony] (hereinafter called the company) acknowledges that it has received from A B of in the county of the sum of £ sterling, and hereby covenants to pay to the said A B or the bearer hereof for the time being on presentation hereof on the day of , 1915, or on such earlier date as the principal moneys hereby secured shall become payable in accordance with the conditions endorsed hereon the sum of £ sterling, and to pay by way of interest thereon in the meantime to the bearer of every coupon hereto annexed the sum of money therein specified at the time therein mentioned on the bearer previously presenting such coupon at one of the offices therein mentioned.

and interest.

Charge on undertaking.

2. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

Debenture holders entitled to benefit of trust deeds.

2a. The holder of this debenture is entitled *pari passu* with the other holders of the debentures referred to in the conditions endorsed

hereon to the benefit of [a deed of hypothecation dated and registered in the office of the Registrar of Deeds in and] an indenture dated and made between the company of the one part and A B and C D as trustees of the other part by virtue of which deeds certain property of the company was assured to trustees with powers and stipulations for the security of the holders of the said debentures. Form 5.

3. The obligations of the company and the charge on the company's property created by this debenture are subject to the conditions endorsed hereon.

Given under the common seal of the company this day of 1912.

The common seal of the company was affixed hereto in the presence of } Directors. C.S.

CONDITIONS.

1. This debenture is one of an issue of 1000 like debentures made or to be made by the company for securing a sum amounting in the aggregate to £100,000. Series of Debentures.

2. The debentures of the said issue (hereinafter called the said debentures) are all to rank *pari passu inter se* as a floating charge on the property hereby charged and so that the company may dispose of and deal with any property in the ordinary course of business. Floating charge.

3. The company may at any time on giving six calendar months' notice by advertisement in the *Times* (such notice to expire upon either of the dates fixed for payment of any coupon) redeem any one or more of the said debentures (over and above the debentures to be redeemed at par under or by virtue of the conditions hereinafter contained) on the terms of paying a bonus of 10 per cent. on the principal moneys to be paid off in addition to interest on such principal moneys up to the date of payment off, such bonus to be deemed a special payment for redemption and not part of the principal moneys comprised in the debenture to be redeemed. The bearer of this debenture shall accept such payment of the principal moneys and interest up to the date so fixed for payment in full discharge of all his claims under this debenture. Power of company to give notice of intention to redeem.

4. The company will redeem of the said debentures at par on the day of next and on the day of and the day of in each year until the entire issue of the said debentures shall be redeemed. Redemption of specified proportion half-yearly.

Form 5.

[*Where it is intended to create a sinking fund,*(*j*) *substitute the following condition for condition* 4 :—

Sinking fund.

4*a*. The said debentures will be redeemed at par on or before the day of by means of a [half] yearly sinking fund which shall be formed by the company appropriating on the day of [and the day of] in each year the sum of £5000 until the entire issue of the said debentures shall be redeemed. The company shall apply each sum of £5000 so appropriated as follows (that is to say) it shall pay thereout the interest due on all the said debentures for the time being outstanding and shall out of the residue thereof after payment of such interest as aforesaid redeem at par so many of the said debentures as such residue shall be sufficient to satisfy.]

Drawings.

5. In order to ascertain which of the said debentures will be redeemed on each of the above-mentioned dates, half-yearly drawings will be made at the registered office of the company for the time being in London in the presence of a notary public of London at least 21 days before the days on which the debentures are to be redeemed.

Notice of drawings.

6. Fourteen days at the least before the date of each of the said drawings the company will cause the date and hour appointed by it for such drawing to be advertised in the *Times*.

Notice of result.

7. Immediately after each of the said drawings the company will cause the numbers of the debentures drawn to be advertised in the *Times*.

Book recording result of drawings.

8. The company will cause the number of every debenture from time to time drawn under the provisions of this debenture to be entered in a register to be kept for that purpose. Such register will be kept at the registered office for the time being of the company in London, and the bearer of this debenture shall be entitled to inspect the same at all reasonable times.

Interest when to cease.

9. As from the day fixed for the redemption of this debenture, it shall cease to carry interest.

When principal moneys become payable.

10. In the event of default being made by the company for the period of *one* calendar month in the payment of some interest payable in respect of one or more of the said debentures, or in the event of an order being made by a competent Court, or of an effective resolution being duly passed for the winding up of the company, the principal moneys secured by the outstanding debentures shall immediately become due and payable.

[*Where it is expressly desired to enable the debenture holder to compel the company to make the drawings, the following clause, though not usual, may be found useful :—*

(*j*) As to when it is desirable to create a sinking fund, see supra, p. 12.

Form 5.

11. If the company shall refuse or omit to cause any one of the said drawings to be made within the period hereinbefore specified for the purpose of ascertaining the particular debentures to be redeemed at par under condition 4 hereof, the bearer of this debenture may require the company to cause such drawing to be made and may, in the event of the company not complying with such request within 14 days after receiving the same, call in the principal moneys hereby secured by sending to the company a notice in writing demanding payment of such principal moneys by the company, and such moneys shall accordingly become payable by the company to the bearer hereof on the expiration of *three* calendar months from the date of such notice.]

Remedy in case of unpunctual drawings.

[*Insert conditions* 7, 8, 9 *and* 10 *of Form* 4.]

15. The principal moneys and interest hereby secured shall be payable at the registered office of the company for the time being in London or Kimberley or at the office of Messrs. N. R. in London or Messrs. P. Q. in Kimberley or at the office of the bankers of the company for the time being in London or Kimberley.

Place of payment.

COUPON.

THE COMPANY, LIMITED.

First Mortgage Debenture. No.
Interest Coupon. No.

Coupon for six months' interest due the first day of and payable in London or Kimberley at the offices of Messrs. N. R. or P. Q. (less income tax) £3 0 0

FORM 6. (*See* p. 34.)

Form 6.

PERPETUAL DEBENTURE.

THE COMPANY, LIMITED.

No. £

The Company, Limited (hereinafter called the company) [hereby acknowledges that it is indebted to A B of in the sum of £ and the company] covenants to pay to [the said] A B [of] or other the registered holder for the time being hereof [*or* to the bearer hereof] the [said] principal sum of £ at the time and in the events specified in the conditions endorsed hereon.

Add other clauses from Forms 3 *or* 4.

[*Where coupons are annexed, there may be annexed the following voucher, which is to be so printed that it need not be detached till after the last coupon :—*

Form 6.

THE COMPANY, LIMITED.

Debenture No.

The bearer of this voucher shall at any time after the day of , 1920, receive upon production hereof a fresh sheet of *twenty* coupons providing for the half-yearly payments of interest during a further period of *ten* years.]

CONDITIONS.

[*Adapt conditions from Forms* 3 *and* 4.]

If coupons are annexed, but there is no voucher for fresh coupons, add the following condition :—

After the day of the registered holder [*or* bearer] of this debenture shall on presenting this debenture receive a fresh sheet of *twenty* coupons providing for the half-yearly payments of interest payable during a further period of *ten* years.

Condition 10 *of Form* 3 *to be altered as follows :—*

Save as is hereinbefore provided the principal moneys hereby secured shall only become payable in the events following : [*conclude as in condition* 10 *of Form* 3].

Form 7.

FORM 7. (*See* p. 11.)

PROFIT DEBENTURE (PROVIDING FOR PAYMENT OF HALF-YEAR'S INTEREST EXCLUSIVELY OUT OF HALF-YEAR'S PROFITS).

Adapt debenture in Form 3 *or* 4. *Add the following sentence to clause* 1 :—

Provided nevertheless that such interest shall be payable, if and so far as the same can be paid, exclusively out of the profits made by the company, such profits to be computed in the manner specified in the conditions endorsed hereon.

Adapt conditions in Form 3 *or* 4, *and add the following condition :—*

The interest payable on the said debentures for any half-year will be paid by the company out of the profits as certified by the company's auditor as having been made by the company during that half-year (without taking into account the interest payable on the said debentures). If during any half-year the profits shall be insufficient to pay in full the half-year's interest, such profits shall be distributed *pari passu* amongst the debenture holders, and so much of the half-year's interest as the profits of the half-year shall be sufficient to pay shall cease to be payable.

FORM 8. (*See* p. 11.) Form 8.

PROFIT DEBENTURE (PROVIDING FOR PAYMENT OF PRINCIPAL AND INTEREST EXCLUSIVELY OUT OF PROFITS).

Adapt debenture in Form 3 *or* 4. *Add the following sentence to clause* 1 :—

Provided nevertheless that the principal moneys and interest hereby secured shall be payable exclusively out of the profits of the company in the manner hereinafter specified, if and so far as the same can be paid.

Adapt conditions in Form 3 *or* 4, *insert also the condition in Form* 7, *and add* :—

The residue (if any) of the profits certified as aforesaid as having been made by the company during any half-year will, after payment of the interest as hereinbefore provided, be applied in or towards payment of the principal moneys secured by such of the debentures as shall have become payable under these conditions and shall not be applicable for dividends, so long as any such principal moneys shall have become due and remain unpaid.

[*The scheme for the payment off of the debentures will vary in each case and the particular scheme should be provided for by the conditions.*]

FORM 9. (*See* p. 13.) Form 9.

GUARANTEE TO BE ENDORSED ON DEBENTURE.

IN PURSUANCE of and as part of the consideration for an agreement between the A B Company, Limited (hereinafter called "the company") and the X Y Assurance Company (hereinafter called "the guarantors") relating to the issue of this debenture and others of the same series, the guarantors promise and guarantee to the holder of this debenture that in the event of default by the company for days in the payment of any principal moneys or interest payable under this debenture, the guarantors will on demand or within days thereafter pay the principal or interest moneys in arrear to the person or persons entitled thereto under the terms of this debenture, PROVIDED that the terms and conditions following shall be incident to this guarantee (that is to say) :—

1. The demand must be made in writing, and made within *three* calendar months after default.

2. On payment of any interest the coupon relating thereto shall be handed over to the guarantors.

3. On payment of the principal this debenture shall be handed over to the guarantors, and any assignment thereof reasonably required by them shall be executed.

4. This guarantee shall not be discharged or affected by time being given to the company, or any other forbearance shown to the company, but default within the meaning of this guarantee shall be default in payment having regard to the modification of the company's obligation by such giving of time or other forbearance. IN WITNESS.

Form 10.

FORM 10. (*See* p. 40.)

DEBENTURE STOCK CERTIFICATE TO BEARER.

THE COMPANY, LIMITED.

(*Incorporated under the Companies' Consolidation Act*, 1908, *with a share capital of* £ .)

No. £

£ MORTGAGE DEBENTURE STOCK BEARING INTEREST AT THE RATE OF £ PER CENT. PER ANNUM PAYABLE EVERY DAY OF AND DAY OF , ISSUED PURSUANT TO CLAUSE OF THE COMPANY'S ARTICLES OF ASSOCIATION, AND TO A RESOLUTION OF THE DIRECTORS PASSED ON THE DAY OF .

This is to certify that the bearer of this certificate is entitled to £ of the above-mentioned debenture stock which stock is created and secured by and subject to the provisions contained in an indenture dated and made between

[*Where the debenture stock is further secured by the issue of debentures to trustees, add:* "and further secured by debentures issued to the trustees pursuant to such deed".](*j*)

Given under the common seal of the company this day of 1912.

Form 11.

FORM 11. (*See* p. 40.)

DEBENTURE STOCK CERTIFICATE TO REGISTERED HOLDER.

THE COMPANY, LIMITED.

(*Incorporated under the Companies' Consolidation Act*, 1908, *with a share capital of* £ .)

No. £

£ MORTGAGE DEBENTURE STOCK BEARING INTEREST AT THE RATE OF £ PER CENT. PER ANNUM PAYABLE EVERY DAY OF AND DAY OF , ISSUED PURSUANT TO CLAUSE OF THE COMPANY'S ARTICLES OF ASSOCIATION AND TO A RESOLUTION OF THE DIRECTORS PASSED ON THE DAY OF .

(*j*) Where a quotation of a series of debenture stock on the London Stock Exchange is desired, the conditions of issue, redemption and transfer should be endorsed on the stock certificates. (See Appendix 26 (D) to the Stock Exchange Rules, *supra*, pp. 73-74.)

This is to certify that Y Z of is the registered holder of £ of the above-mentioned stock which stock is created and secured by and subject to the provisions contained in an indenture dated and made between . Form 11.

[*Where the debenture stock is further secured by the issue of debentures to trustees, add:* "and further secured by debentures issued to the trustees pursuant to such deed".](*j*)

Given under the common seal of the company this day of 1912.

NOTE.—No transfer of the stock or of any part of the stock comprised in this certificate will be registered until this certificate has been delivered at the office of the company.

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TRUST DEED FOR FURTHER SECURING DEBENTURES.(*k*)

THIS INDENTURE made the day of 1912, Between the Company, Limited (hereinafter called "the Company") of the one part and A B of etc. and C D of etc. (who and the survivor of them, or the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents are hereinafter collectively referred to as "the Trustees") of the other part WHEREAS the company is seised of the hereditaments hereinafter described and intended to be hereby assured for an estate in fee simple in possession free from incumbrances, And is also possessed of or entitled to certain machinery, plant, and other effects, the principal of which are mentioned or referred to in the First Schedule hereunder written, And is also entitled to the several Letters Patent and like grants or documents mentioned in the Second Schedule hereunder written, and the rights and privileges thereby granted, AND WHEREAS the directors of the company have determined to issue a series of First Mortgage Debentures of the company [framed in accordance with the form *or* either of the forms set forth in the Third Schedule hereunder written] limited to the sum of £100,000 in the aggregate, bearing interest at the rate of 4 per cent. per annum, and payable on the day of 1920, and further to secure in manner hereinafter appearing the payment of the principal and interest for the time being payable upon such debentures or on any debentures which may be issued to replace any of the debentures which may be paid off. NOW THIS INDENTURE WITNESSETH that for effectuating the said intention and in consideration of the premises THE COMPANY DOTH HEREBY as beneficial owner convey unto the trustees, their heirs, executors, administrators, and assigns FIRST, ALL THOSE [*parcels*] Together with all and singular the buildings and

Recitals.

Testatum.

1. Conveyance of Freeholds.

(*k*) This form has (with the exception of the portions of clauses 5, 11, 14, 23, 24, 27 and 28 enclosed in brackets) been extracted by permission from the third edition of Sir C. Chadwyck Healey's book on *Company Law and Practice*. As to the provisions required by the London Stock Exchange Rules to be inserted in a trust deed, where a quotation of the debentures or debenture stock thereby secured is desired (see *supra*, p. 73).

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erections, now, or which may at any time hereafter be erected, thereon or therein: [SECONDLY, ALL AND SINGULAR the machinery, plant, implements, tools, patterns, moulds, stock-in-trade, materials and utensils which now are or at any time so long as any money shall remain owing upon any of the said intended debentures shall be fixed or fastened to or be in or upon or about the said lands, buildings, and premises, the principal of which machinery and other effects are specified in the First Schedule hereto]. THIRDLY, ALL AND SINGULAR the said several letters patent and like grants or privileges specified in the said Second Schedule hereto: And all the rights and privileges thereby respectively granted or under or by virtue thereof respectively to be exercised or enjoyed. AND FOURTHLY, ALL the business and undertaking of the company, and all other the property (real and personal) moneys, credits, and assets of or belonging to the company or which at any time so long as any money shall remain owing on any of the said intended debentures shall belong or be owing to or vested in the company and not hereinbefore described or referred to or expressed to be assured [including capital not called up and calls made and unpaid], save and except hereditaments to which the company is or may become entitled for any term or terms of years [*where necessary*, and personal chattels belonging to the company]: TO HOLD all the said hereditaments [chattels], letters patent, rights, privileges, property, moneys, and premises hereinbefore expressed to be hereby conveyed unto and to the use of the trustees, their heirs, executors, administrators, and assigns respectively, according to the nature thereof respectively, but upon the trusts, and subject to the powers, provisions, and agreements hereinafter declared, expressed and contained of and concerning the same. [AND THIS INDENTURE ALSO WITNESSETH that for further effectuating the said intention, and in consideration of the premises, the company doth hereby covenant with the trustees that, if the company shall at any time or times hereafter, so long as any money shall remain owing on any of the said intended debentures, become entitled to any real or leasehold property for any estate or interest whatsoever, all such real or leasehold property shall at the request of the trustees but at the cost of the company be forthwith assured or demised by the company and all other necessary parties to the trustees to hold the same upon the trusts, and subject to the powers and provisions hereinafter declared and contained concerning the lands and hereditaments hereby assured or as nearly corresponding thereto as circumstances will admit and, until such assurance or demise shall be executed or made, all such real and leasehold property shall be deemed to be subject to such trusts,

2. Assignment of Chattels.

3. Assignment of Letters Patent.

4. Assignment of Undertaking.

Habendum.

5. Covenant by Company with Trustees to convey, assign or demise future freeholds or leaseholds.

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powers and provisions as aforesaid] : AND IT IS HEREBY AGREED AND DECLARED that the trustees shall stand seised and possessed of the said hereditaments, [chattels], letters patent, rights, privileges, property, moneys and premises hereinbefore respectively expressed to be hereby conveyed, and also the lands, messuages and hereditaments hereinbefore covenanted to be assigned or demised (all which several subjects are hereinafter referred to as "the trust premises") upon trust to secure to the holders of the said debentures respectively without preference or priority the principal moneys and interest payable thereunder in manner following, that is to say, upon trust that the trustees shall permit the company to hold, possess, use and enjoy all the trust premises, and continue and carry on the undertaking and business of the company at or upon the said works and premises and elsewhere as the directors thereof may consider expedient, until some default shall be made in payment of some principal moneys secured by the debentures intended to be issued by the company as aforesaid, or in payment of some interest on the said debentures for the period of *three* calendar months after such principal moneys or interest respectively shall become due according to the terms of the debentures: And in the course of and for the purpose of carrying on such undertaking and business to [sell, let for hire, exchange, use, consume, apply and dispose of all or any part of the machinery, plant, apparatus, implements, tools, patterns, moulds, stock-in-trade, materials, utensils and other chattels and effects, and to] assign and grant licenses to use all or any, or any part of the letters patent and like grants, and the rights and privileges thereby respectively granted hereinbefore expressed to be hereby assured or intended to be comprised in these presents. And also to receive and use and apply all or any of the debts and moneys hereinbefore expressed to be hereby assured or intended to be comprised in these presents [including capital not called up and calls made and unpaid] to the ordinary purposes of the company, and as if these presents had not been executed. And from and after such default as aforesaid, upon trust subject to the proviso hereinafter contained, that the trustees shall upon the request in writing of any holder or holders of any of the said debentures, securing a principal sum of not less than £ , whose principal money or interest shall be so in arrear, but without any further consent on the part of the company or its assigns, enter upon, seize, recover, receive and take possession of the trust premises or any part or parts thereof And shall upon the like request, or at the discretion of the trustees, sell the trust premises or any part or parts thereof respectively. PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that on receiving any such request as aforesaid to seize or to

6. Trusts of property assured.

(a) To secure principal and interest on Debentures.

(b) To carry on business on trust premises until default.

(c) To enter and sell on request of Debenture holders.

7. Notice to Company before entry.

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make entry or sale, the trustees shall give written notice thereof to the company, and shall not enter or sell in pursuance of such request, if the company shall prove to the trustees payment of the principal or interest so in arrear within *one* calendar month next after such notice shall have been given. PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that in case at any time so long as any money shall remain owing upon any of the said debentures, the company shall cease to carry on its said business or shall fail to perform and observe any of the covenants in these presents contained, or if any of the trust premises shall be taken in execution, or otherwise by operation of law, be taken out of the control of the company, or an order shall be made or a resolution shall be passed that the company shall be wound up, then and in any of such cases it shall be lawful for the trustees (whether default shall be made in payment of any principal or interest money as aforesaid or not) forthwith, and without any notice to the company, and notwithstanding the provisoes hereinbefore contained, to enter upon and seize and take possession of, and also, after being requested as aforesaid so to do at the like discretion, sell the said trust premises or any part or parts as aforesaid: AND IT IS HEREBY FURTHER DECLARED that the trustees shall hold the moneys to arise from any sale or sales made in pursuance of the aforesaid power or trust in that behalf: UPON TRUST that they shall IN THE FIRST PLACE, by and out of the same, pay or discharge all costs and expenses incurred in or about such sale, or the performance, or exercise, or attempted performance or exercise, of the trusts, powers, or authorities herein expressed or contained, or otherwise in respect of the premises: AND IN THE NEXT PLACE, shall by and out of the same, pay the interest for the time being due and owing on the said debentures: AND IN THE NEXT PLACE, shall by and out of the said moneys, pay the principal moneys then owing upon the security of the said debentures; and in case the said moneys shall be insufficient to pay all such interest or principal moneys in full, then the said moneys applicable for payment thereof, shall be apportioned rateably and without any preference or priority among all the holders of the said debentures according to the amount of their debentures, and be paid to them accordingly without regard to the date or time of issue of the said debentures respectively, but so nevertheless that all interest due shall be paid before any principal moneys: AND IT IS HEREBY AGREED AND DECLARED that the trustees shall pay the surplus (if any) of the said moneys, after making any such payments thereout as aforesaid, unto the company or its assigns: AND IT IS HEREBY FURTHER AGREED AND DECLARED, that when all the principal moneys and interest intended to be secured by such of the said debentures as shall have been issued by

8. Power of Trustees to enter on breach of any Covenant hereof or on Company being wound up.

9. Trusts of sale moneys

10. Re-conveyance of trust premises to Company on Debentures being paid off.

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the company shall have been fully paid and satisfied, the trustees shall forthwith, upon the request and at the cost of the company, and upon payment of all the costs, charges and expenses of the trustees in relation to the premises, re-convey and re-assign the trust premises, or so much of the same as shall not have been sold or disposed of unto the company or its assigns, subject nevertheless to any leases which may have been granted.

11. Power to Trustees to carry on Company's business.

AND IT IS HEREBY FURTHER AGREED AND DECLARED, that after the trustees shall have entered upon, seised or taken possession of any of the said trust premises, it shall be lawful for, but not obligatory upon the trustees, to carry on the said business carried on by the company, at or upon or in connection with the said works, or any branch or branches of such business, and manage the same in such manner and [upon such terms as they shall in their uncontrolled discretion think fit, with power to discontinue such business either wholly or in part, as they shall think proper, and to employ such person or persons for any of the purposes of the said business upon such terms as to remuneration and otherwise as the trustees shall determine, and to repair and keep in repair and insure either to the full or any less value against loss or damage by fire the trust premises or any part or parts thereof, and to provide or replace any requisite machinery, stock-in-trade, plant, or things]; And also to settle, arrange, compromise, and submit to arbitration any accounts, claims, questions, or disputes whatsoever, which may arise in relation to or in connection with the said business, or the transactions or affairs relating thereto, or the trust premises or any part thereof, and to execute releases and other discharges in relation thereto; And to commence, prosecute, defend, compromise, submit to arbitration, and abandon any actions, suits, or proceedings whatsoever, or in anywise relating thereto; [and to grant extensions of time for the payment of any debt or debts, and to execute and do all deeds, matters and things which the trustees shall consider expedient for all or any of the purposes aforesaid, and generally to use and pursue all such ways and means, and to execute and do all such deeds, matters and things as shall in the opinion of the trustees be expedient for carrying on the said business, and for realising the trust premises, without being answerable for any loss or damage which may happen thereby;]

12. Power of trustees to lease

And that it shall be lawful for the trustees at their discretion, to demise the trust premises, or any part or parts thereof for such terms, at such rents, and, generally, in such manner and upon such conditions and stipulations as the trustees shall think fit,

13. Trusts of moneys arising from business and rents.

AND IT IS HEREBY AGREED AND DECLARED that the trustees shall, by and out of the debts or moneys which shall be received under or by virtue of these presents and the rents and profits of the trust premises, and the

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moneys to be made or received by them in carrying on the said business or otherwise under or by reason of the exercise of any of the trusts or powers herein contained, or in respect of the trust premises, pay and discharge the expenses incurred in or about the management of the trust premises and the said business, or in the performance or exercise or attempted performance or exercise of any of the powers or trusts aforesaid or otherwise in respect of the premises, and all outgoings which they shall think fit to pay, and shall pay and apply the residue of the said rents, profits and moneys, in the manner hereinbefore directed or provided with respect to the net moneys to arise from any sale or sales made by the trustees, AND IT IS HEREBY FURTHER

14. Indemnity to purchasers and lessees.

AGREED that, [if the trustees or any person or persons appointed by them under any of the powers herein contained shall at any time or times do any act or thing purporting or intended to be an exercise of any of the powers herein contained, then any person or persons *bonâ fide* dealing with the trustees or such person or persons so appointed by them, as aforesaid, shall not be bound to inquire whether such power has become exercisable by the trustees or whether any default has been made in the payment of any principal moneys or interest secured by or whether any money remains owing on any of the said intended debentures, or generally as to the regularity or propriety of the act or thing so done as aforesaid]. PROVIDED ALWAYS, and it is hereby agreed and declared that the trustees shall not be obliged unless and until default shall be made in payment of some principal money or interest as aforesaid, and the trustees shall be requested so to do in manner hereinbefore provided, or some of the events hereinbefore mentioned shall have occurred, to enter upon, or take, or receive possession of the trust premises or any part thereof. And that, until the trustees shall have taken possession thereof, they shall not be in any manner bound or concerned to interfere with the working or affairs of the said business or the custody, care, preservation or repair of the trust premises or any part thereof, or be in any manner liable for any injury to, or loss, or destruction, or removal of the same. PROVIDED ALWAYS, and it is hereby agreed and declared that notwithstanding the trusts hereinbefore expressed and declared it shall be lawful for the trustees at any time, and from time to time, upon the request of the company to re-convey, re-assign, surrender and release from the trusts, powers and provisions herein expressed, declared and contained, any of the trust premises for the time being, provided that the company shall convey or assure to the trustees other suitable property of at least equal value in the judgment and discretion of the trustees, or that in their judgment the property to be so released is or has become unsuited for the business of the company, and the security

15. Trustees not bound to interfere until default in payment and request to enter

16. Power to trustees to release portions of property subject to the security.

hereby intended to be created will not be materially diminished in value or affected by reason of such release; and upon such release being executed the property released shall cease to be subject to or affected by the trusts, powers and provisions herein expressed, declared or contained.

Power to trustees to hold as security for debenture debt any property vested in them in exchange for released property.

[AND IT IS HEREBY FURTHER AGREED AND DECLARED that the instrument or instruments conveying or assuring to the trustees any property in exchange for the property re-conveyed, re-assigned, surrendered or released by the trustees upon the request of the company as aforesaid may (if the trustees think fit) provide that the property so conveyed or assured to the trustees shall be held by them as security for such sum or sums to be fixed by the trustees as shall in the opinion of the trustees be the value of the property so conveyed or assured to them.]

17. Power to trustees to concur with Company in selling or leasing trust premises.

PROVIDED ALSO, and it is hereby agreed and declared that notwithstanding and without prejudice to the trusts, powers and provisions hereinbefore expressed, declared or contained it shall be lawful for the trustees at any time, and from time to time, to concur with the company in selling upon such terms as they may think proper any part of the trust premises, or in demising the same or any part thereof for any term of years at such rent and upon such terms and stipulations as they shall think fit.

18. Application of moneys arising from such sales or leases.

PROVIDED ALWAYS, and it is hereby agreed and declared that the purchase moneys of any of the trust premises which may be sold by the company with the concurrence of the trustees as aforesaid, and any fines or premiums which may be paid upon any such demise as aforesaid shall be received by the trustees, and after payment thereout of the costs and expenses of and incidental to the sale or demise, the net amount thereof shall be invested by the trustees in the manner in which trustees shall for the time being be by law permitted to invest trust moneys, and the same and the investments thereof shall be held upon the trusts hereinbefore declared concerning the trust premises, but, nevertheless, until the trustees shall enter into possession as aforesaid, or otherwise have to realise the trust premises, the interest, dividends and income of the said net moneys and of the investments thereof shall be paid to the company. PROVIDED ALWAYS that it shall be lawful for the trustees to apply the net moneys arising from any such sale or fines or premiums as last aforesaid, and whether before or after investment in any manner whereby it shall appear to the trustees in their discretion that the value of any lands or buildings subject to this security shall be permanently increased, or in the purchase or acquisition by lease (if the trustees shall be willing to act as lessees) or otherwise of any hereditaments, chattels, rights, privileges or other property in the opinion of the trustees suitable for the purposes of

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the company and of a fixed or permanent nature, and so that any such hereditaments, chattels, rights, privileges or other property shall be assured to the trustees in such manner as to become subject to this security, and to be held upon the trusts, powers, provisions and agreements hereinbefore declared or contained in such manner in all respects as if originally comprised herein, AND IT IS HEREBY AGREED AND DECLARED that no such concurrence in a sale or demise as last aforesaid shall be deemed to constitute or amount to an entry by the trustees into possession of the trust premises or any part thereof: PROVIDED ALWAYS, and it is hereby agreed and declared that all or any acts or things which shall be done or suffered by the trustees under or in execution or by way of exercise of the powers or trusts hereinbefore expressed or contained, and which either before or after the same shall be done, shall be sanctioned or approved by holders of the aforesaid debentures, the amount of whose debentures shall exceed one-half of the principal moneys owing upon such of the debentures of the said series as shall for the time being be outstanding and unpaid shall be considered to have been duly and properly done, and shall be valid and effectual and binding upon all other present and future holders of the debentures of the said series, and upon the company and its assigns, and all or any accounts of moneys received or paid by the trustees, which shall be sanctioned or approved in like manner shall be deemed to have been duly passed and approved. And no such act, thing or account so sanctioned or approved shall be thereafter disputed or impeached by or on behalf of any present or future holders of any of the said debentures, or by or on behalf of the company or its assigns :(*m*) PROVIDED ALSO, and it is hereby agreed and declared that the trustees shall not be liable for any default, omission or delay in performing or exercising any of the powers or trusts herein expressed or contained, or in enforcing the covenants herein contained, or any of them, or in giving any notices, or in paying the duties or other moneys, or taking any steps, or performing any acts which may be or become due or payable, or require to be taken or done in respect of any of the said letters patent and like grants and privileges, or any of them, and notwithstanding that by reason of such non-payment or non-performance the rights conferred by such letters patent, grants or privileges may be forfeited or become liable to forfeiture, or in taking any other steps which may be necessary, expedient or desirable for the purpose of perfecting or enforcing the

19. Sale or lease in concurrence not to be deemed an entry.

20. Approval by majority in value of debenture holders of acts and accounts of trustees to bind the rest.

21. Trustees not liable for not enforcing their powers until request.

(*m*) If provisions for the holding of meetings of debenture holders are inserted in the debentures themselves, or in a schedule to the trust deed, the approval or sanction should be given by the passing of an extraordinary resolution in accordance with such provisions. These provisions are usually inserted in a schedule to the trust deed.

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security hereby intended to be created, or of completing or perfecting or protecting the title or rights of the trustees to or over any of the trust premises, or for any loss or injury which may be occasioned by reason thereof, unless the trustees shall have been previously by notice in writing requested to perform, exercise or do any of such powers, trusts, acts or things, or to take any such step as aforesaid by some holder or holders of the same debentures securing not less than £ , and that the trustees shall not be bound to perform, exercise or do any of such powers, trusts, acts or things, or to take any such steps [except under the protection of some court of competent jurisdiction to be set in motion either by the trustees or by any person or persons having the benefit of the present security] unless or until sufficient money shall have been provided by or on behalf of the debenture holders or some of them, in order to pay or provide for the costs and expenses of and incidental thereto, and the performance or exercise of any such powers, trusts, acts, or things, shall not alone be deemed a taking possession by the trustees. PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that the trustees may at any time appoint any receiver or receivers, manager or managers, or agent or agents, for any of the purposes aforesaid, upon such terms and with such remuneration as they shall think fit, and may delegate to such person or persons all or any of the powers herein conferred on the trustees, and may at any time remove any person or persons so appointed.

22. Trustees' power to appoint Receiver.

[*Where it is intended that the debenture holders should be represented on the board of directors, insert:—*

AND IT IS ALSO AGREED AND DECLARED THAT THE trustees may, if they think fit, at any time or times remove or dismiss any one or more of the following directors of the company, namely, A, B and C (*being the nominees of the debenture holders specified in the articles*) or the directors appointed in their places respectively by the company from such office and appoint any person or persons to be director or directors in his or their place or places, and that the trustees may from time to time remove or dismiss the director or directors so appointed by them as aforesaid and appoint any other person or persons to be director or directors in his or their place or places, and that a director appointed by the trustees shall not be subject to retirement by rotation under the provisions of the Articles of Association of the Company, and shall not be taken into account in determining the order of retirement of directors, but shall be subject to the same provisions as to resignation as the other directors of the company, and that in case of any vacancy in the office of director held by the said A, B or C, or the directors appointed in their places respectively by the

23. Trustees' power to appoint Directors on behalf of Debenture holders.

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company or any director appointed by the trustees, the trustees may fill up the vacancy by the appointment of some other person, and that the trustees may appoint, if they think fit, one or more of themselves to be director or directors (*n*):] [AND the trustees may at any time or times, whenever they shall think fit, cause a caution or cautions to be entered on the Land Registry at the expense of the company.]

23*a*. Trustees' power to enter caution.

[*If desired, add:—*

Meetings of the holders of the said debentures may be summoned in the manner and shall have the powers and shall be subject to the provisions and regulations specified in the Fourth Schedule hereunder written.]

24. Meetings of Debenture holders.

PROVIDED ALWAYS that whenever the number of trustees under these presents shall exceed two, then the majority of such trustees shall have all the rights and powers hereby vested in the trustees generally.

25. Power of majority of Trustees.

AND THE COMPANY DOTH HEREBY COVENANT with the trustees that the said sum of £100,000 intended to be secured by the debentures of the said series as aforesaid, shall be a first charge on the trust premises, and that the said debentures, including any debentures to be raised by way of renewal, shall take precedence over all moneys which may hereafter be raised by the company by any means whatsoever. And that as between the several holders thereof, the said debentures shall rank *pari passu* without any preference or priority by reason of date or otherwise:

26. Covenant by Company.
(*a*) That Debentures shall be a first charge;

[AND FURTHER, that the company will at all times keep a correct register of the said debentures for the time being outstanding, showing the date and the amount of each debenture, and the number thereof, and the names of the transferees or holders thereof, and that the said register shall at all reasonable times be open to the inspection of the trustees, and the debenture holders or any of them]:

(*b*) To keep register;

AND FURTHER, that the company will, so long as any such debentures remain unpaid, carry on the business of the company, and maintain and keep in proper order, repair and condition, the said messuages, buildings, fixtures, machinery and plant hereinbefore expressed to be hereby granted or assigned, or covenanted to be assigned or demised;

(*c*) To carry on business;

and will keep the same fully insured against loss or damage by fire; [*where desired add:* and will insure and keep insured against loss or forfeiture the license or licenses attached to any property forming part of the trust premises in such sum or sums as the trustees shall think fit] and will duly pay all sums of money necessary for keeping up such insurance [*or* insurances]; and will apply all moneys received by the company under any such policy of insurance, in making good such loss or damage; and will not remove or destroy any part of the said buildings, fixtures, machinery and plant, except for the purpose of renewing or

(*d*) To insure

(*e*) Not destroy trust premises;

(*n*) See supra, p. 45.

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replacing the same, and will in such case renew or replace the same accordingly forthwith; and will duly and punctually pay, perform and observe all rents, rates, taxes, stamp duties, covenants and obligations which ought to be paid, or to be observed or performed by the company or otherwise in respect of any part of the said trust premises: AND FURTHER that it shall be lawful for the trustees, or any person or persons authorised by them, at any time and from time to time during the usual times of business, so long as any money shall remain due upon the security of any of the said debentures, to inspect and examine any part of the trust premises without the trustees being deemed to take possession of the trust premises or any part thereof; and that the company will at all times afford the trustees and every such person as aforesaid, access to the trust premises, and render them or him such assistance as may be required for any of the purposes aforesaid: AND FURTHER that the company will at all times and from time to time pay to the trustees all costs, charges and expenses which may be paid or incurred by them, and which they shall not have money in hand derived from the trust premises sufficient to pay: AND FURTHER that the company will keep proper books of account, which shall at all reasonable times be open to the inspection of the trustees and any person appointed by them for that purpose, and will render to the trustees or such other person, all such information relating to the business or affairs of the company as they or he shall require. AND FURTHER that the company will not without the consent in writing of the trustees exercise the power of leasing by law conferred on a mortgagor in possession. [AND FURTHER that the company will not, so long as any such debentures remain unpaid, neither will any person or persons or corporation on behalf of the company be registered as the proprietor or proprietors of any of the hereditaments or premises hereby mortgaged or charged or any part thereof without the consent in writing of the trustees and, if the trustees shall at any time give such consent, the company will forthwith apply for and hand over to the trustees the land certificate of the land, of which the company or any person or persons or corporation on behalf of the company shall have been registered as the proprietor or proprietors.] [AND IT IS ALSO HEREBY AGREED that, so long as any such debenture remain unpaid, the company shall pay to each of the trustees a salary of £50 per annum by equal half-yearly payments on the 1st day of *January* and the 1st day of *July* in each year, the first of such payments to be made on the day of next, and such salary shall be paid in addition to all the costs and expenses incurred by him in or about the performance or exercise or attempted performance or exercise of the trusts, powers or authorities herein

(*f*) Pay rates and taxes;

(*g*) Permit trustees to inspect.

(*h*) Pay expenses of trustees;

(*i*) Keep books of account.

(*j*) Not to exercise power of leasing.

(*k*) Not to register as proprietor.

27. Salary of Trustees.

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contained, but the salary payable hereunder in respect of any half-year, in which a person shall become or cease to be a trustee on any day other than the 1st day of January or the 1st day of July, shall be apportionable.]

28. Power to appoint new Trustees.

AND IT IS HEREBY FURTHER AGREED that the statutory power of appointing a new trustee or new trustees of these presents shall be vested in the company [but a trustee so appointed must in the first place be approved by a resolution of the debenture holders passed in the manner specified in the Fourth Schedule hereto. A corporation or company may be appointed a trustee of these presents].(*n*) [PROVIDED ALWAYS that the company shall at any time have power without assigning any reason to remove and shall remove any trustee or trustees for the time being of these presents on being previously requested so to do by writing signed by a majority in value of the holders of the debentures of the said series for the time being outstanding and unpaid]. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that no person shall be deemed to be disqualified or unfit to be appointed a trustee of these presents by reason of his being a director, officer, servant or member of the company or a holder of any debentures of the said series or otherwise interested in the business or affairs of the company. IN WITNESS, ETC.

FIRST SCHEDULE.

[*Particulars of Trade Machinery, etc.*]

SECOND SCHEDULE.

[*Particulars of letters patent.*]

THIRD SCHEDULE.

Part I.

[*Insert the form of debenture to registered holder set forth in Form* 3.]

Part II.

[*Insert the form of debenture to bearer set forth in Form* 4.]

FOURTH SCHEDULE.

[*Insert provisions for meetings in Form* 4*a*.]

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FORM 13. (*See* pp. 40, 41 *et seq.*)

TRUST DEED CONSTITUTING AND SECURING DEBENTURE STOCK.

THIS INDENTURE made the day of , 1912, between the Company, Limited (hereinafter called "the company") of the one part and A B of and C D of (who and the survivor of them and the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents are hereinafter called "the trustees") of the other part

Recitals.

WHEREAS the directors of the company have determined to issue

(*n*) The words in brackets are required by the Stock Exchange Rules. See App. 26 to those Rules *supra*, p. 73.

Form 13.

debenture stock limited to the sum of £ , bearing interest at the rate of £4 per cent. per annum to be secured in manner hereinafter provided AND WHEREAS it is intended that such debenture stock shall be held subject to the conditions contained in the Third [*Form* 14] Schedule hereunder written. NOW THIS INDENTURE WITNESSETH First testatum. that the company hereby covenants with the trustees that the company Covenant to pay to holders of debenture stock will (subject to the conditions in the Third Schedule hereunder written) pay to the holders of the said debenture stock when issued interest upon (a) Interest. the respective amounts of stock standing in their respective names at the rate of £4 per cent. per annum by equal half-yearly payments upon the day of and the day of in each year, AND that the company will (subject to (b) Principal moneys. the conditions aforesaid) pay to the respective holders of the said debenture stock the total amount of principal money secured by such stock upon the happening of any of the events following (that is to say) (*a*) if the company shall make default in payment of interest on any of In certain events. the said debenture stock for the period of calendar months after the half-yearly dates above mentioned; (*b*) if the company shall cease to carry on its business; (*c*) if the company shall fail to perform or observe any of the covenants in these presents contained for weeks after having been required by the trustees to perform or observe the same; (*d*) if any of the property comprised in this security shall be taken in execution or otherwise by operation of law be taken out of the control of the company; (*e*) if an order shall be made or a resolution passed that the company shall be wound up, AND THIS INDENTURE Second testatum. ALSO WITNESSETH that for the purpose of securing the principal money and interest due from the company upon the said debenture stock the company doth hereby as beneficial owner convey [*continue from* Conveyance, etc *the testatum in Form* 12 *to the end of the form, substituting "stock" or "stock certificates" for "debenture" or "debentures"*].(*o*) [*Provisions for the meetings of debenture stock holders similar to those in Form* 4*a substituting "stock" or "stock certificates" for "debenture" or "debentures" are frequently inserted in a schedule to the trust deed. The conditions of the issue of the debenture stock* (*see Form* 14), *which are similar to the conditions endorsed on debentures, are usually inserted in a schedule to the trust deed or else are endorsed on the debenture stock certificates.*]

(*o*) This form has been extracted by permission from the third edition of Sir C. Chadwyck Healey's book on *Company Law and Practice*.

Form 14.

FORM 14. (*See* p. 41.)

CONDITIONS SUBJECT TO WHICH DEBENTURE STOCK SECURED BY A TRUST DEED IS ISSUED.(*p*)

Series to rank *pari passu.*

1. The holders of the within-mentioned issue of £ debenture stock (hereinafter referred to as the stock holders) are entitled *pari passu inter se* to the benefit of the charge created by the above trust deed.

Payment of principal and interest.

2. The company will pay the principal moneys due to all the stock holders on the day of , or on such earlier date as the same shall become payable under these conditions or under the provisions contained in the above trust deed and will in the meantime pay interest on the said principal moneys at the rate of £4 per cent. per annum by equal half-yearly payments on the day of and the day of in each year, the first of such payments to be made on the day of next.

Register.

[3. The company will keep at its registered office a register of the said stock (hereinafter referred to as the stock register) in which shall be entered the names and addresses of the holders from time to time of the said stock and the portions thereof held by them respectively.]

Whom company will register as owner.

4. The company will not register as the holder of any portion of the said stock any person other than the person or persons, to whom such portion has been issued, and persons legally claiming through such original holder or holders and will not enter in the stock register any notice of a trust or equity, provided that, if two or more persons are at any time registered as the joint holders of any portion of the said stock, the company will recognise a notice to enable any one of such persons to give effectual receipts for any principal moneys and interest payable in respect thereof.

Issue of registered certificate.

5. On demand of a person or of several persons respectively registered as the holder or joint holders of a portion of the said stock the company will issue to him or them a certificate of title under the common seal of the company specifying the portion to which he or they is or are respectively entitled. Every such certificate shall be in the following form [*insert Form* 11].

Transfer.

6. Any person or persons registered as aforesaid as the holder or joint holders respectively of any portion of the said stock may by instrument in writing signed by him or them transfer the same or any part thereof being £5 or a multiple of £5. On any such transfer a fee of two shillings and sixpence shall be paid to the company and the transfer shall be registered in the stock register on delivery up to the company of the certificate repre-

(*p*) These conditions are sometimes endorsed on the debenture stock certificates, but more usually (as in Form 14) inserted in a schedule to the trust deed. Where a quotation on the London Stock Exchange is desired, the conditions of issue, redemption and transfer must be endorsed on the certificates. See *supra*, pp. 73-74.

Form 14.

senting the stock intended to be transferred and the instrument of transfer and on the directors of the company being reasonably satisfied as to the identity and title of the person purporting to make the transfer.

Registration of transfer postponed.

7. The company will decline to register any such transfer during the seven days immediately preceding the day of and the day of (*the days on which interest is payable*) in each year.

Payments made free from intermediate equities.

8. The principal moneys and interest due to a person or to several persons respectively registered in the stock register as the holder or joint holders of any portion of the said stock will be paid by the company subject only to any equities, which may from time to time subsist between the company and such person or persons, but without regard to any equities between the company and any other holder or holders than as aforesaid. The receipt for the said principal moneys or interest signed by the person or persons for the time being so registered or by the survivor or survivors of several joint holders shall be a good discharge as against all persons whomsoever for the principal moneys or interest specified in such receipt.

Power to give notice of redemption to registered stock holders.

9. The company shall have power at any time [after the day of], upon giving to any person or persons respectively registered in the stock register as the holder or joint holders of any portion of the said stock or to the persons legally claiming through him or them not less than six calendar months' previous notice expiring upon either of the days fixed for the payment of interest, to pay off the principal moneys due to such registered holder or holders, who shall accept payment of such principal moneys and interest up to the date so fixed for payment in full discharge of all claims in respect of his or their stock.

Notices how to be given to registered stock holders.

10. Any notice may be served on any stock holder by sending it through the post in a prepaid letter addressed to the registered holder at his registered address or in the case of joint holders to the person first named in the stock register.

When notice deemed served.

11. Any notice served by post shall be deemed to have been served two clear days after the time, when the letter containing the same shall have been posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and posted.

Issue of certificates to bearer.

12. Any person or persons respectively registered as the holder or joint holders of a portion of the said stock shall be entitled to a stock certificate to bearer (that is to say) a certificate of title to his or their stock or any part thereof entitling the bearer to the stock therein specified, upon applying for the same to the company in writing, and

Form 14.

upon payment of a fee of two shillings and sixpence and any stamp duty payable in respect thereof, and upon surrendering the certificate (if any) representing the portion of the said stock specified in such application. Every such stock certificate to bearer shall be in the following form [*insert Form* 10]. The company shall immediately on issuing any such stock certificate to bearer make an entry in the stock register specifying the date of the issue of and the amount of stock represented by such certificate, and stating that the bearer of such certificate is entitled to the portion of the said stock therein specified.

Coupons.

13. There shall be attached to each stock certificate to bearer coupons for such period as the company may think proper entitling the bearer of each coupon to the interest therein specified, and the company will at the end of such period issue fresh coupons for such further period as the company may think proper and so for successive periods during the continuance in force of such stock certificate to bearer. But the company may in lieu of issuing fresh coupons in respect of any stock certificate give in exchange a fresh stock certificate with coupons. Each coupon will be in the following form [*insert Form* 3*a*, *cancelling the word "debenture" and substituting "interest on debenture stock" for the heading "interest coupon"*].

Stock represented by certificate to bearer not transferable in register.

14. Such portions of the said stock as are from time to time represented by stock certificates to bearer shall cease to be transferable in the stock register.

Entry of holder of bearer certificate in register.

15. The bearer of a stock certificate to bearer may on delivery up to the company of the certificate and of all unpaid coupons belonging thereto require to be entered in the stock register as the holder of the portion of the stock specified in the certificate, under which he derives title, and thereupon the stock shall be re-entered in the stock register and become transferable in the stock register as if no stock certificate to bearer had been issued in respect thereof.

Certificate to bearer to be negotiable.

16. Such stock certificates to bearer shall be treated as negotiable instruments.

Receipt of bearer to be good discharge.

17. The receipt of the bearer of such a stock certificate to bearer shall be a good discharge as against all persons whomsoever for the principal moneys therein specified, and the surrender of each coupon by the bearer thereof to the company shall operate as a good discharge for the money therein specified as against all persons whomsoever.

Payments to holders of bearer certificates and coupons only made on delivery of instrument.

18. Payment of principal moneys represented by a stock certificate to bearer will only be made on delivery of such certificate and all unpaid coupons belonging thereto and payment of interest payable in respect of a stock certificate to bearer will only be made on delivery of the coupons.

Form 14.

19. The company shall have power at any time [after the day of] to pay off the principal sum specified in any stock certificate to bearer upon giving not less than six calendar months' previous notice by advertisement in the *Times*, such notice to expire upon either of the days fixed for the payment of interest. The bearer of such certificate shall accept such payment and interest up to the date so fixed for payment in full discharge of all his claims in respect of his stock certificate.

Power of company to give notice of redemption to holders of bearer certificates.

20. The rights of all the stock holders against the company or the company's property or any part thereof may be modified or released by arrangement between the company and one half or upwards in number of the stock holders holding two-thirds or upwards in value of the said stock for the time being outstanding or by a special resolution of the stock holders at a meeting called and held according to the conditions and provisions set forth in the Fourth Schedule hereunder written.

Power to vary rights of stock holders.

21. If a stock certificate or coupon issued by the company under these conditions is worn out or damaged, the company may on payment of a fee of *five* shillings and on production and delivery up thereof cancel it and issue a new certificate or coupon.

Power to issue fresh certificate or coupon, if damaged.

22. If a stock certificate or coupon issued by the company under these conditions is lost or destroyed, the company may issue a new certificate or coupon on such loss or destruction being proved to the satisfaction of the directors of the company and the company being indemnified to the like satisfaction against the claims of all persons deriving title under the certificate or coupon lost or destroyed and on payment of a fee of *five* shillings.

Power to issue fresh certificate or coupon in case of loss.

23. The company shall issue to any person or persons respectively registered in the stock register as the holder or joint holders of any portion of the said stock or to the bearer of any such certificate to bearer as aforesaid, several separate certificates in respect of separate parts of the said stock held by him or them respectively on such person or persons previously requesting the company so to do and surrendering to the company any certificate, which may have been previously issued by the company in respect of the said stock held by him or them, and also all unpaid coupons belonging to any such certificate.

Issue of several stock certificates.

24. The company shall not issue any stock certificate in respect of any portion of the said stock other than £5 or a multiple of £5.

Value of each certificate.

25. The money payable by the company to the stock holders under these conditions shall be paid at the registered office of the company or at the Bank, No. Street, the bankers of the company.

Place of payment.

Form 15.

FORM 15. (*See* p. 45.)

ARTICLE PROVIDING FOR NOMINATIONS ON THE DIRECTORATE BY THE DEBENTURE OR DEBENTURE STOCK HOLDERS' TRUSTEES.

The trustees for the time being of the trust deed dated, etc., and made between, etc., for the purpose of securing debentures [*or* debenture stock] of the company may, if they think fit, at any time or times remove or dismiss any one or more of the following directors of the company (namely) A, B and C (or the directors appointed in their places respectively by the company) from such office and appoint any person or persons to be director or directors in his or their place or places. The trustees may from time to time remove or dismiss the director or directors so appointed by them as aforesaid and appoint any other person or persons to be director or directors in his or their place or places. A director appointed by the trustees shall not be subject to retirement by rotation under the provisions of these articles, and shall not be taken into account in determining the order of retirement of directors, but shall be subject to the same provisions as to resignation as the other directors of the company. In case of any vacancy in the office of director held by the said A, B or C or the directors appointed in their places respectively by the company or any director appointed by the trustees, the trustees may fill up the vacancy by the appointment of some other person. The trustees may, if they think fit, appoint one or more of themselves to be director or directors.

Form 16.

FORM 16. (*See* p. 60 *et seq.*)

PROSPECTUS INVITING SUBSCRIPTIONS FOR DEBENTURES [*OR* DEBENTURE STOCK].

THE COMPANY, LIMITED.

(Incorporated under the Companies' Consolidation Act, 1908.)

The subscription list will *open* on Monday, the day of , , and will *close* at or before six o'clock p.m. on Wednesday, the day of , .

SHARE CAPITAL . . . £250,000.

[*State the number of founders' or management or deferred shares in the company, if any, and the rights attaching thereto.*](*p*)

Issue at par of [1000 debentures of £100 each making together] £100,000 (forming part of an entire issue of £200,000) of £5 per cent

(*p*) Sec. 81 (1) (*a*)) of the Comp. Cons. Act, 1908.

Form 16.

debentures [*or* debenture stock] secured by a trust deed dated the day of , 1912, and containing a specific mortgage on property valued at £ and a floating charge on the remaining assets of the company.

Each debenture of £100 [*or* the debenture stock] is payable as follows:—

On application	£10.	£10 per cent. of nominal value of stock applied for.
On allotment	£20.	£20 per cent.
On the day of , 1913	£30.	£30 per cent.
On the day of , 1913	£40.	£40 per cent.
	£100.	£100.

TRUSTEES OF TRUST DEED.

DIRECTORS.

[*Insert names, addresses and descriptions of directors and proposed directors.*](q)

BANKERS.

SOLICITORS.

AUDITORS.

[*Insert names and addresses.*](r)

SECRETARY.

OFFICE OF COMPANY.

PROSPECTUS.

Subscriptions are invited for £100,000 of the company's said £5 per cent. debentures [*or* £5 per cent. debenture stock].

[*Here will follow* (1) *a description of the business and assets of the company*, (2) *a statement as to the nature of the security to be given to the subscribers, a valuation of the property comprised in such security and an accountant's report showing the annual profits of the business during*

(q) See sec. 81 (1 (*c*)). The directors mentioned in a prospectus should before issuing the prospectus (1) file a consent to act as directors, and (2) either sign the Memorandum of Association for their qualification shares or file with the Registrar a contract to take from the company and pay for their qualification shares. See sec. 72 of the Act.

(r) See sec. 81 (1 (*b*)) of the Act.

Form 16.

the immediately preceding years, and (3) *the reasons for raising money by the issue. If any part of the proceeds of the issue of debentures or debenture stock is to be used in payment of any property purchased or acquired or proposed to be purchased or acquired by the company, the names and addresses of, and the amounts payable in cash, shares and debentures or debenture stock to, the vendors of such property should be stated, the amount (if any) payable for the goodwill being stated separately.*](s)

The following contracts have been entered into :—

[*State the dates of and the parties to every material contract (other than contracts entered into in the ordinary course of the company's business) entered into by the company within two years before the date of the prospectus.*](t)

[*If the prospectus is issued before the expiration of one year after the date, on which the company is entitled to commence business, add the following four particulars :—*

The estimated amount of the preliminary expense is £ .(u)

One hundred shares is the number fixed by the articles of association as the qualification of a director.

The following provisions are contained in the company's articles of association as to the remuneration of its directors.(v)

[*Insert these provisions.*]

The directors X, Y and Z were respectively interested in the promotion of the company and in the property proposed to be acquired by the company as follows :—(w)

[*Set this out in detail.*]

The company has agreed to pay the sum of £ to the said X for his services in connection with the promotion of the company; the said sum of £ is to be satisfied by payment in cash of the sum of £ and by the allotment of fully paid shares in the company of £1 each [or by the allotment of debentures of £ each of the company].

If it is the case, add :—

Within the two preceding years the company has (*a*) issued or agreed to issue as fully paid up [*or :* as paid up to the extent of] £1 shares in the company [and debentures *or* debenture stock of the company of the aggregate value of £] for a consideration other than

(s) see Sec. 81 (1 (*f*), (*g*)) of the Companies Consolidation Act, 1908.
(t) See sec. 81 (1 (*k*)) of the Act.
(u) Sec. 81 (1 (*i*)).
(v) Sec. 81 (1 (*b*)).
(w) Sec. 81 (1 (*m*)).

Form 16.

payment in cash, that is to say, in consideration of [*state the nature of the consideration*](*x*), and (*b*) has paid [*or* agreed to pay] as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for shares in [and debentures *or* debenture stock of] the company the sum of £ [*or* has paid *or* agreed to pay commission at the rate of £ per cent. of the nominal value of the shares or debentures or debenture stock which have been so subscribed or agreed to be subscribed or for which such subscriptions have been procured or agreed to be procured.](*y*).

No part of the debentures [*or* debenture stock] hereby offered for subscription has been underwritten.

The directors will not proceed to allotment of any of the debentures [*or* debenture stock] hereby offered for subscription, unless debentures [*or* debenture stock] of the nominal value of £ has been subscribed for.(*z*)

The interest on the debentures [*or* debenture stock] now offered will be paid half-yearly on the day of and the day of in each year, the first of such payments to be made on the day of and the principal will be repayable on the day of

[*If desired add :—*

The company reserve the right to redeem the debentures [*or* debenture stock] now offered or any portion thereof at any time after the day of , on giving to the holder or holders thereof not less than six months' notice of their intention to do so, at the price of £ for every £100 debenture [*or* £100 of the debenture stock].]

[*If desired, add :—*

Scrip certificates of the Company, Limited, to be exchanged for definitive debentures [*or* definitive certificates] on completion of payments will be issued against allotment letters and receipts.]

Instead of payment of the instalments on the above dates payment may be made in full on allotment subject to a discount at the rate of £ per cent. per annum.

Messrs. M. N. & Co.'s (the accountant's) report, Messrs. E. F. & Co.'s valuation, a printed copy of the Memorandum and Articles of Association of the company, the above-mentioned contracts or copies thereof, a copy of the said trust deed securing the said debentures [*or*

(*x*) Sec. 81 (1 (*e*)) of the Act.
(*y*) Sec. 81 (1 (*h*)) of the Act.
(*z*) The "minimum subscription" referred to in sec. 81 (1 (*d*)) probably only refers to the minimum subscription for shares; but, as the point is not entirely free from doubt, it is a wise precaution to insert this provision in a prospectus inviting subscriptions for debentures or debenture stock.

Form 16.

debenture stock] and a form of the debentures can be inspected at the office of Messrs. P. Q. & Co., solicitors to the company, on any day between the and the during business hours, while the subscription list is open.

It is intended to apply in due course for an official quotation on the Stock Exchange.

If no allotment is made, the entire deposit will be repaid, but in cases, in which the amount applied for exceeds the allotment, the surplus paid on deposit will be appropriated in payment of the amount due on allotment. Default in payment of any instalment, when due, will render the sums previously paid liable to forfeiture.

Copies of the prospectus and form of application may be had at the offices of the company, or from the bankers or their agents or from the brokers of the company.

Applications are to be made on the enclosed form accompanied by a deposit of £10 upon each debenture [*or* 10 per cent. of the amount of the debenture stock] applied for.

A copy of this prospectus has been filed with the Registrar of Joint Stock Companies.

Dated the of , 1912.

[*The Memorandum of Association of the company with the names, addresses and descriptions of the signatories and the number of shares subscribed for by them respectively must be printed in the fold of the prospectus, if the prospectus is issued before the expiration of one year from the date at which the company became entitled to commence business, but the Memorandum of Association is generally printed in the fold of the prospectus, even after the expiration of such year.*](x)

Form 17.

FORM 17. (*See* pp. 60, 68.)

LETTER OF APPLICATION.

THE A. & CO., LIMITED.

Issue of £100,000 £4 per cent. debentures [*or* debenture stock].

To the directors of A. & Co., Limited.

Gentlemen,

Having paid to the company's bankers the sum of £100, being

(x) See Secs. 81 (1 (a)) and 81 (8) of the Act.

a deposit of £*10* per debenture on *10* debentures [*or* of 10 per cent. on application for £*1000*] of the above issue, I request you to allot me *10* debentures [or £*1000* debenture stock] of the above issue upon the terms of the company's prospectus dated the day of , 1912, and I hereby agree to accept the same or any smaller amount that may be allotted to me, and to pay the further instalments thereon in accordance with the terms of the said prospectus. Form 17.

Name (in full).
Address (in full).
Profession or Occupation.
Usual Signature.

Date, , 1912.

FORM 18. (*See* p. 60.) Form 18.

BANKERS' RECEIPT FOR DEPOSIT PAID ON APPLICATION FOR DEBENTURES [*OR* DEBENTURE STOCK].

A. & CO., LIMITED.

Issue of £*100,000* of £*4* per cent. debentures [*or* debenture stock].

Received the day of , 1912, from the sum of £ , being a deposit of £ per debenture on application for debentures [*or* 10 per cent. on application for £ of the above debentures *or* debenture stock] in the above-named company.

For A. & Co., Limited.

Stamp.

Cashier.

£ : :

N.B.—This receipt must be preserved to be given up in exchange for the debentures [*or* a certificate].

Form 19.

FORM 19. (*See* p. 60.)

PROSPECTUS INVITING TENDERS FOR DEBENTURES [*OR* DEBENTURE STOCK].

THE A B COMPANY, LIMITED.

[*Heading the same as Form* 16.]

£100,000 3 PER CENT. DEBENTURES [*OR* DEBENTURE STOCK].

The directors are prepared to receive tenders for £100,000 of this company's debentures [*or* debenture stock] to be repayable on the day of , 1925, and in the meantime to bear interest at the rate of £3 per cent. per annum payable half-yearly at the Y Z Bank on the day of and the day of in each year, the first of such payments to be made on the day of next.

[*State the security offered.*]

The tenders must be sent in a sealed envelope to the undersigned at the company's office not later than twelve o'clock on the day of marked "Tenders for Debentures" [*or* "Debenture Stock"] and must be made in the following form, copies of which may be obtained at the company's office.

[*Insert form of tender as in Form* 20.]

If desired, add: A deposit of £10 per cent. upon the amount of debentures [*or* debenture stock] applied for must be sent with the tender, to be returned in the event of the tender not being accepted. The balance of the amount payable in respect of the debentures [*or* debenture stock] allotted will be payable on the day of , and in default of punctual payment the allotment will be liable to be cancelled and the deposit to be forfeited to the company.]

The debentures [*or* debentures stock] will be allotted in sums of not less than £100 or in multiplies thereof to the highest bidder, but no less price than £95 for each £100 of the debentures [*or* debenture stock] will be accepted.

[*Adapt prospectus in Form* 16, *omitting clauses providing for issue of scrip certificates, the immediate payment in full and the last three paragraphs.*]

Secretary's office. A. B., *Secretary.*

FORM 20. (*See* p. 60.) Form 20.

TENDER FOR DEBENTURES (*OR* DEBENTURE STOCK).

To the Directors of the Company.

I beg to tender for £ 3 per cent. debentures [*or* debenture stock] to be issued by the above-named company on the terms specified in the prospectus dated the day of and issued by such company, at the rate of £ for every £100 and I hereby agree to accept the said debentures [*or* debenture stock] or any less amount that may be allotted to me and to pay the full amount of the purchase money to the bankers of the said company. [*If desired, add:* A deposit of £ , being at the rate of £ per cent. upon the amount now applied for, is enclosed.]

[*Insert full name, address, description, date and signature.*]

FORM 21. (*See* pp. 97-99). Form 21.

DECLARATION TO BE FILED WITH REGISTRAR UNDER SECTION 87 OF THE COMPANIES (CONSOLIDATION) ACT, 1908, BEFORE COMPANY EXERCISES ITS BORROWING POWERS.(*x*)

COMPANIES (CONSOLIDATION) ACT, 1908.

A 5s. Companies Registration Fee Stamp must be impressed here.

Declaration made on behalf of the.....

.....

..... Limited,

that the conditions of s. 87 (1) have been complied with.

Presented for filing

by.....

.....

(*x*) This is Form 44 of the forms of Board of Trade, dated 29th March supplied at Somerset House. (See Order 1909.)

Form 21.

I.....
of.....
.....
being (*a*).....of the
.....
.....
.....Limited,
do solemnly and sincerely declare :—

(*a*) Insert here "the Secretary," or "a Director".

That the amount of the share capital of the company offered to the public for subscription is £.....

That the amount fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the company may proceed to allotment is £.....

That shares held subject to the payment of the whole amount thereof in cash have been allotted to the amount of £.....

That every director of the 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 I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared at.....
.....
.....
the.....day of.....
one thousand nine hundred and.....
before me,
.....
A Commissioner for oaths.

Form 22.

FORM 22. (*See* p. 119 *et seq.*)

PARTICULARS OF MORTGAGE OR CHARGE TO BE SUPPLIED TO REGISTRAR UNDER SECTION 93 (1) OF THE COMPANIES (CONSOLIDATION) ACT, 1908.(*y*)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

PARTICULARS to be supplied to the Registrar pursuant to s. 93, of

(*y*) This is Form 47 of the forms of Board of Trade, dated 29th March, 1909. supplied at Somerset House. (See Order

a mortgage or charge created by the.....Limited and being:— Form 22

(*a*) A mortgage or charge for the purpose of securing any issue of debentures; or

(*b*) A mortgage or charge on uncalled share capital of the company; or

(*c*) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) A mortgage or charge on any land wherever situate or any interest therein; or

(*e*) A mortgage or charge on any book debts of the company; or

(*f*) A floating charge on the undertaking or property of the company.

Strike out the sub-heads (*a*), (*b*), (*c*), (*d*), (*e*), or (*f*), which do not apply.

Presented for filing

by.....

Particulars of a mortgage or charge created by the

.....Limited

(1) Date of the instrument creating or evidencing the Mortgage or Charge and description thereof*	(2) Amount secured by the Mortgage or Charge.	(3) Short particulars of the Property Mortgaged or Charged.	(4) Names (with Addresses and Descriptions) of the Mortgagees or Persons entitled to the Charge.	(5) Amount or rate per cent. of the Commission Allowance or Discount (if any) paid or made either directly or indirectly by the Company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the Debentures included in this Return.

Signature.....

Designation of position in relation to the company.....

Date.....

Note.—The fees payable on registration of mortgages and charges are as follows:—

* A description of the instrument, *e.g.*, trust deed, mortgage, debenture, etc., as the case may be, should be given.

As to delivery of the instrument, or, in certain cases a copy thereof, with these particulars—see sec. 93 (1) and provisoes (i) and (ii).

Form 22.

Where the amount of the mortgage or charge does not exceed £200	10s.
Where the amount of the mortgage or charge exceeds £200	£1

Form 23.

FORM 23. (*See* pp. 121, 131.)

PARTICULARS OF SERIES OF DEBENTURES TO BE SUPPLIED TO REGISTRAR UNDER SECTION 93 (3) OF COMPANIES CONSOLIDATION ACT, 1908, WHERE THERE IS ONLY ONE ISSUE.(z)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Particulars to be delivered to the Registrar pursuant to s. 93 (3), relating to a series of debentures containing, or giving by reference to any other instrument, any charge, to the benefit of which the debenture holders of the said series are entitled *pari passu* created by the .....Limited.

NOTE.—The deed, if any, containing the charge must be delivered with these particulars to the Registrar within 21 days after the execution of such deed; or, if there is no such deed, one of the debentures must be so delivered within 21 days after the execution of any debentures of the series.

Presented for filing
by.....

Particulars to be delivered to the Registrar pursuant to s. 93 (3) of the Companies Consolidation Act, 1908, of a series of debentures created by.....Limited.

(z) This is Form 47A of the forms of Board of Trade, dated 29th March, supplied at Somerset House. (See Order 1909.)

Form 23.

(1) Total amount secured by the whole series.	(2) Amount of the present issue of the series.	(3) Dates of Resolutions authorizing the issue of the series.	(4) Date of the Covering Deed (if any) by which the security is created or defined; or, if there is no such Deed the date of the first execution of Debentures of the series.	(5) General Description of the Property charged.	(6) Names of the Trustees (if any) for the Debenture holders.	(7) Amount or rate per cent. of the Commission, Allowance or Discount (if any) paid or made either directly or indirectly by the Company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the Debentures included in this Return.

Signature.....

Designation of position in relation to the company.....

Date.....

.....

FORM 24. (*See* pp. 121, 131.)

Form 24.

PARTICULARS OF SERIES OF DEBENTURES TO BE SUPPLIED TO REGISTRAR UNDER SECTION 93 (3) OF COMPANIES (CONSOLIDATION) ACT, 1898, WHERE MORE THAN ONE ISSUE IS MADE.(*a*)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

A 5s. Companies Registration Fee Stamp must be impressed here.

The.....

.....Limited.

(*a*) This is the Form 48 of the forms of Board of Trade, dated 29th March, supplied at Somerset House. (See Order 1909.)

Form 24.

Statement of particulars as required by sub-sec. 3 of s. 93, when more than one issue is made of debentures in a series.

NOTE.—Sub-section 3 of section 93 above-mentioned provides :—

(1) For registration of particulars of the entire series (for which purpose Form No. 47A must be used), and

(2) When there is more than one issue of debentures of the series—for the registration of the amount and date of each issue (for which purpose this Form No. 48 must be used).

Presented for filing
by.....

Particulars of an issue of debentures made by the.....Limited.

To be entered on the register pursuant to s. 93 (3) of the Companies (Consolidation) Act, 1908.

(1) Date of present issue.	(2) Amount of present issue.	(3) Particulars as to the amount or rate per cent. of the commission, allowance, or discount (if any) paid, or made, either directly or indirectly, by the company, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any of the debentures included in this return.

Signature.....

Designation of position in relation to the company. }.....

Date.....

Section 93 (3) of the Companies (Consolidation) Act, 1908, provides, *inter alia*, that :—

Where more than one issue is made of debentures in the series, there shall be sent to the Registrar for entry on the register particulars of the date and the amount of each issue.

FORM 25. (*See* pp. 99-100.) Form 25.

STATEMENT OF THE AMOUNT OF A PROPOSED ISSUE OF DEBENTURES OR DEBENTURE STOCK TO BE DELIVERED TO THE COMMISSIONERS OF INLAND REVENUE.

INLAND REVENUE.

Name.....

.....

Statement of nominal loan capital made pursuant to section 8 of the Finance Act, 1899. (NOTE.—The stamp duty on the nominal loan capital is two shillings and sixpence for every £100 or fraction of £100.)

This statement is to be delivered to the Commissioners of Inland Revenue before the issue of any loan capital by any local authority, corporation, company or body of persons formed or established in the United Kingdom.

Delivered by

.....

.....

The following are the particulars of the nominal loan capital of the

.....

.....

Amount £	Proposed date of issue.	Stamp Duty at 2s. 6d. per cent.

Signature.....

Description.....

Date.....

This statement is to be signed by the proper officer.

Form 26.

FORM 26. (*See* p. 68.)

LETTER OF ALLOTMENT.(*a*)

THE A B COMPANY, LIMITED.

QUEEN VICTORIA STREET, E.C.,
10th April, 1912.

No.....

Sir,

I am instructed to inform you that ten 4 per cent. debentures of £100 each [*or* £1000 4 per cent. debenture stock] of the above-named A B Company, Limited, have been allotted to you in compliance with your application, dated the day of , 1912.

Kindly pay the £ due on allotment, as stated below, on or before the day of , 1912, to Messrs. of , the company's bankers.

Debentures [*or* a debenture stock certificate] will be issued to you in due course, of which notice will be given, and meanwhile you are requested to keep this letter with the bankers' receipts until they are exchanged for such debentures [*or* debenture stock certificate].

Amount payable in respect of the 10 debentures [*or* £1000 debenture stock] allotted to you :—

£.....	payable on application	£
£.....	„ „ allotment.....	£
£.....	„ „ the day of , 1913	£
£.....	„ „ the day of , 1913	£
	Total	£
	Deposit paid by you on application	£
	Balance payable	£

I remain,
Yours obediently,
O. P.,
Secretary.

To.....

(*a*) To be stamped with a sixpenny impressed stamp. (See *supra*, p. 59.)

THE A B COMPANY, LIMITED. Form 26.

No.....

Received the day of from the sum of £ being the amount payable on the allotment of 10 debentures of £100 each [*or* £1000 debenture stock] of the above-named company.

For A. & Co., Limited.

Stamp.

Cashier.

Not to be detached from the letter of allotment.

No..... THE A B COMPANY, LIMITED. ....*April*, 1912.

To be detached by the Bankers.

To Messrs. , Bankers.

Please receive on account of the above company from £ s. d., being the sum payable on allotment of 10 debentures [*or* £1000 debenture stock] of the above-named company.

FORM 27. (*See* pp. 121-2, 132.) Form 27.

REGISTRAR'S CERTIFICATE OF REGISTRATION OF SERIES OF DEBENTURES NOT SECURED BY A TRUST DEED.

CERTIFICATE OF THE REGISTRATION OF A SERIES OF DEBENTURES WHERE THERE IS NO TRUST DEED.

Pursuant to sec. 93 (5) *of the Companies* (*Cousolidation*) *Act*, 1908 (8 *Edw. VII., cap.* 69).

APPLICATION having this day been made for the entry on the register of the particulars required by subsection 3 of section 93 of the Companies (Consolidation) Act, 1908, in relation to a series of debentures (containing a charge to the benefit of which the debenture holders of the said series are entitled *pari passu*) created by.....

Form 27. Limited, and the issue of the series having been authorised by resolution passed on the.....day of.....19.....(and one of such debentures having been duly produced) I HEREBY CERTIFY that the total amount secured or intended to be secured by the said series is £....., and that all the particulars required by subsection 3 of section 93 of the said Act in relation to the said series have been this day entered on the register.

Given under my hand at London this.....day of.....

A. B.,

Registrar of Joint Stock Companies.

(*Subsections* 5 *and* 6 *of sec.* 93 *of the Companies* (*Consolidation*) *Act*, 1908, *are endorsed on the certificate.*)

Form 28.

FORM 28. (*See* pp. 121-2, 132).

REGISTRAR'S CERTIFICATE OF REGISTRATION OF SERIES OF DEBENTURES SECURED BY A TRUST DEED.

CERTIFICATE OF REGISTRATION OF A TRUST DEED AND SERIES OF DEBENTURES.

Pursuant to sec. 93 (5) *of the Companies* (*Consolidation*) *Act*, 1908 (8 *Edw. VII., cap.* 69).

APPLICATION having this day been made for the registration of a *trust deed* dated.....and executed by the....., Limited, for the purpose of securing the series of debentures hereinafter mentioned, and application having been also made this day for the entry on the register of the particulars required by subsection 3 of section 93 of the Companies (Consolidation) Act, 1908, in relation to a series of debentures (containing, or giving by reference to any other instrument, a charge to the benefit of which the holders of such series are entitled *pari passu*), the issue of which was authorised by the said company by resolution passed on the.....day of.....19....., and the said trust deed having been brought in for registration within twenty-one days after its execution, I HEREBY CERTIFY that the total amount secured or intended to be secured by the said trust deed and series of debentures is £....., and that the said trust deed has this day been registered pursuant to section 93, subsection 1, of the said Act, and that all the par-

ticulars required by subsection 3 of section 93 of the said Act in relation to the said series have been entered on the register. Form 28.

Given under my hand at London this.....day of.....19.....

A. B.,

Registrar of Joint Stock Companies.

(*Subsections* 5 *and* 6 *of sec.* 93 *of the Companies* (*Consolidation*) *Act*, 1908, *are endorsed on the certificate.*)

FORM 29. (*See* pp. 121-2, 132.) Form 29.

REGISTRAR'S CERTIFICATE OF REGISTRATION OF DEBENTURE STOCK.

CERTIFICATE OF REGISTRATION OF A TRUST DEED AND PARTICULARS OF DEBENTURE STOCK.

Pursuant to sec. 93 (5) *of the Companies* (*Consolidation*) *Act*, 1908 (8 *Edw. VII., cap.* 69).

APPLICATION having this day been made for the registration of a trust deed dated.....and executed by the....., Limited, for the purpose of securing the certificates of debenture stock hereinafter mentioned, and application having been also made this day for the entry on the register of the particulars required by subsection 3 of section 93 of the Companies (Consolidation) Act, 1908, in relation to certificates of debenture stock (containing, or giving by reference to any other instrument, a charge to the benefit of which the debenture stock holders are entitled *pari passu*), the issue of which was authorised by the said company by resolution passed on the.....day of....., 19....., and the said trust deed having been brought in for registration within twenty-one days after its execution, I HEREBY CERTIFY that the total amount secured or intended to be secured by the said trust deed is £....., and that the said trust deed has this day been registered pursuant to section 93, subsection 1, of the said Act, and that all the particulars required by subsection 3 of section 93 of the said Act in relation to the said debenture stock have been entered on the register.

Given under my hand at London this .....day of..... .....19.....

A. B.,

Registrar of Joint Stock Companies.

(*Subsections* 5 *and* 6 *of sec.* 93 *of the Companies* (*Consolidation*) *Act*, 1908, *are endorsed on the certificate.*)

Form 30.

FORM 30. (*See* p. 134.)

DECLARATION VERIFYING MEMORANDUM OF SATISFACTION OF MORTGAGE OR CHARGE PURSUANT TO SECTION 97 OF THE COMPANIES CONSOLIDATION ACT, 1908.(*b*)

COMPANIES (CONSOLIDATION) ACT, 1908.

DECLARATION VERIFYING MEMORANDUM OF SATISFACTION OF MORTGAGE OR CHARGE TO BE ENTERED ON THE REGISTER PURSUANT TO SECTION 97.

The .....
.....Limited.

We,.....of....., a Director of the above-named company, and.....
of....., the secretary of the above named company, solemnly and sincerely declare that the particulars contained in the memorandum of satisfaction annexed hereto and dated....., are true to the best of our knowledge, information and belief.

And we make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the "Statutory Declarations Act, 1835".

Declared at .....
.....
.....
the.....day of .....
one thousand nine hundred and.....
before me,
.....
A Commissioner for Oaths.

Presented for filing by.....
.....

MEMORANDUM OF SATISFACTION OF MORTGAGE OF CHARGE.

5s. Rgistration Fee Stamp.

The .....
..... Limited,
hereby gives notice that the (*a*).....dated the .....day of.....one thousand nine hundred and....., and created by the company for securing the sum of £ ..... was satisfied to the extent of £..... on the.....day of.....19 .

(*a*) Insert here "mortgage" or "charge," "debentures" or "debenture stock," as the case may be.

(*b*) This is Form 49 of the Forms of Board of Trade, dated 29th March, supplied at Somerset House. (See Order 1909.)

In witness whereof the common seal of the Company was hereunto affixed the.....day of.....one thousand nine hundred and.....in the presence of Form 30.

.....
.....
} Directors.

Seal of Company.

.....Secretary.

FORM 30A. (*See* pp. 133-4.) Form 30A.

ORDER EXTENDING THE TIME FOR REGISTERING MORTGAGE OR CHARGE SECURING AN ISSUE OF DEBENTURE STOCK UNDER SECTION 96 OF THE COMPANIES (CONSOLIDATION) ACT, 1908.

Upon motion this day made unto this Court by counsel on behalf of the above named Moor's & Robson's Breweries, Limited, and upon reading the affidavit of Peter Robson, filed the 24th April, 1909, and the several exhibits therein referred to, the Court being satisfied that the omission to file with the Registrar of Joint Stock Companies pursuant to [section 14 of the Companies Act, 1900, section 10 of the Companies Act, 1907, and] section 93 of the Companies (Consolidation) Act, 1908, the several instruments the particulars whereof are set out in the schedule hereto (being mortgages or charges created by Moor's & Robson's Breweries, Limited, for the purpose of securing debenture stock of the said company) was due to inadvertence, and that it is just and equitable to grant relief DOTH pursuant to [section 15 of the Companies Act, 1900, and] section 96 of the Companies (Consolidation) Act, 1908, order that the time for filing with the Registrar of Joint Stock Companies the said several instruments, particulars whereof are set out in the schedule hereto be extended until the 18th May, 1909, and that an office copy of this order be filed with the said Registrar of Joint Stock Companies, *and* this order is without prejudice to the rights of the parties acquired prior to the time when the said several instruments shall be actually registered.

H. J. HOOD.

The Schedule before referred to.

Date of instrument.	Particulars.
1901—19th July	Conveyance between.....
1901—19th August	Conveyance between.....
1901—21st October	Conveyance between.....
1902—13th March	Conveyance between.....

Re *Moor's & Robson's Breweries, Ltd.*, Neville, J., 27th April, 1909.

Form 31.

FORM 31. (*See* p. 68.)

PROVISIONAL SCRIP CERTIFICATE FOR DEBENTURE.

THE A B COMPANY, LIMITED.

Issue of 1000 debentures of £100 each bearing interest at 5 per cent. per annum.

No.

This is to certify that the bearer of this certificate is entitled, on due completion of the payments hereinafter mentioned, to 10 debentures of the A B Company, Limited, for the sum of £100 each bearing interest at the rate of 5 per cent. per annum and that the sum of £100 is credited as having been paid thereon. The remaining instalments are payable at the Bank at London, in the amounts and at the times hereinafter mentioned, that is to say:

£100 already credited as paid thereon as above;
2nd instalment: £250 to be paid on the , 1912;
3rd instalment: £250 to be paid on the , 1912;
4th instalment: £400 to be paid on the , 1913;
total £1000

Interest will be payable on the amount already credited by this certificate and upon the future instalments, when paid, at the rate of £5 per cent. per annum half-yearly on the of and the of in each year.

This certificate is issued on the express condition, that the further instalments be duly paid at the times above mentioned, and in default this certificate and the payments credited and made thereon will become liable to forfeiture without further notice.

On this certificate together with the receipts for all the above instalments being lodged with the company on or after the day of , this certificate will be exchanged for the debentures.

Dated the day of , 1912.

For the A B Company, Limited.

.....Director.

.....Secretary.

FORM 32. (*See* p. 76.)

Form 32.

BORROWING POWER OF COMPANY IN MEMORANDUM OF ASSOCIATION.

To borrow and raise money and for that purpose to mortgage or charge the undertaking and all or any part or parts of the property and assets of the company both present and future (including its uncalled capital) and to create and issue debentures and debenture stock (whether perpetual and determinable) for securing the money so borrowed or raised and generally to borrow and raise money in such manner and on such terms as the company shall think fit.

FORM 33. (*See* p. 77.)

Form 33.

RESOLUTION EMPOWERING DIRECTORS TO RAISE MONEY BY AN ISSUE OF DEBENTURES.

That the directors may borrow for the purposes of the company a sum or sums of money not exceeding £ and secure the money so borrowed with interest at the rate of 4 per cent. per annum by the issue of debentures and such debentures shall contain such provisions and stipulations and shall be issued subject to such conditions and shall be secured in such manner as the directors shall think fit.

FORM 34. (*See* p. 77.)

Form 34.

RESOLUTION EMPOWERING DIRECTORS TO RAISE MONEY BY AN ISSUE OF DEBENTURE STOCK.

That the directors may borrow for the purposes of the company a sum or sums of money not exceeding £ and secure the money so borrowed with interest at the rate of 4 per cent. per annum by the issue of debenture stock. Such stock shall be created and secured by a trust deed, which shall contain such clauses, provisions and stipulations as the directors shall think fit, and by such other deeds or instruments and generally in such manner as the directors shall think fit.

Form 34A.

FORM 34A. (*See* pp. 198, 226.)

NOTICE OF APPOINTMENT OF RECEIVER OR MANAGER TO BE GIVEN TO REGISTRAR PURSUANT TO SECTION 94 OF THE COMPANIES CONSOLIDATION ACT, 1908.(*c*)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

A 5s. Companies Registration Fee Stamp must be impressed here.

Notice pursuant to section 94 as to the appointment of a receiver or manager.

The.....Company Limited.

NOTES.—This notice must be filed within seven days of the order of the appointment under the instrument.

The penalty for default is a fine not exceeding £5 for every day during which the default continues.

.....

Presented for filing by.....

To the Registrar of Joint Stock Companies.

I,.....

of.....

hereby give notice that :—

* (1) I have obtained an order of the †.....

dated.....for the appointment of

Mr. .....

of.....

as receiver *or* manager of the property of this company.

* (2) On the.....day of.....I appointed

Mr.....of

.....as receiver *or*

manager of the property of this company under the powers contained in an instrument dated ‡.....

Signature.....

Date.....

.....

(*c*) This is Form 53 of the forms of the Board of Trade, dated 29th March, supplied at Somerset House. (See Order 1909.)

* Of these two paragraphs strike out that which does not apply.
† Insert name of Court making the order.
‡ Describe fully the instrument under which appointment is made.

FORM 34B. (*See* p. 199.)

Form 34B.

RECEIVER AND MANAGER'S ABSTRACT OF RECEIPTS AND PAYMENTS TO BE FILED WITH REGISTRAR HALF-YEARLY PURSUANT TO SECTION 95 OF COMPANIES (CONSOLIDATION) ACT, 1908.(*d*)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

[No registration fee payable.]

Receiver or Manager's Abstract of Receipts and Payments.
(*Pursuant to Section* 95.)

Name of company.....Limited.

Name and address of receiver or Manager. .....

.....

Date and description of instrument under which receiver or manager is appointed. .....

.....

.....

.....

Date of taking possession.....

Period covered by the abstract. From .....

To .....

Presented for filing by.....

ABSTRACT.

Receipts.				Payments.			
	£	s.	d.		£	s.	d.

Signature.....

Date.....

(*d*) This is Form 57 of the forms supplied at Somerset House. (See the Order of the Board of Trade, dated 29th March, 1909).

Form 34c.

FORM 34C. (*See* p. 199.)

NOTICE OF CESSER OF RECEIVERSHIP TO BE FILED WITH REGISTRAR PURSUANT TO SECTION 95 OF THE COMPANIES (CONSOLIDATION) ACT, 1908.(*e*)

A 5s. Companies Registration Fee Stamp must be impressed here.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Notice to be given by a receiver or manager on ceasing to act as such.

(*Pursuant to Section* 95.)

Name of company..... .....Limited.

This notice must be filed by the receiver or manager on his ceasing to act as such. The penalty for default is a fine not exceeding £50.

Presented for filing by.....

To the Registrar of Joint Stock Companies.

I, the undersigned,..... of..... hereby give you notice that I ceased to act as receiver or manager of the.....Company, Limited, on the..... day of.....

Signature.....

Date.....

(*e*) This is Form 57A of the forms of the Board of Trade, dated 29th March, 1909.) supplied at Somerset House. (See Order

FORM 35. (*See* pp. 215-270.) Form 35.

STATEMENT OF CLAIM BY THE HOLDER OF DEBENTURES WHICH ARE NOT SECURED BY A TRUST DEED.

Writ issued the.....day of.....1912.

In the matter of the A B Company, Limited.

Between C D (on behalf of himself and all the other holders of debentures issued by the defendant company).

.....Plaintiff.

and

A B Company, Limited.....Defendant.

STATEMENT OF CLAIM.

Delivered, etc.

[*State when company was incorporated, and shortly what are its objects. Set out in full clause conferring borrowing power on company. State that company issued debentures in pursuance of such power, giving short effect of debentures, that plaintiff has been registered as and is a holder of such debentures, that the company has made default in paying interest and that principal and interest are due. If an interim receiver and manager has been appointed, state it.*]

The plaintiff claims :—

(1) A declaration that the plaintiff and the other holders of the said debentures of the defendant company are entitled to a first charge upon the undertaking and all the property both present and future including the uncalled capital of the defendant company ;

(2) An account of what is due to the plaintiff and other holders of the said debentures for principal and interest ;

(3) That the said debentures may be enforced by foreclosure or sale, and

(4) A [*If an interim receiver and manager has been appointed, substitute :* That the said X may be continued as] receiver and manager of the property and undertaking of the defendant company ;

(5) Costs.

Form 36.

FORM 36. (*See* pp. 215-270.)

STATEMENT OF CLAIM BY THE HOLDER OF DEBENTURES WHICH ARE SECURED BY A TRUST DEED.

Writ issued the.....day of.....1912.

In the matter of the A B Company, Limited.

Between C D (on behalf of himself and all the other holders of debentures issued by the defendant company).

.....Plaintiff.

and

A B Company, Limited, and E F and G H.....Defendants.

STATEMENT OF CLAIM.

[*State when company was incorporated, and shortly what are its objects. Set out in full clause conferring borrowing power on company. State that company issued debentures in pursuance of such power giving short effect of debentures. Set out the provisions of the trust deed so far as material. State that the defendants E F and G H are the trustees of the trust deed. State that the company has gone into liquidation, and that the principal moneys due on the debentures are now payable. If an interim receiver and manager has been appointed, state it.*]

The plaintiff claims :—

(1) A declaration that the plaintiff and the other holders of debentures of the defendant company are entitled to a first charge on all the property both present and future and the undertaking and the uncalled capital of the defendant company for securing the repayment of the principal moneys and interest in the said debentures mentioned ;

(2) That the trusts of the said indenture may be performed and carried into execution ;

(3) An account of what is due to the plaintiff and the other holders of the said debentures for principal and interest ;

(4) That the said debentures may be enforced by foreclosure or sale ;

(5) A [*If an interim receiver and manager has been appointed substitute :* That the said X may be continued as] receiver and manager of the property and undertaking of the company ;

(6) Costs.

FORM 37. (*See* pp. 217 *et seq.*, 239-253, 256.) Form 37.

ORDER APPOINTING RECEIVER AND MANAGER.

Upon motion this day made unto this Court by counsel for the plaintiff, no one appearing for the defendants although duly served with the writ of summons and notice of the said motion as by an affidavit by J. H. B. filed the.....appears, and upon reading the writ of summons issued on the.....two affidavits of J. B. C. both filed the..... and the exhibits referred to in one of such affidavits and the plaintiffs by their counsel undertaking to be answerable for what F. J. L. the receiver and manager hereinafter appointed shall receive or become liable to pay until he shall have given security, as hereinafter directed.

This Court doth hereby appoint the said F. J. L., of.....chartered accountant, receiver on behalf of the plaintiffs and all other holders of the first mortgage debentures of the defendant company of all the property of the defendant company, except uncalled capital comprised in or subject to the security created by the said debentures *and* to manage the business of the defendant company. *But* the said F. J. L. is not to act as such manager after the 12th June, 1911, without the leave of the judge in chambers.

And it is ordered that the said F. J. L. do forthwith out of any assets to come to his hands pay the debts of the defendant company which have priority over the claims of the debenture holders under the Companies (Consolidation) Act, 1908, and be allowed such payments in his accounts.

And it is ordered that the said F. J. L. do on or before the 2nd June, 1911, give security as such receiver and manager to the satisfaction of the judge. *But* in case the said F. J. L. shall not within the time aforesaid give such security as aforesaid, then his appointment as such receiver and manager is to lapse as from the said 2nd June, 1911.

And it is ordered that the said F. J. L. do pass his accounts and pay his balances as the judge shall direct.

(Re *Cadogan Laundry Co., Ltd.*, 12th May, 1911.)
Armstrong Co. v. *the Company.* Eve, J.,

Form 37A.

FORM 37A. (*See* pp. 217-253, 254.)

ORDER DIRECTING ACCOUNTS AND INQUIRIES IN DEBENTURE STOCKHOLDER'S ACTION, AND APPOINTING RECEIVER AND MANAGER.

Upon motion this day made unto this Court by counsel for the plaintiffs, and upon hearing counsel for the defendants and upon read-

Form 37A. ing the writ of summons issued the.....an affidavit of F. H. C. filed the....., and the plaintiffs and defendants by their counsel agreeing to treat the said motion as the trial of this action and consenting to this judgment.

This Court doth order that the following accounts and inquiries be taken and made (that is to say):—

1. An accouut of what is due to the plaintiffs and other holders of debenture stock issued by the defendant company and entitled to the benefit of an indenture dated the....., and made between the defendant company of the one part and the plaintiffs of the other part, and under and by virtue of the certificates of such debenture stock.

2. An inquiry what the property comprised in or charged by the said indenture consists and in whom the same is vested.

3. An inquiry what other incumbrances affect the property comprised in or charged by the said indenture or any and what parts thereof.

And the plaintiffs by their counsel undertaking to be answerable for all sums which R. H. C. shall receive or become liable to pay until he shall have given security as hereinafter directed.

The Court doth appoint R. H. C. of.....receiver and manager on behalf of the plaintiffs and other holders of the said debenture stock to receive the assets and property of the defendant company comprised in or subject to the charges created by the said indenture, dated the....., to secure the debenture stock and to manage the business of the defendant Company. *But* the said R. H. C. is not to act as manager after 31st October, 1911, without the leave of the judge.

And it is ordered that the said R. H. C. do on or before the 7th July, 1911, give security as such receiver and manager to be approved by the judge.

And it is ordered that the said R. H. C. do pass his accounts and pay his balances as the judge shall direct. But if the said R. H. C. shall not have given security, as such receiver and manager, on or before the 7th July, 1911, his appointment as such receiver and manager is to lapse, and it is ordered that the said R. H. C. do forthwith out of any assets coming to his hands pay the debts (if any) of the defendant company which have priority over the claims of the holders of debenture stock under the Companies (Consolidation) Act, 1908, and be allowed all such payments on passing his accounts.

And the further consideration of this action is adjourned, and any of the parties are to be at liberty to apply.

(Re *The Inns of Court Hotel, Limited, Cripps* v. *The Company*. Eve, J., 16th June, 1911.)

FORM 38. (*See* pp. 225-6.)

Form 38.

RECOGNIZANCE TO BE ENTERED INTO BY A RECEIVER [AND MANAGER].

Re R. S. Company Limited
P. Q. *v.* the Company.
1902. P. No. 1000.

Mr. Justice.....the Judge to whom this action is assigned has approved and allowed this recognizance this.....day of.....1913.

Master of the Supreme Court.

A. B. of.....

Before our Sovereign Lord the King in his High Court of Justice personally appearing doth acknowledge himself to owe to.....and.....two of the Masters of the Supreme Court the sum of £.....to be paid to the said .....and.....or one of them or the executors or administrators of them or one of them and unless he doth pay the same he the said A. B. doth grant for himself his heirs executors and administrators that the said sum of £.....shall be levied recovered and received of and from him and of and from all and singular his manors messuages lands tenements and hereditaments goods and chattels wheresoever the same shall or may be found.

Witness our said Sovereign Lord George V. by the Grace of God of the United Kingdom of Great Britain and Ireland King Defender of the Faith, and so forth, at the Royal Courts of Justice, the.....day of.....1912.

WHEREAS by an order of the High Court of Justice Chancery Division made by Mr. Justice.....In the matter of the R. S. Company Limited, and in an action wherein P. Q. (suing on behalf of himself and all the other holders of the first mortgage debentures issued by the said company) is plaintiff and the said R. S. Company Limited are defendants. No. 567 of 1912 and dated the.....day..... the Court did appoint the said A. B. [*recite so much of the order appointing the receiver as shall be necessary*] and it is also ordered that the said A. B. should on or before the.....day of.....1912 give security as such receiver [and manager] to the satisfaction of the Court pursuant to Order 50 rule 16 of the rules of the Supreme Court AND WHEREAS the judge hath approved of the above-written recognizance with the under-written condition together with a bond bearing even date herewith entered into by the said A. B. and the M. N. Society as his sureties in the sum of £.....as a proper security to be entered into by the said A. B. pursuant to the said order and the rules of the Supreme Court in that behalf and as well in respect of the period for which the said A. B. has been appointed receiver [and manager] as aforesaid as also in respect of any extended or further period during which he may be continued or appointed such receiver [and manager] either under the said order or any further order in the

Form 38.

said action and in testimony of such approval the Master hath signed an allowance in the margin hereof and of the said bond respectively NOW THE CONDITION of the above-written recognizance is such that if the said A B do and shall duly account for all and every the sum and sums of money and other property which he shall so receive or become liable to pay as such receiver [and manager] as aforesaid [*or* on account of the *following the words of the order appointing the receiver*] including as well all and every the sum and sums and other property so received in respect of the period for which the said A B has been appointed such receiver [and manager] as aforesaid as also all and every the sum and sums and other property so received in respect of any appointment for any extended period during which he may be appointed such receiver [and manager] either under the said order or under any further order in the said action at such periods as the said Judge shall appoint and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court or Judge hath directed or shall hereafter direct then the above recognizance shall be void and of none effect otherwise the same is to be and remain in full force and virtue.

Taken and acknowledged by the above-named A B.....at .....in the County of.....this.....day of.....1912.
Before me a Commissioner for Oaths.

Form 39.

FORM 39. (*See* pp. 225-226.)

RECEIVER [AND MANAGER]'S BOND.

KNOW ALL MEN BY THESE PRESENTS that I, A B of .....and we the.....Society Limited (hereinafter called the Society) are jointly and severally held and firmly bound unto.....and.....two of the Masters of the Supreme Court in the sum of £.....of lawful money of the United Kingdom of Great Britain and Ireland to be paid unto the said.....and..... or one of them or the executors or administrators of them or one of them for which payment well and truly to be made I the said A B for myself my heirs executors and administrators and every of them and we the Society for ourselves and our successors do bind and oblige ourselves for the whole firmly by these presents.

Signed sealed and delivered by the said A B and sealed with the seal of the said Society and signed by two of the directors thereof.

Dated the.....day of.....in the year of our Lord 1912.

Re R. S. Company Limited
P Q *v.* The Company.
No. 567 of 1912.
Mr. Justice the Judge to whom this action is assigned has approved and allowed this bond this day 1912.
Master of the Supreme Court.

Form 39.

WHEREAS by an order of the High Court of Justice made by Mr. Justice.....In the matter of the R. S. Company Limited and in an action wherein P Q (suing on behalf of himself and all the other holders of the first mortgage debentures issued by the said Company) is plaintiff and the said R. S. Company Limited are defendants, No. 567 of 1912, and dated the.....day of.....1912 the Court did appoint the said A B [*recite so much of the order appointing the receiver (or receiver and manager) as shall be necessary*] and it is also ordered that the said A B should on or before the.....day of.....1912 give security as such receiver [and manager] to the satisfaction of the Court pursuant to Order 50 rule 16 of the rules of the Supreme Court AND WHEREAS the Master has approved of the Society as sureties for the said A B in the said sum of £..... and has also approved of the above bond with the under-written conditions as a proper security to be entered into by the said A B and the Society pursuant to the said order and the rules of the Supreme Court in that behalf as well in respect of the period for which the said A B has been appointed such receiver [and manager] as aforesaid as also in respect of any extended or further period during which he may be continued or appointed such receiver [and manager] either under the said order or under any further order in the said action and in testimony of such approval one of the Masters of the Supreme Court hath signed an allowance in the margin hereof NOW THE CONDITIONS of the above-written bond or obligation are such that if the above bounden A B his heirs executors or administrators or some or one of them do and shall duly account for all sums of money and other property which the said A B has received or shall receive or has or shall become or held liable to pay or account for as such receiver [and manager] as aforesaid including as well all sums of money or other property which the said A B shall receive or become liable to pay or account for in respect of the period for which the said A B has been appointed such receiver [and manager] as aforesaid as also in respect of any appointment for any extended or further period during which the said A B may be continued or appointed such receiver [and manager] either under the said order or under any further order in the said action at such period and in such manner as the Court or a Judge shall appoint and do and shall pay or deliver the same as such Court or Judge hath directed or shall hereafter direct and shall give immediate notice to the Court if the Society shall become insolvent or go into liquidation then the above-written bond or obligation shall be void otherwise the same shall be subject to the provisions hereinafter contained and remain in full force and virtue PROVIDED always that if the said A B shall not for every successive term of twelve calendar months to be com-

Form 39. puted from the.....day of.....1912 or within fifteen days after the.....day of.....in each and every year pay or cause to be paid at the office of the Society the annual premium or sum of £.....then the Society shall at any time after such default in payment be at liberty to apply by summons at Chambers to be relieved from all further liability as such sureties as aforesaid and such summons having been served upon such persons as the Judge shall direct and being finally heard all further liability of the Society as such sureties as aforesaid shall from and after the final hearing of such summons or from and after such other time as the Judge shall direct cease and determine save and except in respect of any loss or damage occasioned by any act or default of the said A B in relation to his duties as such receiver [and manager] as aforesaid previously to such cesser and determination of liability PROVIDED always that a certificate or certificates under the hand of a Master of the Supreme Court of the amount which the said A B as such receiver [and manager] as aforesaid is liable to pay and has not paid shall be sufficient and conclusive evidence against the said A B his heirs executors and administrators and against the Society and also as between the Society and the said..... and.....(*the Masters*) of the truth of the contents of the said certificate or certificates and that this bond has become forfeited thereby to the amount of the sum stated in such certificate or certificates and shall form a valid and binding charge and claim not only against the said A B his heirs executors and administrators but also against the Society and the funds and property thereof without its being necessary for the said.....and.....or either of them their or either of their executors or administrators first to take legal or other proceedings against the said A B his heirs executors or administrators for the recovery thereof and without any further or other proof being given either by or on the part of the said.....and .....or either of them their or either of their executors or administrators in any action suit or proceeding to enforce this bond against the Society or against the said A B his heirs executors or administrators or by or on the part of the Society in any action suit or proceeding against the said A B his heirs executors or administrators of the amount of such damage or loss or that the same has been sustained incurred or occasioned by and through the act or default of the said A B while in office PROVIDED always and it is further agreed between the said A B and the Society that the said A B shall and will on being discharged from his office or ceasing to act as such receiver [and manager] as aforesaid forthwith give notice thereof in writing and also furnish to the Society free of charge an office copy of the order of the

Court or Judge discharging him from the office as such receiver [and manager] as aforesaid And further that he the said A B his heirs executors and administrators shall and will from time to time and at all times save defend and keep harmless the Society and their successors and the property and funds of the Society from and against all loss and damage costs and expenses which the Society or the property or funds of the Society shall or may or otherwise might at any time sustain or be put unto for or by reason or in consequence of the Society having entered into the above-written bond for and at the request of the said A B. Form 89.

IN WITNESS whereof the said A B has hereunto set his hand and seal and the said Society have hereunto caused their common seal to be affixed and two directors thereof have set their hands the day and year first above-written.

FORM 40. (*See* p. 226.)

RECEIVER'S ACCOUNT.

(*Title.*)

(To Accord with the Order.)

The [ ] Account of A. B. the receiver appointed in this cause [or pursuant to] an order made in this cause, dated the day of , to receive the rents and profits of the Real Estate, and to collect and get in the outstanding Personal Estate of C. D., the testator [or, intestate] in the cause, named from the day of to the day of .

Real Estate—Receipts.

No. of Item.	Date when received.	Tenants' Names.	Description of Premises.	Annual Rent. £ s. d.	Arrears due at . £ s. d.	Amount due at . £ s. d.	Amount received. £ s. d.	Arrears remaining due. £ s. d.	Observations.
1		John Jones	Home Farm in the Parish of Norton, in the County of Oxford						
2		Thomas Jones	House at Norton, aforesaid						

Payments and Allowances on Account of Real Estate.

No. of Item.	Date of Payment or Allowance.	Names of Persons to whom paid or allowed.	For what Purpose paid or allowed.	Amount.		
1		Sun Fire Office . .	One year's insurance of, due . .			
2		Thomas Carpenter .	Bill for repairs at house let to Thomas Jones			
3		James Francis . .	Allowance for a half-year's Income Tax, due			
			Total Payments...£			

Form 40.

RECEIPTS ON ACCOUNT OF PERSONAL ESTATE.

No. of Item.	Date when received.	Names of Persons from whom received.	On what Account received.	Amount received. £	s.	d.

PAYMENTS AND ALLOWANCES ON ACCOUNT OF PERSONAL ESTATE.

No. of Item.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed. £	s.	d.

SUMMARY.

	£	s.	d.	£	s.	d.
Amount of balance due from receiver on account of real estate on last account				,,	,,	
Amount of receipts on the above account of real estate				,,	,,	
Balance of last account paid into Court	,,	,,				
Amount of payments and allowances on the above account of real estate	,,	,,				
Amount of receiver's costs of passing this account as to real estate	,,	,,				
Balance due from the receiver on account of real estate						£

	£	s.	d.	£	s.	d.
Amount of balance due from receiver on last account of personal estate				,,	,,	
Amount of receipts on the above account of personal estate				,,	,,	
Balance of last account paid into Court	,,	,,				
Amount of payments and allowances on the above account of personal estate	,,	,,				
Amount of receiver's costs of passing this account as to personal estate	,,	,,				
Balance due from the receiver on account of personal estate						£

Form 41.

FORM 41. (*See* p. 226.)

AFFIDAVIT VERIFYING RECEIVER'S REPORT.

IN THE HIGH COURT OF JUSTICE,
CHANCERY DIVISION,
MR. JUSTICE

(*Title.*)

I, A B , of , the receiver appointed in this cause, make oath and say as follows :—

1. The account marked with the letter A, produced and shown to me at the time of swearing this my affidavit, and purporting to be my account of *the rents and profits of the real estate and of the outstanding personal estate of* above-named defendant company from the day of , to the day of , both inclusive, contains a true account of all and every sum of money received by me or by any other person or persons by my order, or to my knowledge or belief, for my use on account or in respect of the *said rents and profits accrued due on or before the said day of on an account or in respect of the said personal estate*, except what is included as received in my former account [or accounts] sworn by me.

2. The several sums of money mentioned in the said account, hereby verified to have been paid and allowed, have been actually and truly paid and allowed for the several purposes in the said account mentioned.

3. The said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief.

4. The ..... Society being the surety named in the bond dated the ..... day of ..... 1912 is still carrying on business and has not been ordered to be wound up.(*d*)

Form 42.

FORM 42. (*See* p. 246.)

ORDER AUTHORISING RECEIVER AND MANAGER TO APPOINT AN ATTORNEY TO MANAGE BUSINESS OUTSIDE THE JURISDICTION.

Upon application of the plaintiff by summons dated ..... It is ordered that C. E. S. Bishop the receiver and manager appointed in

(*d*) For other forms of affidavit verifying accounts, see Daniel's *Chancery Forms*, 5th ed., pp. 877-880.

this action be at liberty to appoint without security R. Davies of Toronto in the Dominion of Canada (who has managed the business of the defendant Brewery Company from the date of its incorporation) attorney and agent of the said C. E. S. Bishop as such receiver and manager as from the 29th day of September 1897 to manage the business now carried on by the defendant Brewery Company in Toronto and to superintend and direct all matters relating to the business and assets of the defendant brewery company situate in Toronto upon the terms stated in a letter from the said R. Davies dated ..... such letter being the exhibit A to the said affidavit of C. E. S. Bishop and with the powers to be contained in a power of attorney to be given by the said C. E. S. Bishop to the said R. Davies such power of attorney to be approved by the Judge in Chambers and it is ordered that the costs of this application be costs in the action. Form 42.

(*Re Dominion Brewery Co., Limited; Consolidated Trust, Limited* v. *Same Company. Stirling, J., 22nd February*, 1898.)

FORM 43. (*See* p. 245.) Form 43.

ORDER AUTHORISING RECEIVER TO BORROW MONEY TO RANK ABOVE THE DEBENTURE HOLDERS' CHARGE.

Upon application by summons of the plaintiff.

It is ordered that F. White the receiver and manager of the defendants the Brighton Hotels Limited be at liberty from time to time to borrow upon the security of a prior lien bond or bonds or mortgage or charge ranking in point of security in priority to the First Mortgage debentures issued by the defendants the Brighton Hotels Limited and the securities for the same except such of the said debentures as have by special resolutions been allocated a special priority such sum or sums of money (not exceeding in the whole £5000) at interest at a rate not exceeding £5 per cent. per annum as may be necessary for the purpose of protecting the assets and carrying on the business of the defendants the Brighton Hotels Limited including therein the amount of the overdraft of the receiver at the bankers Messrs. Armstrong & Co.

(*Re Brighton Hotels, Limited; Forbes* v. *Same Co. Byrne, J., 13th April*, 1901.)

Form 44.

FORM 44. (*See* p. 254)

ORDER MADE UNDER ORDER XV., RULE 1, DIRECTING PRELIMINARY ACCOUNTS AND INQUIRIES IN A DEBENTURE HOLDER'S ACTION.

Upon the application of the plaintiff by summons, dated the..... under Order XV., rule 1, of the Rules of the Supreme Court, and upon hearing the solicitors for the plaintiff and defendants and upon reading the writ of summons issued in this action on the 9th March, 1907, and the order dated the 15th of March, 1907 [*appointing a receiver*], *It is ordered* that the following accounts and inquiries be taken and made (that is to say):—

1. An inquiry what (if any) debentures or debenture stock have been issued by the defendant company and subject to the trusts of the indenture in the writ mentioned and dated the 31st October, 1899, and made between the defendant company of the one part and the defendant, the Right Honourable J. Stewart Earl of Cranbrook and the plaintiff H. Partridge of the other part, and which of such debentures or debenture stock are now outstanding and unpaid and what are the priorities thereof and who are the holders of or the persons entitled to the benefit of such outstanding debentures or debenture stock respectively.

2. An account of what (if anything) is due for principal and interest to the holders of, or the persons entitled to, the benefit of such outstanding debentures or debenture stock respectively.

3. An inquiry of what the property comprised in and charged by the said debentures and the said indenture of the 31st October, 1899, respectively consists and in whom the same is vested.

4. An inquiry what other incumbrances affect the property comprised in or charged by the said debentures or the said indenture of the 31st October, 1899, and in whom the same are vested and what are the priorities.

5. An account of what is due to such other incumbrancers respectively. Form 44.

6. An inquiry what are the priorities of such other incumbrances and the said debentures or debenture stock respectively and what property other than that comprised in the said debentures or the said indenture of the 31st October, 1899, is comprised in such other incumbrances.

And this Order is without prejudice to any question that may be raised on making or taking the said inquiries and accounts as to the validity of all or any of the said debentures issued by the defendant company and of the said indenture of the 31st October, 1899.

And the Court not requiring any trial of this action other than the hearing of this application *It is ordered* that the further consideration of this action be adjourned and any of the parties are to be at liberty to apply as they may be advised.

H. J. HOOD.

(Re *Rhodesia Goldfields, Limited,* Eady, J., 31st January, 1908.)
Partridge v. *Same Company*, Swinfen

Form 45.

FORM 45. (*See* p. 255 *et seq.*)

DECLARATION OF CHARGE AND ACCOUNTS AND INQUIRIES AS TO DEBENTURES.

[*Title of the Action.*]

Declare that the plaintiffs and all other the holders of mortgage debentures of the defendant company of the same issue as the plaintiffs' debentures are entitled to a charge upon [NOTE.—*The property charged by the order is taken from the language of the debenture which is produced to the Registrar*] for securing the repayment of the principal monies and interest in the debentures mentioned.

Let the following accounts and inquiries be taken and made :—

(1) An account of what is due to the plaintiffs and the other holders of mortgage debentures issued by the defendant company under and by

Form 45. virtue of such debentures. [*If more than one series of debentures has been issued, add:* distinguishing the holders of the first mortgage debentures and the second mortgage debentures in the Statement of Claim mentioned.]

(2) An inquiry of what the property comprised in and charged by the said mortgage debentures consists and in whom the same is vested.

(3) An inquiry what other incumbrances affect the property comprised in or charged by the said debentures or any and what parts thereof and in whom the same are vested.

(4) An account of what is due to such other incumbrancers respectively.

(5) An inquiry what are the priorities of such other incumbrances and the said debentures respectively and what property other than that comprised in the said debentures is comprised in such other incumbrances. [NOTE.—*This inquiry is inserted when the debentures constitute a floating charge; see section* 107 *of the Companies Consolidation Act*, 1908.]

Adjourn further consideration in Chambers.

Liberty to apply.

(*Re Wolverhampton District Brewery, Limited; Downes* v. *Same Co.* W. N. (1899) 229(*e*).)

Form 46.

FORM 46. (*See* p. 256 *et seq.*)

ORDER CONTAINING DECLARATION OF CHARGE AND DIRECTING EXECUTION OF THE TRUSTS OF THE TRUST DEED AND ACCOUNTS AND INQUIRIES IN A DEBENTURE HOLDER'S ACTION.

UPON motion for judgment this day made.....THIS COURT DOTH DECLARE that the plaintiff and all other holders of mortgage debentures of the defendant Company of the same issue as the plaintiff's debentures are entitled to the benefit of a charge upon the undertaking and all the property present and future of the defendant company including its uncalled capital for the time being comprised in or subject to the security created by the Indenture or deed of trust dated the 6th of February 1901 in the writ mentioned and made between.....and doth declare that the trusts of the said Indenture dated ought to be performed and carried into execution and doth order and

(*e*) No inquiries as to preferential payments are now inserted in these orders. See W. N. (1900) 58.

adjudge the same accordingly AND IT IS ORDERED that the following accounts and inquiries be taken and made:— Form 46.

(1) An account of what is due to the plaintiff and the other holders of mortgage debentures of the same issue secured by the said Indenture under and by virtue of such debentures.

(2) An inquiry of what the property comprised in and charged by the said Indenture consists and in whom the same is vested.

(3) An inquiry what other incumbrances affect the property comprised in or charged by the said Indenture or any or what parts thereof and in whom the same are vested.

(4) An account of what is due to such other incumbrancers respectively.

(5) An inquiry what are the priorities of such other incumbrances and such debentures or Indenture respectively and what property other than that comprised in such Indenture is comprised in such other incumbrances.

And the further consideration of this action is adjourned to be heard in Chambers.

Liberty to apply.

(*Re H. Wheatley, Limited; Driscoll* v. *Same Company. Buckley, J., 23rd November*, 1901.)

FORM 47. (*See* p. 256 *et seq.*) Form 47.

ORDER IN DEBENTURE-HOLDER'S ACTION CONTAINING DECLARATION OF CHARGE AND DIRECTING ACCOUNTS AND INQUIRIES AS TO VARIOUS SERIES OF DEBENTURES.

[*Title of Action.*]

UPON MOTION, etc.

DECLARE that the plaintiffs and all other holders of the Mortgage Debentures of the Company of the C D E and F series respectively in the Statement of Claim mentioned are entitled to a charge upon all the plant, machinery, book debts, credit and effects and all other the real and personal property of the Company (including its uncalled capital for the time being) for securing the repayment of the principal moneys and interest in the debentures respectively mentioned.

Let the following accounts and inquiries be taken and made:—

1. An account of what is due to the plaintiffs and the other holders of Mortgage Debentures of the C D E and F series respectively issued by the defendant company under and by virtue of such debentures

Form 47. distinguishing the holders of the C D E and F series of debentures respectively in the Statement of Claim referred to.

2. An inquiry what are the priorities of the said debentures *inter se.*

3. An inquiry of what the property comprised in and charged by the said Mortgage Debentures consists and in whom the same is vested.

4. An inquiry what other incumbrances affect the property comprised in or charged by the said debentures or any and what parts thereof and in whom the same are vested.

5. An account of what is due to such other incumbrancers respectively.

6. An inquiry what are the priorities of such other incumbrances and the said debentures respectively and what property other than that comprised in the said debentures is comprised in such other incumbrances.

And order that the time during which the Manager appointed by the said Orders dated and may act may be extended until .

Adjourn further consideration in Chambers.

Liberty to apply.

(*Re Darling & Son, Limited; Government Stock and Other Securities Investment Co.* v. *Same Co.* Cozens Hardy, *J.*, 10*th March*, 1900.)

Form 48.

FORM 48. (*See* p. 256 *et seq.*)

ORDER DIRECTING INQUIRIES AS TO VARIOUS SERIES OF DEBENTURES AND SALE.

This Court doth order and adjudge that the following accounts and inquiries be taken and made, that is to say :—

(1) An account of what is due and owing to the plaintiff and all other the holders of first debentures of the defendant company in respect of their several debentures.

(2) An account of what is due and owing to the defendant, X and all other the holders of the second debentures of the defendant company in respect of their several debentures.

(3) An inquiry of what the property comprised in and charged by the said first and second debentures respectively consists, and in whom the same is vested.

And it is ordered that the property comprised in and charged by the said first debentures, other than the uncalled capital of the defendant company, be sold with the approbation of the judge, and that the money to arise by such sale be paid into Court to the credit of this action.

Proceeds of sale of property comprised in and charged by the first debentures of the defendant company subject to further order. And it is ordered that the following further inquiry be made, that is to say :— Form 48.

(4) An inquiry what steps, if any, ought to be taken as to realising and getting in the uncalled capital of the defendant company, if and so far as the same is comprised in and charged by the said debentures.

The further consideration of this action is adjourned, and any of the parties are to be at liberty to apply as they may be advised.

(*Fowler* v. *Broad's Patent Night Light Co.*, 1893, F. 1833.)

FORM 49. (*See* p. 256 *et seq.*) Form 49.

ORDER IN ACTION BROUGHT BY THE HOLDER OF PERPETUAL DEBENTURE STOCK.

Upon motion :—

This Court doth declare that the plaintiff and the other holders of the irredeemable debenture stock and perpetual debentures of the above-named company are entitled to a first charge upon the undertaking and all real and personal property of the company for securing the repayment of the principal moneys and interest in the said irredeemable debenture stock and perpetual debentures mentioned.

And it is ordered that the following account and inquiry be taken and made, that is to say :—

(1) An account of what is due to the plaintiffs and the other holders of irredeemable debenture stock and perpetual debentures of the company on the security of the said irredeemable debenture stock, and perpetual debentures.

(2) An inquiry who are now entitled to the benefit of the said debenture stock and debentures respectively.

And it is ordered that the undertaking and property of the company, including its business, be sold as a going concern, with the approbation of the judge: and that the money to arise from such sale be paid into Court to the credit of the action (*Hall* v. *Sovereign Chemical Works, Limited*, 1891, H. 2355); "proceeds of sale of property comprised in debentures"; and W. C. Tompson, the receiver and manager appointed by the said order, dated 3rd July, 1891, is not to act as such manager after the 21st May without the leave of the judge.

And the further consideration of this action is adjourned, with liberty to apply.

(*North, J., Hall* v. *Sovereign Chemical Works, Limited*, 1891, H. 2291.)

Form 50.

FORM 50. (*See* p. 256 *et seq.*)

ORDER AGAINST A COMPANY IN AN ACTION BROUGHT TO ENFORCE DEBENTURE STOCK SECURED BY A TRUST DEED.

Declare that the trusts of the Indenture dated the day of in the statement of claim mentioned ought to be performed and carried into execution and doth order and adjudge the same accordingly.

Order the following accounts and inquiries :—

(1) Inquiry what debenture stock has been issued by the defendants the Colonial Debenture Corporation, Limited, under or in pursuance of the said Indenture dated the 4th day of April, 1892 ;

(2) Inquiry what part of the said debenture stock is still outstanding and unsatisfied and what persons are the holders of the same respectively ;

(3) An account of what is due to such holders respectively under or by virtue of the said debenture stock and the said Indenture dated the 4th day of April, 1892 ;

(4) An inquiry of what particulars the property now subject to the debentures issued to the trustees of the said Indenture dated the 4th day of April, 1892, consists ;

(5) An account of the property come to the hands of or received by the defendants A and B or either of them or by any other person or persons by the order or for the use of the said defendants or either of them as the trustees of the said Indenture dated, etc.

Adjourn further consideration. Liberty to apply.

(*Marwick* v. *Lord Thurlow*, 1895, M. 134, *3rd April*, 1895. *Vaughan Williams, J.*)

Form 51.

FORM 51. (*See* p. 263.)

MASTER'S CERTIFICATE CERTIFYING THE AMOUNTS DUE TO THE DEBENTURE HOLDERS.

IN THE HIGH COURT OF JUSTICE,
CHANCERY DIVISION,
MR. JUSTICE

In pursuance of the directions given to me, etc., I hereby certify that the result of the inquiries and account which have been made and taken in pursuance of the Judgment in this Action dated, etc., is as follows :—

Form 81.

The Plaintiff and the Defendants have attended by their respective Solicitors.

None of the Debenture Holders hereinafter named other than the Plaintiff have attended.

The Notice of which a copy is set forth in the 1st Schedule hereto was on the sent by registered post to all the Debenture Holders named in the 2nd part of the 2nd Schedule hereinafter mentioned.

The evidence produced upon this proceeding consists, etc.

1. The 200 Debentures particulars of which are stated in the 2nd Schedule hereto, Parts 1 and 2 have been issued by the Defendant Company subject to and with the benefit of the Indenture of the in the said Judgment mentioned.

The 60 Debentures mentioned in the 1st part of such Schedule have been redeemed by the Defendant Company in pursuance of Condition 6 endorsed on such Debentures.

The 140 Debentures mentioned in the 2nd part of such Schedule are still outstanding and subsisting. The Holders of such Debentures are the persons named in the 3rd column of the said 2nd part.

2. The respective sums mentioned in the 5th and 6th columns of the said 2nd part of the 2nd Schedule are due to the Plaintiff and the other holders of Debentures of the said Company for principal and interest, making together the respective amounts mentioned in the 7th column.

The interest on such Debentures is computed at the rate of £6 per cent. per annum from 1896, the last due date under the said Debentures.

3. The property comprised in the said Indenture of , or comprised in or charged by the said Debentures consists of the Particulars set forth in the 3rd Schedule hereto, Parts 1 and 2.

Subject as hereinbefore mentioned, the said property is vested in the said as trustee for the said Debenture Holders mentioned in the 2nd part of the said 2nd Schedule.

4. Save so far as is hereinbefore stated in answer to the 3rd inquiry there is not any other incumbrance or charge affecting the property respectively comprised in or charged by the said Indenture and Debentures.

The Evidence, etc.

By the Order dated, etc., A B was appointed Receiver and Manager on behalf of the Plaintiff and other Debenture Holders of the Defendant Company of the undertaking of the Defendant Company and all its freehold property and assets whatsoever and wheresoever both present and future including its uncalled capital for the time being comprised

Form 51. in or subject to the securities and charges created by the Debentures and Indenture.

Such Receiver and Manager was by such Order directed not to act for more than 6 months from the date of the said Order without the leave of the Court.

By Order dated 8th December, 1896, he was directed to act for a period of 6 months.

It appears by my former certificate, filed the 14th July, 1896, that the said Receiver and Manager has given security as by such Order directed.

Dated, etc.

(*Re Barff & Co.; Foster* v. *Barff & Co.*, 1896, B.)

Form 52.

FORM 52. (*See* pp. 261-262.)

ORDER FOR FORECLOSURE IN A DEBENTURE-HOLDER'S ACTION.

This Court doth declare that the plaintiff, as the holder of nine mortgage debentures for £500 each dated the 23rd of November, 1891, and forming an issue of £4500 first mortgage debentures of the defendant company, is entitled to a charge on all the property, funds, assets or effects of the defendant company, including its uncalled capital, as the same existed on the 8th of November, 1893 (*the date of the resolution to wind up the defendant company*), subject to any charges on specific parts thereof created previously to that date and then subsisting, for securing the repayment of the principal moneys and interest on the said mortgage debentures. And it is ordered that the following account and inquiry be taken and made, *viz.*: 1. An account of what is due for principal and interest to the plaintiff, as the holder of all the said mortgage debentures, on the security thereof, and for his costs of this action, to be taxed by the Taxing Master.

2. An inquiry what property, assets or effects of the defendant company are comprised in the said mortgage debentures and the charge or security thereby created, and in whom the same are now vested. And it is ordered that, upon the defendants, or any of them, paying to the plaintiff what shall be certified to be due to him as aforesaid within six months from the day of the chief clerk's certificate at such time and place as shall be thereby appointed, the plaintiff do deliver up (upon oath, if required) the said debentures and all deeds and writings in his custody or power relating thereto, to the defendants or to such of them as shall redeem the mortgaged hereditaments and premises, or as he or they shall direct; and in case the defendants, or

any of them, shall so redeem the plaintiff, the defendant or defendants so redeeming is or are to be at liberty to apply to this Court, as he or they may be advised; and on such application it is not to be incumbent on the defendant or defendants so applying to give the plaintiff notice thereof; and this judgment is without prejudice to any question which may arise as to the rights or interests of the defendants as between them in or to the said property. But in default of the defendants, or some or one of them, paying to the plaintiff what shall be certified to be due to him as aforesaid by the time aforesaid, This Court doth declare that the plaintiff will be entitled to the hereditaments and premises comprised in the said debentures, free and clear of and from all right, title, interest and equity of redemption of, in and to the said premises and to have an absolute conveyance. And it is ordered that in such case the defendant company and the liquidators thereof for the time being do all such acts, and execute all such conveyances and deeds, as may be necessary for vesting in the plaintiff the said mortgaged property, such conveyances and deeds to be settled by the judge in case the parties differ. And any of the parties are to be at liberty to apply to this Court generally as they may be advised. Form 52.

(*Sadler* v. *Worley* (1894), 2 Ch. 177.)

FORM 53. (*See* pp. 261-262.) Form 53.

ORDER FOR FORECLOSURE IN A DEBENTURE-HOLDER'S ACTION.

UPON MOTION for judgment, etc. THIS COURT DOTH DECLARE that the plaintiffs as holders of 30 mortgage debentures for £50 each dated .....and forming an issue of £1500 first mortgage debentures of the defendant company are entitled to a charge on all the property funds assets or effects of the defendant company including all its uncalled capital as the same existed on the.....subject to any charges on specific parts thereof created previously to that date and then subsisting for securing the repayment of the principal moneys and interest on the said mortgage debentures. AND THIS COURT DOTH ORDER that the following account and inquiry be taken and made that is to say:—

1. An account of what is due to the plaintiffs as the holders of all the said mortgage debentures under and by virtue of such debentures and for their costs of this action to be taxed by the taxing master.

2. An inquiry what property assets or effects of the defendant company are comprised in the said mortgage debentures and the charge or security thereby created and in whom the same are now vested.

Form 53.

AND IT IS ORDERED that upon the defendants or any of them paying to the plaintiffs what shall be certified to be due to them as aforesaid within 6 months from the date of the Master's certificate at such time and place as shall be thereby appointed the plaintiff do deliver up (upon oath, if required) the said debentures and all deeds and writings in their custody or power relating thereto to the defendants or such of them as shall redeem the mortgaged property or as he or they shall direct.

And in case the defendants or any of them shall so redeem the defendants or defendant so redeeming are or is to be at liberty to apply to the Court as they or he shall be advised and on such application it is not to be incumbent on the defendant or defendants so applying to give the plaintiffs notice thereof and this judgment is without prejudice to any question which may arise as to the rights or interests of the defendants between themselves in or to the said property.

But in default of the defendants or some or one of them paying to the plaintiffs what shall be so certified to be due to them as aforesaid by the time aforesaid THIS COURT DOTH DECLARE that the plaintiffs will be entitled to all the property comprised in the said mortgage debentures free and clear of and from all right title interest and equity of redemption of in and to the said property and to have an absolute conveyance thereof. AND IT IS ORDERED that in such case the defendant company and the liquidator thereof for the time being do all such acts and execute all such conveyances and deeds as may be necessary for vesting in the plaintiffs the said mortgaged property such conveyances and deeds to be settled by the Judge in case the parties differ.

Liberty to apply.

(*Re Abbey Temperance Hotel; Porch* v. *Same Company.* ***Buckley,*** *J., 3rd December,* 1901.)

Form 54.

FORM 54. (*See* p. 255.)

ADVERTISEMENT INVITING HOLDERS OF DEBENTURES (NOT SECURED BY A TRUST DEED) TO SEND IN THEIR CLAIMS.

Pursuant to an order of the High Court of Justice Chancery Division made in an action of P Q on behalf of herself and all others the holders of the first mortgage debentures of the defendant company and the A B Company Limited, C D and E F 1891, P. No. 322, and dated the 25th March 1893 whereby it is *inter alia* ordered that the following inquiry and account be made and taken :—

(1) An inquiry what first mortgage debentures issued by the defendant company (other than those held by the plaintiff) are now outstanding and unpaid. Form 54.

(2) An account of what is due to the plaintiff and other holders of the first mortgage debentures upon the security of their said debentures respectively.

Notice is hereby given, that all persons claiming under the said inquiry and account to be the holders of the first mortgage debentures issued by the defendants, the A B Company Limited, are required on or before the 13th day of July 1893 to produce their first mortgage debentures together with the following particulars, namely, their names and addresses, the particulars of their claims, including the amounts due for principal and interest in respect thereof the number of their debentures and the names and addresses of their solicitors (if any) to G. H. the Receiver and Manager appointed in the said action at his office at ..... between the hours of 10 A.M. and 4 P.M. and, if so required, by notice in writing such persons are, by their solicitors to come in and prove their claims, at such time and place as shall be specified in such notice, or in default thereof they will be excluded from the benefit of the said order. Thursday the 20th day of July 1893 at twelve o'clock at noon at the Chambers of Mr. Justice Kekewich, Royal Courts of Justice, Strand, London, is the time appointed for adjudicating upon the claims.

Dated the 14th day of June 1893.

FORM 55. (*See* p. 255.) Form 55.

ADVERTISEMENT INVITING HOLDERS OF DEBENTURES (SECURED BY A TRUST DEED) TO SEND IN THEIR CLAIMS.

Pursuant to a Judgment of the High Court of Justice, Chancery Division, dated the 22nd July 1896 made in an action of B C & Company *v.* The A Company Limited and others 1895, B. No. 2429, whereby it is ordered (*inter alia*) that an inquiry be made what (if any) debentures have been issued by the defendants the A Company Limited and entitled to the benefit of the indenture dated the..... in the said judgment mentioned are now outstanding and unpaid and who are the respective holders thereof and an account be taken of what (if anything) is due to the plaintiffs and all other the holders of the said debentures respectively in respect of the said debentures Notice is hereby given that all persons claiming to be holders of such debentures

Form 55.

are required on or before the 5th day of March 1897 to send their full Christian names, addresses and descriptions and the particulars of their claims as such debenture holders for principal and interest and also the full particulars held by them together with the names and addresses of their solicitors (if any) to Messrs. E. F. & G. of..... the solicitors for the plaintiffs in the said action and if so required by notice in writing such debenture holders are to come in and prove their claims at such time and place as shall be specified in such notice. Monday the 15th day of March 1897 at 2.15 o'clock in the afternoon at the Chambers of the Registrar, Companies Winding Up, Bankruptcy Buildings, Carey Street, London, is appointed for adjudication upon the claims.

Dated the 26th day of January 1897.

H. J. HOOD, Registrar (Companies Winding Up).

E. F. & G., Solicitors for the Plaintiffs.

Form 56.

FORM 56. (*See* p. 255.)

ADVERTISEMENT INVITING DEBENTURE STOCK HOLDERS TO SEND IN THEIR CLAIMS.

THE A B COMPANY, LIMITED.

Notice is hereby given that an Order has been made in the Chancery Division of the High Court of Justice in an Action *re* The A B Company Limited, C D *v.* The Company, 1899, A. 78, dated the 23rd March 1899, which directs the following Accounts and Inquiries :—

1. An Inquiry what Debenture Stock issued by the Defendant Company is now outstanding and unpaid, and what persons are the holders of the same and of what parts thereof respectively.

2. An Account of what is due to the Plaintiffs and all other the holders of Debenture Stock, entitled to the benefit of the abovementioned Indenture for principal and interest.

3. An Account of the property and assets received by the Defendants E F and G H, the Trustees of the said Indenture, or either of them, or by any other person or persons by the order or for the use of the said Defendants or either of them as such Trustees.

4. An Inquiry of what the property and assets comprised in or subject to the trusts of the said Indenture consists.

5. An Inquiry what Incumbrances (if any), other than such Debenture Stock, affect the said property, and assets, or any and what parts thereof, and what is the priority of such incumbrances (if any) and of the said Debenture Stock.

Form 56.

6. An Inquiry in what way the property and assets comprised in the said Indenture and the business of the Defendant Company can best be realised as a going concern, or otherwise dealt with for the benefit of the Plaintiffs and the other holders of Debenture Stock, entitled to the benefit of the said Indenture.

The said Accounts and Inquiries are now being prosecuted in the Chambers of Mr. Justice Stirling at the Royal Courts of Justice, Strand, London.

All persons claiming to be the holders of such Debenture Stock or to be entitled to any such Incumbrances are required on or before the 17th May, 1899, between the hours of 11 A.M. and 4 P.M. (except on Saturdays when they can do so between the hours of 11 A.M. and 2 P.M.) to produce their Debenture Stock Certificates or their Incumbrances to L. M., the Receiver appointed by such Order, at the Office of the above-named Company, London, E.C., or in default thereof they will be peremptorily excluded from the benefit of such Order.

Dated 29th April 1899.

N. O.,
Master of the Supreme Court.

P. & P.,
Solicitors for the Plaintiffs in the Action.

Form 57.

FORM 57. (*See* p. 268.)

ORDER DIRECTING THE LIQUIDATOR TO GET IN CALLS SUBJECT TO THE DEBENTURE-HOLDERS' CHARGE.

[*Intituled in the winding up and in the action.*]

Upon the application of the plaintiff in the above action by summons dated 14th December, 1892, which, upon hearing counsel for the applicant and the solicitors for the defendant B and for the official receiver and liquidator of the above-named company in chambers, was adjourned to be heard in Court and coming on accordingly, etc.; And upon hearing counsel for the applicant, for the defendant B and for the official receiver and liquidator of the said company and upon reading, etc., It is ordered that upon the official receiver and liquidator of the above-named company being properly indemnified (such indemnity to be settled in the chambers of the Registrar in Companies Winding up in case the parties differ) against all costs, charges and expenses which the official receiver and liquidator may be put to or may become liable to pay in respect of the proceedings in the winding

Form 57. up and in respect of such actions or other proceedings as are hereinafter referred to, the official receiver and liquidator of the said company do take such proceedings as may be necessary to call up any uncalled capital on the shares held by the contributories respectively of the said company; And it is ordered that T. W., the receiver in the above action, be at liberty, in the name of the said company, to bring such actions or take such other proceedings as may be necessary (except in respect of the shares in the said company held by the plaintiff and the defendant B) for getting in such call and any other moneys due and remaining unpaid in respect of shares held by the contributories respectively of the said company; And it is ordered that the amounts due and to become due from the plaintiff and the defendant B in respect of the shares held by them respectively in the said company be set off against the amounts due to them respectively in respect of the debentures held by them in the said company; And it is ordered that the applicant, the plaintiff F, do pay to the official receiver and liquidator his costs of this application, such costs to be taxed, but in such taxation the official receiver and liquidator is to be allowed no costs of his said affidavit, filed 4th January, 1893, etc.; And it is ordered that the costs of the plaintiff and of the defendant B (including in the costs of the plaintiff the amount hereinbefore directed to be paid by him to the official receiver and liquidator in respect of his costs of this application) be their costs in this action.

(*Fowler* v. *Broad's Patent Night Light Company. V. Williams, J., 26th January*, 1893.)

Form 58.

FORM 58. (*See* p. 268.)

ORDER AUTHORISING RECEIVER TO GET IN CALLS.

[*Intituled in the debenture-holder's action and in the winding up.*]

Upon the application, etc. It is ordered that upon the liquidator of the above-named company being properly indemnified (such indemnity to be settled in the chambers of the registrar in companies winding up in case the parties differ) against all costs, charges and expenses which the said liquidator has already incurred in the winding up (such costs, charges and expenses being limited to the costs of and occasioned by making the call hereinafter mentioned) or may be put to or may become liable to pay in respect of such indemnity or actions or other proceedings as are hereinafter referred to, W. B. Peat the receiver in the above action be at liberty in the name of the liquidator or the company to get in and bring such actions or take such other proceed-

ings as may be necessary for getting in the calls and any other moneys due and remaining unpaid in respect of shares held by the contributories respectively of the said company, And it is ordered that the books of the said company shall remain in the custody of the said liquidator and that the receiver shall have liberty to inspect the same at all reasonable times, And it is ordered that the costs of all parties of this application be costs in the winding up. Form 58.

(*Harrison* v. *St. Etienne Brewery Co.*, 1893, H. No. 450.)

FORM 59. (*See* p. 269.) Form 60.

ORDER ON FURTHER CONSIDERATION IN DEBENTURE HOLDER'S ACTION DISCHARGING RECEIVER AND DISTRIBUTING FUND IN COURT.

Upon the application (by summons dated the.....) of the plaintiff for the further consideration of this action adjourned by the order dated..... and upon hearing.....and upon reading the said order, dated.....the certificate dated and filed the..... of the results of the inquiries and accounts directed by the said order, the order dated.....

And it appearing from the affidavit of the said I. S. filed the..... that the only assets and property come to his hands since the.....(the date of the passing of his first account) consists of the sum of £1 mentioned in the said affidavit, which the said I. S. receiver is hereby authorised to retain.

It is ordered that the said I. S. be and is hereby discharged from the office of receiver in this action.

And it is ordered that the bond dated the.....entered into by the said I. S. together with the Employers' Liability Insurance Corporation, Limited, as his surety be vacated.

And it is ordered that the costs of the plaintiff and of defendants, E. U. and J. H. L. [*the trustees of the covering deed*], of this action be taxed as between solicitor and client, including in the costs of the said defendants the costs, charges and expenses properly incurred by them as trustees of the above-mentioned indenture of the 1st day of January, 1898.

And it is ordered that the costs of the defendant, W. B. R., of passing his accounts in pursuance of the said order dated the.....and any costs properly incurred by him as such receiver appointed on the ..... pursuant to the powers contained in the first debentures and the said indenture of the 1st day of January, 1898, in realising the assets comprised in such debentures and the said indenture, and including therein the costs of entering appearance in this action, and of the application by summons dated the....., as taxed.

And it is ordered that such costs when taxed be paid out of the funds in Court, as directed by the schedule hereto.

And it is ordered that the sum of £25 11s. 7d., referred to in the said certificate, dated the 12th day of May, 1909, be paid as directed by the schedule hereto.

Form 59.

And it is ordered that the amounts certified by the said certificate to be due for remuneration to the trustees of the said indenture of the 1st January, 1898, be paid as directed by the schedule hereto.

And it is ordered that the residue of the funds in Court after making the payments hereinbefore directed be apportioned amongst the debenture holders named in the first schedule to the said certificate in proportion to the principal sums appearing by the said certificate to be due to them respectively.

And that the respective amounts so apportioned and the names of the persons to whom such amounts are payable or the accounts to which such sums are to be carried over be certified.

And it is ordered that the funds in Court be dealt with as directed in the payment schedules hereto.

PAYMENT SCHEDULE I.

In the High Court of Justice, , 8th June, 1909
(Chancery Division).

Re New London and Suburban Omnibus Company, Limited.

Re Trusts of an indenture, dated 1st January, 1898.

Appleyard *v.* New London and Suburban Omnibus Company, Limited. 1907. No. 1277.

Ledger Credit, as above. "Proceeds of Sale."

Funds in Court, £1011 9s. 0d. cash.

Particulars of payments, transfers and other operations to be carried out by the Paymaster.	Payees and transferees or Titles of separate Accounts.	Amounts. Money.	Amounts. Securities.
H. S. P. named in the restraint dated ..... having had notice and consenting. *Discharge* the said restraint. *Carry over* the cash.	*Re* New London and Suburban Omnibus Co., Limited, *Re* the Trusts of an indenture, dated 1st Jan., 1898, 1907. N. 1277.	£1011 9 0	

H. J. HOOD.

Re *New London and Suburban Omnibus Co.* Neville, J., June, 1909.

PAYMENT SCHEDULE II.

8th June, 1909.

Re New London and Suburban Omnibus Company, Limited.

Re Trusts of an indenture dated 1st January, 1898.

1907. No. 1277.

Ledger Credit, as above.

Funds in Court { £838 14s. 2d. cash. / Fund to be carried over as above.

Form 59.

Particulars of payments, transfers and other operations to be carried out by the Paymaster.	Payees and Transferees or Titles of separate Accounts.	Amounts. Money.	Amounts. Securities.
		£ s. d.	
Out of cash:—			
Pay remuneration as trustee under said indenture.	E. W. of	10 10 0	
Pay remuneration as trustee under said indenture.	J. H. L. of	5 5 0	
Pay balance mentioned in certificate of 12th March, 1909.	W. B. R. of	25 11 0	
Pay amount apportioned on completion of sale.	W. A. R. of	5 13 0	
Pay arrears of income tax, Schedule D.	Commissioners of Inland Revenue	1 10 0	
Pay costs to be taxed under this order.			
Out of residue of the funds:—			
Pay and carry over sums to be apportioned in respect of principal among the debenture holders by Registrar's certificate to the persons and to the accounts mentioned in such certificate			

H. J. HOOD.

Form 60.

FORM 60. (*See* p. 269.)

MASTER'S CERTIFICATE OF APPORTIONMENT OF THE FUNDS IN COURT AMONG THE DEBENTURE HOLDERS.

[*Title of Action.*]

I certify that under an order dated 8th June, 1909, the sums stated in the schedule subjoined hereto, amounting in the whole to £1104 1s. 3d., have been ascertained to be the sums to be paid and carried over to the persons and to the accounts respectively named in respect of principal amongst the debenture holders referred to in the first schedule to the certificate of the Registrar Companies [Winding Up] dated the 12th March, 1907.

Dated the 12th day of August, 1909.

H. J. HOOD.

SCHEDULE.

Name.	Address (if ascertained).	Amount to be paid.
		£ s. d.
A. B.	.....	55 4 1
C.D.	.....	55 4 1

Form 61.

FORM 61. (*See* p. 269.)

ORDER DISCHARGING RECEIVER WITHOUT HIS PASSING HIS FINAL ACCOUNT.

UPON APPLICATION by summons dated.....of J. R. Hoyle..... and upon hearing.....and upon reading the judgment dated..... an order dated.....and affidavit of A B filed, master's certificates dated respectively.....and....., a recognizance dated.....

Form 61. entered into by H. K. Baynes and a bond of the same date entered into by H. K. Baynes together with the Y Z Society and the applicant by his solicitors admitting that H. K. Baynes the receiver appointed in this action has accounted for his receipts and payments as such receiver to the satisfaction of the applicant and that the receiver's claim for remuneration has been settled It is notwithstanding the said order of the..... Ordered that the passing of the final account directed by the said order be dispensed with And it is ordered that the said recognizance and bond dated the..... be vacated And it is ordered that all further proceedings in this action be stayed.

(*Re Carbon (New) Syndicate, Limited; Wilson* v. *Same Company. Farwell, J., 6th November*, 1901.)

Form 62.

FORM 62. (*See* p. 238.)

ORDER FIXING REMUNERATION OF RECEIVER AND MANAGER.

UPON application by summons.....IT IS ORDERED that the amount of the said receiver's and manager's remuneration be fixed for the two years ending on the 31st of May, 1901, at £2533 6s. 8d., and that they be authorised to retain the said remuneration out of the assets in their hands and the costs of this application are to be costs in the action.

(*Re Anglo-American Construction Company, Limited; White* v. *Same Co. Joyce, J., 2nd December*, 1901.)

Form 63.

FORM 63. (*See* p. 271.)

ORDER IN DEBENTURE OR DEBENTURE STOCK HOLDER'S ACTION ALLOWING TRUSTEES OF COVERING DEED THEIR COSTS WHERE COMPANY'S COSTS ARE DISALLOWED.

Upon motion this day made unto this Court by Counsel for the defendants A, B and C, and upon hearing counsel for the plaintiffs, and upon reading an order dated of , and an affidavit of D filed the of :

This Court doth order that in taxing the costs directed to be taxed by the said order the taxing master do include in the costs of the defendants, the said A, B and C, a full set of costs except as regards any separate costs of the defendant company:

And it is ordered that the costs of the defendants, the said A, B and

C, and of the plaintiffs, of this motion be also taxed by the taxing master and be included in the certificate of taxation to be made under the said order dated the of : Form 63.

And it is ordered that the said costs be paid in like manner as the costs directed by the said order were directed to be paid.

(*Mortgage Insurance Corporation, Ld.* v. *Canadian Agricultural Coal and Colonization Company. Kekewich, J.* (1901), 2 Ch. 377, 382.)

FORM 64. (*See* pp. 210-213.) Form 64.

ORDER GIVING LIBERTY TO COMMENCE ACTION AFTER WINDING-UP ORDER.

Order that the applicant be at liberty notwithstanding the above order to wind up the above-named company to commence and prosecute an action against the above-named company together with Lord Thurlow and G. E. Willoughby for the administration of the trusts of an indenture of 4th April, 1894 [but that no steps be taken in such action till after the same be transferred to the Judge in Companies Winding Up, and that no further step be taken beyond setting down for trial without further leave], 30th October, 1894.

(*Re Colonial Debenture Corporation, Limited.* 00277 of 1894.)

FORM 65. (*See* pp. 210-213.) Form 65.

ORDER GIVING LEAVE TO PROCEED WITH ACTION AFTER WINDING UP.

Upon application, etc. Order that F be at liberty notwithstanding this order to proceed with the action of Fowler *v.* Broad's Patent Night Light Company and another.

(*Re Broad's Patent Night Light Company, Limited, 16th January,* 1892. No. 3 of 1892.)

FORM 66. (*See* pp. 239, 255.) Form 66.

ORDER CONTINUING A RECEIVER AND MANAGER APPOINTED BY THE COURT.

Upon application of the Plaintiff by a summons dated.....It is ordered that R. J. Jeffray the receiver and manager appointed in this action by the said order dated the.....be at liberty to continue to act as manager and to carry on the business of the defendant company up to the 28th March 1902.

(*Re Greymouth Point Elizabeth Railway Coal Company, Limited; Yuill* v. *Same Company. Farwell, J., 19th November,* 1901.)

Form 67.

FORM 67. (*See* p. 255.)

NOTICE OF CLAIM SENT BY DEBENTURE-HOLDER PURSUANT TO ADVERTISEMENT.

THE A B COMPANY, LIMITED.

Sir,

I the undersigned Y Z of hereby give you notice that I claim to be the registered holder of 10 4 per cent. debentures of £100 each issued by the above-named company and numbered 90 to 100 inclusive and forming part of a series of 1000 debentures of £100 each. The said series of debentures is further secured by an indenture dated and made between the said A B company of the one part and M. N. and O. P. of the other part.

The above-named company issued the said debentures to [me on the day of in consideration of the sum of £ paid by me to the company] [*or* D. E. of who was registered as the holder thereof on the day of . The said D. E. by a transfer dated the day of 1913 assigned the said debentures to me in consideration of the sum of £ paid by me to him] and I was on the day of 1913 duly registered as and now am the registered holder of the said 10 debentures.

Usual Signature.....
Name (in full).....
Address (in full).....
Profession or Occupation.....
Holder of debentures.

Dated the of 1913.

To K. L. the Receiver and Manager of the A B Co. Ltd.

Form 68.

FORM 68. (*See* p. 353.)

NOTICE OF MEETING GIVEN BY THE TRUSTEES OF THE TRUST DEED TO THE DEBENTURE-HOLDERS.

THE COMPANY, LIMITED.

Notice is hereby given that a meeting of the holders of the debentures issued by the above-mentioned company and secured by an indenture dated, etc., and made, etc., will be held at on the day

of , 1912, at o'clock in the noon for the purpose of discussing and procuring the assent of the meeting to the provisions contained in an agreement dated, etc., and made between, etc. Form 68.

The agreement to be submitted to the meeting provides [*insert particulars*].

Dated the day of , 1912.

(*Signed*) Y.
Z.

FORM 69. (*See* p. 353.) Form 69.

RESOLUTION OF THE DEBENTURE HOLDERS SANCTIONING AN AGREEMENT MODIFYING THEIR RIGHTS.

That this meeting of the holders of debentures, secured by an indenture dated, etc., and made between, etc. (*the trust deed*), do hereby sanction and adopt all the provisions contained in an agreement dated, etc., and expressed to be made by A of the one part and the above-mentioned company of the other part.

FORM 70. (*See* p. 391.) Form 70.

ORDER DIRECTING THE REPAYMENT TO DEBENTURE-HOLDERS OF DEBENTURE MONEYS IN THE HANDS OF TRUSTEES AFTER IT HAS BECOME IMPOSSIBLE TO CARRY OUT THE TRUSTS.

Minutes of Judgment. Declare that the trusts constituted by the contracts of the 15th of June, 1888, and the 13th of February, 1889, and by the resolutions of the Saragossa and Mediterranean Railway Company passed on the 13th of February, 1889, and by the prospectus issued by the defendant company in the month of May, 1889, all in the pleadings mentioned, ought, so far as they can be performed, to be carried into execution under the direction of the Court.

And declare that, subject to the payment of any charges on the funds subscribed by the plaintiffs and the other holders of 3 per cent. obligations issued by the Saragossa Company, and to any payments which may be certified to be properly payable thereout, and to the payment of any costs directed to be paid thereout, the said fund is (in the events which have happened) divisible rateably amongst such of the holders of the said obligations as are entitled to the benefit of the same; and that no part of the said funds is to be applied in

Form 70.

payment of any such obligation holders in priority, except in respect of obligations which have already been drawn, but have not been paid, and interest which has already accrued due and become payable, but has not been paid.

And declare that the plaintiffs and the other holders of the said obligations are entitled to a charge on the railways and property comprised in or charged by the said obligations, and the trust deed, dated the 6th of October, 1887, for securing the same.

Tax the costs of the plaintiffs and defendants of the above-mentioned actions, on the higher scale, including the costs, charges, and expenses of the defendants Sloper, Robinson, and Wilde properly incurred by them as between solicitor and client, separate sets of costs to be allowed to the defendants Sloper, and Robinson, and to the defendant Wilde.

And let the defendants Sloper, Robinson, and Wilde pay and retain such costs, when taxed, out of the funds in their hands.

And let the following inquiries be made, *viz.* :—

(1) An inquiry what obligations have been issued by the Saragossa Company and which of them are now outstanding and entitled to the benefit of the trust constituted as aforesaid.

(2) An inquiry what sums have come to the hands of the defendants Sloper, Robinson, and Wilde, or any of them, representing moneys subscribed in respect of the said obligations, and what portions of such sums are now in their hands ; and let the defendants Sloper, Robinson, and Wilde, in answering such last-mentioned inquiry, make a statement, to be verified by affidavit, of all disbursements, made by them, and any of the parties are to be at liberty to apply with respect to any sum appearing to have been received by the said defendants, or any of them, and not now in their hands.

(3) An inquiry of what particulars the sums described in respect of the said obligations, which have not been received by the said last-mentioned defendants, now exist, and whether any and what steps ought to be taken to recover any part thereof which may appear to be outstanding.

(4) An inquiry what charges or incumbrances, other than the said obligations, affect the railways and property of the Saragossa Company, comprised in or charged by the said obligations or the said deed, including any property acquired for the purpose of the railways which has been or ought to be paid for by means of the funds subscribed by the plaintiffs and the other holders of the said obligations.

(5) An inquiry whether any and what steps should be taken for the purpose of realising, for the benefit of the plaintiffs and the other

holders of the said obligations, the railways, works, lands, rolling-stock and other materials acquired for the purpose thereof; and, in prosecuting this inquiry, regard is to be had to the question whether any further expenditure should be made out of the said fund in completing and equipping the first section of the said railway or any part thereof. Form 70.

(6) An inquiry whether any other and what sums are properly payable out of the said fund.

Reserve further consideration.

(*Collingham* v. *Sloper* (1893), 2 Ch. 96, 118.)

FORM 71. (*See* pp. 404, 407, 410.) Form 71.

SCHEDULE C TO THE COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

Form of Mortgage Deed.

The Company. Mortgage Number £

By virtue of [*here name the Special Act*] we, The Company in consideration of the sum of pounds paid to us by A B of do assign unto the said A B, his executors, administrators and assigns the said undertaking [and (*in case such loan shall be in anticipation of the capital authorised to be raised*) all future calls on shareholders] and all the tolls and sums of money arising by virtue of the said Act and all the estate, right, title and interest of the company in the same to hold unto the said A B, his executors, administrators and assigns until the said sum of pounds together with interest for the same at the rate of for every one hundred pounds by the year, be satisfied [the principal sum to be repaid at the end of years from the date hereof (*in case any period be agreed upon for that purpose*) at (*or any place of payment other than the principal office of the company*)].

Given under our Common Seal, this day of in the year of our Lord

Form 72.

FORM 72. (*See* pp. 404, 407, 411.)

SCHEDULE D TO THE COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

Form of Bond.

The Company. Bond Number . £ .

By virtue of [*here name the Special Act*] we, The Company in consideration of the sum of pounds to us in hand paid by A B of do bind ourselves and our successors unto the said A B, his executors, administrators and assigns in the penal sum of pounds.

The condition of the above obligation is such that if the said company shall pay to the said A B, his executors, administrators or assigns [at (*in case any other place of payment than the principal office of the company be intended*)] on the day of which will be in the year one thousand eight hundred and the principal sum of pounds together with interest for the same at the rate of pounds per centum per annum payable half-yearly on the day of and the day of , then the above-written obligation is to become void, otherwise to remain in full force.

Given under our Common Seal this day of one thousand eight hundred and

Form 73.

FORM 73. (*See* pp. 412, 414.)

SCHEDULE E TO THE COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

Form of Transfer of Mortgage or Bond.

I, A B of in consideration of the sum of paid to me by G H, of do hereby transfer to the said G H, his executors, administrators and assigns a certain bond [*or* mortgage], Number , made by "The Company" to bearing date the day of for securing the sum of and interest [*or, if such transfer be by endorsement:* the within security] and all my right, estate, and interest in and to the money thereby secured [*and, if the transfer be of a mortgage,* and in and to the tolls, money and property thereby assigned].

In witness whereof I have hereunto set my hand and seal this day of one thousand eight hundred and

FORM 74. (*See* pp. 427-8.) Form 74.

DECLARATION TO BE ENDORSED ON MORTGAGE DEBENTURE, BOND OR DEBENTURE STOCK CERTIFICATE ISSUED BY RAILWAY COMPANY (SCHEDULE II. TO THE RAILWAY COMPANIES SECURITIES ACT, 1866).

The Railway Company.

We, the undersigned, being two of the directors of the company specially authorised and appointed for this purpose, and I, the undersigned registered officer of the company, do hereby declare (each for himself) that the within-written [*or as the case may be*] mortgage deed [*or* bond *or* certificate] is issued under the borrowing powers of the company as registered * on the day of and is † not in excess of the amount there stated as remaining to be borrowed.

Dated this day of 19 .

..... } Directors.
..... }

..... } [Secretary or Accountant, *or as the case may be*] and Registered Officer.

NOTE.—*Where the case so requires with reference to a statement under the First Schedule, Part II., leave out from the * to the end of the form, and insert:* on the day of and the day of , and is not in excess of the amounts there stated as remaining and authorised to be borrowed.

Where the mortgage deed, bond or certificate is issued under a power of re-borrowing, or of issuing debenture stock in discharge of mortgage or bond debt, leave out from the † to the end of the form, and insert: in substitution for a mortgage deed [*or* bond] which has since been paid off.

Form 75.

FORM 75. (*See* p. 428.)

DEBENTURE STOCK CERTIFICATE ISSUED BY RAILWAY COMPANY.

The Railway Company.

Debenture stock. (C. S.) Bearing interest in perpetuity at the rate of £ per cent. per annum.

Register No. £

This is to certify that the sum of pounds of the above stock is registered in the name of A B, of

Dated this day of , 18 .

Entered

Verified by

C. D., Secretary.

[*Endorsement same as Form* 43.]

Form 76.

FORM 76. (*See* pp. 442-465.)

NOMINAL DEBENTURE ISSUED BY LOCAL AUTHORITY.

Borough Treasurer: W X, Hertford, to whom all communications with reference to this nominal debenture should be made.

No. of Debenture Loan, 1.

Debenture No. 10. £100.

CORPORATION OF HERTFORD.

Issue of Loan for £100,000 on nominal debentures of £100 each payable in consecutive years, 10 to be paid off every year.

DEBENTURE FOR £100 BEING PART OF A LOAN OF £ [SANCTIONED BY THE LOCAL GOVERNMENT BOARD ON THE DAY OF 1897].

By Virtue of the powers of the Local Loans Act, 1875, and [*here specify the Private Act, e.g.*, an Act passed in the 59th and 60th years of the reign of her present Majesty, intituled an Act, etc.] and all other powers hereunto enabling us We, the Mayor, Aldermen and Burgesses of the Borough of Hertford do hereby subject to the General Rules made by us [with the consent of the Local Government Board] and in consideration of the sum of £100 (hereinafter called the principal sum) paid to the treasurer of us the said Mayor, Aldermen and Burgesses by

A B of in the County of (hereinafter called "the said holder") grant and assign unto the said holder, his executors, administrators and assigns all rates leviable by us the said Mayor, Aldermen and Burgesses of the Borough of Hertford [*or whatever other property it is intended to charge with payment of the debenture debt*]. To hold to the said holder, his executors, administrators and assigns until the said principal sum be repaid to the said holder, his executors, administrators or assigns with interest at the rate of £3 per centum per annum, such interest to be payable half-yearly on the day of and on the day of in each year; the principal to be repaid on the day of , 1907. Form 76.

Given under the Seal of the said Mayor, Aldermen and Burgesses this day of , 1897.

C. D., *Mayor.*

The Seal of the said Mayor, Aldermen and Burgesses was hereunto affixed in the presence of

E. F., *Town Clerk.*

[This security has been issued under the official sanction of the Local Government Board, in testimony whereof the said Board have hereunto affixed their official stamp this day of 1897. S. H., *Secretary.*]

Endorsed on the preceding debenture.

Received this day of 1897, the amount of this bond.

Stamp.

BOROUGH OF HERTFORD.

General Rules.

Made by the Mayor, Aldermen and Burgesses of the Borough of Hertford in pursuance of the Local Loans Act, 1875, to be applicable to debentures of £100 each chargeable on the rate constituting a loan of £100,000 dated the day of 1897, and to such other nominal debentures as shall hereafter be issued and be expressed to refer hereto.

1. Any number of persons not exceeding four may be registered as joint owners of a nominal debenture with right of survivorship.

Form 76.

2. Warrants for the interest upon nominal debentures will be issued, as it becomes due, to the registered holders of the debentures by the treasurer of the corporation and will be made payable to the order of the registered holder on presentation at the bank of Messrs. Y. Z., Hertford. Where there is more than one registered holder of a nominal debenture the warrant for the interest will be issued and made payable to the order of the holder, whose name stands first on the register of debentures. Where the same person holds more than one entire debenture of the same series one warrant only may be issued for the interest due on all the debentures held by him.

3. Nominal debentures shall be transferable by deed in the manner in which ordinary shares in joint stock companies are transferred. Each transfer shall be registered at the office of the town clerk of the said Borough at any time during office hours within 21 days of its execution and a fee of 2/6 shall be paid on the registration of each transfer. No transfer of any debenture shall be registered, unless and until the debenture be presented at the said office of the town clerk.

4. The fee for inspection of the register will be 1/- and for certified copies or extracts from the same 2/6 for each certificate and 2d. for every folio of 72 words.

[*Insert such of the other rules made by the Mayor, Aldermen and Burgesses relating to its normal debentures, as may be desirable.*]

The above-written General Rules were adopted by the Mayor, Aldermen and Burgesses of the Borough of Hertford in council assembled at a meeting duly held on the day of 1897.

In testimony whereof the Common Seal of the said Mayor, Aldermen and Burgesses was duly affixed in the presence of

C. D., *Mayor.*

E. F., *Town Clerk.*

L. S.

We the Local Government Board hereby consent to the above rules.

Given under the seal of the said Board this day of 1897.

L. S.

G. H., *Secretary.*

N.B.—The Mayor, Aldermen and Burgesses of the Borough of Hertford reserve the power to alter the above-written General Rules under section 30 of the Local Loans Act, 1875.

FORM 77. (*See* pp. 442-465.) Form 77.

NOMINAL DEBENTURE ISSUED BY A LOCAL AUTHORITY.

County Treasurer: W X, Hertford, to whom all communications with reference to this nominal debenture should be made.

COUNTY OF HERTFORD.

Debenture No. , payable in £100.

Date of Loan:

The [*state the authority issuing the debentures*] in pursuance of the Local Loans Act, 1875 [and *here insert the title of the Special Act, e.g.*, of an Act passed in the 59th and 60th years of the reign of Her present Majesty intituled, etc.], and of every other power (if any) them in this behalf enabling and in consideration of the sum of £100 which A B of (hereinafter called "the lender") has advanced [for the purposes of the said last-mentioned Act] Do hereby charge [*here specify the rate charged*] with the payment to the lender, his executors, administrators or assigns of the principal sum of £100 and interest thereon at the rate of £4 per cent. per annum, the said principal sum to be payable on the day of 1900, and the said interest to be payable half-yearly on the day of and the day of in each year until the said principal sum has been paid. This debenture is granted under the powers conferred by the Local Loans Act, 1875, and forms part of a loan of £100,000, dated the day of [*here specify the date as fixed in accordance with section* 8 *of the Local Loans Act*, 1875].

In witness, etc.

RECEIPT BY THE TREASURER.

I acknowledge to have received from the above-named lender the above-mentioned sum of £100.

W. X., *Treasurer.*

[*Endorse rules relating to nominal debentures as in Form* 76.]

Form 78.

FORM 78. (*See* pp. 466-474.)

DEBENTURE ISSUED UNDER THE PROVISIONS OF THE MORTGAGE DEBENTURE ACTS, 1865 & 1870 (BEING FORM B OF THE SCHEDULE TO THE MORTGAGE DEBENTURE ACT, 1870).

The Company.

Mortgage Debenture **No.**

By virtue of The Mortgage Debenture Act, 1865, we the Company in consideration of £ paid to us by A B of do hereby charge all the registered securities of the company with the payment to the said A B, his executors, administrators and assigns of the sum of £ and interest thereon at the rate of per cent. per annum, which sum of £ is to be paid and payable to the said A B, his executors, administrators and assigns at the [*state place*] on the day of (*or* on the expiration of six calendar months from the leaving at the registered office of the company of a notice in writing from the said A B, his executors, administrators or assigns requiring such payment or on the expiration of six calendar months from the day succeeding the posting of a registered letter containing notice in writing from the company of their intention to repay the said sum of £) with interest on the same at the rate of per cent. per annum payable half-yearly at said place on every day of and day of and we hereby undertake to pay said sum of £ and interest at the rate aforesaid as above mentioned.

Given under our Common Seal this day of

C. D., Director.
E. F., Director.
Countersigned *G. H.*, Secretary.

Registered

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