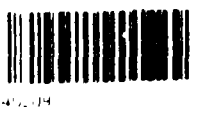
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FIFTEENTH EDITION

BY

ALFRED F. TOPHAM, LL.M.,

*Bencher of Lincoln's Inn, one of His Majesty's Counsel,*

AND

A. M. R. TOPHAM, B.A.,

*of Lincoln's Inn, Barrister-at-Law.*

LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers.

1938.

N. M. TRIPATHI LTD.
Book-Sellers, Bombay.

PRINTED IN GREAT BRITAIN BY
C. F. ROWORTH LTD., 88 FETTER LANE, LONDON, E.C.4.

# PREFACE

## TO THE FIFTEENTH EDITION.

THERE have not been any important alterations of the law directly relating to Debentures and Debenture Stock since the last edition of this Part of Company Precedents; but there have been several decisions of the Courts affecting this branch of the law, more particularly in reference to the position and duties of receivers and the law relating to charges affecting hire-purchase agreements. These have been dealt with in the appropriate places, and the necessary modifications due to the various Law Reform Acts have been noted.

Several new forms have been added, some at the suggestion of readers, such as a form of a Second Debenture Trust Deed, and new forms relating to Voting Rights and similar rights to be conferred on the holders of debentures or their trustees. The Editors are much indebted to readers of both branches of the profession for many valuable suggestions both as to new forms and as to points of law requiring further discussion.

The Editors are also much indebted to Mr. F. C. BOWER for his careful and accurate work in the preparation of the Index, Table of Cases, &c.

A. F. T.
A. M. R. T.

5, NEW SQUARE,
LINCOLN'S INN,
*September*, 1938.

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# DEBENTURES AND DEBENTURE STOCK.

## CHAPTER I.

### WHAT IS A DEBENTURE.

Growth of debentures.

EVER since the passing of the Companies Act, 1862, now replaced by the Act of 1929, companies formed under or subject to those Acts have been in the habit of issuing what are known as "debentures" or "debenture stock," and the growth of these securities in amount and popularity during that period has been truly phenomenal. The fact is not to be wondered at, however, looking at the convenience they offer: (1) For the purpose of securing the repayment of money borrowed; (2) In paying for property purchased, or services rendered, or in satisfaction of money due.

Debenture stock will be found dealt with in the next chapter; in the present it is proposed to say something generally of debentures.

What then is a debenture?

Ancient use and meaning.

The term "debenture" is by no means a new one; it appears to have been in common use more than five centuries ago. Etymologically it is nothing more than the Latin word "*debentur*." This word was the first in the form of acknowledgment of indebtedness used by the Crown in old days and given by it to creditors of the Crown, to soldiers, and to the King's servants, for payment of their wages. Thus the Parliamentary Rolls of 3 Henry V. (1415) mention a petition by a citizen of London praying that he might be paid for certain goods supplied to Henry IV., and alleging that the commission appointed to investigate claims and provide for payment of that king's debts, "*ne voillent paier la somme suis dit a dit suppliant due, a cause q'il ne demonstre pas billes de Debentur, desouth la seal du clerk du spicere du nit nadgairs Roy* [i.e., *Hen. IV.*], *tesmoignauntz la dette suit dit.*" The word is used in the same sense in the Paston letters in 1455: "By a debentur made to the said Falstoff with him remaining."

The Liber Niger (Househ. Ord. 66) gives directions in 1469 that "none other person make such debentures or bylles but the Clerks

of the office, so that their writing or hand may be certainly known to them that are in the counting house."

So again in an Act of 12 & 13 Edw. IV. (1472) in relation to the Staple of Calais, it was amongst other things enacted "that every persone havyng Debentours under the Seal of the said Staple" should bring them in; and in an Act of Edw. IV. (1475) it was recited that "grete multitude of assignments as well by lettres Patentes of the Kyng, Tailles, Debentours, and other billes levyed and rered at the receipt of his [the King's] Exchequer or otherwise . . . as well for the Kyng's household and warderobe as for many and dyvers sommes of money have been made." And 9 Anne, cap. 23 (1710), makes provision for the issue of debentures to be signed by certain commissioners and to bear interest at 6 per cent. per annum.

From all these instances of its early use it is plain that the word was employed to describe an instrument under seal, evidencing a debt—that the essence of a debenture was originally an admission of indebtedness, and this is still its essential characteristic—the central idea—though a certain amount of nebulousness still clings to it, as is apparent from some judicial criticisms of the term in more modern times.

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"What the correct meaning of debenture is I do not know," says Lindley, J., *British India, &c. Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, 172, 173. "I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures which are charges of some kind on property. You may have debentures which are bonds . . . you may have a debenture which is nothing more than an acknowledgment of indebtedness. And you may have a thing like this which is something more; it is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times, and at a certain place upon the production of certain coupons by the holder. I think any of these things which I have referred to may be debentures within the Act" [Stamp Act, 1870].

Chitty, J., in *Levy* v. *Abercorris Co.* (1887), 37 Ch. D. 264, confessed to a similar perplexity. "I cannot find any precise legal definition," he said, "of the term. It is not either in law or commerce a strictly technical term or what is called a term of art." In *Edmonds* v. *Blaina Co.* (1887), 36 Ch. D. 219, the same learned judge, however, essayed a *quasi* definition: "The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures, without anyone being able to say that 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."

But the existence of a charge or other security is not essential. Thus, a certificate of income stock, entitling the holder to a proportion of the profits, containing an admission of indebtedness, but containing no express charge on any property of the company, has been held to be a debenture. *Lemon* v. *Austin Friars Investment Trust, Ltd.*, (1926) 1 Ch. 1.

On the other hand, to say that any document which creates a debt, or acknowledges it, is a debenture (*Levy* v. *Abercorris Co.*, 37 Ch. D. 264), would be going too far. A definition so wide would ignore the distinction between debentures and bills of exchange, I.O.U.'s, promissory notes, deeds of covenant, and many other documents which no one would think of calling debentures. Etymologically, perhaps, the term might properly be applied to such instruments, but etymological propriety is no sure guide in interpretation.

Conventional usage.

Taking the test of conventional or commercial usage, a debenture may be roughly described as an instrument under the seal of a company providing for the payment of a principal sum and interest at a specified rate, and being (usually) one of a series of like debentures ranking *pari passu*, and carrying a charge or secured on the company's undertaking. In ninety-nine cases out of a hundred this description of a debenture will be found fairly accurate, but the description cannot be treated as an exhaustive definition. This may be illustrated by enumerating some of the more common or salient characteristics of a debenture, thus:—

Conflict of definitions.

(a) A debenture is, as a general rule, one of a series, but this rule is not without many exceptions, and a single debenture is not uncommon. *Levy* v. *Abercorris Co.*, *supra*; *Robson* v. *Smith*, (1895) 2 Ch. 118.

(b) The term debenture is applied as a general rule to instruments issued by companies, but it is not confined to companies, *e.g.*, clubs issue debentures, and even individuals have done so, *e.g.*, the Tichborne debentures.

(c) A debenture is usually, in the case of a company, under seal, but not always. See *British India, &c. Co.* v. *Commissioners of Inland Revenue* (7 Q. B. D. 165), in which case the debenture was signed by two directors on behalf of the company; see also *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142. Club debentures are very commonly under hand only.

(d) A debenture usually provides for the payment of a specific principal sum at a specified date, but there are millions of pounds of what are called perpetual or permanent debentures, viz., debentures payable not at any fixed date, but on a contingency, *e.g.*, in the event of a winding-up, or of notice by the company of its intention to pay off the amount secured. It may provide for payment only out of certain funds, *e.g.*, profits which may never eventuate. *Lemon* v. *Austin Friars Investment Trust*, (1926) 1 Ch. 1.

(e) A debenture usually provides for the payment of interest at a specified rate, but sometimes it carries no interest, or the amount of interest payable varies with the profits.

(f) Generally the interest is payable unconditionally, but sometimes it is only payable out of profits, or subject to conditions.

(g) A debenture generally contains a charge on the undertaking of the company or some part of its property, but the term debenture does not necessarily, like the term mortgage debenture, imply security, and debentures to large amounts have been issued without any such charge. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459: and see *British India, &c. Co.* v. *I. R. Commissioners*, and *Speyer Bros.* v. *I. R. Commissioners* (*infra*); *Wylie* v. *Carlyon*, (1922) 1 Ch. 51 (club debentures).

(h) As a general rule, the term debenture is not applied to an instrument unless it purports to be a debenture. But this rule is sometimes disregarded, *e.g.*, see *Gardner* v. *London, Chatham and Dover Ry. Co.*, 2 Ch. 201; *Enthoven* v. *Hoyle*, 21 L. J. C. P. 100 (1852); and *Levy* v. *Abercorris Slate Co.*, 37 Ch. D. 260, where it was held that an instrument may be a debenture within the meaning of sect. 17 of the Bills of Sale Act, 1882, although it does not purport to be a debenture. On the other hand, it has been said that it would be difficult for a company to put on the face of a document that it was a debenture and then to say that it was not a debenture. Sargant, L. J., in *Lemon* v. *Austin Friars Investment Trust*, *supra*, at p. 18.

(i) Debentures are constantly secured by a trust deed vesting property in trustees upon trust, if the company makes default, to sell and pay off the debentures, but vast sums have been lent on debentures not so secured.

When, as is often the case, the term "debenture" is used in an Act of Parliament, it is much easier to determine whether a particular instrument is, or is not, a debenture within the meaning of the statute than to define the meaning of "debenture" in the abstract. For example, the term "debenture" is used in the Stamp Acts, 1870

and 1891. Under these Acts it has been held that an instrument purporting to be a debenture and issued by a company is to be charged as such or sometimes as a marketable security, although it may operate as a promissory note, and might properly be so described. *British India, &c. Co.* v. *I. R. Commissioners*, 7 Q. B. D. 165; *Speyer Bros.* v. *I. R. Commissioners*, (1907) 1 K. B. 246; (1908) A. C. 92. It has also been held that an instrument not purporting to be a debenture may be a debenture within sect. 17 of the Bills of Sale Act, 1882. *Levy* v. *Abercorris Co.*, 37 Ch. D. 260; *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212.

The word "debenture" nowhere appears in the Companies Act, 1862. It occurs in sects. 10 and 14 of the Act of 1900, and is defined in that Act as including debenture stock. It appears in very many sections of the Act of 1908 and is frequently used in the Act of 1929, where it is stated to include "debenture stock, bonds and other securities of a company, whether constituting a charge on the assets of the company or not."

The frequency of the word in the Act of 1908, as compared with the Act of 1862, is very significant, and illustrates the enormous advance in importance of debentures during the interval between the two Acts.

## CHAPTER II.

### DEBENTURE STOCK *

**Difference between debentures and debenture stock.**

THE question is often asked, "What is the difference between debentures and debenture stock?" The formal difference is this:—

(1) "Debenture" is the name given to an instrument embodying a contract, usually under seal.

(2) Debenture stock is the name given to a debt usually created by a trust deed.

Debenture stock is, to use Lord Lindley's words, "borrowed capital consolidated into one mass for the sake of convenience."

Hence the two things cannot well be compared; they differ as much, *inter se*, as a mortgage *deed* and a mortgage *debt*. But if the question be varied to "What is the difference between the position of a debenture holder and that of a debenture stockholder?" the answer is that the terms "debenture holders" and "debenture stockholders" do not import any substantial difference of position. Thus—

**Difference in position of holders.**

(1) *As to time for payment.*—Money secured by debentures is generally made payable at a fixed date, say five, ten, or twenty years, from the date of issue, and although so-called perpetual debentures are sometimes issued, they are exceptional. On the other hand, debenture stock, though sometimes made payable at a fixed date, is more commonly made payable only in the event of a winding-up, or of default by the company in paying the interest for, say, six months, the company reserving power to itself to redeem after a term, say of ten or twenty years, on giving six months' notice of its intention to redeem.

(2) *As to payment of interest.*—Here there is no practical difference. In each case the interest is usually paid by

* When the first edition of this work was published in 1877, the issue of debenture stock by companies incorporated under the Act of 1862 was almost unknown, but in that edition and the subsequent editions the requisite forms for the constitution of debenture stock by such companies were given, and now the issue of debenture stock has become one of the favourite modes of raising money.

warrant or on presentation of coupons issued with the debentures or with the stock certificates.

(3) *As to security.*—In most cases the security is practically the same in substance, though the form differs slightly. Debentures are commonly secured by a charge, appearing in the debentures themselves, sometimes by trust deed, sometimes by both; debenture stock is almost always secured by a trust deed, which is also the instrument which constitutes the stock.

(4) *As to transfer.*—The mode of transfer of both is substantially the same. If the debenture or debenture stock is to bearer, the transfer is by delivery; if to registered holder, by instrument in writing. But in the case of registered debentures the transferee keeps the original debenture; whereas in the case of registered debenture stock the transferor's certificate of title is given up to the company to be cancelled, and a new certificate is issued to the transferee just as in the case of a transfer of shares.

(5) *Divisibility of stock.*—A debenture is always for a fixed sum, say 100*l.*, of which the total amount to be secured by the series is a multiple and the fixed sum is generally (but see p. 275) indivisible, whereas debenture stock, unless it is otherwise provided, can be transferred in any amounts, *e.g.*, 550*l.* or 71*l.* or 13*l.* 10*s.*, and several small holdings can be consolidated into one large holding, a single certificate being obtained for the aggregate amount, though to prevent complications it is commonly provided that a fraction of 1*l.* or 5*l.* or 10*l.* shall not be transferable. See p. 350, *infra*. No doubt it is possible so to frame a debenture that a fraction of the amount thereby secured shall be transferable, and so that several debentures may be consolidated into one; but in such cases it is necessary for the company to issue new debentures or a new debenture, and this involves the payment of special stamp duty, whereas a debenture stock certificate to registered holder is exempt from stamp duty, at any rate if framed in the ordinary way.

(6) *Title.*—The evidence of the holders' title in the case of debentures may consist of a considerable bundle of debentures. In the case of stock it is usually a single stock certificate.

(7) *Mode of enforcement.*—The debenture stockholder has to seek his remedies through the trustees of the deed creating the stock: the debenture holder can usually act independently.

**Debenture stock under Companies Clauses Act, 1863.**

Debenture stock of a company under the Companies Act of 1929 is essentially different from debenture stock issued by railway and other companies under the Companies Clauses Act, 1863.

Debenture stock issued under the Act of 1863 is a security of an anomalous character, and partakes more of the character of preference stock, with a right to a receiver in certain events, than of that of a mortgage debt. It is irredeemable unless Parliament, in the particular case, otherwise enacts; the interest is payable only out of profits; and though the debenture stockholders can obtain the appointment of a receiver if the interest gets into arrear, they can take only "the fruit of the tree"; they cannot realise their security by foreclosure or sale. Public policy does not permit them to break up or destroy an undertaking of public utility. Nevertheless, they rank before all ordinary creditors as against the undertaking and the income thereof. *Attree* v. *Hawe*, 9 Ch. D. 337; *Gardner* v. *L. C. & D. Ry. Co.*, 2 Ch. 201; *Cross* v. *Imperial Continental Gas Assocn.*, (1923) 2 Ch. 553.

**Debenture stock under Act of 1929.**

**Trust deed.**

Debenture stock issued by companies under the Act of 1929 differs from stock such as the above in various respects: in particular the security is more effectually constituted. The usual mode of constituting and securing the debenture stock is by a trust deed under which the company (1) acknowledges (p. 317, *infra*) that it is indebted to the trustees in, or covenants to pay them, a specified sum (*e.g.*, 100,000*l.*) therein called the debenture stock, bearing interest at a specified rate (*e.g.*, 4 per cent. per annum); and (2), provides for the payment of the principal and interest thereon to the equitable owners of the stock, that is, to the persons for the time being registered in the books of the company as the stockholders; and (3), vests in the trustees property as security for the payment of such principal moneys and interest. In some of the earlier trust deeds, instead of giving in the deed an acknowledgment of indebtedness, the company, pursuant to the provisions of the deed, issued to the trustees a debenture or debentures for a specified sum (*e.g.*, 100,000*l.*) carrying interest at a specified rate, and, by the deed, declared that to be the stock. Sometimes the deed contains a covenant with the trustees to pay to the stockholders the amount registered in their respective names, and declares the aggregate of those amounts to be the stock. But, however the stock is constituted, the result generally is that the legal right to enforce payment is vested in the trustees, and the equitable title thereto is portioned out among a number of persons, who are called stockholders, and whose title is evidenced by a register and certificates under the company's seal, there being usually no direct contract between the company and the stockholders. See *Dunderland Iron Ore Co.*, (1909) 1 Ch. 446.

When debenture stock is so constituted, the stockholders obtain a security which can, if necessary, be effectually enforced by the appointment of a receiver and manager, by judgment for payment of the principal, and by realisation of the securities and distribution of the proceeds. How security enforced.

Debenture stock can be made payable as follows:— When made payable.

1. At the end of a fixed term of years, say five, ten, twenty, thirty or fifty years, coupled with a provision accelerating the time for payment in the event of a winding-up, or of the security becoming enforceable [*infra*, pp. 346—348]. And where the term is not very short it is usual to reserve to the company power to redeem at any time during the term at a premium, say on six months' notice to any stockholder.
2. In the event of a winding-up or of the security becoming enforceable, but with power for the company after a term of, say, ten or twenty years, to redeem at a premium on six months' notice, either in accordance with drawings or otherwise.

These two kinds of debenture stock are called terminable debenture stock.

3. In the event of a winding-up or of the security becoming enforceable, but not otherwise.

This is commonly called perpetual or irredeemable stock. See p. 43, *infra*.

As to the redemption price, stock is generally made payable at par, but if the company is given power to redeem on notice prior to the date for payment, the redemption price generally includes a premium, *e.g.*, the redemption price may be 105*l.* or 110*l.* per cent. Moreover, it is not uncommon to provide that if the stock becomes payable by reason of a resolution for a voluntary winding-up for the purposes of reconstruction or amalgamation, the stock shall be paid off at a premium; and the London Stock Exchange authorities sometimes insist on such a provision to protect the stockholders by securing to them some compensation if prematurely paid off. See pp. 346, 347, *infra*. Redemption price.

The stockholders have not, in general, any direct contract with the company; the contract is between the company and the trustees, who are *primâ facie* the proper persons to enforce it; but the stockholders are the persons equitably entitled to the benefit of that contract—the *cestuis que trust*, and their title is evidenced by certificates under the company's common seal. The Court of course recognizes their equitable Debenture stock certificates.

rights, and at their instance enforces the obligations imposed on the company by the deed if the trustees cannot or will not proceed. *Empress Engineering Co.*, 16 Ch. D. 125; *Gandy* v. *Gandy*, 30 Ch. D. 57.

In the last-named case there was a deed of separation, and in it a covenant by the husband with trustees for the wife to pay the expenses of maintaining some of the children. One of the children under age sought to enforce the covenant, the trustees having refused to concur, but afterwards the wife was added as co-plaintiff, and it was held that she was entitled to enforce the covenant as a *cestui que trust*. Lord Justice Cotton, in his judgment, said: "One of the covenants by the husband being a covenant which the plaintiff is now seeking to enforce was to pay to the trustees all the expenses of maintenance and education of the two youngest daughters, of whom the plaintiff is one; and the objection is that the trustees are the only persons to sue on that covenant, or, at any rate, that the present plaintiff is not a person who can sue on that covenant, it having been entered into not with her, but with two other persons, namely, the trustees, who are defendants. Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—the person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception, if the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B. would in a Court of Equity be allowed to insist upon and enforce the contract."

*Uruguay Central and Hygueritas Rail. Co. of Montevideo.*

The beneficial owners of debenture stock secured by trust deed are not, however, as a rule, entitled to petition for the winding-up of the company. Thus, in *Uruguay Central and Hygueritas Railway Company of Montevideo*, 11 Ch. D. 372 (1879), the company had issued mortgage bonds in order to raise money for the construction of the railway. By deed the company covenanted with the trustees that all the bonds should rank *pari passu*, and that every bond should entitle the holder to a fully paid up ordinary share in the company as a bonus share, and that the company should pay to the trustees the interest on the bonds, and also an annual sum by way of sinking fund for the discharge of the bonds, and that the bond interest and sinking fund should be a charge on the railway. Each bond contained a covenant by the company *with the trustees* for payment of 100*l.* to the bearer thereof and of interest to the bearer of the coupons annexed. The interest on the bond having fallen into arrear, a winding-up petition was presented by the holder of six bonds, but was dismissed with

costs on the ground (1) that neither the bearer of the bond as to principal, nor the bearer of the coupon as to interest, was a creditor of the company either at law or in equity within the meaning of the Companies Act, 1862, his right of action being through the trustees only; and (2) that assuming a bondholder to be a creditor, then under sect. 91 of the Companies Act, 1862, regard must be had to the wishes of the bondholders other than the petitioner, all of whom opposed the petition.

*Dunderland Iron Ore Co. Ltd.*

This was followed by Swinfen Eady, J., in *Dunderland Iron Ore Co., Ltd.*, (1909) 1 Ch. 446. There, there was a trust deed for securing debenture stock. It was held that the beneficial owners of stock were not creditors of the company who could *petition* for the winding-up of the company. "The first point," said the learned judge, "taken against the petitioners is that they are not creditors, and are not entitled to petition as creditors. They are not debenture holders. They are debenture stockholders, and their stock was created by the trust deed of 29th November, 1904. The only parties to that deed are the company and the trustees." After referring to the form of the stock certificate and the conditions of issue, the learned judge continued: "In these circumstances, are the petitioners, the debenture stockholders, creditors? There is no covenant by the company with them. The covenant in the trust deed is between the company and the trustees. There is no covenant in the stock certificate, and there is no statement therein beyond a copy of the conditions contained in Schedule I. of the trust deed. In my opinion the true legal position is that the stockholders, although *cestuis que trust*, are not creditors of the company. They have not any direct contract with the company. The contract is between the company and the trustees, and in these circumstances I am of opinion that the petitioners are not creditors entitled to present a winding-up petition."

Transfer.

The stockholders' rights are usually made transferable by instrument in writing, registered with the company, and sometimes provision is made for the issue of stock certificates to bearer.

Irregularly constituted debenture stock.

At one time a few companies, in order to avoid the trifling stamp duty which attaches to a covenant or charge (2*s*. 6*d*. per cent.), purported to create debenture stock by resolution, and then offered it for subscription and issued unstamped certificates to the allottees without the execution of any trust deed or contract constituting a stock. This device is now quite useless; for by the Finance Act, 1899, s. 8, stock thus constituted was subjected to the same duty as if it were duly constituted by trust deed.

Debenture stock without charge or other security.

A few companies have issued debenture stock without giving to the stockholders any charge or security whatever on the undertaking. Of course, if the public are willing with their eyes open to take up

such stock, so much the better for the company. But it seems only fair in such cases to inform subscribers that no security is offered except the personal obligation of the company; for there can be no doubt that the general impression of investors is that debenture stock is secured by a charge, whereas in fact an unsecured debenture stockholder (to adopt the language of James, L. J., in *Florence Land Co.*, 10 Ch. D. 544, with reference to a bond payable at a future date), "instead of being in a better position than an ordinary creditor —instead of getting any security whatever for his money—would be in a worse position than the commonest ordinary creditors of the company."

## CHAPTER III.

### THE DIFFERENT KINDS OF DEBENTURES AND DEBENTURE STOCK.

DEBENTURES and debenture stock may be classified in various ways. Thus, they may be classified according to the mode of transfer—by deed or writing or by delivery—or they may be classified according as they do or do not carry a charge; or they may be classified according as they are or are not payable at a fixed date.

Principal kinds of debentures and debenture stock.

The following—adopting the mode of transfer classification—are the principal kinds of debentures and debenture stocks now generally used:—

(1) Registered. See Form 39.

(2) Registered with interest coupons to bearer. See Form 39.

(3) To bearer. See Form 42.

(4) To bearer but capable of being registered. See Form 61.

Debentures and debenture stock of each of the above kinds may be framed as:—

(a) Mortgage debentures or debenture stock, *i.e.*, secured by mortgage or charge. See Form 44.

(b) Naked, *i.e.*, debentures or debenture stock not secured by any mortgage or charge.

And either may be framed or constituted on the footing that—

(c) The principal moneys shall be paid at a fixed date; or in accordance with drawings; or not until the happening of some particular event, *e.g.*, notice by the company of redemption, or winding-up; and that the interest shall be paid unconditionally, or only out of profits, or at a rate varying with the profits, or that the interest may be paid in debenture stock for a period.

Mortgage debentures.

Where debentures and debenture stock are secured by mortgage or charge they are commonly called mortgage debentures and mortgage debenture stock. Whether the charge or security be legal or equitable,

or partly the one and partly the other, is not material. In either case the term "mortgage" is commonly applied.

Mortgage debentures vary according to the modes in which the charge or mortgage is annexed. They usually take one of three forms:—

(1) Mortgage debentures secured by a trust deed.

(2) Mortgage debentures secured by a charge therein contained.

(3) Mortgage debentures secured by a trust deed, and also by a charge contained in the debentures themselves.

## CHAPTER IV.

### REGISTERED DEBENTURES.

Registered debentures and debenture stock.

REGISTERED debentures and debenture stock are so called because, as in the case of ordinary shares, the name and address of the debenture holder or debenture stockholder are entered in a register kept for the purpose by the company. The debentures and debenture stock in such a case are framed and constituted with a view to registration, and among the advantages which such registration secures to the holders and to the company are the following:—

To the holders—

(1) The advantage of being exempt from the need of proving title under the original holder through, perhaps, a dozen transfers and transmissions.

(2) The advantage of being able to refer to the register of holders as evidence of title.

(3) The advantage of being able to transfer, in a simple and convenient manner, without the intervention of lawyers, and without going into past history.

(4) The advantage of being able to give a good title to a transferee free from any equities available against the original holder.

(5) The advantage of possessing a marketable security well understood on the London Stock Exchange and other stock markets, and now largely in use.

(6) The advantage of safety in having the title recorded in the books of the company and not depending on a document which may be lost or mislaid.

To the company—

(1) The advantage of having its securities framed in a form which commends itself to investors and their advisers.

(2) The advantage of precluding, almost entirely, informal transfers and notices of equities by debenture holders and stockholders and those claiming under them, and thus simplifying the title to the debentures and debenture stock and relieving the company from trouble and disputes.

(3) The advantage of having a record of the names and addresses of the holders for the time being, and of thus being able to communicate with them if it be necessary to redeem, or pay off, or modify or otherwise deal with the debentures or debenture stock.

(4) The advantage of being able to deal with the registered holders as the owners of the debentures or debenture stock without going into their title on each occasion.

The form of registered debenture now generally used was drafted by the original author of this work for the third edition in 1884.

**Registered debentures with coupons.**

Sometimes debentures are so framed that the principal moneys are payable to the registered holder, whilst the interest is payable to the bearer of coupons annexed. See Form 39, note to clause 2. The chief reason for using this form is, that many persons who are unwilling to invest in a security payable to bearer have no objection to, or prefer, the interest being made payable by coupon to bearer. Such an arrangement facilitates the payment and collection of the interest, and at the same time does not expose the debenture holder to any material risk.

Premising this much as to the general objects of the form of debenture or debenture stock known as "registered," it may now be convenient to go in some detail through the various provisions of the usual forms, and explain their object and operation.

**Form of debenture.**

*The —— Company, Limited.*

*Issue of* 100,000*l.* *of debentures of* 100*l.* *each, carrying interest at* 4 *per cent. per annum.*

*No.* —— DEBENTURE. 100*l.*

**Payment of principal.**

1. *The —— Company, Limited (hereinafter called "the company") will, on the —— day of ——, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to A. B. of —— or other the registered holder for the time being hereof, the sum of* [100]*l.*

**Consideration.**

It is to be observed that the above clause does not express the consideration. In the case of a deed there is no necessity to do so, as it is presumed; but if the instrument be under hand only, then the consideration should be stated, and even in the case of a debenture by deed, there may be some advantage in showing, on the face of it, that it was in fact issued for valuable consideration. In such a

case, where it is desired to be more explicit, the clause can begin with the words "For valuable consideration already received," or, if desired, "In consideration of the sum of £—— already received."

"Will pay."

The clause uses the term "will pay." This is a perfectly simple, intelligible and effective expression, and it is more suitable for an ordinary business document than the expression "covenant." But there is no magic in the term, and occasionally the words "undertake," "promise," "covenant," or "binds itself," are substituted. See *Ex parte City Bank* (1868), L. R. 3 Ch. 758; *Norton* v. *Florence Land Co.* (1877), 7 Ch. D. 332.

Time for payment.

A debenture usually fixes a date for payment as above, *e.g.*, at the end of five, ten, twenty, or thirty years; but sometimes it is framed as a perpetual debenture, and in that case the clause runs "will, as and when the principal moneys hereby secured become payable in accordance, &c.," so that the principal may only become payable in the events specified in the conditions 8 and 9, *infra*, p. 26.

Occasionally, where there is a temporary loan on debentures, they are made payable on demand, and then the clause runs, "will, on demand in writing," or "will, at the expiration of seven days after demand in writing, &c." Such debentures are not uncommonly issued to a company's bankers as security for an overdraft.

Where a company covenanted to pay "on or after 1st January, 1898," the Court held that, in an action by the debenture holder after that date, the sum was presently due and payable, though the covenant was followed by a provision that the debentures to be paid off should be determined by ballot—a ballot never in fact held. *Tewkesbury Gas Co., Tysol* v. *The Co.*, (1911) 2 Ch. 279; affd. (1912) 1 Ch. 1 (C. A.).

Why payment to registered holder?

The object of making the debenture payable to the registered holder is to simplify the title, and enable the company to look to some specified person as the holder to whom it can make payments, and whose receipt is to be a sufficient discharge. See clause 3 of the indorsed conditions, *infra*, p. 18.

In the absence of provisions as to register and ancillary clauses, the company must take notice of any number of assignments, charges, and claims that may be brought to its notice.

Payment of interest.

> 2. *The company will, during the continuance of this security, pay to such registered holder interest on the said principal sum of* £—— *at the rate of* —— *per cent. per annum by half-yearly payments on the* —— *day of* —— *and* —— *day of* —— *in each year, the first of such half-yearly payments to be made on the* —— *day of* —— *next.*

Currency of interest.

A debenture almost always provides for payment of interest as above; but sometimes the interest is made payable quarterly. Very commonly the expression used is "will in the meantime pay," but there is some ambiguity in this expression. It may mean "until the date fixed for payment" or "until the date of actual payment." The latter construction would seem to accord best with the intention; but if the former construction were to prevail, subsequent interest would only be recovered by way of damages. *Re Roberts, Goodchap* v. *Roberts* (1880), 14 Ch. D. 49; *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27.

How judgment affects interest.

Moreover, if the holder should obtain judgment on the debenture, the interest would thenceforth cease to be payable under the debenture, for the personal contract would merge in the judgment, and a judgment carries interest at 4 per cent. per annum only. *European, &c. Co.* (1876), 4 Ch. D. 33; *Ex parte Fewings* (1884), 25 Ch. D. 338. By using, however, the words "during the continuance of this security," or "until such principal moneys are paid," both these difficulties are avoided. See *Popple* v. *Sylvester* (1883), 22 Ch. D. 98. In any case the company, or a subsequent incumbrancer, will not be allowed to redeem without paying the full rate. See cases, *infra*, p. 274.

Where arrears of interest on debentures had been paid in cheques which had not been cashed before the company went into liquidation, the Court held that the security for the interest had not been released. *Defries & Son, Ltd., Eichholtz* v. *Same*, (1909) 2 Ch. 423.

As to the place of payment, see condition 12, *infra*.

Charge.

3. *The company hereby charges with such payments its undertaking, and all its property present and future, including its uncalled capital.*

Charge in trust deed.

A mortgage debenture generally contains a charge as above. Sometimes the charge is effected by a trust deed (see p. 76); but even where there is a trust deed, a general charge as above is very commonly inserted in the debenture. The word "charge" creates a good equitable mortgage; but equity is not particular as to the terms used, and the word "mortgage" is equally effective. So, too, if it is stated that the property shall stand as a security, or shall be a security for payment, &c., that is sufficient. All that equity requires is a sufficient indication of the intention to charge, and of the property to be charged. *Re Queensland Land and Coal Co.*, (1894) 3 Ch. 181; *Mercantile Investment Co.* v. *River Plate Trust* (No. 1), (1892) 2 Ch. 303; *Re Hampshire Land Co.*, (1896) 2 Ch. 743; *Pegge* v. *Neath District, &c. Co.*, (1898) 1 Ch. 183; *Simultaneous Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771.

As to the operation of a floating charge on the "undertaking," see *infra*, p. 61. The expression in effect comprises all the company's property, present and future. Floating security.

Sometimes, instead of a charge in general words as above, the debenture charges some specific property, *e.g.*, the company's brewery at —— or the company's patents, &c. Occasionally, too, the charge is on some portion only of the property, *e.g.*, the book debts, present and future, of the company. "All its property" covers everything except uncalled capital. Thus "property and effects" will include goodwill. *Re Leas Hotel*, (1902) 1 Ch. 332. Charge on specific property.

If the charge upon certain specified property is expressed to be a charge by way of legal mortgage, the lender obtains the same protection, powers and remedies as if a legal mortgage term had been created in his favour. Law of Property Act, 1925, s. 87.

As to the words "including the uncalled capital." These words are very commonly inserted where the company has power to mortgage its uncalled capital. See *infra*, p. 53. Uncalled capital.

The inclusion of uncalled capital adds additional security, and, at the same time, does not prevent the company from calling up and dealing with its capital as and when required.

A charge on the "undertaking," or on all the property present and future, does not include uncalled capital, but the word "assets" covers it. *Page* v. *International, &c. Trust Co.*, 68 L. T. 435. See further, p. 53.

4. *This debenture is issued subject to, and with the benefit of, the conditions indorsed hereon, which are to be deemed part of it.* Reference to indorsed conditions.

These words import the indorsed conditions into the contract, and make them part of it. The rule expressed in the maxim, "*verba relata inesse videntur*," applies. Are part of debenture.

Sometimes the conditions are set out on the face of the debenture. This is an alteration merely in form, not in substance. As to the conditions themselves, see *infra*.

*Given under the common seal of the company this —— day of ——.* Sealing.

*The common seal of the above-named company was affixed hereto in the presence of ——.* (L.S.)

A debenture is almost always under seal, but, unless the articles otherwise provide, it need not be so; it may be under hand, and Not always necessary.

occasionally is. See *British India, &c. Co.* v. *Commissioners of I. R.*, 7 Q. B. D. 165. In that case the debentures were signed by two directors on behalf of the company.

If the articles contain any special provisions as to affixing the seal, they must, of course, be observed. See *infra*, p. 123. But if the seal is not properly affixed, the debenture may still be valid, if the articles do not require the debentures of the company to be under seal. *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142.

### Indorsed Conditions.

The conditions referred to in clause 4 above of the body of the debenture and incorporated into it by reference are usually printed on the back of the debenture, and are as follows:—

*The conditions within referred to.*

"*Pari passu*" clause.

1. *This debenture is one of a series of like debentures of the company for securing principal sums not exceeding in the aggregate at any one time* [100,000*l.*]. *The debentures of the said series, whether original or not, are all to rank* pari passu *in point of charge without any preference or priority one over another, and such charge* [*save as regards the property specifically mortgaged by the trust deed below mentioned*] *is to be a floating security* [*but so that the company is not to be at liberty to create any mortgage or charge on its* [*freehold and leasehold*] *property ranking in priority to or* pari passu *with the said debentures*].

Where the debenture is one of a series, the first condition usually gives particulars as to the series. The earliest part of the condition is sometimes now, and used generally to be, expressed thus: "This debenture is one of a series of —— debentures each for securing the principal sum of £—— issued or about to be issued by the company." But that wording gave rise to a doubt whether the company, after paying off a debenture of the series, could issue a debenture in its place with the same priority. Hence the wording of the form above was considered preferable; but see now as to the re-issue of debentures, sect. 75, and *infra*, p. 139.

Why express "*pari passu*" provision?

The principal object of the *pari passu* provision is to place all the debentures of the same series on the same level as to security; so that, if the security is to be enforced, whatever is realised from it shall be divided amongst them rateably. But for some such provision there would, or might be, in case of default, a race for judgment and a scramble for execution, and, irrespective of a case of default, the provision cannot be dispensed with, inasmuch as the

debentures would or might, in the absence of such a *pari passu* provision, rank in point of security according to their dates of issue. *New Clydach Co.*, 6 Eq. 514; *Carrick* v. *Wigan Tramways Co.*, W. N. (1893) 98. This would be entirely destructive of the marketable character of the security. Where there is a *pari passu* clause, a debenture holder, who seeks to enforce the security, must sue on behalf of himself and the other debenture holders of the series. See further, Chap. XLVIII., *infra*.

Floating charge.

It is, and has been for many years, usual to state expressly that the charge is a "floating security," although the presence of the word "undertaking" in the debentures imports this. And even where the word "undertaking" is not used, the fact that there is a general charge on all the property of a company is generally regarded by the Court as a sufficient indication of intention that the charge is to be a floating security; common sense requires it, for, otherwise, the business of the company would be paralysed. *Florence Land Co.* (1878), 10 Ch. D. 530; *Colonial Trusts* (1880), 15 Ch. D. 465; *Illingworth* v. *Houldsworth*, (1904) A. C. 355. See further as to this, *infra*, p. 61.

Effect of, as to later specific charges.

In the form above the floating character of the charge is largely qualified; for one of the most important features of such a charge is that it leaves the company at liberty to create specific mortgages or charges ranking in priority thereto. The clause, as above framed, to some extent restricts this power, and occasionally the prohibition is not confined to the freehold and leasehold land, but is general.

Later legal mortgage.

Such a prohibition is not absolutely protective; for if the company creates a legal mortgage or charge on the property in favour of a person who takes for value without notice of the character of the debenture holders' charge, such person, in accordance with the ordinary rules, obtains priority by virtue of the legal estate. See *English and Scottish, &c. Co.* v. *Brunton*, (1892) 2 Q. B. 700 (C. A.). And see *Castell and Brown, Ltd.*, (1898) 1 Ch. 315; *Valletort Steam Laundry Co.*, (1903) 2 Ch. 654; *Standard Rotary Machine Co.*, 51 S. J. 48; 95 L. T. 829. Registration of the debentures since 1925, operates as actual notice. As to the effect of this provision, see p. 70, *infra*. The prohibition will not prevent the company's solicitor from acquiring the ordinary solicitor's lien in priority to the debenture holders if they have merely a floating charge, for such a lien is not, it has been held, a charge within the condition. *Brunton* v. *Electrical Engineering Co.*, (1892) 1 Ch. 434. A fixed charge would, however, take priority over the lien.

A condition giving the debenture holders power to sanction a creation of debentures ranking *pari passu* with their own refers to floating charges, and will not by implication prevent the company

from creating specific charges on specific assets. *Cox Moore* v. *Peruvian Corporation*, (1908) 1 Ch. 604. See also *Re Benjamin Cope & Sons, Ltd.*, (1914) 1 Ch. 800.

For modification of the condition when the debenture is not to contain a charge, but is to be secured by trust deed, see *infra*, p. 284.

Register to be kept.

2. *A register of the debentures will be kept at the company's registered office wherein there will be entered the names, addresses, and descriptions of the registered holders and particulars of the debentures held by them respectively, and such register will at all reasonable times during business hours be open to the inspection of the registered holder hereof, and his legal personal representatives and any person authorized in writing by him or them.*

Shows title.

This provision as to keeping a register is to simplify the title, and afford both to the company and the debenture holder, and those who may deal with the latter, a simple mode of ascertaining who is for the time being the proprietor of the debenture. It has largely facilitated dealings with debentures.

Registered holder only recognized.

3. [*Save as in these conditions provided*] *the registered holder, or his legal personal representatives, will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of any trust, or save as herein provided and except as ordered by a court of competent jurisdiction to recognize any trust or equity affecting the ownership of this debenture or the moneys hereby secured.*

How such clause operates.

The object of this clause is to fortify the title of the registered holder by making the company agree to recognize him and him only as the person entitled to the debenture. The executor of a deceased registered holder is entitled to be entered as a registered holder without any reference to his position as executor and without a transfer. *Edwards* v. *Ransomes and Rapier, Ltd.*, W. N. (1930) 180.

As between several unregistered transferees, the first in point of time has the better right, and registration of the second transferee after he has received notice of the first transfer will not give him the better title. *Colcman* v. *London County and Westminster Bank*, (1916) 2 Ch. 353.

The latter part of the clause is intended to relieve the company, as far as is practicable, from the onerous obligation to take notice of trusts or equities. Such a provision could not, of course, relieve

the company from its duty to recognize an order of the Court (*Binney* v. *Ince Hall, &c. Co.*, 35 L. J. Ch. 363); but where there is such a clause, it is apprehended that a mere notice of an equity may be disregarded; for one who claims under a debenture must be bound by the terms of the contract, and cannot be allowed both to approbate and reprobate. See *Société Générale* v. *Walker*, 11 App. Cas. 20; *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 Ch. D. 302. In *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, there was *no clause excluding the recognition of equities.*

Transfer.

4. *Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representatives. The transfer must be delivered at the registered office of the company with this debenture and a fee of* 2*s.* 6*d., and with such evidence of identity or transmission as the company may reasonably require, and thereupon* [*if this debenture remains registered in the name of the transferor the transferee will be recognized as having become entitled to the benefit of this debenture free from any equities, set-off, or cross-claims which but for this provision the company would be entitled to set up against the transferor, and*] *the transfer will be registered and a note of such registration will be endorsed hereon. The company shall be entitled to retain the transfer.*

Working of clause.

The object of this clause also is to simplify the title to the debenture by providing for the delivery of every instrument of transfer to the company, so that if any question as to the title arises, the company will have the requisite documents as evidence in its possession. In the absence of some such provision, the company would only receive a notice of the transfer. It would have no right to call for the production of the transfer, and the notice might, or might not, relate to an actual transaction. In practice the condition is found extremely useful. It is binding on the company even when in course of being wound up, and even after judgment in a debenture holder's action. See *infra*, p. 25, and *Re Goy & Co., Farmer* v. *Goy & Co.*, (1900) 2 Ch. 149. But if the company has and asserts an equity against the transferor, and refuses to register the transfer on that ground, the transferee cannot, in the absence of the bracketed words in this and in conditions 3 and 7, insist on being registered. *Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743, 750; *Brown and Gregory, Ltd.*, (1904) 1 Ch. 627; (1904) 2 Ch. 448.

The clause is silent as to a debenture holder's trustee in bankruptcy. He is left to his power of transfer under sect. 48 of the Bankruptcy Act, 1914.

Though the debenture is under seal, the transfer need not be. It is sufficient that it is in writing.

A company is bound to exercise considerable care in regard to the registration of transfers, for if it registers a forged transfer, it may incur serious responsibility. See *infra*, p. 211.

Joint holders

5. *In the case of joint registered holders, the principal moneys and interest hereby secured shall be deemed to be owing to them on a joint account.*

This clause is commonly inserted, but having regard to sect. 111 of the Law of Property Act, 1925, it is superfluous.

Closing of register.

6. *No transfer shall be registered during the seven days immediately preceding the day by this debenture fixed for payment of interest.*

Object of.

This clause is inserted in order to prevent the great inconvenience that may arise if transfers come in just when the half-year's interest is being calculated. Most companies like to send out the interest on the day it becomes due, and it is practically impossible to do this if a number of transfers come in during the calculations.

Exclusion equities.

7. *The principal moneys and interest hereby secured will be paid [and such moneys will be transferable as aforesaid free from and] without regard to any equities between the company and the original or any intermediate holder hereof, or any right of set-off or cross-claim, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the company for the same.*

Advantage of exclusion.

This is one of the most important clauses in the debenture. *Primâ facie* a debenture being a chose in action is only assignable subject to all equities between the company and the original subscribers. *Mangles* v. *Dixon*, 3 H. L. C. 702; *Ryall* v. *Rowles* (1748), 1 Ves. Sen. 348; Law of Property Act, 1925, s. 136.

Thus, in *Athenæum, &c. Soc.* v. *Pooley* (1858), 3 De G. & J. 294, debentures had been issued to A. as part of the consideration for property sold by him to the company. The price was excessive, and A. had bribed the company's manager who arranged the sale. A. afterwards transferred the debentures to B., and B. resold in the market to C., who bought without notice of the circumstances relating to the issue of the debentures. C. subsequently sought to enforce them as against the company. Held, that though a purchaser *bonâ fide* without notice, yet being only a purchaser of a chose in action, he could stand in no better position than A., and therefore that his claim

failed. "Mr. ——," said Knight Bruce, L. J. (p. 298), "appears to have bought these debentures innocently, but very imprudently, in the belief, probably, that they were good securities, and without notice of anything to the contrary. Unfortunately, however, he bought what the English law calls a chose in action, and it is too clearly settled to admit of question or argument that a person buying a chose in action which can only be put in suit in the name of the original holder cannot, in general, stand in a better position than the original holder."

So also in *South Blackpool Hotel Co.*, 8 Eq. 225, the company was held entitled to set off against a transferee's claim on the debentures a counterclaim which would have been available against the original holders, namely, that he had not given the company the full amount of the stipulated consideration for the issue.

Again, in *Christie* v. *Taunton, Delmard & Co.*, (1893) 2 Ch. 175, in the absence of such a condition in the debentures it was held that the company was entitled to set off against the transferee's claim a call made on the transferor in respect of his shares in the company, such call having been made before any notice of the transfer was given to the company.

All chance of such a risk can, however, be precluded by the insertion of apt words in the debentures, as above, or in the trust deed securing the same, and no legal objection can be taken to so moulding the contract. "I am of opinion," says Rolt, L. J., *Blakeley Ordnance Co.*, 3 Ch. 159, "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." And Cairns, L. J., *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, 2 Ch. 397, expresses a similar view. "Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; 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." See also *General Estates Co.*, L. R. 3 Ch. 758. Where the words in brackets in conditions 3, 4 and 7 are *not* inserted, it has been held that although after registering a transfer the company cannot, as against the transferee, set up any equities it has against the transferor, it may do so before registration. *Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743, 751; and see *infra*, p. 277. This is considered objectionable, and accordingly the words in brackets are now commonly inserted and operate as a qualified waiver by the company of its right in this respect.

Exclusion allowable.

From a business point of view the clause is indispensable. Investors and their advisers regard it as an essential condition, and insist on

its insertion. They have long since discovered the extreme inconvenience of dealing with a security which is liable to be defeated or depreciated by the unexpected intervention of some latent equity.

The latter part of the condition is useful as fortifying the position of the registered holder and relieving the company from going into the question of title. Such a stipulation is in point of law free from objection. See *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 385; *Re Natal Investment Co.*, 3 Ch. 355; and *Palmer's Decoration, &c. Co.*, *supra*.

Power for company to pay off on notice.

8. *The company may at any time give notice in writing to the registered holder hereof, his executors or administrators, of its intention to pay off this debenture, and, upon the expiration of six months from such notice being given, the principal moneys hereby secured shall become payable.*

This clause is very commonly inserted. Sometimes the words "after the —— day of —— next" are inserted before the words "give notice," so that the holder may have, at any rate, a term of five, of ten, or sometimes twenty years' quiet enjoyment of the security. Sometimes a premium is made payable, by way of bonus, on redemption; but in large numbers of cases the clause is left as it stands above.

As to the mode of giving notice, see *infra*, p. 29.

Immediate payment where default as to interest or winding-up.

9. *The principal moneys hereby secured shall immediately become payable :—*

(a) *If the company makes default for a period of six months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company, calls in such principal moneys ; or*

(b) *If an order is made or a resolution is passed for the winding-up of the company.*

Repayment if default in interest.

It is now usual to provide as above. Other events are sometimes specified in which the principal moneys are to become payable, as to which see Chap. XIV. As to paragraph (a), it is more satisfactory to the investor to know that if his interest gets largely into arrear he can call up his principal, as in the case of an ordinary mortgage, and such a provision is valid. It is not regarded as a penalty against which equity can relieve. *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1; *Wallingford* v. *Mutual Society* (1879), 5 App. Cas. 685.

Repayment on winding-up.

As to paragraph (b), it was long since settled that where a winding-up ensues, the debenture holder is entitled to enforce his charge and obtain immediate payment, even though his debenture has

not matured. *Hodson* v. *Tea Co.* (1880), 14 Ch. D. 859; *Wallace* v. *Universal, &c. Co.*, (1894) 2 Ch. 547 (C. A.); see p. 280, *infra*. Accordingly the clause does not prejudice the position of the company, while, at the same time, it serves to make clear the position of the debenture holder—a position which otherwise would have to be ascertained from a study of the authorities.

Receiver clause.

10. At this point in the conditions, there is very commonly inserted a condition empowering the holder of the debenture, after the principal moneys become payable, to appoint a receiver of the property charged: see *infra*, p. 281. The power is usually made exercisable only with the consent of a specified proportion of the debenture holders, and, where there is a trust deed, it is common to provide that the receiver must be a person approved by the trustees. Such a provision is effective. *Henry Pound & Son and Hutchins* (1889), 42 Ch. D. 402 (C. A.). In the absence of such a clause, doubt has been expressed whether the provisions of the Conveyancing Act, 1881 (now the Law of Property Act, 1925), relating to the appointment of a receiver, would apply, at any rate, to a debenture which is one of a series, charging the undertaking of the company. See *Blaker* v. *Herts, &c. Waterworks Co.* (1889), 41 C. D. 399. An important advantage gained by the insertion of such a clause is that, in the event of a winding-up and enforcement of the security, the parties interested are able to secure the appointment of a competent person selected by them instead of having to apply to the Court to appoint a receiver, in which case it was not uncommon to find that a liquidator, not necessarily competent and possibly hostile, had been selected. A receiver appointed by debenture holders under the powers of this debenture will not as a rule be displaced. *Henry Pound, Son and Hutchins, supra;* but see *Re Slogger Automatic Feeder Co.*, (1915) 1 Ch. 478, and *infra*, pp. 471, 472.

Trust deed referred to.

> 11. *The holders of the debentures of the above issue are and will be entitled* pari passu *to the benefit of, and subject to the provisions contained in, a trust deed dated the —— day of ——, and made between the company of the one part and —— and —— of the other part, whereby certain property was vested in trustees for securing the payment of the principal moneys and interest payable in respect of the said debentures.*

Where there is not to be any trust deed, this clause is, of course, omitted.

As to the advantages of a trust deed, see *infra*, p. 76. The insertion of words as above, in fact, imports into the debenture the provisions of the trust deed, and renders the security subject to the obligations of such trust deed, and entitled to the benefit of it. See p. 76

Place of payment.

12. *The principal moneys and interest hereby secured will be paid at the —— Bank, Limited, No. —, —— Street, London, or at the registered office of the company.*

It is usual to insert a clause as above. In the absence of some such provision, the ordinary rule prevails, and the company is bound to search out its creditor and pay him. *Fowler* v. *Midland Electric Corpn.*, (1917) 1 Ch. 527, 656. Where a clause is framed in the alternative as above, it rests with the debenture holder to elect at which place payment shall be made, and he must communicate his election to the company. *Saunderson* v. *Bowes*, 14 East, 500; *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357.

In *Escalera Silver Mining Co., Tweedy* v. *The Company*, 25 T. L. R. 87, the conditions provided that "the principal and interest hereby secured will be paid at the registered office of the company." And it was held that a debenture holder whose interest was in arrear but who had not applied for payment at the registered office of the company could not treat the company as in default. But see *Re Harris Calculating Machine Co., Ltd.*, (1914) 1 Ch. 920 (where six months' default had been made after notice).

Currency in which payable.

The interest on debentures is payable in the currency of the country where it is payable. In a case where debentures issued by an Australian company provided that the moneys secured by the debentures would be paid at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide or London at the registered holder's option, the Court of Appeal held that a registered holder requiring payment in London was not entitled to be paid in sterling. *Broken Hill Proprietary Co.* v. *Latham*, (1933) Ch. 373; but this decision was overruled by the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, (1934) A. C. 122, in which case an Australian company by its articles provided that all dividends should be paid in and from Adelaide or elsewhere in Australia, and it was held that the company had discharged its obligation by paying in Australian currency.

The "gold clause."

If payment in gold is desired, the debenture should be so framed as to secure delivery of so much gold by weight or of such a sum of money as on the date of repayment will purchase gold of the specified weight. See Coinage Act, 1870 (33 Vict. c. 10), s. 6, the Gold Standard Act, 1925, and the Gold Standard Amendment Act, 1931.

If other expressions are used it becomes a question of construction whether the bargain was that gold of a certain weight should be paid or a certain amount of money, to be paid in gold, in which latter case the obligation to pay the money is satisfied by paying the amount in whatever form is legal tender. In *Feist* v. *Société Intercommunale Belge*, (1934) A. C. 161, certain bonds provided for payment of a sum

"in sterling or gold coin of the United Kingdom of or equal to the standard of weight or fineness existing on September 1, 1928." The House of Lords held that the reference to gold coin was not a reference to the mode of payment, but to the measure of the company's obligation, and that the bondholders were entitled to be paid the price in London in sterling at the date of payment of gold of the weight and fineness specified. This is, no doubt, what the parties intended.

In the case of the *King* v. *International Trustee for the Protection of Bondholders*, (1937) A. C. 500, a gold bond issued by the British Government undertook to pay $1,000 on the 1st February, 1937, at the option of the holder, either in New York in gold coin of the U.S.A. of the standard of weight and fineness existing in February, 1917, or in London in sterling at the fixed rate of $4.86\frac{1}{2}$ to the pound. The Court of Appeal held that the contract was governed by English law and was covered by *Feist* v. *Société Intercommunale Belge* (*supra*), but the House of Lords held that the contract was governed by American law under which the payment of dollars in gold at the old rate was rendered illegal.

Service of notices on holder.

13. *A notice may be served by the company upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it is posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.*

In the absence of such a provision, it is for the company, if it desires to give notice (*e.g.*, for the purpose of redemption), to find out the address of the debenture holder, and to take care that notice is effectually served on him.

## CHAPTER V.

### DEBENTURES TO BEARER.

**Object of making to bearer.**

IN framing a debenture to bearer the object is to endow it with the dominant characteristics of a negotiable instrument, and in particular—

1. To make it transferable, free from equities between the company and the person to whom it is issued.
2. To avoid the necessity for any written transfer.
3. To render the delivery of the debenture and any interest coupon a good discharge to the company.
4. To enable the bearer to sue the company in his own name.
5. To ensure a good title to any person who acquires the debenture *bonâ fide* for valuable consideration, notwithstanding any defect in the title of the person from whom he acquires it.

**Bearer debentures negotiable.**

A debenture to bearer is a negotiable instrument.

It is well settled that according to the law of England an instrument can only be negotiable (1) by statute, or (2) by the custom of merchants, *i.e.*, the law merchant.

**Statute.**

As to statutes, there is, so far as debentures are concerned, only one which touches the matter, namely, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). Under that Act the promissory note of a company may be under the company's seal (sect. 91). A debenture to bearer containing an unconditional promise to pay (sect. 83) may thus be held to be a promissory note and as such negotiable under the statute, and there are debentures in existence which have been issued in this form. But by far the greater number of current debentures to bearer issued by companies in England contain conditions which exclude them from ranking in the category of promissory notes. These conditional debentures are now negotiable if they are in such a form as to be treated as negotiable by the general custom of merchants.

The negotiability in England of bills of exchange arose from the custom of merchants in England, and inasmuch as such instruments were but little used in England until the sixteenth century or later, the custom cannot have arisen until then.

The negotiability in England of promissory notes arose in like manner in the seventeenth century, and was recognized by the Courts

until Holt, C. J., in *Clerke* v. *Martin* (1703), 2 Lord Raym. 757, and *Buller* v. *Crips* (1704), 6 Mod. 29, challenged the efficacy of the custom and decided against it.

The custom was, however, vindicated by the Act of 3 & 4 Anne, c. 9, and divers other instruments have been recognized by the Courts as having acquired the quality of negotiability by the custom of merchants. Thus the negotiability in England of bonds to bearer issued by a foreign government was recognized in *Gorgier* v. *Mieville* (1824), 3 B. & C. 45; the negotiability of scrip certificates to bearer issued here in respect of a foreign loan in 1875 in *Goodwin* v. *Robarts*, L. R. 10 Ex. 337; 1 App. Cas. 476; the negotiability in England of bonds to bearer issued by a South American Land Bank in 1892: *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201.

In the same year the negotiability by custom in England of bonds or debentures of an American railway company was recognized: *Venables* v. *Baring Bros.*, (1892) 3 Ch. 527.

These instances were all cases of foreign instruments.

*Crouch* v. *Crédit Foncier.*

The negotiability of debentures to bearer issued by an English company was first raised in 1873 in *Crouch* v. *The Crédit Foncier of England, Ltd.*, L. R. 8 Q. B. 375. In that case it was tacitly admitted at the trial that such instruments were by the custom of merchants treated as negotiable; but the Court of Queen's Bench (Blackburn, Quain, and Archibald, JJ.) held that as the instruments were English and the custom was modern, it was not effective.

*Goodwin* v. *Robarts.*

This view of the law was not, however, to remain long unchallenged, for in 1875 the question how far modern custom was competent to attach negotiability to an instrument was raised in the case of *Goodwin* v. *Robarts*, L. R. 10 Ex. 337. In that case the instrument under consideration was scrip to bearer issued by Messrs. Rothschild for the Russian Government, to be subsequently exchanged for bonds to bearer of that government. It was proved that such instruments were by custom treated as negotiable, but it was argued on the authority of *Crouch* v. *Crédit Foncier* that as the custom was modern it could not have effect. The Court, however, held that the custom, though modern, was efficacious and that the scrip was accordingly negotiable.

Affirmed by House of Lords.

The decision in this case was affirmed by the House of Lords, 1 App. Cas. 476, on the ground of estoppel; but also on the ground that negotiability by custom was established. After stating that, in his opinion, the doctrine of estoppel was applicable, Lord Cairns added, "I have no hesitation in saying that I also concur in what I understand to have been the *ratio decidendi* of the Courts below in this case itself," in other words, that the custom of merchants in

England is still competent to attach the quality of negotiability to instruments not hitherto recognized by it as negotiable.

*Rumball* v. *Metropolitan Bank.*

In *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194, the question again arose as to negotiability by custom. This time it was the case of scrip certificates to bearer, issued in England, by an English company, and certifying that on payment of certain instalments the bearer would be entitled to be registered as the holder of shares in such English company. It was proved that for some thirty-five years it had been the custom to treat such scrip certificates as negotiable, and it was held that by force of this custom, the certificates, albeit modern English instruments, had become invested with the qualities of negotiable instruments.

Scrip.

*Bechuanaland Co.* v. *London Trading Bank &c.*, 1898.

With the authorities in this state, the question again came up for decision in *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; the instruments in that case being debentures to bearer issued by an English company—the Beira Junction Railway Company—in England. The debentures in question had been fraudulently taken from the plaintiff company, and pledged with the defendant bank; which took them for value, in good faith, without notice. Evidence was given that, by the custom of merchants in England, similar debentures to bearer were, and for some twenty years and upwards had been, dealt with as negotiable instruments; and it was held, on this evidence, that the custom was efficacious; that the debentures, notwithstanding their being modern English instruments, were negotiable; and, accordingly, that the plaintiff's claim failed.

Thus, the negotiability by the law merchant of debentures to bearer was fully vindicated. The matter has since been carried still further by a decision of Bigham, J., in *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144. In that case the negotiability of debentures to bearer (capable of being registered) issued by an English company was called in question. Evidence of the custom to treat them as negotiable was given, and in the result it was held that they were negotiable. The learned judge said (p. 155): "In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved, and its convenience is so obvious that it must be taken now to be part of the law."

In one respect, and that a most important one, *Edelstein* v. *Schuler & Co.* goes further than *Bechuanaland Exploration Co.* v. *London Trading Bank*, for Bigham, J., considered that the custom of merchants to deal with such instruments as negotiable need no longer be proved—that the Court will take judicial notice of the custom. This accords

with what was laid down in the House of Lords by Lord Cairns, *supra*, p. 31.

This satisfactory termination of a long-standing controversy renders the draftsman's task in framing a debenture to bearer a comparatively simple one. All that is necessary is to make the instrument in terms payable to bearer, and to take care that no condition or stipulation appears which is repugnant to or inconsistent with the nature of a negotiable instrument. Termination of the controversy.

There was formerly a doubt whether under the law of Scotland debentures to bearer could be validly issued; but this doubt was removed by sect. 106 of the Act of 1908 (now sect. 77 of 1929).

In the case of a debenture to bearer it is necessary to provide for payment of interest in accordance with coupons annexed, for otherwise it would be necessary to insist on production of the debenture for payment of interest, and to make some indorsement thereon of the payment. Where the payment is not to be made till a distant date, or the debenture is what is known as a perpetual one, it is usual in the first instance to issue with the debenture only a limited number of coupons providing for the payment of interest, say, for ten or twenty years. In such case provision is made for the issue of further coupons when the original coupons are exhausted. For form of coupons, see Form 43, *infra*. Coupons.

The gross amount of the interest, the amount and rate of the income tax, and the net amount payable should be stated. See Finance Act, 1924, s. 33.

### Debentures to Bearer capable of Registration.

It is sometimes convenient to issue debentures to bearer capable of being registered at any time. (See Form 61, *infra*.) Debentures to bearer capable of registration.

This form of debenture combines the advantages of the debenture to bearer with those of the registered debenture. Those who want a security transferable by delivery get it, those who, like trustees, do not favour such a security can register, and thereby obtain full protection. Such debentures, negotiable by mercantile custom, with an option of registration, have become a favourite form of security. Vendors and purchasers are well aware that transfers (by delivery) of such debentures are exempt from the 1*l.* per cent. *ad valorem* stamp duty generally payable on the transfer of marketable securities, and they also appreciate the fact that such instruments can be transferred without the delay sometimes involved in procuring the registration of a transfer, while the holders can at any moment they desire, by registering, safeguard themselves against the risk incident to the possession of an instrument to bearer. This form of instrument would become even more general than it is but for the stamp duty

of 2*l.* per cent. on the issue;* a duty of course considerably in excess of the duty of 2*s.* 6*d.* per cent. charged on the issue of registered debentures, though justified, from a Government point of view, by the immunity from transfer duty. Nevertheless the higher duty is in many cases a judicious outlay on the part of the company, calculated as it is to attract investors desirous of having a readily convertible security.

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* Stamp Act, 1891. Sect. 82 (1) (a) and Schedule "Marketable Security," (3) "transferable by delivery," 1*s.* for every 10*l.*, doubled by Finance Act, 1909-10, s. 76, and re-doubled by Finance Act, 1920, s. 38.

## CHAPTER VI.

### OUT OF DATE FORMS OF DEBENTURES.

Old forms occasionally crop up.

THE great majority of the outstanding debentures of English companies accord more or less closely with some of the debenture forms set out in this work; but now and then a peculiar special form is met with in practice. For example:—

Debentures are occasionally found which have been issued in the form of mortgage set forth in the schedule to the Companies Clauses Consolidation Act, 1845 (but not under the statutory powers of the Act), as follows:—

Assignment of undertaking.

> *By virtue of e.g. our memorandum and articles of association, we the —— Company, in consideration of the sum of £—— paid to us by —— of ——, do assign unto the said —— his executors, administrators and assigns our undertaking, and all the sums of money arising therefrom, and all the estate, right, title, and interest of the company in the same to hold unto the said —— his executors, administrators and assigns until the said sum, with interest for the same at the rate of —— for every* 100*l. by the year, is satisfied, the principal sum to be repaid at the end of —— years from the date hereof on ——.*
>
> *Given under our common seal this —— day of ——.*

Where such a form is used there can be no doubt that the debenture holders obtain a charge on the undertaking of the company by way of floating security, and that principal and interest are payable as provided in the instrument. But a debenture in such a form has grave defects: it is only transferable subject to equities (*supra*, p. 24), and unless otherwise provided therein such debentures do not rank *pari passu* as a charge on the undertaking, but rank according to the respective dates of issue. *New Clydach Co.*, 6 Eq. 514.

Another form of debenture occasionally met with in practice is based on the above, but in lieu of assigning the undertaking the instrument purports to charge the undertaking. This was the form used in *Panama, &c. Royal Mail Co.*, 5 Ch. 318—the case which may be said to have created "the floating charge."

Another curious specimen of a debenture is to be found in *Re Florence Land, &c. Co.*, 10 Ch. D. 530. By it the company, in consideration of the sum of 100*l.* advanced and lent to them by ——,

Charge on undertaking.

> *do hereby, in pursuance and under the powers of their articles of association bind themselves, their successors, assigns, and all their estate, property, and effects to pay the said —— or bearer on presentation of this bond at the registered office of this company in England the said principal sum on a specified day and also interest on the said sum until paid at the rate of* 6 *per cent. per annum at the time and place mentioned in the coupons attached hereto.*

The problem presented in this case was whether this form of instrument created any valid and effective charge on the undertaking of the company by way of floating security. There was a difference of judicial opinion, but the opinion which prevailed was that it did.

Bond operating as a charge.

Another peculiar form of debenture is to be found in *Colonial Trust Corpn.*, 15 Ch. D. 465. It is expressed in the shape of a bond, whereby the company in consideration, &c., declared that they were held and firmly bound unto the lender in the penal sum of £——, to be paid to the lender, his executors, administrators, and assigns, for which payment to be well and faithfully made they bound themselves and their successors and their real and personal estate firmly by these presents, and on the back there was a condition declaring that the condition of the above written bond was such that if the corporation should pay the principal money and interest half-yearly then the obligation should be void, but otherwise it should remain in full force, and that the debenture holders should be entitled to be paid the principal moneys and interest secured to them respectively *pari passu*. This instrument was also held to create a valid charge on the undertaking of the company, though not upon its uncalled capital.

All these forms of debentures must, however, be regarded as anomalous, and, with few exceptions, debentures now are, and for many years past have been, framed in close accordance with the forms drafted by the author for this work.

But the growth of the debenture still goes on—new circumstances, new exigencies arise, or human methods change—and there are some special forms of debentures which may still be required in special circumstances. Of these the following may be mentioned:—

Debentures payable on demand.

1. Debentures to be issued to the trustees of a debenture stock deed as a foundation for the security. These debentures provide for

the payment to the trustees of all principal moneys and for the payment of interest in the meantime, and give the trustees a charge on the undertaking or property as arranged. They also usually provide that payment of the interest on the debenture stock for each half-year is to be regarded as in satisfaction of the interest on the debentures. They refer to the trust deed, and declare that they are issued pursuant thereto. See Form 74.

2. When a company has a running account with a banker or other lender, debentures deposited to secure the account are frequently made payable on demand. In such case it is not usual to make the instrument transferable free from equities or to insert any provisions as to a register of debentures. The object is to give to the holder a charge on the undertaking for a specified amount—a charge which he can at any moment call in, and so obtain payment of the amount actually due. See Form 74.

According to the unfortunate decisions in *George Routledge & Sons*, (1904) 2 Ch. 474; *W. Tasker & Sons*, (1905) 2 Ch. 587, and *Perth Electric Tramways*, (1906) 2 Ch. 216, if the current account ceased at any time to be in debit, the debentures were extinguished. But the legislature promptly intervened with an enactment (sect. 15 of the Companies Act, 1907, now replaced by sect. 75 of the Companies Act, 1929), which in effect nullifies these decisions. See further, *infra*, pp. 139, 140.

3. Debentures are sometimes issued to persons as a security by way of indemnity. In such cases the object for which they are issued is occasionally set out in the debentures.

4. Debentures are occasionally issued in the shape of a certificate, thus:—

Certificate debentures.

> *This is to certify that the —— Company, Limited, for valuable consideration already received, is indebted to A. B. of —— in the sum of £——, which sum is payable, &c.*

The mere fact that the instrument is in the shape of a certificate does not, of course, affect its operation; it is an acknowledgment under the seal of the company, and the company can be sued thereon accordingly; but no security is created.

## CHAPTER VII.

### DEBENTURE STOCK CERTIFICATES TO REGISTERED HOLDERS.

Certificates to registered holders.

THE holders of debenture stock are usually given the right to certificates of title, stating the amount of the stock held by them, and referring to the deed under which the stock is constituted. Such a certificate is not the stockholder's title, it only constitutes the *indicia* of it—a solemn affirmation, to use Lord Cairns' language, in *Shropshire Union, &c. Co.* v. *Reg.*, L. R. 7 H. L. 509, under the seal of the company that a certain amount of stock stands in the name of the individual mentioned in the certificate. The following is a specimen of the certificate usually issued:—

THE —— COMPANY, LIMITED.

*This is to certify that A. B., of ——, is the registered holder of £—— of the 4 per cent. debenture stock constituted and secured be deed dated and made, &c.*

*Given under the common seal of the said company this —— day of ——.*

The trust deed usually sets forth in detail the rights of the stockholder as regards certificates, transfer, transmission, payment of interest, &c., see *infra*, p. 348; the object being to place the stockholder as nearly as may be in the position of a registered debenture holder, and it is clear that the holder is bound by its provisions.

Sect. 67 of the Act of 1929 provides as follows:—

**67.**—(1) Every company shall, within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the date on which a transfer of any such shares, debentures, or debenture stock, is lodged with the company, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

The expression "transfer" for the purpose of this sub-section means a transfer duly stamped and otherwise valid, and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register.

(2) If default is made in complying with this section, the company and every director, manager, secretary or other officer of the company who is knowingly

a party to the default shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(3) If any company on whom a notice has been served requiring the company to make good any default in complying with the provisions of sub-section (1) of this section fails to make good the default within ten days after the service of the notice, the Court may, on the application of the person entitled to have the certificates or the debentures delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order, and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default.

If a company refuses to register a transfer of any shares, debentures or debenture stock the company must, within two months after the date on which the transfer was lodged with the company, give to the transferee notice of the refusal. See sect. 66.

Where a company issues a certificate stating that a person is the registered holder of so much stock and the certificate is acted on, the company is estopped from denying its truth; that is to say, if it is untrue, the company is responsible in damages to the person who has been prejudiced, for the principle illustrated in *Bahia, &c. Ry. Co.*, L. R. 3 Q. B. 584, 595, applies. See, as to share certificates, Part I., 15th ed. pp. 625, 626. But there is no estoppel where the document to which the seal purports to be affixed is a forgery. *Ruben* v. *Great Fingall Co.*, (1906) A. C. 439.

The London Stock Exchange Rules contain requirements relating to the form of debenture stock certificate. See Part I., 15th ed., Appendix, p. 1476,

## CHAPTER VIII.

### AS TO DEBENTURE STOCK CERTIFICATES TO BEARER.

Debenture stock certificates to bearer.

THE provisions for ensuring the negotiability of debenture stock certificates to bearer are commonly embodied in the trust deed constituting the stock, so that the certificates may be in the simplest possible form. They certify that the bearer is entitled to "£—— of the above debenture stock constituted and secured by trust deed dated," &c. See these provisions set out, p. 352, and form of certificate, *infra*, Form 38; also Stock Exchange Rules, Part I., 15th ed., Appendix, p. 1476.

The holder of the certificate is clearly bound by the provisions of the trust deed constituting the stock. He cannot both approbate and reprobate the contract. Such stock certificates are liable to a duty of 3*l.* per cent. By the Stamp Act, 1891, Sched. I., under "share warrant stock certificate to bearer," the latter are charged a duty of three times the duty chargeable on a deed transferring the stock. Under sect. 108 of the same Act stock certificate to bearer included such a certificate issued under any statute authorizing the creation of debenture stock, and by sect. 5 of the Finance Act, 1899 (see p. 230, *infra*), this definition was extended to cover instruments to bearer issued on behalf of any company established in the United Kingdom and having a like effect. By sect. 38 of the Finance Act, 1920, the duty on stock certificates was doubled.

Sect. 67 of the Companies Act, 1929 (*supra*, p. 38), requires certificates to be issued within two months, unless the conditions of issue otherwise provide.

## CHAPTER IX.

### THE POWER TO BORROW AND TO ISSUE DEBENTURES AND DEBENTURE STOCK.

A COMPANY can do nothing—so as to be valid in law—beyond the scope of its objects expressed or implied. This is a fundamental principle of company law, and it governs a company's power to borrow. There are some *dicta* in *Patent File Co.*, 6 Ch. 83, seeming to postulate that a body corporate as such has an implied power to deal with its property as it thinks fit. James, L. J., there says: "The company is a body corporate, and by the law of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing. In the memorandum and articles of this company I can find nothing to prevent the company *quâ* company from pledging part of its property for payment of a debt incurred in the course of its business." And Mellish, L. J., said (p. 88): "It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so." But too much reliance must not be placed on these *dicta*, for the company in that case was a *trading* company, formed to acquire and work certain patented inventions, and "for the doing of all such other things (including the purchasing, leasing, or otherwise acquiring, holding, and disposing of lands and buildings) as are incidental or conducive to the attainment of the above objects, or any of them." The question for decision was whether the company had power to mortgage its property to secure a debt owing to its bankers, and the mortgage might very well have been treated as covered by the general words in the memorandum, or as justified by reason of the company being a trading company. Except on some such hypothesis as this these *dicta* cannot be sustained, for they are clearly irreconcileable with the principles settled in *Ashbury, &c. Co.* v. *Riche*, L. R. 7 H. L. 653, which was decided five years later, and with the law as laid down by Cotton, L. J., in *Reg.* v. *Sir Charles Reed*, 5 Q. B. D. 483. There the Lord Justice says: "It was said that every corporation,

unless restricted by its act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion this contention . . . cannot be maintained. In our opinion the power of a corporation established for certain specified purposes must depend on what those purposes are, and, except so far as it has express power given to it, it will have such powers only as are necessary for the purposes of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted. . . . A trading corporation"—his lordship was dealing with the case of an educational authority—"stands as regards an implied power of borrowing in a very different position."

And in *Re Badger*, (1905) 1 Ch. 568, 573, Buckley, J., said: "As I understand the law, *primâ facie* a commercial company or a trading company has, as has been said more than once, an implied power to borrow money for the purposes of its business if such borrowing is not expressly prohibited. The fact that that proposition has been confined to commercial or trading companies goes strongly to show that a power to borrow is not implied where the body in question is other than a commercial undertaking."

The true tests, therefore, of a company's borrowing power are—(1) Is the power expressly given by its memorandum? (2) If not, is such a power to be implied as incidental to the company's objects?

Given a company's power to borrow, the question then arises, how this power may be exercised—whether the company can exercise it by the issue of debentures and debenture stock. The answer is that the power depends on the company's memorandum of association.

The company's power.

Usually the power to borrow and to issue debentures and debenture stock is given in the memorandum by a clause in these terms:—

"To borrow or raise or secure the payment of money in such manner as the company shall think fit, and in particular by the 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."

Where, as in such a clause, the power is *expressly* given by the memorandum, it is, beyond question, effective; but an *implied* power to issue debentures or debenture stock is equally effective. Thus, if the memorandum merely gives power "to borrow," that includes power to borrow by the issue of debentures or debenture stock. And the same rule applies where the memorandum only gives an implied power to borrow. Where there is a power, whether express or implied, to borrow, a company has by implication power to secure by mortgage or charge the repayment of the moneys borrowed. *General Auction, &c. Co.* v. *Smith*, (1891) 3 Ch. 432; *Patent File Co.*, 6 Ch. 83.

If a company has no power by its constitution to borrow, it can now remedy this defect by applying to the Court under sect. 5 of the Act, to sanction its taking such a power or extending it, if the existing power is inconveniently limited. See *Re Reversionary Soc.*, (1892) 1 Ch. 615; *Re Empire Trust*, 64 L. T. 221; and Company Precedents, Part I., 15th ed., p. 1124 *et seq.*

Debentures to bearer.

Where it is proposed to issue debentures to bearer, the company must of course have power to borrow, but it is not necessary that a power to issue debentures to bearer should be expressly given in the memorandum of association. It is generally and rightly considered that if the company has power to borrow, the issue of debentures to bearer may be deemed reasonably incident to that power. *Blakeley Ordnance Co.*, 3 Ch. 154; *Imperial Land Co. of Marseilles*, 11 Eq. 478.

Perpetual debentures.

So, too, it would seem, that where the company has power to borrow or raise money by the issue of debentures it may raise it by the issue of what are called perpetual debentures, *i.e.*, debentures payable only in the event of winding-up, or after six months' default in payment of interest; it used to be objected that an instrument under which the principal was never to be repaid could not properly be called a debenture, and that any attempt to make mortgage debentures or debenture stock perpetual or irredeemable must fail as being in contravention of the rule against clogging the equity of redemption; but these objections were put beyond the range of controversy by sect. 14 of the Act of 1907 (now sect. 74).

Perpetual debentures.

**74.** A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that the debentures are thereby 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.

Debenture stock.

Debenture stock is, as we have seen, in substance the same thing as a loan secured by debentures. If the company has, by its memorandum, power to borrow or raise money by the issue of debenture stock, its power is placed beyond question; but, even where there is no such power, it is conceived that a power in the memorandum "to borrow or raise money by the issue of debentures or otherwise," or even a narrower borrowing power, will justify raising money by the issue of debenture stock, although it may, in some cases, be deemed expedient to reserve to the company power to redeem at a specified period.

"Debenture stock," as pointed out in Lindley on Companies, 6th ed., p. 346, "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."

Directors' powers.

Assuming the company, according to its constitution, to possess the requisite power, the next question is whether the Act restricts in any way the exercise of its powers in this respect. As to this, it must be borne in mind that, in relation to certain companies not being private companies, the Legislature has by provisions now embodied in sect. 94 of the Act, imposed certain preliminary restrictions on the exercise of borrowing powers, and these restrictions, as conditions precedent to a company's borrowing, it will be convenient to consider before proceeding to the discussion of the powers of the directors.

Sect. 94 runs as follows:—

Restrictions on commencement of business.

**94.**—(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription: and

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

(c) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2) Where a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

(a) there has been delivered to the registrar of companies for registration a statement in lieu of prospectus ; 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 payable in cash; and

(c) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors in the prescribed form that paragraph (b) of this subsection has been complied with.

(3) The registrar of companies shall, on the delivery to him of the said statutory declaration, and, in the case of a company which is required by this section to deliver a statement in lieu of prospectus, of such a statement, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

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

"Provisional" here means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business. *Re Otto Electrical, &c. Co.*, (1906) 2 Ch. 390; *Clinton's case*, (1908) 2 Ch. 515.

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

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

(7) Nothing in this section shall apply to (a) a private company or (b) a company registered before the first day of January nineteen hundred and one, or (c) a company registered before the first day of July nineteen hundred and eight which has not issued a prospectus inviting the public to subscribe for its shares.

Companies, therefore, that come within the category of private companies, are outside the section. For the definition of a "private company," see sect. 26 (1).

The minimum subscription referred to in sect. 94, sub-sect. (1) (a) must be interpreted by reference to sect. 39, sub-sects. (1), (2) of 1929, which run as follows:—

Allotment.

**39.**—(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors, must be raised by the issue of share capital in order to provide for the matters specified in paragraph 5 in Part I. of the Fourth Schedule to this Act has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company.

For the purposes of this subsection a sum shall be deemed to have been paid to and received by the company if a cheque for that sum has been received in *good* faith by the company and the directors of the company have no reason for suspecting that the cheque will not be paid.

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as "the minimum subscription."

Paragraph 5 of Part I. of the Fourth Schedule provides as follows:—

5. Where shares are offered to the public for subscription particulars as to—

(i) the minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters:—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters;

(d) working capital; and

(ii) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

To put it shortly, a company not being a private company, or a company which has already properly commenced business, cannot exercise its borrowing powers until it has got its certificate to commence business, and to get this the company must—

1. Have obtained its minimum subscription;
2. The directors must have paid up the proper proportion on their shares;
3. The secretary, or one of the directors, must have delivered to the registrar for registration a statutory declaration that the conditions have been complied with.

Supposing this done, and the certificate obtained, the next step is to consider what are the powers with regard to borrowing vested in the directors.

Usually the articles contain express power, as in the clauses following:—

The directors may, from time to time, at their discretion, raise or borrow, or secure the payment of any sum or sums of money for the purposes of the company [but so that the amount at any one time owing in respect of moneys so raised, borrowed, or secured, shall not, without the sanction of a general meeting, exceed the nominal amount of the capital. Nevertheless, no lender or other person dealing with the company shall be concerned to see or inquire whether this limit is observed.]

The directors may raise or secure the payment or repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit, and in particular, by the issue of debentures or debenture stock of the company charged upon all or any part of the property of the company (both present and future), including its uncalled capital for the time being.

Debentures, debenture stock, and other securities, may be made assignable, free from any equities between the company and the person to whom the same may be issued.

Any debentures, debenture stocks, bonds, or other securities may be issued at a discount, premium, or otherwise; and with any special privileges as to redemption, surrender, drawings, allotment of shares, attending and voting at general meetings of the company, appointment of directors and otherwise.

If any uncalled capital of the company is included in, or charged by any mortgage or other security, the directors may, by instrument, under the company's seal, authorize the person in whose favour such mortgage or security is executed,

or any other person in trust for him, to make calls on the members in respect of such uncalled capital; and the provisions hereinbefore contained in regard to calls, shall, *mutatis mutandis*, apply to calls made under such authority; and such authority may be made exercisable, either conditionally or unconditionally, and either personally or contingently, and either to the exclusion of the directors' power or otherwise; and shall be assignable if expressed so to be.

The presence of such clauses as the above precludes, of course, any question as to the directors' powers. In other cases there is no express power in the articles, but there is a clause similar to clause 67 of Table A of 1929 (55 of 1862, or 71 of 1908), or the clause on p. 51, *infra*—empowering the directors to exercise all such powers of the company as are not, by the Act, or by the articles, required to be exercised by the company in general meeting. It is well settled that such a general clause is effective, and invests the directors with any power which the company may possess to borrow on debentures or otherwise. *Patent File Co.*, 6 Ch. 88; *Anglo-Danubian Co.*, 20 Eq. 339. But it ought to be added that the Committee of the London Stock Exchange do not approve of directors being given an unlimited power of borrowing.

If the company has the requisite powers, but the articles do not vest those powers in the directors, it may be necessary to obtain authority from a general meeting, or, in some cases, to pass a special resolution altering the regulations, and vesting the necessary powers in the directors, either absolutely or subject to the control of general meetings.

Sometimes it is necessary to alter a figure in the articles of association, *e.g.*, "That the articles of association be altered by substituting the figures 100,000*l.* for the figures 50,000*l.* in clause —— thereof."

In some cases the directors have power to issue debentures or debenture stock only with the sanction of the company in general meeting, and in such cases the necessary sanction ought, of course, to be obtained; but it does not follow that debentures or debenture stock irregularly issued will be void, for the holder may be entitled to assume that the directors are acting regularly, and have obtained the requisite resolution. See *Royal British Bank* v. *Turquand*, 6 E. & B. 327; and other cases cited on pp. 128, 129, *infra*.

A power to raise money upon mortgage of the whole or any part of the property of the company *or* upon debentures warrants the issue of debentures which contain a mortgage. *Panama, &c. Co.* 5 Ch. 318, 322.

As to charging uncalled capital.

If debentures or debenture stock are to be charged upon the uncalled capital of the company, it must be seen that the company and the directors have power to charge this portion of the company's

assets. Calls, generally speaking, are to be made at the discretion of the directors; and unless the directors are expressly [*supra*, p. 46], or by necessary implication, empowered to mortgage the future calls, it will be *ultra vires* for them to do so. See *infra*, p. 128.

But where the company has the requisite power in its memorandum of association, and the directors have by the articles the general powers of the company (see *infra*, p. 51), that is enough, unless by some clause in the articles the general powers are expressly or impliedly made inapplicable to a mortgage of uncalled capital. *In re Pyle Works*, 44 Ch. D. 534.

The directors' borrowing powers are very commonly limited as above (p. 46). Sometimes the limit is to be a specified sum. See *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156. In most cases the article is so framed as to allow a general meeting to extend this limit, and this is desirable; for if the company wants to pass beyond the limit, it may be very inconvenient for it to be compelled to pass a special resolution.

Occasionally there is a clause to the effect that no debentures or debenture stock shall be issued without the sanction of a separate meeting of the preference shareholders. Such a clause is open to very grave objection. It may at the critical moment paralyze the company, or compel the directors to raise money be selling bills of exchange at a heavy discount.

## CHAPTER X.

### WHAT PROPERTY MAY BE MORTGAGED OR CHARGED TO SECURE DEBENTURES AND DEBENTURE STOCK.

What property may be mortgaged or charged.

To answer this question it is necessary, first, to look at the memorandum and articles of association or other regulations of the company; and, secondly, to consider whether there is anything special in the nature of the property which can affect the company's power to deal with it.

As to the memorandum of association.

First, as to the memorandum of association. Usually the memorandum gives express power to borrow, or raise, or secure money, upon such terms and in such manner as the company may think fit; and, in particular, by the issue of debentures or debenture stock, perpetual or otherwise, charged upon the whole, or any part, of the property of the company, both present and future, including its uncalled capital. It also includes, usually, a clause empowering the company to sell, mortgage, charge, and deal with its property and rights.

When the objects are expressed in these terms, or in substantially similar terms, there is, of course, no doubt that the company can mortgage the whole, or any part, of its property and assets, for securing debentures or debenture stock. But sometimes the expressed objects are not so well defined. For example, they may only give power to borrow or raise money for the purposes of the company, without saying anything about security; yet, even if this is the case, a simple power to borrow or raise money has been held to imply power to give security, for only thus can it be made effective in any business sense—and no limit being imposed, the company may give such security on its property, both present and future, as it thinks fit.

In other cases, there is no express power in the memorandum to borrow or raise money, but the nature of the company's objects is such that the company has implied power to borrow as incidental to such objects; this is the case with a trading or commercial company. See *supra*, p. 41. And a power so implied comprehends and carries

with it power to mortgage or charge for the purpose of securing moneys to be raised.

Debentures and debenture stock are sometimes issued, not only upon a loan transaction, but as part of the consideration for property purchased, or to secure a debt otherwise due. Where a company has power to purchase property, it has an implied power to secure the payment of the purchase-money, and therefore, to issue debentures or debenture stock in part satisfaction. And where a company has power to incur debts on other accounts, it has an implied power to give security for the payment thereof, and the implied power thus to give security extends to the whole property of the company present and future.

Limitation in memorandum.

Occasionally the memorandum of a company limits the power to borrow or mortgage to a fixed amount, and, where it does so, any such limitation must, of course, be observed; to transgress it is *ultra vires* of the company. If it is desired to borrow in excess of the limit, the only course is for the company to obtain an enlargement of its borrowing powers. This the company may do by proceeding under sect. 5 of the Act, and alter its objects with the sanction of the Court, so as to abrogate the limitation or to relax it. A considerable number of companies have in this way obtained power to raise money by debentures and perpetual debenture stock. See *Reversionary Interest Soc.*, (1892) 1 Ch. 615; *Empire Trust*, 64 L. T. 221.

As to the articles of association.

Assuming that the memorandum of association originally, or as enlarged under the Act, confers the requisite power, it is necessary to turn to the articles of association, or other regulations of the company, in order to see whether, and to what extent, the powers of the company or of the directors are fettered thereby.

As a rule, the articles of association, or other regulations, invest the directors with authority to exercise the borrowing powers of the company, either without restriction or subject to certain specified restrictions. See the usual clauses, *supra*, p. 46.

Where such clauses are found, the directors' power to give security for debentures or debenture stock upon the whole or any part of the property or assets of the company is clear enough; but a much more simple form will suffice to enable the directors to mortgage the property and assets of the company as a security for debentures and debenture stock; for instance, a clause such as the following, which is sometimes found in the older forms of articles, is sufficient to invest the directors with a large power:—

> The directors may borrow or raise money, and may secure the repayment in such manner as they think fit.
>
> *or*, The directors may issue debentures or debenture stock on such terms as to security and otherwise as they think fit.

Besides special clauses as above, the articles of a company generally contain a clause in the terms following:—

General powers vested in directors.

The management of the business of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting; but subject nevertheless to the provisions of the statutes, and of these presents, and to any regulations from time to time made by the company in general meeting: provided that no regulation so made shall invalidate any prior act of the directors which would have been valid if such regulations had not been made.

Operation.

Such a general power will, if the memorandum gives an express or implied power to mortgage property to secure debentures or debenture stock, vest in the directors full authority to exercise the company's powers, in respect of giving securities for debentures and debenture stock, even though the articles contain no other more specific power.

Clause 55 of Table A, 1862, was framed in somewhat similar terms, and so is clause 67 of the new Table A.

The validity of such a general authority has been repeatedly recognized. Thus, in *Patent File Co.*, 6 Ch. 83, the articles authorized the borrowing of money with the sanction of an extraordinary meeting of the company; they also contained a clause substantially the same as above: the directors overdrew the company's banking account, and being required by the bank to give security, deposited with it title deeds of property belonging to the company. It was held, in the winding-up of the company, that the mortgage was valid. James, L. J., said: "It is plain that, under these articles, the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing in the memorandum or articles to prevent the directors from making the best terms they can with a creditor of the company, by selling or pledging part of the property of the company." And Mellish, L. J., added: "The articles give to the directors the whole powers of the company subject to the provisions of the articles, and of the Companies Act, 1862; and I cannot find anything, either in the Act or the articles, to prohibit their making a mortgage by deposit. There being nothing in the articles to prohibit the giving of such security, I am of opinion that the company can give it as well for a past debt as for a future one."

*Anglo-Danubian Co.*, 20 Eq. 339, furnishes another illustration. There, the articles contained express power to borrow (clause 29), and also (clause 66) a general delegation of powers as above, and it

was held that, by the conjoint effect of the two clauses, the directors had power to issue debentures at a discount.

Occasionally, though rarely, the articles expressly prohibit any mortgage or charge of some or all of the property of the company or confer power to mortgage only certain of its property. Where the provisions of the articles are too restricted, the only course open to the company is to alter its articles, so as to allow of the creation of the mortgage or charge.

As to certain qualifications of power.

Wide as are the powers of a company and its directors in regard to issuing and giving security for debentures and debenture stock, there are still certain qualifications affecting the power—qualifications which need to be borne in mind—in regard to particular kinds of property or assets. Of these there are four:—

(1) Property employed in statutory undertakings.
(2) Uncalled capital.
(3) Foreign property.
(4) Company's books.

### (1) As to Statutory Undertakings.

Statutory undertakings.

Companies under the Acts of 1862, 1908 or 1929, not uncommonly obtain Acts of Parliament, or provisional orders of the Board of Trade afterwards confirmed by Parliament, or other statutory authority, under which some undertaking of public utility is constituted and power conferred by Parliament on the company as the owner thereof.

When Parliament thus vests authority in a particular person, it is presumed in doing so to trust that person, and no other, and the powers so conferred are not transferable unless otherwise provided by Parliament.

This was laid down in *Gardner* v. *L. C. & D. Ry. Co.*, 2 Ch. 201. See also *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36; and *Crystal Palace Co.*, 104 L. T. 898.

These cases must be borne in mind, because they show that a statutory undertaking cannot be made a complete and effective security unless there is authority from Parliament. The Court has no jurisdiction to appoint a manager, or to make an order for foreclosure or sale of the undertaking. *London, Chatham, &c. Co.* v. *Gardner*, 2 Ch. 201; *Blaker* v. *Herts, &c. Waterworks* (1889), 41 Ch. D. 399.

Nevertheless, if the company has power to borrow, it does not follow that it cannot give an equitable security of a qualified character on its statutory undertaking; for an equitable security does not give any power to enter and take possession, except by means of a receiver appointed by the Court: and when it comes to the enforcement

thereof, the Court will give effect to it as far as is consistent with maintaining the policy of Parliament; and, accordingly, will appoint a receiver of the income, though it will decline to enforce the security by sale or foreclosure or to appoint a manager, and on a winding-up of the company the holders of debentures will have a charge over the assets, including the proceeds of sale of realised assets, in priority to the unsecured creditors. *Re Glyn Valley Tramway Co.*, (1937) Ch. 465.

### (2) As to Uncalled Capital.

Uncalled capital, mortgage of.

At one time it was thought that uncalled capital could not be mortgaged (*Stanley's case*, 4 D. J. & S. 407), the idea being that the directors could not deprive themselves of the discretion vested in them as to calling up such capital; but in 1875, Jessel, M. R., decided that a mortgage of uncalled capital was allowable, where the company's articles of association gave the power, and there was nothing in the memorandum of association to the contrary (*Phœnix Bessemer Co.*, 44 L. J. Ch. 683); and, accordingly, in the first edition of the author's work on Company Precedents, published in 1877, and in all subsequent editions, the author, after referring to this decision, gave forms of debentures charging the company's undertaking and its uncalled capital for the time being. Doubts having been raised as to the validity of such a mortgage, the matter was considered in the Court of Appeal in *Pyle Works*, 44 Ch. D. 534, and it was held that *Phœnix Bessemer Co.* was well decided, and that a company, if authorized to do so by its constitution, may mortgage or charge uncalled capital.

Validity established.

Subsequently the same question came before the Judicial Committee of the Privy Council, and it was again held that if there is power in the memorandum, or if there is power in the articles, and nothing to the contrary in the memorandum, uncalled capital can be effectually charged. *Newton* v. *Debenture Holders of Anglo-Australian, &c. Co.*, (1895) A. C. 244. On the other hand, the rule *expressio unius est exclusio alterius* may prevail. "If the memorandum, when authorizing certain charges, has omitted to authorize a charge on uncalled capital the omission may imply a prohibition." Per Lord Macnaghten, *S. C.*, p. 249.

What words sufficient to allow.

Such power may also be implied in the memorandum.

It is not essential that such a power to mortgage uncalled capital or future calls should be given *in terms—totidem verbis*—by the articles; something less may be sufficient; thus a power in the memorandum to mortgage the property *and rights* of the company will cover uncalled capital. *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156. So, too, a power to mortgage the company's "assets" appears to be sufficient (*Page* v. *International, &c. Trust*, 68 L. T. 435); or to raise money in various modes, or "in such other manner as the company may determine" (*Jackson* v. *Rainford Coal Co.*, (1896) 2

Ch. 340); or to raise money on "any security of the company." *Newton* v. *Debenture Holders of Anglo-Australian, &c. Co., supra.* But a power to borrow merely on the "*property*" or the "*funds*" of the compay will not authorize a charge on the company's uncalled capital, for uncalled capital is only "property" potentially, that is to say, when called up (*Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; *Bank of S. Australia* v. *Abrahams*, L. R. 6 P. C. 265; *Stanley's case*, 4 De G. J. & S. 407). Even the words "property both present and future" are insufficient. *Streatham Estates Co.*, (1897) 1 Ch. 15; *Johnson* v. *Russian Spratts Patent, Ltd.*, (1898) 2 Ch. 149. Nor will a power "to pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company." *Sankey Brook Coal Co.* (No. 2), 10 Eq. 381.

Power in the memorandum to raise money by the "issue" of debentures, mortgages or other securities does not preclude an oral charge on uncalled capital. *Tilbury Portland Cement Co.*, 69 L. T. 495.

*Primâ facie* a charge on uncalled capital does not prevent the directors from forfeiting shares for non-payment. *Agency Land, &c. of Australia*, 20 T. L. R. 41

Reserve capital.

By sect. 49 of the Act, a company may by special resolution "determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purpose of the company being wound up," and thereupon such portion of capital is not to be capable of being called up except in such event and for such purposes.

Where a company has passed such a resolution, the capital so declared "not capable of being called up" cannot be charged by the company under a power in its memorandum or articles to charge its uncalled capital. The Court of Appeal so held in *Re Mayfair Property Co., Bartlett* v. *Mayfair Property Co.*, (1898) 2 Ch. 28. Lindley, L. J., in his judgment in that case, said it was plain that the section was framed, *inter alia*, "to preserve for the general creditors of the company" the reserve capital, and the learned judge considered that any mortgage of such reserve capital would defeat this object, and that to apply any part of the reserve capital to paying off such a mortgage "is not to apply the reserve capital for the purposes of the company being wound up within the true meaning of that expression as used in sect. 5, but to prevent such application."

The author doubted the correctness of this decision, and his reasons are fully stated in the eleventh and previous editions of this work. The decision has now, however, remained unchallenged for more than thirty years, and was expressly approved by Buckley, J., in *Re Irish Club Co., Ltd.*, W. N. (1906) 127.—ED.

### (3) As to Foreign Property.

A great number of English companies own property abroad, *e.g.*, lands, mines, mortgages, concessions, railways, tramways, breweries, and a variety of other industrial undertakings. Such companies, if they require to borrow, are compelled to consider how such foreign property can be made available as security. The leading principle to be borne in mind in solving this problem is that immovable property and rights *in rem* over movable property are governed by the *lex loci rei sitæ*—the law of its situation—and, therefore, to create an unimpeachable security upon property situate abroad, the requirements of the local laws must be complied with. If this is not done, persons in the foreign country where the property is will remain entitled to ignore the security, to take mortgages on the property comprised in it, to levy execution thereon and otherwise deal with the same according to the local law as if the charge or security did not exist.

Property abroad

*Lex loci.*

Hence in every case of borrowing on property abroad the following questions arise:—(1) Can the debentures or debenture stock be secured on the property in accordance with the local laws, and if so, how? (2) If not, what is the best security that can be given?

How security to be given.

As regards the first—giving security according to the local laws.

It would not be practicable within the limits of this work to deal with the complexities of this important question in detail; but a few examples may be given of the kind of difficulties that arise. Thus, in many countries there is a difficulty about vesting land in aliens, *e.g.*, as trustees for debenture holders.

The difficulties to be faced.

It may be that the foreign country does not recognize trusts, and therefore imposes a heavy duty on the transfer, and further duties on the death of a trustee.

In some countries, again, there is a difficulty about vesting land in a foreign corporation, *e.g.*, an English company, when it is desired to appoint such a company as trustee for debenture holders.

In some countries whilst a transfer to an alien cannot be effected, a mortgage to an alien may be practicable, but the law of the country may not recognize trusts.

In some countries whilst a mortgage can be created, the duties payable in respect thereof are excessive.

In some countries a floating charge in a debenture is inoperative, *e.g.*, in Scotland, France and Germany; in some, chattels cannot be mortgaged unless possession is at once taken by the mortgagee: in some, debts cannot be mortgaged unless notice is given to the debtors: in some, future property cannot be mortgaged at all. Hence, in such countries a floating charge cannot be created.

The position as regards movable chattels situate abroad is somewhat similar. An assignment valid by the law of the assignor's domicile is valid by English law. *Duder* v. *Amsterdamsch Trustees*, (1902) 2 Ch. at p. 140; *North Western Bank* v. *Poynter*, (1895) A. C. at p. 66. Accordingly the Court would, at the instance of a debenture holder of a company registered in England, appoint a receiver of movables situate abroad. *Maudslay* v. *Maudslay, Sons & Field*, (1900) 1 Ch. at p. 611.

Protection against disregard of equities.

The risk that if land or chattels situate abroad are charged with debentures otherwise than in accordance with the *lex rei sitæ*, or without compliance with the formalities required by it, the debenture holders may find their charge postponed or ousted by a purchaser or mortgagee who has complied with the *lex rei sitæ* (see p. 56, *supra*), is not seriously detrimental to the debenture holders' security, the principal object of which is to give the debenture holders a preference over the general creditors of the company, and not to fetter the company in dealing with its property: for the risk is reduced by the following considerations. A person here, who has notice of the equitable interest given to the debenture holders or debenture stockholders, cannot by taking the legal title under local laws, displace that equity or gain priority over it. It was long since settled that, as regards land in England, a second mortgagee with notice of a first, could not, by availing himself of the Registration Acts, obtain priority over a first, although unregistered, mortgage. See *Le Neve* v. *Le Neve*, Amb. 436. As Lord Hardwicke said in that case: "The taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser. . . . This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that he takes away the right of another person by getting the legal estate." And the same principle is applied where the land or property is abroad. A person here, who has notice of an equity vested in debenture holders or debenture stockholders, will not be allowed to take unfair advantage of the local laws of some foreign country to displace or oust that equity. This was in effect determined by Sir R. Pepper Arden, M. R., in 1796, in *Lord Cranstown* v. *Johnston*, 3 Ves. 170; 3 R. R. 80. In that case a person here, in violation of the plaintiff's equity, obtained a legal title to certain property of the plaintiff situate in the island of St. Christopher, by making use of the local law of the island; but the Court here, acting *in personam*, deprived the defendant of the right thus wrongfully obtained. "It is said," observed Sir R. Pepper Arden (p. 181), "this Court has no jurisdiction because it is a proceeding in the West Indies. It has been argued very sensibly that it is strange for this Court to say it is void by the laws of the island or for want of notice. I admit I am bound to say that according to those laws a creditor may do this. To that law"

*Cranstown* v. *Johnston.*

he has had recourse and wishes to avail himself of it. The question is whether an English Court will permit such a use to be made of the law of that island or any other country. . . . This Court cannot act upon the land directly but acts upon the conscience of the person living here. . . . I will lay down the rule as broad as this: This Court will not permit him to avail himself of the law of another country to do what would be gross injustice." The principles thus laid down have since been frequently recognized. In *Mercantile Investment and General Trust Co.* v. *River Plate Loan and Agency Co.*, (1892) 2 Ch. 303, a company, incorporated in one of the United States of America and domiciled there, created an equitable charge on land in Mexico to secure payment of a series of debentures issued by it. The land subsequently became vested in an English company, subject to an expressed obligation by them to pay off such charge out of the proceeds of sale of the property. Subsequently the English company claimed to disregard the debenture charge, and contended that the whole jurisdiction in respect of real estate situate abroad, and the proceeds of sale, was founded on contract; that, therefore, an order in respect of such subject-matter could only be made against a person who had contracted expressly, or by implication, to be bound by the Courts in this country, and that there being no privity of contract between the English company and the debenture holders, there was no jurisdiction, at their instance, to appoint a receiver or otherwise accord recognition to their rights. North, J., whilst declining for special reasons of expediency to appoint a receiver, repudiated altogether the attitude assumed by the English company; and, after referring at some length to *Lord Cranstown* v. *Johnston*, 3 Vesey. 170—the St. Christopher case above cited—proceeded: "Applying that to the present case I say it would be most unconscionable to allow defendants here, who have registered their assignment in Mexico subject to the obligations created in favour of the plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of these obligations, and the taking by the English company upon themselves of the burden of satisfying these obligations; in my opinion it would be as unconscionable as anything could be to say that now, because they had registered their transfer before the hypothecation of the plaintiffs had been registered, they are at liberty to set the plaintiffs at defiance altogether."

*Mercantile, &c. Co., v. River Plate, &c. Co.*, 1892.

The principles laid down in *Lord Cranstown* v. *Johnston* and *Re Pollard*, 4 Deac. 27, were referred to with approval by the Court of Appeal in *British South Africa* v. *De Beers Consolidated Mines, Ltd.*, (1910) 2 Ch. 502, and although that decision was reversed by the House of Lords on appeal, (1912) A. C. 52, it was on wholly different grounds. On the other hand, an English Court cannot in all cases control

Whether unsecured creditors can proceed abroad.

Whether secured.

proceedings in foreign Courts; and in *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Ch. 479, Lord Chelmsford considered that the mortgagees of a ship would have no equity to prevent an unsecured creditor of the shipowner from taking proceedings at New Orleans which would result in judgment against the ship in disregard of the mortgage; and Cozens-Hardy, J., in *Maudslay* v. *Maudslay, Sons & Field*, (1900) 1 Ch. 602, held that unsecured English creditors of a company having notice that the company had issued debentures charging its undertaking, were not precluded by that notice from taking legal proceedings in France against the company and attaching, to the exclusion of the debenture holders, an asset in France.

### (4) Books of the Company.

Books.

The books of the company may be a very important part of the debenture holder's security, and the words "all the property of the company" in the debenture holder's charge are, *primâ facie*, amply sufficient to cover them. Hence a receiver in a debenture holder's action is entitled to have delivery of all books relating to the debenture holder's security, that is to say, to the debenture holder's documents of title. *General Assets Purchase Co.* v. *Chesterton Coal Co.*, 32 Sol. J. 645.

On the other hand, it has been held that the company or its liquidator is entitled to claim possession of the minute book of the directors, the share register and other books which relate to the management of the company. See *Clyne Tin Plate Co.* (1882), 47 L. T. 439; *Engel* v. *South Metropolitan Co.*, (1892) 1 Ch. 442; *General Assets Purchase Co.* v. *Chesterton, supra.* In *Capital Fire Insurance Assocn.* (1883), 24 Ch. D. 408, which was a case of solicitor's lien, the Court of Appeal drew a distinction between different kinds of books. There are books which, by the provisions of the Companies Acts, are to be kept at the office of the company, such as the register of members and the register of mortgages; and for the directors to mortgage or charge these would, as Cotton, L. J., points out, be to deal with the property of the company in a way inconsistent with its objects and constitution; and the same principle applies to books which, by the articles of the company, are to be kept at its office—such, for instance, as the directors' minute book. *Anglo-Maltese Hydraulic Dock Co.*, 54 L. J. Ch. 730. The company also has a right to inspect books of account and other documents in the possession of a receiver and is entitled to discovery accordingly. *Fenton Textile Assocn.* v. *Lodge*, (1928) 1 K. B. 1.

Holders of debentures and debenture stock have a right to require a copy of the balance sheets and auditors' and other reports of a company other than a private company. Sect. 130 (1) (a).

## CHAPTER XI.

### AS TO FLOATING CHARGES.

Validity and nature of floating charge.

THE validity and effect of what is now called a "floating charge" on the property, both present and future, of a company was first judicially recognized in *Panama, &c. Co.* (1870), L. R. 5 Ch. 318, by Giffard, L. J. In that case the company had issued debentures, and thereby charged its "undertaking" with the payment thereof. It was held that the word "undertaking" meant all the property, present and future, of the company, and that the charge thereon was effective and was to operate by way of floating security. Giffard, L. J., said: "I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that 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 would not be entitled to any account of mesne profits or of any dealing with the property of the company in the ordinary course of carrying on their business. . . . I see no difficulty or inconvenience in giving that effect to this instrument; but the moment the company comes to be wound up and the property has to be realized, that moment the rights of these parties beyond all question attach. My opinion is that, even if the company had not stopped, the debenture holders might have filed a bill to realise their security. I hold that under these debentures they have a charge upon all property of the company, past and future, by the term 'undertaking,' and that they stand in a position superior to that of the general creditors, who can touch nothing until they are paid."

This decision was of the utmost importance, not merely because it put this construction of the word "undertaking"—a word which had been largely used in debentures—but because it recognized clearly the validity of a general charge on all the property of a company, both present and future, by way of floating security. Long previously it had been decided, no doubt, that in equity future property, or even possibilities, could be effectually charged: *Row* v. *Dawson* (1749), 1 Ves. sen. 331; *Townshend* v. *Windham* (1750),

2 Ves. sen. 1; and *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191, was sufficient to show that a charge on all the property, present and future, of a company was not too indefinite to take effect; see also *Tailby* v. *Official Receiver*, 13 App. Cas. 523. These principles being established, there was, of course, no difficulty in holding that such a charge—provided the intention was sufficiently expressed—could be made subject to the company's power to deal with the property notwithstanding the charge; in fact, any other interpretation, looking at the generality of the charge, must have paralysed the business of the company as a going concern.

Nevertheless, the decision was one of the greatest practical importance, as it judicially recognized and established the power of a company to give a floating charge on its undertaking, a form of security which has since approved itself to the commercial community and to the investing public as of an eminently convenient type.

Words to create.

Convenient though it is as a typical term, it must not be supposed that the word "undertaking" had any magic in it, or that an effective floating charge on the property, both present and future, of a company, cannot be created by other forms of words. A charge on all the property, both present and future, will create a floating security. So will a charge upon all the property now belonging or hereafter acquired by the company, or a charge on the company's undertaking, lands, properties, and effects. *Wheatley* v. *Silkstone, &c. Co.*, 29 Ch. D. 715. Indeed, the Court is strongly disposed to construe a general charge on all the company's property as intended to operate as a floating security on all its property present and future, the *ratio decidendi* in such cases being that the charge contemplates the continuance of the company as a going concern, and such a state of things as would be rendered impossible if the charge were to be construed as fixed and not floating. Thus, where a company issued bonds binding itself and its estate, property, and effects—*Florence Land Co.*, 10 Ch. D. 530—or binding themselves and their real and personal estate—*Colonial Trusts Corpn.*, 15 Ch. D. 465—the Court held that the charge was intended to operate as a floating security; and, therefore, to charge both present and future property.

It is not essential that the charge should be on all the assets of the company. It may be made to operate on a class of assets of the company, *e.g.*, all its present and future book and other debts, with the benefit of the securities for the same: *Yorkshire Woolcombers' Assocn.*, (1903) 2 Ch. 284; affirmed, as *Illingworth* v. *Houldsworth*, (1904) A. C. 355; or "the furniture and effects which now are or may from time to time be placed on" certain specified premises: *National Provincial Bank*

v. *United Electric Theatres, Ltd.*, (1916) 1 Ch. 132; or one-fourth of the profits of certain schemes for developing lands: *Hoare* v. *British Columbia Assocn.*, W. N. (1912) 235.

Some subsequent cases.

The nature of a floating charge has been elucidated still futher in other cases, and the following points have been settled:—

(1) A floating charge operates as an immediate and continuing charge on the property charged, subject only to the company's powers to deal with the property in the ordinary course of its business or as provided by the contract. *Florence Land Co.*, 10 Ch. D. 541; *Standard Manufacturing Co.*, (1891) 1 Ch. 627; *Willmott* v. *London Celluloid Co.*, 34 Ch. D. 150; *Hubbock* v. *Helms*, 56 L. T. 232; *Wallace* v. *Evershed*, (1899) 1 Ch. 891; *Smith* v. *Wilkinson*, *Re. Victoria Steamboats, Ltd.*, (1897) 1 Ch. 158; *Evans* v. *Rival Granite Quarries* (1910) 2 K. B. 979.

(2) Unless otherwise agreed, a floating charge, whilst it floats, leaves the company at liberty to create specific mortgages ranking in priority to the floating charge (*Wheatley* v. *Silkstone Coal Co.* (1885), 29 Ch. D. 715; *Government Stock, &c. Co.* v. *Manila Ry. Co.*, (1897) A. C. 81; *Ind, Coope & Co.*, *Fisher* v. *The Company*, (1911) 2 Ch. 223. See *infra*, p. 68); or ranking after it (*Robert Stephenson & Co.*, (1913) 2 Ch. 201; 107 L. T. 33); but not a floating charge ranking prior to or *pari passu* with it. *Benjamin Cope & Sons, Ltd.*, (1914) 1 Ch. 800. A general floating charge is, however, not necessarily incompatible with the subsequent creation under a special charging power of a floating charge over part of the assets to rank in priority to or *pari passu* with the earlier floating charge. *Re Automatic Bottle Makers, Ltd.*, (1926) Ch. 412.

(3) Notice of the floating charge whilst floating does not postpone subsequent specific mortgages. *Hamilton's Windsor Ironworks*, 12 Ch. D. 707.

(4) As to execution creditors. A floating charge, whilst it floats, is not completely effective as against an execution creditor. Thus in *Evans* v. *Rival Granite Quarries, Ltd.*, (1910) 2 K. B. 979, the company had issued a debenture constituting a floating charge on the undertaking. Whilst that charge continued to float—no winding-up and no receiver appointed—a judgment creditor obtained a garnishee order nisi against the banking account of the defendant company, whereupon the debenture holder gave notice to the bank that he contested the right of the plaintiff to attach the

balance. The Court of Appeal held that the garnishee order was valid and effective on the ground that a floating charge does not specifically affect any particular assets until some event occurs or some act on the part of the debenture holder is done which causes the security to crystallize into a fixed security, *e.g.*, a winding-up or appointment of receiver. This case in effect overruled *Davey & Co.* v. *Williamson & Sons*, (1898) 2 Q. B. 194; and *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771; but it did not overrule *Re Opera, Ltd.*, (1891) 3 Ch. 260; or *Taunton* v. *Sheriff of Warwickshire*, (1895) 2 Ch. 319; or *Norton* v. *Yates*, (1906) 1 K. B. 112; for in each of those cases the floating charge had become crystallized before sale under the execution, or before the garnishee order was made absolute. Where the company paid the amount of the debt to the sheriff to induce him to withdraw from possession, and the money remained in the hands of the sheriff when the debenture holders appointed a receiver, it was held that the execution creditors were entitled to the money. *Heaton & Dugard, Ltd.* v. *Cutting Bros., Ltd.*, (1925) 1 K. B. 655. A creditor who has obtained a garnishee order absolute may be deprived of the fruits of his diligence by the subsequent appointment of a receiver at the instance of a debenture holder (*Cairney* v. *Back*, (1906) 2 K. B. 746), unless he has obtained payment. *Robson* v. *Smith*, (1895) 2 Ch. 118.

(5) It is valid as against the general creditors, whether in a winding-up or otherwise. *Panama, &c. Co.*, *supra*, p. 61.

(6) It is postponed to preferential claims. See sects. 78 and 264, and Chap. LXVI., *infra*.

(7) Unless otherwise agreed, a floating charge retains its floating character until a receiver is appointed or a winding-up commences (*Florence Land Co.*, 10 Ch. D. 530; *Government Stock, &c. Co.*, (1897) A. C. 81; *Hubbard & Co.*, 68 L. J. Ch. 51; *Wallace* v. *Evershed*, (1899) 1 Ch. 891), or the company stops business. When a floating charge ceases to float, it is commonly said to crystallize.

(8) The floating charge may be invalid if created within six months of winding-up. See sects. 266, *infra*, pp. 73, 74.

(9) Sums recovered by the liquidator as paid by way of fraudulent preference are not covered by a floating charge in debentures. *Re Yagerphone, Ltd.*, (1935) Ch. 392.

"A floating security," said Lord Macnaghten in *Government Stock Co.* v. *Manila Ry. Co.*, (1897) A. C. at p. 86, "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 after default."

But in a subsequent case, referring to a criticism of these words, Lord Macnaghten said: "What I said was intended to be a description, not as a definition of a floating charge. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property 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." *Illingworth* v. *Houldsworth*, (1904) A. C. 355, 358.

In the case last mentioned when in the Court below (*sub nom. Houldsworth* v. *Yorkshire Woolcombers' Assocn.*, (1903) 2 Ch. 284, 295), Romer, L. J., said: "I certainly do not intend to attempt to give an exact definition of the term 'floating charge,' nor am I prepared to say that there will not be a floating charge within the meaning of the Act [of 1900] which does not contain all the three characteristics which I am about to mention, but I certainly think that if a charge has the three characteristics . . . it is a floating charge. (1) If it is a charge on a class of assets present and future; (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 may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

Subsequent dealings by company with property subject to floating charge.

Pending any such intervention, the company has a free hand to deal with and dispose of the property charged in the ordinary course of the company's business.

Dealings in ordinary course of business.

What, then, is in the "ordinary course of business"? The answer to this depends on the nature of the particular company's business; but as a general rule the words include sales, leases, mortgages, charges, payment of debts, discharge of liabilities, and other transactions with a view to carrying on the concern. See *Willmott* v. *London*

*Celluloid Co.*, 34 Ch. D. 147; *Government Stock Co.* v. *Manila Ry. Co.*, (1897) A. C. 81; *Arauco Co.*, 79 L. T. 336; *Re Hubbard & Co.*, 68 L. J. Ch. 54, where a company issued debentures to its solicitor as security for his costs of defending an action brought by the debenture holders.

Execution.

A seizure by execution creditors of the company's goods is not a dealing with the company in the ordinary course of business. It is a legal process *in invitum* against the company. *Davey & Co.* v. *Williamson & Sons*, (1898) 2 Q. B. 194; *London Pressed Hinge Co.*, (1905) 1 Ch. 576. But debenture holders who have not obtained a receiver are not entitled to prevent a judgment creditor of the company who has attached a debt due to the company getting the garnishee order made absolute. *Evans* v. *Rival Granite Quarries Co.*, (1910) 2 K. B. 979; *supra*, p. 63. Nor can debenture holders bring within their security a fund which they have left to the company as a free asset by giving notice to the trustees of the fund. *Ind, Coope & Co., Fisher* v. *The Company*, (1911) 2 Ch. 223.

Objects to be regarded.

In determining what is the "ordinary course of business" the objects of the company are to be regarded, and transactions which are within those objects may be treated as in the ordinary course of the company's business even as regards acts which may be somewhat exceptional in their character. Thus, in *Re Borax Co.*, *Foster* v. *Borax Co.*, (1901) 1 Ch. 326, the company, having issued debentures charging its undertaking, agreed to sell the whole of its property with the exception of certain investments for shares and debenture stock in a new company, the vendor company agreeing not to carry on any similar business, otherwise than in conjunction with or for the benefit of the new company. The memorandum of the vendor company did not authorize a sale of the undertaking, but gave the company power to amalgamate and to sell all or any part of its property for shares or debentures, &c. Farwell, J., held that the dissenting debenture holders had a charge on certain funds paid into Court under an order of the Court of Appeal; but it was held by the Court of Appeal that the floating charge had not become enforceable by reason of the sale. This decision was to some extent affected by a previous order of the Court of Appeal, and cannot, it is submitted, be taken as laying down that a sale of the undertaking, even in pursuance of an express power in the memorandum is a transaction in the ordinary course of the company's business. The debenture holder was precluded by the form of his pleadings from attaching the sale as being in effect a sale of the company's undertaking.

Sale of undertaking.

The view expressed above is in accordance with the decision in *Hubbuck* v. *Helms*, 56 L. T. 232, in which Stirling, J., held that the sale of a company's undertaking under a power in its memorandum

of association was not to be regarded as in the ordinary course of the company's business and allowed by a floating charge in its debentures. In that case the learned judge said: "It is sworn that this deed comprised the whole undertaking of the property of the company. . . . If that is so, the transaction is contrary to the terms of the debentures, because a debenture of this kind only permits dealings by the company in the ordinary course of business, and here it is the whole undertaking—*i.e.*, the whole of the assets for the time being—which is transferred to the [defendant] so that it can no longer be dealt with by the company. It is not a transaction for the purpose of changing the nature of the company's business. If, for example, the company were proposing to sell the business with a view of starting another business, or of carrying on the same business in another place, it is possible that much might be said upon the question whether that was not a dealing in the ordinary course of business. But it is obvious from the correspondence that that was not the object of the transaction. The company was hard up for money, and instead of a mortgage of the assets to the defendant this arrangement is made with him, the effect of which is to transfer to him absolutely from 18th January the whole of the undertaking"; and accordingly at the instance of a debenture holder a receiver was appointed.

The decision of Cozens-Hardy, J., in *Re H. H. Vivian & Co.*, (1900) 2 Ch. 654, is also consistent with this view. There the company carried on business at three branches and sold one of its branches to another company. The company had covenanted to carry on its business in a proper manner, and it was held not to be inconsistent with this covenant for the company "to dispose of the stock in trade and plant of one of the branches of that business, the other branches of the business being carried on, not nominally, but largely and profitably."

*Coveney* v. *Persse*, (1910) 1 Ir. R. 194, C. A., in which a whiskey distillery company which had issued floating debentures made pledges and sales of certain lots of whiskey, illustrates well what is and what is not in the "ordinary course of business."

A fraudulent transaction is not to be treated as in the ordinary course of business. *Williams* v. *Quebrada, &c. Co.*, (1895) 2 Ch. 751. Fraud.

Not only does a floating charge leave the company at liberty to deal with its property as aforesaid, but it lets in equities against the company's property, *e.g.*, a right of set-off. See *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, (1896) 2 Ch. 93. In that case a company had issued floating charge debentures. A. became indebted to the company for rent, and the company became indebted to him for goods supplied, but not paid for. A receiver was then appointed in a debenture action. In due course an action was brought in the name of the company against A. for payment of the amount due from him to the Set-off.

company. He claimed to set off the amount due to him. It was argued that the debenture holders were assignees of the property of the company before any right of set-off had accrued, and therefore that no set-off could be allowed; but it was held that A. was entitled to the set-off claimed, on the ground that a floating charge left the company at liberty to carry on its business in the ordinary way and to make any arrangements express or implied with its creditors, and that in this respect a floating charge differed from an ordinary assignment. "It is said," observed Lopes, L. J., "that there is no right of set-off against an assignee of a chose in action where the person claiming the set-off had notice of the assignment when the debt due to him was contracted. That is quite true in ordinary cases, but a debenture differs from an ordinary assignment. If this doctrine were applied to debentures, no creditor of the company would ever get the benefit of a set-off where debentures had been issued. Now it is the essence of a floating security that it allows the company to carry on business in its ordinary way until a receiver is appointed; and it would paralyse the business of companies to give to the issuing of debentures the effect now contended for." "There was," said Kay, L. J., in the same case, "an inchoate right of set-off at the time when the receiver was appointed, and that, and not the time of issuing the debentures, is the time to be looked at." And see *Hubbuck* v. *Helms*, 56 L. T. 232; *Edward Nelson & Co.* v. *Faber & Co.*, (1903) 2 K. B. 367.

### As to Specific Mortgages.

Specific mortgages.

The power to create a specific mortgage ranking on the property charged in priority to the debenture charge, was not at first recognized; for Giffard, L. J., in *Panama, &c. Co., supra*, p. 61, in stating that the company might, notwithstanding the charge, deal with its property, said: "I do not refer to such things as sales or mortgages of property." But the law of debentures, like all branches of a living law, is constantly growing; and it was held in *Florence Land Co.* (1878), 10 Ch. D. 530, and in *Colonial Trusts Corpn.* (1880), 15 Ch. D. 465, that the floating charge left the company at liberty to create specific mortgages or charges in priority to such floating charge. In the latter case it was laid down (at p. 472) that it would be a monstrous thing to hold that a floating security prevented the making of specific charges, or specific alienations of property, because it would destroy the very object for which the money was borrowed—the carrying on of the business of the company.

In a subsequent case it was urged that where the subsequently-created charge was only an equitable security, it ought not to have priority over the equitable charge of the debenture holder; but this

too was overruled. See *Wheatley* v. *Silkstone Co.* (1885), 29 Ch. D. 715, where the company, after creating a floating charge on its undertaking, had created a subsequent equitable charge in favour of its bankers by deposit of title deeds. In that case North, J., after referring to the authorities, said: "Those authorities furnish a very clear and intelligible principle to be followed. In this case I find that the debenture is intended to be a general floating security over all the property of the company as it exists at the time when it is to be put in force; but it is not intended to prevent, and has not the effect of in any way preventing, the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course, and inasmuch as I find that in the ordinary course of business and for the purpose of the business, this mortgage was made, it is a good mortgage upon, and a good charge upon, the property comprised in it, and it is not subject to the claim created by the debentures."

This decision is a specially strong one, because the debentures in question were expressed to be by way of *first charge* on the undertaking; but in regard to this the learned judge said: "I find also that the 'first charge' referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises, and can have effect given to it. There will be a declaration, therefore, that the charge of the plaintiff is prior to the debentures." See also *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. 174.

Property *acquired* subject to a charge.

In *Conolly Bros., Wood* v. *Same*, (1912) 2 Ch. 25, where a company which had issued floating-charge debentures subsequently purchased some real estate, and the purchase-money was advanced by a person who took an equitable mortgage by deposit of deeds of the property, such equitable mortgage was held to have priority over the debenture holders.. And see *Wilson* v. *Kelland*, (1910) 2 Ch. 306.

### As to the Clause qualifying the Floating Charge.

Prior mortgages, prohibition of.

The extreme elasticity of a floating charge, and the wide powers which it allows to the company, are in some cases considered excessive, and accordingly it is not uncommon to insert in the instrument creating it words to the effect that the floating charge is *not* to authorize the company to create any mortgage or charge ranking in priority to or *pari passu* with the debentures.

Such a clause is not a new expedient; it was introduced by way of suggestion in the first edition of this work (1877), and has gradually come into use. It protects the debenture holders, but may seriously embarrass the company.

If the company creates a mortgage in favour of any person who has notice of the floating charge and qualification, such person

ranks after the floating charge. But a person who obtains a legal mortgage, and makes out (a) that he was not aware of the existence of the floating charge; or (b) that though he was aware of the charge he was not aware of the qualifications, is entitled to priority by virtue of the legal estate. *English & Scottish, &c. Co.* v. *Brunton*, (1892) 2 Q. B. 700. And it has been held that in some cases a subsequent specific mortgagee, who takes merely an equitable charge, may obtain priority over the antecedent floating charge. See *Castell and Brown, Ltd.*, (1898) 1 Ch. 315. In that case the company had issued mortgage debentures containing a floating charge qualified as above, but had retained the title deeds to landed property thereby charged. It subsequently deposited such title deeds with a bank by way of security for an advance. The bank, when it made the advance, had no notice of the debentures, and it was held by Romer, J., that the bank were entitled to rank before the debenture charge, on the ground that it had the better equity.

The learned judge based his decision on the principle exemplified in *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21, viz., that if a mortgagee lends the deeds to the mortgagor for a limited purpose, he is estopped from disputing the mortgagor's acts, though in excess of the authority.

*Castell and Brown, Ltd.*, was followed by Swinfen Eady, J., in *Valletort Sanitary Steam Laundry Co.*, (1903) 2 Ch. 654, in which the facts were similar. The fact that in the latter case the bank was aware that the debentures had been issued and held some of them as security for another company's account, was held not to give the bank notice of the preclusion of the right to give a second charge. And the fact that the bank subsequently took debentures expressly subject to the prior debentures was held not to postpone their equitable mortgage in respect of subsequent advances.

Kekewich, J., followed the case last cited, although the debentures had been registered under the Act of 1900. *Standard Rotary Machine Co.*, 95 L. T. 829.

These decisions must now be read in conjunction with sect. 97 of the Law of Property Act, 1925, under which mortgages affecting a legal estate and not protected by a deposit of documents rank according to the date of their registration as land charges.

It should also be noted that sect. 10 (5) of the Land Charges Act, 1925, when read in conjunction with sect. 198 of the Law of Property Act, 1925, makes registration of the debentures under sect. 93 of the Companies Act, 1908 (now sect. 79), actual notice, though this does not, it is submitted, necessarily affect the priority of a person who advances money on the security of the title deeds (see Law of Property

Act, 1925, s. 13, and *Valletort Sanitary Steam Laundry*, (1903) 2 Ch. 654), or operate as notice of the fact that the debentures preclude the right of the company to create other charges. See *Wilson* v. *Kelland*, (1910) 2 Ch. 306, where the debentures were postponed to the lien of an unpaid vendor secured by a mortgage.

In an Irish case, however (*Cox* v. *Dublin Distillery* (1), (1906) 1 I. R. 446), where the bank had notice of the debentures, they were held not entitled to priority.

It is not the practice for debenture holders to obtain the custody of title deeds to property on which they have merely a floating security, and accordingly they must take the additional risk which the decisions cited on p. 70 impose on their security. If this is objected to, there should be a trust deed, and the trustees should hold the deeds; or, in the alternative, a clause may be inserted in the articles providing in effect that no mortgage or charge shall be created in priority to the debentures, and in the debentures a provision inserted enabling the holders to call in their money if the company alters, or attempts to alter, the clause. Outsiders dealing with the company are fixed with notice of the clause, and thus the position of the debenture holders is fortified to a considerable extent.

A simple expedient for meeting the difficulty would be to endorse notice of the charge, with the provisions limiting the power to create further charges, on the title deeds; but this is inconvenient.

Where there is a floating charge qualified by the prohibitory clause above mentioned, it has been held that the qualification is to be strictly construed. See *Brunton* v. *Electrical, &c. Corpn.*, (1892) 1 Ch. 434, in which case it was held that the qualification did not prevent the company's solicitor from acquiring a lien in priority to the debentures; and see *Robson* v. *Smith*, (1895) 2 Ch. 118, in which it was held that the qualification did not prevent a creditor of the company, who had obtained a garnishee order, attaching a debt due from a debtor to the company, and obtaining payment thereof.

The use of words "floating charge," and explanatory words.

Usually a debenture or debenture stock deed which charges "the undertaking and property, present and future," or charges "the property and assets for the time being," expressly declares that the charge is to be "floating security," and this is convenient now that the character of a floating security or charge has been so clearly established; but the presence of the words is not essential, for where there is a charge on "the undertaking," that charge operates as a floating charge (*Panama, &c. Co.*, 5 Ch. 318); and where there is a general charge on the property, the Court will, if practicable, construe the charge as a floating security. Thus, in *Florence Land Co.*, 10 Ch. D. 530, where the debentures purported to "bind the company and all their estate, property, and effects," it was held

that these words created a floating security on the assets for the time being. And the like construction was placed on debentures purporting to "bind or charge the company and their real and personal estate." *Colonial Trusts Corpn.*, 15 Ch. D. 465.

Even when the words "floating charge" are used, it is not uncommon to add explanatory words, *e.g.*, "such charge is to be a floating charge, and accordingly is in no wise to hinder or prevent the company from selling, leasing, exchanging, charging, or otherwise dealing with its property for the time being in the ordinary course of its business." When the nature of a floating charge was not settled it was desirable to use some such words, and even now there may be cases in which it is desirable thus to emphasize its character by explanation, but such explanation is not necessary, and adds nothing to the legal effect of the term.

In *Government, &c. Stock Co.* v. *Manila Ry. Co.*, (1897) A C. 81, the debenture charge was expressed to be by way of "floating security," but the words as to dealings were not in common form, but as follows:—"Notwithstanding the said charge the company shall be at liberty in the course of, and for the purpose of, its business to use, employ, sell, lease, exchange or otherwise deal with any part of the property, until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due, or until an order of some Court of competent jurisdiction shall have been made, or a special or extraordinary resolution shall have been duly passed for the winding-up of the said company."

These words were taken from the first edition of this book (p. 435), but the clause immediately following in the book, which provides that on the happening of the events specified the company's authority to deal with the assets should cease, was, whether by design or accident, omitted from the document under consideration by the House of Lords. The question arose whether such a provision should be implied, and it was held by the House of Lords that it could not; and that, consequently, the charge retained its floating character, notwithstanding default by the company for more than three months in payment of interest. Lord Macnaghten said, (1897) A. C. 86: "In the present case, it was intended that the right of intervention on the part of the debenture holders should be suspended for a term after default. That is what the second condition points to. . . . During the period of grace, or until there is a winding-up, the company are to be free to carry on their business; they are to carry it on as of right. When that period comes to an end the charge will have its ordinary effect. Thenceforward, so long as the default lasts, the business will be carried on, not as of right, but by the sufferance of

the debenture holders, and at their mercy." If the omitted clause had been inserted the decision would have been different.

Floating charges constitute a present charge *sub modo*.

Although a floating charge does not finally attach or crystallize until a winding-up or appointment of a receiver, or stoppage of the business, this only means that until the happening of some one of these events the company is permitted to deal with the property in the ordinary course of its business. It does not mean that there is no charge until then. A debenture usually purports to give a present charge, *e.g.*, "the company hereby charges its undertaking and all its property present and future"; and though it is necessary, in order not to paralyse the business, to construe such a charge as giving the company an implied power or licence to deal with the property charged in the ordinary course of its business, there is no necessity or reason for holding that the charge is not to take effect at once, subject to that power. Thus, in *Florence Land Co.*, 10 Ch. D. 530, Jessel, M. R., considered that the debenture charging the estate, property and effects ought to be read as giving "a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company, whilst carrying on the business in the ordinary course." And James, L. J., stated that he read it as "a charge upon the assets for the time being of the company that would not in the slightest degree interfere with the company carrying on the business." And, in *Driver* v. *Broad*, (1893) 1 Q. B. 744, Kay, L. J., referring to the term "floating security," said: "It does not mean that there is not to be a charge, and an immediate charge, on the property, but merely that, notwithstanding the existence of the charge on all the property, including the real property of the company, power is reserved to dispose of the property if, in the ordinary course of carrying on the company's business, it becomes necessary to do so. The charge is none the less a charge because such a power is reserved."

So, too, in *Wallace* v. *Evershed*, (1899) 1 Ch. 891, Cozens-Hardy, J., said: "A floating charge gives an immediate equitable charge on the assets, subject to the right of the company in the ordinary course and for the purposes of the business of the company, but not otherwise to dispose of the assets as though the charge had not been created."

### Qualified Operation of Floating Charge under Sect. 266.

Floating charge within three months of winding-up.

By sect. 266 of the Companies Act, 1929, it is provided as follows:—

**266.** Where a company is being wound up, a floating charge on the undertaking or property of the company created within six 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.

This section re-enacts provisions originally enacted by sect. 13 of the Act of 1907. The period of three months specified in that section and in the corresponding section (212) of 1908, was extended to six months by the Act of 1928.

In case of a winding-up order the winding-up commences at the date of the petition unless there has been a previous resolution to wind up, in which case it dates from the resolution (sect. 175).

Hence, where a company gives a floating charge on its undertaking or property and within six months afterwards an effective resolution is passed or a petition is filed on which an order is made for winding-up the company, the floating charge is invalid, except so far as any cash is 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 5 per cent. per annum, unless it is proved that the company immediately after the creation of the charge was solvent. Thus the section does not prohibit the creation of a floating charge, but if the company is insolvent the person in whose favour the floating charge is created must take it subject to the chance of its being partially invalidated if there is a winding-up within six months. A payment to a company made on account of the consideration for a floating charge and in reliance on the resolution to create the same is made "at the time of the creation of the charge" within the meaning of the section, though the payment was in fact made some days or even weeks before the creation of the charge. *Columbian Fireproofing Co.*, (1910) 2 Ch. 120, C. A.; *Olderfleet Shipbuilding Co.*, (1922) 1 I. R. 26; *F. & E. Stanton, Ltd.*, (1929) 1 Ch. 180.

In *Orleans Motor Co., Ltd.*, (1911) 2 Ch. 41, it was held that where the directors of a company have guaranteed the company's overdraft with its bankers, debentures giving a floating charge created by the company in favour of the guarantors who find money to pay off the debt owing by the company and guaranteed by them are, if the company goes into liquidation within three (now six) months after the issue of the debentures, invalid unless it is proved that the company was solvent immediately after the creation of the charge. Parker, J., said: "It is impossible to hold that any money was actually paid to the company at all. Three cheques passed through its hands, but they were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them over to the bank in discharge of the overdraft."

In *Gregory, Love & Co.*, (1916) 1 Ch. 203, an agreement to give debentures if a director, who had deposited his own securities to secure an overdraft of the company, should be called upon to redeem his securities, was held to be only a contingent agreement for a charge and void, the actual charge being given within three (now six) months before the commencement of the liquidation.

In *Hayman, Christy & Lilly, Ltd.*, (1917) 1 Ch. 283, it was held that debentures given within three (now six) months before liquidation as further security for an existing loan account and a future overdraft on current account were invalid as to the loan account.

Where a new loan was purported to be made, but part of the money lent was applied in discharging an existing loan, it was held in Ireland that the debenture was only valid for the balance representing further cash in fact advanced. *Revere Trust* v. *Wellington Handkerchief Works* (1931), N. I. 55.

Notwithstanding these decisions the Court of Appeal, in a case where money was advanced by a director on the security of a debenture on the terms that part of the money was to be applied in paying a debt due from the company to a firm of which the director was a partner, held that the money so advanced was "cash paid to the company." *Re Matthew Ellis, Ltd.*, (1933) 1 Ch. 458.

It is only the floating charge which is rendered invalid, and if the debenture is paid off before the winding-up, the liquidator cannot recover the amount paid, except in the case of fraud or fraudulent preference. *Parkes Garage* (*Swadlincote*), (1929) 1 Ch. 139.

Proof of solvency.

The burden of proof lies on the debenture holders to prove that the company was solvent.

The company may be insolvent in either of two ways:—

(1) If the property left is not enough to pay its debts. *Jackson* v. *Bowley*, Car. & M. 97, 103; *Re Stainton*, 19 Q. B. D. 182; *European Assurance Co.*, L. R. 9 Eq. 122. For this purpose all the assets and all the liabilities must be considered.

(2) If the company is unable to pay its debts as they fall due. *Re Russell*, 19 Ch. D. 588; *London and Counties Assets Co.* v. *Brighton Grand Concert Hall*, (1915) 2 K. B. at p. 496. For this purpose it is immaterial that the assets exceed the liabilities. *Hodson* v. *Blanchards* (*London*), *Ltd.*, 131 L. T. Newsp. 9.

## CHAPTER XII.

### AS TO TRUST DEEDS FOR SECURING DEBENTURES AND DEBENTURE STOCK.

DEBENTURES and debenture stock are frequently secured, as has been already said, by a "trust deed." Before entering on the details of such a deed, a few preliminary observations may be made as to the nature of such a deed, its objects and form.

Trust deeds.

A trust or covering deed to secure debentures or debenture stock executed before 1926 usually conveyed, or provided for the conveyance, to trustees of the freehold land of the company and the buildings and fixtures thereon and sub-demised to them its leasehold property by way of security for the payment of the debentures or debenture stock, and the interest thereon. Since 1926 the freeholds also are, if in England, demised to the trustees or charged by way of legal charge. The deed also usually contains a floating charge on the undertaking and other assets of the company and a number of ancillary provisions for the benefit of the company and the holders of the debentures or debenture stock.

Advantages of.

Trust deeds afford many advantages—of convenience and security—to debenture holders. For example:—

(1) If the company makes default, the trustees are there ready to protect the interests of the debenture holders, and charged with the duty of doing so; whereas in the absence of trustees it is left to the initiative of some debenture holder or debenture holders to take action.

(2) By means of a trust deed the debenture holders, through their trustees, can be empowered to enter and sell, and thus realise the property without the assistance of the Court; whereas if the charge is merely contained in the debentures these remedies cannot be so readily or efficiently exercised though provision may be made for the exercise of these powers by a receiver.

(3) A legal estate in the property charged can be vested in the trustees or protected by a charge by way of legal mortgage under sect. 87 of the Law of Property Act, 1925, and thus

the debenture holders may be secured against having their title—which, so far as the debentures are concerned, is only an equitable one—postponed to that of some other subsequent incumbrancer. See p. 142.

(4) The trustees can be empowered to convene meetings of the debenture holders to ascertain their wishes, and exercise, if necessary, powers of control over the trustees.

(5) The trustees can be enabled to do a variety of things at the request and with the concurrence of the company, *e.g.*, to effect interim sales, exchanges, and leases, and thus the security can be made effective without interfering with the business.

(6) The company can be brought, under covenant, to do many things which, in the interests of the debenture holders, are necessary—*e.g.*, to insure, to repair, to protect the property, &c.—and in default the trustees can be given power to do these things at the expense of the company.

Where trust deed desirable.

Whether, in the case of debentures, there should or should not be a trust deed must depend on the circumstances. Sometimes a company proposing to raise money on debentures stands in so strong a financial position that there is no need to offer subscribers the additional security of a trust deed; or the company, though not so situate, may prefer, if possible, to avoid the fetters, however light, which a trust deed imposes, and offers its debentures without any trust deed, believing that the public will subscribe without any very critical examination of the form of the security—a belief not to be too readily indulged, as of late the public has become much more alive to the importance of examining the securities offered it, and to the precarious nature of a mere floating charge; or, again, it may be that debentures are to be issued only for a temporary purpose—*e.g.*, to bankers as security for an overdraft, or to capitalists as security for a short loan—or are to be taken up by the directors and their friends, who have perfect confidence that the board will not do anything to endanger the priority of the debentures. In such cases a trust deed is generally dispensed with, and there is no doubt that in this and other ways large sums of money have been and are being borrowed on debentures containing a charge but not secured by any trust deed. Nevertheless, the practice of fortifying debentures and debenture stock by a mortgage to trustees, by way of collateral security, in the shape of a trust deed, is now very general, and the following are some of the reasons—in addition to those already given—which recommend such a security:—

(a) Because companies are advised to make the securities offered by them as sound and attractive as possible.

(b) Because brokers, trust companies, bankers, financiers, underwriters, lawyers, and others, commonly advise or insist on a trust deed.

Even companies which might raise money on debentures without a trust deed often consider it expedient, as a matter of credit and of sound business, to give their debenture holders the best possible security, including a trust deed, so that if, as occasionally happens, the character of the security is brought under discussion, *e.g.*, in the financial press, or in controversial circulars, it may not be possible to accuse the company of having issued imperfectly secured debentures, and traded on the credulity of those who trusted that they would be given a fair security.

In many cases debentures are issued pursuant to some agreement —*e.g.*, an agreement for sale of property—or pursuant to some scheme of arrangement or reconstruction, and in such cases it is usual to provide that there shall be a trust deed in a specified form.

In short, whatever may be the causes, there is no doubt that the practice of fortifying the debenture holders' or debenture stockholders' security by a debenture trust deed is largely on the increase.

Frame of deed.

As regards its frame, a trust deed usually contains or provides for a legal mortgage of the principal properties (*e.g.*, in the case of a brewery, the brewery and tied houses) and a general charge by way of floating security on the rest of the undertaking. The legal mortgage can, since the 1st of January, 1926, only be made by a demise of a term or by a charge by deed expressed to be by way of legal mortgage, and the estate formerly vested by trust deeds operating by way of conveyance of a fee simple is converted into a term of 3,000 years. Law of Property Act, 1925, s. 85, and 1st Sched., Pt. VII.

Cases sometimes occur in which a mortgage or transfer would be impracticable or prejudicial, *e.g.*, in the case of a foreign concession or foreign land; in the latter case, for instance, the duties on the transfer of property may be, by the local law, so high as to be prohibitive. In cases like these the trust deed generally contains a fixed charge on specific land and property of the company, and a floating charge on the rest of its property, fortified by special provisions for the security of the debenture holders; and such a security will be effective as against English creditors even as regards the foreign land. For although the right to the possession of land must be determined by the *lex rei sitæ*, land situate abroad can be effectually charged in equity by a company resident here, see pp. 55, 56. In the case of companies proposing to acquire a business abroad, it is sometimes considered advisable to vest the business in a local company, and to take security from that company to trustees for

the debenture holders. Another plan occasionally resorted to is to vest the property in a local company, all the shares in which are vested in the English company, and the English company then mortgages the same to trustees to secure its debentures.

Where security enforceable.

Following on the demise or charge in the trust deed in favour of the trustees comes a clause specifying the various events on the happening of which the security is to become enforceable. As a general rule the events specified in such a clause are—(1) default in payment of principal or interest, (2) winding-up, (3) breach of covenant, and (4) appointment of a receiver; but in cases (1) and (3) the deed usually allows the company further time to make good the default or breach. Sometimes the list of events is considerably increased, see, for instance, p. 280. Cases also occur where very stringent provisions may, in the interests of the debenture holders, be necessary and reasonable. Thus, if the debenture holders of a liquidating concern agree to reconstruction, and to take fresh debentures in satisfaction of their existing ones, it may be fair enough to provide for enforcing the fresh debentures, if the trustees of the deed securing the same certify that, in their opinion, the business cannot be carried on profitably. So, too, if a company is in low water, those who lend money on debentures are fully entitled to exact such terms as they think necessary for their protection.

The trust for sale,

The trust deed next goes on to provide that when the security becomes enforceable, the trustees may at their discretion, and shall at the request of a specified majority or proportion of the debenture or debenture stock holders, sell and convert into money the mortgaged premises, and shall apply the net proceeds in paying off the debentures or debenture stock, and hand the balance to the company.

and payment off of the security holders.

Receivers.

The deed also empowers the trustees to appoint receivers after the security becomes enforceable, and invest them with specified powers; enables the trustees to carry on the business (if any) until realisation; provides for the indemnity of the trustees and for amplifying the ordinary rules for the protection of trustees; provides for meetings of the debenture and debenture stock holders, and gives to the majority certain powers for the benefit of the class, and imposes on the company certain obligations as regards insurance, repairs, furnishing information, further assurance, &c. It also provides for the appointment of new trustees, and for the discharge of the property in due course. See Form 81, *infra*, p. 316.

Carrying on the business.

Indemnity of trustees, &c.

Meetings.

Repairs.

Insurance.

New trustees.

Discharge.

# CHAPTER XIII.

## AS TO TRUSTEES OF DEEDS SECURING DEBENTURES AND DEBENTURE STOCK.

### Appointment and Removal.

Appointment.

WHERE a company proposes to raise money by the creation and issue of debentures or debenture stock secured by a trust deed, trustees of the deed have to be chosen. The choice of the persons who are, in the first instance, to fill this office rests with the company, that is, with the directors; and they generally make a wise selection, knowing that many subscribers are largely influenced for or against an issue according as the trustees are well known and of high standing or not.

Corporate trustees.

In a good many cases, especially those in which it is likely that there will be a succession of dealings by way of sale, investment, purchase, lease, &c., it is considered preferable to appoint a trust company to be the sole trustee. Ordinary trustees cannot always be found when they are wanted: they take holidays, get ill, go abroad, and die; whereas a trust company is always ready to attend to business. If some of its directors are absent, others remain; and it has legal advice always at hand. Its business is to facilitate trust matters, and its credit depends upon its doing its business in a prompt and efficient manner.

Ordinary trustees.

If, instead of a trust company, ordinary trustees are appointed, care should be taken that they are quite independent of the company and in a position to protect the debenture and debenture stockholders for whom they are to act. Sometimes a director is appointed one of the trustees, but such appointments are to be strongly deprecated, and in several instances have been found distinctly disadvantageous. The argument used in favour of such appointment is that the director-trustee knows, as director, what is going on in the affairs of the company and what is wanted, and can, therefore, better look after the interests of the debenture holders. At the same time he is in a better position, it is said, to explain matters to his co-trustees and get their concurrence in any transaction. The objection to such an appointment is that the director-trustee is placed in a position in which his interest or his duty to the shareholders may be in conflict with his duty to the debenture holders. Circumstances may occur

in which he should, as trustee, refuse his consent to a transaction, whilst as director and shareholder he may want the transaction to go through. In such circumstances, human nature being as it is, one cannot expect the director to act with entire impartiality. Again, the mere consciousness on the part of a scrupulous director of his two-fold position and of the difficulties attaching to it, may and does in some cases complicate matters still further and cause delay and inconvenience. Such a director sometimes declines to concur in a proper transaction merely because he is apprehensive that it might, by possibility, be regarded as unduly advantageous to the company and that he may be accused or suspected of abusing his position.

Same trustees for first and second debentures.

Sometimes the same persons have been appointed trustees of two successive series of debentures, *e.g.*, first debentures and second debentures. It is a question whether it is not a breach of trust for those who have undertaken office for first mortgagees afterwards, without their consent, to undertake office for second mortgagees, and thus bring into operation conflicting duties and interests. But, apart from this, such a combination of offices is highly inconvenient and generally to be deprecated. As an example of the inconvenience which may ensue, cases have arisen in which it has become necessary for trustees so placed to carry out, as between the two trusts, transactions, *e.g.*, sales or exchanges, which could readily have been carried out but for the duplication of offices; but the duplication precluding the exercise of discretion, rendered it impossible to act without the sanction of the Court.

Sometimes a trust company and an ordinary person are appointed jointly, and since the Bodies Corporate Joint Tenancy Act, 1899 (62 & 63 Vict. c. 20), this is allowable. See *Re Thompson's Settlement Trusts*, (1905) 1 Ch. 229.

Residence.

One important point to be borne in mind in appointing new trustees is that they should have their residence in the United Kingdom. To appoint as trustees persons residing out of the jurisdiction of the High Court of Justice is open to grave objection; for suppose the assistance of the Court be required, the trustee is not here and the Court has or may have no power to compel a trustee who is abroad and out of the jurisdiction to act in co-operation with trustees here.

Practically, in the case of trustees abroad, there are in general no means of compelling them to perform their duties. The only course is to remove them from the trust, but even this may be an unsatisfactory remedy, *e.g.*, where the company has foreign property vested in trustees, one or more of whom is abroad, for the Court cannot compel the transfer of such property to the new trustees, and the local Courts may decline to act.

New trustees.

As to the appointment of a new trustee, the trust deed usually contemplates an appointment under sect. 36 of the Trustee Act, 1925 (*infra*, p. 105), and accordingly vests the power of appointing a new trustee in the company. Occasionally, however, the power of appointing a new trustee is vested in the debenture or debenture stockholders and made exercisable at a meeting.

The London Stock Exchange has for some time past required the insertion of some such provision as the following: "the power to appoint a new trustee is vested in the company, provided that no person shall be appointed under that power unless he has first been approved by a meeting of the debenture holders." This requirement must therefore be complied with where a quotation is deemed desirable. See *infra*, p. 346.

Occasionally the statutory power to appoint is left to operate without qualification, and in such case the persons to appoint are the surviving or continuing trustees. (See Trustee Act, 1925, s. 36, *infra*, p. 105.)

Where any difficulty arises as to appointing a new trustee, the Court can always make the appointment under sect. 41 of the Trustee Act, 1925.

There appears to be no doubt that the provisions of the Trustee Act, 1925 (even where not expressly made applicable by the agreement of the parties), apply to a trust deed for securing debentures or debenture stock.

It is true that sect. 68 of the Act provides that in the Act the expression "trust" does not include the duties incident to an estate conveyed by way of mortgage, but it was long since held that these words which come from the Trustee Act, 1850, refer merely to the duties incident to a mere mortgage. See *Re Underwood*, 3 K. & J. 745 (1857). In that case there was a mortgage of freeholds by way of trust for sale, and to hold the proceeds of the payment of the mortgage moneys for the mortgagor, his executors, administrators or assigns. Held, that this was more than a mortgage, and that it was a trust within the meaning of the 15th section of the Act. So also in *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642, where a mortgagor had charged certain premises in favour of the mortgagee and declared that he held the legal estate in trust for the mortgagee with power for the mortgagee to appoint a new trustee, it was contended that the Trustee Act, 1893, had no application; but North, J., held the contrary, and, referring to the definition, his lordship said: "It does not say that no trusts shall be created in addition to those incidental to the duties. I do not see any expression to the effect that a vesting declaration is not applicable to property on mortgage where the instrument or charge

contains an express trust. If there is the relationship of trustee and *cestui que trust* established, there is no reason why the parties should not have the full benefit of the enactment. In my opinion, this limitation of the word 'trust' does not apply where in a deed of charge there is an express declaration that the mortgagor will hold the legal estate on trust."

### The Public Trustee not available.

Public Trustee.

By the Public Trustee Act, 1906 (6 Edw. VII. c. 55), the office of "Public Trustee" was established. He is a corporation sole under that name, with perpetual succession, and an official seal, and may sue and be sued under that name like any other corporation sole (sect. 1). Subject to the Act and rules thereunder the Public Trustee may, if he thinks fit, act (amongst other capacities) as an ordinary trustee, and he may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of the Act, and has the same powers, duties and liabilities, rights and immunities, and is subject to the control of the Court as a private trustee acting in the same capacity; but he is not to accept "any trust which involves the management or carrying on of any business," except in the cases in which he may be authorized to do so by rules made under the Act (sect. 2).

The Public Trustee cannot act as a trustee of a debenture trust deed, since the Public Trustee Rules, 1912, provide (rule 6), that the Public Trustee is not to "accept the trusts of any instrument made solely by way of security for money." See Annual Practice, Part V., Div. III.

### Trust Corporations.

Certain corporations are by the Trustee Act, 1925, and by Rules made under the Public Trustee Act, 1906, and the Law of Property (Amendment) Act, 1926, s. 3, trust corporations. Such corporations are entitled to give receipts for capital money arising under the Settled Land Act or under a trust for sale, though acting as a sole trustee.

Although it may be doubted whether trustees under a debenture trust deed are trustees for sale for this purpose, it would be advisable before appointing a corporation sole trustee to see that it is a trust corporation.

### As to Removal of a Trustee.

Removal.

The trust deed sometimes gives to the company a power, with the sanction of a meeting of the debenture holders, to remove a trustee. Sometimes it vests such a power in a general meeting of the

debenture holders. Where such a provision is inserted, the power of removal can of course be exercised subject to such conditions (if any) as are specified in the deed.

If the deed contains no power to remove, resort must be had to sect. 41 of the Trustee Act, 1925. The Court is not disposed to remove a corporate trustee merely because its credit has been impaired, if it is not shown that the interest of the debenture holders has suffered or is likely to suffer.

If the company and all the debenture or debenture stockholders concur, they can of course call on the trustee to retire, and if he will not, can compel him to convey the property to their own nominee on such trusts as they think fit. But a mere majority have not this power (unless the deed specially gives it them), nor will the Court compel a trustee to retire merely because the majority of the debenture or debenture stockholders desire such retirement. *Assets Realisation Co.* v. *Trustees, Executors and Securities Corpn.*, 44 W. R. 126.

In the case last mentioned the trustee (the defendant company) had passed through a period of financial difficulties which had somewhat impaired its credit, and the majority of the debenture holders wished to have it removed from the trusteeship; but the Court refused the application, on the ground that no danger or risk to the trust property or injury to the debenture holders was shown.

## Trustees' Indemnity.

Indemnity.

Trustees of a debenture holders' trust deed are entitled, like other trustees, to be indemnified out of the trust premises against all costs, damages, and expenses incurred by them in the performance of the trusts, and they have, to secure such indemnity, a lien on the trust premises. See also sect. 30 of Trustee Act, 1925, *infra*, p. 104. This right to indemnity includes, *inter alia*:—

(a) The costs, as between solicitor and client, of legal proceedings taken or defended by the trustees for the benefit of the trust.

(b) The costs, as between solicitor and client, of proceedings to administer the trust.

(c) The legal expenses necessarily incurred in the administration of the trust, *e.g.*, taking the advice of their solicitor and employing him in regard to sales, &c.

(d) The expenses of employing other necessary agents, *e.g.*, brokers, auctioneers, valuers, &c.

(e) Costs of actions and proceedings against trustees.

(f) Damages for injury occasioned to other persons' property in the reasonable management of the trust estate. *Re Raybould*, (1900) 1 Ch. 199.

As to costs of actions against trustees.

Trustees, as between themselves and strangers to the trust, are only entitled to the same costs as if they were suing in their own right (*Ex parte Angerstein*, 9 Ch. 479); but the difference between the costs recovered from the other side and those to which the trustees have been put, can be taken or recovered by them from the trust funds, assuming such costs to have been properly incurred.

A trustee defending proceedings in the interest of the trust estate, *e.g.*, a suit to impeach a compromise, does not lose his costs, because he is personally charged in the suit with fraud and has to defend his character accordingly. *Walters* v. *Woodbridge*, 7 Ch. D. 504.

Costs in administration proceedings.

In an action to administer the trusts, a trustee is entitled to his costs, as between solicitor and client, that is, to a complete indemnity, unless a case of misconduct is established against him. *Re Love*, *Hill* v. *Spurgeon*, 29 Ch. D. 348; Rules of Supreme Court, Ord. 65. This right of a trustee to his costs is well settled. It is an absolute right, and does not rest in the discretion of the Court within sect. 31 (1) (h) of the Judicature Act, 1925 (formerly sect. 49 of the Judicature Act, 1873): and accordingly, an appeal in regard thereto will lie without leave. *Farrow* v. *Austin*, 18 Ch. D. 58; *Turner* v. *Hancock*, 20 Ch. D. 303.

"The contract between the author of a trust and his trustees," said Lord Selborne, in *Cotterell* v. *Stratton*, L. R. 8 Ch. 295, "entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

In *Walters* v. *Woodbridge*, 7 Ch. D. 510, James, L. J., said: "The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trusts," and the right, as already stated, is secured by a lien on the trust premises.

Charged on trust premises.

"The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and corpus." *Stott* v. *Milne*, 25 Ch. D. 715, per Lord Selborne, L. C. It must, however, be remembered, that the right of indemnity, though so fully recognized, is limited (i) to the trust fund, and (ii) to expenses properly and legitimately incurred in the execution of the trust. *Earl of Winchelsea's Policy Trust*, 39 Ch. D. 168; *Smith* v. *Dale*, 18 Ch. D. 516; *Stott* v. *Milne*, 25 Ch. D. 710; *Ecclesiastical Commrs.* v. *Pinney*, (1900) 2 Ch. 736.

And the trustee must first make good any sum in which he is indebted to the trust estate. *British Power Traction Co.*, (1910) 2 Ch. 470.

Improperly incurred costs.

The rule does not extend to costs not properly incurred. For instance, trustees should not, as a general rule, sever in defence, for it unnecessarily increases the costs; but this rule is subject to exceptions. Thus, if one be a defaulter, or indebted to the trust estate, the others may properly sever from him. *Smith* v. *Dale*, 18 Ch. D. 516; *Re Maddock, Butt* v. *Wright*, (1899) 2 Ch. 588.

In a debenture holders' action trustees' costs are postponed to the costs of realisation and the costs and remuneration of a receiver, but have priority over the costs of the plaintiff in the action. *Batten* v. *Wedgwood Coal Co.*, 28 Ch. D. 317

Legal advice.

Trustees who take and act on the opinion of counsel in regard to an action are not necessarily entitled to their costs (*Devey* v. *Thornton*, 9 Hare, 232), unless the trust deed so provides (*infra*, p. 339), though such advice would go a long way to justify proceedings instituted *bonâ fide* for the protection of the estate and in accordance with such opinion. If they make a mistake, acting on their own judgment, or on the erroneous advice of their lawyers, and the trust money is misapplied, they, the trustees, will *primâ facie* be personally responsible for the misapplication; though since the Judicial Trustee Act, 1896, the relevant provisions of which are now incorporated in sect. 61 of the Trustee Act, 1925 (see p. 92, *infra*), the Court has power to relieve a trustee wholly or partially from personal liability where he has acted honestly and reasonably and ought fairly to be excused.

Upon one occasion, before the Act of 1896, Lord Redesdale said: "I have no doubt [the executors] meant to act fairly and honestly; but they were misadvised, and the Court must proceed not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune, but public policy requires that he should be the person to suffer" (*Doyle* v. *Blake*, 2 Sch. & Lef. 243; and see *Stott* v. *Milne*, 25 Ch. D. 710), the theory being that a trustee in doubt can always go to the Court for guidance. A trustee who honestly acts on counsel's opinion seems pre-eminently a proper subject for relief under the Trustee Act.

As to the reimbursement of a solicitor-trustee, see *Re Chapple*, 27 Ch. D. 584; *Vipont* v. *Butler*, W. N. (1893) 64.

Indemnity as against co-trustees.

A few words may be added as to a trustee's right of indemnity against his co-trustees. In *Thompson* v. *Finch*, 8 De G. M. & G. 560, the situation was this: There were two trustees, A. and B., A. allowed B. to have under his control money for investment, and B., who was a solicitor, advanced those sums to a client in his own name.

The sums so advanced were ultimately lost, though B. represented to A. that they had been invested on a sufficient mortgage. On these facts it was held that, although A. was liable to make good the amount, he was entitled to indemnity as against B.

So in *Lockhart* v. *Reilly*, 1 De. G. & J. 464, special stress was laid on the fact that the trustee by whom the breach of trust had been actively committed was a solicitor, and that he had gained an advantage from it. "As to the question between Lockhart and Ellis, two trustees," said Lord Cranworth, C., "Ellis is the person who must be responsible. The whole matter was entrusted to him. He was a solicitor, and he evidently acted with a view to favouring his own family. Even if that had not been so, the co-trustee leaves it with the trustee who was a solicitor, and from the negligence of the latter the evil to a very great degree has arisen."

In a more recent case, *Bahin* v. *Hughes*, 31 Ch. D. 390, Cotton, L. J., said: "I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust;* but, so far as cases have gone at present, relief has only been granted against a trustee who has himself got the benefit of a breach of trust, or between whom and his co-trustee there is existing a relation which will justify the Court in treating him as solely liable for the breach of trust." And see *Head* v. *Gould*, (1898) 2 Ch. 250.

Even where no actual loss has happened to the trust estate by a solicitor-trustee's negligence, his co-trustee is entitled to be indemnified against the cost of an action thereby caused. *Re Linsley*, (1904) 2 Ch. 785.

### Remuneration of the Trustees.

Usually provided.

Unpaid labour is never satisfactory, and of late years it has—perhaps on this ground—become customary in deeds for securing debentures or debenture stock to provide for the remuneration of the trustees. In the absence of such a clause the trustees, like all that ill-used race, are not entitled to claim any remuneration for their services. Of its validity there can be no doubt. The usual form is for the company by the trust deed to covenant to pay the trustees their remuneration, and, where this is the case, the company is, of course, liable to pay the trustees the amount; if needs be the trustees can sue the company. Over and above this right of action on the covenant the trust deed usually by express or implied provision gives the trustees a lien on the trust premises for the amount of their remuneration.

Lien.

Whether the trustees have a lien for their remuneration ranking before the debenture or debenture stockholders depends on the terms of the trust deed.

*Hodgson* v. *Accles, Ltd.*

Where (as at p. 325, *infra*) the deed provides that the proceeds of sale of the trust premises are to be applied in paying such remuneration the trustees obviously have a lien thereon (*Piccadilly Hotel, Paul* v. *The Company*, (1911) 2 Ch. 534), but where the deed merely provides for the payment of the remuneration, and does not give an express or implied lien or charge, the trustees cannot insist on payment of their remuneration in priority to the debentures or debenture stock. See *Re Accles, Ltd., Hodgson* v. *Accles*, 18 T. L. R. 786. In that case the deed did not (as at p. 324, *infra*) provide for the payment of remuneration out of the proceeds of sale of the trust premises. It provided for the payment by the company, and contained a clause on the lines of clause 38, *infra*, p. 341, with the additional provision that the trustees might also retain their remuneration. A debenture action having been brought, the property was realised in that action, and the question arose whether the trustees had any lien for their remuneration. Farwell, J., held that they had not. His lordship said that the contract was by the company. He could not find any contract that either the debenture holders would pay the remuneration or that the property charged should be liable to satisfy the claim to remuneration; and as to the clause allowing the trustees to retain and pay their remuneration out of any moneys in their hands, his Lordship considered that the earlier part merely provided for indemnity out of the mortgaged premises, and said nothing about remuneration, and that the latter part merely authorized the retainer "out of moneys in the trustees' hands," and was therefore inapplicable, inasmuch as the money was in Court and not in the hands of the trustees. It may be doubted whether this conclusion is altogether consistent with the views expressed by Chitty, J., in another case below referred to.

**Remuneration after appointment of receiver and manager.**

A question sometimes arises whether the trustees are entitled to remuneration *after* a receiver and manager has been appointed in an action to enforce the securities. The answer depends in each case upon the construction of the particular deed. The authorities are somewhat conflicting. The question was raised in *Debenture Corpn., Ltd.* v. *Uttoxeter Brewery, Ltd.*, before Chitty, J. In that case a receiver and manager had been appointed in a debenture action, and the usual judgment for execution of the trusts was obtained (the trustees not opposing); the property had been realised in the action, conduct of the sale being given to the trustees, and they had concurred in the requisite conveyances. Under the deed they were to be paid a salary, "as remuneration for their services," and Chitty, J., held that the services performed after the appointment of the receiver were not those contemplated by the deed, and therefore that the trustees were not entitled to remuneration for them.

*Debenture Corpn.* v. *Uttoxeter Brewery* (1895).

"I have asked in vain," said the learned judge, "for a statement of the services which have been performed since that date. The answer I get is that the trustees kept the deeds. The trustees would, of course, hold the deeds until the sale—that could not be called services by itself. But I will enumerate the other services. They conveyed under the order of the Court, and they conducted the sales under the order of the Court. In fact, since the judgment the trustees, I find as a fact, have not performed the services contemplated by the deed." His lordship, however, held that the trustees were entitled to their remuneration up to the date of the order appointing the receiver, and as to the question whether they should be treated as having a lien on the money in the Court for that remuneration, his lordship said: "It is said now that, with regard to the right of retainer of an executor (which extends, as is well known, only to legal assets), the right of retainer is taken away from the executor by the appointment of a receiver where the receiver himself gets in money and the money never passes through the hands of the executor. I am not speaking of the case where the executor receives the money and hands it over to the receiver, but of the simple case which I have just stated. It is not necessary to refer to the decisions on this point beyond mentioning the case of Kay, J., in *Re Jones*, 31 Ch. D. 440, mentioned in Williams on Executors, 10th ed. at p. 789, where the learned editor, following the language, I think, of Kay, J., states that 'the reason seems to be that when a receiver is once appointed a debtor to the estate may pay his money direct to the receiver and obtain good discharge, so that the appointment of a receiver prevents the money actually or theoretically coming into the executor's hands, and without possession there can be no retainer.' Now, that right of retainer coupled with possession is analogous to the ordinary common law doctrine of lien. There is no lien, as is well known, in the case of a man who does work or supplies goods—there is no lien except when he has possession—and upon the analogy of an executor it is argued that there can be no right of retainer in this case, though conferred by contract, because the language of the deed is that 'the trustees may retain out of moneys in their hands on the trusts of these presents,' and it is said that, inasmuch as the moneys passed from the purchaser direct into Court on the sale, the trustees have never had the moneys in their hands, and that consequently the right of retainer by contract cannot exist. But there is a difference between equitable lien and common law lien, and possession is not necessarily the keeping of possession in all cases where an equitable lien is claimed. Now this clause, as I have pointed out, includes, besides the remuneration, charges, and expenses of the trustees, and it is quite clear that the trustees are

entitled to those charges and expenses, notwithstanding they have not received the money. But then it is rightly said that without the clause in the contract they would be entitled to them, and that is so. Now, the trustees admittedly have in no way misconducted themselves, and I do not think that the mere payment of money into Court alters the rights of parties. I am not dealing any longer with the case of an executor, but I am dealing with the case of trustees upon whom this equitable lien, as it appears to me, of retainer is conferred by the instrument itself. I think that the statement of Cotton, L. J., in *Richmond* v. *White*, 12 Ch. D. 361, is perfectly correct. 'The Court,' he says, 'never allows an order for payment of money into Court to prejudice the rights of the persons paying it in.' I think that may be enlarged so as to make it applicable to the present case by saying that the order for payment into Court is not allowed to prejudice the rights of a person existing at the time."

In *Locke & Smith, Ltd.*, (1914) 1 Ch. 687, the trust deed provided for remuneration "during the continuance of the security," and the trustees were held not to be entitled to remuneration after the appointment of a receiver, they not having performed any services. Eve, J., however, said (p. 693): "But, of course, there may be cases in which the trustee does render services after the receiver's appointment, which entitle him to remuneration notwithstanding that appointment," and remuneration has been paid in some cases where trustees have taken an active part in assisting in the realisation of the assets. It is submitted, however, that the quantum of services is not material where the remuneration of a trustee is payable at a fixed rate; and in *Re British Consolidated Oil, Ltd.*, (1919) 2 Ch. 81, where the trust deed contained similar words, Peterson, J., held that the trustees were entitled to their remuneration notwithstanding the appointment of a receiver.

In *Anglo-Canadian Lands, Ltd.*, (1918) 2 Ch. 287, where the deed provided for remuneration until the mortgaged premises should be reconveyed or realised, the remuneration was held to continue after the appointment of a receiver, and in *Piccadilly Hotel, Paul* v. *The Company*, (1911) 2 Ch. 534, where the trust deed contained a clause similar to clause 35 on p. 338, and a receiver and manager had been appointed in an action to enforce the securities, Swinfen Eady, J., held the trustees entitled to their fixed contractual remuneration until the trusts were finally wound up.

*South Western of Venezuela.*

The above decisions may be usefully compared with *South Western of Venezuela, &c. Ry. Co.*, (1902) 1 Ch. 701. Under the articles in that case the directors were entitled as remuneration to 1,000*l.* per annum. Two of them were appointed receivers and managers of

the company's business in a debenture action and were liberally remunerated for their services as such. It was contended that the directors had ceased to manage the business after the appointment of the receivers and managers and, therefore, ought not to be remunerated as directors. Buckley, J., said: "This contention cannot prevail. The directors are entitled to their 1,000*l.* a year as the payment to be made to them for doing that which for the time being they have to do as directors of the company. If by reason of the appointment of receivers and managers the directors have less to do, that in my judgment does not in any way diminish the amount which they are to be paid as remuneration under the articles. Their obligation as directors is to do whatever there is to be done by them as directors. The remuneration paid to two of them as the receivers and managers was a payment made to them for doing what they had to do as receivers and managers, and if in the latter character they did something which made their work lighter in the former character, that did not in any way diminish the amount which they were entitled to receive for acting in that former character."

### Duties of Trustees.

Duties generally.

Trustees of deeds for securing debentures or debenture stock stand in the same position in most respects as other trustees; they are bound to perform their duties as trustees in accordance with the terms of their trust deed and in a proper and reasonable manner. They are bound to act honestly, and according to the best of their judgment, and to abstain from committing any breach of the trusts imposed upon them. What these trusts are and the correlative duties of the trustees must depend on the special terms of the trust deed, supplemented by the general principles of equity in regard to the duties of trustees. It is necessary, therefore, to consider the trust deed with the utmost care and attention, and to see how far, if at all, the provisions of the deed, coupled with the provisions of the Trustee Act, 1925, relax the somewhat harsh rules which the Courts in the past, imposed on trustees. In practice, trust deeds have for many years relaxed those rules to a large extent, otherwise it would (at any rate before 1896) have been practically impossible to induce suitable persons to undertake the office of trustees. In the case of a marriage settlement or a will where the duties of the trustees consist mainly in holding certain investments in trust, paying over the income, and in due course realising them and dividing the proceeds amongst the beneficiaries, even in these simple matters, the strict rules of equity have in the past produced most unfortunate results. But in the case of a trust deed for securing debenture or debenture stock under

which a number of properties, perhaps in every quarter of the globe, are vested in the trustees, with numberless duties and discretions as to concurring in sales, mortgages, leases, and other transactions, there is far more reason that the rules should be relaxed so far as may be necessary for effectuating the intention of the parties and securing the best trustees, and even after the legislation of 1925 there are advantages in expressing in clear language in the trust deed such provisions for the protection of the trustees as are thought to be desirable.

Hence it will be found that such deeds now generally contain special clauses for the protection of the trustees by way of supplement to the Trustee Act, 1925, and authorize the delegation of their powers and duties and the appointment of agents and attorneys.

**Duties.**

It may be useful to enumerate some of the duties and obligations of trustees of a deed securing debentures or debenture stock.*

The following are the most material to be borne in mind:—

**Study of trust deed.**

1. The trustees should make themselves thoroughly acquainted with the provisions of the trust deed under which they are to act. They cannot justify a breach of trust by pleading ignorance of the terms of the trust deed.

**Fidelity to duties.**

2. They should observe and perform the duties imposed on them by the deed in strict accordance with the terms of the trust. If they fail to do so, or commit a breach of trust, they may possibly not be visited, since the Judicial Trustees Act, 1896 (repealed and replaced by sect. 61 of the Trustee Act, 1925), with the same severity as they would have been before the Act, but to obtain the benefits of the Act they must be prepared to prove that they have acted "honestly *and* reasonably' *and* "ought fairly to be excused."

Sect. 61 is as follows:—

> If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him, either wholly or partly, from personal liability for the same.

Acting honestly and reasonably means a good deal (*Perrins* v. *Bellamy*, (1899) 1 Ch. 797), but is not of itself sufficient. The erring trustee must show that under all the circumstances he ought

* Subject, nevertheless, to any relaxations or modifications in the deed contained. See also sect. 62 of the Trustee Act, 1925, and *Fletcher* v. *Collis*, (1905) 2 Ch. 24, as to the subsequent concurrence of beneficiaries in breaches of trust.

fairly to be excused. And the case is not bettered by the trustee being a company which is paid for its services. *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, (1905) A. C. 373, 381. Also see *Re Lord de Clifford*, (1900) 2 Ch. 707; *Second East Dulwich, &c. Soc.*, 79 L. T. 726; *Re Smith, Smith* v. *Thompson*, 71 L. J. Ch. 411; *Re Turner, Barker* v. *Ivimey*, (1897) 1 Ch. 536; *Re Grindey, Clews* v. *Grindey*, (1898) 2 Ch. 593; *Perrins* v. *Bellamy*, (1899) 1 Ch. 797; *Re Allsop*, (1914) 1 Ch. 1. The section does not by implication impose on trustees the duty of having a valuation made where they advance money. *Palmer* v. *Emerson* (1911) 1 Ch. 758. And see *Re Solomon*, (1912) 1 Ch. 261.

Joint action.

3. The trustees should, unless the deed otherwise provides, act jointly and unanimously. The beneficiaries are entitled to the benefit of the collective wisdom of the trustees, and if they cannot agree, the direction of the Court should be obtained, for the majority has no power in a private trust to overrule the dissentient minority. *Luke* v. *South Kensington, &c. Co.*, 11 Ch. D. 121. Trustees differ in this respect from directors, but for convenience sake and to save expense it is very common for a provision to be inserted in the trust deed to the effect that whenever there shall be more than two trustees the majority of such trustees shall be competent to execute and exercise all the trusts, powers, and discretions by the deed vested in the trustees generally. This meets the case of temporary absence as well as of disagreement. See *infra*, p. 344. There is nothing against such a provision.

Must not delegate.

4. The trustees must act personally in the trust, and may not delegate their office—this is a fundamental rule of law—either wholly or in part, and either to one of themselves or to a stranger, save so far as the trust deed expressly or impliedly authorizes such delegation, or the delegation is one which a prudent man, acting for himself in the ordinary course of business, usually makes. *Speight* v. *Gaunt*, 9 App. Cas. 5; *Re Weall, Andrews* v. *Weall*, 42 Ch. D. 674; *Re Gasquoine, Gasquoine* v. *Gasquoine*, (1894) 1 Ch. 470; *Shepherd* v. *Harris*, (1905) 2 Ch. 310.* The essence of trusteeship is personal confidence.

"Neither the statute nor the doctrine of *Ex parte Belchier*, Amb. 218, authorizes a trustee to delegate at his own mere will and pleasure the execution of his trust and the care and custody of the trust moneys to strangers, in any case in which (to use Lord Hardwicke's words)

* Of course where a body corporate is trustee it can act through its directors as provided by its regulations, for a company, being a mere abstraction and having no corporeal existence, can only act by its agents. *Ferguson* v. *Wilson*, 2 Ch. 89.

there is no 'moral necessity from the usage of mankind' for the employment of such agency." Per Lord Selborne in *Speight* v. *Gaunt*, 9 App. Cas. 5.

"Moral necessity" may not be the happiest phrase to describe circumstances which will justify delegation, but as paraphrased by Lord Selborne in *Speight* v. *Gaunt* it becomes sufficiently clear. "In the early case of *Ex parte Belchier*, before Lord Hardwicke, it was determined," said Lord Selborne, "that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents, and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees though the moneys are trust moneys; and that if under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss."

**Exceptions to Rule:— Brokers.**

Hence the trustees may, without infringing the rule against delegation, employ **Brokers** to buy and sell securities dealt in on the London or Country Stock Exchanges where they have occasion to buy or sell such securities in the execution of the trusts. *Speight* v. *Gaunt*, 9 A. C. 5. A co-trustee who is a broker may be employed as such. *Shepherd* v. *Harris*, (1905) 2 Ch. 310.

**Bankers.**

They may also employ **Bankers** to hold the trust funds, provided the bank is one in good repute at the time. See Trustee Act, 1925, s. 23 (1); *Ex parte Belchier*, Ambler, 218; *Adams* v. *Claxton*, 6 Ves. 226; *Swinfen* v. *Swinfen*, 29 Beav. 211; but they must not leave the money with the bankers longer than is necessary. *Rehden* v. *Wesley*, 29 Beav. 213; *Lunham* v. *Blundell*, 27 L. J. 179; *Cann* v. *Cann*, 51 L. T. 770; *In re Earl*, 39 W. R. 107; nor should they place trust money in a bank so that it cannot be readily withdrawn (*e.g.*, in the name of themselves and another), for it is their duty to keep the control over the trust funds in their hands. *White* v. *Baugh*, 3 Clark & Fin. 44. See also *Re De Pothonier*, (1900) 2 Ch. 529.

**Solicitors.**

Trustees may also employ **Solicitors** so far as requisite for the purposes of the trust, but they must be careful in the selection, and must not (unless the deed otherwise provides) employ such solicitor to perform duties other than those which fall within the ordinary scope of his professional work. See Trustee Act, 1925, s. 23, *infra*; *Andrews* v. *Weall*, 42 Ch. D. 674.

Trustees may employ **Accountants** where accounts are complicated. See Trustee Act, 1925, s. 22 (4). **Accountants.**

Trustees may employ **Bailiffs** to collect debts, and also **Attorneys** to transact business abroad. *Stuart* v. *Norton*, 14 Moore P. C. 17; *De Bussche* v. *Alt*, 8 Ch. D. 286; and valuers, *Re Solomon, Vori* v. *Meyer*, (1912) 1 Ch. 261. **Bailiffs.** **Attorneys.**

The rationale of such exceptions is that in all such cases the employment of an expert is in the interest of the trust estate.

A trustee who is about to go abroad can delegate the trust under sect. 25 of the Trustee Act, 1925. Going abroad.

5. The trustees should use their best endeavours to protect the trust funds, but they may be partially relieved from this obligation by the terms of the trust deed expressly sanctioning dealings or risks which would otherwise be improper. In particular, the title deeds and securities of property specifically mortgaged to the trustees should be placed in safe custody, either at a bank or safe deposit, in joint names, and in such manner that a single trustee cannot obtain access without the consent and approval of the others. Protection of trust funds.

The custody of the title deeds goes with the legal estate in the property, and trustees of a trust deed are therefore entitled to retain such custody though a receiver has been appointed, but they must give the receiver inspection. *Ind, Coope & Co., Fisher* v. *Same*, 26 T. L. R. 11, C. A.

Trustees may vote in respect of shares of companies mortgaged to them and standing in their name as they consider best in the interests of the debenture holders. *Siemens Bros. & Co.* v. *Burns*, (1918) 2 Ch. 324; and they may require their holding to be split up into two or more joint holdings, with their names in different orders, in order to enable them to use their voting power most beneficially. *Burns* v. *Siemens Bros., Ltd.*, (1919) 1 Ch. 225.

6. Where the trust premises comprise buildings, or other insurable property, the trustees should ascertain whether such property is, or is not, insured, and, if not insured, should consider whether they should or should not, exercise the power vested in them by sect. 19 of the Trustee Act, 1925, *infra*, p. 99. Insurance.

7. They should also see to the repair of the trust premises, and if they fall into disrepair should call on the company to put them in repair; and, in default, should apply to the Court or to the debenture holders. Repairs.

8. They should take all proper steps by registration, notice and otherwise to perfect their title to trust property so that the company or its assigns may not be able to deal with it and create a title paramount in some third person. Perfecting title.

Exacting performance of covenants.

9. They should see to the performance by the company of the covenants and obligations entered into and undertaken by it under the deed.

Interest and duty: avoiding conflict of.

10. They must studiously abstain from placing themselves in a position in which their interest might—not merely does but might—conflict with their duty as trustees, and, in particular, they must not attempt to purchase, or be interested in the purchase of, any part of the trust premises (*Parker* v. *McKenna*, L. R. 10 Ch. 96); nor must they accept any secret benefit, much less any bribe, in relation to the exercise of their powers or the performance of the trusts.

It would seem, however, that trustees are not agents within the Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34).

Discretion in acting.

11. They should act with due caution and judgment in administering the trusts. Thus, on the one hand, they should abstain from premature intervention, *e.g.*, a precipitate sale of securities. *Rowley* v. *Adams*, 2 H. L. C. 725; *Buxton* v. *Buxton*, 1 M. & Craig, 80. On the other hand, where delay may involve danger to the trust premises they should act with the utmost promptness. They are not, however, bound to take the opinion of an expert; they may act on their own judgment, and if they act honestly will not be held responsible for loss resulting from an error of judgment. *Re Chapman*, *Cocks* v. *Chapman*, (1896) 2 Ch. 763.



Assistance of counsel or Court.

12. They should, if grave questions of law arise, take the opinion of counsel, or, if so advised, of the Court, upon an originating summons under the R. S. C., Ord. 55, r. 3. The Court can sanction that which the trustees have no power under the deed to do. See Trustee Act, 1925, s. 57; and, as to the powers of the Court before that Act, *Re New*, (1901) 2 Ch. 534; *Morgan's Brewery Co.* v. *Crosskill*, (1902) 1 Ch. 898.

Giving information.

13. They should, on demand, furnish their *cestuis que trust*—the debenture holders or debenture stockholders—with information as to the mode in which the trust fund has been dealt with and where it is. See Lindley, L. J., *Low* v. *Bouverie*, (1891) 3 Ch. 99.

Not to ignore interests of company.

14. They should act with due regard to the interests, not only of the debenture holders, but of the company, that is, they must not sacrifice the interests of the company merely because they have not a good enough margin of security, remembering that to a great extent the interests of the company and of the debenture holders or debenture stockholders are identical, that they are metaphorically speaking all in the same boat. Nevertheless, they must bear in mind, so soon as the interests of the debenture holders and of the company begin to diverge, that their *first* duty is to look after the debenture holders; for although the security is framed as a conveyance on trust to sell, in certain contingencies, it is in substance a mortgage.

"I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But this distinction makes no substantial difference in his position, which is that of a mortgagee." Wood, V.-C., *Kirkwood* v. *Thompson*, 2 H. & M. 392, approved in *Locking* v. *Parker*, 8 Ch. 39, C. A.

Statutes of Limitations.

Lastly, there is no statute of limitation applicable in favour of trustees as against a claim founded upon any fraud or fraudulent breach of trust, or to recover trust property retained or converted by the trustees. *Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444; *Thorne* v. *Heard*, (1895) A. C. 495; *Re Davies, Ellis* v. *Roberts*, (1898) 2 Ch. 142. See sect. 8 of the Trustee Act, 1888, *infra*; and *Re Taylor*, 81 L. T. 812; *Re Sharp*, (1906) 1 Ch. 793.

EXTRACT FROM THE TRUSTEE ACT, 1888 (51 & 52 Vict. c. 59).

Statute of Limitations may be pleaded by trustees.

**8.**—(1) In any action or other proceeding against a trustee, or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a) All rights and privileges conferred by the statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(b) If the action or other proceeding is brought to recover money or other property and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

POWERS AND DUTIES OF TRUSTEES UNDER THE TRUSTEE ACT, 1925.

PART II.—GENERAL POWERS OF TRUSTEES AND PERSONAL REPRESENTATIVES.

*General Powers.*

Power of trustees for sale to sell by auction, &c.

**12.**—(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

(3) This section does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner.

Power to sell subject to depreciatory conditions.

**13.**—(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

(4) This section applies to sales made before or after the commencement of this Act.

Power of trustees to give receipts.

**14.**—(1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for—

(a) the proceeds of sale or other capital money arising under a disposition on trust for sale of land;

15 Geo. 5, c. 18.

(b) capital money arising under the Settled Land Act, 1925.

(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

Power to compound liabilities.

**15.** A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

(a) accept any property, real or personal, before the time at which it is made transferable or payable; or

(b) sever and apportion any blended trust funds or property; or

(c) pay or allow any debt or claim on any evidence that he or they think sufficient; or

(d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

(e) allow any time of payment of any debt; or

(f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

Power to raise money by sale, mortgage, &c.

**16.**—(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being also the statutory owners.

Protection to purchasers and mortgagees dealing with trustees.

**17.** No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

Devolution of powers or trusts.

**18.**—(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" does not include an executor who has renounced or has not proved.

Power to insure.

**19.**—(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

Application of insurance money where policy kept up under any trust, power or obligation.

**20.**—(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the Settled Land Act, 1925, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be.

(2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into Court.

(3) Any such money—

(a) if it was receivable in respect of settled land within the meaning of the Settled Land Act, 1925, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in Court, under the direction of the Court accordingly;

(b) if it was receivable in respect of personal chattels settled as heirlooms within the meaning of the Settled Land Act, 1925, shall be deemed to be capital money arising under that Act, and shall be applicable by the trustees, or, if in Court, under the direction of the Court, in like manner as provided by that Act with respect to money arising by a sale of chattels settled as heirlooms as aforesaid;

(c) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;

(d) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(4) Such money, or any part thereof, may also be applied by the trustees, or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of money subject to the trust, and, in the case of money which is deemed to be capital money arising under the Settled Land Act, 1925, be subject to the provisions of that Act with respect to the application of capital money by the trustees of the settlement.

(5) Nothing contained in this section prejudices or affects the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the rights of any mortgagee, lessor, or lessee, whether under any statute or otherwise.

(6) This section applies to policies effected either before or after the commencement of this Act, but only to money received after such commencement.

Deposit of documents for safe custody.

**21.** Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

Reversionary interests, valuations, and audit.

22.—(1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same falling into possession, or becoming payable or transferable may—

(a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;

(b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments;

(c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;

(d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release;

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

(2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

(a) to place any distringas notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid is derived, payable or charged; or

(b) to take any proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property or any of them or any part thereof are for the time being, or had at any time been, vested;

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken:

Provided that nothing in this sub-section shall relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession.

(3) Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust.

(4) Trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to him as he may require; and the costs of such examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

Power to employ agents.

**23.**—(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immoveable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

(3) Without prejudice to such general power of appointing agents as aforesaid—

(a) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

(b) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(c) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

Provided that nothing in this sub-section shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

This sub-section applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

Power to delegate trusts

**25.**—(1) A trustee intending to remain out of the United Kingdom for a period exceeding one month may, notwithstanding any rule of law or equity

to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from the United Kingdom of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons: during absence abroad.

Provided that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this sub-section.

(2) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

(3) The power of attorney shall not come into operation unless and until the donor is out of the United Kingdom, and shall be revoked by his return.

(4) The power of attorney shall be attested by at least one witness, and shall be filed at the Central Office within ten days after the execution thereof with a statutory declaration by the donor that he intends to remain out of the United Kingdom for a period exceeding one month from the date of such declaration, or from a date therein mentioned.

(5) The execution of any such instrument and statutory declaration shall be verified in such manner as is required by statute in the case of powers of attorney filed at the Central Office.

(6) If the power of attorney confers a power to dispose of or deal with land or a charge registered under the Land Registration Act, 1925, an office copy shall be filed at the land registry. 15 Geo. 5, c. 21.

(7) The statutory declaration aforesaid and a statutory declaration by the donee of the power of attorney that the power has come into operation and has not been revoked by the return of the donor shall be conclusive evidence of the facts in favour of any person dealing with the donee.

(8) In favour of any person dealing with the donee, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has become revoked by the act of the donor or by his death or otherwise, be as valid and effectual as if the donor were alive and of full capacity, and had himself done such act or executed such instrument, unless such person had actual notice that the power had never come into operation or of the revocation of the power before such act was done or instrument executed.

(9) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

(10) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

(11) In this section "trustee" includes a tenant for life and a statutory owner.

Protection in regard to notice.

**28.** A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

Exoneration of trustees in respect of certain powers of attorney.

**29.** A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying:

Provided that—

(a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;

(b) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Implied indemnity of trustees.

**30.**—(1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

## PART III.—APPOINTMENT AND DISCHARGE OF TRUSTEES.

Limitation of the number of trustees.

**34.**—(1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

(2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act—

(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(b) the number of the trustees shall not be increased beyond four.

(3) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply—

(a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or

(b) where the net proceeds of the sale of the land are held for like purposes; or

(c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

Appointments of trustees of settlements and dispositions on trust for sale of land.

35.—(1) Appointments of new trustees of conveyances on trust for sale on the one hand and of the settlement of the proceeds of sale on the other hand, shall, subject to any order of the Court, be effected by separate instruments, but in such manner as to secure that the same persons shall become the trustees of the conveyance on trust for sale as become the trustees of the settlement of the proceeds of sale.

(2) Where new trustees of a settlement are appointed, a memorandum of the names and addresses of the persons who are for the time being the trustees thereof for the purposes of the Settled Land Act, 1925, shall be endorsed on or annexed to the last or only principal vesting instrument by or on behalf of the trustees of the settlement, and such vesting instrument shall, for that purpose, be produced by the person having the possession thereof to the trustees of the settlement when so required.

(3) Where new trustees of a conveyance on trust for sale relating to a legal estate are appointed, a memorandum of the persons who are for the time being the trustees for sale shall be endorsed on or annexed thereto by or on behalf of the trustees of the settlement of the proceeds of sale, and the conveyance shall, for that purpose, be produced by the person having the possession thereof to the last-mentioned trustees when so required.

(4) This section applies only to settlements and dispositions of land.

Power of appointing new or additional trustees.

36.—(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed

to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

(4) The power of appointment given by sub-section (1) of this section or any similar previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.

(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.

(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the Court or otherwise, then and in any such case—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(9) Where a lunatic or defective, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by the continuing trustees or trustee, under this section, unless leave has been given by the Judge or Master in Lunacy to make the appointment.

**Supplemental provisions as to appointment of trustees.**

**37.**—(1) On the appointment of a trustee for the whole or any part of trust property—

(a) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and

(b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that

no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and

(c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.

(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust.

Evidence as to a vacancy in a trust.

**38.**—(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

(2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

Retirement of trustee without a new appointment.

**39.**—(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

Vesting of trust property in new or continuing trustees.

**40.**—(1) Where by a deed a new trustee is appointed to perform any trust, then—

(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest

in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates, interests and rights with respect to which a declaration could have been made.

(2) Where by a deed a retiring trustee is discharged under the statutory power without a new trustee being appointed, then—

(a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.

(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in sub-sections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

(4) This section does not extend—

(a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

(b) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

(c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

In this sub-section "lease" includes an underlease and an agreement for a lease or underlease.

(5) For purposes of registration of the deed in any registry, the person or persons making the declaration expressly or impliedly, shall be deemed the

conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(6) This section applies to deeds of appointment or discharge executed on or after the first day of January, eighteen hundred and eighty-two.

POWERS OF TRUSTEES AS MORTGAGEES UNDER THE LAW OF PROPERTY ACT, 1925.

Charges by way of legal mortgage.

87.—(1) Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) as if—

(a) where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three thousand years without impeachment of waste had been thereby created in favour of the mortgagee; and

(b) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee.

(2) Where an estate vested in a mortgagee immediately before the commencement of this Act has by virtue of this Act been converted into a term of years absolute or sub-term, the mortgagee may, by a declaration in writing to that effect signed by him, convert the mortgage into a charge by way of legal mortgage, and in that case the mortgage term shall be extinguished in the inheritance or in the head term as the case may be, and the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them) as if the mortgage term or sub-term had remained subsisting.

The power conferred by this sub-section may be exercised by a mortgagee notwithstanding that he is a trustee or personal representative.

(3) Such declaration shall not affect the priority of the mortgagee or his right to retain possession of documents, nor affect his title to or right over any fixtures or chattels personal comprised in the mortgage.

Realisation of freehold mortgages.

88.—(1) Where an estate in fee simple has been mortgaged by the creation of a term of years absolute limited thereout or by a charge by way of legal mortgage and the mortgagee sells under his statutory or express power of sale—

(a) the conveyance by him shall operate to vest in the purchaser the fee simple in the land conveyed subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured, and thereupon;

(b) the mortgage term or the charge by way of legal mortgage and any subsequent mortgage term or charges shall merge or be extinguished as respects the land conveyed;

and such conveyance may, as respects the fee simple, be made in the name of the estate owner in whom it is vested.

(2) Where any such mortgagee obtains an order for foreclosure absolute, the order shall operate to vest the fee simple in him (subject to any legal mortgage having priority to the mortgage in right of which the foreclosure is obtained and to any money thereby secured), and thereupon the mortgage term, if any, shall thereby be merged in the fee simple, and any subsequent mortgage term or charge by way of legal mortgage bound by the order shall thereupon be extinguished.

(3) Where any such mortgagee acquires a title under the Limitation Acts, he, or the persons deriving title under him, may enlarge the mortgage term into a fee simple under the statutory power for that purpose discharged from any legal mortgage affected by the title so acquired, or in the case of a chargee by way of legal mortgage may by deed declare that the fee simple is vested in him discharged as aforesaid, and the same shall vest accordingly.

(4) Where the mortgage includes fixtures or chattels personal any statutory power of sale and any right to foreclose or take possession shall extend to the absolute or other interest therein affected by the charge.

(5) In the case of a sub-mortgage by sub-demise of a long term (less a nominal period) itself limited out of an estate in fee simple, the foregoing provisions of this section shall operate as if the derivative term, if any, created by the sub-mortgage had been limited out of the fee simple, and so as to enlarge the principal term and extinguish the derivative term created by the sub-mortgage as aforesaid, and to enable the sub-mortgagee to convey the fee simple or acquire it by foreclosure, enlargement, or otherwise as aforesaid.

(6) This section applies to a mortgage whether created before or after the commencement of this Act, and to a mortgage term created by this Act, but does not operate to confer a better title to the fee simple than would have been acquired if the same had been conveyed by the mortgage (being a valid mortgage) and the restrictions imposed by this Act in regard to the effect and creation of mortgages were not in force, and all prior mortgages (if any) not being merely equitable charges had been created by demise or by charge by way of legal mortgage.

**Realisation of leasehold mortgages.**

**89.**—(1) Where a term of years absolute has been mortgaged by the creation of another term of years absolute limited thereout or by a charge by way of legal mortgage and the mortgagee sells under his statutory or express power of sale—

(a) the conveyance by him shall operate to convey to the purchaser not only the mortgage term, if any, but also (unless expressly excepted with the leave of the Court) the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured, and thereupon

(b) the mortgage term, or the charge by way of legal mortgage and any subsequent mortgage term or charge, shall merge in such leasehold reversion or be extinguished unless excepted as aforesaid ;

and such conveyance may, as respects the leasehold reversion, be made in the name of the estate owner in whom it is vested.

Where a licence to assign is required on a sale by a mortgagee, such licence shall not be unreasonably refused.

(2) Where any such mortgagee obtains an order for foreclosure absolute, the order shall, unless it otherwise provides, operate (without giving rise to a forfeiture for want of a licence to assign) to vest the leasehold reversion affected by the mortgage and any subsequent mortgage term in him, subject to any legal mortgage having priority to the mortgage in right of which the foreclosure is obtained and to any money thereby secured, and thereupon the mortgage term and any subsequent mortgage term or charge by way of legal mortgage bound by the order shall, subject to any express provision to the contrary contained in the order, merge in such leasehold reversion or be extinguished.

(3) Where any such mortgagee acquires a title under the Limitation Acts, he, or the persons deriving title under him, may by deed declare that the leasehold reversion affected by the mortgage and any mortgage term affected by the title so acquired shall vest in him, free from any right of redemption which is barred, and the same shall (without giving rise to a forfeiture for want of a licence to assign) vest accordingly, and thereupon the mortgage term, if any, and any other mortgage term or charge by way of legal mortgage affected by the title so acquired shall, subject to any express provision to the contrary contained in the deed, merge in such leasehold reversion or be extinguished.

(4) Where the mortgage includes fixtures or chattels personal, any statutory power of sale and any right to foreclose or take possession shall extend to the absolute or other interest therein affected by the charge.

(5) In the case of a sub-mortgage by sub-demise of a term (less a nominal period) itself limited out of a leasehold reversion, the foregoing provisions of this section shall operate as if the derivative term created by the sub-mortgage had been limited out of the leasehold reversion, and so as (subject as aforesaid) to merge the principal mortgage term therein as well as the derivative term created by the sub-mortgage and to enable the sub-mortgagee to convey the leasehold reversion or acquire it by foreclosure, vesting, or otherwise as aforesaid.

(6) This section takes effect without prejudice to any incumbrance or trust affecting the leasehold reversion which has priority over the mortgage in right of which the sale, foreclosure, or title is made or acquired, and applies to a mortgage whether executed before or after the commencement of this Act, and to a mortgage term created by this Act, but does not apply where the mortgage term does not comprise the whole of the land included in the leasehold reversion unless the rent (if any) payable in respect of that reversion has been apportioned as respects the land affected, or the rent is of no money value or no rent is reserved, and unless the lessee's covenants and conditions (if any) have been apportioned, either expressly or by implication, as respects the land affected.

Powers incident to estate or interest of mortgagee.

**101.**—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest wherein is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof; or, if

the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof; and

(iv) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2) Where the mortgage deed is executed after the thirty-first day of December, nineteen hundred and eleven, the power of sale aforesaid includes the following powers as incident thereto (namely):—

(i) A power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing;

(ii) A power to sell the mortgaged property, or any part thereof, or all or any mines and minerals apart from the surface:—

(a) With or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold; and

(b) With or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements, rights, and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold; and

(c) With or without covenants by the purchaser to expend money on the land sold.

(3) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(4) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of the mortgage deed and to the provisions therein contained.

(5) Save as otherwise provided, this section applies where the mortgage deed is executed after the thirty-first day of December, eighteen hundred and eighty-one.

(6) The power of sale conferred by this section includes such power of selling the estate in fee simple or any leasehold reversion as is conferred by the provisions of this Act relating to the realisation of mortgages.

Regulation of exercise of power of sale.

**103.** A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been

made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, or in an enactment replaced by this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Conveyance on sale.

**104.**—(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage.

(2) Where a conveyance is made in exercise of the power of sale conferred by this Act, or any enactment replaced by this Act, the title of the purchaser shall not be impeachable on the ground—

(a) that no case had arisen to authorise the sale; or

(b) that due notice was not given; or

(c) where the mortgage is made after the commencement of this Act, that leave of the Court, when so required, was not obtained; or

(d) whether the mortgage was made before or after such commencement, that the power was otherwise improperly or irregularly exercised;

and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.

Application of proceeds of sale.

**105.** The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

Provisions to exercise of power of sale.

**106.**—(1) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(2) The power of sale conferred by this Act does not affect the right of foreclosure.

(3) The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected therewith, or, where the mortgage is executed after the thirty-first day of December, nineteen hundred and eleven, of any power or provision contained in the mortgage deed.

(4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagee's receipts, discharges, &c.

**107.**—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act, but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and application of insurance money.

**108.**—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):—

(i) Where there is a declaration in the mortgage deed that no insurance is required;

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Act authorised to insure.

(3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied in or towards the discharge of the mortgage money.

Appointment, powers, remuneration and duties of receiver.

**109.**—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the powers conferred by this Act, or any enactment replaced by this Act, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows (namely):—

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage; and

(v) In or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

## CHAPTER XIV.

### TIME FOR PAYMENT AND REDEMPTION OF DEBENTURES AND DEBENTURE STOCK.

When made payable.

DEBENTURES and debenture stock deeds, framed in the usual form, are made payable at the expiration of a fixed term of years, *e.g.*, ten, twenty, or thirty years from the date of issue, but to this is commonly annexed a condition or qualification providing that the principal moneys shall immediately become payable—

(a) If the company makes default for a period of six months in the payment of any interest secured by the debenture and the registered holder thereof before such interest is paid by notice in writing to the company calls in such principal moneys, or,

(b) If an order is made or a resolution is passed for the winding-up of the company.

At times the condition specifies additional events on the happening of which the principal moneys are to be payable. See *infra*, p. 118. And as to acceleration in case of non-registration, see *infra*, p. 119.

Sometimes debentures and debenture stock are made payable when drawn for redemption.

Occasionally debentures are made payable on demand simply, or seven or fourteen days after demand. As to what is a demand, see *Worthington* v. *Abbott*, (1910) 1 Ch. 588.

They can be made payable on demand or a thousand years hence, or on any contingency which the parties may choose to specify.

But besides variations like these in the matter of payment there are what are called perpetual, or permanent debentures and debenture stock. The peculiarity of these is—and it is hence they derive their name—that no date is fixed for repayment of the principal: it is—by the frame of the debenture or debenture stock—not to be payable until the happening of certain events, such as those specified in clauses (a) or (b) above referred to.

There was a doubt whether perpetual debentures or debenture stock, if secured on property of the company, were not obnoxious to the rule of equity which invalidated any clog on the equity, that is, any condition making a mortgage irredeemable or unduly postponing the

period of redemption. See *Salt* v. *Marquess of Northampton*, (1892) A. C. 1; *Noakes* v. *Rice*, (1902) A. C. 24; *Samuel* v. *Jarrah Timber Co.*, (1904) A. C. 323; *Reeve* v. *Lisle*, (1902) A. C. 461. The doubt, however, was removed by sect. 14 of the Companies Act, 1907, now replaced by sect. 74 of 1929, which provides that a condition contained in any debentures or in any deed for securing any debentures, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.

Perpetual debentures.

This covers debenture stock, see sect. 380.

Perpetual debentures or debenture stock are repayable by the company at par in a winding-up, unless the contract otherwise provides. *Southern Brazilian Rio Grande do Sul Co.*, (1905) 2 Ch. 78.

Premium on redemption. *Whether valid.*

As already mentioned, it is common enough to make debentures and debenture stock redeemable at a premium at or before maturity. If there is a fixed time for payment or redemption, say twenty, thirty, or fifty years, and power to redeem previously at a premium, there can be no doubt that this is not a clog on the equity of redemption, or an unjustifiable collateral advantage; it is merely compensation for premature redemption. So, too, if the debentures or debenture stock are issued at a premium, and made payable or redeemable at a like premium, that cannot be regarded as a clog. But suppose they are issued at par, or at a premium, and made payable at maturity at a premium, or higher premium, is that provision for this premium or excess premium to be regarded as a clog or collateral advantage? It appears now to be quite clear that such provisions are not to be regarded as clogs on the equity, but as, in substance, a deferred bonus for the advance. Debentures may be issued at a discount. *Campbell's case*, 4 Ch. D. 470; *Anglo-Danubian Co.*, 20 Eq. 339. Debenture stock issued at par, but made payable at a premium, seems to stand on the same footing. See also *Mainland* v. *Upjohn*, 41 Ch. D. 126 (where the deduction of a bonus of 5 per cent. from the amount advanced was held valid); and *Potter* v. *Edwards* (1857), 26 L. J. Ch. 468.

In *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307, the older authorities were reviewed, and it was held that the statement of the law by Sir J. Trevor in *Jennings* v. *Ward*, 2 Vernon, 520, where he said: "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any bye-agreement," was too widely expressed; and that the rule is that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain; and that the obligation is on those who impeach the bargain to show that it is unconscionable or oppressive. Chitty, L. J., in that case said: "The present appears to me to be a reasonable trade bargain

between two persons who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside."

A similar doctrine was applied by the House of Lords in *G. & C. Kreglinger* v. *New Patagonia Meat Co., Ltd.*, (1914) A. C. 25, in which Lord Haldane, L. C., expressed his opinion that the rule applies to a floating charge as much as to any other mortgage security; but it was held that a collateral advantage reserved to the lenders for a fixed period was not terminated by payment off of the loan, the arrangement being a perfectly fair and business-like transaction (see per Lord Parker, at p. 61).

Clog on equity.

Where, however, a share of profits (in addition to interest at 10 per cent. per annum) was to be paid on each debenture until a bonus of 100 per cent. had been paid, the bonus was held to be a clog on the equity of redemption and ceased to be payable after the principal sum and interest had been paid off. *Re Rainbow Syndicate, Ltd.*, W. N. (1916) 178. The debenture holder had in this case taken proceedings to enforce payment of the debenture.

See further, as to clogging, *Salt* v. *Marquess of Northampton*, (1892) A. C. 1; *Bradley* v. *Carritt*, (1903) A. C. 253; *Browne* v. *Ryan*, (1901) 2 I. R. 671; *Samuel* v. *Jarrah Timber and Wood Paving Corpn.*, (1904) A. C. 323; *De Beers Consolidated Mines* v. *British South Africa Co.*, (1912) A. C. 52; and *Cuban Land and Development Co.*, (1921) 2 Ch. 147 (where debenture holders had a right to share in surplus assets on a winding-up).

### Drawings.

Redemption by drawings.

Provision is very commonly made for the redemption of debentures or debenture stock pursuant to drawings. See Forms 62 and 63, *infra*.

Specific performance of contracts to create charges.

It has not yet been settled whether a company can be compelled to make drawings pursuant to its contract, but it is conceived that it can, in equity, be so compelled. The usual mode of securing the due performance of such provisions is by enabling the debenture holders, or debenture stockholders, to call in their money to enforce their security if the company makes default.

There seems no ground for the doubt suggested by Jessel, M. R., in *Sykes* v. *Beadon*, 11 Ch. D. 170, 185, that such a drawing is obnoxious to the Lottery Acts. See *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685.

### When the Company entitled to Redeem or Pay off.

Payment at maturity.

That a bargain is a bargain is a maxim as applicable to a loan secured by debenture or debenture stock as to the purchase of an estate or the chartering of a ship. Accordingly, a company issuing

debentures or debenture stock cannot redeem or pay off the same in contravention of the terms of issue: thus, where debentures are by the contract embodied in the instrument made payable simply at a specified date, say ten years after issue, the company cannot compel the debenture holder to accept payment and give up his security until the expiration of the stipulated ten years; subject, however, to what is said below as to a winding-up. *Browne* v. *Cole*, 14 Simon, 427.

Accelerating conditions.

Usually, however, as we have seen, a debenture is made payable at a fixed date, *or at such earlier time as the principal moneys hereby secured shall become payable in accordance with the conditions indorsed hereon.* The conditions thus engrafted on the contract generally provide that the principal moneys shall become due—(a) if the company makes default in payment of interest for (say) six months, and the holder before payment of the interest by notice in writing to the company calls in the principal moneys, or (b) if an order is made, or a resolution is passed, for the winding-up of the company: but the conditions do not always stop there. They very commonly go on to provide that the company may, after a certain fixed time from the date of issue, give notice in writing to the debenture holder of its intention to pay off the debenture, and that the principal moneys shall thereupon become payable at the expiration of, say, six months after the giving of such notice. And sect. 79 (1) of the Companies Act, 1929, re-enacting sect. 10 of the Companies Act, 1907, introduces another provision by way of acceleration, for that section, after requiring the registration of mortgages and charges to secure debentures or debenture stock and making void those not duly registered, enacts that "When a charge becomes void under this section the money secured thereby shall immediately become payable." This also applies to debenture stock (sect. 380).

Enforcing right to redeem.

Where the principal moneys thus become payable in accordance with the terms of the debenture as expressed in the conditions, the company is, of course, entitled to pay off the debt and redeem the security, and should the debenture holder refuse to submit to being redeemed, the company can bring an action for redemption and compel him to accept payment.

Place of payment.

Where no place for payment is fixed, payment must be made to the creditor himself or his personal representatives; and where the creditor does not claim payment, the company must seek out the creditor and pay him, and unless the creditor does something to prevent payment the company, even after notice to pay off, is bound to pay interest at the rate agreed until payment or legal tender. *Fowler* v. *Midland Electric Corpn.*, (1917) 1 Ch. 527, 656.

Right to call for a transfer.

The company, like any other mortgagor, can call on the debenture holder to transfer on redemption; but if the transfer is to be to a

nominee of the company, the consent of the second mortgagees should be obtained. *Magneta Time Co., Ltd.*, W. N. (1915) 318; 84 L. J. Ch. 814.

Election to call in.

*Payment under Clause* (*a*) (Form 40 (10)).—Where the principal money has become due by reason of default on the part of the company in payment of interest, followed by a notice by the debenture holder calling in the principal moneys, the company can insist on paying the moneys, and it is too late for the debenture holder to waive his notice; he has made his election and cannot alter or withdraw it. *Scarf* v. *Jardine*, 7 App. Cas. 345; Part I., 15th ed., pp. 189, 190; *Grimwood* v. *Moss*, L. R. 7 C. P. 360; *Reg.* v. *Mayor of Wigan*, 14 Q. B. D. 908.

Accelerating winding-up for reconstruction.

*Payment under Clause* (*b*) (Form 40 (10)).—In cases where the debenture expressly provides that the principal moneys are to become due in the event of an order being made or an effective resolution being passed for the winding-up of the company, it sometimes happens that the company passes a resolution for voluntary winding-up, not with intent to terminate the business, but merely with a view to reconstruction, thus accelerating the time for payment. The suggestion is sometimes made that in such a case the condition ought not to be held operative, that it must be taken as intended to refer to a case where the company means to stop its business finally, not to one in which it merely proposes to reconstruct; and that it is wrong thus to allow the company to defeat its own contract by accelerating the time of payment of the debentures, or—to put it otherwise—to curtail the duration of the security, and so get an advantage out of its own wrong. This view, though plausible, is fallacious. There is no wrong done. The mere fact that the debenture holder is disappointed does not invest him with any legal or equitable right of complaint; the question is, what is the bargain he has entered into?—because by the terms of that bargain he is bound. If the debenture embodying the bargain is framed as above, and provides in an unqualified manner that the principal moneys shall become immediately payable in the event of a resolution being passed for the winding-up of the company, he—the debenture holder—having accepted his security without qualification, has no right to complain of the passing of such a resolution. He cannot say "*non hæc in fœdera veni*," for he must be presumed to have read and understood—even if he has not actually done so—the contract under which he claims, and to have accepted it with its consequences. As was said by Jessel, M. R. (*Griffith* v. *Paget*, 6 Ch. D. 511, 517), in reference to members of a company, they "must be taken to have read them [the regulations], and must be taken to have understood them; and if they are to be taken to

have read them and to have understood them, which they ought to do before entering into those contracts, they cannot complain if the contract is afterwards carried out. That appears to me a conclusive answer to any notion of hardship." And note, too, that it is the contract *in its true meaning* which they must be taken to understand. As Lord Selborne said in *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 70: "Each party must be taken to have made himself acquainted with the terms of the written contract . . . he must also in law be taken, though that it sometimes different from what the fact may be, to have understood the terms of the contract according to their proper meaning; and that being so, he must take the consequences, whatever they may be, of the contract which he has made." And see *Fryer* v. *Ewart*, (1902) A. C. 187. Disappointed investors, however, who are ignorant of this rule of law, are apt to complain of breach of faith and hardship.

Premiums upon reconstruction.

With a view to removing all cause of complaint as to this supposed grievance, it is now not uncommon to provide in debentures and debenture stock deeds that if a redemption takes place by reason of a voluntary winding-up, or a voluntary winding-up otherwise than for the purpose of reconstruction or amalgamation, before a specified date, the debenture holder shall receive a certain premium or sum in compensation. Such a provision may in some cases be very proper and reasonable; at all events, the London Stock Exchange authorities are in the habit of pressing the provision, or something equivalent to it.

Notice of intention to pay off.

In the case of an ordinary mortgage, when the mortgagor has made default in paying off the mortgage money and interest in accordance with the conditions for redemption, the mortgagee is entitled *primâ facie* to six months' notice in writing before payment off.

But if he takes steps to enforce payment, or enters into possession, he is bound to accept payment without notice. *Bovill* v. *Endle*, (1896) 1 Ch. 648; *Ex parte Wickens*, (1898) 1 Q. B. 543. The proviso for redemption in a mortgage is strictly construed, and if it does not in terms provide for the payment of the interest within a specified time, non-payment of such interest on the dates fixed for payment will not give to the mortgagee a right of foreclosure if the interest is subsequently paid. *Williams* v. *Morgan*, (1906) 1 Ch. 804.

### When Debenture or Debenture Stockholders entitled to call for Payment.

This of course depends on the terms of the contract, whether express or implied. Thus, where the principal moneys are not made payable at any fixed time or in any specified event, the holder has an implied power to call in by giving six calendar months' notice to

the company. *Hopkins* v. *Worcester and Birmingham Canal*, 6 Eq. 437.

If the debenture fixes a day for payment of the principal moneys, they become payable on that day, and there is no implied power to call in at an earlier day: *expressum facit cessare tacitum*.

So if the debenture contains power for the debenture holder to call in after a specified day, he cannot call in earlier.

If a debenture provides for payment "on or after the 1st day of July next," and it is not paid on that day, the company must pay on six months' notice by the debenture holder. *Tewkesbury Gas Co., Tysoe* v. *The Company*, (1911) 2 Ch. 279; (1912) 1 Ch. 1. But such a debenture is rarely issued.

And if a specified notice is required, a shorter notice is not effective. *Rogers & Co.* v. *British and Colonial, &c. Assocn.*, 68 L. J. Q. B. 14; 79 L. T. 494. So where there is a fixed time for payment the Court will not imply a provision that if the interest gets into arrear the holders may call in the principal due. *Edwards* v. *Martin*, 25 L. J. Ch. 284; *Williams* v. *Morgan*, (1906) 1 Ch. 804.

The mere fact that the company has by the terms of the debenture power to pay off does not imply a corresponding power in the debenture holder to claim payment.

And where there are provisions for drawings, default by the company in regard thereto does not of itself imply power to call in the debentures or debenture stock. See *Tewkesbury Gas Co., supra*.

If the debenture is made payable on demand, it will become payable when demand is made, and if payable in the event of a resolution being passed for winding-up, it will become payable accordingly, whatever may have been the motive with which such resolution was passed.

As to acceleration of the time for payment where a mortgage or charge for any debentures is not registered in due time, see *supra*, p. 119.

As to the implied right to enforce the security in the event of a winding-up before maturity, and as to the implied right to have a receiver appointed where the security is in jeopardy, see *infra*, p. 496.

As to the power to prove in winding-up before maturity, see *infra*, p. 496.

## CHAPTER XV.

### EXECUTION OF DEBENTURES AND TRUST DEEDS.

Sealing of debentures.

DEBENTURES of a company are usually under the common seal of the company. Such a form has the advantage, amongst other things, of raising an estoppel, and of dispensing with the statement of the consideration; but, unless the articles of the company so provide, sealing is not essential. *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142.

The debenture may be signed by any person duly authorized in this behalf by the company.

Sealing of trust deeds.

With trust deeds it is different. They are almost always under seal, and where the deed contains a conveyance or demise of landed property, it is, of course, necessary that it should be under seal. See Part I., 15th ed., pp. 73, 74.

Special formalities required by regulations.

Sometimes the articles of the company contain special provisions as to the form of execution of securities by the company, and when this is the case, those who deal with the company are by a well-recognized rule bound to see that an instrument issued by it in pursuance of its regulations accords on the face of it with the requirements of such regulations. See p. 128. But this is now subject to an exception introduced by sect. 74 of the Law of Property Act, 1925, under which in favour of a purchaser a deed is to be deemed to have been duly executed by a company if its seal is affixed thereto in the presence of and attested by its secretary (or similar officer) and a member of the board of directors. Thus the articles may require that every instrument to which the seal is affixed must be signed by two directors; and where they do so, any person, other than a purchaser, taking an instrument other than a deed (*e.g.*, a share certificate) must see that it is so signed; or again, the articles may declare, as they generally do, who is to have power to affix the seal. Usually the power is expressly vested in the directors, if not, it is impliedly so vested (*Barned's Banking Co.*, 3 Ch. 105), and in either of these cases the power is exercisable—and will be duly exercised—by resolution passed at a board meeting; but it by no means follows that where the seal has been irregularly affixed, the instrument is therefore ineffective. See *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629. The seal there had been affixed at an irregular board meeting, but the company was nevertheless held bound by it, the instrument appearing

Presumption of regularity.

to be in accordance with the articles and *ex facie* regular. See also *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142, at p. 150. In such cases the law draws a distinction between external and internal regulations, or, as it is sometimes expressed, between outdoor and indoor management. See *infra*, p. 128. With the one—the outdoor management, the external position of the company—a person dealing with the company must acquaint himself; but with the indoor management he need not, and for the very good reason that, as an outsider, he cannot —he has no means of doing so. *Davies* v. *R. Bolton & Co.*, (1894) 3 Ch. 678; and see Chap. XVI.

Apart from the rule above referred to, and in the absence of any special provision in the articles (*infra*, p. 128), the seal of the company having been affixed to an instrument without authority cannot make such instrument binding on the company though it may be some evidence of an agreement by the company. *Bank of Ireland* v. *Evans' Trustees*, 5 H. L. C. 389; *Mayor of the Staple* v. *Bank of England*, 21 Q. B. D. 160; *Ruben* v. *Great Fingall Consolidated*, (1906) A. C. 439.

In the last mentioned case it is pointed out that it is not "incumbent on the company to lock up their seal and guard it as a dangerous beast," and that it is not "culpable negligence on the part of the directors to commit the care of the seal to the secretary or any other official."

**Delivery.** A deed to be effective must not only be sealed but *delivered*, and this in the case of a corporation is done like any other act by the corporation's accredited agents—the directors. In the case, however, of a corporation, the affixing of the seal *primâ facie* imports delivery. "Le fait d'un corporation ne besoign ascun delivery nes l'apposition del common seale done perfection al ces sans ascun deliverie." Rol. Abr. 23 (1), 50; and see Comyns' Digest, Fact A (3), that "a common seal fixed to the deed of a corporation is tantamount to a delivery." Accordingly, whilst in the case of a private individual it is usual to add an attestation clause to the effect that the instrument was "signed, sealed, and *delivered*" in the presence of the witness, in the case of a company the clause merely states that "the common seal was affixed hereto in the presence of —— and ——." *Omnia præsumuntur rite esse acta*, including delivery.

**Escrow.** There is no doubt, however, that a corporation can execute a deed (without delivery) in escrow, *i.e.*, can seal it subject to a condition suspending its efficacy.

As Lord Cranworth said in *Xenos* v. *Wickham*, L. R. 2 H. L. 323: "The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession. This as a general proposition of law cannot be controverted. It is not affected

by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or until some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow. . . . I know of nothing intermediate between a deed and an escrow" (p. 324).

Intention to deliver as escrow.

Whether an instrument sealed by a company is to operate as a complete and operative instrument or as an escrow depends on the intention of the parties as expressed or implied. See *Derby Canal Co.* v. *Wilmot*, 9 East, 360. In that case the company's seal had been affixed to a conveyance; but the clerk was directed to retain it until certain accounts were adjusted, and Lord Ellenborough, C. J., and the rest of the Court held that, "in order to give the instrument effect the affixing of the seal must be done with intent to pass the estate. Otherwise it operates no more than a feoffment would do without delivery of seisin; whereas here, though the seal was directed to be and was affixed to the instrument for form, yet it was with a reservation of any present effect to pass the title out of the company, as they did not choose to deliver over the possession of the conveyance till the accounts were settled between them and the purchaser." An express condition is not essential to suspend the operation of a deed if the circumstances denote it. *Bowker* v. *Burdekin*, 11 M. & W. 128; *Walker* v. *Ware, &c. Ry. Co.*, 35 Beav. 52. See, too, *Mowatt* v. *Castle Steel, &c. Co.*, 34 Ch. D. 58, in which the Court found, as a fact, that debentures to bearer sealed by the company had not in fact been delivered, and held them void in consequence.

It is quite consistent with this, however, that the company may be estopped from setting up non-delivery where an instrument under the seal of the company is taken in good faith. *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629. See *infra*, p. 126; and *primâ facie*, where a deed is sealed with the common seal and the usual attestation clause is signed, it is to be taken as a completed instrument, unless it is shown that it was conditionally delivered to some third party. Thus, in *Roberts* v. *Security Co.*, (1897) 1 Q. B. 111, where a policy had, before payment of the first premium, been executed, it was nevertheless held to be operative. "I do not see," said Lord Esher, M. R. (p. 114), "any evidence of a conditional delivery or that this document was intended not to be a policy unless certain conditions were fulfilled. The document states that in witness thereof the company have caused their common seal to be affixed,

and that the undersigned, being two directors and the secretary of the company, have thereunto set their hands. It is urged that the document was still in the hands of the company or of their officers on their behalf. There is no suggestion that it was delivered to any one as an escrow. If it was in the hands of the company itself it cannot be delivered as an escrow. The proper inference appears to me to be that the directors simply executed the policy, and the fact that it remained in their hands, or, as I suppose, in the hands of their secretary on their behalf, does not seem to me material. The company might have delivered the policy to some one to hold as an escrow, but they did not, and never intended to do so." See also *London Freehold, &c. Co.* v. *Sufficld*, (1897) 2 Ch. 608.

Where an instrument is delivered as an escrow, it will not take effect until the condition is fulfilled. *Watkins* v. *Nash*, 20 Eq. 262; *Nash* v. *Flynn*, 1 Jo. & Lat. 162; *Whelan* v. *Palmer*, 39 Ch. D. 648. But so soon as the condition is fulfilled, the deed, it seems, takes effect from the original sealing and delivery. Shep. Touch, 58; *Graham* v. *Graham*, 1 Ves. jun. 274; *Roberts* v. *Security Co.*, (1897) 1 Q. B. 111.

Deed executed in blank.

A deed issued in blank, that is, with a blank left for the name of the purchaser, is void as a deed (*Hibblewhite* v. *McMorine*, 6 M. & W. 200); but this will not prevent the agreement in pursuance of which it is issued being enforced. Thus, where a company agrees for valuable consideration to issue debentures, and such debentures are void as deeds by reason of their being issued in blank, the holders are entitled to stand in the same position as if valid debentures had been issued to them, and to equal rights with other debenture holders under the trusts of a covering deed. *Re Queensland, &c. Co.*, (1894) 3 Ch. 181; *Hampshire Land Co.*, (1896) 2 Ch. 743; *New Durham Salt Co.* (1890), 2 Meg. 360; 7 T. L. R. 13.

## CHAPTER XVI.

### CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES.

Notice of memorandum and articles.

PERSONS who subscribe for debentures or debenture stock of a company, or otherwise have dealings with a company formed or registered under the Companies Acts, are presumed to have read and understood the company's memorandum and articles of association, and also the Acts under which the company is constituted, and it is no answer that in fact they have not perused these documents. They ought to have done so; for the memorandum and articles of association and any special resolutions passed by the company are public documents, and as such open to inspection by anyone at the office of the Registrar of Companies.

Obligation to read the documents.

"It is settled," says Lord Hatherley, in *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869, "by a series of decisions of which *Ernest* v. *Nicholls*, 6 H. L. C. 401, is one, and *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327, a later one, that those who deal with joint stock companies are bound to take notice of what I call the external position of the company. Every joint stock company has its memorandum and articles of association. . . . Those articles of association . . . are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents." Lord Halsbury, L. C., in the *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629, affirms the same principle in somewhat different language: "Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company, that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which everyone has a right to refer to, disclose any infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority." See also *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; *Owen and Ashworth, and Whitworth's Claims*, (1901) 1 Ch. 115.

Lord Halsbury, L. C., states the rule.

Consequences.

This rule of constructive notice entails important consequences, for inasmuch as every one dealing with a company is to be deemed to have notice of its memorandum and articles it follows that—

(1) He is fixed with notice of the extent of the company's objects and the consequent limitation of its powers and sphere of action, and cannot therefore hold the company to any contract which is beyond its objects, and *ultra vires* the company. *Ashbury, &c. Co.* v. *Riche*, L. R. 7 H. L. 653; *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354.

(2) He is fixed with notice of the extent of the directors' powers, and of any limitations and restrictions thereon imposed by the articles or other the regulations of the company. Thus, if the regulations provide that the directors shall not borrow or raise money to an amount exceeding, say, 50,000*l.*, a subscriber for debentures or debenture stock must ascertain that his debentures or debenture stock are within the limit, for should they be in excess of the limit, the security may be mere waste paper. An exception to this rule has been made by sect. 74 of the Law of Property Act, 1925, which provides that in favour of a purchaser a deed shall be deemed to have been duly executed by a company if its seal be affixed thereto in the presence of and attested by its secretary (or similar officer) and a director (or similar officer). Subject to this exception, if the articles provide that the seal of the company is to be affixed in the presence of two directors, who are to sign their names, a person dealing with the company cannot safely rely on an instrument not so signed. It is on the face of it informal and irregular. See *Eagle Co.*, 4 K. & J. 549; *Agar* v. *Athenæum Soc.*, 3 C. B. N. S. 725. This doctrine of constructive notice is an onerous one, but the burden of the obligation is to some extent lightened by what is known as the

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

How far outsiders may presume regularity of proceedings.

This rule is that, where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement, or memorandum and articles registered in some public office, persons dealing with the company, though they are bound to read the Act and registered documents and to see that the proposed dealing is not inconsistent therewith, are not bound to do more. They need not inquire into the regularity of the internal proceedings—"the indoor management," as Lord Hatherley called it: whether, for instance, a meeting was duly convened, or a quorum was present, or

whether directors were duly elected. Outsiders dealing with a company are entitled to assume with respect to all such matters that everything has been done regularly, *omnia rite acta esse*. See also *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *Land Credit Co. of Ireland*, L. R. 4 Ch. 460; *County Life Assurance Co.*, L. R. 5 Ch. 288; *Hambro* v. *Burnand*, (1904) 2 K. B. 10; *Davies* v. *R. Bolton & Co.*, (1894) 3 Ch. 678.

This rule is based on principles of convenience and common sense. Business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.

Examples.

Thus, where the articles give power to borrow with the sanction of a general meeting, a lender need not inquire whether such sanction has in fact been obtained. *Royal British Bank* v. *Turquand*, *ubi supra*. He may assume that it has, and if he is acting *bonâ fide* will, even though the sanction has not in fact been obtained, stand in as good a position as if it had been obtained. So also if he acts in good faith and the company appears to have power he will be safe even though the money is not in fact raised for *intra vires* purposes. *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. C. 331; *Marseilles, &c. Ry. Co.*, 7 Ch. 161; *Re David Payne & Co.*, *Young* v. *David Payne & Co.*, (1904) 2 Ch. 608.

Borrowing limit.

Quorum.

In another case illustrating the rule the directors of a company had, under the articles, power to borrow and power to fix their own quorum and they fixed three as the quorum. A meeting of the directors was held at which *two* only were present, and at it the secretary was authorized to affix the company's seal to a mortgage. This was accordingly done by the secretary in the presence of the same two directors and the mortgage was handed over to the mortgagee. It was contended that the seal had not been duly affixed inasmuch as the two directors not being a quorum had no power to act; but it was held that this was only an internal irregularity with which the mortgagee need not concern himself, and that the execution of the deed was therefore valid. "All the public documents," said Lord Halsbury, L. C., "with which an outside person would be acquainted in dealing with the company would only show this, that by some regulations of their own—what Lord Hatherley describes as their indoor management—they were capable if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document seal with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description. It

turns out that their own internal regulation was that the number of directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the company of which an outside person would be cognizant would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned and had attended to effect the completion of that instrument." *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629. And see *Bank of Syria*, (1901) 1 Ch. 115, and *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. p. 142, where there was a quorum of one.

Managing director.

On the same principle, if there is a managing director and authority in the regulations for the directors to delegate to him, an outsider dealing with him is entitled to assume that he has power to do what he purports to do, provided that it is within the company's objects and the powers ordinarily conferred on a managing director and otherwise apparently regular. All he has to do is to see that the managing director *might* have power to do what he purports to do. That is enough for a person dealing with him *bonâ fide*. *Biggerstaff* v. *Rowatt's Wharf*, (1896) 2 Ch. 93; *Hambro* v. *Burnand*, (1904) 2 K. B. 10. But where a servant of the company, such as a single director, secretary or bank manager, purports to make a contract on behalf of the company which is not within the ordinary ambit of the powers of such a servant, nor within the powers which the company has held him out as possessing, the company does not incur liability merely because under the articles power to make such a contract might have been delegated to him by the board. *Houghton & Co.* v. *Nothard, Lowe and Wills*, (1927) 1 K. B. 246; *Kreditbank Cassel* v. *Schenkers, Ltd.* (1927), *ibid*, p. 826. The dictum of Sargant, L. J., in the former case at p. 266, though explained by Lord Atkin in the latter (pp. 841—845), has led to the rule in *Royal British Bank* v. *Turquand* being somewhat sparingly applied in recent cases (see *South London Greyhound Racecourses, Ltd.* v. *Wake*, W. N. (1930) 243); but it is submitted that none of these cases can effectually modify the rule as laid down by the House of Lords in *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869 (above). The dictum of Sargant, L. J., was as follows: "Next, as to the power to delegate which is contained in the articles of association. In a case like this, where that power of delegation had not been exercised, and where admittedly Mr. Dart and the plaintiff firm had no knowledge of the existence of that power and did not rely on it, I cannot for myself see how they can subsequently make use of this unknown power so as to validate the transaction. They could rely on the fact of delegation had it been a fact, whether known to them or not. They

Servant acting outside general course of employment.

might rely on their knowledge of the power of delegation had they known of it as part of the circumstances entitling them to infer that there had been a delegation and to act on that inference though it were in fact a mistaken one. But it is quite another thing to say that the plaintiffs are entitled now to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted. No case was cited to us in which a binding obligation has been constructed out of so curious a combination and I cannot see any principle on which an obligation could be so constructed." The general rule was followed by the Court of Appeal in *British Thomson-Houston Co.* v. *Federated European Bank*, (1932) 2 K. B. 176. In that case the chairman of directors signed a guarantee on behalf of the company. The articles provided that two directors should be a quorum of the board, but contained power for the directors to delegate to any one or more of their body any of their powers (with specified exceptions). There was no evidence that the plaintiffs had read the articles or knew of the power of delegation. Scrutton, L. J., referring to the decision in *Houghton's case* (*supra*), said: "But Atkin, L. J., held that in certain circumstances the inquiry, whether directors have in fact nominated one of their number to do the act relied on, need not be made—namely, where directors have power to nominate one of their number to do acts on their behalf and a director is found acting in a matter in which normally a director would have power to act for his company. In that case, in the view of Atkin, L. J., a person dealing with the company would not be obliged to inquire whether the director had been formally invested with authority to do the act. Assuming that to be correct, in the present case we have a director acting in matters which are normally entrusted to directors. The learned judge (Macnaghten, J.) held that the chairman of a board of directors . . . was a person acting normally in the affairs of the defendant company. In my opinion he came to the right conclusion. The plaintiffs were entitled to assume that [the chairman] was duly authorized to act for the company"; and the Court held that the company was bound by the guarantee.

The true principle would appear to be, *omnia rite esse acta præsumuntur;* but a third party is put on inquiry if the agent is acting in a matter which is outside the ordinary scope of his employment, and the presumption is rebutted if the third party would have seen that the power was not, and could not, have been properly exercised, had he taken the precaution to read the memorandum and articles; but the presumption of regularity is not rebutted, if the third party would have seen, had he read the memorandum and articles, that the power in question could properly have been delegated to the agent who

purported to exercise it, the agent being a director or other officer who would ordinarily be entrusted with the power in question.

**Directors and presumption of due appointment.**

In the same way a person dealing with a company is entitled to assume that the directors who carry on its business are directors *de jure*. It matters not to him that they have not been duly appointed —that is part of the indoor management. *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869; *County Life, &c. Co.*, 5 Ch. 288; *Hampshire Land Co.*, (1896) 2 Ch. 743; *Duck* v. *Tower Galvanising Co.*, (1901) 2 K. B. 314.

**Notice of irregularity, consequence.**

But it is to be noted that the benefit of this rule is reserved for persons dealing with a company in honest ignorance of the irregularity. A person who has notice of the irregularity cannot claim the protection of the rule. Thus, where directors had only power to borrow in excess of 1,000*l.* with the assent of a general meeting, and without having obtained such assent had issued debentures for 2,500*l.* to themselves in respect of money lent to the company, it was held that, as they must be taken to have known that the internal regulations had not been complied with, the debentures could only stand good for 1,000*l.* *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156; *Tyne Mutual* v. *Brown*, 74 L. T. 283. And the mere fact that the directors propose to do something in excess of their powers under the articles will not entitle a person dealing with them to assume that their powers have been extended by a special resolution. He must take the articles to be such as appear at the office of the registrar of companies to be in force. Had a special resolution been passed it would have appeared on the file. *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

## CHAPTER XVII.

### LIABILITY OF DIRECTORS IN RELATION TO DEBENTURES OR DEBENTURE STOCK.

Directors' exemption from personal liability on the contract.

DIRECTORS are not under any personal liability *primâ facie* in relation to debentures and debenture stock issued by the company of which they are directors.

Directors may, indeed, be held liable to pay damages where by misrepresentation or fraud whether in a prospectus or otherwise they have induced persons to take up debentures or debenture stock. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459; *Arnison* v. *Smith*, 41 Ch. D. 348. As to a prospectus, see p. 165; but they are not liable on the contract. The contract under which the debenture holders or debenture stockholders claim is one made by the company, that is, by the directors on behalf of the company, and on the company's contract the directors are not liable. *Ferguson* v. *Wilson*, 2 Ch. 77. "What," said Lord Cairns, L. J., in that case, "is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person, it can only act through directors, and the case is as regards those directors merely the ordinary case of principal and agent. Wherever an agent is liable, those directors would be liable. Where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this Court, or into any other Court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent but the principal would be the person liable."

This is the general principle; but it was held long since, in *Collen* v. *Wright* (8 E. & B. 647), that when a man offers to contract as agent there is an implied warranty that he is really authorized by the person named as principal, and that on this warranty he or his estate will be answerable *ex contractu*. See *Starkey* v. *Bank of England*, (1903) A. C. 114.

Personal liability for excess borrowing.

On this principle—which is illustrated in a number of cases (*Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Whitehaven Banking Co.* v. *Reed*, 54 L. T. 360; *Firbanks' Executors* v. *Humphreys*, 18 Q. B. D. 54; *Oliver* v. *Bank of England*, (1901) 1 Ch. 652)—directors may be held liable to pay damages where they issue debentures or debenture stock *ultra vires* the company. And see *Sheffield Corpn.* v. *Barclay*, (1905) A. C. 392; and *Bank of England* v. *Cutler*, (1907) 1 K. B. 889.

In *Firbanks' Executors* v. *Humphreys*, *supra*, Lord Esher, M. R., after referring to the above authorities or some of them, said (p. 60): "The rule to be deduced is that where a person by asserting that he has the authority of a principal induces any person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

Distinction between *ultra vires* cases.

Where directors incur liability in this way to pay damages by issuing debentures or debenture stock in excess of their powers, a distinction must be taken between cases in which the borrowing in excess is *ultra vires* the company or merely *ultra vires* the directors. If it is only *ultra vires* the directors, it may be ratified by the company (*Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366); if it is *ultra vires* the company, it is absolutely void, and the company cannot be charged at all. But cases of this kind (arising out of implied warranty) rarely occur, for if the person to whom the issue is made has notice, express or constructive, that the directors are acting in excess of authority he obviously is not misled, and cannot claim damages. If, on the other hand, he takes the securities without notice that the directors are acting in excess of their authority in issuing them, he is generally entitled to insist on their validity by virtue of the rule in *Royal British Bank* v. *Turquand*, 6 E. & B. 327, unless the borrowing is *ultra vires* the company, when the rule does not apply.

Liability in winding-up.

Directors in a winding-up may be held liable for breach of trust or misfeasance whereby the debenture holders or debenture stockholders, in their character of creditors of the company, have been damnified (*Anglo-Austrian Printing and Publishing Union*, (1895) 2 Ch. 891; *British Guardian Life Assurance Co.*, 14 Ch. D. 335); but the liability in such a case is through the medium of the company and its liquidator. Directors are not trustees for the creditors of the company, whether secured or unsecured; but they may, of course, make themselves trustees, and if they undertake any trust in relation to the debenture holders or debenture stockholders, they will be liable for any breach of that trust committed by them.

As trustees.

Again, if the company holds any property in trust for the debenture holders or debenture stockholders, the directors, if they, on the company's behalf or otherwise, commit a breach of that trust (*e.g.*, by misapplying the trust property), may be held liable as constructive trustees (*Attorney-General* v. *Leicester Corpn.*, 7 Beav. 176); for, as active participators in the breach of trust, they cannot rely on the general rule in favour of agents laid down in *Barnes* v. *Addy*, 9 Ch. 251. See also *Mercantile Investment Co.* v. *River Plate, &c. Co.*, (1892) 2 Ch. 315, in which a company was proposing to deal with property in disregard of equities attaching thereto; and North, J., said: "I think that the company *and every officer* who took part in such proceedings would be personally responsible to the Court in respect of any such misapplication of the funds which might be made." *Wilson* v. *Lord Bury* (1880), 5 Q. B. D. 518, is not inconsistent with this, for in that case the directors escaped on the ground that the company was bound by contract, not trust.

Torts and frauds.

In like manner directors who are parties to the commission of a tort in relation to the holders of debentures or debenture stock may be held liable in damages, for all parties to a tort or fraud are liable as principals. *Cullen* v. *Thompson's Trustees*, 4 Macq. 424; *Weir* v. *Bell*, 3 Ex. Div. 238, at p. 248.

Guarantee.

Directors who give a personal guarantee for the payment of debentures or debenture stock may, of course, be held liable thereon; and directors cannot, if the company is insolvent, rely upon debentures issued to them within six months of the company's winding-up, in consideration of their paying off the company's overdraft at its bankers which they have guaranteed, for this is not "cash paid to the company" within sect. 266 of the Act. *Orleans Motor Co., Ltd.*, (1911) 2 Ch. 41.

Penalties for not registering.

As to the penalties directors may incur for not registering a mortgage or charge, and for omitting to indorse a copy of the registrar's certificate on debentures and debenture stock certificates, see *infra*, Chap. XXIV.

Relief under sect. 372.

Directors may claim relief in case of negligence or breach of trust, under sect. 372 of the Act where they have acted honestly and reasonably and ought fairly to be excused. See Part I., 15th ed., p. 667.

Relief under articles.

They can no longer be relieved by provisions in the articles (as in *Re City Equitable Fire Insurance Co.*, (1925) Ch. 407). See sect. 152 and Part I., 15th ed., pp. 742—43.

Criminal liability.

Directors may also be liable to prosecution if a debenture prospectus is false in any material particular. This may include a prospectus which is misleading though it contains no statement which is in itself untrue. *R.* v. *Kylsant*, (1932) 1 K. B. 442.

# CHAPTER XVIII.

## PRIORITIES.

Priorities.

DEBENTURES and debenture stock are subject to the ordinary rules as to priorities applicable to the securities given by natural persons. The following is a short statement of the most material of these rules in their relation to debentures and debenture stock:—

### I. As to Naked (i.e., Unsecured) Debentures and Debenture Stock.

Where no charge, the debenture holders, &c., rank as unsecured creditors.

Debentures and debenture stock which are not secured by any mortgage or charge, do not confer on the holders any priority over other unsecured creditors, though a debenture under seal carries the rights of a specialty debt. Hence, if the company goes into liquidation, the only remedy of the holders is to prove in the winding-up and take their dividend (if there be one) *pari passu* with the other unsecured creditors. The issue of such debentures or debenture stock therefore in no way prevents the company from mortgaging or charging, or otherwise dealing with its property; and mortgages and charges so created all take priority over the naked (*i.e.*, unsecured) debentures or debenture stock, subject to sect. 265 of the Act, as to fraudulent preference, and to sect. 266 as to winding-up within six months.

A creditor who obtains judgment against the company can take in execution any property of the company, and may thus obtain priority over naked debentures or debenture stock.

### II. As to Secured Debentures and Debenture Stock.

Charges affecting a legal estate in land belonging to the company require registration under sect. 79 of the Act, and, if created after 1925, now appear to rank according to the date of registration if not accompanied by the deposit of documents of title. See Land Charges Act, 1925, s. 10 (5); Law of Property Act, 1925, s. 97.

*Pari passu* provisions.

Subject to this, debentures, being equitable securities, *primâ facie*, rank in the order in which they are issued or agreed to be issued (*New Clydach, &c. Iron Co.*, 6 Eq. 514; *James* v. *Boythorpe Colliery Co.*, W. N. (1890) 28; *Carrick* v. *Wigan Tramways Co.*, W. N. (1893) 98); but debentures and debenture stock deeds almost

invariably provide for the holders ranking *pari passu* in point of charge, so that this equality among debenture holders of the same series has come to be regarded as one of the inherent incidents of a debenture or of debenture stock.

There is no special virtue in the words "*pari passu*," "equally," or "in equal proportions" might have the same effect, or any other words showing that the debentures were intended to stand on the same level footing without preference or priority among themselves; but the words *pari passu* are adopted as a term well recognized in the administration of assets in Courts of Equity. Even when no *pari passu* clause or words actually expressive of equality are used, it is not difficult to imply them, *e.g.*, where the debentures each say, "this debenture is one of a series of 1,000 like debentures, all ranking as a first charge on the undertaking of the company." True, nothing is here said about *pari passu* security, but if *all* are to rank as a first charge, it is clearly implied that, as between them, there is to be no priority. See *Murray* v. *Scott*, 9 App. Cas. 519.

It is doubtful what operation a *pari passu* clause would have in the case of a naked or unsecured debenture; but the presence of such a clause tends rather to show that the debenture containing it was not meant to be a naked one, but was meant to give a security for the debentures or debenture stock. See *Colonial Trusts Corpn.*, 15 Ch. D. 465. In the case of secured debentures, the clause is of vital importance to the debenture holders or debenture stockholders, placing, as it does, all of the same issue on a level of strict equality, and preventing any one of them from forestalling or obtaining priority over the others. If proceedings, for example, to enforce the charge are taken by any one of the class, he is bound to make the other members of the class defendants, or to sue on their behalf, and if the charge is enforced by the Court, it will be enforced for the benefit of the whole class, and not for the exclusive benefit of any one member of the class. And the same principle applies where a debenture holder in an issue ranking *pari passu* obtains from the company a special security. He cannot hold it for his own individual benefit. He must be content to share and share alike in this, as in other respects, with the other holders of the *pari passu* issue, with those who are associated with him in what is in truth a great contributory mortgage. *Murray* v. *Scott*, 9 App. Cas. 519; *Small* v. *Smith*, 10 App. Cas. 131; and *Land Owners, &c.* v. *Ashford*, 16 Ch. D. 411. This is old law; see, as long ago as *Fairtitle* v. *Gilbert*, 2 T. R. 169, the case of a turnpike loan, where the Act provided that no preference should be given, and it was held that one of the mortgagees who had obtained a special security could not avail himself of it.

Operation of *pari passu* provision.

Special security.

**Execution.**

The same principle applies where one of a number of debenture holders, ranking *pari passu*, brings an action for payment, obtains judgment and issues execution—the other debenture holders can intervene and restrain him from proceeding with the execution on the ground that they are interested in the premises. He holds the judgment, in fact, as trustee for all the debenture holders of the issue. *Bowen* v. *Brecon Ry. Co.*, L. R. 3 Eq. 541.

Possibly, however, if he has levied execution and appropriated the proceeds, it may then be too late for the other debenture holders to intervene.

The commencement of a debenture action, which does not include a claim for payment, by one debenture holder does not prevent another holder from suing for interest due. *Cleary* v. *Brazil Ry. Co.*, 113 L. T. 96; W. N. (1915) 178.

**Application of *pari passu* provision.**

The effect of a *pari passu* clause is that, when the security is enforced, whatever is realised is divided among the debenture holders in proportion to the amounts due on their respective debentures whether in respect of capital or interest: *Re Midland Express Ltd.*, (1914) 1 Ch. 41; and, where the debentures are payable by instalments, in proportion to the instalments paid: *Re Smelting Corpn.*, (1915) 1 Ch. 472.

**Enforcement of *pari passu* provision.**

As a term, and a very essential one, of the debenture holders' contract, the debenture holders are entitled to insist on the *pari passu* clause, not only as between themselves, but also as between them and the company. For this purpose they are entitled to an injunction to restrain the company from issuing debentures, in fraud of their rights, purporting to rank *pari passu*—debentures, that is to say, which the company is not entitled to issue on that footing. If the company has improperly issued such debentures purporting to rank *pari passu* with existing debentures, the aggrieved debenture holders are further entitled to object, when the security comes to be enforced, to their being allowed to rank in competition with them. *Mowatt* v. *Castle Steel Co.*, 34 Ch. D. 58; *George Routledge and Sons*, (1904) 2 Ch. 474; and *infra*, p. 150. The effect, of course, of the admission of such new debenture holders is to depreciate the security for the rest.

**Whether payment off of some of issue allowable.**

Given, then, this principle of debenture holders' equality *inter se* under a *pari passu* security, how far does the principle go? Suppose an issue of debentures containing a *pari passu* clause, all made payable at the same date, and no power reserved to the company to pay off any one before the others, is the company precluded from buying up or paying off one or more of the debentures before maturity? The point, until the Legislature dealt with it, was a difficult one and unsettled. On the one hand, for a company

to pay its debts is no doubt a transaction in the ordinary course of its business (*Wilmott* v. *London Celluloid Co.*, 34 Ch. D. 147); and the payment off of a debenture is, therefore, *primâ facie* within the company's power.

On the other hand, it may be contended that, as all the debenture holders are in the same class, one ought not to accept payment before the rest out of the common fund, and thus diminish it to the possible detriment of the others.

However, sect. 15 of the Companies Act, 1907, now re-enacted in sect. 75 of 1929 (p. 140, *infra*), appears to recognize very clearly a company's power thus to redeem part of a series, and to keep the redeemed debentures alive.

Re-issue when allowable.

A further question has sometimes arisen whether a company, having paid off, redeemed, or by any means acquired any of its debentures or debenture stock (forming part of a series or amount secured *pari passu*), can keep the same alive so as to permit of subsequent re-issue, or can create similar debentures or debenture stock in the place of the amounts paid off, redeemed, or otherwise acquired.

The following are instances of cases in which the question sometimes arises in practice:—

(1) A company has issued a series of first mortgage debentures, all ranking *pari passu*, and also a series of second mortgage debentures. Some of the first mortgage debentures are in the market, and the company wishes to apply temporarily part of its funds (whether at reserve or otherwise) in the purchase of these debentures, but intending to keep them alive, and later on to resell them as being part of its first mortgage debentures.

(2) A company has issued 100,000*l.* of debentures, all ranking *pari passu*. Of these 20,000*l.* have been issued to the company's bankers as security for a temporary overdraft on its current account. The company desires to pay off this overdraft, but to keep the debentures alive, so as to be able to re-issue them (with their original priority) to subsequent purchasers as occasion may require, or even to the same bankers as security for further accommodation.

The power of companies to keep alive and re-issue debentures was at one time a matter of considerable doubt and difficulty.

However, these difficulties were solved by sect. 15 of the Companies Act, 1907, now re-enacted with amendments by sect. 75 of 1929. This section is wider in its operation than the corresponding sub-sects. (1) and (2) of sect. 104 of 1908. Power to re-issue instead of being confined

to cases where the company has purported to exercise the power to keep the debentures alive, may be exercised unless the company has manifested an intention to cancel them.

Particulars as to debentures which are capable of re-issue must be inserted in the balance sheet."

Sect. 75 provides as follows:—

**Power to re-issue redeemed debentures in certain cases.**

**75.**—(1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, then—

(a) unless any provision to the contrary, whether express or implied, is contained in the articles or in any contract entered into by the company; or

(b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,

the company shall have, and shall be deemed always to have had, power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place.

(2) On a re-issue of redeemed debentures the person entitled to the debentures shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.

(3) Where a company has power to re-issue debentures which have been redeemed, particulars with respect to the debentures which can be so re-issued shall be included in every balance sheet of the company.

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

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

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

(6) Where any debentures which have been redeemed before the date of the commencement of this Act are re-issued subsequently to that date, the re-issue of the debentures shall not prejudice any right or priority which any person would have had under or by virtue of any mortgage or charge created before the date of the commencement of this Act, if section one hundred and four of the Companies (Consolidation) Act, 1908, as originally enacted, had been enacted in this Act instead of this section.

This section is applicable not only to debentures, but to debenture stock (sect. 380).

The effect of these enactments is to displace the law on the subject as laid down in *George Routledge & Son*, (1904) 2 Ch. 474; *Tasker & Sons*, (1905) 2 Ch. 587; and *Russian Petroleum and Liquid Fuel Companies*, (1907) 2 Ch. 540, and to enable a company to keep its debentures alive for the purposes of re-issue from time to time. See *Fitzgerald* v. *Persee Ltd.*, (1908) 1 Ir. R. 279.

The section is retrospective, and operates upon past as well as future transactions. It preserves the priority of the re-issued debentures as of the original date of issue, and not merely as of the date of re-issue.

Thus where a company, before the act of 1907, deposited from time to time some of its first debentures with its bankers as security for an advance, the debentures being transferred by nominees of the company to trustees for the bank, and upon repayment of the overdraft, being re-transferred to the nominees of the company, the Court held that the effect of the section on such re-transfer was to preserve the original priority of the debentures. See *Fitzgerald* v. *Persee, Ltd.*, *supra*.

Paragraph (4) of the section is notable as removing the difficulty that where a company deposited some of its debentures as security for a loan they became extinguished if for a moment the account ceased to be in debit. *Perth Electric Tramways*, (1906) 2 Ch. 216.

Paragraph (5) is for the protection of the revenue, but the proviso affords relief to investors who without notice or negligence take a debenture not duly stamped on its re-issue.

Discount and deposit

The issue of part of a series of debentures which are all to rank *pari passu*, does not by implication restrict the company's power as regards the terms on which the rest of the issue may be dealt with, and there is nothing, therefore, to prevent the company from issuing the remainder of the debentures at a discount, or from depositing them as security for an advance. See *Regent's Canal Co.*, 3 Ch. D. 43.

The power to issue the balance continues until the appointment of a receiver or a winding-up, even though proceedings to enforce the debentures have been taken. *Re Hubbard, Hubbard* v. *Hubbard & Co.*, 68 L. J. Ch. 54.

Priority where mortgage or charge.

The following list sums up, though not exhaustively, the priorities of secured debenture holders and debenture stockholders as between them and other creditors and incumbrancers. Priorities vary, as it will be seen, according as the debenture holders' or debenture stockholders' mortgage or charge is legal or equitable, and according to the nature of the property charged or mortgaged, and the circumstances of the case, due regard being also had to sects. 79—91 of the Act, whereby certain classes or mortgages and charges are avoided

unless registered in accordance with sect. 79, and to sect. 97 of the Law of Property Act, 1925, whereby the priority of mortgages affecting a legal estate which require registration is made to depend on the date of registration under the Land Charges Act, 1925:—

**Over general creditors.**

(1) In the case of a winding-up they rank, subject to the provisions of sects. 264, 265 and 266 of the Act, in priority to the unsecured debts and liabilities of the company. *Panama Co.*, 5 Ch. 318; *Florence Land Co.*, 10 Ch. D. 530; *Colonial Trusts Corpn.*, 15 Ch. D. 465. But a floating charge, whilst it floats, has no priority over an execution creditor; in order to obtain priority the floating charge must have crystallized. See *supra*, p. 65. Moreover, debenture holders have no priority over a person having a right of set-off, or a landlord who has levied a distress, before in either case a receiver has been effectually appointed. *Roundwood Colliery Co.*, (1897) 1 Ch. 373, 393; *Edward Nelson & Co.* v. *Faber & Co.*, (1903) 2 K. B. 367.

**Over execution creditors.**

**Legal estate.**

(2) Debentures and debenture stock secured by *legal* mortgage or charge by way of legal mortgage rank in priority to all previously-created equitable interests, unless on the issue of such debentures or debenture stock the subscribers had notice (*infra*, p. 152) of such previously-created estates or interests (*Jared* v. *Clements*, (1903) 1 Ch. 428); for the rule in such a case is, that when equities are equal the law prevails. *Pilcher* v. *Rawlins*, 7 Ch. 259; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231. So where chattels supplied to a company under a hire-purchase agreement are fixed to the freehold, a mortgagee or debenture holder having the protection of a legal estate will get priority on taking possession of the land, in the absence of notice of the rights of the owner of the chattel. *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; *Reynolds* v. *Ashby & Son*, (1904) A. C. 466; *Ellis* v. *Glover and Hobson, Ltd.*, (1908) 1 K. B. 388.

The rule that equities must be equal does not refer to equality in point of time. *Bailey* v. *Barnes*, (1894) 1 Ch. 25. The legal estate is most potent in protection, and the holder thereof will not be postponed to a subsequent equity of which he had no notice, unless for fraud, or gross negligence, *e.g.*, not calling for production of the title deeds. *Northern Counties, &c. Co.* v. *Whipp*, 26 Ch. D. 482. Charges secured by deposit of title deeds may secure priority, since the possession of the deeds usually amounts to notice, and the failure of debenture holders to secure the possession of title deeds may postpone their charge. *Re Castell & Brown, Ltd.*, (1898) 1 Ch. 315.

**Title deeds.**

This priority is preserved by sect. 13 of the Law of Property Act, 1925. *Oliver* v. *Hinton*, (1899) 2 Ch. 264.

(3) Debentures and debenture stock secured by equitable charge rank, subject to what is hereafter stated, after all previously-created estates and interests; for the rule of equity is, that, as between persons having only equitable interests, if those equities are, in all other respects, equal, *Qui prior est in tempore, potior est in jure. Capell* v. *Winter*, (1907) 2 Ch. 376; *Re Morrison, Jones & Taylor, Ltd.*, (1914) 1 Ch. 50 (where the rights of the owner of a chattel comprised in a hire-purchase agreement which was fixed to the soil prevailed over debentures subsequently created containing only a floating charge). In *Re Samuel Allen & Sons, Ltd.*, (1907) 1 Ch. 575, the rights of the owner of a chattel comprised in a hire-purchase agreement which had been fixed to the soil were held to have priority over a subsequent equitable charge in favour of a bank. **Equities.**

In these cases the hire-purchase agreement was prior in date to the equitable charge; but if a floating charge were created first and the hire-purchase agreement were made subsequently, the floating charge would, it is submitted, still be subject to the rights of the owner of the chattel, since the floating charge would only attach to the company's interest in the chattel, which was qualified by the owner's right to enter and remove it if the payments provided for under the hire-purchase agreement were not paid. See per Eve, J., *Re Morrison, Jones & Taylor, Ltd.*, (1914) 1 Ch. at p. 55; *Hamer* v. *London, City and Midland Bank*, 87 L. J. K. B. 973; cf. *Connolly Bros.* (*No.* 2), (1912) 2 Ch. 25.

A floating charge leaves the company free to dispose of its property in the ordinary course of business, and accordingly, a person dealing with the company after the creation of a floating charge has the better equity, unless he has notice of provisions in the debenture which restrict the company's liberty to deal with its property. Where equities are not equal the better equity prevails. *Castell* v. *Brown*, (1898) 1 Ch. 315 (where the debenture holders had left the title deeds in the possession of the company); *Valletort Steam Laundry Co.*, (1903) 2 Ch. 654; *Standard Rotary Machine Co.*, 51 S. J. 48 (charge on shares).

(4) The holders of debentures and debenture stock secured originally by mere equitable charge, and therefore ranking after previously-created equitable estates and interests, could formerly gain priority over the same by subsequently **Getting in legal estate.**

obtaining the legal estate, if when they advanced their money they had no notice of such previously-created estates and interests (*Willoughby* v. *Willoughby*, 1 T. R. 767; *Taylor* v. *Russell*, (1892) A. C. 244; *Bailey* v. *Barnes*, (1894) 1 Ch. 25; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. at p. 491), but the doctrine of "tacking" has been abolished, except in respect of further advances by a prior mortgagee by sect. 94 of the Law of Property Act, 1925.

**Loss by legal estate.**

(5) The holders of debentures and debenture stock, secured by equitable charge, may lose their priority by the creation of a subsequent legal mortgage or conveyance on a sale in favour of persons who take for value without notice of the terms of the charge for securing the debentures or debenture stock. *English, &c. Co.* v. *Brunton*, (1892) 2 Q. B. 1, 700 (C. A.).

**Fraud and negligence.**

(6) Debentures and debenture stock, secured by equitable charge, may also lose their priority, as against subsequent equities, by reason of fraud or negligence on the part of the holder or by estoppel. *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1 (C. A.); *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182; *Roberts* v. *Croft*, 27 L. J. Ch. 220; and see *Castell* v. *Brown*, (1898) 1 Ch. 315, *supra*, p. 70; *Valletort Steam Laundry Co.*, (1903) 2 Ch. 654; *Standard Rotary Machine Co.*, 51 S. J. 48.

**County registers.**

(7) As to lands in "register" counties: Priority of registration, subject to various exceptions and qualifications, gives priority of title, unless the party registered had, as to Middlesex, actual or constructive notice of a prior equity (*Le Neve* v. *Le Neve*, Amb. 436; 2 W. & T. L. C. 4th ed. 35; *Rolland* v. *Hart*, 6 Ch. 678); or as to Yorkshire registry, was guilty of actual fraud (*Battison* v. *Hobson*, (1896) 2 Ch. 403); notice in the absence of fraud not being material. See Middlesex Registry Act, 1708, and Yorkshire Registry Acts, 1884 and 1885. The Land Registration Act, 1925, now applies to the County of Middlesex. As to Irish Registry Acts, see *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309.

**Sects. 79—91 of Act of 1929.**

(8) As to registration of mortgages and charges under sects 79—91 of the Act (re-enacting and extending sect. 14 of the Act of 1900), see *infra*, p. 186. The object of the sections is disclosure, and non-registration of a mortgage or charge within due time does not merely postpone it to registered securities, but avoids it as a charge as against creditors and the liquidator of the company. Where mortgages affecting a legal estate in land

and requiring registration are created or transferred after 1925, priority depends upon the date of registration. Land Charges Act, 1925, s. 10 (5); Law of Property Act, 1925, s. 97. It is apprehended, however, that where before the 1st January, 1926, there were two successive mortgages requiring registration, and both were registered in due time, the second did not obtain priority over the first merely because it was registered before the first. Where a subsequent mortgage is registered in due time and a mortgage prior in date but not registered in due time is registered with the sanction of the Court after the registration of the subsequent mortgage, the subsequent mortgage takes priority even though the mortgagee had notice of the existence of the prior mortgage. *Re Monolithic Building Co.*, (1915) 1 Ch. 643. If some mortgage debentures of a series are registered and others (issued before 1st January, 1901, the date when the Act of 1900 came into force), are not, the *pari passu* clause has full effect; but if some mortgage debentures of a series were issued before 1st January, 1901, and some issued after that date are not duly registered, the *pari passu* clause is not of any avail to the latter.

Land Registration Act.

(9) Under the Land Registration Act, 1925, debentures and debenture stock secured on unregistered land may lose priority if the owner is registered with an absolute title and executes a registered transfer behind their backs, and in case of registered land, the debenture or debenture stock-holders should be protected by a registered charge, otherwise a subsequent incumbrancer may obtain priority.

Foreign property.

(10) As to land and moveables in foreign countries: A mortgage or charge thereon will rank after any rights *in rem* which affect the property under local laws; unless, indeed, the party claiming the paramount right is here within the jurisdiction of the Court, and an equity can be established against him. *Supra*, p. 59.

Ships.

(11) As to ships subject to the Merchant Shipping Act, 1894, or the enactments for which that Act was substituted: The incumbrancer, legal or equitable, who, though not first in date, has (and that, too, notwithstanding any express, implied, or constructive notice) first registered his security, takes priority. See sect. 33 of that Act; *Coombes* v. *Mansfield*, 3 Drew. 200; *McCalmont* v. *Rankin*, 2 De G. M. & G. 403; *Black* v. *Williams*, (1895) 1 Ch. 408. As to priority as between mortgagees and holders of liens for matters within sect. 34 of that Act, see *The Heather Bell*,

(1901) P. 272. As to the effect of transferring to a company a ship which is subject to a charging order for costs, see *The Birnam Wood*, (1907) P. 1. And as to conflicting equities see *Burgis* v. *Constantine*, (1908) 2 K. B. 484, and *Barclay* v. *Poole*, (1907) 2 Ch. 284.

Patents.

(12) As to registration of assignments of patents: See the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), s. 16, as amended by 22 & 23 Geo. 5, c. 32, Sched. Registration of an assignment does not give priority to the assignee if at the time of the purchase the purchaser was informed of the prior equity. *New Ixion Tyre, &c. Co.* v. *Spilsbury*, (1898) 2 Ch. 484.

Choses in action.

(13) As to choses in action (not including shares in incorporated companies or mortgage debts charged on a legal estate in land) (*Taylor* v. *London and County Banking Co., supra; Hopkins* v. *Hemsworth*, (1898) 2 Ch. 347), the ordinary rule established in *Dearle* v. *Hall*, 3 Russ. 1, applies; and, accordingly, where debentures or debenture stock are secured on any choses in action, *e.g.*, book debts, contracts, bonds, policies, &c., the holders may, if notice of the security is not at once given to the debtor or trustee, be deprived of their priority by some other incumbrancer or purchaser who gives the necessary notice of his incumbrance, and so takes possession, unless such person, when he advanced his money, had notice of the charge created by the debentures or debenture stock. The rule is applicable to all choses in action as distinguished from choses in possession (save where, as in the case of shares in a company under the Companies Acts, the rule is, in effect, excluded by statute). *Colonial Bank* v. *Whinney*, 11 App. Cas. 426. The rule is not confined to debts, much less to debts presently payable. On the contrary, it has been held to apply to current policies of assurance (*Thompson* v. *Spiers*, 13 Sim. 469; *Re Lake, Ex parte Cavendish*, (1903) 1 K. B. 151), and to shares in an unincorporated joint stock company (*Martin* v. *Sedgwick*, 9 Beav. 333), and to interests in a trust fund, absolute or contingent. *Phillips' Trusts*, (1903) 1 Ch. 183. Further, "the rule in *Dearle* v. *Hall* is independent of any consideration of the conduct of the competing assignees, where the assignee, second in date, has no notice of the earlier assignment. Priority in such case depends simply and solely on priority of notice." Per Lord Macnaghten, *Ward* v. *Duncombe*, (1893) A. C. 390; *Re Wasdale, Brittin* v. *Partridge*, (1899) 1 Ch. 163; *Marchant* v. *Morton*, (1901) 2 K. B. 829. And see *Porter* v. *Moore*,

(1904) 2 Ch. 367; *In re Dallas*, *ib.* 385. But as between the assignor and the assignee notice is not essential. *William Brandt's Sons & Co.* v. *Dunlop*, (1905) A. C. 454. The rule in *Dearle* v. *Hall* has been extended to equitable interests in land by sect. 137 of the Law of Property Act, 1925.

(14) As to uncalled capital: This is no doubt a chose in action, for the shareholders are under a statutory liability, in the nature of a covenant, to pay the uncalled capital when required. (Sect. 20.) Subject to the effect of registration, such a liability is within the rule in *Dearle* v. *Hall*, *ubi supra*, and debenture and debenture stockholders who take even a specific charge on uncalled capital, may, if notice thereof be *not* given to the shareholders, find themselves postponed to some subsequent mortgagee who takes a charge without notice of the debenture charge, and gives notice of his charge before the debenture charge is notified. A charge on uncalled capital has, however, since the Act of 1900 (s. 14), required registration, and must now be registered under sect. 79. As to the effect of registration under this section see p. 186, *infra*. It has been held that if the debenture holders' security was entered in the company's register of mortgages under sect. 88 of the Act of 1929, or the corresponding sections of earlier Acts, such registration will not protect them by giving to subsequent mortgagees constructive notice of their charge. The register of mortgages under sect. 88 of the Act is not a public register. *Wright* v. *Horton*, 12 App. Cas. 371. Uncalled capital.

(15) As to shares in registered companies:—The legal title thereto secures priority in the absence of notice of prior equitable rights, and such legal title is obtainable by registration, or its equivalent. *Roots* v. *Williamson*, 38 Ch. D. 485; *Nanney* v. *Morgan*, 37 Ch. D. 346; *Moore* v. *North Western Bank*, (1891) 2 Ch. 599; *Ireland* v. *Hart*, (1902) 1 Ch. 522. The articles of a registered company usually contain provisions protecting it from being affected by notice of equitable rights affecting its shares. See Part I., p. 601, *et seq.*; but notice to a company of an equitable right to shares is not altogether ineffective, and may serve to prevent the acquisition of a legal title in derogation of the rights of the person who gave the notice. See *Roots* v. *Williamson*, *supra*; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, *supra*, p. 23. Shares.

(16) As to negotiable securities, see *supra*, p. 30, and *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, and *Venables* v. *Baring Bros. & Co.*, (1892) 3 Ch. 527; *Bentinck* Negotiable securities.

v. *London Joint Stock Bank*, (1893) 2 Ch. 120; *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658. In the case of negotiable instruments, the delivery for value of the instrument confers a good title, unless the person to whom it is delivered is guilty of fraud. Negligence alone will not invalidate the title of the holder; but it may be evidence of fraud. *Jones* v. *Gordon*, 2 A. C., at pp. 628, 629.

Vendor's lien. (17) As a general rule, debentures and debenture stock charged on property rank after a vendor's lien for unpaid purchase-money thereof (*Re Connolly Bros.*, (1912) 2 Ch. 25; *Wilson* v. *Kelland*, (1910) 2 Ch. 306); though, where the debenture holder has the benefit of a legal estate without notice, this would not be the case. *Kettlewell* v. *Watson*, 21 Ch. D. 685; 26 Ch. D. 501. The doctrines as to the vendor's lien are applicable not only to land, but also to personal property, when the vendor has not parted with possession. As to vendor's lien on chattels, see *Chase* v. *Westmore*, 5 M. & S. 180.

*Lis pendens.* (18) As to a *lis pendens*, persons dealing with the company are presumed to have notice of any claim as against land duly registered as a *lis pendens* or as a pending action under the Land Charges Act, 1925. *Bull* v. *Hutchens*, 32 Beav. 615; *Pratt* v. *Bull*, 1 D. J. & S. 141; 4 Giff. 117. But the registration of an action as a *lis pendens* does not affect personal property, *e.g.*, book debts. *Wigram* v. *Buckley*, (1894) 3 Ch. 483.

*Hopkinson* v. *Rolt.* (19) Before 1926 the rule in *Hopkinson* v. *Rolt*, 3 De G. & J. 177; 9 H. L. Cas 514, applied, and accordingly after the creation of debentures or debenture stock, and notice thereof to a prior incumbrancer (*e.g.*, a banker), he could not make further advances upon the footing that they were to rank in priority to debentures or debenture stock, even though he had contracted to make such advances. *West* v. *Williams*, (1899) 1 Ch. 132; *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53. See, however, (20) below, and sect. 94 of the Law of Property Act, 1925, which gives a prior mortgagee a right to make further advances to rank in priority to subsequent mortgages where the mortgage imposes an obligation on him to make such further advances.

*Clayton's case* (20) The rule in *Clayton's case*, 1 Meriv. 572; Tudor's L. C. Merc. 1, must be borne in mind, and accordingly, if debentures are issued subject to a prior incumbrance in favour of a banker or other creditor with whom there is an account current (*The Mecca*, (1897) A. C. 286) all payments made

to the bank after notice of the debentures or debenture stock, will go in satisfaction of the balance due when the notice was given, and all subsequent advances will rank after the debentures or debenture stock (*Deeley* v. *Lloyds Bank* (1912) A. C. 756); but this may be avoided by special arrangement between the company and the banker. The rule in *Clayton's case*, 1 Mer. 572, is not a rule of law but only a presumption of fact, and it is not to be applied for the purpose of giving a mortgagee a priority never intended by the parties. *British Red Cross Fund*, W. N. (1914) 337. Registration of the debentures does not in itself amount to notice as against a prior incumbrancer where the prior mortgage was made expressly for securing a current account or other further advances. Law of Property Act, 1925, s. 94 (2).

Priority by consent.

(21) Debentures and debenture stock secured whether by legal or equitable charge may be postponed to any estates or interests created subsequently thereto in accordance with the terms of the securities given for such debentures or debenture stock; for instance, if the security in favour of the debentures or debenture stock is a floating charge, that, as appears above, does not prevent the company creating any prior mortgage or charge, although it is at liberty to make the charge a subsequent one (*Robert Stephenson & Co.*, 107 L. T. 33; and, even where there is a specific mortgage to secure the debentures or debenture stock, it is not uncommon to find express provision in the securities empowering the company or the trustees to create prior securities to a limited extent. And see *Ind, Coope & Co.*, (1911) 2 Ch. 223.

Trustees' and receiver's lien.

(22) Debentures and debenture stock secured by charge or mortgage to trustees rank after the lien which the trustees have for all expenses and liabilities in relation to the trust (*Re Piccadilly Hotel*, (1911) 2 Ch. 534), and after all moneys properly advanced or raised by any receiver in an action for enforcing the securities (*Greenwood* v. *Algesiras* (*Gibraltar*) *Co.*, (1894) 2 Ch. 205), and after the receiver's and manager's right to indemnity. *Strapp* v. *Bull, Sons & Co.*, (1895) 2 Ch. 1, as explained in *Glasdir Copper Mines, Ltd.*, (1906) 1 Ch. 365; and see *British Power, &c., Co.*, (1906) 1 Ch. 497, and *Re Boynton, Ltd.*, (1910) 1 Ch. 519.

Company's expenditure.

(23) Debentures and debenture stock rank before any expenditure, however beneficial, by the company or its liquidator or by any second mortgagee on the trust premises where such expenditure is made otherwise than by agreement with the

debenture holders. *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 234; *Landowners, &c.* v. *Ashford*, 16 Ch. D. 411; *Regent's Canal Co.*, 3 Ch. D. 411.

Solicitor's lien.

(24) Where there is a trust deed to secure debentures the company's solicitor very commonly acts for the trustees as well as for the company, and in such a case the solicitor is to be taken *primâ facie* to waive his lien on any deeds in his possession relating to the mortgaged property, unless it is expressly reserved. *Re Snell*, 6 Ch. D. 105; *Re Mason & Taylor*, W. N. (1878) 245; *Re Dee Estates, Ltd.*, (1911) 2 Ch. 85.

No *pari passu* issue without consent.

(25) Where a company issues a series of debentures or debenture stock charging property, it cannot issue further debentures or stock ranking *pari passu* therewith, or in priority thereto, unless otherwise provided in such first-mentioned securities expressly or by implication (*Tasker & Sons, Ltd.*, (1905) 2 Ch. 587), or unless allowed by sect. 75 of the Act. *Supra*, p. 140. Where a company issues more than one series of debentures, and each series is expressed to rank *pari passu, inter se*, the earlier series *primâ facie* ranks before the later series. *James* v. *Boythorpe Co.*, W. N. (1890) 28.

Company's landlord.

(26) The issue of debentures or debenture stock does not deprive the landlord of his right to distrain for rent. He can distrain even after the appointment of a receiver in a debenture holders' action becomes effective. *Re Roundwood Colliery Co.*, (1897) 1 Ch. 373. If after the appointment of a receiver takes effect the landlord desires to distrain, he must apply for leave so to do, for the Court is then in possession of the property by its officer (see Chap. LXXXII.), and, if the company is not in liquidation, the Court should as a general rule give leave. But if the company is being wound up by the Court or under supervision, sect. 174 of the Act applies and invalidates a distress on the goods of the company made without leave of the Court, and the Court will not grant leave to distrain for rent accrued before the winding-up. *Oak Pits Colliery Co.*, 21 Ch. D. 322. Nevertheless, a landlord will not be restrained from distraining on goods charged by the debentures or debenture stock where the company's equity of redemption therein is worthless, for in such a case the property is not the property of the company, and therefore the distress is not a proceeding against the "estate or effects of the company" within sect. 174. *Re New City Constitutional Club*, 34 Ch. D. 646; *Harpur's Cycle Fittings Co.*, (1900) 2 Ch. 731. And there is nothing to prevent a landlord from applying in a debenture action or winding-up for liberty to re-enter, if arrears of rent are not paid. *General Share and*

*Trust Co.* v. *Wetley Brick, &c. Co.*, 20 Ch. D. 260. Where the security is by way of sub-demise, and the receiver has sold goods, he will not be ordered to pay the rent out of the proceeds. *Hand* v. *Blow*, (1901) 2 Ch. 721.

(27) As to rates, see the overseer's power of distress conferred by the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2, and by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 161; and see Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90). This power is exercisable so long as the company's possession remains unchanged, and an order appointing a receiver without a direction to give possession does not change the possession. *Marriage, Neave & Co.*, (1896) 2 Ch. 663. But where the receiver takes possession under due authority from the Court, or his appointor, the possession is effectually changed. *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212. When a receiver appointed by the Court is in possession, leave to distrain must be obtained. See the cases above, and Chap. LXXXII. As to priority given to rates under sect. 264 of the Act of 1929, see *infra*, Chap. LXVI. Rates.

(28) Payment of sums due for electric light supply may sometimes be enforced indirectly by cutting off the supply until the receiver has entered into a new contract. *Husey* v. *London Electric Supply Corpn.*, (1902) 1 Ch. 411. Electric light.

(29) Where two series are issued on the same day, it is a question of intention whether they are all to rank *pari passu*, or one after the other; and if it appears from the terms of issue or the circumstances that the one series is intended to rank after the other, even though it was in point of fact issued before the other, that intention must have effect. *Gartside* v. *Silkstone Co.*, 21 Ch. D. 762. Concurrent issues.

Where a company issued part of a specified series and then issued a new series, and subsequently issued further debentures of the first series, it was held that the intention was that the second series should rank after the whole of the first series whenever issued; and effect was given to such intention accordingly. *Lister* v. *Henry Lister & Son*, 41 W. R. 330. This case cannot, however, be relied on as an authority, as the facts originally agreed on were subsequently re-stated.

Sometimes a *pari passu* clause is modified, so that the company may have power to issue further debentures ranking *pari passu* with the original issue, in which case it is commonly provided that all the debentures already issued by the

company, and all those of the present issue, shall rank *pari passu* in point of charge.

Further property.

(30) When a company issues a series of debentures charging its property and undertaking, and then acquires further property which it mortgages subject to the first debentures, the second mortgagee ranks after the debentures. *Robert Stephenson & Co., Poole* v. *Same*, 107 L. T. 33.

Agreement to issue debentures.

(31) Where a company has agreed for value to issue debentures or debenture stock secured on its property, or any specified part thereof, the persons entitled under such agreement to the issue thereof are, in point of security, in the same position as if the debentures or debenture stock had been issued in the manner agreed upon (subject to the requirements of registration under sects. 79—91). *Queensland, &c. Co.*, (1894) 2 Ch. 181; *Pegge* v. *Neath and District Tramway Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771. But this must be an agreement to give a present charge, not future or contingent. *Re Gregory Love & Co.*, (1916) 1 Ch. 203.

Irregular issue.

(32) Irregularly issued debentures may be good as agreements to issue debentures, and registration of the series is sufficient protection. *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142.

Notices affecting order of charges.

Notice, as affecting priorities, may either be actual or constructive:

Actual.

**A.—Actual notice** means, in its narrow sense, notice brought to the actual personal knowledge of the party; but it is sometimes used in a wider sense, so as to include some kinds of constructive notice, such as the notice imputed to a principal of what is brought to the actual notice of his agent. "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is *actual* notice to the client." Per Lord Hatherley, L. C., *Rolland* v. *Hart*, 6 Ch. 678, 681. See, however, *Blackburn* v. *Vigors*, 12 App. Cas. 531, 543, where such notice was referred to as constructive notice. The registration of any instrument or matter under the Land Charges Act, 1925, is declared by statute to be "*actual*" notice. Law of Property Act, 1925, s. 198.

Constructive.

**B.—Constructive notice** means notice which, though it does not in fact reach the party in question, is, in a Court of law or equity, imputed to that party—

To agent.

(1) Thus, if a person employs an agent in any particular

transaction, notice to the agent is treated in point of law as notice to the principal.

(a) Notice to a solicitor or broker is notice to the principal. *Rolland* v. *Hart*, 6 Ch. 681; *Boursot* v. *Savage*, 2 Eq. 134, *supra;* but it must be notice reaching the solicitor or broker in respect of the transaction in question: *Blackburn* v. *Vigors*, 12 App. Cas. 531. The rule is based on a presumption of communication, and accordingly does not apply where the agent is guilty of fraud, for there the presumption is the other way, that the agent will not communicate the fact to his principal. *Cave* v. *Cave*, 15 Ch. D. 639; *Kennedy* v. *Green*, 3 M. & K. 699; *Re European Bank*, 5 Ch. 358. "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him." *Rolland* v. *Hart*, 6 Ch. at p. 682. And see *Jacobs* v. *Morris*, (1902) 1 Ch. 816; *Hampshire Land Co.*, (1896) 2 Ch. 743; *Fenwick, Stobart & Co. (Secretary)*, (1902) 1 Ch. 507; *Re David Payne & Co.*, (1904) 2 Ch. 608; *The Birnam Wood*, (1907) P. 1.

(b) Notice to the directors of a company, or even to a clerk in the office, if he is in charge of the particular transaction (*Truman's case*, (1894) 3 Ch. 272), may be notice to the company. But knowledge of a fact by a single director is not necessarily notice to the company. *Hampshire Land Co., supra; David Payne & Co., supra; Marseilles, &c. Co.*, L. R. 7 Ch. 161; and a company is not to be taken to have notice of all its secretary knows, *e.g.*, of matters communicated to him as secretary of another company, where he is under no duty to pass the knowledge on. *Fenwick, Stobart & Co., Deep Sea Fishery's Claim*, (1902) 1 Ch. 507; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392; *Re David Payne & Co., Young* v. *David Payne & Co.*, (1904) 2 Ch. 608.

(2) Where a person has notice of a fact which in common prudence should have led him to make further inquiries, *e.g.*: Where notice of a fact putting a party on inquiry.

(a) Notice to a person that the property was encumbered, fixes him with constructive notice of facts and instruments, to a knowledge of which he would have been led by further inquiry. *Jones* v. *Smith*, 1 Ha. 43,

at p. 55; *Ware* v. *Lord Egmont*, 4 D. M. & G. 460; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Montefiore* v. *Brown*, 7 H. L. C. 262; *A. W. Hall & Co.*, 37 Ch. D. 712; *Hunt* v. *Luck*, (1902) 1 Ch. 428. Notice of tenancy. Compare *Rainford* v. *James Keith, &c. Co.*, (1905) 2 Ch. 147.

(b) Notice of an instrument affecting the title is notice of any other instrument which would be discovered by an examination thereof. *Coppen* v. *Fernyhough*, 2 Brown, C. C. 291. But notice of a deed that may, but does not necessarily, affect the title, is not notice of the contents thereof if the party sought to be affected with notice is told that the deed does not affect the title. *English and Scottish, &c. Co.* v. *Brunton*, (1892) 2 Q. B. 1, 700; or if he had no reason to suppose that the deed did affect the title. *Valletort Sanitary Steam Laundry Co.*, (1903) 2 Ch. 654.

(c) Where a party wilfully shuts his eyes and abstains from making inquiry, notice of what he would have ascertained, if the inquiry had been made, is imputed to him *Jones* v. *Smith*, 1 Hare, 55; *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460, 473.

(d) Where a person knows that he is dealing with a company under the Companies Acts, he is taken to have constructive notice of the contents of the company's memorandum and articles of association, and all special resolutions duly filed. *Peel's case*, 2 Ch. 674; *Royal British Bank* v. *Turquand*, 6 El. & Bl 327; *Mahoney* v. *East Holyford Co.*, L. R. 7 H. L. 869, 893. And it may be that he is to be taken to have constructive notice of the registered particulars of all mortgages and charges registered under sect. 79 of the Act, for they, too, are open to public inspection, but, *semble*, not of the contents of the instruments beyond such registered particulars. See p. 70, *supra*.

(e) Constructive notice may also arise by record, *e.g.*, a public Act of Parliament

Sect. 199 of the Law of Property Act, 1925 (replacing sect. 3 of the Conveyancing Act, 1882), must also be borne in mind. It runs thus:—

Restrictions on constructive notice.

**199.**—(1) A purchaser shall not be prejudicially affected by notice of—

(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces,

which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;

(ii) any other instrument or matter or any fact or thing unless—

(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) Paragraph (ii) of the last sub-section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if that paragraph had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act.

For the purposes of this section, "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires "purchaser" includes an intending purchaser; "purchase" has a meaning corresponding with that of "purchaser"; and "valuable consideration" includes marriage but does not include a nominal consideration in money.

# CHAPTER XIX.

## POWER TO MAJORITIES OF DEBENTURE AND DEBENTURE STOCK HOLDERS.

Powers of majorities to bind minorities.

Resolutions at meetings or sanction in writing of provisional agreements.

It is now a common practice, in the case of debentures and debenture stock, to give power to a specified majority of the holders thereof to sanction certain modifications of the rights of the holders as a body. This power is usually made exercisable by resolution passed at a meeting of the holders, but sometimes it is provided that if a provisional agreement for modification, made on behalf of all, is sanctioned in writing by a specified majority, it shall bind all.

Protection of great majority against minority.

The object of conferring this power on the majority is to protect it against unreasonable conduct on the part of the minority, and to prevent a deadlock and defeat of a beneficial arrangement because unanimity cannot be obtained. Unless the majority is thus enabled, in special circumstances, to determine what is to be done on behalf of the whole body, the minority, however small, is placed in a position to dictate to the majority, and the interests of the whole of the majority may be imperilled by the ignorance, perverseness, fraud, or cupidity of an insignificant minority, or by the delay which would result if it were necessary to obtain the consent of every debenture or stockholder.

Examples of cases of modification of rights.

For example, the time for payment of debentures or debenture stock may be approaching, and it may be desirable to give further time, or the rate of interest may be too high, and it may be necessary to reduce it temporarily, or it may be expedient to allow the company to raise further funds ranking in priority to the debentures or debenture stock, or *pari passu* with it. In special emergencies it may even be necessary to cancel arrears of interest, or to suspend a sinking fund for redemption of the securities, or procure the security holders to take shares in satisfaction of their securities, or concur with the company in making over the whole undertaking to a new company, on the terms that the holders should accept securities or shares of that company in satisfaction of their debentures or debenture stock.

If special powers for enabling a large majority of security holders to make any such modifications as these have not been conferred by the contract, such modifications cannot be carried out as against any holder who objects. He may insist on strict adherence to the original bargain, and may thus injure or imperil the interests of those who have a largely preponderating interest.

Consequences of no powers of modification being conferred on a majority.

Having had some experience of the dangers to which majorities were exposed, the writer, in drafting in 1879 a trust deed to secure the debentures of the New Zealand Agricultural Co., Ltd., inserted clauses intended to avert these dangers, and in the second edition of this work (published in 1881) the writer made these clauses public.

Majority provisions have since been adopted in thousands of cases and their validity and usefulness are generally acknowledged.

Thus, trustees who hold securities of a company may now concur in any scheme or arrangement for release or modification of rights. Trustee Act, 1925, s. 10 (3).

Cases on majority clauses.

The Court has in many cases approved the insertion of majority provisions in deeds settled pursuant to schemes of arrangement and otherwise. It is believed that the first case in which the validity of such provisions came into question was *Tod* v. *New Zealand Agricultural Co.*, decided in June, 1886. In that case it appeared that the company had issued debentures for upwards of 500,000*l.* payable at different times, but all ranking *pari passu* in point of charge. The trust deed for securing the debentures contained majority clauses as above mentioned. In 1885 a meeting of the debenture holders was held, at which it was resolved that the time for payment of all the outstanding debentures should be extended for five years, and that in the meantime each of the debentures should continue to carry interest at the existing rate. The plaintiff's debentures shortly afterwards fell due and he sued for the amount, alleging that the resolutions were not effective. A special case was stated in the action, and, at the hearing thereof, it was held by the Queen's Bench Division that the resolution was binding, and accordingly the action was dismissed.

*Tod* v. *New Zealand Agricultural Co.*

Shortly afterwards, the operation of majority clauses was in question before Chitty, J., in *Dominion of Canada, &c. Co.*, 55 L. T. 347. The company had issued debentures secured by a trust deed which contained majority provisions, and enabled a meeting, by the specified majority, to assent to any modifications of the deed. In the year 1884 it became necessary to raise further funds for the purposes of the company, and it was impossible to raise the same except by means of a charge or security to take priority over the

*Dominion of Canada, &c., Co.*

debentures. Accordingly, a provisional agreement was, in 1884, made between H., purporting to act on behalf of the holders of the debentures, and the company, whereby the company was empowered to create such prior charge. That agreement was submitted to a meeting of the debenture holders, and sanctioned by the requisite majority. The prior charge was subsequently created and made a security for the issue of certain rent-charge securities. In 1886 the company went into liquidation. A scheme of arrangement between the rent-charge holders and the debenture holders and the company having been proposed, the question whether the creation of the prior charge was valid arose. Chitty, J., held that it was valid. "The material words," said his lordship, "are 'assent to any modification.' Now, the modification that was assented to by the resolutions, carried by the requisite majority, was a modification which let in, in priority to the debentures, persons who were willing to subscribe money for which they were to receive the security of the rent-charge. I think that such a resolution was authorized by the deed, because one of the difficulties that there always are 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."

*Follit* v. *Eddystone Granite, &c.*

The next representative case is *Follit* v. *Eddystone Granite Quarries*, (1892) 3 Ch. 75. In that case the company had issued debentures secured by a trust deed containing majority clauses giving a meeting "power to assent to any modification of the provisions contained in these presents which shall be proposed by the company." The company having got into difficulties, a resolution was passed authorizing the creation of a prior mortgage, and Stirling, J., held the resolution effective, following the decision of Chitty, J., above referred to.

*Mercantile Investment, &c., Co.* v. *International Co. of Mexico.* (Exchange of debentures for shares held invalid.)

In *Mercantile Investment, &c. Co.* v. *International Co. of Mexico*, (1893) 1 Ch. 484, n., the defendants, an American company, had issued debentures secured by a trust deed containing majority provisions. The defendants had sold their undertaking to an English company, and a resolution had been passed at a meeting of the debenture holders for the exchange of the debentures for preference shares in the new company. The debentures gave power to a meeting of debenture holders to release the mortgaged premises or to sanction any modification or compromise of the rights of the debenture holders.

There was no evidence that there was any difficulty in enforcing the rights of the debenture holders, or of any special circumstances to justify the scheme. The plaintiff brought an action to impeach the resolution, and it was held by the Court of Appeal to be invalid, on the ground that it was not a modification of rights, but an extinction thereof, and that it was not a compromise, as there was no

dispute or difficulty. Lindley, L. J., considered that the resolution did not, in the circumstances, fall within the wording of the clauses. "The 'power to release the mortgaged premises' does not," said his lordship, "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" (p. 489).

*Same* v. *River Plate, &c.* (*Same*, held valid.)

Subsequently, however, this very case was re-opened in *Mercantile, &c. Co* v. *River Plate, &c. Co.*, (1894) 1 Ch. 578, and it being proved that there was, when the resolution was passed, a difficulty in enforcing in Mexico the rights of the debenture holders, it was held by Romer, J., that the resolution was effective. "What I have to consider," said the learned judge (p. 596), "is not whether, if the debenture holders did not accept the resolution, they would altogether lose their security or all chance of being paid; but whether there were not difficulties in the way of enforcing their rights of so substantial a character that the majority of the debenture holders might *bonâ fide* come to the conclusion that it was desirable, in face of those difficulties, to compromise those rights on the terms of the resolution; and, on the facts established before me, I think there were such difficulties." In deciding that a difficulty brought the power to compromise into play, Romer, J., was assisted by the decision of the Court of Appeal in *Sneath* v. *Valley Gold, Ltd.*, (1893) 1 Ch. 477.

*Sneath* v. *Valley Gold.* (Debenture-holders to take shares, held valid.)

There the debenture trust deed contained similar provisions. The company had got into difficulties, and a scheme proposed for the transfer of the undertaking to a new company, the debenture holders to receive paid-up shares in satisfaction of their debentures, was approved by a resolution of the debenture holders. It was held by the Court of Appeal that the resolution was valid on the ground that there was a difficulty, and that this brought into operation the power to compromise. "Here," said Lindley, L. J. (p. 494), "it is true that there is no pending litigation, but that is not necessary; all that is required is a difficulty which cannot be got over without some arrangement." And Kay, L. J., said: "The clause does not say that the meeting is to have power to compromise litigation, or to compromise disputes, but to comprise *rights*." See also *Finlay* v. *Mexican Investment Co.*, (1897) 1 Q. B. 517, and *Walker* v. *Elmore's German Metal Co.*, 85 L. T. 767.

*Cox Moore* v. *Peruvian Corp.*

In *Cox, Moore* v. *Peruvian Corpn., Ltd.*, (1908) 1 Ch. 604, the company had issued in 1890, 3,700,000*l.* out of a total issue of 6,000,000*l.*

(New debentures charged on specific assets, held valid.)

first mortgage debentures, and by them the company purported to create a floating charge on all its property. The company proposed to issue further debentures to be secured by a specific mortgage to trustees of certain assets, or in the alternative to issue further debentures, part of the authorized 6,000,000*l.*, and to create in favour of trustees for them a specific security on certain assets. The debentures contained provisions enabling a majority to assent to alterations, and a resolution was passed approving of the creation of the further securities. It was held that the resolutions were valid and that there was no reason why the company should not carry out the proposals.

*Willey* v. *Stocks.* (Conversion into irredeemable stock, held valid.)

*In re Joseph Stocks & Co., Ltd., Willey* v. *Stocks*, 26 T. L. R. 41 (1909). In that case there was a trust deed with the ordinary provisions for modifying and compromising the rights of the stockholders, and an extraordinary resolution was passed by the stockholders for the conversion of their 4 per cent. mortgage debenture stock redeemable at par in 1907 into 4½ irredeemable debenture stock, and it was held by Eve, J., that the resolution was a modification of the rights of the debenture stockholders and that it was competent for the majority to make such modification, and that the resolution was, that the debenture stock which was by the trust deed to be paid off on 1st October, 1907, was to be replaced by stock which was not so liable.

*Northern Assurance* v. *Farnham United.* (Same.)

In *Northern Assurance Co., Ltd.* v. *Farnham United Breweries, Ltd.*, (1912) 2 Ch. 125, the company had issued first mortgage debentures redeemable in 1909 (subsequently postponed to 1919). The conditions of the trust deed provided that the debenture holders should have power exercisable by extraordinary resolution to sanction any modification or compromise of the rights of the debenture holders against the company or its property, and to assent to any modification of the trust deed recommended by the trustees. At the meeting of the debenture holders, after due notice, an extraordinary resolution was duly passed approving of certain alterations in the trust deed recommended by the trustees, the chief effect of which was to convert the debentures into irredeemable debentures, to authorize the provision by the company of a sinking fund for the redemption of the debentures by purchase as the trustees should think fit, and to extend the powers of the trustees in various directions. A minority objected. Held that there was no implied condition in the trust deed that the powers of the debenture holders should be exercised only in the event of some serious occasion arising, that the effect of the resolution was a modification of the rights of the debenture holders, that there was no reason to fear that any inequality or unfairness could be caused thereby, and that the resolution was accordingly valid and binding upon the minority. *Joyce, J.*

*Shaw* v. *Royce, Ltd.*, (1911) 1 Ch. 138. In this case the company had issued debentures secured by trust deed, and guaranteed by the Law Guarantee, &c. Society, Ltd., which was to be trustee for the debentures. By the deed a sinking fund for the redemption of the debentures was to be established, and the company was to pay to the society an annual premium at the rate of 10*s.* per cent. on the amount of the outstanding debentures. A general meeting of the debenture holders was to have power by extraordinary resolution to assent to any arrangement or compromise proposed to be made between the company and the debenture holders, provided that it was one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof if the company were being wound up, and the requisite majority at a meeting of the debenture holders summoned pursuant to that Act had agreed thereto. In 1909 the company was placed in liquidation, and a supervision order made. At meetings duly convened in March, 1910, resolutions were passed by the requisite majority of the debenture holders releasing the society from the guarantee, increasing the interest on the debenture debt, and appointing new trustees of the deed and discontinuing the sinking fund. Held that the guarantee was in the nature of a policy of insurance as well as a contract of suretyship, and was not destroyed by the disappearance of the debt; that the resolutions were an arrangement or compromise between the company and the debenture holders which the debenture holders could pass and the Court could sanction, although the position of the third party was thereby affected, and that the whole scheme of the resolutions was valid and binding on the plaintiff.

*Shaw* v. *Royce, Ltd.* (Release of guarantee by third party, held valid.)

*Goodfellow* v. *Nelson Line* (*Liverpool*), *Ltd.*, (1912) 2 Ch. 324. In this case the defendant company had issued, in 1907, a series of debentures which were guaranteed in part by the Law Guarantee Trust and Accident Company, Ltd., and were secured by a trust deed of which that society and the British Steamship Investment Trust were trustees. Under the trust deed a large sum of money would become payable by the defendant company to the Trust Company in respect of their guarantee, unless the debentures were paid off by a certain date, which the company had no intention of doing. Subsequently the defendant company offered the debenture holders, in lieu of the existing guaranteed debentures, non-guaranteed debentures bearing a higher rate of interest, and in order to obtain the consent of the trustees to the scheme the defendant company added certain provisions by which the payments to be made to the Trust Company in respect of the guarantee would remain unaffected by the scheme. The scheme was only carried by the

*Goodfellow* v. *Nelson Line.* (Substitution of non-guaranteed debentures held valid.)

requisite majority through the Trust Company voting in favour of it, and it was held that where a scheme openly provides for the separate treatment of persons with special interest there can be no question of bribery, and further, that equity did not preclude a debenture holder voting for or against the scheme containing special provisions for special interest merely because he is interested therein, and therefore that the resolutions were valid.

*British America Nickel Corpn.* (Special advantage offered to one bondholder).

But where a special personal advantage was promised to a large holder of bonds to induce him to assent to the compromise, it was held to be invalid. *British American Nickel Corpn.*, (1927) A. C. 369.

Debentures in new company.

In *W. H. Hutchinson & Sons, Ltd.* (1915), 31 T. L. R. 324, the clause contained, besides the power to modify, the following powers:—

(4) power to accept other securities instead of the stock;

(5) power to sanction any scheme of reconstruction of the company.

An agreement to accept debentures in a new company on reconstruction was held to be within the majority clause.

Redemption by purchase at lowest price, held invalid.

On the other hand, in *Re New York Taxi-Cab Co.*, (1913) 1 Ch. 1, a resolution sanctioning the sale of the company's assets and the application of the proceeds in redemption of the debentures by purchase, the particular debentures to be redeemed to be those offered to the company at the lowest price, was held to be invalid on the ground that it purported to provide for a distribution of assets otherwise than *pari passu* between the debenture holders. And see *Meade King* v. *Usher's Wilts. Brewery*, 44 T. L. R. 298.

After judgment.

Where the conditions of debenture stock provided that a meeting of stockholders might agree to exchange the stock for shares in another company, the Court approved a sale of the assets to a new company for shares, after judgment in a debenture holders' action. *Buenos Ayres Tramways, Ltd.* (1920), 123 L. T. 748.

*Hay* v. *Swedish Rail. Co.* (Validity of majority provisions firmly established.)

Thus the validity of majority provisions is firmly established, and all that is necessary is to frame the desired power in clear and explicit terms. The importance of this is emphasized by *Hay* v. *Swedish Ry. Co.*, 5 T. L. R. 460 (1889). There the trust deed contained elaborate provision for meetings of debenture holders, and declared that a resolution passed by the requisite majority should be binding on all the debenture holders; but unfortunately the draftsman had omitted to insert any specific powers, and as a result the Court held that the majority had no power to sanction any departure from the trusts of the deed, or any modification of the rights of the debenture holders.

Where the terms of the power are clear the Court will and must give full effect to it. Where terms clear, Court gives effect.

It is not a question whether the contract is or is not prudent, unusual, or unwise. *Roberts* v. *Bury Commissioners*, L. R. 5 C. P. 310, 326; *Jones* v. *St. John's College*, L. R. 6 Q. B. 115, 127; *Scott* v. *Avery*, 5 H. L. C. 811; *Wilson* v. *Miles Platting Building Soc.*, 22 Q. B. D. 381, n.; *Doman's case*, 3 Ch. D. 21; *Re Argus Co.*, 39 Ch. D. 571. Of that the contracting parties are the best judges. The Court has merely to ascertain the meaning of the document. "To construe is nothing more than to arrive at the meaning of the parties to the agreement." Per Lord Chelmsford, *Scott* v. *Corporation of Liverpool*, 3 De G. & J. 334, at p. 360.

"It is of the utmost importance, as regards contracts between adults—persons not under disability and at arm's length—that Courts of law should maintain the performance of the contracts according with the intention of the parties; that they should not overrule any clearly-expressed intention on the ground that judges know the business of the people better than the people know it themselves." Per Jessel, M. R., *Wallis* v. *Smith*, 21 Ch. D. 243, 266. And see the observations of Lord Macnaghten in *Samuel* v. *Jarrah Timber Corpn.*, (1904) A. C. 323. The Court acts on very similar principles to those applied in the case of schemes of arrangement when the sanction of the Court is applied for. See Part II., 15th ed., pp. 913 *et seq.*

As to the form of the majority clauses they vary considerably. Where inserted in debentures they commonly run in the terms of Form 58 or 59. Where there is a trust deed to secure debentures or debenture stock the majority clauses are usually inserted in a schedule to the trust deed (see p. 355), with a corresponding clause in the body of the trust deed. See p. 344, clause 43. Form of majority clauses.

Occasionally where there is no trust deed the full set of clauses, as at p. 355, are set out with the requisite modifications as part of the conditions indorsed on the debentures.

One important question which sometimes arises is whether an effective resolution can be passed at a debenture holders' meeting where the majority passing it have some interest which is adverse to the general interests of the class, or where the resolution is not to operate evenly on the whole class. In *Tod* v. *New Zealand*, *supra*, p. 157, it is obvious that the Court considered that the resolution to be effective must deal with all alike, and it would seem that the majority cannot be allowed to benefit themselves at the expense of the minority—to commit a fraud, in fact, on the minority. *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350; *Mason* v. *Harris*, 11 Ch. D. 97; Voting where adversely interested.

*Burland* v. *Earle*, (1902) A. C. 83; *Normandy* v. *Ind, Coope, Ltd.*, (1908) 1 Ch. 84; *Cook* v. *Deeks*, (1916) 1 A. C. 554.

Apart from this it seems difficult to see any distinction in reason between a meeting of shareholders and a meeting of debenture holders, and as to the former a shareholder can vote freely even though having an adverse interest. *East Pant, &c. Co.* v. *Merryweather*, 2 H. & M. 254; *N. W. Transportation Co.* v. *Beatty*, 12 App. Cas. 589; *Burland* v. *Earle*, (1902) A. C. 94.

**Arrangements under s. 153 of Act of 1929.**

Where there is no majority clause or a difficulty in applying the same it may be possible to carry out the scheme proposed as an arrangement under sect. 153 of the Act. This section is applicable to a going company as well as to one in winding-up. See *infra*, Chap. LXXXVIII.

Persons entitled in equity to an immediate issue of debentures are entitled to vote at meetings. *Dey* v. *Rubber and Mercantile Corpn.*, (1923) 2 Ch. 528

## CHAPTER XX.

### PROSPECTUSES IN RELATION TO DEBENTURES AND DEBENTURE STOCK.

Issue of prospectus.

WHERE it is intended to appeal to the public to subscribe for debentures or debenture stock the usual course is to issue a prospectus inviting applications for the same.

Truth of statements.

In framing a prospectus the cardinal rule to be observed is that the prospectus must be a fair, honest and candid statement of the facts. Its authors must scrupulously abstain from making any statement or combination of statements which may mislead or give a false impression to those who are invited to subscribe. Nor is it sufficient that what is stated should be capable of being construed as an accurate statement. Those who are responsible for the prospectus must see to it that none of the statements made are even ambiguous or equivocal; for if a statement is susceptible of two meanings, one of which is true and the other false, a subscriber may understand it in the sense in which it is false, and may justly complain that he has been deceived thereby. Moreover, it is not enough to avoid actual misstatements. Care must be taken not to keep back anything material which, if stated, would qualify or give a different complexion to that which is stated, for a half-truth may be as misleading as a positive falsehood. The prospectus must be looked at as a whole to ascertain the impression which it is calculated to produce on the mind of an ordinary recipient; for even without any deliberate suppression of material facts the statements contained in it may collectively, by mere collocation or suggestion, create a false impression. It is quite possible for a prospectus as a whole to be misleading, though each statement it contains is, taken separately, unexceptionable. See *infra*, p. 427.

As regards facts within the personal knowledge of the directors, they can have little difficulty in stating these correctly; but commonly a prospectus includes statements as to a number of facts not within the knowledge of the directors, but in regard to which they have obtained information which they are satisfied is accurate. The directors of a mining company may, for instance, have received a cable from A. B. stating that the main reef of the mine has been struck. If they choose to adopt this statement, and to assert in the

prospectus that the main reef has been found, and it afterwards turns out that it was some other and less valuable reef, the directors will have committed themselves to a misrepresentation; whereas if they contented themselves with stating the exact truth—that they have received a cablegram from A. B. stating that the main reef has been found—there would be no cause for complaint. See *infra*, p. 435.

**Rules for drafting a prospectus.**

In framing a prospectus offering either shares or debentures, or both, the directors and others who are responsible for it should bear in mind—

(1) That a misstatement of a material fact, however innocently made may give a subscriber the right to repudiate his subscription. See *infra*, Chap. XLV.

(2) That a perfectly innocent misstatement may render the directors liable to pay compensation to a subscriber unless when challenged they are able to show not only that they believed the statement to be true, but that they had reasonable grounds for so believing; and they will, if necessary, be ordered to state what those grounds were. See Chap. XLV., *infra*.

(3) That if the prospectus contains an incorrect or misleading statement of a report or valuation, the directors may be held liable to compensate subscribers. See Chap. XLV., *infra*.

(4) That if the prospectus contains any untrue statement purporting to be a statement made by an official person, or contained in what purports to be a copy of or extract from an official document, the directors may be liable if it is unfairly or incorrectly stated. See Chap. XLV., *infra*.

Onerous as the above obligations are, sect. 35 of the Act carries the duty of disclosure still further by prescribing a long list of matters which must be disclosed in the prospectus.

The section runs thus:—

**Specific requirements as to particulars of prospectus.**

**35.**—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of of any person who is or has been engaged or interested in the formation of the company, must state the matters specified in Part I. of the Fourth Schedule to this Act and set out the reports specified in Part II. of that Schedule and the said Parts I. and II. shall have effect subject to the provisions contained in Part III. of the said Schedule.

(2) A condition requiring or binding an applicant for shares in or debentures of a company 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.

(3) It shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of this section:

Provided that this subsection shall not apply if it is shown that the form of application was issued either—

(a) in connection with a bonâ fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this subsection he shall be liable to a fine not exceeding five hundred pounds.

(4) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

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

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the court dealing with the case were immaterial or was otherwise such as ought, in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph 15 of Part I. of the Fourth Schedule to this Act, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(5) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(6) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

What is a prospectus within the section.

It will be noted that the section at its commencement uses the expression "every prospectus." These words must be interpreted in the light of sect. 380 of the same Act, which declares that:—

"In this Act, unless the context otherwise requires, the expression 'prospectus' means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company."

The expression "debenture" includes debenture stock, bonds and other securities of a company whether constituting a charge on the assets of the company or not.

But the section does not apply (see sub-sect. (5)) to the issue to existing members or debentures holders of a company of a prospectus

or form of application relating to shares or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons.

Although the section in terms applies only to a prospectus issued by or on behalf of a company or of a person interested in the formation of a company, its provisions are now made to apply where a company agrees to allot debentures with a view to their being offered for sale to the public. See sect. 38.

When the section is applicable and when not.

To determine whether a particular prospectus comes or may come within the section, the promoter or director must ask himself certain questions in relation to such prospectus:—

1. Does the prospectus offer debentures or debenture stock to the *public* for subscription or purchase?

A letter or circular, for instance, marked "strictly private and confidential, not for publication," issued by a director on his own account to private friends is not a prospectus. *Sherwell* v. *Combined Incandescent, &c. Syndicate*, W. N. (1907) 110. Nor are letters of a private nature recommending shares to a few business friends. *Sleigh* v. *Glasgow and Transvaal Options*, 6 F. 420, Ct. of Sess. But a prospectus marked "for private circulation only" and sent to 3,000 shareholders in gas companies, was held to be an offer of shares to the public. *South of England Natural Gas Co.*, (1911) 1 Ch. 573.

A prospectus may be issued, though it is shown to one person only, provided it is shown to him as a member of the public; but a document has been held not to be issued where it is shown to a person privately with a view to his becoming a director of a private company. *Nash* v. *Lynde*, (1929) A. C. 158.

If the section applies, it must be complied with in its entirety, though many of the particulars required to be disclosed are irrelevant in the case of a debenture prospectus, except as bearing on the general character and stability of the company, but it would not be safe on this ground to omit them.

The section applies to a prospectus issued by an English company abroad. *Roussell* v. *Burnham*, (1909) 1 Ch. 127.

The disclosures which must be made when the section applies are now set out in the Fourth Schedule to the Act, as follows:—

FOURTH SCHEDULE.

PART I.

MATTERS REQUIRED TO BE STATED IN PROSPECTUS.

1. Except where the prospectus is published as a newspaper advertisement, the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively.

2. 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.

3. 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.

4. The names, descriptions, and addresses of the directors or proposed directors.

5. Where shares are offered to the public for subscription particulars as to—

(i) the minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters:—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters;

(d) working capital; and

(ii) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

6. 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, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

7. The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

8. The names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.

9. 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.

10. The amount, if any, paid within the two preceding years, or payable, as commission (but not including commission to sub-underwriters) for subscribing

or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission.

11. The amount or estimated amount of preliminary expenses.

12. The amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment.

13. The dates of and parties to every material contract, not being a contract entered into in the ordinary course of business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected.

14. The names and addresses of the auditors, if any, of the company.

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

16. If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.

17. In the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the length of time during which the business of the company or the business to be acquired, as the case may be, has been carried on.

## PART II.

### REPORTS TO BE SET OUT IN PROSPECTUS.

1. A report by the auditors of the company with respect to the profits of the company in respect of each of the three financial years immediately preceding the issue of the prospectus, and with respect to the rates of the dividends, if any, paid by the company in respect of each class of shares in the company in respect of each of the said three years, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years, and, if no accounts have been made up in respect of any part of the period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

2. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by accountants who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus.

## PART III.

### PROVISIONS APPLYING TO PARTS I. AND II. OF SCHEDULE.

1. The provisions of this Schedule with respect 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 the preliminary expenses, shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

2. Every person shall for the purposes of this Schedule be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

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

(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;

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

3. Where any property to be acquired by the company is to be taken on lease this Schedule shall have effect 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. For the purposes of paragraph 8 of Part I. of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

5. If in the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the accounts of the company or business have only been made up in respect of two years or one year, Part II. of this Schedule shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years.

6. The expression "financial year" in Part II. of this Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the company or business terminates the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of the said Part of this Schedule be deemed to be a financial year.

(1) The memorandum.

As to paragraph (1):—The usual plan is to print the memorandum of association with the names, descriptions, and addresses of the signatories on the back of the prospectus. It is not necessary to set out the names of the witness or witnesses to the signatures.

(2) Founders and management shares.

As regards the founders or other shares (paragraph (2)):—The facts as to these have to be set out whether the rights are defined in the memorandum or in the articles of association.

It is to be noted that paragraph (1) of Part I., and paragraph (1) of Part III., whilst permitting the omission of the memorandum from a prospectus issued more than two years after the company is entitled to commence business or in a newspaper advertisement, makes no similar concession in regard to the particulars as to founders or management shares.

(3) Qualification of directors.

As to paragraph (3):—There can be no doubt that "articles" here mean the articles for the time being in force. See sect. 380. The

best plan is to set out in full the provisions as to qualification and remuneration, including those for remuneration of the managing director and for special services.

If there is no qualification clause in the articles nothing need be said.

Paragraph (3) does not apply where the prospectus is issued more than two years after the date on which the company became entitled to commence business. See Part III. para. (1).

(4) Directors. Paragraph (4) also does not apply in the case of a prospectus published more than two years after the date on which the company is entitled to commence business.

(5) The minimum subscription. Paragraph (5) does not apply to a prospectus by which nothing but debentures or debenture stock is offered for subscription.

It is not uncommon, however, in offering debentures or debenture stock for subscription, to state what is the minimum subscription thereof on which the directors may proceed to the issue of the debentures or debenture stock.

(6) Amount of shares and debentures issued. As to paragraph (6):—This in the case of a new company does not involve much difficulty; but in the case of a company which has been in existence for some length of time it is necessary to go back and ascertain the facts required to be stated. These are sometimes stated in a tabular form.

In regard to "consideration" it seems sufficient to state the general nature of the consideration. *S. Frost & Co.*, (1899) 2 Ch. 207.

(8) Vendors and purchase money. As to paragraph (8):—This must be carefully considered having regard to the extended meaning attributed to the word "vendor" by paragraph (2) of Part III. of the Schedule. As to the meaning of that term and who is a sub-purchaser, see *Brookes* v. *Hansen*, (1906) 2 Ch. 129.

(9) Price of goodwill. As to paragraph (9):—The necessity for specifying the amount payable for goodwill renders it necessary to frame the contract specially so as to separate goodwill from the other assets, and, if needs be, a supplemental contract must be made.

(10) Underwriting commission. As to paragraph (10):—Sect. 43, which legalises payment of underwriting commission in case of shares provided the amount is stated in a prospectus or statement in lieu of prospectus, does not apply to debentures; but, if a prospectus is issued, the underwriting commission on debentures must be disclosed. It must also be disclosed in balance sheets under sect. 44 and in the annual summary under sect. 108 (3) (f), and particulars must be registered under sect. 79 (9). The contract for payment may be a material contract which will have to be disclosed as to date and parties under paragraph (13) of the section.

As to paragraph (11):—This information as to preliminary expenses is not required in the case of a prospectus published more than two years after the date at which the company is entitled to commence business. (11) Preliminary expenses.

As to paragraph (12):—If the company has already paid within the two preceding years, or intends to pay to any promoter any sum, the amount must be stated, and the consideration. As to who are promoters, see Part I., Chap. II. (12) Promotion moneys.

As to paragraph (13):—The wording of this paragraph is very wide, and no doubt designedly so. It is not necessary that the company should be a party to the contract. It may be that the contract will be material although made between strangers to the company. Thus, suppose that A. agrees to sell a property to B. for 1,000*l.*, and shortly afterwards B. agrees to sell the same to the company for 5,000*l.*, such a contract may very well be deemed material to persons investing their money in the shares or debentures of the company. In determining materiality the whole circumstances must be looked at, and it seems probable that it will be held that every contract (not within the exception of the proviso) is material which upon a reasonable construction of its purport and effect would assist a person in determining whether he should become a subscriber or not. See *Sullivan* v. *Mitcalfe*, 5 C. P. D. 455; followed by the Court of Appeal in *Cackett* v. *Keswick*, (1902) 2 Ch. 456; see also *Shepheard* v. *Broome*, (1904) A. C. 342; *Tait* v. *Macleay*, (1904) 2 Ch. 631; (1906) A. C. 24; *Nash* v. *Calthorpe*, (1905) 2 Ch. 237; *Calthorpe* v. *Trechmann*, (1906) A. C. 24. (13) Material contracts.

The word "inspection" seems to point to contracts in writing only, but *quære* if it can be so limited. *Capel* v. *Sims Ship Co.*, 36 W. R. 689; *Arkwright* v. *Newbold*, 17 Ch. D. 301.

As to paragraph (15):—The words at the commencement of this paragraph, "full particulars of the nature and extent," are very emphatic, and render it necessary to disclose not merely the fact that a director is interested, but to give the details of his interest. Thus, if the director is interested in the vendor company or in the promoting company, it must not only be stated how many shares he has, but what proportion his shares bear to the other shares. And see *Imperial Assocn.* v. *Coleman*, L. R. 6 H. L. 190. (15) Directors' interests.

As to sub-sect. (2) of sect. 35:—This in effect precludes any waiver clause in regard to the matters which are required by the section to be disclosed. Sub-sect. (2): Waiver clauses.

Before the Act of 1908 a waiver clause was valid and effective to cover honest omissions or mistakes. *Macleay* v. *Tait*, (1906) A. C. 24.

**Abridged prospectus for newspaper advertisement.**

As to paragraph (1) of Part III.:—This paragraph affords a small, though only a small, measure of relief for advertising purposes. The prospectus must still appear almost in its entirety. It has been suggested that there is nothing in the section to prevent the advertisement in a newspaper of the fact that the company is issuing a prospectus, and that such prospectus contains certain statements and other matters, and that copies can be obtained at a particular place. Advertisements purporting to be "abridged" prospectuses have accordingly been issued on these lines. Some of these do in fact, if not in form, offer shares or debentures for subscription. These are probably within the section, and directors who attempt to use the abridged prospectus merely as a means of avoiding some of the disclosures required by the section may find themselves exposed to liability. A form of application for shares cannot now be issued with such an advertisement. See sect. 35 (3).

**Sub-sect. (6): Non-compliance with section.**

As to sub-sect. (6): The result of and remedy for non-compliance with the section is dealt with in Chap. XLV. It is not rescission but an action for damages.

**Naming of directors and prospectus.**

In addition to the statement of a director's share qualification (if any), and his interest (if any) under paragraph (15), the Act (by sect. 140) requires as a condition precedent to a person being named as a director in a prospectus or capable of being appointed a director under the articles, that certain formalities shall be complied with. The section runs thus:—

**140.**—(1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in a prospectus issued by or on behalf of the company, or as proposed director of an intended company in a prospectus issued in relation to that intended company, or in a statement in lieu of prospectus delivered to the registrar by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the delivery of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(a) signed and delivered to the registrar of companies for registration a consent in writing to act as such director; and

(b) either—

(i) signed the memorandum for a number of shares not less than his qualification, if any; or

(ii) taken from the company and paid or agreed to pay for his qualification shares, if any; or

(iii) signed and delivered to the registrar for registration an undertaking in writing to take from the company and pay for his qualification shares, if any; or

(iv) made and delivered to the registrar for registration a statutory declaration to the effect that a number of shares, not less than his qualification, if any, are registered in his name.

(2) Where a person has signed and delivered as aforesaid an undertaking to take and pay for his qualification shares, he shall, as regards those shares, be in the same position as if he had signed the memorandum for that number of shares.

(3) On the application for registration of the memorandum and articles of a company the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds.

(4) This section shall not apply to—

(a) a company not having a share capital; or

(b) a private company; or

(c) a company which was a private company before becoming a public company; or

(d) a prospectus issued by or on behalf of a company after the expiration of one year from the date on which the company was entitled to commence business.

"Director" in this section includes any person occupying the position of director by whatever name called. (Sect. 380.)

When a company entitled to commence business.

The expression "company entitled to commence business" refers to the restrictions imposed by sect. 94 of the Act.

This section runs as follows:—

Restrictions on commencement of business.

94.—(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

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

(c) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2) Where a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

(a) there has been delivered to the registrar of companies for registration a statement in lieu of prospectus; 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 payable in cash; and

(c) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors in the prescribed form that paragraph (b) of this sub-section has been complied with.

(3) The registrar of companies shall, on the delivery to him of the said statutory declaration, and, in the case of a company which is required by this section to deliver a statement in lieu of prospectus, of such a statement, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

(4) 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.

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

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

(7) Nothing in this section shall apply to—

(a) a private company; or

(b) a company registered before the first day of January, nineteen hundred and one; or

(c) a company registered before the first day of July, nineteen hundred and eight, which has not issued a prospectus inviting the public to subscribe for its shares.

Until, then, a company is entitled to commence business, it cannot exercise any borrowing power which it may possess. The borrowing power is vested in the company, but dormant. This, at least, is the natural inference from sub-sect. (5), providing that nothing in the section shall prevent the simultaneous offer for subscription of any shares and debentures or the receipt of any application money. The contract is to be provisional—that is, it is to be read as if it contained a proviso that it is not to be binding on the company unless and until the company becomes entitled to commence business. *Otto Electrical Co.*, (1906) 2 Ch. 390; *Clinton's case*, (1908) 2 Ch. 515.

See further, *supra*, Chap. IX.

**Consequences of non-compliance with Act.**

As to the consequence of non-observance of the statutory and other rules and requirements above set forth, see Chap. XLV., *infra*.

### Inspection of Documents.

**Inspection of documents.**

The prospectus should state where copies of the memorandum and articles of association, and of any contracts and other documents mentioned in the prospectus, can be inspected, and it is also necessary to include in the prospectus a copy of the memorandum of association of the company.

### Stock Exchange Quotation.

**As to Stock Exchange rules.**

If it is intended to apply to the Stock Exchange for a settlement and quotation, it is also necessary to state fully the terms of redemption,

and in the case of debentures whether they are to be to bearer or registered (see Further Rules of the Stock Exchange, Part I., 15th ed., Appendix, pp. 1465 *et seq.*).

### Registration of Prospectuses.

Sect. 34 of the Act makes provision for the delivery of a copy of every prospectus to the registrar. The section runs as follows:—

Prospectus.

**34.**—(1) A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be delivered to the registrar of companies for registration on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so delivered 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 delivered for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so delivered 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 delivered.

For the purpose of compliance with this section, it must be borne in mind that, under sect. 380 of the Act, "prospectus" means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures [or debenture stock] of a company.

The object of this section is twofold:—(1) To preserve an authoritative record of the terms on which the public are invited to subscribe for shares or debentures; and (2) to secure that the directors or directors elect of the company make themselves responsible for the statements in the prospectus.

### Statement in Lieu of Prospectus.

Where a company having a share capital and not being a private company does not issue a prospectus to the public it must, under sect. 40 of 1929, deliver to the registrar of companies a statement, in lieu of prospectus in the form set out in the Fifth Schedule to the Act, three days before it can allot any shares or debentures.

As to this, see Part I., 15th ed., p. 226 *et seq.*

# CHAPTER XXI.

## CONTRACT TO TAKE OR ISSUE DEBENTURES AND DEBENTURE STOCK.

Contract to issue debentures or debenture stock. How made.

THE contract to take up debentures or debenture stock is usually made by application followed by allotment. In such case, as in the case of shares, the application can, by notice to the company, be withdrawn before it is accepted by the company. The posting of a letter of allotment is an acceptance binding the applicant from the date of posting. *Harris' case*, 7 Ch. 587; *Henthorn* v. *Fraser*, (1892) 2 Ch. 27; *Ex parte Jones*, (1900) 1 Ch. 220. Allotment followed by acceptance would equally suffice. Sometimes the contract to take and issue is combined in one document, *e.g.*, when a vendor agrees to sell for debentures, or to sell property and subscribe for debentures. Where sect. 94 applies, a contract to take debentures made before the company is entitled to commence business is provisional only; that is, it must be read as if it contained a proviso that the contract is not to be binding on the company unless and until the company becomes entitled to commence business. *Otto Electrical Co.*, (1906) 2 Ch. 390; *Clinton's case*, (1908) 2 Ch. 515; see *supra*, p. 176.

Specific performance by subscriber, or forfeiture of paid instalments.

If a subscriber for debentures made default in paying up any instalments thereon, he could not, as the law formerly stood, be compelled specifically to perform the contract by paying up the instalments, for the Court would not grant specific performance in such a case. *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271; *South African Territories* v. *Wallington*, (1898) A. C. 309. The company's only remedy was to sue for damages, and such damages it might not be easy to prove, for on a contract to make a loan of money the measure of damage is the loss sustained by the breach, and the damages may be merely nominal. This rule in limitation of the Court's jurisdiction has been found unjust and inconvenient, and by sect. 16 of the Companies Act, 1907 (now re-enacted in sect. 76 of the Act of 1929), it was provided that: A contract with a company to take up and pay for any debentures [including debenture stock] of the company may be enforced by an order for specific performance.

Action.

To obtain such an order an action will be needful, and the company must offer to perform its part of the contract, that is, to issue the

debentures or debenture stock in due course. The defendant will be able to resist the action on any of the grounds available in actions for specific performance, *e.g.*, misrepresentation or mutual mistake or inequitable conduct on the part of the company. Thus the company cannot insist upon forfeiting paid-up instalments and at the same time obtain specific performance of the agreement to pay the balance. *Kuala Pahi Rubber Estates, Ltd.* v. *Mowbray*, (1914) W. N. 321; 111 L. T. 1072.

**Undue instalments not payable in winding-up.**

When a company goes into liquidation while instalments are still due from a subscriber for debentures, he is not bound to pay up such instalments (*Ellerby's claim*, 20 W. R. 855); for the winding-up gives him a right to treat the contract as at an end. This is *à fortiori* the case where the company is insolvent, for no man is bound to advance money after notice of insolvency. *Ex parte Chalmers*, 8 Ch. 289; *Ex parte Carnforth Co.*, 4 Ch. D. 108.

## CHAPTER XXII.

### AS TO ENFORCING THE CONTRACT TO BORROW AGAINST THE COMPANY.

As to enforcement of contract against company.

THE Court will not compel a company to fulfil its agreement to borrow money; *Rogers* v. *Challis*, 27 Beav. 175; and sect. 16 of the Companies Act, 1907 (now sect. 76), *supra*, p. 178, does not alter the law in this respect.

But where money had actually been advanced on the terms that it was to be secured by mortgage, the Court will specifically enforce the execution of the mortgage. *Ashton* v. *Corrigan*, 13 Eq. 76; *Hermann* v. *Hodges*, 16 Eq. 18.

If the contract is not capable of being specifically enforced, it would be very difficult to make out a case for damages.

Where a company offers debentures or debenture stock for subscription and states the security offered, and any debentures or debenture stock are taken up on the faith of the prospectus, the subscribers stand in equity in the same position as if the securities had been actually granted; for equity treats that as done which ought to have been done. *Mercantile Investment Co.* v. *River Plate Trust*, (1892) 2 Ch. 303; *Queensland, &c. Co.*, (1894) 3 Ch. 181; *Pegge* v. *Neath District Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 Q. B. 771. Thus, where a prospectus offered for subscription 20,000*l.* worth of mortgage debentures "to be secured on the entire property of the company," and S. applied for debentures "upon the terms of the company's prospectus," and a resolution to allot was passed by the directors and notified to S., but no allotment took place, and afterwards a trust deed was executed charging certain property specified "in the schedule" in favour of the debenture holders, but no schedule was annexed; the Court in the winding-up held S. entitled to a charge on the entire property of the company. *New Durham Salt Co.* (1890), 2 Meg. C. R. 360; 35 S. J. 24; and see Form 288, *infra*.

Equitable debenture holders.

So in *Thorn* v. *Nine Reefs, Ltd.* (1892), 67 L. T. 93, the plaintiff had subscribed and paid for debentures and had received a provisional scrip certificate certifying his title to receive the debentures so soon as the trust deed had been registered in India. The Court of

Appeal held that the plaintiff, had he proved that the assets were in jeopardy, would have been entitled to the appointment of a receiver. "There has," said Bowen, L. J., "been a payment of money on the one side entitling the person who paid it to debentures of the company, and entitling him to the benefit of those debentures, if not to the manual delivery of them. That gives him the actual right to be placed in the position of a debenture holder. He will be clothed in equity with all the rights of a debenture holder."

And in *Queensland Land & Coal Co., Davis* v. *Martin*, (1894) 3 Ch. 181, debentures sealed, but with a blank as to the names, were deposited by way of security for an advance. This was held to place the depositee in the position of an equitable debenture holder. "Assuming," said North, J., "that there is a clear, definite contract to have debentures issued to them in respect of the loan for the amount mentioned, it seems to me that they have as good a claim as any debentures could give them, except that their claim is equitable, and not legal. In my opinion, therefore, they are equitable holders of debentures, just as they would have been legal holders if the names of the obligees had been inserted before the debentures were executed by the company."

And again in *Pegge* v. *Neath and District Tramways Co., Ltd.*, (1898) 1 Ch. 183, where the defendant company had borrowed money from the plaintiff, for which they gave him a promissory note bearing interest at 5 per cent., and undertook that they would, at any time when called upon by the holder of the note, issue debentures for the amount bearing interest at a specified rate and secured as a second charge on the company's undertaking, it was held that the plaintiff, having called for the debentures, was in equity a holder of second debentures, and was entitled to stand on the same footing in the distribution of the company's assets as if he were a legal holder of second debentures.

See also *Perth Electric Tramways*, (1906) 2 Ch. 216, in which debentures in blank were deposited as security for a loan and were held to be "issued"; and *Dey* v. *Rubber and Mercantile Corpn., Ltd.*, (1923) 2 Ch. 528, where creditors to whom notices of allotment of debentures had been sent and whose names were entered on the register were held entitled to vote at meetings of debenture holders, though their debentures had not been sealed.

The lender's right to assert this equity to have his security appropriated to him is qualified by sect. 79 of the Act. See *infra*, Chap. XXIV. For suppose an agreement in writing to issue debentures, this is in equity "a charge created by the company" within the section, and if particulars of the charge are not registered under sect. 79 within the twenty-one days, how can the debenture subscribers

assert that they have any security in equity? If a security, it is avoided by non-registration within the time allowed. The position is analogous to that of a person under the Bills of Sale Act, 1854, who had an (unregistered) agreement for the execution of a bill of sale. He was not entitled to rely on it as giving him a security (*Ex parte Mackay*, 8 Ch. 643); although he could obtain an order for specific performance (*Ex parte Homan*, 12 Eq. 598; *Ex parte Hauxwell*, 23 Ch. D. 626). To meet the difficulty, agreements to issue debentures and give security are sometimes registered under sect. 79 of the Act. But registration of an agreement to issue debentures constituting part of a series is not necessary where particulars of the issue have been registered pursuant to sub-sect (8) of sect. 79 of the Act. See p. 187, *infra*.

The issue of a debenture which is void for want of registration does not avoid a fresh debenture issued in lieu of the void debentures. *N. Defries & Co.*, (1904) 1 Ch. 37. Sect. 14 of the Act of 1900 which was in force at the date of this decision did not contain the words now appearing in sect. 79 (1): "the money secured thereby shall immediately become payable." The addition of these words certainly does not appear to detract from the authority of this decision.

If an agreement to issue debentures is kept unregistered for the purpose of giving the company a false credit, the execution and registration of a debenture on the eve of a winding-up may amount to a fraudulent preference. *Jackson and Bassford, Ltd.*, (1906) 2 Ch. 467; but not to a fraudulent assignment with the statute 13 Eliz. c. 5. See *Re Lloyds Furniture Palace, Ltd.*, (1925) 1 Ch. 853. It may be evidence of fraudulent trading within sect. 275; but fraud must be proved to the satisfaction of the Court. *Re Patrick and Lyon, Ltd.*, (1933) Ch. 786. See Part II., 15th ed., pp. 652 *et seq.*

## CHAPTER XXIII.

### SCRIP CERTIFICATES TO BEARER.

Scrip certificates to bearer.

THE allottee of debentures or debenture stock is very commonly given a scrip certificate to bearer, when he has paid up the amount payable on allotment. See Form 35. These certificates are, by the law merchant, negotiable. *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194; *Goodwin* v. *Robarts*, 1 App. Cas. 476.

If the company goes into liquidation before the instalments are all paid, the holder need not pay the balance. See *Ellerby's claim*, 20 W. R. 855, where, before payment of the last instalment, steps were taken with a view to the winding-up of the company, and an effective resolution was shortly afterwards passed. The last instalment was paid in the winding-up without prejudice. The Court ordered its return, and allowed the scrip-holder to prove for what he had previously paid. "Can anything be more plain," said Malins, V.-C., in that case, "than that a person who enters into a contract to lend money to a company or to an individual in the belief that it is a solvent concern or a solvent individual, from whom he may expect to get his money back with interest, directly he gets notice, or has reasonable ground to believe, that the company or individual is insolvent, is entitled to withhold any further payments? I cannot understand such a thing for a moment being contested. It is said that the winding-up order did not commence till the 1st of November. . . . It is not a question whether the winding-up process had commenced; the question is whether a state of things existed on the 10th of October which justified him in withholding payment. As it was intimated to him that the company was a dissolved or dissolving concern, he was, in my opinion, justified as a reasonable man in withholding any further payment." See also *Indemnity Fire Office, Ltd.* v. *Cousins*, W. N. (1882), p. 16; *Ex parte Chalmers*, 8 Ch. 289; and *Ex parte Carnforth Co.*, 4 Ch. D. 108.

# CHAPTER XXIV.

## REGISTRATION.

### (1) Bills of Sale Acts, whether applicable.

Bills of sale.

UNTIL *Standard Manufacturing Co.*, (1891) 1 Ch. 627, was decided, it was generally supposed that debentures and debenture trust deeds, in so far as they charged personal chattels, were bills of sale within the meaning of the Bills of Sale Acts, and that only debentures of mortgage or loan companies or similar companies were exempted from the operation of the Act of 1882 by sect. 17 of that Act, which provides: "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."

It was always assumed that debentures were within the Bills of Sale Act, 1854. *Shears* v. *Jacob*, L. R. 1 C. P. 513; *Deffell* v. *White*, L. R. 2 C. P. 144; *Marine Mansions*, 4 Eq. 601. And numbers of trust deeds and debentures were registered accordingly under that Act. And similarly under the Act of 1878 the Courts, in many cases, acted on the assumption that the Bills of Sale Acts applied to the debentures and trust deeds of companies, and accordingly treated the question whether a given instrument could be brought within the exempting clause of the Act of 1882 (s. 17) as material. *Edmonds* v. *Blaina Co.*, 36 Ch. D. 215; *Levy* v. *Abercorris Co.*, 37 Ch. D. 260; *Topham* v. *Greenside Co.*, 37 Ch. D. 281; *Read* v. *Joannon*, 25 Q. B. D. 300.

Acts of 1878 and 1882 held not applicable to debentures. (*Re Standard Manufacturing Co.*)

At length, however, in *Standard Manufacturing Co.*, (1891) 1 Ch. 627, the question was raised whether the Acts of 1878 and 1882 applied at all to companies under the Act of 1862. In that case the company had issued debentures charging, by way of floating security, all its property, present and future, and further secured by trust deed. The securities were not registered as bills of sale. A judgment creditor of the company having levied execution on part of the chattels charged, the question whether the securities were not void as against him for non-registration was raised, and the Court of Appeal answered this question in the negative. Bowen, L. J., delivered

the judgment of the Court, and after observing (p. 644) that the debentures were expressly excepted from the operation of the Act of 1882, proceeded as follows (p. 645):—"The next question to be solved is, whether these debentures, or either of them, are bills of sale, and bills of sale to which the Bills of Sale Act, 1878, applies. That these debentures are 'agreements by which a right in equity to a charge or security on personal chattels is conferred,' appears to be clear. But we are of opinion, nevertheless, that on the true construction of the Act of 1878, the mortgages or charges by any incorporated company for the registration of which a statutory provision had already been made by the Companies Clauses Act, 1845, or the Companies Act 1862, are not bills of sale within the scope of the Bills of Sale Act, 1878. . . . (p. 647). We think that this appeal should therefore be allowed . . . *on the ground* that the mortgages or charges of any incorporated company for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878."

This decision settled the law on the subject. It was followed and explained by North, J., in *Richards* v. *Kidderminster Overseers*, (1896) 2 Ch. 212. See also *Opera, Ltd.*, (1891) 3 Ch. 260. Its *ratio decidendi* was confirmed when sect. 14 of the Companies Act, 1900, provided a system of public registration for a company's mortgages and charges, and, in particular sub-sect. 1 (c) of this section may be said expressly to recognize the validity of these decisions, for it assumed that a charge created by means of a bill of sale by a company would not, apart from the section, require registration under the Bills of Sale Acts; since it provided for the registration, *inter alia*, of—

"(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."

(See now sect. 79 (2) (c).)

The exemption section, sect. 17 of the Act of 1882, does not, however, apply to absolute bills of sale under the Bills of Sale Act, 1878.

### (2) Registration in Middlesex and Yorkshire.

County registers.

As to Middlesex and Yorkshire, see *supra*, p. 144.

### (3) Registration in Devon and Cornwall.

Stannaries.

As to registration of mortgages and charges of mining property in Devon and Cornwall, see Stannaries Act, 1887 (50 & 51 Vict. c. 43), ss. 19, 4. The relevant provisions of the Act of 1887 are not repealed by the Stannaries Court (Abolition) Act, 1896; but the latter Act abolishes the old Court and its registrar, and by the Act and the Order

under it the jurisdiction is now transferred to the County Court of Cornwall, and by rule 2 of the Order of 16th December, 1896, anything to be done by the registrar of the old Court is now to be done by the County Court registrar.

### (4) Land Registration Act, 1925.

Land Registration Act.

The Land Registration Act, 1925 (replacing the Land Transfer Acts, 1875 and 1897), and the Rules of 1925 make it necessary to register any charge in favour of trustees for debenture or debenture stockholders where the title to land charged is registered. See Rule 145, and p. 371, *infra*.

### (5) Registration under sect. 79 of the Companies Act, 1929.

Sect. 79 of the Act of 1929 runs thus:—

REGISTRATION OF CHARGES.

Registration of charges with registrar of companies.

**79.**—(1) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered in England and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the 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 charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges:—

(a) a charge for the purpose of securing any issue of debentures;
(b) a charge on uncalled share capital of the company;
(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;
(d) a charge on land, wherever situate, or any interest therein;
(e) a charge on book debts of the company;
(f) a floating charge on the undertaking or property of the company;
(g) a charge on calls made but not paid;
(h) a charge on a ship or any share in a ship;
(i) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright.

(3) In the case of a 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 verified in the prescribed manner of the instrument by which the charge is created or evidenced, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar.

(4) Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the charge may be sent for registration under this section notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(5) Where a charge comprises property situate in Scotland or Northern Ireland and registration in the country where the property is situate is necessary to make the charge valid or effectual according to the law of that country, the delivery to and the receipt by the registrar of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced, together with a certificate in the prescribed form stating that the charge was presented for registration in Scotland or Northern Ireland, as the case may be, on the date on which it was so presented shall, for the purposes of this section, have the same effect as the delivery and receipt of the instrument itself.

(6) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a charge on those book debts.

(7) The holding of debentures entitling the holder to a charge on land shall not for the purposes of this section be deemed to be an interest in land.

(8) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall for the purposes of this section be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

(a) the total amount secured by the whole series; and

(b) the dates of the resolutions 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:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(9) Where any commission, allowance, or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this sub-section be treated as the issue of the debentures at a discount.

(10) In this Part of this Act—

(a) the expression "charge" includes mortgage;

(b) the expression "fixed date" means in relation to the charges specified in paragraphs (a) to (f), both inclusive, of sub-section (2) of this section, the first day of July, nineteen hundred and eight, and in relation to the charges specified in paragraphs (g) to (i), both inclusive, of the said sub-section, the commencement of this Act.

**Notes on the section.**

**(1) What requires to be registered under the section.**

This section applies to certain specified classes of mortgages and charges only—namely, those particularized in sub-sect. (2), of which paragraphs (g), (h) and (i) of this sub-section were added by the Act of 1929. Hence, a simple mortgage or charge (not being a floating charge, nor for the purpose of securing an issue of debentures or debenture stock) on a concession will not require registration under the section, or a mortgage, by deposit of dock warrants, bills of exchange, or other mercantile documents, unless made for securing an issue of debentures or debenture stock. Such mortgages or charges must, however, be entered in the company's register provided for by sect. 88. A deed of covenant securing bonus certificates requires registration. *Hoare* v. *British Columbia Assocn.*, W. N. (1912) 235; 107 L. T. 602.

**(c) Bill of sale.**

As to what is a bill of sale, see sect. 4 of the Bills of Sale Act, 1878. A pledge of goods accompanied by delivery of possession to the pledgee is not a bill of sale (*Ex parte Hubbard* (1886), 17 Q. B. D. 690); even if accompanied by "letters of trust" (*Re David Allester, Ltd.*, (1922) 2 Ch. 211); nor where the goods are retained by the company in locked rooms, the keys being given to the creditor (*Wrightson* v. *McArthur and Hutchinsons* (1919), *Ltd.*, (1921) 2 K. B. 807), nor is an oral agreement giving security followed by possession (*Charlesworth* v. *Mills*, (1892) A. C. 231; *Ramsay* v. *Margrett*, (1894) 2 Q. B. 18); nor *primâ facie* are inventories of goods with receipt attached (*Ramsay* v. *Margrett, supra*; *Prudential Mortgage Co.* v. *Marylebone Borough Council*, 8 Loc. Gov. Rep. 901); nor sale and hiring agreements (*Manchester Ry. Co.* v. *North Central Waggon Co.*, 13 App. Cas. 554). But invoices and warrants for delivery of a stock of whiskey have been held to be within the section. *Dublin City Distillery* v. *Doherty*, (1914) A. C. 823. This provision "must be construed as applying to all instruments which, if executed by an individual, would for their validity require registration": per Lord Parker, (1914) A. C. at p. 854.

An industrial and provident society is not within the protection accorded to companies; but where the society charged all its property, the charge was held to be severable and to be valid as to the assets other than personal chattels. *North Wales Produce and Supply Assocn.*, (1922) 2 Ch. 340.

"Book debts" are debts properly accounted for in books. See *Shipley* v. *Marshall*, 14 C. B. N. S. 566; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Dawson* v. *Isle*, (1906) 1 Ch. 633. A re-insurance contract involving book debts does not require registration if it creates no charge on the book debts. *Law Car and General Insurance Co.*, W. N. (1911) 101. A deposit of duplicate bills of lading accompanied by letter hypothecating the shipments or the proceeds of sale requires registration. *Ladenburg & Co. v. Goodwin Ferreira & Co.*, (1912) 3 K. B. 275. The section cannot be avoided by endeavouring to alter the form of the transaction. *Saunderson & Co.* v. *Clark*, 29 T. L. R. 579. A document assigning hire-purchase agreements was held by Eve, J., to be a charge, and he further held (and, it is submitted, rightly) that the rentals reserved under the hire-purchase agreements were book debts. This decision was overruled by the Court of Appeal on the ground that the transaction in question was not a charge, but an absolute assignment. The ruling of Eve, J., that the rentals were book debts was not dealt with by the Court of Appeal and remains unaffected. *Re Geo. Inglefield, Ltd.*, (1933) 1 Ch. 1. **(e) Book debts.**

A letter authorising the London County Council to pay a certain sum to a creditor of the company out of the next payment to fall due to the company from the council was held by the Court of Appeal to be an absolute assignment of part of a book debt and not a charge on book debts within sect. 79. *Ashby Warner & Co., Ltd.* v. *Simmons*. (1936) W. N. 212.

A mortgage or charge—which word includes an equitable charge —is "created" when the deed is executed or the agreement for the mortgage or charge made, though the advance takes place subsequently. *Spiral Globe Co.*, (1902) 2 Ch. 209; *Re Harrogate Estates, Ltd.*, (1903) 1 Ch. 498; *New London and Suburban Co.*, (1908) 1 Ch. 621. Thus a debenture is "created" when the common seal is affixed to it, even though it be not issued until some subsequent period. *Spiral Globe Co.*, (1902) 2 Ch. 209. So a debenture stock trust deed containing an acknowledgment of indebtedness and charge "creates" the stock when the company executes the deed. Where a debenture trust deed was executed in 1895 to secure debentures and some of the debentures were issued in 1903 (*i.e.*, after the Act of 1900 which first required registration), the debenture holder was held entitled to the benefit of the specific charge contained in the trust deed, though not to the floating charge contained in the debentures. *Dublin City Distillery* v. *Doherty*, (1914) A. C. 823. A mortgage by deposit with a memorandum dates from the deposit and not from advances on it or from a date subsequently filled in. *Esberger & Son, Ltd.* v. *Capital and Counties Bank*, (1913) 2 Ch. 366. **"Created."**

A debenture creating a floating charge duly delivered for registration

within twenty-one days of its actual issue is not void under sect. 79, because the lender advanced the money under an agreement to issue the debenture more than twenty-one days before the date of the delivery for registration. *Columbian Fireproofing Co.*, (1910) 2 Ch. 120.

**Avoidance of security.**

It is the security only which is avoided under sect. 1 when the mortgage or charge becomes void under the section; the money secured by the mortgage or charge is to become immediately payable. The security is void "against the liquidator and any creditor of the company." This includes secured creditors even though they have notice of the unregistered charge. *Re Monolithic Co.*, (1915) 1 Ch. 643.

**(8) Registration of a series of debentures.**

Sub-sect. (8) of the section provides for a different mode of registration to that of sub-sect. (1). This is by registering certain specified particulars. According to this method it is not necessary to register the debentures themselves; see *Harrogate Estates, Ltd.*, (1903) 1 Ch. 498, where it was held that the registration of the particulars specified in the sub-section protected the subsequently created debentures of the series, and also those of the series created not more than twenty-one days before the registration of such particulars. It was also held that they can be registered at any time, and that the words "debentures containing any charge" are equivalent to debentures which have the benefit of a charge, and that the limit of twenty-one days does not apply to the registration of these particulars, but this was a decision under sect. 14 of the Act of 1900, and the words of sect. 79 are different, the limit of twenty-one days being expressly inserted. This mode of registering particulars is now commonly adopted in the case of a series of debentures and debenture stock. *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564.

Where debentures duly registered are deposited by way of security, it is apprehended that the agreement defining the terms of redemption does not require registration. The deposit is analogous to a transfer of beneficial interest, and cannot involve any higher obligation in respect of registration. But if the deposit is of debentures unregistered, the agreement as to the deposit cannot be relied on as a security giving an equitable charge, unless such agreement is duly registered under sect. 79. See *Ex parte Mackay*, 8 Ch. 643.

There is no difficulty in registering a specified amount of debentures (or debenture stock) "forming part of an issue not exceeding the issued (or paid-up) capital for the time being"; and a charge, *e.g.*, for securing money advanced and to be advanced, not exceeding £——, can be registered; nor should there be any difficulty as to registering a security for advances, present and future, without limit, for sect. 79 does not require the minimum amount or the maximum amount to be registered, save as regards debentures or debenture stock.

Sect. 79 only applies to a charge created by the company; but the provisions of the section have now been expanded to charges affecting property acquired by the company.

Sect. 81 provides as follows:—

81.—(1) Where after the commencement of this Act a company registered in England acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside Great Britain, twenty-one days after the date on which the copy of the instrument could in due course of post, and if dispatched with due diligence, have been received in the United Kingdom shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds.

The provisions of this section are also made to apply to companies registered outside England (sect. 90) and to charges created before the Act of 1929, which would have required to be registered if made after the Act. (Sect. 91.)

Certificate conclusive.

A casual omission from the particulars required to be registered under sect. 79 (8) is cured when the registrar has certified that registration has been fully made. *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564; *Yolland, Husson and Birkett*, (1908) 1 Ch. 152. And see sect. 82 (2), p. 197, *infra*.

A mortgage or charge once registered is valid as to all the property comprised in it, notwithstanding that the particulars of the property charged as registered are insufficient. *National Provincial, &c. Bank* v. *Charnley*, (1924) 1 K. B. 431.

Substituted property.

Property comprised in a trust deed is often released and replaced by other property. When this is the case, a mortgage made or charge given on such substituted property after the date of the Act requires registration (*Cornbrook* v. *Law Debenture Corpn.*, (1904) 1 Ch. 103): unless the trust deed has already been registered under sub-sect. (8) of the section (*Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564). Having regard to sect. 81 (1), the mere fact that the charge was not created by the company would not affect the necessity for registration. To this extent *Bristol United Breweries* v. *Abbott*, (1908) 1 Ch. 279, must be taken to be overruled by sect. 81.

It has been suggested that sect. 79 (8) does not apply to a case where property is conveyed to the trustees of a debenture trust deed by way of substituted security; it is submitted, however, that sect. 81 (1) does not require registration in any case where it would not be required by sect. 79 (1), and that such a substituted security is a charge within sect. 82 (1) (a). See *Cunard Steamship Co.* v. *Hopwood*, *ubi supra*, at p. 577.

**Omission to file is a crime.**

By sect. 80 a statutory duty is imposed on the company to send the necessary particulars to the registrar, and the duty is enforced by heavy penalties.

**Renewals.**

As to renewals:—Where in the case of a debenture issued before the commencement of the Act an agreement is subsequently made merely to extend the time for payment, this does not "create" any mortgage or charge and, therefore, does not require registration; so also in the case of a debenture registered under sect. 79 a mere extension of time does not require registration. But where the extension involves the creation of a further charge, *e.g.*, where the rate of interest is increased, the extension does require registration.

The Act does not contain any provisions as to renewal similar to those in the Bills of Sale Act, 1878, s. 11. A transfer of a duly registered mortgage or charge or of a mortgage or charge not requiring registration needs of course no registration.

**Extension of time for registration.**

Sect. 85 provides for extending the time for registration as follows:—

**85.** The Court, on being satisfied that the omission to register a charge within the time required by this Act, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, 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 Court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified.

The jurisdiction is conferred in the widest terms; terms much wider than those used in the Bills of Sale Act, 1878, s. 14.

For a form of application see Form 75, p. 307, *post*. The affidavit in support should show the reasons for the omission to register and should state that no executions have been levied against the company and no proceedings to wind up the company have been commenced. *Bootle Cold Storage Co.*, W. N. (1901) 54; *Re Tingri Tea Co.*, W. N. (1901) 165. These statements in the affidavit are not, however, essential, and orders have been made in their absence.

The application to extend is usually made on the ground that the omission was accidental or due to inadvertence.

The definition of the word "accident" in Johnson's Dictionary is, "that which happens unforeseen; casualty; chance"; and in Richardson's Dictionary, "that which falls or happens or comes to, generally with a sub-condition of something unforeseen, unexpected, unfortunate, unnecessary, without design, contrivance or intention."

The definition in Johnson's Dictionary of "inadvertence" is "carelessness, negligence, inattention"; and in Richardson's Dictionary, "inattention, uncautiousness, carelessness, negligence, improvidence." Thus it appears that inadvertence is a much wider word than accident.

Huddleston, B., in *Ex parte Lenanton* (1889), 53 J. P. 263, defined "inadvertence" as meaning negligence or carelessness where the circumstances show an absence of bad faith; and in *Jackson & Co.*, (1899) 1 Ch. 348, ignorance of law was held to be "inadvertence." The term was used in the Bankruptcy Act, 1883, Sched. I., r. 10, and its meaning there has been much discussed. See *Re Piers*, (1898) 1 Q. B. 627. See also *Fenton* v. *J. Thorley & Co.*, (1903) A. C. 443; *Brintons, Ltd.* v. *Turvey*, (1905) A. C. 230, and other cases under the Workmen's Compensation Act, 1897. As to extension where delay is caused by the property being abroad, see *Tingri Tea Co.*, W. N. (1901) 165.

Many orders have been made extending the time for registration of mortgages and charges.

In *Joplin Brewery Co.*, (1902) 1 Ch. 79, Buckley, J., laid down as a rule of practice that the order extending the time for registration of a mortgage or charge should contain words to the effect that "The order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." This rule of practice was based on the practice adopted in the case of bills of sale with reference to the decisions in *Ex parte Furber, Re Parsons*, (1893) 2 Q. B. 122; *Crew* v. *Cummings* (1888), 21 Q. B. D. 420, namely, that the Court should not make the order for extension so as to defeat a title actually vested in a person who has acted with perfect *bona fides*, *e.g.*, rights of a trustee in bankruptcy or of any execution creditor; but the words adopted go much further, unless, indeed, the words "rights of parties acquired" mean titles actually vested as above.

The practice thus initiated came before the Court of Appeal in *I. C. Johnson & Co., Ltd.*, (1902) 2 Ch. 101. There it was proposed to issue debentures ranking *pari passu*, and to be secured by a floating charge and a trust deed. Some were issued before the Companies Act, 1900, came into operation, and therefore did not require registration; the rest were issued after that date and were not registered. A very pretty legal puzzle was thus presented. The holders of these debentures of the company applied for an

extension of time. Kekewich, J., acceded to the application, but added to the order the qualification introduced by Buckley, J., in *Joplin Brewery Co., supra.* There was an appeal, and it was contended that the words of the qualification were too wide, and that the *pari passu* rights of the class ought not to be interfered with. The Court assented to this argument, and whilst extending the time for registration, added to the order a proviso as follows:—

"Provided always that this order is to be without prejudice to any rights other than rights in respect of debentures of the said series which may have been or may be acquired against the holders of the said debentures set forth in the schedule to this order prior to the time when the last-mentioned debentures shall be actually registered, and it is hereby declared that except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality amongst themselves attached to all the debentures of this series, but so that in the event of the debentures set forth in the said schedule being avoided as against parties having any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series, other than the holders of the debentures set forth in the said schedule, shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance."

With reference to the words in the proviso, "rights of parties acquired," Collins, M. R., said: "It is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected and who ought to displace the rights of those who were not registered until after his debt had accrued. It is not necessary to give a decision upon that point, though I am bound to say that Buckley, J.'s, judgment, which purported to apply this Act on the analogy of the clause in the Bills of Sale Act, does seem in these terms rather to enlarge the area to which the Bills of Sale Act was held to be limited, for, instead of dealing with creditors who have actually issued execution —that has been the subject of discussion under former Acts—he says this: 'The orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale.' Now with respect to bills of sale, one case has been cited to us which went to the Court of Appeal, and in which Bowen, L. J., gave the judgment, in which Lord Esher, M. R., agreed. That was the case of *Crew* v. *Cummings*, 21 Q. B. D. 420. In that case an execution had actually been put in between the date of the bill of sale and the time of the application to enlarge the time for registration, and the Court held that the time for registration could not be extended under the 14th section so as to defeat the vested right of an execution creditor. . . . Now it seems to me that that judgment is given on the footing that but

for the execution put in, the creditor would have taken no rights which would have been interfered with by giving permission to extend the time necessary for the registration of the bill of sale. However, it seems to me that it is not necessary for the Court to decide any point about creditors, whether execution creditors or others." Stirling, L. J., agreed, as also did Cozens-Hardy, L. J., who stated that he doubted whether the words of qualification inserted in the order made by Kekewich, J., in conformity with *Joplin Brewery Co.*, "would have any effect in protecting creditors who have not taken some proceedings to get a charge or security upon the goods."

The question thus left open was ultimately decided by the Court of Appeal in *Ehrmann Bros.*, (1906) 2 Ch. 697. In that case the Court explained the true meaning of the proviso. It is only designed to protect rights acquired by charge, execution or otherwise *against the property of the company* in the interval between the expiration of the twenty-one days for registering and the extended time allowed by the order. Such persons are protected even though they had notice of the unregistered charge. *Re Monolithic Co.*, (1915) 1 Ch. 643. It does not protect the existing unsecured creditors who have not obtained any security or charge upon the property subject to the debentures. *Re M. I. G. Trust*, (1933) Ch. at pp. 569—572.

In the subsequent case of *Cardiff Workmen's Cottage Co.*, (1906) 2 Ch. 627, Buckley, J., after referring to the case last cited, made an order in the *Johnson* form without any further qualification; but said: "When a case of sufficient magnitude arises it may be well to give notice to some of the unsecured creditors of substantial amount so as to give them an opportunity of being heard, if they so desire, upon the question of what is 'just and expedient.'"

Where an order extending the time is made, and the words of the protecting proviso appear in it, and before actual registration a winding-up commences, the mortgage or charge if subsequently registered is not effective against the general body of creditors. *Anglo-Oriental Carpet Co.*, (1903) 1 Ch. 914.

Where notices had been sent out convening a meeting to consider a resolution for voluntary winding-up and the motion to extend the time for registration came on before the meeting had been held, a special order was made preserving a right to the liquidator to apply to discharge the order. *Re L. H. Charles & Co., Ltd.*, (1935) W. N. 15; and see Form 77A, *infra*.

On an application to extend the time for registration made after the commencement of a voluntary winding-up, Swinfen Eady, J., held that for the protection of the general creditors whose rights had accrued the qualification words in *Joplin Brewery Co.* must be

inserted in the order. *Spiral Globe Co.*, (1902) 1 Ch. 393. But in *S. Abrahams and Sons*, (1902) 1 Ch. 695, Buckley, J., refused an order for extension after a winding-up had commenced.

The power to extend the time for registration under sect. 15 of the Act of 1900 remains, though the Act of 1900 is repealed. *Re Lush & Co.*, W. N. (1913) 39; 108 L. T. 450.

Fraudulent preference.

Where the directors of the company, knowing that the company was bound to go into liquidation, did not oppose the extension of the time for registration and did not inform the Court of the circumstances, the proceedings were held by Eve, J., to be a fraudulent preference, but the Court of Appeal, affirmed by the House of Lords, held that there was not sufficient evidence of intention to prefer. *Re M. I. G. Trust, Ltd.*, (1933) 1 Ch. 542; *S. C. sub-nom. Peat* v. *Gresham Trust*, (1934) A. C. 252.

The difficulties involved as to extension of time may sometimes be avoided by cancelling the unregistered debentures and issuing in substitution new debentures, which can be registered within twenty-one days from the date of their issue. See *N. Defries & Co.*, (1904) 1 Ch. 37; *Renshaw & Co.*, W. N. (1908) 210. In some cases, however, the issue of the new debentures might, where a winding-up takes place within three or six months, be held to be a fraudulent preference (see sect. 265), or void as a floating charge under sect. 266. *Cardiff Workmen's Cottage Co., supra.*

With reference to sect. 75 of the Act—the re-issue section—a question may arise as to whether a debenture duly registered and kept alive, and "re-issued" within the meaning of that section, requires to be re-registered on its re-issue.

The re-issue under the section may be made alternatively, either by re-issuing the same debentures, or by issuing other debentures in their place.

In the latter case where there is a single debenture, the new debenture should be registered, for it "creates" a mortgage or charge, or where the re-issued debentures are part of a series, particulars of the re-issue should be sent to the registrar under sect. 79 (8); but when the original debenture was duly registered and is kept alive by being transferred to a nominee of the company, it is apprehended that the transfer by that nominee, though a re-issue for the purposes of sect. 75, is not a new "creation" of a mortgage or charge, for the original mortgage or charge has been kept alive.

## Form of Register.

Sect. 82 provides as follows:—

*82.—(1) The registrar of companies shall keep, with respect to each company,* a register in the prescribed form of all the charges requiring registration under

this Part of this Act, and shall on payment of the prescribed fee, enter in the register with respect to such charges the following particulars:—

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in sub-section (8) of section 79 of this Act;

(b) in the case of any other charge—

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property; and

(ii) the amount secured by the charge; and

(iii) short particulars of the property charged; and

(iv) the persons entitled to the charge.

(2) The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part of this Act, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part of this Act as to registration have been complied with.

(3) 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.

(4) The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the charges entered in the register.

Sect. 83 provides as follows:—

Certificate of registration.

83.—(1) The company shall cause a copy of every certificate of registration given under the last foregoing 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 charge so registered:

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any charge so given to be endorsed on any debenture or certificate of debenture stock issued by the company before the charge was created.

(2) If any person knowingly and wilfully authorizes or permits the delivery of any debenture or certificate of debenture stock which under the provisions of this section is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be liable to a fine not exceeding one hundred pounds.

Sect. 84 provides as follows:—

Satisfaction

84. The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof.

## Registration at the Company's Office.

Sect. 88 provides as follows:—

88.—(1) Every limited company shall keep at the registered office of the company a register of charges and enter therein all charges specifically affecting

property of the company and all floating charges on the undertaking or any property of the company, giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto.

(2) If any director, manager, or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

The non-registration of a mortgage or charge—so it was held under the original section, Companies Act, 1862, s. 43—does not invalidate it, even where the person in whose favour it is created is a director of the company. *Wright* v. *Horton*, 12 App. Cas. 371. Its sole effect is to expose the defaulting directors to the prescribed penalties. Directors are not liable for "knowingly and wilfully" authorizing or permitting the omission if they have directed the secretary to make the entry and he has not made it. *Borough of Hackney Newspaper Co.*, 3 Ch. D. 669.

### Right of Inspection.

Both registers are now open to the inspection of creditors and members of the company.

Sect. 89 provides as follows:—

89.—(1) The copies of instruments creating any charge requiring registration under this Part of this Act with the registrar of companies, and the register of charges kept in pursuance of the last foregoing section, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to the inspection of any creditor or member of the company without fee, and the register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorizing or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues.

(3) If any such refusal occurs in relation to a company registered in England, the Court may by order compel an immediate inspection of the copies or register.

### (6) Order and Disposition.

**Bankruptcy rules as to "order and disposition" not applicable to a company.**

Sect. 261 of the Act, reproducing so far as applicable to companies sect. 10 of the Judicature Act, 1875, does not make the bankruptcy law, as to order and disposition, applicable to companies winding-up, and accordingly, if a company goes into liquidation, property remaining in its order and disposition will not be withdrawn thereby from the debenture charge. *Crumlin Viaduct Works Co.*, 11 Ch. D. 755; *Gorringe* v. *Irwell Indiarubber Works*, 34 Ch. D. 128.

### (7) Annual Summary to show Mortgages and Charges.

Sect. 108 of the Act, provides for a return to be made annually with regard to the share capital and other matters. This annual return must also contain some particulars in regard to debentures. Annual summary.

The section contains the following provisions:—

108.—(1) Every company having a share capital shall once at least in every year make a return containing a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or, in the case of the first return, of the incorporation of the company. Annual return.

(3) The return must also state the address of the registered office of the company and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(f) The total amount of the sums, if any, paid by way of commission in respect of any shares or debentures;

(h) The total amount of the sums, if any, allowed by way of discount in respect of any debentures, since the date of the last return;

(o) The total amount of the indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July, nineteen hundred and eight.

The summary required by this section represents an expansion of the summary required by sect. 26 of the Act of 1862. The obligations of the company under it will be found in Part I., 15th ed., at pp. 572 *et seq.*

### (8) Balance Sheets.

In the case of a public company a certified copy of the balance sheet must now be included in the annual return.

Sect. 110 contains the following provisions:—

(3) Except where the company is a private company, or is an assurance company which has complied with the provisions of sub-section (4) of section seven of the Assurance Companies Act, 1909, the annual return shall include a written copy, certificated by a director or the manager or secretary of the company to be a true copy, of the last balance sheet which has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon certified as aforesaid, and if any such balance sheet is in a foreign language there shall also be annexed to it a translation thereof in English, certified in the prescribed manner to be a correct translation:

Provided that, if the said last balance sheet did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there shall be made such additions to and corrections in the

said copy as would have been required to be made in the said balance sheet in order to make it comply with the said requirements, and the fact that the said copy has been so amended shall be stated thereon.

(4) If a company fails to comply with this section or either of the two last foregoing sections of this Act, the company and every officer of the company who is in default shall be liable to a default fine.

Further, every holder of debentures is now entitled to be furnished with copies of balance sheets. Sect. 130 (1) (b). This is a statutory recognition of what had become a very general and proper practice on the part of companies—to send copies of balance sheets and reports to their debenture holders (which includes debenture stockholders).

The right of debenture and debenture stockholders to inspect the register of debenture holders and to have copies of any trust deed is now recognized by sect. 73, under which the periods for closing the register must be specified in the debentures or stock certificates, and the Court has power to compel inspection and production of copies.

Sect. 73 provides as follows:—

**73.**—(1) Every register of holders of debentures of a company shall, except when duly closed, 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 not less than two hours in each day shall be allowed for inspection.

For the purposes of this sub-section a register shall be deemed to be duly closed if closed in accordance with provisions contained in the articles or in the debentures or, in the case of debenture stock, in the stock certificates, or in the trust deed or other document securing the debentures or debenture stock, during such period or periods, not exceeding in the whole thirty days in any year, as may be therein specified.

(2) Every registered holder of debentures and every holder of shares in a company may require a copy of the register of the holders of debentures of the company or any part thereof on payment of sixpence for every hundred words required to be copied.

(3) 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 hundred words required to be copied.

(4) If inspection is refused, or a copy is refused or not forwarded, the company and every officer of the company who is in default shall be liable to a fine not exceeding five pounds, and further shall be liable to a default fine of two pounds.

(5) Where a company is in default as aforesaid, the Court may by order compel an immediate inspection of the register or direct that the copies required shall be sent to the person requiring them.

An income stock certificate has been held to be a debenture within the corresponding section of the Act of 1908. *Lemon* v. *Austin Friars Investment Trust, Ltd.*, (1926) 1 Ch. 1.

## CHAPTER XXV.

### *ULTRA VIRES* AND IRREGULAR ISSUES.

*Ultra vires* debentures and debenture stock.

WHERE a company possesses no power, express or implied, by its constitution to borrow, any borrowing by it is *ultra vires*. So where the memorandum of association fixes a limit to the borrowing powers of the company, any borrowing in excess of the limit is equally *ultra vires*, and securities given for the loan are inoperative. The contract in such cases is not merely voidable, it is absolutely void and incapable of ratification, even if every member of the company purports to ratify it. See *Ashbury* v. *Riche*, L. R. 7 H. L. 653. In that case a contract beyond the company's objects had been made, and Lord Cairns, L. C., said: "The question is as to the competency and power of the company to make a contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association; if so, it was thereby placed beyond the powers of the company to make the contract. If so, my lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby by unanimous consent have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing."

Void, not voidable.

No ratifications by acquisition of subsequent powers.

Hence an *ultra vires* issue of debentures or debenture stock is wholly void. Nor can a company make good an *ultra vires* issue by altering its powers under sect. 5 of the Act. For example, if by the memorandum the company's powers of borrowing are limited to 10,000*l*. and the company raises money by the issue of debentures to the extent of 5,000*l*. in excess, and afterwards the limit is struck out by proceedings under the above-mentioned Act, the company cannot call in the *ultra vires* debentures and issue valid ones in their place. *Ex parte Watson*, 21 Q. B. D. 301.

Borrowing for *ultra vires* purposes.

A person lending money to a company which has express or implied power to borrow is not bound to ascertain that the money is being borrowed for *intra vires* purposes. He is entitled to assume this if he knows nothing to the contrary. See *Young* v. *David Payne & Co.*, (1904) 2 Ch. 608, and other cases cited *supra*, p. 129. Again, if several companies concur, without any power to do so, in borrowing on debentures, and charge the respective assets jointly, though the transaction is as a joint borrowing invalid, yet, to the extent to which the money lent has come to the hands of each company, the debentures will be upheld as a valid charge on that company's assets. *Johnston Foreign Patents Co.*, (1904) 2 Ch. 234.

Subrogation.

There is another principle which comes in relief of the debenture holder when the money has been borrowed *ultra vires*. This is known as subrogation. The lender in such a case has no right of action in respect of his loan against the company. Nevertheless he has certain rights in respect of the moneys received by the company under the transaction; he has, that is to say, if he intervenes before the money has been spent, a right to obtain an injunction restraining the company from parting with it. If he cannot do that, yet, if the company has spent it in paying off just debts owing to creditors of the company, he may be entitled to stand in the place of and to be subrogated to the rights of such creditors. See *Blackburn Building Soc.* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 61, 71; 9 App. Cas. 857; *Baroness Wenlock* v. *River Dee* (No. 2), 19 Q. B. D. 155; *Harris Calculating Machine Co.*, (1914) 1 Ch. 920.

This concession to the lender is based on a well settled principle of equity, namely, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as in substance to make those other people pay their debts. Per Lord Selborne, *Blackburn Building Soc.* v. *Cunliffe, Brooks & Co.*, 22 Ch. D., p. 71. Nor is it essential that the debts in question should be debts existing at the time when the advance is made. The equity extends also to cases in which money advanced has been applied in payment of debts and liabilities accruing subsequently. *Baroness Wenlock and others* v. *River Dee Co.*, 19 Q. B. D. 155. "This equity," said Lord Justice Fry in that case, "is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice; the Court closes its eyes to the true facts of the case, namely, an advance as a loan by the *quasi* lender to the company and a payment by the company to its creditors as out of its own moneys, and assumes on the contrary that the *quasi* lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim

against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between *quasi* lender and the creditor was confined to the day and hour of the advance of the money to the company—in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the *quasi* lender, and the Court as the author of the benevolent fiction on which it acts can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court. . . . Now the payment of *bonâ fide* liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company, and, therefore, in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred."

Fry's view questioned.

This imaginary scene—the meeting together of the *quasi* lender and creditor, as in some primitive action of Roman law—is a flight of judicial fancy; and in *Wrexham, Mold and Connah's Quay Ry. Co.*, (1899) 1 Ch. 440 (C. A.), doubt was expressed whether the passage correctly expressed the equity, whether it was in fact necessary to resort to the doctrine of subrogation at all, and it was held that at any rate the lender was not subrogated to any securities or priorities of the creditors who were paid off out of the moneys lent by such lender.

Balance after payment of debts.

If on a winding up a balance of the company's assets remains after payment of all valid debts, the balance is divisible *pari passu* between the creditors by *ultra vires* borrowing and the shareholders. *Sinclair* v. *Brougham* (*Birkbeck Building Soc.*), (1914) A. C. 398.

Implied power.

As to a company's implied power to issue debentures, see Part I., 15th ed., pp. 438, 464.

## Irregular Issues.

Irregular issues.

Irregular issues—issues which are *intra vires*, but not in accordance with the form of issue required by the regulations of the company—are to be distinguished from *ultra vires* issues. Irregular issues can be ratified. *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; *Grant* v. *United Kingdom Switchback Co.*, 40 Ch. D. 135. As to when, in spite of irregularities, a debenture holder is entitled to presume "*omnia rite acta*," see pp. 128 *et seq.*

Debentures so issued may be enforced as agreements to give debentures. *Re Fireproof Doors, Ltd.*, (1916) 2 Ch. 142.

# CHAPTER XXVI.

## ISSUING AT A DISCOUNT.

Issue at discount.

A COMPANY could, under the Companies Act, 1862, and can now, lawfully issue debentures at a discount—the artificial rule requiring shares to be paid in full having no application to debentures—and the directors, if they have the general powers of the company, can exercise the same power. *Anglo-Danubian Steam, &c. Co.*, 20 Eq. 339; *Regent's Canal Ironworks Co.*, 3 Ch. D. 43; *Campbell's case*, 4 Ch. D. 470; *Webb* v. *Shropshire Rys. Co.*, (1893) 3 Ch. 307. Sometimes the issue at a discount is effected by the issue of, say, a 100*l.* debenture in consideration of 90*l.* or less, and sometimes in pursuance of an underwriting contract under which the subscriber pays par, and gets, a commission which, in the result, reduces the cost to him. Another plan occasionally adopted is to offer the debentures for subscription on the footing that a subscriber for a 100*l.* debenture shall have a bonus debenture for, say, 20*l.* in addition.

Debenture stock, as regards issue at a discount, stands in the same position as debentures. *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841.

But though debentures can be issued at a discount, it has been held that to make it one of the terms or conditions of issue that the holders shall be at liberty to call on the company to allot fully paid-up shares at par in satisfaction is open to objection on the ground that it is capable of being used as a means of issuing shares at a discount. *Mosely* v. *Koffyfontein Mines*, (1904) 2 Ch. 108.

Doubts may be entertained, however, whether this is good law, and whether, to render the borrowing on these terms *ultra vires*, it is not necessary to prove that the issue is in fact a device for raising money by the issue of shares at a discount. Suppose an issue of a 100*l.* debenture at 90*l.*, with power to the debenture holder at any time after, say, three years, to call for the allotment to him of 100*l.* in fully paid-up shares, why should this, without more, be regarded as a scheme to issue shares at a discount? It seems a perfectly reasonable transaction, and that those who impeach it ought to prove that it was not made in good faith but as a scheme or device. The

mere fact that a scheme is open to abuse does not seem a sufficient ground for holding it *ultra vires*.

In *Famatina Development Co.* v. *Bury*, (1910) A. C. 439, bonus certificates for payment of an additional sum out of profits were issued with debentures, and it was held, reversing Parker, J., that the company could not afterwards, by arrangement, issue paid-up shares in satisfaction of the certificates; in other words, could not issue paid-up shares in consideration of the surrender of a right to be paid out of future profits. The author had so advised.

Where any debentures or debenture stock creating any mortgage or charge are to be registered under sect. 79 of the Act, particulars of any commission, allowance, or discount thereon have to be registered in accordance with sub-sect. (9) of that section. See *supra*, p. 187.

## CHAPTER XXVII.

### DEPOSITING DEBENTURES AS SECURITY.

Deposit of debentures and certificates of debenture stock as security.

ONE advantage of debentures and debenture stock being issuable at a discount is that they may be issued and deposited by way of security for an advance of less than the *par* value, with power for the creditor to sell them. *Regent's Canal Ironworks Co.*, 3 Ch. D. 43; *Strand Music Hall*, 3 De G. J. & S. 147; *Whitehaven Joint Stock Bank* v. *Reed*, 54 L. T. 360; *Hampshire Land Co.*, (1896) 2 Ch. 743; *Robinson* v. *Montgomeryshire Brewery*, (1896) 2 Ch. 841. And the creditor is entitled, on distribution of the fund in a debenture action, to take dividends on the full nominal amount of his security.

The fact that the debentures are deposited with a blank left for the name of the holder does not invalidate the security in equity. *Strand Music Hall, ubi supra.* In the case last mentioned, A. had advanced to the company 5,000*l.* under a written agreement, one of the terms of which was that 2,000 mortgage bonds of 50*l.* each, "forming part of 25,000*l.* of mortgage bonds, constituting a first charge on the property of the company," should be deposited with him as security for the sum. The bonds were deposited, but with a blank left for the name of the payee, and it was held by Turner and Knight-Bruce, L. JJ., that A. had a good charge on the property for the amount, although at law the bonds were invalid. "I apprehend," said Turner, L. J., "that where this Court is satisfied that it was intended to create a charge and that the parties who intended to create it had the power to do so, it will give effect to the intention notwithstanding any mistake which may have occurred in the attempt to effect it. . . . In this Court what is agreed to be done is to be considered as done." This principle has been repeatedly followed. See *Queensland, &c. Co.*, (1894) 3 Ch. 181; *Hampshire Land Co.*, (1896) 2 Ch. 743; *Pegge* v. *Neath, &c. Tramways Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 Q. B. 771; and *infra*, Form 288.

Such a deposit is usually accompanied by a memorandum in writing. If the deposit is made without any such agreement in writing, it would seem that the oral charge implied by the deposit is a charge to which

sect. 79 of the Act applies, as that section requires the filing of "particulars" and of "the instrument (if any)."

Sometimes debentures or debenture stock are deposited as security for a loan of, say, half the amount, with a provision that the lender may at any time elect to keep part of the stock at a specified price in satisfaction of his advance. *Primâ facie* this is a clog on the equity of redemption and void, see *supra*, p. 117. *Samuel* v. *Jarrah Timber, &c. Co.*, (1904) A. C. 323; but the desired end can be achieved by a slight alteration in the security.

Before the re-issue of debentures was declared to be legal (*supra*, p. 140), it was held in *Perth Electric Tramways Co.*, (1906) 2 Ch. 216; and *Russian Petroleum Fuel Co.*, (1907) 2 Ch. 540, that a deposit of debentures, even in blank, as security for an advance was, in equity, an issue of them, and that when this advance was paid off they were satisfied and extinguished, and consequently could not be re-issued.

See further, Chap. LXXXIX., *infra*.

# CHAPTER XXVIII.

## BONUS SHARES TO SUBSCRIBERS FOR DEBENTURES, ETC.

**Bonus shares to subscribers for debentures, &c.**

WHEN a company is issuing debentures or debenture stock the intrinsic merits of the security may not always be sufficient to secure its subscription. Some additional attraction has to be held out. Formerly it was not uncommon for this purpose to offer debentures for subscription on the footing that the company would give to the subscribers not only debentures for the amount advanced, but paid-up shares in the company by way of bonus. But as this in effect amounts to issuing the shares at a discount, it is *ultra vires*. *Railway Time Tables Publishing Co.*, 68 L. T. 649.

Where, however, it is necessary to give to debenture holders a share in the profits as an inducement to subscribe, the result can be attained in one of the following ways:—

(a) By providing in the debentures that, in addition to interest, the holder shall get a percentage of surplus profits. This plan, however, is open to objection as savouring of partnership, involving the risk of postponing the debenture holder's right to prove in competition with ordinary creditors. Partnership Act, 1890, ss. 2 and 3; and cf. *Ex parte Sheil, Re Lonergan*, 4 Ch. D. 789; *Ex parte Bayly, Re Hart*, 15 Ch. D. 223.

(b) By creating a special class of shares of small nominal amount, conferring on the holders a right to participate in the profits as if they were of much larger nominal amount, *e.g.*, a 1*l.* share carrying the same right to dividend as a 50*l.* share, or carrying a right to a specified proportion of the profits, *e.g.*, 20 per cent.

In either case the debenture holders can be given the option of subscribing for the shares at the rate of, say, a 1*l.* share for each 100*l.* debenture. And there is, of course, no objection to giving to debentures holders the call of shares at par or over par, see *infra*, p. 289.

Sometimes the principal shareholders, in order to facilitate the subscription of the debentures, place at the disposal of the company some paid-up shares, in order that they may be appropriated by way of bonus to subscribers of the issue.

# CHAPTER XXIX.

## TRANSFER OF DEBENTURES AND DEBENTURE STOCK.

Transfer of debentures and debenture stock.

In the case of a debenture to bearer, and of a debenture stock certificate to bearer, a transfer is effected by delivery of the debenture or the certificate, and this delivery (however defective the possessor's title) gives a good title to a person taking for value without notice. *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658, and *supra*, p. 32. But in the case of a registered debenture or of registered debenture stock, the transfer must be effected in the manner prescribed by the conditions of the debenture, or by the terms of the trust deed or certificate. Unless otherwise provided, a transfer of the debt, and any other rights of action in the nature of a *legal* chose in action, created or conferred by a debenture, can be effected by an absolute assignment in writing, followed by a notice thereof in writing to the company. Sect. 136 of the Law of Property Act, 1925 (replacing sect. 25 (6) of the Judicature Act, 1873).* Where a registered debenture is subject to conditions which provide that the registered holder shall be regarded as the owner, and that the company shall not be bound to take notice of any equity, it is obviously desirable, in the interest of a transferee, to get his name registered as the holder, inasmuch as, until this is done, he is, by the terms of the contract, excluded from recognition. Where, however, the conditions provide that transfers will be registered on delivery of the transfer with the proper fee, a transferee for value has been held to be entitled to be registered, even where the transfer took place after the commencement of the winding-up, and to hold his debenture free from equities affecting the transferor, where the conditions so provide. *Re Goy & Co.*, (1900) 2 Ch. 149. But in *Re Palmer's Decorating and Furnishing Co.*, (1904) 2 Ch. 743, Buckley, J., declined

* As to what is an absolute assignment, see *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190; *Jones* v. *Humphreys*, (1902) 1 K. B. 10; *Bateman* v. *Hunt*, (1904) 2 K. B. 530; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, (1905) A. C. 454; *Fitzroy* v. *Cave*, (1905) 2 K. B. 364; *Re Williams*, (1917) 1 Ch. 1.

to enforce such a right to a transfer, and distinguished *Re Goy & Co.* on the ground that the transfer in that case was presented before the company had set up any equities. An unregistered transferee of a registered debenture may serve a notice in lieu of *distringas*. See p. 214, *infra*.

In the absence of special provisions in the debenture the transfer of a debenture (not being to bearer) gives to the transferee no better right than the transferor had (p. 24, *supra*). But if the debenture is made transferable free from equities, a transferee for value, when registered, is entitled to insist that the company has waived its right to set up equities. The rights of the transferee may vary with the exact terms of the conditions, and for further security it is now not uncommon to insert the bracketed words which appear in clause 8, Form 40, *infra*. The company can set up equities against a registered transferee who is not a transferee for value. *Brown and Gregory, Ltd.*, (1904) 1 Ch. 627, at p. 632. In this case it turned out that the transferee was not registered, and his appeal was dismissed on terms. S. C., (1904) 2 Ch. 448.

Even where the contract is not, in its inception, made transferable free from equities or counter-claims, a company may, by registering the transfer, and by conduct recognising the transferee, estop itself from setting up such equities against the transferee. *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387; *South Essex Estuary Co.*, 11 Eq. 157; *Brunton's claim*, 19 Eq. 302.

It is a very common practice to require transfers of registered debentures to be signed both by the transferor and transferee, so that the company may thus obtain the signature of the transferee, and (where it is so provided) the company may, no doubt, refuse to register in the absence of the transferee's signature, and even where the conditions do not require a transfer to be signed by the transferee, if the transfer is in a form which contemplates the signature of the transferee, and the transferee has not executed it, the company may treat the transfer as incomplete. *Marino's case*, L. R. 2 Ch. 596, at p. 600.

It is usual, where a transfer is registered, to indorse a note thereof on the debenture, and sometimes the debenture expressly provides for such indorsement.

**Statute of Frauds.**—It was held, in *Driver* v. *Broad*, (1893) 1 Q. B. 744, that debentures creating a floating charge on the undertaking of a company, which included land, created an interest in land, and that a contract for the sale of such a debenture was a contract for the sale of an interest in land within the 4th section of the Statute of Frauds (now replaced by sect. 40 of the Law of Property Act, 1925),

and therefore not enforceable unless in writing signed by the vendor or his agent.

This decision accords with *Toppin* v. *Lomas* (1855), 16 C. B. 145, and it would seem at first sight to prevent debentures to bearer charged on land passing by delivery. This, however, is not so, for debentures to bearer are negotiable (*supra*, p. 30). The explanation seems to be that a debenture to bearer is a shifting contract. It is not transferred from holder to holder, but newly made direct with each successive person who answers the description of "holder" as he comes into existence.

**As to Forged Transfers.**—Every care should be taken to avoid being misled by a forged transfer; but the utmost caution on the part of transferees and of the company cannot prevent transfers being occasionally forged and passed. Fortunately, such fraud is rare. Where a company acting on a forged transfer issues a certificate, *e.g.*, of debenture stock, it may incur a liability to pay damages to anyone who acts on the certificate. *Bahia, &c. Ry. Co.*, L. R. 3 Q. B. 584; *Cottam* v. *Eastern Counties Ry. Co.*, 1 J. & H. 243; *Davis* v. *Bank of England*, 2 Bing. 393. The forged transfer will not pass the title to the stock, and accordingly the company can be compelled to reinstate the true owner. *Barton* v. *L. & N. W. Ry. Co.*, 38 Ch. D. 144, 149. If this is done by restoring to the register the name of the real owner of the stock, the name of the transferee must be displaced, and it will then rest with such transferee as a person who has been misled by the company's certificate to seek his redress (if any) by an action for damages. To get this the party who receives the certificate from the company must show that he acted on the certificate (as distinguished from the forged transfer). *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188. He is to be considered to act on it if he sells shares in reliance on the certificate (*Balkis, &c. Co.* v. *Tomkinson*, (1893) A. C. 396; *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618), or lulled by the certificate loses his remedy against a third party (*Dixon* v. *Kennaway & Co.*, (1900) 1 Ch. 833); and in like manner if he shows the certificate to another person who acts on the faith of it, that person also is entitled to rely on estoppel as against the company. *Bahia Ry. Co.*, *supra*. If, on the other hand, the rightful owner is placed *in statu quo* by means of a like amount of stock being purchased by the company and placed in his name, neither he nor the transferee is injured. The company in that case bears the brunt, and has its remedy over against those who have misled it. This was the view of Lord Alverstone, C. J., in *Sheffield Corpn.* v. *Barclay*, (1903) 1 K. B. 1. The Chief Justice there held that as between the company

Forged transfers.

and the party who brings in a forged transfer for registration, both being innocent, the latter is bound to indemnify the former, so that if the company registers the transfer and issues a certificate to the supposed transferee and is subsequently held liable to restore the stock or to pay damages to some person who has acted on the faith of that certificate, the party who brought in the forged transfer is liable to make good to the company the damages it has had to pay. The principle on which this decision rests is that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, that is, done honestly and *bonâ fide* in compliance with the defendant's directions, the defendant is bound to indemnify the plaintiffs against the consequences thereof. This decision was contrary to the view of Lindley, J. (in *Anglo-American Telegraph Co.* v. *Spurling*, 5 Q. B. D. 188), who considered that a company was the guardian of its own register, and that this guardianship involved a duty of looking after the transfer of stock or shares standing in the names of the persons on the register, that this duty the company owed to those who came with transfers, and that there was no corresponding or conflicting duty on the part of the person who brought in the transfer, except, of course, that of bringing in what he believes to be an honest document. Lord Alverstone's decision in *Sheffield Corpn.* v. *Barclay* was therefore reversed by the Court of Appeal, (1903) 2 K. B. 580, but was subsequently restored by the House of Lords, which overruled *Anglo-American Telegraph Co.* v. *Spurling*, and held that the person bringing the transfer was bound to indemnify the corporation, (1905) A. C. 392. *Starkey* v. *Bank of England*, (1903) A. C. 114, is another case showing that a stockbroker who innocently produces to the Bank of England a forged power of attorney for the sale and transfer of Consols standing in the name of the third party is bound to indemnify the Bank if it acts thereon. And a broker who pledges himself as to the identity of a person with the stock-owner, and so enables a forged transfer to be made and acted on, is equally liable to the Bank. *Bank of England* v. *Cutler*, (1907) 1 K. B. 889.

Act of 1891. The Forged Transfers Act, 1891, as amended by the Forged Transfers Act, 1892, provides that, "where a company issue or have issued shares, stock or securities transferable by instrument in writing or by an entry in any book or register kept by or on behalf of the company, they shall have power to make compensation by a cash payment out of their funds for any loss arising from a transfer of any such shares, stock or securities in pursuance of a forged transfer or of a transfer under a forged power of attorney, whether

such loss arises and whether the transfer or power of attorney was forged before or after the passing of this Act, and whether the person receiving such compensation or any person through whom he claims has or has not paid any fee or otherwise contributed to any fund out of which the compensation is to be paid."

The Act empowers the company by fees or otherwise to provide a fund to meet claims for compensation and to raise the amount by mortgages and to impose such reasonable restrictions on the transfer of shares, stock or securities, or with respect to the powers of attorney for the transfer thereof, as they may consider requisite for guarding against losses arising from forgery.

These Acts, it is to be observed, do not impose on the company any obligation to pay compensation; they only give power to do so if the company considers the case a proper one—that is, one of hardship.

### Mortgages of Debentures and Debenture Stock.

Mortgages of debentures and debenture stock.

There are several modes of effecting a mortgage, legal or equitable, of debentures and debenture stock.

Bearer securities.

In the case of debentures to bearer, and of debenture stock certificates to bearer, the debenture or the stock certificate should be handed over to the lender in consideration of the advance, and thereby the lender will obtain the legal title, for as regards a mortgage by deposit of negotiable instruments the rule is that the title of the mortgagee, if he takes in good faith and for value, is unimpeachable. *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Venables* v. *Baring Bros.*, (1892) 3 Ch. 527; *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120. Nor is negligence or forgetfulness sufficient to affect his title. *Raphael* v. *Bank of England*, 17 C. B. 161, at p. 223. "When," said Lord Herschell, in the first of these four cases, "a person whose honesty there is no reason to doubt offers negotiable securities to a bank or other person the only question likely to engage his attention is whether the security is sufficient to justify the advance required; and I do not think that the law lays upon him the obligation of making any inquiry into the title of the person he finds in possession of them. Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different."

If it is impracticable to deposit the securities, *e.g.*, where they are already in the hands of a mortgagee whom it is not proposed to redeem, the only course is to give an equitable charge, and this should be effected by an instrument in writing made in consideration of the advance.

**Registered debentures and debenture stock.**

In the case of debentures or debenture stock certificates not to bearer the mortgage or charge can be created either—

(a) as a legal mortgage, *i.e.*, by absolute transfer in writing duly notified to the company (Law of Property Act, 1925, s. 136, replacing sect. 25 (6) of the Judicature Act, 1873), and, if so required by the conditions, duly registered; or

(b) as an equitable mortgage (*Re Pryce*, 4 Ch. D. 685; *Carter* v. *Wake*, 4 Ch. D. 605), *e.g.*, by deposit of the debentures or debenture stock certificates as security for the advance with or without memorandum specifying the purposes and terms of deposit; or

(c) by a charge without deposit created by contract in writing, and sometimes accompanied by debentures executed in blank; or

(d) by a charge created by oral contract, *e.g.*, by a proposal in writing signed by one party and orally accepted by the other party.

**Common form of security.**

The commonest mode adopted for giving an equitable security on debentures or debenture stock is the following:—

**Blank transfers.**

The debenture or debenture stockholder deposits with the mortgagee (a) the debentures or the stock certificates; (b) blank transfers —that is, transfers with a blank left for the name of the transferee signed by the debenture or debenture stockholder; (c) a memorandum in writing stating that the debentures or stock are charged with the payment of the advance and interest, and that in certain events the mortgagee may sell and fill up the transfers. This mode is found convenient, and offers a large measure of safety to the lender, for he has the debentures or stock certificates, and in the absence of the debentures or stock certificates the owner would have the greatest difficulty in dealing with the security behind the back of the mortgagee; and even this risk can be eliminated (1) by getting a restraining order under 5 Vict. c. 5, s. 4, or (2) by filing a formal affidavit and distringas notice at the Royal Courts of Justice, and giving the company notice as provided by R. S. C., Ord. XLVI. r. 4. See Forms set out on p. 883 *et seq*, *infra*, where also will be found forms of agreements in regard to deposits and equitable securities.

**Where transfer under seal required.**

If a transfer be executed, leaving the name of the transferee in blank, a transferee for value may fill in the blanks. See as to transfer of shares (*Re Tahiti Cotton Co.*, 17 Eq. 273); but if the provisions of the debenture require a transfer under seal the blank transfer cannot be made use of, as a deed cannot be altered in any material way after execution. *Powell* v. *London and Provincial Bank*, (1893) 2 Ch. 555; and see Part I., 15th ed., p. 621.

Express and implied power of sale.

As to a mortgagee's statutory power of sale where the mortgage is by deed, see secs. 88, 89, 101, 103 and 104 of the Law of Property Act, 1925; *infra*, Chap. XL.

In cases unaffected by sect. 101 of the Law of Property Act the law is, that a mortgagee of stock or shares may sell the same at any time after the day originally fixed for payment of the loan, or if no day was originally fixed then after reasonable notice has been given to the mortgagor and default made by him in payment after such notice. *De Verges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579.

Current account satisfied.

As to debentures deposited to secure a current account becoming satisfied when the account ceases to be in debit, and the operation of sect. 75 of the Act, see *supra*, p. 140.

### Bills of Sale Acts in relation to Transfers.

It is apprehended that a transfer of a debenture charging *inter alia* chattels of a company, is not a bill of sale within the Acts. See *Ex parte Turquand, In re Parker*, 14 Q. B. D. 636.

### Certificates on Transfer of Debenture Stock.

See sect. 67 as to certificates being ready for delivery within two months.

## CHAPTER XXX.

### TRANSMISSION OF DEBENTURES.

**Transmission.** DEBENTURES being personal estate pass, on the death of the holder, to his executors or administrators. Executors derive their title under the will; but it is not safe for companies to deal with them until their title has been shown to have been formally ratified by the Court, in other words, without production of probate.

Similarly in the case of administrators, the letters of administration which constitute their title, and are the sole authentic evidence thereof, must be produced to the company.

**Foreign testators and intestates.** This rule applies *à fortiori* where the testator or intestate was domiciled abroad. The company before recognizing the executor or administrator should require probate or letters of administration to be obtained in England. This is the evidence on which alone the Court itself would act, and it is the evidence which the company is bound to require from executors and administrators, and the company may incur serious liability if it transfers shares or debentures to the foreign executors who have not proved in this country. *New York Breweries Co.* v. *Attorney-General*, (1899) A. C. 62.

In the case of colonial probate provision is made by the Colonial Probate Act, 1892 (55 Vict. c. 6), for producing the probate or letters of administration to the Court (Probate Division) in England to be sealed with the seal of the Court. Where this is done and the Act applies, the sealed probate or letters have the same effect as if granted by the Court in England.

**Bankruptcy.** As to bankruptcy, debentures belonging to the bankrupt vest, by virtue of sect. 38 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), as part of his property in the trustee, and the same section entitles him to transfer them.

The trustee of a bankrupt contributory, who is also a debenture holder, may, under sect. 31 of the Bankruptcy Act, 1914, set off the debenture debt against calls, a bankrupt contributory creditor being in a different position to a solvent contributory. *Re Duckworth*, L. R. 2 Ch. 578; *Strang's case*, 5 Ch. 492; *Carralli and Haggard's case*, 4 Ch. 174.

Debentures, as choses in action, are excepted from the reputed ownership section of the Bankruptcy Act. *Re Pryce, Ex parte Rensburg*, 4 Ch. D. 685; *Re Jenkinson*, 15 Q. B. D. 441.

## CHAPTER XXXI.

### DIRECTORS, MEMBERS, AND PROMOTERS MAY TAKE UP DEBENTURES AND OTHER SECURITIES OF THE COMPANY.

Directors may lend;

DIRECTORS of a company are not under any disability as to lending or advancing money to their company, and if a director has taken debentures at a discount, but on the same terms as the public, he cannot be made accountable for the discount. *Campbell's case*, 4 Ch. D. 470. Conf. *Burland* v. *Earle*, (1902) A. C. 83.

and so may members.

Nor are the members of a company under any such disability. Thus, in *General South American Co.*, 2 Ch. D. 337, 72,000*l.* was raised on mortgage debentures at 18 per cent. per annum interest, all but 4,000*l.* being advanced by members of the company; and in the winding-up, the debentures were held to be valid, and to give the holders a charge upon all the property of the company in priority to the general creditors.

Promoters.

As to the validity of debentures issued to promoters who are vendors to the company, see *Seligman* v. *Prince & Co.*, (1895) 2 Ch. 617; *Salomon* v. *Salomon & Co.*, (1897) A. C. 22; *Re Slobodinsky, Ex parte Moore*, (1903) 2 K. B. 517; *Wheatley's Trustee* v. *H. Wheatley, Ltd.* (1901), 85 L. T. 491; and *Re Goldberg, Ex parte Silverstone*, (1912) 1 K. B. 384.

Fraudulent preference.

In winding-up, debentures issued to directors are frequently attacked, sometimes successfully, on the ground of fraudulent preference. Pressure by a director will not avail to save the preference from being fraudulent, for "the only way in which a director can exercise pressure is by ceasing to be a director, and then, when he has done that, he may require the directors to pay his money, and press them to do so." *Gas Light Improvement Co.* v. *Terrell*, 10 Eq. 168, 176. And see *Jackson and Bassford, Ltd.*, (1906) 2 Ch. 467, and Part II., 15th ed. of this work, pp. 648 *et seq.*, and as to the jurisdiction of the County Court. *Re F. & E. Stanton, Ltd.*, (1928) 1 K. B. 464.

Fraudulent assignment.

Where debentures were promised to the managing director of a private company who held a large proportion of the shares, and were fraudulently held over with a view to preferring him to the company's other creditors, it was held that the issue of debentures, which would clearly have been a fraudulent preference if the company

had been wound up within three months, were not "devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors" within the statute 13 Eliz. c. 5. *Re Lloyds Furniture Palace, Ltd.*, (1925) 2 Ch. 853. Such a transaction might now, however, be held to be a conveyance of property with intent to defraud creditors within sect. 172 of the Law of Property Act, 1925, having regard to the definition of "conveyance" in sect. 205 (ii) of that Act, as including a charge; or it might be held to be fraudulent trading within sect. 275. See *Wm. C. Leitch Bros., Ltd.*, (1932) 2 Ch. 71.

**Payment of guaranteed overdraft.**

Directors paying off out of their own moneys the company's overdraft at its bankers which they have guaranteed, is not a payment of cash to the company under sect. 266 of the Act, which will support floating charge debentures for the amount issued to the directors within six months of winding-up. *Orleans Motor Co.*, (1911) 2 Ch. 41.

But a debenture issued to a director for the purpose of raising money to pay an existing debt due to a firm of which he was the senior partner was held by the Court or Appeal to be valid, though issued within six months of the winding-up. *Re Matthew Ellis, Ltd.*, (1933) Ch. 458, thereby overruling the decision of Eve, J., and the dicta of Astbury, J., in *Re Hayman, Christy & Lilley, Ltd.*, (1917) 1 Ch. 283.

## CHAPTER XXXII.

### COUPONS.

Coupons:

IT has for some time past been usual to make the interest on debentures to bearer payable on presentation of coupons annexed to the debentures. When the period for payment arrives, a coupon is detached, and is commonly forwarded for collection through a banker. By this means the payment of the interest is facilitated; for, whatever be the precise form of the coupon, the bearer is, under the debenture contract, entitled to the interest therein specified. Another convenience in having coupons attached to a debenture is, that the holder can, if in want of cash, cut off and sell the coupons, or any of them, or procure the same to be discounted. Coupons to bearer are sometimes attached to a debenture to registered holder. See p. 16.

convenience of.

As to stamping signature.

In signing coupons, the name of the executing director can, if thought fit, be impressed by means of a stamp. "I see no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing." Per Bovill, C. J., *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28, 31. The law in the United States is the same. *Pennington* v. *Baehr*, 48 Cal. 465.

No stamp duty.

Coupons are exempted from stamp duty. (52 & 53 Vict. c. 42, s. 16.) And see *infra*, p. 235.

## CHAPTER XXXIII.

### AS TO RECOVERING DEBENTURE MONEY SUBSCRIBED FOR A PARTICULAR PURPOSE WHICH HAS FAILED.

Recovery where money specifically appropriated.

CASES sometimes occur, in which moneys are subscribed on debentures or debenture stock, bonds or other securities, for a specified purpose which subsequently becomes impracticable; and the question then arises whether the subscribers can compel restitution of the unexpended moneys, or whether they are irrevocably merged in the company's general assets. The leading authority on the question is the *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176. In that case a loan was raised to make a railway in a foreign country, such loan being raised on the faith of a prospectus, which set forth, as a security to the bondholders, the grant of a concession by the foreign government, in virtue of which the bondholders would have the benefit of the customs duties imposed by the government on goods passing along that railroad. The railroad was not made, and the foreign government revoked its concession. The moneys subscribed by the bondholders for the construction of the railroad had been placed in the hands of trustees for the bondholders, on the footing that such trustees were to pay portions of the money as portions of the intended railroad were constructed, and at the date of the revocation of the concession a large part of such moneys was still in the hands of the trustees upon these terms. It was admitted that the construction of the proposed railway had become impracticable, from a business point of view, and that the whole scheme was abortive. In these circumstances it was held by the House of Lords that the bondholders were entitled to demand and receive from the trustees repayment of the moneys remaining in their hands, notwithstanding that some of the bondholders objected to the return.

Lord Selborne.

"The effect," said Lord Selborne, "in my opinion, is that the entire basis of the prospectus, trust deed, and security contract, on the faith of which the bondholders lent their money, has been destroyed by the action of the Bolivian Government, caused by the default of the Navigation Company. The consideration for the loan has failed,

and the fund *in medio* ought, as the Court of Appeal has decided, to be restored to the bondholders" (p. 205).

*Collingham* v. *Sloper*, (1893) 2 Ch. 96, was a somewhat similar case. There a foreign company formed to make a railway issued bonds charged on their undertaking, but owing to litigation and consequent delay in realising the bonds, it became impossible, with the present or prospective resources of the company, to carry out the scheme. A portion of the funds subscribed had, when the loan was raised, been placed in the hands of trustees in England with a view to paying for the construction of the railway and certain other outgoings. This being the state of affairs, a minority of the bondholders brought an action for the administration of the trusts as regarded the unspent part of the proceeds of the bonds in the hands of the trustees, and the Court made an order on the footing that such funds ought to be applied, in the first place, in preserving and realising the property charged, and subject to that ought to be distributed *pro ratâ* amongst the bondholders. The judgment declared that, subject to the payment of any charges on the fund properly payable thereout, and to the payment of costs, the fund was, in the events which had happened, divisible rateably amongst such of the holders of the said obligations as were entitled to the benefit of the same; and declared the plaintiffs and the other holders entitled to the charge on the railways and property charged by the obligations and trust deed; and directed an enquiry as to the obligations issued, as to the funds in hand representing the money subscribed, &c. See further, *Collingham* v. *Sloper*, (1901) 1 Ch. 769, reversed under the name of *Saragossa and Mediterranean Ry. Co.* v. *Collingham*, (1904) A. C. 159.

In both the above cases it is to be remarked that the subscribed funds sought to be recovered were in the hands of third persons as trustees. But the same rule or principle of equity applies even where the fund is in the company's hands.

Arresting money specifically appropriated

By this rule, where money is subscribed or placed in the hands of a person for a particular purpose, the money is regarded as, in some sense, impressed with the trust to apply it to that particular purpose, and the party who provides the money is entitled to restrain the application thereof otherwise than to such purpose, and if the purpose fails, to obtain restitution of the money. In other words, what is known in equity as a resulting trust arises. See the cases following: *Harris* v. *Truman*, 9 Q. B. D. 264; *Gibert* v. *Gonard*, 52 L. T. 54.

In the case last mentioned money had been advanced for specific purposes: the person to whom it was advanced became bankrupt before it had been fully applied to those purposes, and it was held

that the lender was entitled to arrest the balance, its identity being established.

**Identification.** But it is essential that the moneys sought to be reclaimed should be identified or identifiable. See *Re Hallett's Estate*, 13 Ch. D. 696, and the case last mentioned. Under ordinary circumstances where moneys are raised by debentures or debenture stock they become the property of the company absolutely, indistinguishable from the rest of the assets, and subject to no trust in favour of the lenders. In fact, the lender is under no obligation to ascertain for what purpose the company wants the money. All the lender's rights are summed up in his security.

# CHAPTER XXXIV.

## STAMP DUTIES.

It may be convenient here to give some of the provisions of the Stamp Act, 1891 (54 & 55 Vict. c. 39), and subsequent Acts in regard to stamp duties as affecting debentures and debenture stock. The schedule to the Stamp Act, 1891, as amended by the Customs and Inland Revenue Act, 1893, imposes the following duties:—

**MARKETABLE SECURITY** [*and Foreign or Colonial Share Certificate.*— Repealed by 56 Vict. c. 7, s. 4].

| | £ | s. | d. |
|---|---|---|---|
| (1) Marketable security, (a) being a colonial government security; or (b) being a security not transferable by delivery; or (c) being a security transferable by delivery and bearing date or signed (*or offered for subscription**) before or on the 6th August, 1885:— | | | |
| For or in respect of the money thereby secured | The same *ad valorem* duty according to the nature of the security as upon a mortgage. | | |

Duty at mortgage rate is chargeable upon a premium secured by a debenture as well as upon the principal sum (*Rowell* v. *Commrs. I. R.*, (1897) 2 Q. B. 194), but not where the premium is payable only in an event dependent on the option of the company (*Knight's Deep, Ltd.* v. *Commrs. I. R.*, (1900) 1 Q. B. 217).

| | | | |
|---|---|---|---|
| (2) **Transfer, Assignment, Disposition, or Assignation** of a marketable security of any description— | | | |
| Upon a sale thereof. See "Conveyance or Transfer on Sale." | | | |
| Upon a mortgage thereof. See "Mortgage of Stock or Marketable Security." | | | |
| In any other case than a sale or mortgage ... ... ... | 0 | 10 | 0 |
| (3) **Marketable** security (except a colonial government security), *being a security transferable by delivery*, and bearing date, | | | |

* Repealed by 61 & 62 Vict. c. 46, s. 7 (3).

| | £ | s. | d. |
|---|---|---|---|
| or signed, or offered for subscription after the 6th August, 1885:— | | | |
| For every 10*l.*, and also for any fractional part of 10*l.*, of the money thereby secured ... ... ... ... | 0 | 1 | 0 |
| (4) Marketable security (except a colonial government security), being such security as last aforesaid, 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:— | | | |
| For every 20*l.*, and also for any fractional part of 20*l.*, of the money thereby secured ... ... ... ... | 0 | 0 | 6 |

The duties on certain marketable securities were doubled by sect. 76 of the Finance Act, 1910, which runs as follows:—

**Sect. 76.**—The stamp duties chargeable on marketable securities (other than colonial government or colonial municipal securities) under paragraphs (1) (c), (3) and (4) of the heading "Marketable Security" in the First Schedule to the principal Act, and the stamp duty chargeable on marketable securities, share warrants, or stock certificates to bearer under sub-section (1) of section 4 of the Finance Act, 1899, shall be double those specified in the said Schedule or charged by the said section as the case may be.

They were again doubled by sect. 38 of the Finance Act, 1920.

**Reduced duty on short term securities.**

By sect. 13 of the Finance Act, 1911:—

(1) The stamp duty charged on marketable securities transferable by delivery (not being colonial government securities) shall, when the amount secured by the security is to be paid off within a term not exceeding three years after the date on which the duty is payable and the date by which the amount is to be paid off is conspicuously stated on the face of the security, be reduced to threepence for every ten pounds or fractional part of ten pounds of the money secured, if that money is to be paid off within a term not exceeding one year from the date on which the duty is payable, and sixpence for every ten pounds or fractional part of ten pounds of the money secured if that money is to be paid off within a term exceeding one year but not exceeding three years from the date on which the duty is payable.

(2) If any marketable security on which the stamp duty has been charged in accordance with this section is assigned, transferred or in any manner negotiated in the United Kingdom after the date stated on the face of the security as the date by which the amount secured is to be paid off, stamp duty shall be charged thereon at the full rate of duty, an allowance being made for the duty already paid, and, if any person in the United Kingdom after the said date assigns, transfers or in any manner negotiates, or is concerned as broker or agent in assigning, transferring or in any manner negotiating any such security and the security is not stamped in accordance with this provision, that person shall incur a fine of twenty pounds.

(3) Paragraph (4) under the heading "Marketable Security" in the First Schedule to the Stamp Act, 1891 (which provides a reduced duty in the case of marketable securities given in substitution for like securities duly stamped), shall not apply in the case of marketable securities given in substitution for marketable securities which have been stamped only with the reduced duty under this section.

By sect. 82 of the Stamp Act, 1891:—

Meaning of marketable securities for charge of duty.

(1) Marketable securities for the purpose of the charge of duty thereon include:—

(a) A marketable security made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and

(b) A marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the third day of June, one thousand eight hundred and sixty-two—

(i) Which is made or issued in the United Kingdom, or

(ii) Which, though originally issued out of the United Kingdom, has been, after the sixth day of August, one thousand eight hundred and eighty-five, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom [see *Brown* v. *Inland Revenue Commrs.*, 84 L. T. 71], or

(iii) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and

(c) A marketable security by or on behalf of any colonial government which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security).

Definition of marketable security.

Sect. 122 of the Stamp Act, 1891, provides *inter alia* that in the Act, unless the context otherwise requires, "The expression 'marketable security' means a security of such a description as to be capable of being sold in any stock market in the United Kingdom." Debentures and debenture stock in ordinary form come under this definition, whether quoted or not. *Texas Land Co.* v. *Inland Revenue*, 26 Sc. L. R. 49; and see *Brown, Shipley & Co.* v. *Commrs. I. R.*, (1895) 2 Q. B. 598; *Speyer Bros.* v. *Inland Revenue*, (1907) 1 K. B. 246; (1908) A. C. 92. Debentures secured by a trust deed and a charge on ships and other assets are marketable securities. *Deddington S.S. Co.*, (1911) 2 K. B. 1001.

Stamp on debentures and debenture stock.

Debentures not transferable by delivery are stamped with the same stamp as a mortgage as set out below under clause (1) of the schedule (p. 223, *supra*), but debentures to bearer are stamped as marketable securities transferable by delivery under clause (3) of the schedule (p. 223, *supra*). A document which is a promissory note and also a debenture and also a marketable security must be stamped with the highest duty applicable, viz., as a marketable security under clause (3). *Speyer Bros.* v. *I. R. Commrs.*, (1907) 1 K. B. 246; (1908) A. C. 92.

**MORTGAGE, BOND, DEBENTURE, COVENANT** (except a marketable security otherwise specially charged with duty), and **WARRANT of ATTORNEY to confess and enter up judgment.**

| | £ | s. | d. |
|---|---|---|---|
| (1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money— | | | |
| Not exceeding 10*l.* ... ... ... ... ... ... | 0 | 0 | 3 |
| Exceeding 10*l.* and not exceeding 25*l.* ... ... ... | 0 | 0 | 8 |
| ,, 25*l.* ,, ,, 50*l.* ... ... ... | 0 | 1 | 3 |
| ,, 50*l.* ,, ,, 100*l.* ... ... ... | 0 | 2 | 6 |
| ,, 100*l.* ,, ,, 150*l.* ... ... ... | 0 | 3 | 9 |
| ,, 150*l.* ,, ,, 200*l.* ... ... ... | 0 | 5 | 0 |
| ,, 200*l.* ,, ,, 250*l.* ... ... ... | 0 | 6 | 3 |
| ,, 250*l.* ,, ,, 300*l.* ... ... ... | 0 | 7 | 6 |
| *Exceeding 300l., for every 100l., and also for any fractional* part of 100*l.*, of the amount secured ... ... ... | 0 | 2 | 6 |
| (2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped— | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured ... ... ... ... ... | 0 | 0 | 6 |

By sect. 7 of the Revenue Act, 1903, the amount of duty under this sub-heading is limited. It runs as follows:—

**Sect. 7.**—*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 additional, or substituted security, or by way *of further assurance, shall not exceed ten shillings.*

| | | | |
|---|---|---|---|
| (3) Being an equitable mortgage— | | | |
| For every 100*l.*, and any fractional part of 100*l.*, of the amount secured ... ... ... ... ... ... | 0 | 1 | 0 |
| (4) **Transfer, Assignment, Disposition, or Assignation** of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment— | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disponed, exclusive of interest which is not in arrear ... ... ... ... | 0 | 0 | 6 |
| And also where any further money is added to the money already secured. | *The same duty as a principal* security for such further money. | | |
| (5) **Reconveyance, Release, Discharge, Surrender, Re-surrender, Warrant to Vacate, or Renunciation** of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured— | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured ... ... ... ... ... ... ... | 0 | 0 | 6 |

And see sects. 86, 87, 88 and 89 of the Act.

MORTGAGES, &c.

Meaning of "mortgage."

**86.**—(1) For the purposes of this Act the expression "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

And includes—

(a) Conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever; and

(b) Any deed containing an obligation to infeft any person in annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured; and

(c) Any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified, who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number; and

(d) Any defeazance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable, or explaining or qualifying any conveyance, transfer, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security; and

(e) Any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title deeds for making a mortgage, wadset, or any other security or conveyance as aforesaid of any lands, estate, or property comprised in the title deeds, or for pledging or charging the same as a security; and

(f) Any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland; and

(g) Any deed operating as a mortgage of any stock or marketable security.

(2) For the purpose of this Act the expression "equitable mortgage" means an agreement or memorandum under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property.

Direction as to duty in certain cases.

**87.**—(1) A security for the transfer or re-transfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, is to be

charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock.

(2) A security for the payment of any rentcharge, annuity, or periodical payments by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

(3) A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security.

(4) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of Court, or the memorandum thereof, and on the copy of the Court roll of the surrender or grant, if made in Court.

(5) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of Court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than ten shillings.

(6) An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser.

**Security for future advances, how to be charged.**

**88.**—(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 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.

(3) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in the security upon the dropping of any life whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

The schedule to the Stamp Act, 1891, also contains the following:

**LETTER OF ALLOTMENT and LETTER OF RENUNCIATION,** or any other document having the effect of a letter of allotment—

| | £ s. d. |
|---|---|
| (1) Of any share of any company or proposed company ... ... | 0 0 1 |
| (2) In respect of any loan raised, or proposed to be raised, by any company or proposed company, or by any municipal body or corporation ... ... ... ... ... ... | |
| (3) Issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company ... ... ... | |

But see now sect. 9 of the Finance Act, 1899, *infra*, p. 232, increasing the duty to 6*d*. where the nominal amount is over 5*l*.

**And SCRIP CERTIFICATE, SCRIP,** or other document—

| | £ s. d. |
|---|---|
| (1) Entitling any person to become the proprietor of any share of any company or proposed company ... ... ... ... | 0 0 1 |
| (2) Issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company ... ... ... | |
| (3) Denoting, or intending to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation ... ... ... ... ... | |
| (4) Issued or delivered in the United Kingdom, and denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company ... ... ... | |

This duty is increased to 2*d*. by Finance Act, 1920, s. 35.

As to what is a scrip certificate, see p. 268 *et seq.*, *infra*.

And see sect. 79.

*Letters of Allotment or Renunciation, Scrip Certificates, and Scrip.*

Provisions as to letters of allotment, &c

**79.**—(1) Every person who executes, grants, issues, or delivers out any document chargeable with duty as a letter of allotment, letter of renunciation, or scrip certificate, or as scrip, before the same is duly stamped, shall incur a fine of twenty pounds.

(2) The stamp duty of one penny on a letter of renunciation may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the letter of renunciation is executed.

*Share warrant* and *stock certificate* to bearer—(three times the amount of the *ad valorem* duty on transfer).

As to the stamp duty on stock certificate to bearer, see Chap. VIII., *supra*.

The following sections are extracted from the Finance Act, 1899 (62 & 63 Vict. c. 9):—

Stamp duty on foreign or

**4.**—(1) There shall be charged on every marketable security made or issued by or on behalf of any foreign State or Government, or foreign or colonial

colonia. instruments on which duty is not now payable.

municipal body, corporation, or company, being a security transferable by delivery, which

(a) is after the first day of August one thousand eight hundred and ninety-nine, assigned, transferred, or in any manner negotiated in the United Kingdom, and

(b) is not, under the law existing at the passing of this Act, chargeable with stamp duty as a marketable security transferable by delivery,

and on every share warrant or stock certificate to bearer by means of which any share or stock of any company or body of persons formed or established out of the United Kingdom is, after the first day of August one thousand eight hundred and ninety-nine, assigned, transferred, or in any manner negotiated in the United Kingdom, a stamp duty of one shilling for every ten pounds, and also for any fractional part of ten pounds in the case of a marketable security of the money thereby secured, and in the case of a share warrant or stock certificate of the nominal value of the share or stock to which the warrant or certificate relates.

(2) There shall be charged on every instrument to bearer, not being a share warrant or stock certificate to bearer charged under the foregoing provision, by means of which any share or stock of any company or body of persons formed or established out of the United Kingdom is, after the first day of August one thousand eight hundred and ninety-nine, assigned, transferred, or in any manner negotiated, in the United Kingdom, a stamp duty of threepence for every twenty-five pounds, and also for every fractional part of twenty-five pounds of the nominal value of the share or stock.

(3) Every person who, in the United Kingdom, assigns, transfers, or in any manner negotiates, or is concerned as broker or agent in assigning, transferring, or in any manner negotiating, any instrument which is chargeable with duty under this section, and is not duly stamped, or any share or stock by means of such an instrument, shall incur a fine of twenty pounds, and the amount of the duty shall be a debt due from any such person to Her Majesty.

(4) For the purposes of this section—

(a) the expression "share warrant to bearer" includes any instrument by whatever name called, having the like effect as a share warrant issued under the provisions of the Companies Act, 1867; and

30 & 31 Vict. c. 131.

(b) the expression "stock certificate to bearer" includes any instrument by whatever name called, having the like effect as a stock certificate to bearer.

Extension of stamp duty on share warrants and stock certificate to bearer.

54 & 55 Vict. c. 39.

**5.**—(1) The stamp duty charged under the Stamp Act, 1891, on share warrants issued under the provisions of the Companies Act, 1867 (now sect. 70 of the Companies Act, 1929), 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 share warrant, and 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.

(2) Section one hundred and seven of the Stamp Act, 1891 (which related to the penalty for issuing share warrants not duly stamped), shall apply to any instrument chargeable with stamp duty under this section as a share warrant or stock certificate to bearer, in the same manner as it applies to the share warrants named in that section; and section one hundred and nine of the

Stamp Act, 1891 (which relates to the penalty for issuing stock certificates unstamped), shall apply to any instrument chargeable with stamp duty under this section as a stock certificate to bearer in the same manner as it applies to the stock certificates to bearer named in that section, and as if "company or body of persons" were mentioned in sub-section one of that section as well as "local authority."

Provision as to instruments passing by delivery in pursuance of usage.

6. For the purposes of this Part of this Act, an instrument used for the purpose of assigning, transferring, or in any manner negotiating the right to any marketable security, share, or stock shall, if delivery thereof is by usage treated as sufficient for the purpose of a sale on the market, whether that delivery constitutes a legal assignment, transfer, or negotiation or not, be deemed a marketable security transferable by delivery, or an instrument to bearer, as the case may be, and the delivery thereof an assignment, transfer, or negotiation.

Duty on loan capital.

8.—(1) Where any local authority, corporation, company, 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 of the amount proposed to be secured by the issue.

(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 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 to Her Majesty.

(3) The duty under this section shall not be charged to the extent to which it is shown to the satisfaction of the Commissioners 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.

(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, corporation, company, or body of persons shall be liable to pay to Her Majesty, in addition to the duty, a sum equal to ten 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 continued.

(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.

By the Finance Act, 1920 (10 & 11 Geo. V. c. 18), ss. 36 and 38, the stamp duty charged by the Stamp Act, 1891, on transfer of stocks and marketable securities is doubled.

As to meaning of "issue," see *Att.-Gen.* v. *Liverpool Corporation*, (1902) 1 K. B. 411; *Att.-Gen.* v. *Regent's Canal & Dock Co.*, (1904) 1 K. B. 263; *Perth Electric Tramways*, (1906) 2 Ch. 216. As to

reduction in the duty on loan capital issued for consolidating existing capital, see sect. 10 of the Finance Act, 1907.

**Increase of duty on letters of allotment and letters of renunciation.**

**9.**—(1) Sixpence shall be substituted for one penny as the stamp duty chargeable under the Stamp Act, 1891, on a letter of allotment, and letter of renunciation, or any other document having the effect of a letter of allotment, where the nominal amount which is allotted or to which the letter of renunciation relates is not less than five pounds.

(2) A separate duty shall be chargeable in respect of letters of allotment and letters of renunciation, although they may be contained in the same document.

(3) The stamp duty of sixpence, chargeable by virtue of this section on a letter of renunciation, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the letter of renunciation is executed.

**Letters of allotment and renunciation.**

Letters of allotment, &c., of debentures and debenture stock require a 6*d.* stamp (sect. 9 of the Finance Act, 1899, *supra*), unless they relate to less than 5*l.* nominal, in which case the duty is 1*d.* Letters of renunciation require the same duty, viz., 6*d.* or 1*d.*, according to the amount.

Having regard to the decision in *London & Westminster Bank* v. *Inland Revenue*, (1900) 1 Q. B. 166 (C. A.), it would seem that receipts attached to a duly stamped letter of allotment are exempt from duty.

**Definition of "marketable security."**

The term "marketable security" is defined by sects. 82 and 83 of the Act of 1891, and means a security issued by or on behalf of a company of such a description as to be capable of being sold in any stock market in the United Kingdom. The true test is not whether the security is current, but whether it is a security of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought. Per Lord Shand, *Texas, &c. Co.* v. *Comm. I. R.*, 26 Sc. L. R. p. 51. In that case the security was a debenture, one of a series issued from time to time to investors, though not quoted on any Stock Exchange. And see *Brown, Shipley & Co.* v. *Comm. I. R.*, (1895) 2 Q. B. 598. The term is not confined to securities for debt. Preference stock may be a marketable security. *Noakes* v. *Comm. I. R.*, 17 T. L. R. 99; 83 L. T. 714. *As a general rule, therefore, debentures* and debenture stock are marketable securities, and chargeable accordingly.

**Premium on redemption.**

Where a debenture or debenture stock is to be paid off or redeemed at a premium, the stamp must extend both to the principal moneys and premium (see *Rowell* v. *Inland Revenue*, (1897) 2 Q. B. 194), for the premium is part of the "money thereby secured," but where there is merely *power* to redeem at a premium the duty does not, it seems, attach in respect of the premium. *Knights Deep* v. *Inland Revenue*, (1900) 1 Q. B. 217 (C. A.). All question can be precluded by making

the payment of the premium a condition precedent to the exercise of the power to redeem. See p. 279, *infra*.

The revenue authorities hold a debenture trust deed to be chargeable with a 10*s.* duty as a deed.

Trust deed of debenture stock.

As to debenture stock, the trust deed for securing it is chargeable as a covenant or mortgage, viz., with duty at 2*s.* 6*d.* per cent.; but the certificates to registered holders, where there is a trust deed, require no stamp. Where there is not a trust deed (*supra*, p. 11) the certificates would seem chargeable under the title "bond, covenant, or instrument, being the only, or principal, or primary security for any annuity," viz., 2*s.* 6*d.* for every 5*l.* of the annuity.

Certificates to bearer (debenture stock).

Debenture stock certificates to bearer would seem to be chargeable under the heading "share warrant and stock certificate to bearer" in the schedule to the Act of 1891, *i.e.*, three times the amount of the *ad valorem* duty on transfer. The expression "stock certificate to bearer" is not a technical term, and it is not defined by the Act; and though sect. 108 states that the expression is to "include" certain instruments there specified, the word "include" is not restrictive. *Corporation of Portsmouth* v. *Smith*, 13 Q. B. D. 184, 195; *Dyke* v. *Elliott*, L. R. 4 P. C. 184; *Robinson* v. *Barton-Eccles Local Board*, 8 App. Cas. 798. But they are clearly charged with the duty by sect. 5 of the Finance Act, 1899.

An instrument which is called a debenture will be chargeable as such, although it may operate as a promissory note (*British India Steam Nav. Co.* v. *In. Rev. Commrs.*, 7 Q. B. D. 165), or marketable security (*Speyer Bros.* v. *In. Rev. Commrs.*, (1907) 1 K. B. 246).

Provision for further *pari passu* issues.

It is very common for debenture stock deeds to provide for an issue of stock of limited amount, say 500,000*l.*, and, subject to certain conditions precedent, for the creation and issue of further *pari passu* stock, say, 300,000*l.* Of late the Revenue authorities have contended that the deed must in such cases be stamped with the *ad valorem* duty on the full amount, and it cannot be denied that the words of sect. 88 of the Stamp Act, 1891, afford some foundation for this claim. Where the further stock was to be issued exclusively in satisfaction of existing debentures it was held that the trust deed *quâ* the further stock only required duty at the rate of 6*d.* per cent. as a substituted security, but on appeal this decision was reversed. *City of London Brewery Co.* v. *Comm. I. R.*, (1899) 1 Q. B. 121.

The parties usually do not wish to pay the duty on the further stock until it is created, for *non constat* it will ever be needed. This can be accomplished by the insertion of a few words in the deed, for, although sect. 88 of the Act charges money to be lent, "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,"

the same section provides that, "where such total amount is *unlimited*, the security is to be available for such an amount only as the said *ad valorem* duty 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." Hence, if the trust deed contains words to the effect that it is also to stand as a security for all further advances from time to time made by the trustees out of moneys provided by the stockholders, such further advances to rank in point of security after the other moneys thereby secured, the deed can be stamped up to the amount of the original issue in the first instance, and the further stamp can be put on it prior to the further issue of stock.

Re-issued debentures.

Where debentures forming part of a *pari passu* series are paid off, and then re-issued, the re-issued debentures must be re-stamped. *Tasker and Sons, Ltd.*, (1905) 2 Ch. 587; and see sect. 75 (4) of the Companies Act, 1929, *supra*, p. 140.

Collateral, auxiliary and additional securities.

As to what is a collateral, auxiliary, or additional security chargeable with the duty of 6*d.* per cent., see *Gartsides* (*Brookside*) *Brewery Co.* v. *Inland Revenue*, 82 L. T. 686; 16 T. L. R. 378. In that case it was held that where a piece of property was conveyed to the trustees of a debenture deed in substitution for another piece withdrawn from the trusts, the duty was payable at the rate of 6*d.* per cent. on the full amount of the debentures secured by the deed. Thus, suppose the debentures amount to 1,000,000*l.*, and that the piece of land is worth 100*l.*, the conveyance to the trustees would require an *ad valorem* stamp of 250*l.*—an altogether extravagant amount.

The above case was followed by Phillimore, J., in *British Oil and Cake Mills* v. *Inland Revenue Commissioners*, 66 J. P. 438. In that case, for the purpose of carrying out the provisions of a trust deed by which a joint stock company secured 750,000*l.* debenture stock and interest, sixteen deeds were executed by the company conveying different parts of the property of the company to trustees for the debenture holders, and the Court held that each of these sixteen deeds was liable to stamp duty at the rate of sixpence per 100*l.* on the whole principal money of the debenture stock—namely, 750,000*l.* The decision was affirmed by the Court of Appeal, (1903) 1 K. B. 689. But now by sect. 7 of the Revenue Act, 1903, the total amount of duty on such a further security is not to exceed 10*s.* See *supra*, p. 226.

Where a company is formed in a colony to take over the assets and liabilities of an English company which has issued debentures, and by agreement the debenture holders take in lieu of them

debentures of the colonial company, these are not given "in substitution" within sub-head (4) of "Marketable Security," but must be stamped to the full amount. *Mount Lyell Mining, &c. Co.* v. *Inland Revenue Commissioners*, (1905) 1 K. B. 161.

What is an unlimited security.

Prior to February, 1908, the Commissioners in several cases raised the remarkable point that where a trust deed for securing debentures or debenture stock contained a covenant to repair and empowered the trustees in default to repair and gave them a charge for the amount, that is an unlimited security and therefore incapable of adjudication under sect. 12 of the Stamp Act, 1891.

However, in *Suffield* (*Lord*) v. *Inland Revenue*, (1908) 1 K. B. 865 (February, 1908), it was held that the Commissioners' point was unsound and their view incorrect.

Coupons.

"A coupon or warrant for interest attached to or issued with any security, or with any agreement or memorandum for the renewal or extension of time for payment of a security," is exempted from duty by the Stamp Act, 1891, which re-enacts the repealed provisions to the same effect in the Stamp Act, 1870 (Schedule), and the Revenue Act, 1889 (sect. 16). See Schedule to Act of 1891 (54 & 55 Vict. c. 39), under title "Bills of Exchange," Exemption 11.

And by the Finance Act, 1894, s. 40, it is further provided that "a coupon for interest on a marketable security, as defined by the Stamp Act, 1891, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty."

This section was passed with reference to *Rothschild* v. *Commrs. I. R.*, (1894) 2 Q. B. 142, in which a new set of coupons not attached to the security, but issued subsequently, were held by Mathew, J., to be bills of exchange, and liable to stamp duty.

In this case *Enthoven* v. *Hoyle*, 13 C. B. 373, in which it was held that a coupon being a mere token required no duty, was not cited.

Scrip or provisional certificates.

The duty on scrip or provisional certificates, *infra*, pp. 267 *et seq.*, in respect of debentures and debenture stock is 2*d*. (see *supra*, p. 229), and hitherto no distinction has been drawn between scrip to bearer or to a named person. *Ellerby's case*, 20 W. R. 855; *Goodwin* v. *Robarts*, 1 App. Cas. 476; *London and Westminster Bank* v. *Inland Revenue*, (1900) 1 Q. B. 166 (C. A.).

It has, however, been suggested that scrip to bearer was made chargeable with 10*s*. per cent. duty by sect. 6 of the Finance Act, 1899. That section, however (*supra*, p. 231), did not purport to impose any duty: it merely interpreted and extended "for the purposes of this part of this Act" [*i.e.*, sects. 4—14] the meaning of certain expressions. Assuming then that the earlier words of sect. 6 are sufficient to include a scrip certificate to bearer for

debentures or debenture stock of an English company, it is necessary to consider whether any other section read in conjunction with sect. 6 in effect charges such a scrip certificate to bearer.

Now sect. 4 read in conjunction with sect. 6 clearly does not, for it only charges instruments of foreign or colonial companies. Sect. 5 extends the duty charged on stock certificates to bearer, as defined by the Stamp Act, 1891, "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*." But a provisional or scrip certificate has not such effect. The effect of the stock certificate is to declare the absolute title of the bearer to the stock therein mentioned, whereas the provisional or scrip certificates merely declare that in certain events the bearer *will* be entitled to be registered as the proprietor of so much stock. And sects. 7—14 carry the matter no further. It is therefore submitted that the duty on scrip certificates to bearer remains at 2*d.* as regards English companies.

**Receipts on scrip.**

Where a scrip certificate duly stamped is issued, it has been held that the receipts for instalments thereon do not require any stamp, inasmuch as the words of exemption in the schedule under the heading "Receipt" apply; they are as follows:—

> (ii) Receipt indorsed or otherwise written upon or contained in any instrument 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.

See *London and Westminster Bank* v. *Inland Revenue Commrs.*, (1900) 1 Q. B. 166 (C. A.).

**Transfers.**

Transfers of debenture stock are chargeable with the 1*l.* per cent. duty as above. Under sect. 86 of the Stamp Act, 1891 (substituted for the repealed sect. 14 of the Act of 1888, above mentioned), a mortgage by deed of any stock or marketable security is liable to duty like any other mortgage, viz., 2*s.* 6*d.* per cent. (see table above), but by sect. 23, a charge under hand only, on debentures or debenture stock, to bearer, is only chargeable with the duty charged on an agreement. It is doubtful, however, whether this section applies where the charge contains a power of sale.

**Receipts on debentures.**

A receipt on a debenture or debenture trust deed, acknowledging that the amount secured has been paid off and satisfied, is not a "discharge" within sub-heading (5) of the heading "Mortgage," and is not liable to *ad valorem* or other duty. *Firth & Sons, Ltd.* v. *In. Rev. Commrs.*, (1904) 2 K. B. 205.

As to stamps on conveyances or transfers for effectuating the retirement of trustees, see Finance Act, 1902 (2 Edw. VII. c. 7), s. 9.

As to fees on registering mortgages and charges under sect. 79 of the Companies Act, see *infra*, p. 400. Registration of mortgages and charges.

The following is the form used under sect. 8 of the Finance Act, 1899:— Loan capital.

INLAND REVENUE.

[*Name*] ——.

**STATEMENT of Nominal Loan Capital made pursuant to sect. 8 of the Finance Act, 1899.**

(NOTE.—*The Stamp Duty on the Nominal Loan Capital is 2s. 6d. for every 100l. or fraction of 100l.*)

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 ——

Date ——. Description ——.

This Statement is to be signed by the proper officer.

[*Indorsed is a copy of sect.* 8 ]

As to the reduction of stamp duty on loan capital to be issued for consolidating existing capital, see sect. 10 of the Finance Act, 1907.

By sect. 29 of the Finance Act, 1934, "loan capital" is not to include any loan capital which is of such a description as to be incapable of being dealt with on a stock exchange in the United Kingdom.

# CHAPTER XXXV.

## RESOLUTIONS, PROSPECTUSES, ETC.

RESOLUTIONS in regard to the issue of debentures and debenture stock must be framed with due regard to the provisions of the memorandum and articles of association. It must be seen that the former gives an express or implied power to issue the proposed securities (see p. 41, *supra*), and then the articles must be considered in order that it may be seen what the directors' powers are. Usually the articles confer on the directors express borrowing powers, but so that the amount at any one time owing in respect of money so borrowed or raised shall not at any time, without the sanction of a general meeting, exceed the nominal amount of the capital [or the subscribed capital or the paid-up capital or the sum of ——*l.*]. And accordingly resolutions in regard to borrowing generally operate as an extension of some existing powers of the directors to borrow. See Forms 1 and 2.

Sometimes it is preferred to point out more specifically the particular kind of securities proposed to be issued, as in Forms 5 to 7.

Where it is proposed to raise a considerable sum by the issue of debentures or debenture stock, the directors, even if they have ample powers to borrow without the sanction of a general meeting, often think it expedient to obtain that sanction in preference to acting on their own responsibility.

Sometimes, but rarely, the resolution provides that the debentures or debenture stock shall be offered in the first instance to the shareholders. Whether the resolution is to be ordinary or special or extraordinary depends on the articles. If they limit the powers absolutely to a fixed sum there must be a special resolution to alter the limit. See Form 3. But where they merely fix a limit which is not to be passed without the sanction of a general meeting, it is sufficient to take an ordinary resolution passed at a general meeting. If an extraordinary resolution is required by the articles it must be obtained.

### Resolutions.

**Form 1.**

Resolution extending directors' borrowing powers.

That the directors' powers of borrowing and raising money be extended by ——*l.* beyond the limit fixed by article —— of the coy's arts of asson.

**Form 2.**

Another, more specific.

That in extension of the powers of borrowing and raising money conferred by article —— of the arts of asson [and by resolutions passed at general meetings of the coy on the —— and ——] the directors be authorized to create and issue debentures of the coy for securing principal sums not exceeding at any one time ——*l.* and carrying

interest at such rate not exceeding ——*l.* p.c.p.a. and secured in such manner as the directors think fit. **Form 2.**

In both the above cases it is assumed that the articles fix a limit and provide that such limit is not to be exceeded without the sanction of a general meeting.

That it is desirable to extend the directors' borrowing powers, and accordingly that article —— of the coy's arts of asson be altered by substituting the figures 500,000*l.* for 400,000*l.* **Form 3.** Resolution altering limit in articles.

Where it is necessary to alter the articles the resolution must, of course, be passed as a special resolution in accordance with sect. 117 of the Act.

That the directors be authorized to create and issue debentures providing for the payment of principal sums not exceeding 50,000*l.*, with interest at the rate of 5 p.c.p.a., such debentures to be in such form, and to be secured in such manner, and to be issued to such persons and on such terms as the directors think expedient. **Form 4.** Resolution as to issue of debentures.

An irregularity in the resolution may invalidate the debentures. Thus, if a resolution is passed to issue debentures to directors, care should be taken to see that a quorum of directors, capable of voting on the question, is present: *Cox* v. *Dublin City Distillery* (No. 2), (1915) I I. R. 345; *Neal* v. *Quinn*, W. N. (1916) 223; *Re North Eastern Insurance Co.*, (1919) 1 Ch. 198.

That the directors be authorized to create and issue debenture stock of the nominal amount of 100,000*l.*, such stock to be called 4 p.c. debenture stock, and to be constituted and secured by trust deed and debentures framed in accordance with the drafts which have been already approved by the directors, and that the directors be authorized to dispose of such stock, &c., to such persons and on such terms and conditions as they think fit. **Form 5.** Creation of debenture stock.

See *infra*, Form 81.

That the directors be authorized, in addition to any sums already borrowed for the purposes of the coy, to borrow to an amount not exceeding in the aggregate 10,000*l.*, by the issue of 200 debentures of 50*l.* each, redeemable on the 1st January, 19—, such debentures to bear interest at the rate of 10 p.c.p.a. payable half-yearly, and to be in the form of the draft a print whereof has been produced to this meeting and identified by the signature of the secretary of the coy. **Form 6.** Creation of debentures.

That the repayment of the moneys payable according to the tenor of the sd debentures be secured by a trust deed in the form of the

**Form 6.** draft submitted to this meeting and identified by the signature of the secretary of the coy, expressed to be made between the coy of the one pt and —— of the other pt, and that the directors be authorized to execute, under the seal of the coy, a deed in the terms of the sd draft.

**Form 7.**

**Creation of debentures to pay off old debentures.**

That the directors be authorized to borrow the sum of 10,000*l.* for the purpose of paying off the debentures of the coy which fall due on the 1st January, 19—, and that such sum be raised by the issue of new debentures payable on the 1st January, 19—, and bearing interest at the reduced rate of 4 p.c.p.a., such debentures to be secured by trust deed, and that the new debentures and trust deed afsd be framed in accordance with the forms submitted to this meeting, and identified by the signature of the coy's secretary; and that the directors be authorized to issue any of the sd new debentures in exchange, at par, for any of the existing debentures the holders of which may desire to renew, and that, pending the placing of the new debentures, the directors be authorized to borrow from the coy's bankers or otherwise, on such terms as they think fit, any moneys required to pay off any of the existing debentures which fall due.

The above are resolutions of general meetings and are more or less general in terms.

### DIRECTORS' RESOLUTIONS.

The following are examples of directors' resolutions:—

**Form 8.**

**Directors' resolutions to issue debentures.**

That the coy do raise money by the issue of —— debentures of ——*l.* each, carrying interest at the rate of ——*l.* p.c.p.a. and secured by way of floating charge on the coy's undertaking, such debentures to be payable on the —— day of ——, 19—, with power for the coy to redeem at any time previously at par on giving six months' previous notice to the holders, such debentures to be framed in the terms of the draft submitted to this meeting, and that such debentures be offered for public subscription at par payable as to ——*l.* per debenture on applicon and ——*l.* on allotment and ——*l.* fourteen days after allotment, and that such offer be made by a prospectus in the terms of the draft submitted to this meeting, and that the scheme submitted to this meeting for advertising and circulating such prospectus be approved, and that Messrs. —— be instructed to carry out such scheme, and that the coy's bankers be requested to receive the subscriptions and to carry the amounts pd in by applicants to a separate account to be called the "Debenture Account."

**Form 9.**
Another debenture stock.

That debenture stock of the coy limtd to the amount of the subscribed share capital for the time being of the coy be created and secured by trust deed, in the terms of the draft submitted to this meeting and that such draft be forthwith engrossed in triplicate, and that the seal of the coy be affixed to the engrossments, and that the first issue of the stock do consist of 1,000,000*l.*, carrying interest at the rate of 4*l.* p.c.p.a., payable on the 15th May and the 15th November in each year, and redeemable at the option of the coy at 104 p.c., on and after the 15th May, 19—, or by purchase, and that such first issue be offered for subscription on the terms set forth in the prospectus submitted to this meeting.

**Form 10.**
Redemption of debentures.

That —— debentures of the coy numbered —— to —— be redeemed at par, and that such debentures when redeemed be kept alive for the purposes of re-issue.

See sect. 75 and notes, p. 140, *ante*.

## Prospectuses.

**Form 11.**
Skeleton prospectus offering debentures.

SKELETON PROSPECTUS offering debentures for subscription.

This Prospectus has been delivered to the Registrar of Cos for registration.

See sect. 34, *supra*, p. 177.

The Subscription List will open the —— day of ——, and will close on or before ——day, the —— of ——.

THE —— COY, LIMTD.

SHARE CAPITAL ——*l.*, divided into, &c.

If any founders or management shares, state number and nature. See paragraph (2) of Part I. of Schedule IV. of the Act, *supra*, p. 169.

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Issue of —— 4½ p.c. debentures of 100*l.* each.

Payable as follows:—

On applicon, ——*l.* per debenture.
On allotment, ——*l.* per debenture.
On the —— of ——, ——*l.* per debenture.
On the —— of ——, ——*l.* per debenture.

The debentures will be secured by a specific mortgage to trees of the freehold ppty below mentd and by a floating charge on the

**Form 11.**

general undertaking and assets of the coy. The debentures will carry interest at the rate of —— p.c.p.a., payable half-yearly on the —— day of —— and the —— day of ——, the first half-year's interest being calculated on the instalments as from their due dates of payment.

The debentures will be payable to the registered holder, and will be transferable by duly registered transfer in the form prescribed.

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PROSPECTUS.

The coy was incorporated in January, 19—, for the purpose [*state facts as to its position and prospects*].

The money to be raised by the issue of the debentures now offered for subscription is required for further working capital rendered necessary by the development of the business.

The security for the debentures will be as follows:—

[*State security.*]

The following valuation has been made as to the freehold ppty of the coy:—

[*Set it out.*]

The general assets of the coy apart from the freeholds to be specifically mortgaged as above mentd stand in the coy's books at ——*l.*

Messrs. ——, the auditors of the coy, have prepared a report of the profits of the coy for the last three years and of the dividends pd by the coy during that period on all classes of shares. Their report is as follows:—

[*Set it out.*]

See sect. 35 and Schedule IV., Part II. of 1929.

To pay the interest on the debentures will require ——*l.* per annum.

The following contracts have been made, &c.

See paragraph (13) of Schedule IV., Part I., *supra*, p. 170.

In the year —— a commission of ——*l.* was pd to —— for his services in the promotion of the coy, and the sum of ——*l.* was pd for underwriting shares in and debentures of the coy.

See paragraphs (10) and (12) of Schedule IV., Part I., *supra*, pp. 169, 170. These statements have now to go back only two years.

No underwriting commission is being pd in respect of the present issue of debentures.

—— of the shares in the capital issued as above mentd were issued as fully pd-up shares as pt of the conson for the acquisition by the coy of the business of Messrs. ——. Form 11.

See paragraphs (6) and (7) of Schedule IV., Part I., *supra*, p. 169. The limit is now two years.

The arts of asson of the coy provide [*here set out clauses as to directors' qualifications and remuneration*].

See paragraph (3) of Schedule IV., Part I., *supra*, p. 169.

The preliminary expenses of the coy were ——*l.*

See paragraph (11) of Schedule IV., Part I., *supra*, p. 170.

The directors were interested in the ppty acquired by the coy on its formation as follows:—

See paragraph (15) of Schedule IV., Part I., *supra*, p. 170.

A copy of the coy's memdum of asson is printed on this prospectus, and forms pt of it.

Provisional certificates will be issued on payment of the amount due on allotment, and exchanged for definitive debentures on completion of the payments.

[*For form of certificate, see* Form 35, *infra.*]

Instalments may be pd in advance on allotment, or on any of the above dates, under discount at the rate of —— p.c.p.a.

Where no allotment is made the deposit will be returned in full, and in case a less number of debentures is allotted than is applied for the excess of the deposit will be applied in or towards payment of the amount payable on allotment, and the balance, if any, will be returned. Failure to pay any instalment when due will render the allotment liable to cancellation and the previous payments to forfeiture.

Applicons in the annexed form should be filled up and sent to the coy's bankers, Messrs. ——, accompanied by a deposit of 10*l.* upon each debenture applied for.

The draft of the proposed trust deed and form of debenture can be seen at the office of the coy, and applicants will be deemed to have notice of the contents thof.

By order of the board of directors,

——, Secretary.

No. —, —— Street, London, E.C.

Date ——.

See sect. 34 (2) of the Act, *supra*, p. 177, as to signature of copy for registration.

**Form 12.**

**Prospectus offering debenture stock and preference shares, the vendors taking the ordinary shares.**

This prospectus has been delivered for registration to the Registrar of Cos.

See sect. 34 (4) of the Act, *supra*, p. 177.

The list of applicons will be opened on the —— day of ——, and closed on or before —— o'clock on the following ——day.

THE —— COY, LIMTD.

(Registered as a coy limtd by shares under the Cos Act, 1929.)

CAPITAL.

| | |
|---|---|
| 30,000 5 p.c. Cumulative Preference shares of 10*l.* each ... | £300,000 |
| 50,000 Ordinary shares of 10*l.* each ... ... ... ... | 500,000 |
| Total share capital ... ... ... | £800,000 |
| 4 p.c. Mortgage Debenture stock ... ... ... ... | £400,000 |

The whole of the ordinary shares are taken by the vendors, credited as fully pd, in pt payment for the ppty.

---

Issue of ——*l.* 4 p.c. mortgage debenture stock at par [*or at* ——*l. per* ——*l.*], and 5 p.c. cumulative preference shares of 10*l.* each at par.

The issue price is to be pd as follows:—

| | Debenture Stock. | Preference Shares. |
|---|---|---|
| On applicon ... ... ... | £10 ... | £1 per share. |
| On allotment ... ... ... | 40 ... | 4 ,, |
| On the —— day of ——, 19— ... | 50 ... | 5 ,, |
| | £100 ... | £10 per share. |

The debenture stock will carry interest at the rate of 4 p.c.p.a., and will be secured by a specific mortgage to trees of the freehold and leasehold ppty below mentd and by a floating charge in their favour on the general undertaking and assets of the coy. The interest will be pd half-yearly, on the 1st April and the 1st October in each year, the first payment being calculated on the instalments as from their due dates of payment.

The debenture stock will be redeemable at 105 p.c. at any time after the —— day of ——, on six months' notice to the holder, and

Form 12.

will be redeemed at the same price in the event of a voluntary winding-up for reconstruction or amalgamation. Any stock not previously redeemed will be pd off at par on the —— day of ——, or when the security becomes enforceable.

The preferential shares confer the right to a fixed cumulative preferential dividend at the rate of 5 p.c.p.a. on the capital for the time being pd up thereon, and rank both as regards capital and dividend and all arrears of dividend on a winding-up in priority to the ordinary shares, but do not confer any other right to participate in the profits or assets of the coy. The dividend is to be pd half-yearly, on the 1st day of April and the 1st day of October in each year, the first payment being calculated on the instalments from their due dates of payment.

Trees for the debenture stockholders.

The —— Corporation, Limtd.

—— Street, E.C.,

*Or*,

A. of ——, and B. of ——.

---

Directors:

[*Names, addresses, and descriptions.*]

See paragraph (4) of Schedule IV., Part I., *supra*, p. 169.

Bankers:

Brokers:

Solors to the coy:

Auditors:

[*Names and addresses.*]

See paragraph (14) of Schedule IV., Part I., *supra*, p. 169.

Registered Offices:

Secretary:

PROSPECTUS.

This coy has been formed to acquire and take over as a going concern the old-established —— manufacturing business carried on by Messrs. A., B. and C., at ——.

**Form 12.**

The purchase price is ——*l.*, which will be satisfied as to ——*l.* by the issue to the vendors of the whole of the ordinary shares credited as fully pd up, and as to the balance, in cash or, at the option of the coy, partly in cash and partly in fully pd debenture stock and fully pd-up preference shares.

The business ppty and assets to be acquired by the coy have been inspected by Messrs. ——, of ——, who report as follows:—

Messrs. —— of —— report as to the profits of the business during the last three years as follows:—

See Schedule IV., Part II. of 1929.

By the arts of asson of the coy it is provided as follows:—

[*Clauses as to qualification and remuneration of directors.*]

The debenture stock will be secured by a trust deed executed in favour of the trees for the debenture stockholders, and comprising—

(1) A specific first mortgage of the freehold and leasehold properties in —— above mentd.

(2) A floating charge upon the general undertaking and assets of the coy, including its uncalled capital.

| | £ |
|---|---|
| As appears from the foregoing report, the average annual profits for the last three years are ... ... ... | |
| To pay 4 p.c. interest on ——*l.* debenture stock requires... | |
| Dividend on ——*l.* 5 p.c. cumulative preference shares of 10*l.* each ... ... ... ... ... ... ... | |
| Leaving a balance of ... ... ... ... ...£ | |

The shares of the vendors (who constitute the firm of A., B., C. & Co.) in the ppty to be taken over are as follows:—The sd A., 3-12ths; the sd B., 3-12ths; the sd C., 2-12ths; the sd D., 2-12ths; and the sd A. and B. jointly as trees, 2-12ths. They are all interested in the promotion in the like proportions.

As to the above disclosure, see paragraphs (12) and (13) of Schedule IV., Part I., *supra*, p. 170. There is no need to show the proportions.

The following contracts have been made:—

(1) An agreemt dated, &c., and made between the vendors, A., B., C., D., and E., all of ——, of the one pt, and the coy of the other pt, being the contract for the sale and purchase of the business and ppty above mentd.

(2) An agreemt, &c.

(3) An agreemt, &c.

As to contracts, see paragraph (13) of Schedule IV., Part I., *supra*, p. 170.

The amount pd for goodwill is ——*l.*

As to goodwill, see concluding words of paragraph (9) of Schedule IV., Part I., *supra*, p. 169.

Under the sd contract number (3) a commission of —— is to be pd to Messrs. —— for underwriting the debenture stock now offered, and a commission of —— at the rate of —— p.c. for underwriting the shares now offered.

See paragraph (10) of Schedule IV., Part I., *supra*, p. 169.

All liabilities of the business up to —— of —— will be pd by the coy, in addition to the price above mentd. These liabilities amount to ——*l.*

The amount of the preliminary expenses other than for underwriting is estimated at ——*l.* These expenses will be pd by the vendors.

They include a sum of ——*l.* which is to be pd by the vendors to Mr. —— for his services in the promotion of the coy.

See paragraphs (11) and (12) of Schedule IV., Part I., *supra*, p. 170.

Include statements as to the qualification and remuneration of directors and the interests of the directors and promoters as on p. 243, *supra*, and the minimum subscription in respect of the intended issue of shares. See Schedule IV., Part I., paragraph (5) of the Act, and Company Precedents, Part I., 15th ed., p. 235.

Applicon will be made to the Committee of the London Stock Exchange for a quotation of the debenture stock and cumulative preference shares.

Preference shareholders are not to be entld to notice of or to attend or vote at general meetings unless the proposal to be submitted to the meeting directly affects the rights and privileges of the holders or the dividend thereon is in arrear for more than two months.

This statement, with the statement on p. 245, *supra*, is necessary to comply with paragraph (16) of Schedule IV., Part I.

Applicons for debenture stock and preference shares are to be lodged at the —— Bank, E.C., or one of their branches, on the accompanying forms, with a separate cheque for deposit for each applicon. If no allotment is made the applicon money will be returned in full, and when the amount allotted is less than that applied for the balance will be applied towards the payment due on allotment. Failure to pay any instalment when due will render the previous payments liable to forfeiture.

**Form 12.**

Copies of the memdum and arts of asson and of the sd contract for sale and other contracts and the draft of the proposed trust deed creating and securing the debenture stock and the report and certificate of the valuers can be seen at the office of the coy's solors, —— Street, ——.

A copy of the memdum of asson is endorsed hereon, and forms pt of this prospectus.

Prospectuses and forms of applicon can be obtained at the offices of the coy, and from the bankers, brokers, and solors of the coy.

Date, ——.

(*Memdum of Asson.*)

**Form 13.**

Prospectus offering debenture stock, part to go in satisfaction of existing debenture stock.

This prospectus has been delivered for registration to the Registrar of Cos pursuant to sect. 34 of the Cos Act, 1929.

The subscription list will be opened on —— the —— day of ——, and will be closed at or before 4 p.m. on ——day, the —— day of ——.

N. & M. LIMTD.

Incorporated under the Cos Act, 1929.

| AUTHORIZED CAPITAL. | £ | ISSUED CAPITAL. | £ |
|---|---|---|---|
| 60,000 5 p.c. cumulative preference shares of 5*l.* each ... | 300,000 | — p.c. fully pd-up cumulative preference shares of 5*l.* each ... ... ... ... | |
| 60,000 ordinary shares of 5*l.* each ... ... ... ... | 300,000 | — fully pd-up ordinary shares of 5*l.* each ... ... ... | |
| | £600,000 | | £ |

Issue of 250,000 4 p.c. first mortgage debenture stock of which 100,000 has been allotted to the holders of the former first mortgage debenture stock in redemption thof.

The balance of 150,000*l.* is now offered for subscription at par as under:—

| | |
|---|---|
| Payable on applicon (per 100*l.* stock)... ... | £10 |
| Allotment ... ... ... ... ... | 10 |
| 31st January, 19— ... ... ... ... | 40 |
| 31st March, 19— ... ... ... ... | 40 |
| | £100 |

with option of payment in full on allotment at a discount at the rate of 2½ p.c.p.a. until the appointed days of payment.

Form 13.

Repayable at par on the 31st May, 1952, or at the option of the coy on giving six months' notice at any time after the 31st May, 1940, at the rate of 105*l.* per 100*l.* of stock, and at the same rate in the event of a voluntary winding-up for reconstruction or amalgamation.

The first payment of interest will be made on the —— day of ——, calculated from ——, and thenceforward half-yearly on the —— day of —— and —— day of —— in each year.

Trees for the Debenture Stockholders:

Directors, &c.

---

PROSPECTUS.

This debenture stock is secured by a charge upon the undertaking and ppty and assets of the coy. According to the audited balance sheet, dated the 31st December, 1932, a copy of which is enclosed, the ppty and assets of the coy amounted on that day to ——*l.*, not including the amount pd for goodwill, which has been written off. The indebtedness of the coy on the same date, including the then existing debenture debt of 100,000*l.*, amounted to ——*l.* The assets of the coy were as follows:—

Freehold land and works at ——, value as per last balance sheet ... ... ... ... ... ... £

&c.
&c. } Other items.

Items 1, 2, 3 and 5 are valued in the balance sheet at much below the original cost.

The freehold land and works at, &c., and the leasehold land and works at, &c., have been specifically mortgaged to the trees for the debenture stockholders by a deed which also creates in their favour a floating charge on the general undertaking of the coy.

New works at —— were erected, &c., &c.

In 1930 an issue of 100,000*l.* debenture stock was made. The holders of this stock have agreed by resolution passed in accordance with the provisions of the trust deed to accept in lieu thereof 100,000*l.* of the present issue. The securities hitherto held in trust in respect of the sd issue of 1930 have been released, and 100,000*l.* of the present issue is therefore applicable in redemption as afsd and is not offered for subscription.

The money to be raised by the debenture stock now offered is required for completing the works at ——, for additional plant and machinery and for further working capital.

**Form 13.** The accounts of the coy have been audited since its formation in the year —— by Messrs. ——, whose certificate is as follows:—

[*Certificate as to profits.*]

It will be seen that the net profits are sufficient to pay interest on the debenture stock many times over.

The last issue of 5*l.* ordinary shares was made at a premium of ——*l.* per share.

Of the shares —— preference and —— ordinary shares were issued in the year —— credited as fully pd up in consn of the transfer to the coy of, &c.

The trust deed constituting and securing the stock can be inspected at the office of the coy's solors, where also may be inspected copies of the memdum and arts of assn of the coy, together with plans of the freehold ppty at —— and of the leasehold ppty at ——.

Applicns for stock should be made in sums being multiples of ——*l.* on the form enclosed with this prospectus, accompanied by a remittance of the deposit, and the sums so applied for should be sent to the —— Bank, Limtd, No. —, —— Street, E.C.

Prospectuses and forms of applicn can be obtained from the coy and from the London office and from all branch offices of the —— Coy, Limtd, as well as from the coy's solors, from the brokers, and from the secretary of the coy.

If the whole amount applied for by any applicant be not allotted, the amount pd on deposit will be appropriated towards the sum payable on allotment. In the case of an applicant to whom no allotment is made, the deposit will be returned in full. Failure by allottees in payment at the due date of any instalment will render the allotment liable to cancellation and the previous payments to forfeiture.

Stock certificates will be issued by the coy as soon as possible after the payments are completed.

NOTE.—This form is a form of prospectus issued more than two years after the company has become entitled to commence business, and accordingly the requirements of sect. 35 of the Fourth Schedule of the Act, as to the memorandum of association 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, do not apply. See Schedule IV., Part III., paragraph (1). As to disclosure under the other clauses, see the preceding Forms 11 and 12.

THE —— COY, LIMTD. **Form 14.**

Issue of ——*l.* 4½ p.c. Debenture Stock.

* Circular offering further debenture stock to existing debenture stockholders.

Authorized share capital, ——*l.* Subscribed and pd-up capital—

| | |
|---|---|
| Ordinary Shares ... ... ... ... ... | £ |
| Preference Shares ... ... ... ... | |
| Making together ... ... ... ... ... | £ |
| Debenture Stock ... ... ... ... ... | £ |

To ——.

The directors have decided to offer for subscription to the existing debenture stockholders in proportion to the stock already held by them 100,000*l.* further 4½ p.c. debenture stock at the price of ——*l* per 100*l.* of stock.

The stock is offered to the holders on the register at this date of the existing debenture stock in the proportion of ——*l.* of the further debenture stock for every ——*l.* of the already issued debenture stock now held.

The payments will be as follows:—

On allotment, —— p.c.
On the —— of ——, —— p.c.
On the —— of ——, —— p.c.
On the —— of ——, —— p.c.

The stock will carry interest as from the —— day of ——, and the first payment of interest will be made on the —— day of ——. The stock will rank in all respects *pari passu* with the already issued debenture stock, and is constituted and secured by trust deed dated the —— day of ——, and made between the coy of the one pt and —— and —— as trees of the pt.

As the registered holder of ——*l.* of the already issued debenture stock of the coy you are entld to an allotment of ——*l.* of the further debenture stock, and I have to request that you will notify to me your acceptance thof on or before the —— day of —— next, as failing such notification you will at the expiration of that time be considered to have declined the allotment.

Should you desire to take up the stock to which you are entld as above, please sign and return to me the annexed form of acceptance.

---

* Under sect. 35 (5) of the Act, such a circular can be issued to debenture holders or shareholders or both without compliance with the requirements of sect. 35 as to disclosure.

**Form 14.** Forms of renunciation may be obtained on applicon at the office of the coy if you wish to transfer your right to an allotment of stock.

By order of the Board,

——,

Secretary.

Trees for Debenture Stockholders:

Directors:

Bankers:

Auditors:

Solors:

Offices:

Secretary:

**Form 15.**

Form of request.

THE —— COY, LIMTD.

Issue of ——*l.* further 4½ p.c. Debenture Stock.

FORM OF ACCEPTANCE.

To the Directors of the —— Coy, Limtd.

GENTLEMEN,

I request you to allot me ——*l.* of the further 4½ p.c. debenture stock of the coy now in course of issue, being the proportion offered to me in respect of my present holding of the already issued debenture stock, and I hby agree to accept the same and to pay the sum due thereon in accordance with the terms of the circular dated, &c.

Signature ——.

Address ——.

Date ——.

In the event of your desiring to renounce the whole or pt of the allotment to which you are entld, forms for the purpose can be obtained on applicon at the office of the coy.

This sheet to be filled up and returned to the —— Coy, Limtd No. —, —— Street, E.C.

FORM OF RENUNCIATION. No. ——. **Form 16.**

Renunciation.

(This document must be presented at the coy's office.)

The —— Coy, Limtd.

I, ——, of ——, hby renounce my right to apply for an allotment of ——*l.* 4½ p.c. debenture stock to which I am entld under the circular dated the —— of ——, and nominate ——, of ——, to apply for the sd stock.

Dated, &c.

I, ——, of ——, hby apply for the allotment of the sd stock, and agree to be bound by the terms of the sd circular.

Signature of nominee ——.

Address ——.

Unless this letter is signed and delivered at the coy's office, No. —, —— Street, E.C., on or before the —— of —— this applicon will be rendered void.

**Prospectus of Debenture Stock to Consolidate Prior Issues.** **Form 17.**

Prospectus of debenture stock (exchange and consolidation).

THE —— CORPORATION, LIMTD, offer for subscription the under-mentd debenture stock.

The subscription list will open on Tuesday, the 26th July, and close at or before 4 o'clock on the same day.

THE L. M. COY, LIMTD.

*Incorporated, &c.*

| | | |
|---|---|---|
| Capital subscribed ... ... | £2,000,000. | |
| Capital called up and pd up in advance ... ... ... | | £600,000 |
| Uncalled capital ... ... ... ... ... ... | | 1,400,000 |
| | | £2,000,000 |
| Reserve fund ... ... ... | £200,000. | |

Issue of 300,000*l.* 4*l.* p.c. Debenture Stock at 94*l.* per 100*l.*

To be redeemed at par on the 1st January, 1957.

Part of the under-mentd debenture stock, the whole of which will be secured by mortgage on the coy's uncalled capital and by floating charge on the undertaking of the coy.

Trees for the Debenture Stock:

A., of ——. B., of ——.

Solors to the Trees:

**Form 17.** The security for the debenture stock will be:—

1. A mortgage on the uncalled capital, amounting to 1,400,000*l.*
2. A floating charge on the undertaking of the coy.

According to the last balance sheet of the coy, dated the 31st December, 19—, its assets (after providing for trade liabilities) available to meet outstanding debentures and debenture stock amounted, exclusive of the uncalled capital, to upwards of 3,000,000*l.*

The above debenture stock is now offered for subscription at 94*l.* per 100*l.*, payable as follows:—

£5 p.c. on applicon.
34 p.c. on allotment.
30 p.c. on the 24th October, 1927.
25 p.c. on the 15th December, 1927.

£94

The whole amount may be pd up on allotment, or with any subsequent instalment under discount at the rate of 3*l.* p.c.p.a.

The debenture stock to be secured as above stated is ——*l.* The total amount of the debenture stock for the time being issued together with the amount of the debentures or debenture stock already issued and for the time being outstanding, is never to exceed the amount of the uncalled capital of the coy.

The object of the present issue is to replace money used in paying off terminable debentures bearing a higher rate of interest. The residue of the debenture stock is intended to be applied in the conversion of all outstanding debentures and debenture stock into one uniform debenture stock, which will be specially secured by a mortgage to the above-named trees for the debenture stockholders of the whole of the uncalled capital amounting, as above stated, to 1,400,000*l.*, and by a floating charge in their favour upon the undertaking of the coy.

The holders of outstanding debentures and debenture stock will, within such time as will be prescribed by the coy, have the option of conversion on the basis set forth in the following examples:—

1. A terminable debenture af 100*l.*, bearing interest at 5*l.* p.c. due on the 31st December, ——, if presented for conversion at 94*l.* per 100*l.* on the 1st August, ——, will be exchangeable into debenture stock bearing 4*l.* p.c. interest for 100*l.* and a cash payment of 9*l.* 6*s.* 5*d.*, being the difference of interest between 4*l.* p.c. and 5*l.* p.c. capitalized and 6*l.* per 100*l.* representing the discount on the issue of the debenture stock. Debentures falling due at other dates will be dealt with on the same principle.

Form 17.

2. A terminable debenture of 100*l.* bearing interest at 4½*l.* p.c. due on the 31st December, ——, if presented for conversion at 94*l.* per 100*l.* on the 1st August, ——, will be exchangeable into debenture stock bearing 4*l.* p.c. interest for 100*l.* and a cash payment of 7*l.* 1*s.* 10*d.*, being the difference between 4*l.* p.c. and 4½*l.* p.c. capitalized and 6*l.* per 100*l.* representing the discount on the issue of the debenture stock. Debentures falling due at other dates will be dealt with on the same principle.
3. Holders of existing perpetual debenture stock will be entld to exchange their present security for the new stock at par.

The L. M. Coy, Limtd, was established in the year 1889, and has since the first year of its formation pd a uniform dividend of 10*l.* p.c.p.a., and in several years in addition it has pd bonuses amounting to ——*l.* A report has been made by Messrs. ——, the auditors of the coy, as to the profits of the coy and the dividends pd during the last three years and is as follows:—

[*Set it out.*]

The coy occupies the first position as, &c.

The directors of the coy are:—

[*Names and addresses.*]

Add other formal disclosures if required, as in Forms 11 and 12.

The debenture stock will be transferable in the usual way by registered transfer, and transfers will be permitted in any fractions. But the holders of the stock may at any time, at their own expense, call on the coy for certificates to bearer for any portion of their stock (100*l.*, or in multiples thof), with interest coupons attached, and such certificates may thereafter be surrendered and the stock registered.

The interest on the debenture stock will be payable half-yearly, on the 1st January and the 1st July. Interest at 4 p.c. on the instalments, calculated from the dates of the respive payments, will be pd on the —— of ——.

Applicons for the debenture stock, in the form enclosed with the prospectus, and accompanied by the stipulated deposit on the debenture stock applied for, will be received by the —— Corporation, Limtd, —— Street, London.

If the whole amount of debenture stock applied for by any applicant be not allotted, the amount pd on deposit, or such pt thof as will suffice, will be appropriated towards the sum due on allotment.

**Form 17.**

Applicants to whom no allotment is made, or whose deposit is beyond that required to meet the further payment on allotment, will receive back their deposit, or such excess as the case may be, in full.

Failure by allottees in payment at the due date of any instalment will render the allotment liable to cancellation and the deposit to forfeiture.

A copy of the memdum and arts of asson of the coy, and the draft of the proposed trust deed for securing the debenture stock, can be inspected at the office of Messrs. ——, solors, —— Street, E.C.

Prospectuses and forms of applicon can be obtained at the offices of Messrs. ——, —— Street, E.C.; from Messrs. ——, &c.

London, —— July, 19—.

A circular like this can be issued to existing debenture holders without complying with the requirements of sect. 35: see sub-sect. (5) of that section.

**Form 18.**

**Prospectus by financiers offering debenture stock (owned by them) for sale.**

THE —— COY, LIMTD.

——*l.* 4½ p.c. Debenture Stock.

Trees for Debenture Stockholders:

—— and ——.

Messrs. —— & Co. are instructed by the purchasers from the coy to offer for sale at par the above-mentd ——*l.* debenture stock. The price will be payable as follows:—

£5 p.c. on applicon.
20 p.c. on allotment.
25 p.c. on, &c.
25 p.c. on, &c.
25 p.c. on, &c.

£100

Purchasers will have the option of paying up in full on allotment, and interest will be allowed on such payments at the rate of 3 p.c.p.a.

Failure to pay any instalment when due will render all previous payments liable to forfeiture.

Where the amount allotted is less that that applied for the surplus will be appropriated towards payment of the amount payable on allotment. If no allotment is made the deposit will be returned without reduction.

Scrip to bearer will be issued after allotment, and will be exchanged for debenture stock certificates after payment of the last instalment.

The stock will be transferable in multiples of 1*l.*

Form 18.

Interest will be payable half-yearly, on the 1st January and the 1st July, and the first payment on the 1st July, ——, and will be calculated from the dates of payment of the instalments.

This coy has acquired, &c.

[*Here set out parlars as to the position and prospects of the coy, and the security offered and the profits, officers, &c.*]

Applicons may be made on the forms accompanying this prospectus, and forwarded with the amount of deposit payable on applicon.

The stock will be transferred to the purchasers free of expense to them.

Prospectuses and forms of applicon can be obtained from Messrs. ——, and from Messrs. ——.

London.

Date ——.

THE —— COY, LIMTD.

[*Here set out capital, directors, officers, &c., and other information as in Forms* 10 *and* 11.]

Applicon will be made in due course to the Committee of the London Stock Exchange to grant an official quotation of the issue.

Date ——.

The above is an instance of a case in which it is assumed that the parties offering the stock for sale have purchased the stock and are not persons who have been engaged or interested in the formation of the company.

The provisions of sects. 34 and 35 (replacing sects. 80 and 81 of 1908) will now apply to this prospectus, unless it can be shown that the debentures were not allotted with a view to their being offered to the public. See sect. 38.

## Miscellaneous Statements in Heading of Prospectuses.

Form 19.

Preferential consideration and exchange.

Preferential conson in the allotment will be given to applicons from the existing debenture stockholders who elect to exchange their present stock for the new issue at the price of 108*l.* p.c. Stock not exchanged on these terms will be pd off at 110*l.* p.c., together with accrued interest thereon on the 1st January next.

Stock held by existing debenture stockholders to the extent of any allotment made to them will be exchanged at 108*l.* p.c. in pt payment of the 4 p.c. mortgage debenture stock now offered.

Interest will be payable half-yearly, on the 29th September and the 25th March in each year, and the first two payments will be calculated from the date of payment of the instalments, or in case of exchange of debenture stock from allotment.

**Form 20.**

Floating charge debenture stock.

The interest is payable half-yearly. The first payment will be made on the 1st July, ——, calculated from the dates when instalments are pd.

The debenture stock will be secured by a trust deed constituting a first floating charge on the whole ppty and assets of the coy both present and future, and will be redeemable at the option of the coy, on six months' notice, at the rate of 110*l.* per 100*l.*, but this option will not be exercised before the 1st January, 19—.

In the event of a voluntary winding-up for reconstruction or amalgamation the debenture stock will be paid off at the rate of 110*l.* per 100*l.* stock. The trust deed provides that the coy shall not create any mortgage or charge ranking in priority to or *pari passu* with the sd floating charge.

The above is an extract from a prospectus offering debentures secured by floating charge only.

**Form 21.**

"B" Debenture stock.

The "B" debenture stock and the interest thereon will be secured by a deed giving to trees a floating charge upon the whole undertaking of the coy, ranking next after the 200,000*l.* 4½ p.c. mortgage debenture stock already existing.

Power is reserved to the coy to increase the issue of "B" stock up to ——*l.*, but no portion of the balance will be issued except for the purpose of acquiring further ppty, making trade loans, effecting, extending, and equipping buildings, or redeeming or paying off the existing mortgage debenture stock.

Any of the above instalments on the "B" debenture stock may be pd up in full on allotment, or on the —— day of ——, and interest will be pd thereon at the rate of 3½ p.c.p.a.

Provisional scrip will be issued on allotment.

The above is an instance of a floating charge to secure second debenture stock.

**Form 22.**

Stock repayable at average market price.

The first mortgage debenture stock is repayable at 108*l.* on the 1st January, 19—, and is redeemable at the option of the coy, in whole or in pt, on or at any time after the 1st January, 19—, on six months' notice, at 108*l.*

If the debenture stock should at any time become payable owing to the voluntary winding-up of the coy, it is to be redeemed at a price calculated according to the average mean market value in London during the three years immediately preceding the date when the security becomes enforceable, but so that the price shall not be less than 108*l.* per 100*l.* stock.

**Form 22.**

Interest on the first mortgage debenture stock will be pd on the —— day of —— and the —— day of —— in each year. The first interest calculated from the dates of the respive instalments will be pd on the —— day of ——, 1927.

**Form 23.**

Another.

The stock will be redeemed at par on the 31st August, 1950, but in the event of the coy going into liquidation before that date for the purpose of reconstruction, the stock will be pd off at a price not less than the average market price during the previous three years. A sinking fund will be formed to provide for the redemption of the stock on the 31st August, 1950.

**Form 24.**

Redemption fund.

The 4½ p.c. mortgage debenture stock will be secured by a specific first mortgage on, &c., and by a floating charge on the undertaking of the coy.

The stock will carry interest at the rate of 4½ p.c.p.a. The first payment of interest will be computed up to the 30th June, ——, from the dates fixed for the payment of the instalments on the stock. Thereafter interest will be payable half-yearly up to the 31st January and the 31st July in each year.

The stock will be transferable in multiples of 10*l.*, is redeemable at the coy's option at 105*l.* p.c. at any time after the 31st January, ——, on six months' notice by the coy, and in a voluntary winding-up for reconstruction is repayable at the same rate. A sum of 20,000*l.* per annum will be pd to the trees for the stockholders, and after payment thereout of interest on the stock, the balance will be carried to a redemption fund, and applied in the purchase of stock at any price not exceeding 105*l.* p.c., or in the alternative in redeeming the stock at that price in accordance with drawings. Any stock not previously purchased or redeemed will be pd off at par on the 31st March, ——.

**Form 25.**

Power reserved to issue further *stock pari passu.*

The directors have reserved power in the trust deed to issue 100,000*l.* debenture stock in addition to and ranking with the present issue, making a total of 300,000*l.*, but this power is not to be exercised unless due provision is made to the satisfaction of the trees for the applicon of the proceeds in acquiring additional ppty as provided by the trust deed.

**Form 26.**

Prospectus of debenture stock (tenders invited).

THE —— COY, LIMTD.

4 p.c. Mortgage Debenture Stock.

The directors invite tenders for the unissued balance, about ——*l.*, of the coy's debenture stock. This stock bears interest at the rate of —— p.c.p.a., payable half-yearly, on the —— of —— and —— of —— in each year. The purchase-money for the stock will be payable on the —— day of ——, 19—, and the interest will commence on the —— of ——.

The stock [*show position and security, and comply with the requirements of sect.* 35 *of the Act, so far as applicable*]. See p. 166.

The stock will be allotted in amounts of not less than 100*l.* to the highest bidders (but no less price than 96*l.* for each 100*l.* stock will be accepted), and the stock will be registered in the names of the applicants or their nominees free of expense.

Tenders sealed up and marked "Tender for Debenture Stock" must be sent to the undersigned at this office not later than 10 a.m. on —— the —— of ——, and may be made in the following form, or if desired, printed forms of tender may be obtained on applicon.

*Form of Tender.*

I hby tender for ——*l.* 4 p.c. debenture stock of the —— coy, at the price of ——*l.* for each 100*l.* stock, and I undertake to accept the sd stock or any less amount that may be allotted to me, and to pay the purchase-money to the coy's bankers on or before the —— day of —— next.

[*Name, address, and description in full.*]

*Note.*—Letters of allotment of stock will be sent by post on or before ——, the —— of ——, to applicants whose offers are accepted.

By order, ——, Secretary.

Secretary's Offices, ——,
——, 19—.

**Form 27.**

Circular offering stock in exchange.

**Circular Offering New Stock in Satisfaction of Issued Debenture Stock.**

THE —— COY, LIMTD.

SIR *or* MADAM,

I enclose formal notice of the coy's intention to redeem the 5 p.c. debenture stock held by you in accordance with the provisions of the trust deed.

The coy is about to make an issue of 400,000*l.* 4 p.c. debenture stock at 112*l.* (advance proof prospectus of which I enclose), and

Form 27.

the directors in allotting will be prepared to give preferential consn to applicons by holders of the existing debenture stock who elect to exchange their stock for the new stock at 108*l.* p.c. In the event of your electing to exchange early intimation is desirable owing to the large number of applicons which it is expected will be received.

The amount of stock held by you is ——*l.*, and should you desire to exchange you should apply for ——*l.* of the new stock, and should fill up the accompanying form, and return it with a cheque for ——*l.*, being the difference between the issue price of 112*l.* and 108*l.* p.c. On allotment you should forward to me the certificate for the stock now held by you and the allotment letter of new stock received by you and you will receive in exchange a receipt in full for the new stock upon the allotment letter. In the event of the directors being unable to allot you the whole amount applied for, you will receive a cheque in redemption of the old stock not exchanged (taken at 110*l.* p.c.), with interest up to the date of payment and also for interest up to the date of the allotment of the new stock on the amount exchanged. Interest on the new stock will run from allotment.

Yours truly,

——,

Secretary.

P.S.—In the event of your desiring a further allotment kindly apply for prospectus in the usual way, and make a separate applicon.

As to the stamp in such a case, see *London and India Docks Co.* v. *Att.-Gen.*, (1909) A. C. 7.

Form 28.

Application for exchange.

*Form of Applicon.*

Applicon No. ——. Allotment No. ——.

THE —— COY, LIMTD.

Issue of 400,000*l.* 4 p.c. First Mortgage Debenture Stock at 112*l.*

To the Directors of the —— Coy, Limtd.

GENTLEMEN,

Having pd to your bankers the sum of ——*l.*, being a deposit of 4 p.c. on applicon for ——*l.* 4 p.c. first mortgage debenture stock we/I as —— holder —— of ——*l.* 5 p.c. debenture stock desire to exchange the same for ——*l.* 4 p.c. first mortgage debenture stock in the terms of the prospectus dated ——, that is to say, we/I desire you to accept a surrender of the 5 p.c. debenture stock held by us/me as payment of the amount payable on the 4 p.c. first mortgage debenture stock applied for at the rate of 108*l.* for every 100*l.* of stock; and we/I agree to accept the amount allotted us/me as satisfaction

**Form 28.**

of an equal amount of the 5 p.c. debenture stock held by us/me, and we/I will on allotment forward to you the certificate for the "B" debenture stock held by us/me.

Name in full ——.
Address ——.
Occupation or description ——.
Usual signature ——.
Date ——.

---

Issue of 400,000*l.* 4 p.c. First Mortgage Debenture Stock at 112*l.*

Received of —— the sum of ——*l.*, being deposit of 4 p.c. on ——*l.* 4 p.c. first mortgage debenture stock.

For the —— Bank, Limtd.
[2*d. stamp.*]
——*l.* ——, *Cashier.*

This form must be sent entire to the bankers of the company, The —— Bank, Ltd., —— Street, London, E.C., or Branches.

**Form 29.**

**Allotment on exchange.**

5 p.c. Debenture Stockholders.

*Allotment Letter.*

THE —— COY, LIMTD.

New issue of 400,000*l.* 4 p.c. First Mortgage Debenture Stock.

No. ——.

To ——, of ——.

SIR *or* MADAM,

The directors, in accordance with your applicon to exchange your existing 5 p.c. debenture stock for stock of the new issue, have allotted to you ——*l.* of the new issue on the terms of the circular dated ——.

| | |
|---|---|
| ——*l.* debenture stock allotted at 112*l.* ... ... | £ |
| Pd on applicon ... ... ... ... ... ... | £ |
| 5 p.c. debenture stock exchanged at 108*l.* ... ... | £ |
| Balance due to you ... ... ... | £ |

Kindly forward me your certificate cancelled with this allotment letter, when I will return this allotment letter receipted in full, and send you cheque for the balance, together with a cheque for the accrued interest due to you to —— of ——.

——, Secretary.

Allotment Note.

No. ——.

Old certificate stock No. ——.

# CHAPTER XXXVI.

## LETTERS OF APPLICATION AND ALLOTMENT.

See *supra*, p. 178.

**Form 30.**

Letter of application for debentures.

No. ——.

THE A. COY, LIMTD.

Issue of 10,000*l.* 6 p.c. Debentures.

To the Directors of the A. Coy, Limtd.

GENTLEMEN,

I beg to apply for —— debentures of the above issue in the terms of the prospectus issued by you, dated, &c., on which I have pd the required deposit of 10*l.* per debenture; and I undertake to accept the same or any less number you may allot to me, and to make the remaining payments in respect thof* at the dates specified in the sd prospectus.

Your obedient servant,

——.

Names ——.
Address ——.
Occupation ——.
Date ——.

* If you desire to pay in full on allotment, the words "at the dates specified in the said prospectus" should be struck out, and the words "on allotment under discount" substituted.

**Form 31.**

Letter of allotment of debentures.

THE —— COY, LIMTD.

Issue of, &c.

*Allotment Letter.*

SIR,

In response to your applicon, the directors of the above-named coy have allotted to you —— debentures of 100*l.* each.

The amount payable on applicon is ... ... ... ... £
And the amount payable on allotment is ... ... ... £

Making together ... ... ... ... ... ... £

Deducting from this the amount already pd by you, viz. ... £

There remains a balance due from you of ... ... ... £

**Form 31.**

You will be so good as to pay this sum to the coy's bankers, Messrs. ——, No. —, —— Street, E.C., on or before the —— of ——.

The remaining instalments will be payable as follows:—

——*l.* on the —— of ——.
——*l.* on the —— of ——.
——*l.* on the —— of ——.

This letter must be produced at the bank on payment of each instalment, and the proper receipt taken.

Failure to pay any instalments when due will render previous payments liable to forfeiture.

The debentures, when ready, of which due notice will be given, will be delivered in exchange for this letter of allotment, duly signed by you, and the bankers' receipts for the amount pd thereon.

Your obedient servant,

To ——. ——, Secretary.

*** This letter should be carefully preserved.

Received the within-mentd debentures. Date ——.

Signature ——.

If scrip certificates to bearer are to be allotted, this fact should be stated.

Stamp 6*d.* if nominal amount not less than 5*l.* Finance Act, 1899 (62 & 63 Vict. c. 9), s. 9.

**Form 32.**

**Letter of allotment, debenture stock.**

No. ——. A. B. & COY, LIMTD.

*Allotment Letter.*

SIR,—I am directed to inform you that, in accordance with your applicon, you have been allotted ——*l.* 4½ p.c. First Mortgage Debenture Stock of A. B. & Coy, Limtd.

The sum of ——*l.*, the amount due on allotment, should be pd to the —— Bank, Limtd, No. —, —— Street, London, E.C., on or before the —— of ——.

Scrip certificates to bearer will be delivered by the coy in exchange for this letter of allotment and receipt on any date after the —— of ——. The request printed below must be signed by the allottee, and this allotment letter, request, and receipt must be forwarded to the coy before the exchange can be made.

I am, Sir,

Yours faithfully,

——, Secretary.

Memo:—

Total sum payable on applicon and allotment .....

Less amount pd on applicon .....

Amount due on allotment .....

To ——.

*Request.* **Form 32.**

To A. B. & Coy, Limtd.

I hby request you to *[hand to the bearer hof] [send by registered letter at my risk to —— of ——,] a scrip certificate to bearer for the stock represented by this allotment letter.

* Strike out whichever words are not required.

*Receipt.*

Received on behalf of A. B. & Coy, Limtd, the sum of ——*l.* due on the above allotment.

——*l.* For The —— Bank, Limtd,

—— 1912.

*** To be retained by the —— Bank, Limtd.

A. B. & Coy, Limtd.

Issue of 4½ p.c. First Mortgage Debenture Stock.

Name ——. Allotment No. ——.

Date ——. ——*l.*

☞ This sheet must be presented entire on payment of the amount to the —— Bank, Limtd, No. —, —— Street, E.C.

As to stamps, see *supra*, pp. 229, 232.

THE —— COY, LIMTD. **Form 33.**

Issue of 500,000*l.* 4 p.c. Mortgage Debenture Stock at 105*l.* p.c. **Another.**
Redeemable at coy's option after the 1st January, 19—, at 110*l.* p.c.

No. —— Street, E.C.

SIR,

The directors of the —— Coy, Limtd, having received your applicon for ——*l.* of 4 p.c. debenture stock, have allotted you ——*l.* stock. Be good enough to pay to the —— Bank, Limtd, No. —, —— Street, E.C., on or before the —— inst., the balance payable on allotment, viz.:—

| | |
|---|---|
| Amount payable on ——*l.* stock allotted ... ... ... | |
| Less amount already pd on applicon ... ... ... | |
| Balance to be pd by you on or before the —— inst. ... | |

The first instalment ——*l.* is payable on the —— of ——, and the final instalment of ——*l.* on the —— of ——.

Your obedient servant,

——, Secretary.

**Form 33.**

Received the —— day of —— the sum of ——, being the balance as above payable on allotment. ——*l.*

Received the —— day of —— the sum of ——, being the first instalment as above. ——*l.*

Received the —— day of ——, &c., being the final instalment as above.

*** This letter of allotment, duly indorsed, and banker's receipt for the deposit, will be exchanged for a stock certificate as soon as the same is ready.

**Form 34.**

**Form of tender for debentures.**

**Form of Tender for Four per Cent. Debentures.**

*Tenders at different prices must be on separate forms.*

To the directors of the —— Coy, Limtd, —— Street, London, E.C.

—— hby tender for ——*l.* of the 4 p.c. debentures of the —— Coy, Limtd, according to the prospectus dated the —— day of ——, and agree to pay the sum of ——*l.* for every 100*l.* debenture, and to accept that amount or any less amount that may be allotted to ——, and to pay the same in conformity with the terms of the sd prospectus.

—— herewith enclose the required deposit, viz. 200*l.*, being 10*l.* p.c. on the nominal amount of debentures tendered for.

Signature ——.
Name in full ——.
Date ——. Address ——.

Sometimes the prospectus states that the company "invites tenders" for the debentures, and that "The debentures will be allotted to the highest bidders. No tender will be accepted for less than 100*l.*, or a multiple of 100*l.*, and no tender will be received after —— o'clock on the —— day of ——. No tender will be received unless on the printed form accompanying the prospectus, &c."

In such case the allotment letter will state that, "in response to your tender for debentures of the above issue, the directors have allotted to you —— debentures, at the price of ——*l.* per debenture, making a total of ——*l.* The amount payable on allotment (less the sum of ——*l.* already paid by you) is ——*l.* You will be so good, &c. See Form 31.

## CHAPTER XXXVII.

### CERTIFICATES.

**Form 35.**

Provisional certificate of title to debenture stock.

THE —— COY, LIMTD.

Capital ——*l.*

Bankers ——. Offices ——.

Issue at par [*or* at ——*l.* per 100*l.*] of 100,000*l.* 4*l* 10*s.* p.c. Debenture Stock, constituted and secured by Trust Deed, dated, &c., and made, &c.

*Provisional Certificate to Bearer.*

Issued in respect of allotment letter, No. ——.

No. ——.

For ——*l.* Debenture Stock.

THIS IS TO CERTIFY that the above-named coy has already received the sum of ——*l.* in respect of an allotment of ——*l.* of the above-mentioned debenture stock, and that on payment of the remaining instalments as below mentd, the bearer will be entld to be registered as the proprietor of ——*l.* of the sd debenture stock.

The remaining instalments are to be pd to the bankers of the coy as follows:—

On the —th June next 10*l.* p.c., viz., ——*l.*
On the —th July next 20*l.* p.c., viz., ——*l.*
On the —th Aug. next 50*l.* p.c., viz., — *l.*

Failure to pay any instalment when due will render the previous payments liable to forfeiture without further notice.

The remaining instalments may be pd in advance under discount at the rate of —— p.c.p.a. on any day on which an instalment falls due.

Fractional certificates will be issued where desired.

This provisional certificate must be produced to [the coy's bankers], upon payment of each instalment, and will be returned receipted. It must be lodged, together with such receipt, with the coy, on or after

**Form 35.**

the —— day of ——, in order that it may be exchanged for a definitive certificate. The provisional certificate and receipt must be left three clear days for examination.

For the —— Coy, Limtd.
Date ——.

——, Director.
——, Secretary.

---

Received the sum of ——*l.*, being the instalment payable on the above stock on the 1st of August, 19—.
For the —— Bank, Limtd.
——*l.*

Received the sum of ——*l.*, being the instalment payable on the above stock on the 1st of July, 19—.
For the —— Bank, Limtd.
——*l.*

---

[*To be detached by bankers.*]

The —— Coy, Limtd.
——*l.* 4 p.c. Perpetual Debenture Stock.
Amount payable, 1st August, 19—, in respect of ——*l.* Debenture Stock, specified in the Provisional Certificate to bearer.
No. ——.
——*l.* pd the —— day of —— 19—.

[*To be detached by bankers.*]

The —— Coy, Limtd.
——*l.* 4 p.c. Perpetual Debenture Stock.
Amount payable, 1st July, 19—, in respect of ——*l.* Debenture Stock, specified in the Provisional Certificate to bearer.
No. ——.
——*l.* pd the —— day of —— 19—.

---

See *supra*, Chap. VIII.

Scrip certificates to bearer, issued in respect of debentures, debenture stock, bonds, and foreign loans, have long been in use, and are negotiable. *Ellerby's Claim*, 20 W. R. 855; *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Rumball* v. *The Metropolitan Bank*, 2 Q. B. D. 194; *supra*, p. 31. But, strange to say, the London Stock Exchange authorities view with disfavour and discourage so far as they can the issue of such scrip save when the debentures or debenture stock therein referred to are to be to bearer. The reason assigned for this opposition to a mercantile custom of more than thirty years' standing is that the issue of scrip to bearer may diminish the public revenue from transfer; but this is surely a matter of policy for the Legislature, not for the Stock Exchange. If the Legislature considers that, for the benefit of trade and to facilitate dealings, a duty of 1*d.* is sufficient, it seems preposterous that the Stock Exchange should arrogate to itself a higher wisdom and restrain the Legislature's liberality to business men. To be logical, the authorities should also discourage the issue of debentures to bearer; but they do not; and so eminent a lawyer as Lord Chancellor Cairns could see no objection to framing debentures so as to "save the trouble and expense of assignments by deed."

As to the security of a scrip holder in equity, see *supra*, p. 183.

**Form 35.**

The stamp duty on scrip to bearer is 2*d*. See Stamp Act, 1891, under Letters of Allotment, Scrip Certificates, &c., and Finance Act, 1920, s. 35; and the receipts are exempt. *London and Westminster Bank* v. *Inland Revenue*, (1900) 1 Q. B. 166 (C. A.), *supra*, p. 229.

Where a scrip certificate as above is used in respect of debentures or debenture stock, and before full payment of the instalments the company goes into liquidation, the holder is not bound to go on paying the further instalments, even though there is a forfeiture clause. *Ellerby's claim*, 20 W. R. 855.

**Form 36.**

Scrip to registered holders.

*Transfers of this Scrip are liable to Stamp Duty.*

500,000*l*. 4 p.c. First Mortgage Debenture Stock

—— of ——

I. K. & Coy, Limtd.

1,000*l*. *Scrip.* No. —.

For 1,000 pounds on which 50 p.c. has been pd.

This is to certify that A. B., of ——, W.C., or other the registered holder for the time being hof, will, on payment to The —— Bank, Limtd, or any of their branches, of the final instalment of 50*l*. p.c. on —— of ——, 19—, and lodgment of this scrip certificate become entld to be registered as the holder of one thousand pounds of the above-mentd debenture stock.

If the above-mentd final instalment is not duly pd, the sum previously pd on applicon and allotment and on this certificate will be liable to forfeiture without previous notice.

Dated this —— day of ——, 19—.

For I. K. & Coy, Limtd,
——, Secretary.

Transfers of the rights hby conferred must be in writing in the usual common form, or as near thto as circumstances will admit, and must be signed by the transferor and transferee, and must be left at the coy's office, No. —, —— Street, London, E.C., for registration, accompanied by this certificate, and every such transfer when registered will be retained by the coy, and a note or memdum thof shall be indorsed hereon. A fee of 2*s*. 6*d*. will be charged for the registration of each transfer, and must be pd to the coy before registration.

Fractional certificates, not involving fractions of one pound, will be

**Form 36.**

issued where desired to the registered holder hof in exchange for the present certificate, on payment of the stamp duty thereon.

Final instalment due —— July, 19—.

Received the —— day of July, 19—, the sum of 500*l.*

For The —— Bank, Limtd,

——, Cashier.

See *supra*, Chap. VII.

**Form 37.**

Debenture stock certificate (registered holder).

THE —— COY, LIMTD.

No. ——. ——*l.*

100,000*l.* Mortgage Debenture Stock, 19—.

Bearing interest at the rate of —— p.c.p.a., payable every —— [January] and —— [July].

[The stock is redeemable at ——*l.* p.c. at any time after the —— day of ——, on six months' notice from the coy.]

This is to certify that —— of —— is the registered holder of ——*l.* of the above-mentd stock, which stock is constituted and secured by trust deed dated the —— day of ——, and made between the coy of the one pt, and —— and —— (trees) of the other pt, and is issued subject to and with the benefit of the provisions contained in the sd deed.

Given under the common seal of the coy this —— day of ——.

NOTE.—This certificate must be surrendered before any transfer of the whole or any pt of the stock comprised in it can be registered. No fraction of [one] pound can be transferred.

Where a quotation on the London Stock Exchange is wanted, it should be borne in mind that the committee now commonly require the certificate to be headed with a reference to the authority under which the company is constituted, the nominal amount of the capital, the dates when the interest on the debentures or debenture stock is payable, and the authority under which the issue is made, *e.g.*, "Issued pursuant to clause — of the company's articles, and to resolution of the directors passed the —— day of ——"; and on their back the conditions of issue, redemption, conversion and transfer. A footnote as above is also required.

Accordingly, it is well to submit the form for approval before issue. See *supra*, p. 19, as to inserting the words "and with the benefit of."

See *supra*, Chap. VII.

**Form 38.**

Debenture stock certificate (bearer).

THE —— COY, LIMTD.

No. ——. ——*l.*

100,000*l.* Mortgage Debenture Stock, 19—.

Bearing interest at the rate of —— p.c.p.a., payable every —— [January] and —— [July].

[The stock is redeemable at, &c.]

This is to certify that the bearer is the proprietor of ——*l.* of the above-mentd debenture stock, which stock is constituted and secured by trust deed dated the —— day of ——, and made between the coy of the one pt, and —— and —— (trees) of the other pt, and is issued subject to the provisions contained in that deed.

Given under the common seal of the coy this —— day of ——.

Form of coupon.

(*Form of Interest Coupon.*)

The —— Coy, Limtd.

No. ——. Six months' interest on Debenture Stock, 19—.

Certificate to bearer, No. ——.

For —— pounds.

Payable at —— (less ——*l.*, being income tax at the rate of —— in the pound).

——. Secretary.

# CHAPTER XXXVIII.

## DEBENTURES.

**Form 39.**

**Registered debenture.**

THE —— COY, LIMTD.

(Incorporated under the Cos Act, 1929.)

Capital, ——*l.*, divided into —— shares of ——*l.* each.

Issue of a series of 2,500 debentures of 100*l.* each,

Carrying interest at [4] p.c.p.a., payable half-yearly on the —— day of ——, and —— of —— [all ranking *pari passu*, and numbered —— to ——, inclusive, made under the authority of clause —— of the arts of asson of the coy, and of a resolution of the directors dated the —— day of ——].

The above heading will be varied when necessary, *e.g.*, where the debentures may vary in amount: "Issue of ——*l.* debentures carrying interest, &c."; or "Issue of ——*l.* debentures, namely: —— of 1,000*l.* each, —— of 500*l.* each, and —— of 100*l.* each"; or "Issue of ——*l.* second mortgage B debentures, &c." Sometimes the date of incorporation and other particulars are stated.

Where quotation on the London Stock Exchange is contemplated the debentures should state on their face (1) the authority under which the company is constituted, *e.g.*, "Incorporated under the Companies Act, 1929"; (2) the nominal capital of the company; (3) the dates when the interest on the debentures is payable; and (4) the authority under which the issue is made, *i.e.*, the articles of association and resolutions; and on their back should be the conditions of issue, redemption and transfer.

No. ——. *Debenture.* ——*l.*

1. The —— Coy, Limtd (hnftr called the coy), will, on the —— day of —— [or on such earlier day as the principal moneys hby secured become payable in accordance with the conditions indorsed hereon], pay to —— of —— or other the registered holder [*supra*, p. 16] for the time being hof, the sum of ——*l.*

Sometimes the words following are added: "with a bonus of ——*l.*" In such case, and where the debenture is made redeemable at a premium, the debenture must be stamped in respect of the bonus or premium as well as the principal. *Rowell* v. *Inland Revenue*, (1897) 2 Q. B. 194. And see *supra*, p. 232.

Form 89.

2. The coy will, in the meantime [*or*, during the continuance of this security], pay to such registered holder interest thereon [*or, where there is a premium*, on the sd principal sum of ——*l.*], at the rate of —— p.c.p.a., by half-yearly payments on the —— day of ——, and —— day of——, in each year, the first of such half-yearly payments [or an apportioned pt thof] to be made on the —— day of —— next.

Sometimes words are added to the clause: "and to be calculated as from the date hereof [*or*, as from the —— day of ——]." If there are to be interest coupons, add the words: "in accordance with the coupons annexed hereto," and add form of coupon, &c., as in Form 61, and vary the conditions accordingly.

A provision for payment of interest "free of income tax" is void (23 (2) of All Schedule Rules of the Income Tax Act, 1918) in the sense that notwithstanding such covenant the company has to deduct the tax. But there is no objection to increasing the rate so as to cover the estimated tax.

3. [*If there is to be a charge, say :*] The coy hby charges with such payments its undertaking and all its ppty, present and future [including its uncalled capital].

See *supra*, p. 18. Omit the words in brackets if there is not to be a charge on uncalled capital.

4. This debenture is issued subject to, and with the benefit of, the conditions indorsed hereon, which are to be deemed pt of it.

Given under the common seal of the coy this —— day of ——.

The common seal of the coy was
affixed hto in the presence of

——
——
——
} *Directors.* (Common Seal.)

*Consideration.*—It is not essential to express the consideration in a debenture, but there may be an advantage in framing the instrument so that it shall carry on the face of it a representation that it was issued for value; and if in any case it is deemed desirable so to frame the instrument, it will commence as follows:—"For value already received"; *or*, "In consideration of the sum of 100*l.* to the above-named company (*or*, to The —— Company, Ltd.) paid by ——, of ——, the said company will, &c."; *or*, "The —— Company, Ltd., in consideration of ——*l.* paid to it by ——, of ——, will, &c.," *or*, "For valuable consideration already received, The —— Company will, &c."

*Will Pay.*—Instead of "will pay," the words "undertakes," "promises," or "covenants," or "binds itself" to pay are sometimes used. *Re General Estates Co., Ex parte City Bank*, 3 Ch. 758; *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374; *Norton* v. *Florence Public Works Co.*, 7 Ch. D. 332.

*Time for Payment.*—Sometimes the time for payment is fixed by reference to the conditions, thus: "Will as and when the principal moneys hereby secured become payable in accordance, &c."

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*Interest.*—It has not been settled whether the words "in the meantime" mean until the day fixed for payment, or until actual payment. The latter construction would seem to accord best with the intention, and as the words are ambiguous, should be preferred. If the former construction be adopted, subsequent interest could only be recovered by way of damages. *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49; *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Gordillo* v. *Weguelin*, 5 Ch. D. 287. If the holder should obtain judgment on the debenture, the interest would thenceforth cease to be payable under the debenture, for the contract would merge in the judgment (*Re European Central Ry. Co.*, 4 Ch. D. 33; *Ex parte Fewings*, 25 Ch. D. 338); but this might be prevented by making the contract to pay interest run thus: "The company will during the continuance of this security." See *Popple* v. *Sylvester*, 22 Ch. D. 98, and the observations thereon in the case last mentioned. Sometimes interest is made payable out of profits. *Heslop* v. *Paraguay Central*, 54 Sol. J. 234.

Whatever the construction, the company will not be allowed to redeem without paying interest at the agreed rate until payment (*Mellersh* v. *Brown*, 45 Ch. D. 225); and a subsequent incumbrance is in no better position. *Economic Life Assurance Soc.* v. *Usborne*, (1902) A. C. 147. And see *Re Lloyd*, (1903) 1 Ch. 385.

A debenture holder does not lose his right to be paid arrears of interest because he has neglected to cash cheques for such interest before winding-up. *Defries & Son, Ltd., Eicholz* v. *The Company*, (1909) 2 Ch. 423.

Statutes of Limitation.

The debt is a specialty debt and the period under the Statutes of Limitation is twenty years. Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), s. 3. Statements of the amount of the debenture debt and accrued interest in the balance sheets are a sufficient acknowledgment within sect. 5 of that Act. *Burham* v. *Atlantic & Pacific, &c. Co.*, (1928) Ch. 836.

*Stamps.*—See *supra*, p. 223.

*Charge.*—Some persons prefer to enumerate some of the items charged, *e.g.*, "all the collieries, mining rights, plant, machinery, book-debts, credits, and moneys of the company, and all other," &c. Sometimes only part of the assets are charged, *e.g.*, "all the property of the company present and future except what is effectually charged by the indenture mentioned in the conditions indorsed hereon," and in that case a clause will be inserted in the conditions referring to the trust deed (see *infra*, clause 13); but not uncommonly in either case the debentures purport to charge all the property. As to a charge of uncalled capital, see *supra*, p. 53.

*Conditions.*—If thought fit, the debenture can refer to the conditions as subjoined, or they may be set out in the body of the debenture.

*Debenture Holder Suing.*—A covenantee can sue on a deed without executing it. But holders of a company's debenture stock secured by trust deed are not creditors of the company entitled to present a winding-up petition. *Dunderland Iron Ore Co.*, (1909) 1 Ch. 446.

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The conditions within referred to.

Conditions. See *supra*, p. 20.

1. This debenture is one of a series of like debentures of the coy for securing principal sums not exceeding in the aggregate at any one time [100,000*l.*]. [The debentures of the sd series, whether original or not, are all to rank *pari passu* as a [first] charge on the ppty hby

charged without any preference or priority one over another, and such charge [save as regards the hereditaments comprised in the indenture below mentd] is to be a floating security, [*if desired, add*] but so that the coy is not to be at liberty to create any mortgage or charge [on its freehold and leasehold land] in priority to or *pari passu* with the sd debentures.] **Form 40.**

Sometimes the charge is made a fixed charge on the freehold and leasehold property of the company. This gives the debenture holders a better security in some respects, but may hamper the company's business.

It would appear that the protection afforded by a legal estate can now be conferred on the debenture holders by means of a charge by way of legal mortgage under sect. 87 of the Law of Property Act, 1925, if the charge in clause 3 is expressed to be a charge by way of legal mortgage.

Sometimes these words are inserted: "Such debentures are to be for such amounts respectively, and are to be issued at such dates and made payable at such times, and to carry interest at such rate or rates, as may be arranged between the company and the respective subscribers for the same."

Sometimes the amount is otherwise limited, as thus: "This debenture is one of a series of debentures of the company for securing principal sums, which shall not at any one time exceed the amount of the issued [*or*, paid-up] capital [*or*, the uncalled capital] for the time being of the company. Such debentures, &c."

Having regard to sect. 75 of the Act (*supra*, p. 140), a company can keep alive and re-issue debentures paid off or redeemed.

As to floating charges, see *supra*, pp. 21, 61.

It was formerly customary to insert words in explanation of the expression "floating security," *e.g.*, and so that the company in the course of its business, and for the purpose of carrying on the same, may sell, lease, exchange, or otherwise deal with its property for the time being as may seem expedient," but as the meaning of a floating charge or security is now well settled (*supra*, p. 61) and generally understood, these words may safely be omitted.

A floating security leaves the company at liberty to create specific mortgages; and when it is desired to limit that power, words should be inserted as above. As between the company and the debenture holder the restriction is effective. *Re Horne and Hellard*, 29, Ch. D. 736. But it cannot prevail against a subsequent purchaser or mortgagee who obtains the legal estate without notice of the charge created by the debentures. *See supra*, pp. 65 *et seq.*

An express power in debentures to the company to create mortgages does not authorize the company to create a floating charge ranking in priority to or *pari passu* with the debentures. *Re Benjamin Cope & Sons, Ltd.*, (1914) 1 Ch. 800.

If the debentures are to be a first charge, the words "and by way of first charge on such property" can be used and the debentures can be called First Mortgage Debentures. But the Committee of the London Stock Exchange object to the use of the words "first mortgage" unless provision is made for the creation of a specific first mortgage in favour of the debenture or debenture stockholders.

Reference is sometimes made to an existing prior charge, *e.g.*, "The debentures are to rank *pari passu* as a second charge on the property, namely, next after such of the mortgage debentures issued by the company in the year —— as shall for the time being be outstanding," *or* "next after such of the 100,000*l.* First Mortgage Debentures of the company as shall for the time

**Form 40.**

being be outstanding, whether issued before or after the issue hereof." See *Gartside* v. *Silkstone Co.*, 21 Ch. D. 762, as to priority between two classes bearing the same date. *Supra*, p. .

Where a second trust deed was made "subject to the provisions of the first deed," it was held to be subject both to the specific and the floating charge created by the first deed. *Re Robert Stephenson & Co.*, (1913) 2 Ch. 201.

Sometimes words are added to the effect that the charge created by the debentures of this series is to rank, as regards the [freeholds] of the company, next after a charge thereon in favour of the company's bankers for securing all moneys now or at any time hereafter owing by the company to them, but so that the amount of such prior charge shall not at any one time exceed ——*l.*, and the company, notwithstanding such debentures, is to be at liberty to give, and from time to time to maintain, such prior charge.

The words, "save, &c.," should be omitted where there is no trust deed.

Whether the words "but so that, &c." should be inserted is a matter for consideration in each case. Since the publication of the first edition of this work (1877), in which the insertion of the words was suggested, it has become very common to insert such words in order to negative the company's implied power to create specific mortgages in priority to the debentures, but there are many cases in which the company cannot carry on business without some such power, and accordingly, where such words are used, it is best to confine them to land. Sometimes the prohibition is qualified thus, "but so that (except for the purpose of paying or securing the payment of purchase-money for land hereafter required) the company is not to be at liberty, &c.," or the consent of a majority of the debenture holders at a meeting may be required.

Where there is a trust deed covering all the company's property it is now not uncommon not to insert any charge in the debentures and to drop all reference to a charge in the conditions. See *infra*, p. 284. This course is adopted in order to avoid having to register the debentures as well as the trust deed, which the registrar has insisted on; but it is questionable whether this can properly be required. If there is a charge in debentures as well as in the trust deed, care should be taken to see that the terms of the charge are the same in both documents. It has been held, however, that an express charge in the trust deed is not cut down by somewhat different provisions in the debentures. *Wilson* v. *Kelland*, (1910) 2 Ch. 306.

2. A register of the debentures will be kept at the coy's registered office, wherein there will be entered the names, addresses, and descriptions of the registered holders, and parlars of the debentures held by them resply [and such register will, at all reasonable times during business hours, be open to the inspection of the registered holder hof or his legal personal representatives, and any person authorized in writing by him or them].

The words in brackets are sometimes omitted. Sect. 73 gives debenture holders a statutory right to inspect the register and have copies of the trust deed.

3. [Save as in these conditions provided], the registered holder, or his legal personal representatives, will be regarded as exclusively entld to the benefit of this debenture, and all persons may act accordingly, and the coy shall not be bound to enter in the register

notice of any trust, or save as afsd and except as by some Ct of competent jurisdiction ordered, to recognize any trust or equity affecting the title to this debenture or the moneys hby secured. **Form 40.**

The object of the first part of the condition is to fortify the title of the registered holder by making the company agree to recognize him and him only as the owner of the debenture. There is no legal objection to such provision. The latter part is intended to relieve the company from the obligation to take notice of trusts and equities. Such a provision cannot, of course, relieve the company from its duty to recognize an order of the Court (*Binney* v. *Ince Hall, &c., Co.*, 35 L. J. Ch. 363), for it is a contract of the company and the debenture holders *inter se* only; but a notice of an equity as between the debenture holder and a third party may, it is apprehended, be disregarded by the company, inasmuch as anyone who claims under the debentures must be bound by the terms of the contract, and cannot be allowed both to approbate and reprobate. Such a clause does not, however, entitle the company to disregard equities of which it has notice as between the debenture holder and the company itself. *Mackereth* v. *Wigan Coal Co.*, (1916) 2 Ch. 293. In the absence of the bracketed words in this condition and in condition 8 the company can set up equities against an unregistered transferee of the debenture. See *Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743; and *Re Brown and Gregory*, (1904) 2 Ch. 448; and *supra*, p. 24.

The company should not allow legal personal representatives to transfer or deal with the debentures until they have obtained probate or letters of administration. *New York Breweries* v. *Att.-Gen.*, (1899) A. C. 62.

The executor of a registered holder is entitled under these conditions to be registered after probate without executing a transfer. *Edwards* v. *Ransomes & Rapier, Ltd.*, W. N. (1930), 180.

4. Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representatives. The transfer must be delivered at the registered office of the coy with a fee of 2*s*. 6*d*., and such evidence of identity or title as the coy may reasonably require, and thereupon, if this debenture remains registered in the name of the transferor, the transferee will be recognized as having become entld to the benefit of this debenture free from any equities, set-off, or cross-claims which, but for this provision, the coy would be entld to set up against the transferor, and the transfer will be registered, and a note of such registration will be indorsed hereon. The coy shall be entld to retain the transfer.

The object of this clause is to simplify the title to the debenture by providing for the delivery of the instrument of transfer to the company. In the absence of some such provision the company would only receive notice of a transfer having been made. In practice the condition is found useful and effective. The note of registration usually runs thus:—

A. B., of ——, was this day registered as the holder of this debenture.
Date ——. ——, Secretary.

As to bankruptcy, sect. 48 (3) of the Bankruptcy Act, 1914, gives the trustee in bankruptcy power to transfer.

The question sometimes arises whether, in the absence of the concluding words, the company is entitled to retain a transfer sent in for registration.

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It would seem that the question should be answered in the affirmative, for the instrument is to be delivered to the company, and nothing is said about a return to the transferee. The company is, on the strength of the transfer, to alter the register and grant a certificate which may work an estoppel, and if the company does not retain the transfer, how can it prove, if it becomes necessary to do so, that the transfer was authentic and one on which it was justified in acting?

Under the Forged Transfers Acts, 1891 and 1892 (54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36), a company may pay compensation for loss arising from a transfer of securities in pursuance of a forged transfer, or of a transfer under a forged power of attorney. But it is under no obligation to make such compensation, unless apart from these Acts it would be under such obligation, *e.g.*, where it is bound by estoppel. *Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Balkis Consolidated Co. v. Tomkinson*, (1893) A. C. 396; *McKay's case*, (1896) 2 Ch. 757; *Bloomenthal v. Ford*, (1897) A. C. 156; *Sheffield Corpn. v. Barclay*, (1905) A. C. 392; *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439.

The Acts were only intended to meet a company's disability to relieve (under the *ultra vires* doctrine) in cases of hardship. See p. 211, *supra*.

[5. In the case of joint registered holders, the principal moneys and interest hby secured shall be deemed to be owing to them upon a joint account.]

Having regard to sect. 111 of the Law of Property Act, 1925 (replacing sect. 61 of the Conveyancing Act, 1881), this clause is now unnecessary.

6. No transfer will be registered during the seven days immediately preceding each of the days by this debenture fixed for payment of interest.

7. In respect of each half-year's interest on this debenture, a warrant on the coy's bankers, payable to the order of the registered holder thof, or in case of joint holders to the order of that one whose name stands first in the register as one of such joint holders, will be sent by post to the registered address of such registered holder, and the coy shall not be responsible for any loss in transmission. The payment of the warrant, if purporting to be duly endorsed, shall be a good discharge to the coy.

Under such a condition if a dividend warrant is lost in the post the company will not be liable. *Thairlwall v. Great Northern Ry.*, (1910) 2 K. B. 509.

Until payment of the warrant, the debt is not satisfied. *Re Defries & Son*, (1909) 2 Ch. 423.

8. The principal moneys and interest hby secured will be pd [and such moneys are to be transferable as afsd free from and] without regard to any equities between the coy and the original or any intermediate holder hof, or any set-off or cross-claim, and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the coy for the same.

As to this clause, see *supra*, p. 24.

Looking to the bracketed words in this clause, and to clauses 3 and 4, it is apprehended that the company is not entitled to set up an equity as against a transferee who seeks registration. See p. 25. **Form 40.**

9. The coy may at any time give notice in writing to the registered holder hof, or his legal personal representatives, of its intention to pay off this debenture, and upon the expiration of six months from such notice being given the principal moneys hby secured [with a premium of —— p.c. thereon] and all interest then due and unpaid shall become payable.

If thought desirable, this can be omitted, or the following substituted:—

"At any time after the —— day of —— next, the registered holder of the company may give notice, in writing, that the principal moneys hereby secured are to be paid off. And at [*or*, on the —— day of ——, which shall first happen after] the expiration of six months from any such notice being given, the principal moneys hereby secured shall become payable."

Sometimes it is desired to give the debenture holder power to call in the moneys at stated intervals, thus: "The registered holder for the time being hereof may, upon giving not less than six months' previous notice, in writing to the company, require payment of the principal moneys hereby secured on the 1st day of July in any of the following years, namely, 1920, 1925, and 1930, and such principal moneys shall become payable accordingly."

To avoid questions as to duty on the premium, omit the words in brackets and add at the end of the clause the words "provided such notice shall have been accompanied by a cheque for a sum equal to —— per cent. on such principal moneys by way of premium." See p. 232.

10. The principal moneys hby secured shall immediately become payable:—

(a) If the coy makes default for a period of six months in the payment of any interest hby secured, and the registered holder hof before such interest is pd, by notice in writing to the coy, calls in such principal moneys; or

(b) If an order is made or a resolution is passed for the winding up of the coy.

Some debentures contain in clause (b) the words "an effective resolution," but if a dispute arises as to the validity of the resolution, the validity of the receiver's appointment is rendered doubtful.

It is now usual to provide that if default is made in paying the interest for, say, six months, the principal moneys shall become due, or may (as above) be called in by the debenture holder, and the propriety of inserting some such provision is obvious. The above form is better than making the principal payable on default, because it gives the debenture holder an option, if he thinks fit, to allow the company further time. Sometimes less than six months is specified. As regards making the principal payable in the event of a winding-up, such a provision is now very common, and, while it can do the company no harm, may prevent disputes as to the rights of the debenture holder.

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It was long since settled that where a winding-up ensues, it accelerates the date of payment and enables the debenture holder to enforce his charge and obtain payment, even though his debenture has not matured. *Hodson* v. *The Tea Co.*, 14 Ch. D. 859, approved and followed by the Court of Appeal in *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547. And see *Re Simmer and Jack East, Ltd., Consolidated Goldfields, &c.* v. *Simmer, &c., Ltd.*, (1913) W. N. 41; *Re General Motor Cab Co.*, 56 S. J. 573. And this has been extended to a case where the debenture provided that the principal should be payable on a winding-up "otherwise than for purposes of reconstruction." *Re Crompton & Co., Ltd.*, (1914) 1 Ch. 954.

A clause such as clause 10 above does not prejudice the position of the company, while at the same time it serves to make clear the position of the debenture holder, a position which would otherwise have to be ascertained from a study of the authorities. The clause enables the company to insist on paying off the debenture holders in the event of a winding-up; but the company cannot require the trustees for the debenture holders to release their security without satisfying them that all the debentures are paid off. *Re Simmer and Jack East, Ltd.*, (1913) W. N. 41; 108 L. T. 488; explaining *Re General Motor Cab Co.*, 56 Sol. J. 573.

It may here be mentioned that a provision for accelerating the time for payment of the principal moneys is not a penalty against which equity can relieve. *Thompson* v. *Hudson*, L. R. 4 H. L. 1; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685.

Sometimes other clauses are added, *e.g.*, "or (c) if the uncalled capital of the company at any time ceases to exceed the amount of the principal moneys secured by the debentures of the company," or "if any of the property of the company should be secured under a distress." See *Central Printing Works* v. *Walker and Nicholson*, 24 T. L. R. 88.

Sometimes a more stringent form is required, and further clauses based on paragraphs (3) to (10) of clause 11 of the form *infra*, p. 322, are added. But where there is a trust deed it is not usual to set out such contingencies in the debentures; what is required is set out in the trust deed. Sometimes a clause is added thus:—

"Or if the security constituted by the indenture below-mentd becomes enforceable, and the trees thof by notice in writing to the coy require payment of the debentures of this series."

Or (c) If by notice in writing to the coy the holder of the debenture shall call in such debenture pursuant to the agreemt dated, &c., and made, &c.

See an alternative scheme in Form 57, *infra*.

"Default" means non-payment. *Williams* v. *Stern*, 5 Q. B. D. 409; but see note to Condition 7.

The clause may provide that no action shall be taken by any debenture holder without the consent of the majority. Such a clause is effectual. *Pethybridge* v. *Unibifocal Co., Ltd.*, (1918) W. N. 278.

[10a. Any holders of debentures of this series may by notice in writing to the coy convert the sd floating charge into a specific charge as regards any assets specified in the notice which shall be in danger

of being seized or sold under any sort of distress or execution levied or threatened, and may appoint a receiver thof.] **Form 40.**

This clause cannot be implied. *Evans* v. *Rival Granite Quarries*, (1910) 2 K. B. 979.

As to repairs, see *White* v. *Metcalf*, (1903) 2 Ch. 567.

11. At any time after the principal moneys hby secured become payable [*or*, after the security constituted by the indenture below mentd becomes enforceable], the registered holder of this debenture may from time to time, with the consent in writing of the holders of the majority in value of the outstanding debentures of this series, appoint, by writing, any person [approved by the trees of the sd indenture] to be a receiver of the ppty charged by the debentures [and not comprised in such indenture], and may with the like sanction remove any such receiver, and such appointment or removal shall be as effective as if all the holders of debentures of this series had concurred in such appointment. And a receiver so appointed shall have power—

(1) To take possession of, collect, and get in the ppty charged by the debentures [and for that purpose to take any proceedings in the name of the coy or otherwise].

(2) To carry on or concur in carrying on the business of the coy [and for that purpose to raise money on the premises charged in priority to the debentures or otherwise].

(3) To sell or concur in selling any of the ppty charged by the debentures, after giving to the coy at least seven days' notice of his intention to sell [and to carry any such sale into effect by conveying in the name and on behalf of the coy or otherwise].

(4) To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture holders.

A receiver so appointed shall be deemed to be the agent of the coy, and the coy shall be solely responsible for his acts or defaults and for his remuneration. The provisions of sects. 101, sub-sects. (1) and (2), 104, 106, 107, and sect. 109, sub-sects. (3), (4), (6), (7) and (8) of the Law of Property Act, 1925, and the powers thereby conferred on a mortgagee or receiver shall so far as applicable apply to the receiver so appointed as if such provisions were incorporated herein, save that all moneys received by such receiver after providing for the matters specified in clauses (i) to (iii) of sect. 109, sub-sect. (8) afsd, and sect. 264 of the Cos Act, 1929, so far as applicable, and for all costs, charges and expenses of or incidental to the exercise of any of the powers of such receiver shall be applied in or towards satisfaction *pari passu* of the debentures.

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A receiver appointed by debenture holders is the agent of the debenture holders, unless expressly stated to be the agent of the company. *Robinson Printing Co.* v. *Chic, Ltd.*, (1905) 2 Ch. 123; *Bissell* v. *Ariel Motors*, 27 T. L. R. 73.

The clause set out below in italics, which was set out in some former editions, did not contain an express provision to that effect, and it was construed in *Deyes* v. *Wood*, (1911) 1 K. B. 806, not to be sufficient to make the receiver the agent of the company so as to absolve the debenture holders from liability.

*And all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paragraphs of sub-sect.* (8) *of sect.* 24 *of the Conveyancing and Law of Property Act,* 1881, *and for the purposes aforesaid, be applied in or towards satisfaction* pari passu *of the debentures. And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sects.* 19, 20, 21, 22, 23 *and* 24 *of the said Act, which provisions, so varied and extended, shall be regarded as incorporated herein.*

For the corresponding provisions of the Law of Property Act, 1925, see clause 11, *supra*, p. 281.

Where a similar clause was employed with the addition of the words "and the holder of this debenture shall not in making or consenting to such appointment incur any liability to the receiver for his remuneration or otherwise," Sargant, J., held that the receiver was the agent of the company. *Cully* v. *Parsons*, (1923) 2 Ch. 512.

If the debenture does not contain any charge the above clause should not be inserted; but where there is a charge in the debenture the clause is frequently inserted unless there is a trust deed comprising the whole undertaking. It should not be inserted without careful consideration: for by it a majority of the debenture holders obtain an uncontrolled power to appoint their own nominee to be receiver, and to exercise very wide powers. Of course, if there is no trust deed, the reference to the trustees must be struck out.

A receiver appointed under such a clause as the above will not be superseded in favour of a liquidator under a winding-up by the Court: see *Henry Pound, Son & Hutchins*, 42 Ch. D. 402, where, notwithstanding the opposition of the official liquidator, the receiver appointed by the debenture holders was held entitled to possession.

The words in brackets at the end of the clause in italics were inserted with a view to precluding any questions whether the relevant provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), were applicable to a debenture charging the undertaking of the company. In *Baker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399, Kay, J., was of opinion that they were not applicable in the case of a series of debentures ranking *pari passu*, but it was not necessary to decide the point. It is, however, submitted that they are applicable as re-enacted in the Law of Property Act, 1925. No one can doubt that a contributory mortgage is within the Act, and that the contributors together constitute a mortgagee within the Act, and there seems no difference in substance between such a mortgage and a charge created by a series of debentures.

It should also be noted that the definition of "mortgage" in sect. 2 of the Conveyancing Act, 1881 (now sect. 205 of the Law of Property Act, 1925), includes "any charge on any property for securing money or money's worth." See *infra*, Chap. XLV., sect. 6.

Where the above clause is inserted in a debenture to bearer, the words "registered holder" must be omitted, and the words following substituted: "The bearer of the debenture may, with the consent in writing notarially certified of, &c."

Sometimes it is considered desirable to require the concurrence of a small proportion, *e.g.*, "with the consent in writing of the holders of not less than one-fifth in value of the outstanding debentures." **Form 40.**

Whether a receiver so appointed can in the absence of the bracketed addition to paragraph (2) raise money in priority, see *infra*, Chap. XLV. sect. 6.

The object of the bracketed words in paragraphs (1) and (3) is to enable the receiver to sue for debts and to convey the legal estate.

The receiver under paragraph (3) of this clause can, it is apprehended, only convey the equitable title; but sometimes the bracketed words ["and by deed in the name and on behalf of the company or otherwise to convey the same to the purchaser"] are added, and, in such case, the receiver, if appointed by deed, can convey the legal estate, if vested in the company.

The receiver should not expend money in repairs except with the written direction of the debenture holders: otherwise he may not be able to recover the amount as against them. *White* v. *Metcalf*, (1903) 2 Ch. 567. And he should not use the assets in carrying on the business without making provision for preferential debts. (Sects. 78 and 264.)

A receiver can apply on behalf of the debenture holders for a renewal of a lease under the Landlord and Tenant Act, 1927. *Gough's Garages, Ltd.*, (1930) 1 K. B. 615.

12. *If a majority clause is required, insert here* Form 58 or 59. [Such a clause is not wanted where provisions are made in the trust deed for meetings of debenture holders. See Form 81, 3rd Schedule.]

*If there is to be a trust deed, add :—*

13. The holders of the debentures of this series will be entld *pari passu* to the benefit of and will hold the debentures subject to the provisions contained in an indenture dated the —— day of ——, and made between the coy of the one pt, and A., B. and C. of the other pt [whereby certain ppty of the coy was vested in trees for securing the payment of the principal moneys and interest payable in respect of the sd debentures].

See *supra*, p. 76, as to trust deeds.

The words in brackets will be varied according to circumstances. Sometimes the nature of the property is stated.

If there is no trust deed the clause will, of course, be omitted.

If there is no trust deed, and a stringent debenture is required, clauses binding the company to keep in repair and insure are inserted.

14. The principal moneys and interest hby secured will be pd at the —— Bank, Limtd, No. —, —— Street, London, or at the registered office of the coy.

Where a person contracts generally to pay a sum of money, he is liable to the creditor everywhere; but when a person binds himself, even by bond, to pay at a particular place, then he is not liable at any other place, and the demand must be made upon him there. Per Bayley, J., *Saunderson* v. *Bowes*, 14 East,

**Form 40.**

509; *Thorn* v. *City Rice Mills*, 40 Ch. D. 357. Thus where the debenture holder's principal was made payable "at the registered office of the company," a debenture holder who had not demanded payment in accordance with the condition was refused a receiver. *Escalera Silver Lead Mining Co., Tweedy* v. *The Company*, 25 T. L. R. 87. But a receiver was appointed in *Harris Calculating Machine Co.*, (1914) 1 Ch. 920, where default had been made for six months after notice in writing requiring payment, though payment had not been demanded at the specified bank.

As to the necessity for tender by the company when desirous of paying off the debentures where no place for payment is fixed, see *Fowler* v. *Midland Electric, &c.*, (1917) 1 Ch. 527, 656.

The place of payment does not necessarily fix the currency in which the payment is to be made. *Broken Hill Proprietary Co.* v. *Latham*, W. N. (1933) 12.

15. A notice may be served by the coy upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address.

16. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it is posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

The Registrar of Companies has taken the view that where the debentures contain a charge, they, as well as the trust deed charging the same property, must be registered under sect. 79 of the Act. To avoid the expense and trouble thus involved the charge in the debentures is sometimes omitted, and condition 1 altered so as to run thus:—

> "This is one of a series of debentures of the coy for securing principal sums not at any one time exceeding ——*l.*, which debentures are issued pursuant to and secured by the indenture below mentd, whereby it is provided that they are all to rank *pari passu* without any preference one over another."

An alternative and more convenient plan is to leave the charge in the debentures, and to leave condition 13 (*supra*), and register a series of debentures under sub-sect. (8) of sect. 79. See *Harrogate Estates, Ltd.*, (1903) 1 Ch. 498; *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564.

**Form 41.**

**Form of transfer of registered debenture.**

I, A. B., of, &c., in conson of the sum of —— pd to me by C. D., of, &c., do hby transfer to the sd C. D. (hnftr called "the transferee") the under-mentd debentures issued by The —— Coy, Limtd, that is to say:—

[*Here state date, character, amount and numbers*, e.g., *five first mortgage debentures of* 100*l. each, numbered* —— *to* —— *inclusive*:]

and the full benefit thof.

TO HOLD the same unto the transferee subject to the several conditions on which I held the same immediately before the execution

hof, and I the transferee do hby agree to take the sd debentures subject to the same conditions. **Form 41.**

As WITNESS our hands [and seals] this —— day ——.

Signed [sealed and delivered] by the above-named A. B. in the presence of:—

Witness's Signature, Address, and Profession.

There is no need to make the transfer by instrument under seal, unless the regulations so require. See Chap. XXIX.

**Form 42.**

Debenture to bearer, &c.

THE —— COY, LIMTD.

[As to heading generally, see *supra*, p. 272.]

Issue of 2,000 Debentures of 100*l.* each, carrying interest at the rate of 6 p.c.p.a.

As to the validity of debentures to bearer, see *supra*, p. 30.
For debenture to bearer capable of registration, see Form 61.

*Language.*—Where a company is likely to find a foreign market for its debentures, or a vendor so stipulates, the debentures are printed in several languages on the same sheet.

No. ——. *Debenture.* 100*l.*

1. The —— Coy, Limtd (hnftr called "the coy"), will on the —— day of —— [or on such earlier day as the principal moneys hby secured become payable in accordance with the conditions indorsed hereon], pay to the bearer on presentation of this debenture the sum of 100*l.*

2. The coy will during the continuance of this security (see *supra*, pp. 17, 18) pay interest thereon at the rate of —— p.c.p.a. by equal half-yearly payments on every —— day of —— and —— day of ——, in accordance with the coupons annexed hto; [*if the debenture is to contain a charge, add :*]

3. The coy hby charges with such payments its undertaking, and all its ppty, whatsoever and wheresoever, both present and future [*add, if so intended :* including its uncalled capital for the time being].

4. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed pt of it. [See *supra*, p. 19.]

Given, &c.

Forms of coupons (see Form 43) and conditions (see Form 44) will be added.

**Form 43.**

Coupon.

THE —— COY, LIMTD.

Debenture No. ——. Interest coupon No. ——.

For 3*l.* Half-year's interest due the —— day of ——, and payable at the —— Bank [*address*] or at the registered office of the coy (less income tax).

3*l.* —— Secretary.

As to exemptions of coupons from stamp duty, see p. 235.

**Form 44.**

Conditions (debenture to bearer).

The conditions within referred to:—

1. This debenture is one of a series of —— bearer debentures, each for ——*l.*, all, whether original or not, ranking *pari passu* in point of charge, and the charge hby created, save as regards the ppty specifically mortgaged by the indenture below mentd, is to be a floating security.

2. Annexed to this debenture are —— coupons, each providing for the payment of a half-year's interest, and such interest will be payable only on presentation [and delivery] of the coupon referring thto.

As to coupons, see *supra*, p. 33.

Presentation includes delivery. *Bartlett* v. *Holmes*, 13 C. B. 630; 22 L. J. C. P. 182.

As to vouchers for further coupons, see *infra*, Form 64.

3. The principal moneys and interest hby secured will be pd and transferable without regard to any equities between the coy and the original or any intermediate holder hof.

This condition is valid (*supra*, pp. 30 *et seq.*), and is implied by the debenture being "to bearer" (*supra*, p. 213). Having regard to the decision in *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; and *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144, the clause may now safely be omitted. See *supra*, p. 209.

4. If the principal moneys hby secured shall become payable before the —— day of ——, the person presenting this debenture for payment must surrender therewith the coupons representing subsequent interest; the coy, nevertheless, paying the interest for the fraction of the current half-year.

5. The delivery to the coy of this debenture and of each of the sd coupons shall be a good discharge for the principal moneys and interest therein resply specified.

It is more convenient to make the delivery of the instrument, rather than the receipt of the bearer, a good discharge. Such a condition is unquestionably valid. See *supra*, p. 32. This clause since *Bechuanaland Exploration Co.* v. *London Trading Bank*, and *Edelstein* v. *Schuler & Co.*, *supra*, may be omitted.

6. The coy may at any time [after the —— day of ——] give notice of its intention to pay off this debenture, and upon the expiration of six months from such notice being given, the principal moneys hby secured shall become payable [with a premium of ——*l.*].

If desired, the words "—— day of ——, or —— day of ——, which shall next happen after the" can be inserted before the word "expiration," so that the principal moneys may become payable on one of the days fixed for payment of interest. In the absence of express power or a demand for payment, a mortgagee cannot be compelled to accept payment before maturity. *Brown* v. *Cole*, 14 Sim. 427; *Bovill* v. *Endle*, (1896) 1 Ch. 648. As to stamp, see *supra*, pp. 224, 232.

The notice must be given before the debenture falls due, and must specify the debenture by number. *First National Bank* v. *Orinoco Shipping Co.* (1904), 21 T. L. R. 39.

7. The principal moneys hby secured shall immediately become payable—(a) if the coy makes default for a period of six months in the payment of any interest hby secured, and the bearer hof, before such interest is pd [produces this debenture to the coy, and], by notice in writing to the coy, calls in such principal moneys; or (b) if an order is made, or a resolution is passed for the winding-up of the coy.

See note to condition 10 of Form 40.

8. This debenture is to be treated as negotiable, and all persons are invited by the coy and the owner for the time being hof to act accordingly.

A condition as above used is, or was, very commonly inserted in order to obtain if possible the benefit of the decisions above referred to (p. 32). It may now be omitted, regard being had to *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; and *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144.

8a. [*If there is to be a receiver clause, insert condition* 11 *of* Form 40, *omitting the words* "registered holder" *and inserting* "The bearer of this debenture may, with the consent in writing, notarially certified, of the bearers of the majority in value," &c.]

9. The principal moneys and interest hby secured will be pd at the —— Bank, Limtd, No. —, —— Street, London, or at the registered office of the coy.

See the note to condition 7 of Form 40, *supra*.

**Form 44.**

*If there is to be a trust deed, add:—*

10. ["The holders," &c. See Form 40, condition 13.]

11. A notice may be given by the coy to the bearer of this debenture by advertising the same once at least in *The Times* and *Daily Mail* and any notice so given shall be deemed to be served on the day following that on which such advertisement appears.

**Form 45.**

Power to call for registered debenture instead of debenture to bearer.

Upon the request in writing of the bearer hof the coy will issue to him a debenture in either of the forms set forth in the second and third schedules to the indenture below mentd. Such debentures shall provide for the payment of the principal moneys and interest hby secured and then remaining unpaid, at the times hby fixed for the payment thof resply. Upon or before such issue this debenture, and the coupons thto relating to subsequent interest, must be surrendered to the coy, and the person making such request must pay the expense of stamping the new debenture, and such sum, not exceeding ten shillings, for the expense of issuing the same as the coy shall prescribe.

It is not at all uncommon now, where debentures are secured by a trust deed, besides giving subscribers the option of taking their debentures in one of several forms, as above, to set out the forms in schedules to the trust deed, and insert in each debenture a clause as above. That clause is intended for use where two forms are given.

**Form 46.**

Uncalled capital to be carried to redemption fund.

The uncalled capital hby charged shall be deemed to be exclusively applicable to the redemption of the debentures of the above issue, and whenever any pt thof shall be called and pd up the same shall be carried to the credit of the redemption fund and applied in redeeming debentures as hnftr provided.

**Form 47.**

Unpaid capital to be deemed specifically charged.

If at any time the unpd capital of the coy, whether called or uncalled, is less than the principal moneys for the time being owing on the debentures of this series, such unpd capital shall be deemed to be specifically charged with the payment of the debentures of this series, and if subsequently pd up shall be pd to trees to be nominated by the coy to be held in trust accordingly.

**Form 48.**

Voting.

This debenture confers on the registered holder thof the right, subject to the Cos Act, 1929, to attend and vote at general meetings of the coy and to receive notice of such general meetings [as provided by the arts of asson].

Special powers must be given in the articles to justify such a condition. Debenture holders as such cannot be given a right to vote on special or extraordinary resolutions. See sect. 117 of the Act.

**Form 49.**

Option to exchange debenture for shares.

The bearer or registered holder hof may at any time before the principal moneys hby secured have been pd off direct the coy to issue to him fully pd-up shares in the capital of the coy equal in nominal amount to such principal moneys [*or* equal in value (every 1*l.* share being treated as of the value of 1*l.* 10*s.*) to the amount of such principal], and in satisfaction and discharge thof, and the coy shall, upon the surrender of this debenture, comply with such direction; provided that the holder signs and on such surrender delivers to the coy a contract in writing providing for such issue and framed in a form approved by the coy.

A contract must be delivered to the registrar for registration pursuant to sect. 42 of the Act.

Where the debentures are issued at a discount the condition cannot provide for the issue of shares at par. *Mosely* v. *Koffyfontein Mines, Ltd.*, (1904) 2 Ch. 108; *Famatina Development Corpn.* v. *Bury*, (1910) A. C. 439. See *supra*, p. 205.

The nominal value of the shares to be issued must not be greater, but may be less than the amount of the debentures to be exchanged.

**Form 50.**

Option to call for shares at a premium.

The registered holder of this debenture shall be at liberty at any time before the —— day of ——, by notice in writing to the coy, to call for an allotment to such registered holder of —— ordinary 1*l.* shares in the coy; and if such notice is accompanied by a sum in cash equal to [twice] the full nominal amount of the shares so called for, and by the appropriate voucher annexed hto, the coy shall allot the shares so called for and apply such sum in paying up the same.

Occasionally it is desired to give the debenture holders the call of shares at par or at a premium. This may be a right of great value, and in some cases debentures with such rights have gone to enormous premiums.

Sometimes the right to the call is represented by a separate document, as follows:—

**Form 51.**

Scrip certificate to bearer conferring right to call for shares.

THE —— MINING COY, LIMTD.

The above-mentd coy hby certifies that the bearer of this certificate is entld at any time not later than the 1st day of January, 19—, to claim an allotment of 100 ordinary shares in the coy of 1*l.* each, subject as follows, that is to say:—

(1) The claim afsd must be made in writing and must specify the name and address and description of the person by whom the claim is made.

(2) It must contain an undertaking by that person to accept the allotment subject to the terms and conditions of the coy's memdum and arts of asson.

**Form 51.**

(3) It must be accompanied by this certificate and also by a sum of ——*l.* in cash, being the full amount of the sd shares.

And the coy will forthwith after such claim is made and such conditions fulfilled allot the shares claimed to the persons so claiming the same.

AS WITNESS, &c.

**Form 52.**

**Option to exchange for shares at a premium.**

The registered holder of this debenture shall have the option exercisable at any time before the —— day of ——, 1940, of taking an allotment from the coy of fifty fully pd-up ordinary shares of 1*l.* each in the coy in satisfaction of the principal moneys secured by this debenture, and of all interest thereafter to accrue thereon, provided such holder complies with the conditions following, that is to say:—

(1) Such holder must give to the coy at least six weeks' notice in writing under his hand of his desire to convert, and the notice must specify this debenture and the date of conversion, which must be one of the days following, that is to say, &c.

(2) Such holder must, on the day of conversion so fixed, deliver up this debenture to the coy at its registered office, with a receipt indorsed thereon acknowledging satisfaction of the principal moneys hby secured, and must at the same time and place pay to the coy the sum of 12*l.* 10*s.* in cash, being at the rate of 5*s.* per share on the shares to be allotted as afsd.

And upon these conditions being complied with, the coy shall allot and issue the sd fifty fully pd-up ordinary shares to such holder in satisfaction as afsd.

**Form 53.**

**Power to exchange for preference shares.**

At any time before the —— day of —— (if and so long as a sufficient number of the preference shares of the coy remain unissued) the coy will, upon the request in writing of the registered holder hof, and upon the surrender of this debenture, issue to him—— of the sd preference shares credited as fully pd up, and will pay to him the interest for the fraction (if any) of the current half-year up to the day of surrender.

See note to Form 15.

**Form 54.**

New debentures by way of sub-division or consolidation of present debentures.

Upon the request in writing of the bearer of any debenture of this series, and upon the surrender of his debenture for division, the coy will issue in substitution therefor several debentures each for a fraction of the principal moneys secured by the surrendered debenture (every such fraction to be for 10*l.* or a multiple thof); and upon the like request, and upon the surrender of several debentures for consolidation, the coy will issue in substitution therefor one debenture for the principal moneys secured by the surrendered debentures or several each for a portion of such moneys. The debenture holder surrendering as afsd must in each case pay all expenses of and incident to the issue and stamping of the substituted debentures, and such fee to the coy as may reasonably be required, and the surrendered debentures shall be cancelled by the coy.

**Form 55.**

Debenture stock to be issued in satisfaction of some interest on the debentures.

As regards each half-year's interest on this debenture up to and including the half-year ending on the —— of ——, the coy is to be at liberty to satisfy the same by the allotment to the registered holder of this debenture of "B" debenture stock of this coy equal in nominal amount to such half-year's interest after deduction of income tax as provided by the indenture below mentd.

**Form 56.**

Trustee's certificate.

This is to certify that the above debenture is one of the 3,000 like debentures numbered —— to —— inclusive, secured by the indenture therein referred to.

——<br>——} Trees.

Occasionally, where there is a trust deed, the trustees indorse a certificate on the debentures as above; but this practice is more common in America than here. See the Railway Companies' Securities Act, 1866. Such a certificate, too, may involve the trustees in serious liabilities. *Whitehaven Joint Stock Banking Co.* v. *Reed*, 54 L. T. 360.

**Form 57.**

Power to majority to appoint accountant to investigate.

The registered holders of the majority in value of the outstanding debentures of this series may from time to time appoint some chartered accountant [being a member of the firm of ——] to investigate the affairs of the coy, and the coy shall afford such accountant all such facilities as he may require for making such investigation, and if such accountant shall, in writing, certify that in his opinion—

(a) The outstanding debentures of this series have not a margin of security amounting to at least — p.c. beyond their amount; or

(b) The coy is carrying on business at a loss; or

**Form 57.**

(c) The coy's book debts, stock-in-trade, and cash in hand are together of less value than ——*l.*; or

(d) The further prosecution by the coy of its business would imperil the security of the holders of the debentures of this series,

then and in such case the registered holders of these debentures [or the majority in value afsd] may by notice in writing to the coy call in the principal moneys hby [or by the debentures of this series] secured, and the same shall become payable forthwith accordingly.

This clause is sometimes used where a stringent form is required. It will protect the debenture holders from such a position as arose in *Lawrence* v. *W. Somerset Ry.*, (1918) 2 Ch. 250.

**Form 58.**

Power of majority to modify rights.

The holders of three-fourths in value of the debentures of this series for the time being outstanding may, by writing under their hands, sanction any modification of the rights of the debenture holders of this series which shall be proposed by the coy, and any compromise or arrangement proposed to be made between the coy and the holders of the debentures of this series, and any modification, compromise, or arrangement so sanctioned shall be binding on all the holders of debentures of this series, and notice thof shall be given to them accordingly, and each holder shall be bound thereupon to produce his debentures to the coy and to permit a note of such modification or compromise to be placed thereon.

Such a clause is commonly inserted in registered debentures, but it is usually considered preferable to have a trust deed setting out the full clauses, as at p. 355, *infra*, or else to indorse those clauses on the debentures with requisite modifications. And see p. 163, *supra*.

A conversion of redeemable debenture stock into irredeemable is a "modification" of the rights of the stockholders. See *Re Joseph Stocks & Co.*, (1912) 2 Ch. 134 (n.); 26 T. L. R. 41; *Northern Assurance Co., Ltd.* v. *Farnham United Breweries*, (1912) 2 Ch. 125; *supra*, p. 160.

**Form 59.**

Another.

The holders of three-fourths in value of the outstanding debentures of this series may sanction any agreement with the coy for any modification or alteration of the rights of the holders of debentures of this series as a class, including any release of any ppty charged thereby, and any postponement of the time for payment of any moneys secured thereby, and any increase or reduction of the rate of interest; and an agreemt so sanctioned shall be binding on all the holders of debentures of this series, and notice thof shall be given to each debenture holder, and each debenture holder shall be bound thereupon to produce his debentures to the coy, and to permit a note of such agreemt and the sanction thof afsd to be placed thereon.

**Form 60.**

Consent to reduction of capital.

If the coy shall at any time pass a special resolution reducing the coy's capital by cancelling the coy's uncalled capital or any pt thof, and if the holders of the coy's debenture stock by extraordinary resolution as defined in the trust deed constituting such stock consent to such reduction, then and in such case the registered holder for the time being of this debenture and all persons claiming under him shall be deemed to consent to such reduction, and the coy is to be at liberty to authorize any officer of the coy on behalf of such registered holder or persons afsd to sign and place before the High Ct of Justice a consent in writing to such reduction and such consent shall be effective, and upon the passing of such resolutions as afsd the holder of this debenture shall be bound to produce this debenture to the coy and to permit a note of such resolutions and consent to be placed thereon.

This clause would simplify the procedure on a reduction of capital under sect. 56.

In cases not falling within that section the consent of the debenture holders is not requisite. See *Re Meux's Brewery, Ltd.*, (1919) 1 Ch. 28.

**Form 61.**

Debenture to bearer capable of registration.

THE —— LIMTD.

Series of —— Debentures of ——*l.* each, carrying interest at the rate of —— p.c.p.a.

No. ——. *Debenture.* ——*l.*

1. The —— Limtd (hnftr called "the coy"), will on the —— day of —— or on such earlier day as the principal moneys hby secured become payable in accordance with the conditions indorsed hereon, pay to the bearer of this debenture, or if registered, to the registered holder hof on presentation of this debenture, the sum of ——*l.* [with a bonus of ——*l.*].

2. The coy will, during continuance of this security, pay interest on the sd principal sum of ——*l.* at the rate of —— p.c.p.a. by equal half-yearly payments on every —— day of —— and —— day of —— in accordance with the coupons annexed hto.

3. The coy hby charges with such payments its undertaking and all its ppty whatsoever and wheresoever, both present and future [including its uncalled capital for the time being].

4. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which are to be deemed pt of it.

Given, &c.

[INDORSEMENT.

**Form 61.**

| | |
|---|---|
| THE —— LIMTD.<br>Debenture, No. ——.<br>Interest coupon, No. ——.<br>For ——*l.* half-year's interest due the —— day of —— and payable at the —— bank or at the registered office of the coy (less ——*l.*, being income tax at the rate of —— in the pound.)<br>——*l.* Secretary. | THE —— LIMTD.<br>Debenture, No. ——.<br>Interest coupon, No. ——.<br>For ——*l.* half-year's interest due the —— day of —— and payable at the —— bank or at the registered office of the coy (less ——*l.*, being income tax at the rate of —— in the pound.)<br>——*l.* Secretary. |

THE CONDITIONS WITHIN REFERRED TO.

1. This debenture is one of a series of debentures of the coy, all in like form, for securing principal sums not exceeding at any one time in the aggregate ——*l.* The debentures of this series, including any re-issued or issued in substitution for any debentures pd off, redeemed, or otherwise satisfied, are all to rank *pari passu* as a first charge on the premises hby charged without any preference or priority one over another, and such charge, save as regards the hereditaments comprised in the indenture below mentd, is to be a floating security [but the coy is not to be at liberty to create any mortgage or charge on the sd freehold and leasehold hereditaments ranking in priority to or *pari passu* with the sd debentures].

2. Annexed to this debenture are —— coupons each providing for the payment of a half-year's interest and such interest will be payable only on presentation and delivery of the coupon referring thto.

3. If the principal moneys hby secured shall become payable before the —— day of ——, the person presenting this debenture for payment must surrender therewith the coupons representing subsequent interest, the coy nevertheless paying the interest for the fraction if any of the current half-year.

4. The registered holder for the time being of this debenture when registered, and the bearer hof for the time being when not registered, and the bearer of each of the interest coupons afsd, shall be entld to the principal money and interest secured by such instruments resply free from any equities between the coy and the original or any intermediate holder hof and all persons may act accordingly, and the receipt of such registered holder or bearer, as the case may be, for such principal money and interest shall be a good discharge to the coy, which shall not be bound to inquire into the title of such registered

Form 61.

holder or bearer or save as herein provided, and except as ordered by some Ct of competent jurisdiction or as by statute required to take notice of any trust or equities affecting the ownership of such instruments or moneys.

5. Except when registered this debenture is transferable by delivery, but the coy will at any time, upon the request of the bearer (whilst unregistered), register him or his nominee in the register, below mentd, as the holder of this debenture, and indorse hereon a note of such registration, and the coy will also at any time upon the request of the registered holder or his exors or admors cancel the registration and the note thof indorsed hereon, and thereupon this debenture will again become transferable by delivery. A fee of 2*s.* 6*d.* shall be pd to the coy upon every such registration or cancellation.

6. A register of the debentures will be kept at the coy's registered office wherein there will be entered the names, addresses, and descriptions of the registered holders and parlars of the debentures held by them resply; and such register will at all reasonable times during business hours be open to the inspection of the registered holder hof and his exors or admors and any person authorized in writing by him or them. See p. 276.

7. Every transfer of this debenture when registered must be in writing under the hand of the registered holder or his exors or admors. The transfer must be delivered at the registered office of the coy with a fee of 2*s.* 6*d.*, and such evidence of identity or title as the coy may reasonably require, and thereupon the transfer will be registered and a note of such registration will be indorsed hereon. The coy shall be entld to retain the transfer. See p. 277.

8. In the case of joint registered holders, the principal moneys and interest hby secured shall be deemed to be owing to them upon a joint account.

9. The coy may at any time after the —— day of —— give notice to the registered holder of this debenture, his exors or admors, of its intention to pay off this debenture, and upon the expiration of six months from such notice being given the principal moneys hby secured shall become payable [with a bonus of ——*l.*]. See p. 279.

10. The principal moneys hby secured shall immediately become payable:—

(a) If the coy makes default for a period of six months in the payment of any interest hby secured, and the bearer or registered holder hof before such interest is pd by notice in writing to the coy calls in such principal moneys, or

(b) If an order is made or a resolution is passed for the winding-up of the coy. See p. 279.

**Form 61.**

11. At any time after the principal moneys hby secured have become payable the holder of this debenture may with the consent in writing of ——*l.* in value of the holders of debentures of this series, such consent as regards debentures to bearer to be notarially certified, appoint by writing any person or persons approved by the trees of the sd indenture to be a receiver or receivers of the ppty charged by the debentures and not comprised in such indenture, &c. [*as in Form* 40, p. 281].

12. The holders of the debentures of the above issue are and will be entld *pari passu* to the benefit of and subject to the provisions contained in an indenture, dated —— day of ——, and made between the coy of the one pt, and A., B. and C., of the other pt, whereby certain ppty of the coy was vested in trees for securing the payment of the principal moneys and interest payable in respect of the sd debenture. See p. 27.

13. The principal moneys hby secured will be payable at the —— Bank, Limtd, No. —, —— Street, London, or at the registered office of the coy. See pp. 28, 283.

14. This debenture, except when registered, is to be treated as negotiable. See *supra*, p. 32.

15. Any notice may be served by the coy upon the holder of this debenture whilst unregistered by advertising the same in the *Times* newspaper, and whilst registered by sending it through the post in a prepd letter addressed to such person at his registered address, and any notice so advertised or served by post shall be deemed to have been served at the expiration of twenty-four hours after it is advertised or posted, as the case may be; and in proving such service it shall be sufficient to prove that the letter containing the notice was so advertised, or was properly addressed and put into the post office. See p. 29.

Debentures framed as above are a favourite form of security. See *supra*, p. 32. The duty is 4*s.* for every 10*l.* or part of 10*l.* See pp. 224, 225, *supra*; Finance Act, 1910, s. 76; and Finance Act, 1920, s. 38. They are negotiable by the law merchant. See *supra*, p. 32.

**Form 62.**

**Redemption by drawings.**

1. One hundred of the debentures of this series will be redeemed by the coy on the —— day of ——, 19—, and on each succeeding —— day of ——, and —— day of ——, until the whole of the sd debentures have been redeemed or pd off.

The days fixed for redemption are usually the same as those fixed for payment of interest.

Sometimes part of the profits or the proceeds of sale of specific assets are to be carried to a redemption fund, thus: "A redemption [or sinking] fund shall be established, and to the credit thereof the company shall carry fifty per cent.

Form 62.

of the net proceeds arising from the sale of the company's freehold hereditaments at —— [*or* the share of surplus profits in that behalf mentioned in clause —— of the company's articles of association], and as and whenever such fund shall amount to ——*l.* it shall be applied in redeeming at par an equivalent amount of the debentures of this series." This condition would be substituted for the above

Sometimes a cumulative sinking fund is established (see Form 63), so that the funds applicable to redemption will be augmented each year as the interest diminishes.

When there is a trust deed the fund is sometimes made payable to the trustees. As to a sinking fund, see p. 377 *et seq.*

2. The particular debentures to be redeemed on each occasion will be determined by half-yearly drawings, which the sd coy will cause to be made at its registered office for the time being.

3. Such drawings will be made in the presence of a notary public of London not less than twenty-one or more than sixty days before the respive half-yearly days on which the debentures are to be redeemed. And the principal moneys hby secured shall become payable [on the —— day of ——, or —— day of ——, which shall first happen after this debenture shall have been drawn for redemption].

4. Public notice of the day and time fixed for each drawing will be given by the coy at least ten days previously, by advertisement in a London daily newspaper, and the bearer of this debenture will be entld to attend at any such drawing.

5. Forthwith after each drawing, notice will be given by advertisement in a London daily newspaper of the numbers of the debentures drawn for redemption.

6. The numbers of the debentures from time to time drawn will be recorded in a book to be kept for that purpose by the coy, and to be open for the inspection of the bearer of this debenture.

7. If the bearer of this debenture shall so require, the notary public present at any such drawing as afsd shall make a statutory declaration as to the result thof.

Having regard to the observations of Sir G. Jessel, M. R., in *Sykes* v. *Beadon*, 11 Ch. D. 170, doubts were at one time felt whether such a scheme of redemption was not open to objection as amounting to a lottery. But the general opinion appears to be that it is not, even where the debentures are issued at a discount and made redeemable at par; and accordingly the practice of providing for redemption in accordance with the result of periodical drawings continues. And see the observations in *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; also police case in *Times* of the 11th January, 1907.

If it is desired in any case to make the redemption of debentures contingent on the profits of the company, the following clauses can be introduced into the conditions, which will require to be slightly modified:—

1. The company will, on the 1st day of November, 19—, and on every succeeding 1st day of November, until the whole of the said debentures shall have

**Form 62.**

been redeemed or paid off, apply a sum equal to one moiety of the net profits of the company, for the year ending on the 30th day of June, immediately preceding such 1st day of November, in the redemption at par of so many of the said debentures as such sum shall be sufficient to redeem.

2. Nevertheless, if, in any such year, the net profits shall be less than ——*l.* there shall not be any drawing or redemption in respect of such year.

3. The certificate in writing of the auditor or auditors for the time being of the company shall as against the bearer hereof be conclusive evidence as to the amount of the net profits of the company in any year, or of there being none.

Where debentures are redeemed pursuant to provisions for redemption as in the above form, it seems clear that they cannot be kept alive and re-issued under sect. 75. That section does not apply where "any provision to the contrary, whether express or implied, is contained in . . . any contract entered into by the company." Perhaps, however, it may be well to add—

8. This debenture, when redeemed as afsd, shall be cancelled, and the coy shall not issue any debenture in its place.

See sect. 75 (1) (a).

**Form 63.**

Provision for a service fund and drawings.

The coy shall appropriate and set apart in each year commencing with the year 19—, the sum of 10,000*l.* as a fund to provide for the service of the debentures of this series. So much of the sd fund as shall not be required for payment of interest on the debentures for the time being outstanding shall be from time to time applied in the redemption or discharge of so many of the debentures of this series as the same shall suffice to redeem in manner hnftr mentd.

[*Add provision for drawings, &c.,*] *e.g.*,

The coy may out of the sd service fund purchase in the market or by tender at a price below par any of the debentures of this series, but, subject as last afsd, the particular debentures to be from time to time redeemed shall be determined by annual drawings which the coy shall cause to be made in the presence of a notary public at its registered office for the time being.

Forthwith after each drawing notice shall be given of the denoting numbers of the debentures drawn for redemption, and the principal moneys secured by the debentures so drawn shall become payable and be pd off at par at the expiration of fourteen days after the same shall have been so drawn, together with interest up to the date so fixed for payment.

**Form 64.**

Perpetual debentures.

THE —— COY, LIMTD.

No. ——. *Perpetual Debenture.* ——*l.*

1. The —— Coy, Limtd (hnftr called "the coy"), will, as and when the principal moneys hby secured become payable, in accordance

with the conditions indorsed hereon, pay to the registered holder of this debenture the sum of ——*l.* **Form 64.**

Another form sometimes used is :—" The —— Company, Ltd., being indebted to the person to whom this debenture is issued in the sum of ——*l.*, upon the terms that such sum is to be repayable only in the events and subject as hereinafter expressed, will when, &c."

2. The coy [*interest as in Form* 42, *adding the words :* and any further coupons issued in respect of such interest].

3. The coy hby charges [Form 39].

4. This debenture is issued [Form 39].

Given, &c.

[*Add coupons and conditions as follows :—*]

1. This debenture is one of a series of —— debentures, all bearing even date. The debentures of the sd series, and the debentures of any subsequent series containing a similar charge, are all to rank *pari passu* in point of charge as a floating security on the ppty charged thereby [*if any limit, provide accordingly : supra, note to condition* 1 *of Form* 40].

2. Annexed to this debenture are —— coupons, each providing for a half-year's interest [*and if so*, and also a voucher for fresh coupons], and such interest will be payable only on presentation of the coupon referring thto. After the —— day of —— [ten *years after date*], and at the expiration of each succeeding period of ten years, the registered holder, on production of this debenture for indorsement, [*or* the bearer of the appropriate voucher on presentation thof,] will be entld to the issue of fresh coupons for a further period of ten years.

The voucher will be as follows :—" The —— Company, Ltd. Debenture No.——. Voucher for fresh coupons to be presented at the office of the company on or at any time after the —— day of ——," and it will be printed so that it can be detached immediately after the last coupon of the series.

3. The principal moneys hby secured will only become payable [*as in Form* 40, *condition* 10].

[*Add clauses from Form* 40.]

Companies frequently experience inconvenience in providing for the renewal of terminable debentures, that is, of debentures payable at a fixed date ; when the time for payment arrives, for instance, the money market or the affairs of the company may happen to be temporarily depressed just when a loan to pay off debentures is required. Moreover, there is a large class of investors who require a permanent security, and for that reason dislike terminable debentures. Accordingly a considerable number of companies in good credit have taken to issuing (so called) perpetual debentures [and perpetual debenture stock], and the public have invested largely therein.

**Form 64.**

Although called "perpetual," the debentures are made payable in certain events (see condition 3), but the meaning is, that they may happen to continue for an unlimited period. Some companies which issue perpetual debentures modify condition 3 by adding the words "or (*c*) if the company gives six months' notice by advertisement in the *Times* of its intention to pay off this debenture, but so that in such a case a bonus of 10*l.* shall be paid along with such principal moneys." And in some cases it is desirable so to provide, *e.g.*, where the issue is to be limited in amount; for the company might otherwise find its operations inconveniently fettered. In the absence of a power to pay off it might be necessary to reconstruct.

See further, *supra*, p. 117, as to perpetual debentures, and sect. 74 validating them.

According to present practice it is more common to issue debenture stock than debentures as above.

**Form 65.**

Profit or income debentures where interest payable out of profits only.

*Adopt Forms* 39 *and* 40, *adding to clause* 2 *of the debenture the words :* "such interest to be payable exclusively out of profits as provided by the conditions indorsed hereon."

*And insert a condition as follows :*

"Each half-year's interest on the debentures of this series shall be payable *pari passu* exclusively out of the profits, if any, of the coy made during that half-year, as and when the same shall have been ascertained [as hnftr provided]. Such profits shall be calculated as if the debentures did not carry interest. The certificate in writing of the coy's auditor as to the amount of the profits [calculated as afsd] made during any half-year, or that none were made, shall be conclusive. Within [fourteen] days after the close of each half-year the coy's auditor shall certify in writing the amount of the profits of the coy for such half-year. Such profits shall be calculated as if the debentures did not carry interest, but after deducting all current expenses, including income tax and other taxes and the salaries [and remuneration] of the [directors and other] officers of the coy, and after making such provision for depreciation (not exceeding—— p.c. of the book values) as may be fixed by the directors with the approval of the auditors."

**Form 66.**

Cumulative interest.

The interest payable under the debentures of this series is to be payable *pari passu* out of the profits of the coy from time to time made and out of such profits exclusively, and such interest is to be cumulative, so that if the profits of any half-year or year shall be insufficient for payment thof the deficiency shall be made good out of the subsequent profits, and the interest on the sd debentures for each half-year shall be payable out of profits in priority to the interest on such debentures for any subsequent half-year, and the certificate in writing of the coy's auditor or auditors as to the amount of the profits of the coy or as to there being none shall be conclusive, but when the

**Form 66.**

interest on the debentures of this series has been pd up to the close of any year or half-year out of the profits of the coy the remaining profits of such year or half-year or any pt thof may be distributed by way of dividend or otherwise dealt with as the coy may direct without any obligation to set the same or any pt thof aside for the payment of subsequent interest on the debentures of this series.

In case the coy shall be wound up, any surplus assets remaining after payment of the capital pd up or credited as pd up on all the shares of the coy for the time being issued shall be applied in the first place in payment of any arrears of interest unpaid on the debentures down to the date of repayment thof.

Sometimes provision is to be made for future interest before dividends are paid. Thus—

"The interest payable on the debentures of the above issue is to be payable only out of the net profits from time to time made by the company, and is to be a first charge on such profits, and the company will not at any time divide any profits among its members without first paying all interest then due on the debentures, and providing for the payment of all interest to become due thereon at any time within six months after such division."

**Form 67.**

**Another, where principal and interest payable only out of profits.**

1. The —— Coy, Limtd, will, as and when the principal moneys hby secured become payable, pay to ——, of ——, the sum of ——*l.*

2. The coy will in the meantime pay to the sd, &c.

3. The principal moneys and interest secured by the debentures of this series are payable exclusively out of the profits of the coy as provided by the arts of asson of the coy, and the coy will apply such profits accordingly.

4. This debenture is issued, &c.

It is not by any means uncommon to issue debentures payable out of profits only, *e.g.*, to shareholders or unsecured creditors upon the reconstruction of an insolvent company, or upon a scheme of arrangement in bankruptcy whereby the assets are made over to a company.

And sometimes a vendor agrees to accept such debentures in part satisfaction of his purchase-money. If desired the interest is made non-cumulative, so that if the profits of any one year are insufficient to pay the interest, there will be no claim on subsequent profits for the deficiency. Sometimes instead of providing for redemption by means of drawings, provision is made for the payment of dividends to the debenture holders *pari passu* on account of principal.

Sometimes when the assets of a company or bankrupt are taken over by a new company, debentures are issued to the creditors or others for the amount of their claims, but charged only on the assets so taken over, subject to any prior incumbrances, and without any personal liability being imposed on the new company. In such case the debentures (or a trust deed) provide for the realisation of the assets by the new company, and for the division from time to time of the net proceeds, less a commission to the new company, among the debenture holders, *pari passu*. Such a scheme is often found attractive, because the creditors get a tangible security of large nominal amount.

Sometimes income certificates are issued, as in the following form :—

**Form 68.**

Income certificate.

THE —— COY, LIMTD.

Issue of —— certificates of ——*l.* each.

Payable out of profits.

No. ——. *Certificate.* ——*l.*

1. This is to certify that the above-named coy is indebted to —— of —— or other the registered holder for the time being of this certificate in the sum of ——*l.* payable only out of profits as hnftr mentd.

2. The net profits of the coy of each year are within —— months after the conclusion of such year to be applied in or towards paying off the certificates of this series *pari passu*.

3. As and whenever the coy becomes bound to make any payment to the certificate holders as afsd, the coy shall give notice in writing to such certificate holders stating the amount to be pd in respect of each certificate and the time and place where the same will be pd, and calling on the certificate holders to attend at such time and place and to produce their certificates in order that a memorandum of the payment may be placed thereon.

4. At the time and place so fixed the holder of this certificate must attend by himself or his agent and must produce this certificate, and thereupon the sum payable in respect of such certificate will be pd to him or his duly authorized agent, and a note of such payment will be placed on the certificate, which will thereupon be returned, unless the payment made completes the full nominal amount of the certificate, in which case the certificate will be retained by the coy.

This certificate is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed pt of it.

Given, &c.

The conditions indorsed provide for transfer on the lines of a registered debenture.

**Form 69.**

Debentures participating in profits.

Whenever the average annual dividends declared on the ordinary shares in the coy shall exceed 5 p.c.p.a. on the ordinary shares, the coy shall distribute amongst the holders of the debentures of this series (*pari passu*) by way of further interest a sum sufficient to make up the rate of interest on such debentures for the same period to the rate of such average annual dividend.

Sometimes the debenture holders are given extra interest with reference to profits, as in the above and following Forms.

**Form 70.**

Another.

Whenever the profits of the coy in any year shall exceed the amount required to pay a dividend for such year at the rate of 5 p.c.p.a. on the capital pd up on the ordinary shares in the coy, the holders of the debentures of this series shall be entld by way of further interest to participate in such excess *pari passu* with the holders of the ordinary shares, and in proportion to the amounts of the sd debentures and shares.

**Form 71.**

Debentures with interest and share of profits.

1. The —— Coy, &c. See Form 42.

2. The coy, &c. See Form 42.

3. In addition the coy shall apply one-third of the profits of the coy, of each year, commencing with the year ——, in paying further interest for such year on the debentures of this series *pari passu*, and the certificate in writing of the coy's auditors as to the amount of the profits of the coy of any year shall be conclusive as to the amount thereof.

4 This debenture is issued, &c. See Form 42.

Sometimes the form is varied so as to provide for application of, say, a sum equal to one-third of the "trading profits" of the company of each year to the payment of further interest, with a condition to the effect that "The trading profits within referred to of any year means the whole of the company's income of such year remaining after deducting all proper outgoings for rent, wages, rates, taxes, purchase of materials, interest, commission, and administration expenses [and income tax, excess profits duty and other taxes, if any], and so that in case of difference the certificate in writing of the auditor as to the amount of such trading profits shall be conclusive evidence thereof."

As to income tax in such a case, see Income Tax Act, 1918, General Rules, 19

**Form 72.**

Debentures to be paid up by instalments.

DEBENTURE TO BE PAID UP BY INSTALMENTS.

[*Heading.*]

1. The —— Coy, Limtd (hnftr called "the coy"), will, as and when the principal moneys hby secured become payable, in accordance with the conditions indorsed hereon, pay to ——, of ——, or other the registered holder for the time being hof, a sum equal to the aggregate amount of the principal moneys pd up hereon, limited to 100*l.* together with a bonus of 20 p.c. on such principal moneys.

As to stamping the debenture with extra *ad valorem* stamp duty to cover the bonus, see *Rowell* v. *Inland Revenue*, (1897) 2 Q. B. 194, and *supra*, p. 232.

2. In the meantime the coy will pay to the registered holder interest on such principal sums at the rate of —— p.c.p.a., by equal half-yearly payments, on every —— day of —— and —— day of ——,

**Form 72.**

the first of such half-yearly payments to be made on the —— day of —— next.

3. The coy hby charges, &c., as in Form 39.

4. This debenture is issued subject, &c., as in Form 39.

Given, &c.

The conditions within referred to:—

1. This debenture is one of a series of 1,000 like debentures of the coy, which are to be issued upon the footing that the principal sum of 100*l.* is to be pd up thereon by instalments as follows, namely:—

5*l.* per debenture on applicon and 5*l.* per debenture on allotment, and the balance if and when called up, and parlars of the principal sums from time to time and for the time being pd up hereon will be certified on this debenture by the coy's secretary or managing director, and such certificate is to be conclusive, notwithstanding that by reason of a discount allowed for payment in advance, or otherwise, the amount actually pd up is less than the amount certified.

2. The coy may at any time call up the balance of the sd sum of 100*l.* or any pt thof, and the registered holder of this debenture shall be liable to pay up any calls so made on him to the persons and at the time and place appointed by the coy. No call shall exceed 10*l.* per debenture, or shall be made within three months from the last preceding call. Fourteen days' notice of any call shall be given, specifying the time and place of payment, and to whom such call is to be pd.

3. If the registered holder of this debenture fails to pay any call or instalment on or before the day appointed for the payment thof, the coy may at any time thereafter, whilst such call or instalment remains unpd, serve a notice on such holder requiring him to pay the same, together with interest at the rate of 10 p.c.p.a. as from the time when the same ought to have been pd, and such notice shall state that in default of payment within fourteen days this debenture will be liable to forfeiture, and if the requisitions of such notice are not complied with, the coy may at any time thereafter, by resolution of its directors, forfeit this debenture; and if this debenture is so forfeited, it shall forthwith become the ppty of the coy, and shall be given up to the coy to be cancelled.

*Continue as in Form* 40.

It has not been usual to issue debentures as above, owing to the difficulty of enforcing the payment of the instalments, for the Court would not enforce specific performance of a contract to lend. *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271; *South African Territories* v. *Wallington*, (1898) A. C. 309,

*supra*, p. 178. This difficulty was removed by sect. 16 of the Companies (Consolidation) Act, 1907 (now sect. 76 of 1929). See *supra*, p. 178. **Form 72.**

When the debentures have been forfeited the company cannot recover calls made before the forfeiture. *Kuala Pahi Estate* v. *Mowbray*, W. N. (1914) 321.

**Form 73.**

Debenture to trustees for securing debenture stock.

THE —— COY, LIMTD.

Issue of a series of 100,000*l.* Debentures, all ranking *pari passu* in point of charge.

No. —. *Debenture* — 20,000*l.*

1. The —— Coy, Limtd (hnftr called "the coy"), will, as and when the principal moneys hby secured become payable as below mentd, pay to —— of, &c., and —— of, &c., or other the trees or tree for the time being of the trust deed below mentd, the sum of 20,000*l.*

2. The coy will in the meantime pay interest thereon at the rate of 5*l.* p.c.p.a. by equal half-yearly payments, on every —— day of —— and —— day of ——, but so that payment of each half-year's interest to the stockholders as defined by the trust deed below mentd shall operate in satisfaction *pro tanto* of the corresponding half-year's interest on the debentures.

3. The coy hby charges with such payments its undertaking and all its ppty whatsoever and wheresoever both present and future [including all uncalled-up capital for the time being].

4. This debenture is one of a series of five debentures, each for securing the principal sum of 20,000*l.*, all ranking *pari passu* in point of charge on the ppty hby charged without any preference or priority one over another, and such charge is to be a floating security, so that the coy in the course of its business and for the purpose of carrying on the same, may sell, lease, charge, exchange, or otherwise deal with its ppty for the time being as may seem expedient, and that the debentures shall attach on the ppty for the time being of the coy.

5. The principal moneys hby secured shall immediately become payable if and when the security constituted by the trust deed below mentd becomes enforceable.

6. At any time after the security constituted by the indenture below mentd becomes enforceable, the holders of the debentures of this series may by writing appoint any person or persons to be receiver of the ppty charged by such debentures, &c. [See Form 40, p. 281.] The holders of the debentures of this series may appoint one or more of themselves to be such receiver or receivers, or may appoint a stranger.

7. The debentures afsd are issued pursuant to a trust deed dated, &c., and made between the coy of the one pt, and A. B., &c., as trees,

**Form 73.** of the other pt, being an indenture for securing debenture stock of the nominal value of 100,000*l.* about to be issued by the coy.

Given under the common seal of the coy this —— day of ——.

The above is a specimen of the form of debenture to be issued pursuant to a debenture stock trust deed. See *infra*, Form 81, clause 9a. But it is only necessary to issue such debentures in special circumstances. See note to Form 81, clause 9a, p. 321.

**Form 74.**

THE —— COY, LIMTD.

Debenture payable on demand.

Issue of ten Debentures of 1,000*l.* each, all ranking *pari passu*.

No. ——. *Debenture.* ——*l.*

1. The —— Coy, Limtd (hnftr called "the coy"), will, on demand in writing, pay to the —— Bank, Limtd (hnftr called "the bank"), the sum of ——*l.*

Interest. 2. The coy will in the meantime, until such payment, pay to the bank interest thereon at the rate of —— p.c.p.a. by equal half-yearly payments on every —— day of —— and —— day of —— in each year, the first of such half-yearly payments to be made on the —— day of —— next.

Charge. 3. The coy hby charges with such payments its undertaking and all its ppty whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

*Pari passu* rights. 4. This debenture is one of a series of ten debentures each for securing the principal sum of ——*l.* The debentures of the sd series are to rank *pari passu* in point of charge on the ppty hby charged, without any preference or priority over one another, and such charge as regards the coy's land, goodwill, and uncalled capital is to be a specific charge and as regards the coy's other assets is to be a floating security, but so that the coy is not to be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the sd debentures.

Notice to repay. 5. The coy may at any time give notice in writing to the bank of its intention to pay off this debenture, and upon the expiration of one month from such notice being given the principal moneys hby secured shall become payable.

Uncalled capital. 6. None of the now uncalled capital of the coy shall, whilst this debenture is outstanding, be called up or received in advance of calls without the consent in writing of the bank, and if the same is called up with or without such consent the amount shall be made payable to the bank and to no other person or persons, and shall be applicable in or towards payment of the moneys owing from the coy to the bank.

**Form 74.**

Payment on winding-up.

7. The principal moneys hby secured shall immediately become payable if an order is made or a resolution is passed for the winding-up of the coy.

Receiver.

8. At any time after the principal moneys hby secured become payable the bank may, by instrument in writing, appoint any person or persons, whether an officer of the bank or not, to be a receiver or receivers of the premises hby charged, and may in like manner remove any such receiver, and a receiver so appointed shall have power, &c. [See Form 40, p. 281.]

Agreement.

9. The debentures of this series are issued to the bank pursuant to an agreement dated the —— day of ——, and made between the coy and the bank, and subject to the provisions thof.

Given, &c.

Very commonly debentures payable on demand are issued by a company to its bankers or banker as a security for the payment of the balance for the time being due on its current account. In such case the debentures are usually made payable on demand, and there is an agreement between the company and the bank providing that they are to stand as a security for the final balance with interest, and providing that the interest on the debenture is not to run prior to the demand, and sometimes providing that the bank is not to call in the debentures for a specified period or until the happening of certain specified events. See Chap. LXXXIX., *infra*, Forms 584, 586.

**Form 75.**

Notice of motion to extend time for registration of mortgage or charge.

In the High Ct of Justice,
Chancery Division.
[*Name of Judge.*]

In the Matter of ——, Limtd,
and
In the Matter of the Cos Act, 1929.

TAKE NOTICE that this Ct will be moved, before his Lordship, Mr. Justice ——, on ——day, the —— day of ——, at the sitting of the Ct, or as soon thereafter as counsel can be heard, by counsel on the pt of ——, of ——, for an order that the time for the registration in manner required by sect. 79 of the Cos Act, 1929.

[*Here state particulars, e.g.*]

of a trust deed to secure debentures dated the —— day of ——, and made between the above-named coy of the one pt, and —— and —— as trees of the other pt, for securing ——*l.* debenture stock of the sd coy,

**Form 75,**

*Or,*

of a series 1,000 debentures of the above-named coy, each for 100*l.* and interest, and containing a charge by way of floating security on the undertaking of the coy,

*Or,*

of an agreemt dated the —— day of ——, and made between the above-named coy of the one pt, and ——, Limtd, of the other pt, creating a charge on the uncalled capital of the coy,

be extended until after the expiration of fourteen days from the date of the order to be made hereon on the ground that (*state the grounds for extension*) or that such further or other order may be made in the premises as the Ct may deem expedient.

Dated, &c.

**Form 76.**

Order extending time. Sect. 85.

Upon motion this day made unto this Ct by counsel for the above-named coy and The —— Insurance Coy, Limtd, the trees appointed by an indenture dated ——, for securing a series of debentures to the amount of 10,000*l.* issued by the first-named coy, and upon reading the respive affts, &c., both filed ——, and the exhibit therein referred to.

The Ct being satisfied that the omission to register the mortgage or charge contained in the sd deed and debentures within the time required by the [Cos Act, 1929], was accidental, doth, pursuant to the [85th] sect. of the sd Act, order that the time for registration of the sd mortgage or charge be extended until ——, and an office copy of this order is to be left with the Registrar of Joint Stock Cos. *Bootle Cold Storage Co.*, Farwell, J., 1st March, 1901.

**Form 77.**

Another. Trust deed.

Upon the applicon by summons dated —— of the above-named coy, and upon hearing, &c., and upon reading an afft of M., filed ——, 19—, and the exhibits therein referred to.

This Ct being satisfied that the omission to register the trust deed for securing debentures charged upon the ppty and undertaking of the sd coy dated the ——, 19—, and made between the sd coy of the one pt and the sd T. and S. of the other pt, within the time required by sect. 79 of the Cos Act, 1929, was due to inadvertence and that it is just and equitable to grant relief, doth, pursuant to sect. 85 of the sd Act, order that the time for the registration of the sd deed be extended to the —— day of ——, 19—, and it is ordered that a copy of this order be delivered to the Registrar of Cos and this order is to be without prejudice to the rights of parties acquired prior to the time

when such deed shall be actually registered. *Walter Danks (Contractors), Ltd.* (0048 of 1933). **Form 77.**

As to preservation of power to extend time for registration under repealed section, see *Re Herts and Essex Waterworks Co., Ltd.*, W. N. (1909) 48.

**Form 77a.**

Another. Where meeting convened to pass resolution to wind up.

The applicant (A. B.) by his counsel undertaking that in case a resolution for the winding up of the respt coy shall become effective on or before ——, 19—, and in case the coy by its liqr shall within twenty-one days after the commencement of such winding up apply to this Ct to discharge this order, then the applicant will submit to the jurisdiction of this Ct, and will abide by any order that this Ct may make (in case of the discharge of this present order) for the rectification of the register of the coy by the removal therefrom of any registration effected under this present order. And this Ct being satisfied that the omission to register the charge contained in the sd legal charge, parlars whereof are set forth in the schedule hto within the time required by the Cos Act, 1929, was due to inadvertence, doth, pursuant to sect. 85 of the sd Act, order that the time for registration of the parlars of the sd charge be extended until ——, 19—. But this order is to be without prejudice to the rights of parties acquired prior to the time when parlars of such charge shall be actually registered. And the coy is to be at liberty to apply to discharge this order within twenty-one days after the commencement of the winding up of the coy in the event of a resolution for the voluntary winding up of the coy becoming effective on or before ——, 19—.

THE SCHEDULE.

Legal charge dated——, and made between —— of the one pt, and —— of the other pt, to secure ——*l.* and interest at ——*l.* p.c.p.a. *Re L. H. Charles & Co., Ltd.*, W. N. (1935) 15.

## CHAPTER XXXIX.

### GUARANTEES.

**Form 78.** Indorsement as to guarantee.

THE payment of the principal moneys and interest hby secured is unconditionally guaranteed by the —— Society, Limtd, as appears by the trust deed within mentd.

Such an indorsement is sometimes placed on a debenture where the trust deed contains a guarantee.

**Form 79.** Guarantee on debentures.

The —— Society, Limtd (hnftr called "the society"), acknowledges that the within debenture was subscribed for on the condition and in pt conson that the society would give the guarantee following, and accordingly the society hby guarantees to the registered holder of the within debenture (which expression in this guarantee means the person or persons within named or other the registered holder or holders for the time being of the within debenture) the payment of the principal moneys and interest to become due under the sd debenture in manner following, that is to say:—

1. Should the coy make default for more than thirty days in the payment of any principal moneys or interest due under the debenture, the society will pay the same, as to principal moneys at the expiration of three months, and as to interest at the expiration of fourteen days, after the debenture holder shall have demanded payment thof from the society.

Another form sometimes used is as follows :—

1. As to the interest. If and whenever the coy makes default in the payment of any interest for more than thirty days, the society will pay such interest on demand.

2. As to principal. If the coy makes default in the payment of the principal moneys, or any part thof, the society will pay the amount upon whichever of the following days shall first happen—(a) on the —— day of ——, 19—, within mentd; or (b) on the day on which the securities provided by the within mentd indenture for the debenture holders shall have been enforced and completely realised and distributed so far as regards the holder of this debenture.

3. At any time after the coy shall have made default for more than fourteen days after the payment of any of the sd principal moneys or interest, the society may by notice in writing to the debenture holder call on him to transfer

Form 79.

to the society the above debenture and all his rights thereunder, and the debenture holder shall be bound to comply with such demand on payment of the full amount of the principal moneys and interest then owing in respect of such debenture.

4. If the coy makes default for more than thirty days in the payment of any principal moneys or interest secured by the within debenture, the debenture holder must give notice in writing of such default to the society; and if such notice is not given, as to interest within six months after the default, and as to principal within twelve months after the default, the society shall not be liable to pay such interest or principal.

2. The society is not to be liable to pay any such interest as afsd unless it is demanded from the society within two months after it becomes payable by the coy, and the society is not to be liable to pay any such principal moneys unless the same shall be demanded within six months after the same shall become payable by the coy.

3. The debenture holder, without exonerating the society, may grant time or any other indulgence to the coy, and may assent to any modification of his rights, and may accept or make any composition or arrangement with the coy, and may realise his securities as and when he thinks fit.

4. Under no circumstances shall it be necessary for any debenture holder, who has given notice in accordance with clause 2, to take any steps or proceedings for enforcing his rights against the coy, or for preserving the securities for the debenture; but the debenture holder shall be bound to give to the society, on its request, all reasonable facilities therefor.

5. Any demand under this guarantee must be made by writing, signed by the debenture holder, and served at the registered office of the society, and the debenture holder must, if required by the society, produce this debenture at or before the time of payment.

IN WITNESS whereof the society has caused this guarantee to be signed by two of its directors this —— day of ——.

An instrument as above, being under hand only, requires only a 6*d.* stamp (*Mortgage Insurance Corpn.* v. *Commissioners of Inland Revenue*, 21 Q. B. D. 352); if under seal it would require a 10*s.* stamp as a deed. Being under hand only, it is desirable to show, in the instrument, that the consideration moved from the debenture holder, for otherwise the party suing would have to prove that there was consideration for the guarantee moving from the original debenture holder. *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Crears* v. *Hunter*, 19 Q. B. D. 341.

Occasionally debentures and debenture stock of one company are guaranteed by another company. A guarantee by some well-known company may be very desirable when the company proposing to issue the debentures or debenture stock is in the nature of a private concern, or is not well known to the public as a successful concern, or where the security, unguaranteed, does not look very

**Form 79.**

attractive, even though it may be in reality amply sufficient. The guarantee is usually given in consideration of an annual premium, either with or without a lump sum down, and the guaranteeing company investigates the security and satisfies itself that there is a sufficient margin. The mode of giving the guarantee varies and must depend on the circumstances. Sometimes the guarantee is, by a separate instrument, indorsed on each debenture and signed on behalf of the guaranteeing company. Sometimes it is effected by a contract of guarantee made between the guaranteeing company and trustees for the debenture or debenture stockholders, and in such cases a memorandum of the guarantee, or a copy thereof, can be indorsed on the debentures or debenture stock certificates. In most cases this is the best plan to adopt. Where, as occasionally happens, the guaranteeing company itself undertakes to act as trustee for the debenture or debenture stockholders (*i.e.*, of property vested in or charged in its favour), it is best to place the guarantee on the debentures, or to have a separate contract of guarantee made with trustees.

In the interest of the company and the debenture holders, it is desirable to see that the formal guarantee is so framed as to protect the debenture or debenture stockholders.

Too often the forms used are so general, or so complicated, that the debenture holder is not unlikely to find that he has lost the benefit of the guarantee by oversight, misapprehension, or error of judgment. Thus, unless otherwise provided in a guarantee or other contract of suretyship, the surety is discharged by any material variation made without the surety's consent in the terms of the contract between the principal debtor and the creditor, *e.g.*, the giving of time or the release of any security. *Rees* v. *Berrington*, 2 Ves. jun. 540; White & Tudor, L. C. 9th ed. Vol. II. 521; *Holme* v. *Brunskill*, 3 Q. B. D. 495; *Clarke* v. *Birley*, 41 Ch. D. 422; *Mayhew* v. *Boyes*, 103 L. T. 1, C. A. Mere neglect to sue the principal does not discharge; to have this effect there must be a binding agreement. *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; *Oriental Financial Corpn.* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142. An agreement with a stranger to give the principal time is not enough. *Clarke* v. *Birley*, 41 Ch. D. 422.

The contract of suretyship is strictly construed, and the surety will only be bound in accordance with the terms of the contract. *Stamford, &c. Banking Co.* v. *Ball*, 4 De G. F. & J. 310; *Blest* v. *Brown*, 8 Jur. N. S. 602. And if it contains some special stipulation which the creditor does not observe, the surety is discharged. *Lawrence* v. *Walmsley*, 12 C. B. N. S. 799.

The principle is not that the liability of the surety depends on the value of the performance of the act for which he has stipulated, but that the creditor, not having performed the act stipulated for, is deprived of his remedy against the surety. Per Erle, C. J., in the case last mentioned.

Accordingly, a guarantee sometimes provides that the surety shall not be released by time being given to the principal debtor or by any other dealing between the creditor and the principal debtor, which might, but for this provision, release the surety.

Under sect. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), a surety, on payment of the debt or performance of the duty guaranteed, "is entitled to have assigned him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to be satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor and use all the remedies, and, if need be and upon a

Form 79.

proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain payment from the principal debtor," &c. And looking to the words "entitled to stand in the place of a creditor," it has been held that the surety who pays a debt is entitled to sue for the amount without obtaining any assignment of the debt. See *In re M'Myn, Lightbown* v. *M'Myn*, 33 Ch. D. 575.

In *Dane* v. *Mortgage Insurance Corpn.*, (1894) 1 Q. B. 54, it was held that the defendant company was not discharged by a scheme of arrangement under which the assured's rights were modified.

This was in accordance with the decisions in *Browne* v. *Carr*, 7 Bing. 508; *Ellis* v. *Wilmot*, L. R. 10 Ex. 10; *Ex parte Jacobs*, 10 Ch. D. 211; and *London Chartered Bank of Australia*, (1893) 3 Ch. 540. But if by operation of law the assured is prevented from performing a condition, whether precedent or concurrent, the assurers may escape. *Worsley* v. *Wood*, 6 T. R. 710; *Bankart* v. *Bowers*, L. R. 1 C. P. 484; *Roberts* v. *Brett*, 11 H. L. C. 337.

Where the holder of a debenture which matured for payment on the 4th November, 1895, effected a policy of insurance with a corporation which, after reciting that the debenture matured on that day and that the assured had paid a premium for insurance until that date, guaranteed to him the due payment of the principal money secured by the debenture, if the debtors should make default for more than three months in payment of any principal money due "under the debenture," and subsequently, by a special resolution of the debenture holders, which was neither assented to nor dissented from by the holder, the date for payment of the debentures of the company was postponed; and the debenture was not paid off on the 4th November, 1905, nor in three months after that date: it was held that, assuming the special resolution to be valid, the contract was nevertheless one of insurance against the default of the company to pay the amount of the debenture on the original date; that there had been a default by the company to pay money due under the debenture within the meaning of the policy; and that the holder was therefore entitled to recover the amount of the policy from the corporation, who were entitled on payment to be subrogated to his rights as modified by the special resolution. *Finlay* v. *Mexican Investment Corpn.*, (1897) 1 Q. B. 517; *Law Guarantee Trust, &c. Soc.* v. *Munich Re-Insurance Co.*, (1912) 1 Ch. 138.

Re-insurance of guarantee company.

Re-insurance is a contract to indemnify the original guarantee company against all that company's liability. There is usually no fiduciary relation between the re-insurer and the guarantee company or between the latter and the debenture holder whose debentures are guaranteed. Where there was a deficiency on realising the debentures and the guarantee company was wound up and could only pay a dividend on the deficiency, a company which had re-insured two-elevenths of the risk was held bound to pay two-elevenths of the deficiency to the liquidator of the guarantee company (*Law Guarantee Soc., Liverpool Mortgage Co.'s case*, (1914) 2 Ch. 617); but the guaranteed debenture holder has been held not to be entitled to the benefit of the amount so recovered. *Law Guarantee Soc., Godson's claim*, (1915) 1 Ch. 340. And see *Law Guarantee Soc.* v. *Munich Re-Insurance Co.* (1915), 31 T. L. R. 572.

Where a policy provided that it should cease if the interest in the mortgages should pass from the insured otherwise than by operation of law, it was held that a sale by the liquidator of the insured would not avoid the policy. *Re Birkbeck Building Soc.*, (1913) 2 Ch. 34.

As to the difference between co-suretyship and insurance of a security, see *Re Denton's Estate*, (1904) 2 Ch. 178.

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A contract of guarantee like an ordinary policy of insurance may, in some cases, be avoided for non-disclosure of material facts. *Seaton* v. *Burnand*, (1900) A. C. 135; *Carlisle & Cumberland Banking Co.* v. *Bragg*, (1911) 1 K. B. 489; *London General Omnibus Co.* v. *Holloway*, (1912) 2 K. B. 72.

As to the desirability of having guarantees under seal, see *In re Crace*, (1902) 1 Ch. 733.

An arrangement whereby the guarantors of an issue of debentures are released from that guarantee, the interest on the debentures is increased, new trustees of the trust deed securing the debentures are appointed, and the sinking fund discontinued, is an "arrangement or compromise" which the Court has jurisdiction to sanction under sect. 153 of the Act. *Shaw* v. *Royce, Ltd.*, (1911) 1 Ch. 138.

**Form 80.**

Guarantees in a trust deed.

The guarantors hby guarantee the due payment of the stock and the interest thereon, and the premium on the stock, and the following provisions shall have effect:—

(1) Whenever the coy makes default for more than fourteen days in the payment of any redemption moneys payable in respect of the stock which for the time being ought to be redeemed, or in payment of any interest on any of the stock, the guarantors shall forthwith, on demand by the trees, pay the redemption moneys or the interest (as the case may be) in regard to which such default has been made to the trees to the intent that the same may be distributed by the trees amongst the persons entld to the stock in relation to which such default shall have been made.

(2) Whenever any such default has been made the trees shall be at liberty to take legal proceedings against the guarantors, and (a) proof therein that as regards any specified stockholder the coy has made default in redeeming his stock, or any pt thof, shall be sufficient evidence that the coy has made the like default as regards all the other stockholders; and (b) proof therein that as regards any specified stockholder the coy has made default in paying any interest due to him for any particular period shall be sufficient evidence that the coy has made the like default as regards all the other stockholders, save so far as within seven days after such proof whether (a) or (b) has been given the stockholders have been duly pd all redemption moneys and interest due to them resply.

(3) The guarantors shall not be exonerated by time being given to the coy by the trees, or by the stockholders, or any of them, or by any concessions to the coy granted by the trees, or by the stockholders, or any of them, or by anything done by the stockholders, or any of them, or by the trees in exercise of

Form 80.

any of the trusts, powers, authorities, or discretions vested in them by these presents, or by anything such stockholders or trees may omit or neglect to do, or by any other dealing or thing which but for this provision might operate to exonerate the guarantors.

(4) The guarantee herein contained is to be a continuing guarantee, and accordingly is to remain in operation whilst and so long as these presents remain in operation, that is to say, until all the stock has been pd or satisfied and the mortgaged premises have been released from this security.

(5) The moneys from time to time received by the trees under these presents are to be applied by the trees in or towards satisfaction of the payment, on default in respect of which such moneys shall have been so received.

(6) The trees shall be entld to determine from time to time when they shall enforce this guarantee, and may from time to time make any arrangement or compromise with the guarantors in relation to the premises which the trees may think expedient in the interests of the stockholders.

(7) Any sum so paid by the guarantors shall be forthwith repaid to them by the coy, and until repayment the guarantors shall, in respect of such sum, be entld to a charge on the coy's undertaking for repayment of the amount with interest at 5 p.c.p.a., such charge to rank after the debenture stock and the interest and all other money hby secured.

# CHAPTER XL.

## TRUST DEEDS.

### Form 81. Trust Deed constituting and securing Debenture Stock or securing Debentures.

Trust deed to secure debenture stock or debentures.

THE draughtsman can readily expunge the clauses in the following form not required in any particular case. See extra clauses, pp. 364 *et seq.*, *infra*.

It often happens that there is an issue of debentures or debenture stock before the company has actually acquired the property intended to be made a security. In such cases the deed will contain a covenant by the company to convey or procure the conveyance to the trustees of the specified property when acquired. See Form 98.

Where debentures, and not debenture stock, are to be secured, the words within thick square brackets will be omitted, and the words in italics will be inserted. The words in italics will be omitted where the deed is to secure debenture stock.

THIS TRUST DEED is made the —— day of ——, between the ——, Limtd (hnftr called "the coy"), of the one pt, and —— of —— and —— of —— (hnftr called "the present trees") of the other pt.*

[Whereas the coy has determined to issue debenture stock to be constituted and secured in manner hnftr provided.]

(*Whereas the coy has determined to issue debentures, framed in accordance with the form set forth in the first schedule hto, and to secure the same in manner hnftr provided.*)

NOW THIS DEED WITNESSETH AND DECLARES as follows:

Interpretation.

1. The marginal notes hto shall not affect the construction hof, and in these presents, unless there be something in the subject or

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Debenture trust deeds.

*Occasionally it is considered desirable to make the trust deed extremely concise. As a rule this is a mistaken policy, for, in all probability, inconvenience will subsequently arise from the omission of the clauses and provisions struck out. But if conciseness is found necessary the experienced draughtsman will see at a glance that the essential provisions are those contained in Clauses 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 22, 23, 42, 43, and 48, plus the schedules.

context inconsistent therewith, the expressions following shall have the meanings hnftr mentd, that is to say:— **Form 81.**

"The trees" means the present trees or the survivors or survivor of them, or other the trees or tree for the time being hof.

["The stock" means the amount of the coy's indebtedness to the trees or tree under clause 2 hof [and any further indebtedness to the trees or tree under clause —— hof. See Form 83].

"The stockholders" means [as regards registered stock] the several persons for the time being entered in the register hnftr mentd as holders of the stock [and, as regards stock represented by certificates to bearer, the bearers for the time being of such certificates].

If there are not to be certificates to bearer, omit the words in brackets.

"The issue of the stock" means, as regards each share therein, the entry in such register of the name of the first holder thof.

"The registered stock" means so much of the issued stock as shall not for the time being be represented by certificates to bearer.

If there are not to be certificates to bearer, omit the words in the last definition.]

("*The debentures*" *means the debentures of the company for the time being outstanding, and entitled to the benefit of these presents.*

"*The debenture holders*" *means the holders for the time being of the debentures.*)

"The specifically mortgaged premises" means the freehold and leasehold hereditaments by clauses 7 and 8 hof expressed to be demised and all other ppty hby made a specific security for the payment of the moneys for the time being owing and intended to be secured hereunder.

If desired, add to the above the words "and all further property hereafter with the consent of the trustees demised or charged by the company to or in favour of them on the footing that the same shall be considered part of the specifically mortgaged premises."

"The general assets" means the assets comprised in the charge created by clause 9 hof, and does not include the specifically mortgaged premises.

"The mortgaged premises" means and includes the specifically mortgaged premises and the general assets collectively.

[2. The coy hby acknowledges that it is indebted to the present trees in the sum of [500,000*l.*], carrying interest at the rate of —— p.c.p.a., payable half-yearly on the —— day of —— and —— day of Constitution of stock.

**Form 81.**

——, the first payment to be made on the —— day of ——, 19—. And the payment to the stockholders of interest for each half-year or other period on the stock held by them resply shall operate in satisfaction of the interest for such half-year or other period payable to the trees under this clause.]

Beneficial ownership.

[3. The stockholders are to be regarded as the beneficial owners of their respive shares of the stock.]

Terms of issue of stock.

4. The [stock] (*debentures*) may be issued (or re-issued) to such persons, and on such terms, and either at par or at a discount or at a premium, as the coy shall determine, and [is] (*are*) to rank as a charge on the coy's undertaking.

Limit.

[4*a*. The stock is limited to [500,000*l*.].]

The deed very commonly contains a clause as above, but in many cases the limit is qualified so as to allow the company to issue further stock. See Forms 83, 84 and 85.

As to stamp duty where there is provision for further stock, see *supra*, p. 233.

In case of a trust deed to secure debentures the following clause should be substituted for clauses 3 and 4a:—"The charges herein contained are made for the purpose of securing the principal moneys and interest secured by the debentures. The debentures entitled to the benefit of these presents shall be a series of —— debentures of ——*l*. each [which will be issued in the form set out in the schedule hereto]."

Payments to be made to stockholders.

[5. As and when the stock or any pt thof ought to be redeemed or pd off in accordance with the provisions hof, the coy will pay to the stockholders, or those whose stock ought to be redeemed or pd off, the full nominal amount of the stock held by them resply, with such premiums, if any, as shall be payable in respect thof. Such payment shall be made at the —— Bank and shall operate in satisfaction of the amount of the stock so redeemed or pd off, and in the meantime, until the stock is redeemed or pd off, the coy shall pay to the stockholders interest on the stock held by them resply at the rate of —— p.c.p.a., and such interest shall be pd by equal half-yearly payments on every —— day of —— and —— day of ——.]

As to the necessity for legal tender where no place for payment is fixed, see *Fowler* v. *Midland Electric*, (1917) 1 Ch. 527, 656.

Conditions on which stock held.

[6. The stock shall be held subject to the conditions set forth in the first schedule hto, and such conditions shall be binding on the coy and the stockholders, and all persons claiming through them resply.]

Or the form of certificate with the conditions indorsed thereon can be set out in the First Schedule. See Form 81a, *infra*, p. 360.

Demise of freeholds.

7. The coy, as beneficial owner, hby demises unto the present trees the freehold hereditaments specified in the first pt of the second

schedule hto: To hold the same unto the present trees for the term of [500] years from the date of these presents without impeachment of waste, subject to the proviso for cesser of the sd term hnftr contained. **Form 81.**

Since the Law of Property Act, 1925, a trust deed can no longer be made by vesting the legal estate in fee simple in the trustees on trust for sale (see sect. 85 (1) and (3), but is only capable of taking effect by a demise for a term of years subject to a proviso for cesser on redemption or by a charge by deed expressed to be by way of legal mortgage. For proviso for cesser, see clause 48, *infra*.

If the trustees sell under their power or trust for sale under clause 10, they can convey the fee simple to a purchaser. Sect. 88 of the Law of Property Act, 1925.

As at law the right to the title deeds goes with the legal estate, the trustees of the trust deed are entitled to retain the custody of the title deeds of the property though a receiver has been appointed of the property comprised in the trust deed, but the trustees may for convenience deposit the title deeds with the receiver on his undertaking to give them access and to re-deliver when required. *Re Ind, Coope & Co., Fisher* v. *The Company*, 26 T. L. R. 11, C. A. The right of the trustees to retain the deeds is not affected by the Law of Property Act, 1925. (Sect. 85 (1).)

8. The coy, as beneficial owner, hby demises unto the present trees all and singular the leasehold hereditaments specified in the second pt of the second schedule hto: To hold the same unto the present trees for all the respive residues now unexpired of the several terms for which the same premises were resply granted by the several leases mentd in the second pt of the same schedule, except the last three days of each of the sd terms. Demise of leaseholds

It is to be noted that trustees taking by sub-demise are not like an assignee liable to pay the rent under the superior lease, nor will the Court order the receiver for the debenture holders to pay the same at the instance of the landlord. *Hand* v. *Blow*, (1901) 2 Ch. 721.

Since by sect. 89 of the Law of Property Act, 1925, a mortgagee of leaseholds has power to sell the nominal leasehold reversion, there would appear to be no need to insert the provisions which were formerly usual declaring trusts of the nominal reversion and giving the trustees power to appoint new trustees.

The object of the power to appoint a new trustee was to enable the trustees to appoint the purchaser and so vest the reversion in him. *London & County Bank* v. *Goddard*, (1897) 1 Ch. 642.

Sometimes there are agreements for leases to be assigned, and in such cases the following clauses may be required :—

[8*a*. The coy, as beneficial owner, hby assigns unto the present trees all and singular the full benefits and advantages of the several agreemts specified in the third schedule hto, and all and singular the rights, easements, liberties, and privileges thereby resply conferred or agreed to be granted: To hold the same unto the present trees, subject to the terms and conditions contained in the sd several agreemts.] Assignment of agreements for leases.

**Form 81.**

Company to obtain leases.

[8*b*. The coy shall forthwith, at its own cost, do and perform all acts and things which may be necessary to entitle it to have granted to it the respive leases for which it has entered into the several agreemts, specified in the third schedule hto, of the premises therein comprised resply, and will, at its own cost, procure such respive leases to be granted accordingly, and if, when the sd leases shall have been resply granted, any principal money or interest shall remain on the security [of the debentures or] of these presents, shall, if necessary, use its best endeavours to obtain, at its own cost, proper licences for the purpose, and shall immediately after such licences resply, if necessary, shall have been obtained, or if such licences resply shall be unnecessary, then immediately after the sd intended leases resply shall have been granted, at its own cost, well and effectually demise, or procure to be demised, the premises to be comprised in such leases resply unto the trees, for such pt of the then respive residues of the terms of years to be granted by the sd intended leases resply as the trees may require, and with such covenants for title and otherwise as are usual in mortgages by demise as may be reasonably required, and upon the trusts and for the purposes hnftr expressed concerning the same.]

Floating charge on general assets.

9. The coy hby charges in favour of the trees its other assets for the time being, both present and future, including its uncalled capital, with the payment of all moneys for the time being owing on the security of these presents, and such charge shall rank as a floating charge, and shall accordingly in no way hinder or prevent the coy from selling, mortgaging, charging, leasing, or otherwise disposing of or dealing with such assets in the ordinary course of its business, and for the purpose of carrying on the same, [and any mortgage or charge so created may be specific or floating, and may be made to rank in priority to or *pari passu* with or after the security hby constituted].

A general charge as above has for some time past been commonly given in debenture stock trust deeds, on the assumption that, as laid down in *Standard Manufacturing Co.*, (1891) 1 Ch. 627, the Bills of Sale Acts do not apply to companies registered under the Act of 1862. See *supra*, p. 184; and see now sect. 79 of the Companies Act, 1929. It used to be the practice, especially where chattels in England formed an important part of the security, to fortify the security by issuing debentures to the trustees pursuant to a clause [9a] as below; but this practice is now rarely followed.

As to the operation of a "floating charge," see *supra*, p. 61.

Sometimes the words in brackets are omitted, and in lieu thereof the following words are inserted:—

"But the coy is not to be at liberty, without the previous consent in writing of the trees, to create any mortgage or charge ranking in

priority to or *pari passu* with the moneys hby secured, and the trees shall have absolute and uncontrolled discretion as to giving or refusing such consent." **Form 81.**

[[9*a*. The coy shall forthwith execute and deliver to the trees [ten] debentures of the coy each for securing the principal sum of 50,000*l*. and interest [and before issuing any of the stock in excess of 500,000*l*., the coy shall execute and deliver to the trees further debentures in like form for securing principal sums equal to the excess], and such debentures shall be framed in accordance with the form set out in the —— schedule hto [see Form 73, *supra*], and shall be held by the trees as a collateral security for the payment of the stock and the interest thereon, and the trees shall, as and when the security hby constituted shall become enforceable as hnftr provided, be at liberty to deal with and enforce the sd debentures in such manner as they think expedient.]] Debentures to be issued to trustees.

Occasionally it is considered desirable to fortify the security by issuing debentures to the trustees, and sometimes it is necessary to provide for such issue, *e.g.*, where the company has issued debentures and has power to issue further debentures ranking *pari passu* with them, but wants instead to issue debenture stock.

The words in brackets in the above form should be omitted, unless by the deed the company is empowered to issue additional stock.

10. The trees shall permit the coy to hold and enjoy all the mortgaged premises, and to carry on therein and therewith the business, or any of the businesses, mentd in the memdum of asson of the coy, until the security hby constituted shall become enforceable, as hnftr provided, and then the trees may, in their discretion, without any such request as next hnftr mentd, and shall, upon the request in writing of the holder or holders of one-half of the [stock] (*or of the holder or holders of* [50] *at least of the debentures*) (but in either case without any further consent on the pt of the coy or its assigns), enter upon or take possession of the mortgaged premises, or any of them, and may in the like discretion, and shall upon the like request, sell, call in, collect, and convert into money the same, or any pt thof, with full power to sell any of the same premises either together or in parcels, and either by public auction or private contract, and either for a lump sum or for a sum payable by instalments, or for a sum on account and a mortgage or charge for the balance [and with full power upon every such sale to make any special or other stipulations as to title or evidence, or commencement of title or otherwise, which the trees shall deem proper, and with full power to buy in, or rescind, or vary any contract for sale of the sd premises, or any pt thof, and to resell the same without Trusts of mortgaged premises. When sale, &c. to be made, and how.

**Form 81.** being responsible for any loss which may be occasioned thereby, and with full power to compromise and effect compositions, and for the purposes afsd, or any of them, to execute and do all such assurances and things as they shall think fit].

If debts and other personal property are not to be included, the words "CALL IN, COLLECT" will be unnecessary in the above clause, and generally throughout the form.

The words in brackets "and with full power, &c.," can generally be omitted in reliance on sects. 12 and 15 of the Trustee Act, 1925, *supra*, p. 98; but if the company's undertaking is abroad they should remain.

Sometimes a power to sell for shares is added, *e.g.*: "and it is hereby expressly declared that any such sale as aforesaid may be made wholly or in part for shares, debentures, debenture stock, or other securities of any company [having objects altogether or in part similar to those of the company], and that the provisions hereof shall extend to such shares, debentures, debenture stock, or other securities, as if the same constituted part of the mortgaged premises, to the intent that the same may be sold and dealt with accordingly." But it must be seen that the directors can confer the power to sell for shares. See *Dougan's case*, 8 Ch. 540, as to a power merely "to sell" not conferring a power to sell for shares.

Sometimes the clause following is inserted, *i.e.*: "The trustees shall be at liberty to form and promote, or take part in the formation and promotion, of any company or companies constituted, or to be constituted, for the purpose of purchasing or otherwise acquiring from the trustees the mortgaged premises, or any part thereof"; but it must be seen that the directors can give such a power under their borrowing powers in the articles.

As to a mortgagee not being a trustee of the power of sale, see *Warner* v. *Jacob*, 20 Ch. D. 220.

Where part of the specifically mortgaged premises consisted of shares, the trustees before taking possession were held entitled to vote as they thought fit in respect of those shares. *Siemens Bros. & Co.* v. *Burns*, (1918) 2 Ch. 324.

When security is to be enforceable.

11. The security hby constituted shall (subject to clause 12 hof) become enforceable within the meaning of these presents in each and every of the events following:—

(1) If the coy shall make default in the payment of any principal moneys or interest which ought to be pd in accordance with these presents.

(2) If an order shall be made or a resolution passed for the winding-up of the coy.

(3) If a receiver of the coy's undertaking or any pt thot shall be appointed, and such appointment shall, in the opinion of the trees be prejudicial to the security hby constituted.

(4) If a distress or execution be levied or enforced upon or against any of the chattels or other ppty of the coy.

Where the sheriff called at the company's shop and was asked to wait till the secretary obtained change, this was held not to amount to a distress. See *Central Printing Works* v. *Walker & Nicholson*, 24 T. L. R. 88.

[(5) If any execution, extent, or other process of any Ct or authority is sued out against the mortgaged premises, or any pt thof, for any sum whatever.]

[(6) If the balance sheet of the coy shall not be duly made out in accordance with the coy's arts of asson, and certified by the auditors of the coy, and a copy thof and of the auditors' certificate presented to the trees on or before the 31st day of December in each year.]

[(7) If at any time it appears from the balance sheet of the coy, or the trees shall certify in writing, that in their opinion the liabilities of the coy exceed its assets, including uncalled capital, or that the coy is carrying on business at a loss, or that the coy's book debts, stock-in-trade and cash are together of less value than ——*l.*, or that the further prosecution by the coy of its business will endanger the security of the stockholders.]

[(8) If the coy shall without the consent of the trees make, or attempt to make, any alteration in the provisions of its memdum or arts of asson which might, in the opinion of the trees, detrimentally affect the interest of the stockholders.]

[(9) If the coy shall, without the consent of the [stockholders] (*debenture holders*) to be obtained in accordance with the provisions contained in the [third] schedule hto, create, or purport or attempt to create, any charge or mortgage ranking, or which by any means may be made to rank, on the mortgaged premises, other than the general assets, *pari passu* with or in priority to the security hby constituted.]

(10) If default shall be made by the coy in the performance or observance of any covenant, condition, or provision binding on the coy under these presents.

(11) If the coy shall stop payment, or shall without the consent in writing of the trees cease to carry on its business, or threaten to cease to carry on the same.

As to these events in acceleration of payment, see pp. 279, 280.

The paragraphs in square brackets are occasionally used where the circumstances are special. As to sub-clause 10, see *Melbourne Brewery and Distillery*, (1901) 1 Ch. 453, which shows that it is desirable to refer to more than "covenants."

What notice to be given before realisation.

12. Sect. 103 of the Law of Property Act, 1925, shall not apply hto, but before making any such entry, or taking possession as afsd, or making any sale, calling in, collection or conversion under the afsd trust or power in that behalf (hnftr referred to as "the primary trust for conversion"), the trees shall, except when they shall certify that in their opinion further delay would imperil the interests of the [stockholders] (*debenture holders*), and except in the case of such order or resolution as afsd having been made or passed, give written notice of their intention to the coy, and shall not enter upon the mortgaged premises or execute the primary trust for conversion

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if in the case of such trust arising by reason of any default in payment of any principal moneys or interest, the directors shall prove to the trees payment of the principal or interest so in arrear within three months next after such notice shall have been given to the coy, or if in the case of such trust arising by reason of any such distress, or execution, or process as afsd, or any breach of any covenant, condition, or obligation as afsd, the coy shall forthwith, upon such notice as afsd being given, remove or discharge such distress, execution or process, or fully perform or make good the breach of such covenant, condition or provision, to the satisfaction of the trees.

**Trustee's receipt.**

13. Upon any such sale, calling in, collection, or conversion as afsd, the receipt of the trees for the purchase-money of the premises sold, and for any other moneys pd to them, shall effectually discharge the purchaser or purchasers, or other person or persons paying the same therefrom, and from being concerned to see to the applicon, or being answerable for the loss or misapplicon thof.

This clause is inserted as a matter of convenience, but sect. 14 of the Trustee Act, 1925, is sufficiently wide. See *supra*, p. 98.

**Trust of proceeds.**

14. The trees shall hold the moneys to arise from any sale, calling in, collection, or conversion, under the primary trust for conversion, upon trust that they shall thereout in the first place pay or retain the costs, charges, and expenses incurred in or about the execution of the primary trust for conversion or otherwise in relation to these presents, including the remuneration of the trees, and shall apply the residue of such moneys, first in or towards payment to the [stockholders] (*debenture holders*) *pari passu* in proportion to the amount due to them resply of all arrears of interest remaining unpd on the stock held by them resply; secondly, in or towards payment to the [stockholders] (*debenture holders*) *pari passu* in proportion to the [stock held by] (*amounts due to*) them resply, and without any preference in respect of priority of issue or otherwise howsoever of all principal moneys due in respect of the [stock] (*debentures*) held by them resply, and that whether the same principal moneys shall or shall not then be payable; and thirdly, shall pay the surplus (if any) of such moneys to the coy or its assigns.

"Stock held by" and "amount due to" in this form have much the same meaning: *Re Smelting Corpn.*, (1915) 1 Ch. 472. And accordingly, where some of the debenture stock was only partly paid, it was held that all the stockholders were entitled to a rateable distribution of the funds available.

If for stamp duty reasons it is desired to make the security unlimited (see *Suffield* (*Baron*) v. *Inland Revenue Commrs.*, (1908) 1 K. B. 865; and *supra*, p. 235), say, "thirdly, in or towards the repayment of all further moneys, if any, advanced by the [stockholders] (*debenture holders*) to the company on

the security hereof, through the medium of the trustees; and fourthly, shall pay," &c.

As to appropriating payments to principal, where there is a deficiency, to avoid payment of income tax, see *Smith* v. *Law Guarantee Soc.*, (1904) 2 Ch. 569.

As to the effect of a subsequent surplus being realised where the order provided for payment of principal only, see *Calgary and Medicine Hat, &c. Co.*, (1908) 2 Ch. 652, C. A.

As to the desirability of providing clearly for the trustees' remuneration, see *Accles, Ltd., Hodgson* v. *Accles*, W. N. (1902) 164; 51 W. R. 57; *Piccadilly Hotel*, (1911) 2 Ch. 534; and *supra*, pp. 87, 88.

Power to withhold payment until *sufficient to pay 10 per cent.*

15. Provided always, that if the amount of the moneys at any time apportionable under the last preceding clause hof shall be less than [10 p.c. on the stock] (*10l. per debenture*), the trees may at their discretion invest such moneys upon some or one of the investments hnltr authorized, with power from time to time at the like discretion to vary such investments, and such investments with the resulting income thof may be accumulated until the accumulations, together with any other funds for the time being under the control of the trees and applicable for the purpose, shall amount to a sum sufficient to pay [10 p.c. upon such of the stock] (*10l. per debenture upon such of the debentures*) as shall be outstanding, and then such accumulations and funds shall be applied in manner afsd.

Notice of apportionment to be given.

16. The trees shall give not less than seven days' notice in the manner provided for in clause 42 hof, of the day and place fixed for any payment to the [stockholders] (*debenture holders*) under clause 14 or 15 hof, and after the day so fixed the holder of [the stock] (*each outstanding debenture*) shall be entld to interest on the balance only (if any) of the principal moneys due to such [stock] (*debenture*) holder after deducting the amount (if any) payable in respect thof on the day so fixed.

Receipt of stockholder.

17. The receipt of each [stockholder] (*debenture holder*) for the principal moneys and interest payable by the trees to him in respect of [such stock] (*his debenture*) shall be a good discharge to the trees.

Indorsement on stock certificates upon part payment.

18. Upon any payment under clause 14 or 15 hof to the [stockholders] (*debenture holders*) on account of the principal moneys or interest hby secured the [stock certificates] (*debentures*) must be produced to the trees, who shall cause a memdum of the amount and date of payment to be indorsed thereon, but the trees may in any particular case dispense with the production and indorsement of a [stock certificate] (*debenture*) upon such indemnity being given as they shall deem sufficient.

This is a most reasonable and proper clause, and the Court has frequently approved of it, but, strange to say, the London Stock Exchange authorities object to it.

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Powers of trustees to concur with the company in specified dealings with specifically mortgaged premises.

19. At any time before the security hby constituted becomes enforceable the trees may, upon the applicon and at the expense of the coy [*if London Stock Exchange quotation wanted, say,* but only if and so far as in their opinion the interests of the [stockholders] (*debenture holders*) shall not be prejudiced thereby], do or concur in doing all or any of the things following, in respect of the specifically mortgaged premises, that is to say—

(1) May sell or collect all or any of the specifically mortgaged premises, with full power to make any such sale for a lump sum, or for a sum payable by instalments, or for a sum on account and a mortgage or security for the balance, or for a rent charge, and to give any option to purchase.

(2) May let on lease any pt of the specifically mortgaged premises on such terms as may seem expedient.

(3) May acquire a new lease of any leasehold hereditaments for the time being forming pt of the specifically mortgaged premises for such term not being less than the then residue of the then existing term therein, and at such rent and subject to such covenants and conditions as may seem expedient, and for that purpose, if thought fit, surrender the then existing lease of such hereditaments and the then existing term therein.

(4) May exchange any pt or pts of the specifically mortgaged premises for any other ppty suitable for the purposes of the coy, and upon such terms as may seem expedient, and either with or without payment or reception of money for equality of exchange.

(5) May permit any transfer or removal of the licences attached to any of the specifically mortgaged premises to any other of the specifically mortgaged premises, and may allow the lapse or surrender of any licences.

(6) May set out, appropriate, grant or dedicate land forming pt of the specifically mortgaged premises for the purposes of roads, ways, canals, watercourses, gardens, places of amusement, places of recreation, sites for chapels, schools, churches, and other purposes, public or private, which may seem expedient.

(7) May assent to the modification of any contracts or arrangements which may be subsisting in respect of any of the specifically mortgaged premises, and in particular the terms of any leases or covenants.

(8) May, with moneys forming pt of the specifically mortgaged premises, purchase or otherwise acquire any freehold or leasehold ppty with or without goodwill, licences, fixtures, and trade-marks, which may seem suitable for the purposes of the coy, and may pay off or acquire any mortgage or charge on the specifically mortgaged premises ranking in priority to the security hby constituted.

(9) May exercise all or any of the powers or rights incident to the ownership of all or any of the specifically mortgaged premises, and in particular as regards shares the voting rights, and as regards securities the right to enforce the same by foreclosure, sale or otherwise.

(10) May place any of the specifically mortgaged premises in the names or under the control of any nominees of the trees or of the coy where the same seems expedient with a view to realisation or otherwise.

(11) May release in favour of the coy or its nominees any pt of the specifically mortgaged premises upon the coy mortgaging or charging to or in favour of the trees by way of legal mortgage or legal charge as part of the specifically mortgaged premises any freehold or leasehold ppty (whether forming pt of the general assets or not) which the trees shall be satisfied is at least equal in value to the ppty to be released and is suitable for the purposes of the coy.

See note to clause 41, p. 342, *infra*.

Omit the above if clause 41 is inserted.

(12) May make any sale, lease, or other dealing under this clause in conson, or pt conson, that the purchaser, lessee, or other party shall be bound for a term or otherwise to buy from the coy or its nominees all or any of the liquor required for the purposes of the premises so dealt with.

(13) May release any of the specifically mortgaged premises which, in the opinion of the trees, are unprofitable or a source of loss or danger to the coy.

(14) May settle, or refer to arbitration, all accounts, questions, and claims in relation to any of the specifically mortgaged premises.

(15) May execute and do all such agreemts, assurances, instruments, and things, and prosecute, defend, or abandon all such proceedings in relation to any of the specifically mortgaged premises as may seem expedient.

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(16) May apply any net capital moneys arising from any sale, lease or other dealing with the specifically mortgaged premises under this clause in developing, improving, or preserving any of the specifically mortgaged premises, or in erecting or constructing any buildings or works.

(17) May repay to the coy (by way of recoupment to the general assets) any sums which the coy may from time to time out of the general assets have expended upon any purpose specified in para. 16 of this clause.

In the absence of such a clause there is a difficulty in thus recouping the company. See *Tucker's Settled Estates*, (1895) 2 Ch. 468.

(18) May sanction and confirm anything done or suffered by the coy.

(19) Generally may act in relation to the specifically mortgaged premises in such manner and on such terms as they may deem expedient in the interest of the [stockholders] (*debenture holders*).

The unsuitable paragraphs of the above clause should be omitted.

**Application of proceeds.**

20. All capital moneys arising under the last preceding clause, and all assets acquired pursuant to that clause, shall become part of the specifically mortgaged premises, and shall be vested in the trees accordingly.

**Interim investments.**

21. Subject as afsd, the trees shall invest the net capital moneys referred to in the last preceding clause hof upon some or one of the investments hnftr authorized, with power from time to time at their discretion to vary such investments, and with power from time to time at their discretion to resort to any such investments for any of the purposes for which such proceeds are under clause 19 hof *authorized to be expended; and subject as afsd, the trees shall stand* possessed of the sd investments upon trust, until the primary trust for conversion shall arise, to pay the income thof and any net moneys in the nature of income arising under such clause to the coy or its assigns, and after the primary trust for conversion shall have arisen, shall hold the sd investments and the income thof resply, and net moneys in the nature of income, upon and for the trusts and purposes hnbefore expressed concerning the moneys to arise from any sale, calling in, collection, and conversion under the primary trust for conversion: Provided always, that in default of such trust for conversion arising, and after payment and satisfaction of all moneys intended to be secured by these presents, the sd investments and the income thof and net moneys last afsd shall be held in trust for the coy or its assigns.

Where it is desired to extend the leasing powers of the company beyond those conferred by the Law of Property Act, the following clause may be added: **Form 81.**

21*a*. The coy may during the continuance of this security and at any time and from time to time before the same becomes enforceable, exercise over or in relation to any of the specifically mortgaged premises, without the consent or concurrence of the trees, any of the powers of leasing and ancillary powers contained in or given by sect. 99 of the Law of Property Act, 1925, to a mortgagor in possession.

Subject to the variations following; that is to say,

(a) Any lease may be granted in consideration or part consideration of a premium, but so that such premium shall forthwith be paid over to the trustees as part of the specifically mortgaged premises.

(b) Any lease may be granted in consideration or part consideration that the lessee shall be bound either for a term or otherwise to buy from the company or its nominees all or any of the liquor required for the purposes of the demised premises.

The following is alternative to clause (a) above:—

(a) Any lease may be granted in consideration or part consideration of a premium payable in a lump sum or by instalments or otherwise, but all such premiums and all instalments from time to time paid in respect thereof shall in due course be paid over to the trustees as part of the specifically mortgaged premises; that is to say, in the month of —— and month of —— in each year the company shall furnish to the trustees a written and duly vouched account showing the amount of all sums received by the company in respect of premiums or instalments on premiums during the six months ending on the last day of the preceding March or September, as the case may be, and shall at the same time pay over to the trustees the full amount of the sums so received.

Power for trustees after entry, &c. to carry on business,

22. After the trees shall have made such entry or taken possession as afsd, and until the whole of the mortgaged premises shall be sold, called in, collected, and converted under the primary trust for conversion, the trees may, if they shall think fit, but not otherwise, carry on the business of the coy in and with the mortgaged premises, or any of them, and may manage and conduct the same as they shall, in their discretion, think fit, and for the purposes of the sd business may employ such agents, managers, receivers, accountants, servants, and workmen upon such terms as to remuneration and otherwise as they think proper, and may renew such of the plant, machinery, and effects of the coy as shall be worn out or lost or otherwise become unserviceable, and may for the purposes afsd raise money on the mortgaged premises in priority to the [stock] (*debentures*), and at such rate of interest and on such terms as the trees think fit, and generally may do or cause to be done all such acts and things, and may enter into such arrangements respecting the sd premises, or the working of the same or any pt thof, as they could do if they were

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and exercise powers under clause 19.

absolutely entld thto, and without being responsible for any loss or damage which may be occasioned thereby. And may also, at their discretion, without the concurrence or request of the coy, exercise all or any of the powers and discretions vested in them by clause 19 hof, as if the word "specifically" were omitted throughout that clause.

How returns under last clause to be applied.

23. The trees shall, out of the rents and profits and income of the mortgaged premises and the moneys to be made by them in carrying on the sd business, pay and discharge the expenses incurred in and about carrying on and management of the sd business, or in the exercise of any of the powers under the last preceding clause hof 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 sd rents, profits, income and moneys in the same manner as is hnbefore provided with respect to the moneys to arise under the primary trust for conversion.

Investment clause.

24. Any moneys which, under the trusts herein contained, ought to be invested may be invested, in the names or under the legal control of the trees, in any of the public stocks or funds or Government securities of the United Kingdom, or in the stock of the Bank of England, or in any other stocks, funds, or securities by law authorized for the investment of trust moneys, or may be placed on deposit in the names of the trees in such bank or banks as they may think fit.

Receiver.

25. The trees, at any time after the security hby constituted becomes enforceable, may, by writing, appoint a receiver of the mortgaged premises, or any pt thof, and remove any receiver so appointed, and appoint another in his stead, and the following provisions shall have effect:—

(a) Such appointment may be made either before or after the trees shall have entered into or taken possession of the mortgaged premises, or any pt thof.

(b) Such receiver may be invested by the trees pursuant to clause 45 hof, with such powers and discretions as the trees may think expedient.

(c) Unless otherwise directed by the trees, such receiver may exercise all the powers and authorities vested in the trees by clause 22 hof.

(d) Such receiver shall, in the exercise of his powers, authorities and discretions, conform to the regulations and directions from time to time made and given by the trees.

(e) The trees may, from time to time, fix the remuneration of such receiver, and direct payment thof out of the mortgaged premises.

(f) The trees may, from time to time, and at any time, require any such receiver to give security for the due performance of his duties as receiver, and may fix the nature and the amount of the security to be so given, but the trees shall not be bound in any case to require any such security.

(g) Save so far as otherwise directed by the trees, all moneys from time to time received by such receiver shall be pd over to the trees to be held by them on the trusts declared by clause 23 hof and concerning the moneys to arise under clause 22 hof.

(h) The trees may pay over to such receiver any moneys constituting pt of the mortgaged premises, to the intent that the same may be applied for the purposes hof by such receiver, and the trees may from time to time determine what funds the receiver shall be at liberty to keep in hand with a view to the performance of his duties as such receiver.

(i) The receiver shall be the agent of the coy, and the coy shall be solely responsible for his acts and defaults, and for his remuneration.

(j) Subject as afsd, the provisions of sects. 101, subsects. (1) and (2), 104, 106, 107, and sect. 109, sub-sects. (3), (4), (6), (7) and (8) (i), (ii) and (iii), of the Law of Property Act, 1925, and the powers thereby conferred on a mortgagee or receiver shall apply to such receiver.

It is important that it should be made quite clear whether a receiver so appointed is to be the agent of the company or of the trustees. In several cases (*Vimbos, Ltd.*, (1900) 1 Ch. 470; *Robinson Printing Co.* v. *Chic, Ltd.*, (1905) 2 Ch. 123; and *Deyes* v. *Wood*, (1911) 1 K. B. 806) the Court held that the receiver was the agent of the debenture holders and not of the company, though in the last cited case the provisions of the conditon were to take effect "as and by way of variation and extension of the provisions of sects. 19 and 24 of the Act" (Conveyancing Act, 1881).

Power to enter or appoint receiver where jeopardy.

[25*a*. In addition to the powers hnbefore given the trees may enter into possession of and hold or appoint a receiver to take possession of any pt of the mortgaged premises which may at any time appear to them [in danger of being taken under any process of law by any creditor of the coy or otherwise] in jeopardy, and where a receiver is appointed under this clause the provisions of the last preceding clause shall apply *mutatis mutandis*, and the trees may at any time give up possession or withdraw the receivership.]

Powers for trustees to raise moneys for paying costs or prior incumbrances.

[26. The trees may raise and borrow money on the security of the specifically mortgaged premises, or any pt thof, for the purpose, but for the purpose only, of paying off or discharging any mortgage or charge for the time being charged on the specifically mortgaged premises or any pt thof in priority to these presents, or for the purpose

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of defraying any costs, charges, losses, and expenses, which shall be incurred by the trees in relation to these presents. And the trees may raise and borrow such moneys as afsd at such rate of interest, and generally on such terms and conditions, as the trees shall think fit, and may secure the repayment of the moneys so raised or borrowed, with interest for the same, by mortgaging or otherwise charging the specifically mortgaged premises, or any pt thof, in such manner and form as the trees shall think fit. The trees may also concur in the transfer of any mortgage or charge for the time being charged on the specifically mortgaged premises, or any pt thof, in priority to these presents, and may redeem or concur in redeeming the specifically mortgaged premises, or any pt thof, from any such mortgage or charge, and for the purposes afsd may execute and do all such assurances and things as they shall think fit.]

The above clause will only be inserted in cases where the circumstances require it.

Covenants by company:

27. The coy hby covenants with the present trees that the coy will at all times during the continuance of this security—

To carry on business.

(1) Carry on and conduct the business of the coy in a proper and efficient manner; and

To keep accounts and let them be open for inspection.

(2) Keep proper books of account and therein make true and perfect entries of all dealings and transactions of and in relation to the sd business, and keep the sd books of account, and all other documents relating to the affairs of the coy, at its registered office, or other place or places where the sd books of account and documents of a similar nature have heretofore been kept, and procure that the same shall at all reasonable times be open for the inspection of the trees, and such person as they shall from time to time in writing for that purpose appoint; and

To give information to trustees.

(3) Give to the trees, or to such person afsd, such information as they or any of them shall require as to all matters relating to the sd business, or any after-acquired ppty of the coy, or otherwise relating to the affairs thof; and

Not to pull down buildings, &c., and to renew machinery.

(4) Not pull down or remove any dwelling-houses [storehouses, stations, engine-houses], buildings, erections [furnaces, forges, foundries, gins, railways, tramways, or wharves], being pt of the specifically mortgaged premises, or the [fixed engines, steam engines], plant, machinery, fixtures and fittings annexed to the same resply, or any of them, without the previous consent in writing of the trees, except in any case where such pulling down or removal shall in the opinion of

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the coy be rendered necessary by reason of any of such premises being worn out or injured, and in such case will replace the premises so worn out or injured by others of a similar nature, and of at least equal value, and when necessary renew and replace all moveable engines, plant, machinery, tools, implements, utensils, and other effects of a like nature, now used or hereafter to be used for the purpose of or in connection with the business of the coy when and as the same shall be worn out or destroyed; and

As to the implied power to remove, before entry by the mortgagee, fixtures hired by mortgagor and attached after the mortgage, see *Cumberland Union Banking Co.* v. *Maryport, &c. Steel Co.*, (1892) 1 Ch. 415; and *Gough* v. *Wood*, (1894) 1 Q. B. 713: and as to loss of that power by mortgagee's entry, see *Reynolds* v. *Ashby & Sons*, (1904) A. C. 466; and *Hobson* v. *Gorringe*, (1897) 1 Ch. 182.

To keep premises in repair.

(5) Keep all hereditaments forming pt of the specifically mortgaged premises, and all plant, machinery, works, fixtures, fittings, implements, utensils, and other effects in or upon the same resply, and used for the purposes of or in connection with the sd business and every pt thof, in a good state of repair and in perfect working order and condition; and

To permit trustees to inspect.

(6) Permit the trees, and such persons as they shall from time to time in writing for that purpose appoint, to enter into and upon the same hereditaments resply to view the state and condition thof, and of all plant, machinery, works, fixtures, fittings, implements, utensils, and other effects in or upon the same resply, and used for the purpose of or in connection with the sd business; and

To insure premises, or in default to permit trustees to do so.

(7) Insure and keep insured such of the specifically mortgaged premises as are of an insurable nature against loss or damage by fire to the extent of three-fourths of their full value in such office or with such underwriters as the trees shall for that purpose appoint, and duly pay the premiums and other sums of money payable for that purpose, and immediately after every such payment deliver (if required) to the trees the receipt for the same, and apply all moneys to be received by virtue of any such policy in making good any loss or damage which may so arise to the same premises or any of them. And if default shall be made in keeping the same premises in a good state of repair and in perfect working order and condition, and so insured as afsd, or in delivering any such receipt as afsd, the trees may repair the same premises or such of them as shall in their or his opinion require

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reparation, and may insure and keep insured the same premises, or such of them as they may deem fit; and the coy will, on demand, repay to the trees every sum of money expended for the above purposes, or any of them, by them, with interest at the rate of 5 p.c.p.a. from the time of the same resply having been expended, and until such payment the same shall be a charge upon the mortgaged premises in priority to the stock.

See sect. 101 of the Law of Property Act, 1925, and sect. 19 of the Trustee Act, 1925, *supra*, p. 99.

Suppose the company voluntarily insures part of the specifically mortgaged premises against fire and pays the premium and recovers the amount, are the trustees before the security is enforceable entitled to the amount as part of the specifically mortgaged premises? It would seem not, for the company is not a trustee for them of the equity of redemption (*Hopkinson* v. *Roll*, 9 H. L. C. 514, 534), but the proceeds are caught by the floating charge. Compare *Warwicker* v. *Bretnall*, 23 Ch. D. 188; *Seymour* v. *Vernon*, 16 Jur. 189; and *Gaussen* v. *Whatman* (1905), 93 L. T. 101.

Such a covenant does not make the deed a "security without limit" for the purposes of stamp duty. *Suffield (Baron)* v. *Inland Revenue Commrs.*, (1908) 1 K. B. 865.

A covenant to "produce" a receipt does not mean "deliver up." *Ex parte Wickens*, (1898) 1 Q. B. 543.

Sometimes provision is made for insuring licences thus:—

[(8) Insure and keep insured against loss or forfeiture the licences attached to the specifically mortgaged premises in their full value and duly pay the premiums and other sums of money payable for that purpose and immediately after each such payment deliver (if required) to the trees the receipt for the same and pay over to the trees all moneys to be received by virtue of any policy effected pursuant to this covenant to the intent that the same may become pt of the specifically mortgaged premises and if default shall be made in insuring or keeping insured the sd licences or in delivering any such receipt if required as afsd the trees may insure and keep insured the sd licences and the coy will on demand repay to the trees every sum of money expended for this purpose with interest at the rate of 5*l.* p.c.p.a. from the time of the same resply having been expended and until such payment the same shall be a charge upon the mortgaged premises.]

By the Licensing (Consolidation) Act, 1910, power to refuse to renew a licence on grounds other than misconduct, &c., is vested in the licensing authority therein defined, but is only exercisable on payment of compensation. And by sect. 2, where there is such a refusal to renew, "a sum equal to the difference

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between the value of the licensed premises (calculated as if the licence was subject to the same conditions of renewal as were applicable immediately before the passing of this Act [15th August, 1904], and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises shall be paid as compensation to the persons interested in the licensed premises." And the amount is to "be divided amongst the persons interested in the licensed premises including the holders of the licences in such shares as may be determined by quarter sessions." Where quarter sessions so determines this determination settles the matter, but where the company in respect of part of the specifically mortgaged premises claims and receives compensation, the trustees not having proved any separate claim, the compensation moneys generally fall to the trustees as part of the specifically mortgaged premises. See *Law Guarantee Soc.* v. *Mitcham and Cheam Brewery Co.*, (1906) 2 Ch. 98; *Noakes* v. *Noakes*, (1907) 1 Ch. 64; *Dawson* v. *Baines' Tadcaster Breweries*, (1907) 2 Ch. 359; *Liverpool Corpn.* v. *Walker*, (1908) 2 K. B. 33; *Bent's Brewery Co.* v. *Dykes*, 100 L. T. 476. As to the facts to be considered in assessing the compensation, see *Lassells & Sharman*, 72 J. P. 323; and *Rex* v. *Sham*, (1910) 2 K. B. 418. As to the lessee's deductions for "unexpired term," see *London County Council* v. *Watney, Combe, Reid & Co.*, (1909) 1 K. B. 637; *Llangattock* v. *Watney, Combe, Reid & Co.*, (1910) A. C. 394; *Wooler* v. *North Eastern Breweries*, 26 T. L. R. 129; and *Knight* v. *City of London Brewery Co.*, (1912) 1 K. B. 10. As to investment of the compensation fund, see *Bent's Brewery* v. *Dykes*, 100 L. T. 476; *Bentley's Yorkshire Brewery*, (1909) 2 Ch. 609. Accordingly it is now not uncommon to make provision as above.

[(9) Pay over to the trees as pt of the specifically mortgaged premises all compensation moneys received under the Licensing (Consolidation) Act, 1910, in respect of any of the specifically mortgaged premises less such proportion thof (if any) as the trees may think it proper that the coy should retain for loss of prospective profit.]

Sometimes a covenant not to endanger licences is inserted.

Sometimes a covenant as follows is inserted:—

Leasehold depreciation.

[(10) At the expiration of the year —— and of each succeeding year furnish to the trees a report by some competent expert approved by the trees stating whether in his opinion there has been any and what depreciation during the past year in the leaseholds forming pt of the specifically mortgaged premises occasioned by the wearing out of the leases or any of them, and shall forthwith pay over to the trees a sum equal to the amount of the depreciation so certified and the sum so pd shall become pt of the specifically mortgaged premises and be dealt with accordingly.]

Protection of purchasers, &c.

28. No purchaser, mortgagor, mortgagee, or other person or coy dealing with the trees, or any receiver appointed by them, or with

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their attorneys or agents shall be concerned to inquire whether the power exercised, or purported to be exercised, has become exercisable, or whether any money remains due on the security of these presents, or as to the necessity or expediency of the stipulations and conditions subject to which any sale shall have been made, or otherwise as to the propriety or regularity of any sale, calling in, collection or conversion, or to see to the applicon of any money pd to the trees or such receiver, and in the absence of *mala fides* on the pt of such purchaser, mortgagor, mortgagee, or other person or coy, such dealing shall be deemed, so far as regards the safety and protection of such purchaser, mortgagor, mortgagee, person or coy, to be within the powers hby conferred, and to be valid and effectual accordingly, and the remedy of the coy and its assigns in respect of any impropriety or irregularity whatsoever in the execution of such trusts shall be in damages only.

Such a proviso does not protect a purchaser who knows of an irregularity which cannot have been waived (*Selwyn* v. *Garfit*, 38 Ch. D. 273); *secus*, if he is ignorant of the irregularity (*Dicker* v. *Angerstein*, 3 Ch. D. 600); as to waiver by company, see *Re Thompson and Holt*, 44 Ch. D. 492. As to the right to ask whether proper notice has been given, see *Life Interest, &c. Co.* v. *Hand-in-Hand, &c. Soc.*, (1898) 2 Ch. 230.

**Further assurance.**

29. After the security hby constituted has become enforceable the coy shall from time to time, and at all times, execute and do all such assurances and things as the trees may reasonably require for facilitating the realisation of the mortgaged premises, and for exercising all the powers, authorities and discretions hby conferred on the trees, and in particular the coy—

(a) Shall execute all transfers, conveyances, assignments, and assurances of the mortgaged premises, whether to the trees or to their nominees.

(b) Shall perform or cause to be performed all acts and things requisite or desirable according to the law of the country in which the mortgaged premises are situate for the purpose of giving effect to the exercise of any of the sd powers, authorities and discretions.

(c) Shall give all notices and orders and directions which the trees may think expedient.

For the purposes of this clause a certificate in writing, signed by the trees for the time being [*or the majority of them as the case may be*], to the effect that any particular assurance or thing required by them is reasonably required by them, shall be conclusive evidence of the fact.

30. The coy hby irrevocably appoints the trees to be the attorneys of the coy, and in the name and on behalf of the coy to execute and do any assurances and things which the coy ought to execute and do under the covenants herein contained, and generally to use the name of the coy in the exercise of all or any of the powers hby conferred on the trees or any receiver appointed by them. Attorneys.

There is no objection to appointing the covenantee attorney. *Furnivall* v. *Hudson*, (1893) 1 Ch. 335.

31. The trees shall not, nor shall any receiver as afsd by reason of the trees, or such receiver entering into possession of the mortgaged premises, or any pt thof, be liable to account as mortgagees in possession, or for anything except actual receipts, or be liable for any loss upon realisation, or for any default or omission for which a mortgagee in possession might be liable. Protection of trustees and receivers.

[32. During the continuance of this security the coy shall allow the trees, or their nominee, at all times to have full access to all books, accounts, and documents of the coy, and shall furnish to the trees or their nominee a copy of every balance sheet, trade account, and profit and loss account prepared by the coy within ten days after its preparation, or such other information (if any) with reference to the affairs and business of the coy as the trees shall from time to time require, and such trees shall be entld, if they think fit, from time to time to nominate an accountant or agent to examine the books, accounts, documents and ppty of the coy, or any pt thof, and to investigate the affairs thof, and the coy shall allow any such accountant or agent to make such examination and investigation, and shall furnish him with all such information as he may require, and shall pay all the costs, charges and expenses of and incident to such examination and investigation.] Accounts and access.

A clause as above is not uncommonly inserted, but in most cases paragraph (2) of clause 27 is considered sufficient.

It was formerly not unusual to insert an attornment clause, but it may be that the attornment renders the mortgagee liable for wilful default in respect of the rent. *Ex parte Punnett*, 16 Ch. D. 226; *Stockton Iron Co.*, 10 Ch. D. 335; *Ex parte Jackson*, 14 Ch. D. 725; see *contra*, *Stanley* v. *Grundy*, 22 Ch. D. 478.

33. The trees shall not by reason of their fiduciary position be in anywise precluded from making any contracts or entering into any transactions with the coy in the ordinary course of the trees' business, and without prejudice to the generality of these provisions it is Financial contracts.

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expressly declared that such contracts and transactions include any contract or transaction in relation to the placing of the stock, shares, debenture stock, debentures, or other securities of the coy.

Where the trustee is a trust and finance company, a clause as above may be desirable.

**Application to the Court.**

34. The trees may at any time after the security hby constituted becomes enforceable, apply to the Ct for an order that the trusts hof be carried into execution under the direction of the Ct, and for the appointment of a receiver or receiver and manager of the mortgaged premises, or any of them, and for any other order in relation to the administration of the trusts hof as they shall deem expedient, and they may assent to or approve of any applicon to the Ct made at the instance of any of the [stockholders] (*debenture holders*), and shall be indemnified by the coy against all the costs and expenses incurred by and in relation to any such applicon or proceedings.

This clause, though commonly inserted, appears only to express what would otherwise be implied, viz., the right to resort to the Court on proper occasions for guidance. It may, however, preclude captious objections to the trustees' conduct.

**Salary to trustees.**

35. The coy shall in each and every year during the continuance of this security, pay to each of the trees for the time being of these presents [as and by way of remuneration for his services as tree] the sum of ——*l.* by equal half-yearly payments, on the —— day of —— and the —— day of —— in each such year, in addition to all travelling and other costs, charges and expenses which he may incur in relation to the execution of the trusts hby in him reposed, and the first of such half-yearly payments shall be made on the —— day of —— next; [and the sd salary shall continue payable until the trusts hof shall be finally wound up, and whether or not a receiver or receiver and manager shall have been appointed or the trusts of this indenture shall be in course of administration by or under the direction of the Ct].

As to omitting the words within the first pair of brackets, see *supra*, p. 88.

The trustees, being in a fiduciary position, cannot take any salary or remuneration from the company without express authority, *supra*, p. 87.

Sometimes it is provided that the said yearly sum of ——*l.* should be increased to ——*l.* as from the time when the security hereby constituted becomes enforceable until the trusts hereof shall have been fully executed; and that the appointment of a receiver shall not affect or prejudice the trustees' right to remuneration as aforesaid.

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Provisions supplemental to Trustee Act, 1925, in favour of trustees.

36. By way of supplement to the Tree Act, 1925, it is expressly declared as follows (that is to say):—

(1) That the trees may, in relation to these presents, act on the opinion or advice of any lawyer, valuer, surveyor, broker, auctioneer, or other expert, [whether] obtained by the trees [or by the coy or otherwise], and shall not be responsible for any loss occasioned by so acting.

(2) That any such advice or opinion may be sent or obtained by letter, telegram, cablegram [or telephonic message], and that the trees shall not be liable for acting on any advice or information purporting to be conveyed by any such letter, telegram, or cablegram [or telephonic message], although the same shall contain some error, or shall not be authentic.

(3) That the trees shall be at liberty to accept a certificate, signed by the chairman of the coy and any two directors of the coy to the effect that any particular dealing or transaction, or step or thing, is, in the opinion of the persons so certifying, expedient, as sufficient evidence that it is expedient, and the trees shall be in nowise bound to call for further evidence, or for any certificate, or be responsible for any loss that may be occasioned thereon.

(4) That the trees shall not be responsible for the consequences of any mistake or oversight, or error of judgment or forgetfulness, or want of prudence on the pt of the trees or any attorney, receiver, agent, or other person appointed by them hereunder.

(5) That the trees shall not be responsible for any misconduct on the pt of any attorney, receiver, agent, or other person appointed by them hereunder, or bound to supervise the proceedings of any such appointee.

As to the necessity for such provision, see *National Trustees Co.* v. *General Finance Co.*, 21 T. L. R. 522.

Where quotation on London Stock Exchange is required, insert the following paragraph (4) in the place of paragraphs (4) and (5) above, and omit all words in square brackets in this form:—

(4) That no tree hof shall be liable for anything whatever, except a breach of trust knowingly and intentionally committed by him.

(6) That the trees shall not be bound to give notice to any person or persons of the execution hof, [or to see to the performance or observance of any of the obligations hby imposed on the coy], or in any way to interfere with the conduct of the coy's business, unless and until the security

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hby constituted shall have become enforceable and the trees shall have determined to enforce the same.

(7) That the trees shall, as regards all the trusts, powers, authorities, and discretions hby vested in them, have absolute and uncontrolled discretion as to the exercise thof, in relation to the mode of and time for the exercise thof, and in the absence of fraud, they shall be in nowise responsible for any loss, costs, damages, or inconvenience that may result from the exercise or non-exercise thof.

(8) That the trees are to be at liberty to place all deeds and other documents certifying, representing, or constituting the title to any of the mortgaged premises, and to any other assets for the time being in their hands, in any safe or receptacle selected by them, or with any banker or banking coy, or solicitor or firm believed by them to be of good repute [whether at home or abroad], and the trees shall not be responsible for any loss incurred in connection with any such deposit, and the trees may pay all sums required to be pd on account of or in respect of any such deposit.

(9) That with a view to facilitate sales, leases, and other dealings, under clause 19 hof, the trees shall have full power prospectively to consent to any specified transactions conditionally, on the same conforming to specified conditions approved by the trees, and in particular any sale of ppty at or above a specified price, and any lease of ppty at or above a specified rent, and any purchase of ppty at or below a specified price.

(10) That the trees shall have power to determine all questions and doubts arising in relation to any of the provisions hof, and every such determination, whether made upon a question actually raised or implied in the acts or proceedings of the trees shall be conclusive, and shall bind all persons interested under these presents.

Under sect. 61 of the Trustee Act, 1925 (replacing the Judicial Trustees Act, 1896, s. 3), the Court is invested with a large discretionary power to grant relief to trustees for negligence or breach of trust where they have acted "honestly and reasonably and ought fairly to be excused."

**Trustees may employ agents and act and charge professionally.**

37. Any tree hof may, in the conduct of the trust business, instead of acting personally, employ and pay an agent, whether being a solicitor or other person, to transact, or concur in transacting, all business, and to do, or concur in doing, all acts required to be done in the trust, and any tree, being a solor, broker, or other person engaged

in any profession or business, shall be entld to be pd all professional and other charges for business transacted and acts done by him or his firm in connection with the trusts hof [including acts which a tree not being in any profession or business could have done personally]. **Form 81.**

Omit words in brackets if quotation on London Stock Exchange is required.

See now the Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25). But this Act does not appear to touch a solicitor who is trustee of the mortgage. He may, however, be entitled to charge profit costs where he is acting in litigation on behalf of himself and his co-trustees. *Re Corsellis*, 34 Ch. D. 675; and see Ann Pr., Solicitors.

The clause used to contain the words "including the receipt and payment of money" after the words "to be done in the trust" so as to meet *Re Bellamy*, 24 Ch. D. 387, and *Re Flower*, 27 Ch. D. 592; but the matter is now covered by sect. 23 of the Trustee Act, 1925, *supra*, p. 102.

As to the operation of somewhat similar clauses, see *Re Fish*, (1893) 2 Ch. 413; *Clarkson* v. *Robinson*, (1900) 2 Ch. 722, and article in 47 S. J. 25.

Indemnity of trustees, and their receivers, attorneys, and other agents.

38. Without prejudice to the right to indemnity by law given to trees, the trees, and every receiver, attorney, manager, agent or other person appointed by the trees hereunder, shall be entld to be indemnified out of the mortgaged premises in respect of all liabilities and expenses incurred by them in the execution, or purported execution, of the trusts hof, or of any powers, authorities, or discretions vested in them pursuant to these presents [including liabilities and expenses consequent on any mistake, oversight, error of judgment, forgetfulness, or want of prudence on the pt of the trees or any such appointee], and against all actions, proceedings, costs, claims and demands in respect of any matter or thing done or omitted in anywise relating to the premises, and the trees may retain and pay out of any moneys in their hands arising from the trusts of these presents all sums necessary to effect such indemnity.

Omit words in brackets if quotation on London Stock Exchange is desired.

As to indemnity, see *supra*, p. 84.

Payment by company on demand of moneys to trustees, receivers, &c.

39. The coy shall, on demand by the trees, or any receiver, attorney, manager, agent, or other person appointed by the trees pursuant hto out of the general assets, pay every sum of money which shall from time to time be payable to any such person under any provision herein contained, together with interest at the rate of 5 p.c.p.a. as from the date when the same shall have been advanced or pd or become payable or due; and as regards liabilities the coy will on demand pay and satisfy or obtain the release of such persons from such liabilities and if any sum or sums payable under this clause shall be pd by the trees out of the specifically mortgaged premises, the coy shall forthwith on demand recoup the same to the specifically mortgaged premises.

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Trustees may arrange as to application of stock proceeds.

[40. The trees may, if they think fit, make any arrangement, whether with the coy or with any other person, for ensuring the applicon of the issue price of the stock or any pt thof to the payment off of any sums which it shall be necessary or expedient to pay in order to facilitate the performance by the coy of any of its obligations under clause —— hof, and the trees may from time to time assent to any modification or alteration of any such arrangements, or to the abrogation thof, wholly or in pt, and may waive compliance with such arrangements or any pt thof, and may release or suspend any of the terms thof.]

Such a clause is sometimes required, *e.g.*, where Form 99 is used.

Power for company to withdraw property.

41. The coy shall be at liberty at any time or times during the continuance of this security, with the permission of the trees, to withdraw any of the specifically mortgaged premises from such of the trusts hof as exclusively relate to the specifically mortgaged premises upon substituting other ppty, whether of the same or a different tenure or kind, but of a value equal to or greater than the value of the ppty proposed to be withdrawn; but before the trees permit the coy to withdraw any ppty under this clause, the coy must prove to the satisfaction of the trees that the ppty proposed to be substituted for the same is of a value equal to or greater than the ppty proposed to be withdrawn, and that such ppty is suitable for the purposes of the coy, and upon such proof being made must demise such ppty to the trees or charge the same by way of legal mortgage in favour of the trees or cause such ppty to be conveyed to the coy with a reservation of a legal term in favour of the trees in such manner as the trees shall direct upon the trusts hof relating to the specifically mortgaged premises, and thereupon the trees shall be at liberty to release to the coy, or concur in any conveyance by the coy of the ppty proposed to be withdrawn, free from such of the trusts and provisions hof as relate to the specifically mortgaged premises, and a declaration in writing, signed by the trees, that the proof afsd has been furnished to their satisfaction shall be conclusive evidence thof in favour of the trees, and the following provisions shall have effect; that is to say:—

(a) The trees may accept a certificate, signed by two-thirds of the directors of the coy, to the effect that any such ppty proposed to be substituted is, in their opinion, suitable for the purposes of the coy's business as [sufficient] evidence of the fact.

(b) The trees shall be at liberty to accept the fact that the coy has given a specified price for any such ppty proposed to be substituted as [sufficient] evidence that the same is worth

such price; but they [may] require a written report of a valuer believed by them to be of good repute as to such value, and such ppty shall not be treated as of greater value than the price pd by the coy for the same, *plus*, in the case of land, any expenditure by the coy in or in relation to the construction or repair of buildings thereon with their accessories or conveniences.

(c) The trees shall be in nowise responsible for any error in any such certificate or valuation, or for any loss that may be occasioned by acting thereon, and shall be at liberty to accept such title to such hereditaments as the coy shall obtain, provided that the trees shall be advised that the title so obtained is one which is a reasonably good holding title or a title not likely to be disturbed.

(d) The ppty withdrawn shall, so far as the coy shall be or remain interested therein, be and be deemed pt of the general assets and be subject to the floating charge created by clause 9 hof, and otherwise to the trusts and provisions herein declared and contained of and concerning the general assets.

Land should not be conveyed to the trustees in fee simple, but if conveyed by a vendor direct to the trustees, should be conveyed to the company with the grant or reservation of a legal term in favour of the trustees. See Law of Property Act, 1925, s. 85, and the Form 5 in Sched. V. of the Act.

Where quotation on the London Stock Exchange is desired, the words in brackets above must be omitted, and in such case in paragraph (b) the word "shall" should be substituted for "may."

Notice to stockholders (registered).

42. Any notice may be given by the coy or by the trees to any [holder of stock] (*debenture holder*) by sending the same through the post in a prepd letter addressed to such holder at his registered place of address, and any notice so given shall be deemed to have reached the holder on the day following that on which it is posted. When the trees consider it expedient, any notice, instead of being served as afsd, may be given by them to the [stockholders] (*debenture holders*) or any of them by advertising the same in the *Times* and one other London daily newspaper, and a notice so advertised shall be deemed to be served on the [stockholders] (*debenture holders*) on the day [following that] on which it is advertised.

The above is for use where the stock is all payable to the registered holder. Where there is provision for the issue of certificates to bearer the following clause should be substituted:—

Any notice may be given by the coy or by the trees to any [holder of stock as to registered stock] (*debenture holder as to registered debentures*) by sending the same through the post in a prepd letter

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addressed to such holder at his registered place of address, and as regards [stock represented by certificates to bearer] (*debentures to bearer*) by advertising the same and any notice so given shall be deemed to have reached the holder on the day following that on which it is posted or advertised, and any advertisement afsd shall be published at least once in the *Times* and one other London daily newspaper, and whenever the trees think fit a notice by them may be given to the [stockholders] (*debenture holders*) whether registered or otherwise, by advertising the same as afsd. An advertisement afsd need not be addressed to the [stockholder] (*debenture holder*) by name.

**Meetings of stockholders.**

43. The provisions contained in the third schedule hto shall have full effect in the same manner as if such provisions were herein set forth.

It is now well settled that this reference to the schedule effectually incorporates it with the trust deed: *verba relata inesse videntur*. *Sneath* v. *Valley Gold*, (1893) 1 Ch. 477. Whether part of a document is set out in a schedule is a mere matter of drafting. *Att.-Gen.* v. *Lamplough*, 3 Ex. D. 214.

**Waiver.**

44. The trees may from time to time and at any time [whenever they think it expedient in the interests of the [stockholders] (*debenture holders*)] waive, on such terms and conditions as to them shall seem expedient, any breach by the coy of any of the covenants in these presents contained.

The words in brackets are required by the London Stock Exchange.

**Delegation.**

45. The trees may [whenever they think it expedient in the interests of the [stockholders] (*debenture holders*)] delegate to any person or persons all or any of the trusts, powers and discretions vested in them by these presents, and any such delegation may be made upon such terms and conditions, and subject to such regulations (including power to sub-delegate), as the trees may [in the interests of the [stockholders] (*debenture holders*)] think fit.

The words in brackets are required by the London Stock Exchange.
As to the need for this clause, see *supra*, p. 93.

**Power of majority.**

46. Whenever there shall be more than two trees hof, the majority of such trees shall be competent to execute and exercise all the trusts, powers and discretions hby vested in the trees generally.

In the absence of express power, the majority has no power to bind the minority. All must concur. *Luke* v. *South Kensington Hotel*, 11 Ch. D. 126.

46*a*. *The coy shall pay the principal moneys and interest secured by the debentures in accordance with the tenor thof resply, and shall observe and perform the several conditions indorsed thereon resply.*

46b. *At any time after the security hby constituted becomes enforceable, and the trees shall have determined or become bound to enforce the same, they may, by notice in writing to the coy, declare that the debentures are payable, and the principal moneys thereby secured shall thereupon become payable accordingly.*

46c. *The coy shall at all times keep an accurate register of the debentures, showing the number and amount of such debentures and the date of issue, and the trees and the debenture holders, or any of them, shall be at liberty at all reasonable times to inspect the sd register, and to take copies of or extracts from the same or any pt thof.*

This register is now required to be open to inspection by the debenture holders. See sect. 73, *supra*, p. 200.

Power to modify trusts.

47. The trees may concur with the coy in making any modifications in these presents which, in the opinion of the trees, it shall be expedient to make with a view to obtaining a quotation on the London Stock Exchange for the stock, provided that the trees shall be of opinion that such modifications will not be prejudicial to the interests of the stockholders.

A clause as above is sometimes found very convenient, and may save the need for a meeting of the debenture stockholders.

Discharge and cesser of term.

48. Upon proof being given to the reasonable satisfaction of the trees that the holders of all the [stock] (*debentures*) entld to the benefit of the trusts herein contained, and for the time being issued, have been pd off or satisfied, and upon payment of all costs, charges and expenses incurred by the trees in relation to these presents, the trees shall, at the request of the coy, discharge the mortgaged premises, or such pt thof as may remain vested in them, from the trusts herein contained, or otherwise release the mortgaged premises from this security, and thereupon the term [or terms] hby granted to the trees shall cease and determine.

The property should be discharged by receipt indorsed on the deed as required by sect. 115 of the Law of Property Act, 1925. The receipt must state the name of the person paying the money, and must be executed by the person in whom the charge or the property is vested and who is entitled to give a receipt for the money. The receipt need not be under seal. *Simpson* v. *Geoghegan*, W. N. (1934) 232.

Where debentures are issued, as in clause 9a above, add to the above clause 48 the words "and surrender to the company the said debentures, or such of the same as shall then be outstanding and vested in the trustees or trustee."

Statutory power to appoint new trustees.

49. The statutory power of appointing new trees shall apply to these presents and be vested in the coy [but a tree so appointed must, in the first place, be approved by a resolution of the stockholders

**Form 81.** passed in the manner specified in the third schedule hto]. A corporation or coy limtd or unlimtd may be appointed to be a tree of these presents and if thought fit a sole tree hof.

Or the power may be vested in a meeting of stockholders. In this case the clause should provide that the meeting appoint some person to execute a deed for that purpose.

The London Stock Exchange authorities have of late required the insertion of the words in brackets.

A body corporate may be appointed a new trustee under the ordinary power. *In re Thompson's Settlement Trusts*, (1905) 1 Ch. 229.

**Beneficiaries entitled.**

50. Each of the stockholders shall be entld to sue for the performance and observance of provisions hof so far as his stock is concerned, save where the trees have a discretion hereunder.

See cases, *supra*, pp. 9—12.

**Retirement. Costs.**

51. A tree hof may retire at any time without assigning any reason and without being responsible for any costs occasioned by such retirement.

**General covenant by company.**

52. The coy hby covenants with the present trees that the coy will duly perform and observe the obligations hby imposed on it.

A company is now bound to supply copies of the trust deed on request, see sect. 73.

IN WITNESS, &c.

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The SCHEDULES above referred to.

FIRST SCHEDULE.

[Conditions as to issue of Debenture Stock.]

(*Form of Debenture.*)

[N.B.—Where the trust deed is to secure debentures, and not debenture stock, the following conditions will be omitted, and in lieu thereof a form of debenture will be given, framed in accordance with Form 39, or Form 42, or Form 61.]

**Redemption.**

[The following are the conditions upon which the debenture stock of the —— Coy, Limtd, secured by trust deed, dated, &c., is to be issued.

1. At any time after the —— day of —— the coy may give not less than six months' notice to the stockholders or any of them stating its intention to redeem the stock held by them resply at the rate of ——*l.* for every 100*l.* of the stock, and at the expiration

Form 81.

of the notice such stock will be redeemed accordingly. Any of the stock not previously redeemed will be redeemed on the —— day of —— or so soon as the security hby constituted becomes enforceable if that event occurs before the sd —— day of ——. And as and when any of the stock ought to be redeemed in accordance with these presents, the coy will, subject to these conditions, pay to the several holders of the stock, or those whose stock should be redeemed, the redemption moneys for the same calculated at the rate of ——*l.* per 100*l.* of the stock in the event of the stock becoming redeemable by reason of such notice as afsd being given, and at the rate of ——*l.* per 100*l.* in the event of the stock becoming redeemable by reason of an effective resolution being passed for the voluntary winding-up of the coy [with a view to reconstruction or amalgamation], and in any other case at the rate of 100*l.* per 100*l.* of the stock; such payments will be made at the registered office of the coy. For the purpose of this clause any notice may be given to the stockholders, or any of them, in manner provided in clause 42 of the above written indenture, and as from the time when any stock ought to be redeemed as afsd it shall cease to carry interest unless the coy makes default in paying the redemption moneys when due.]

The Stock Exchange Rules require provision for a premium in the event of the security becoming enforceable by voluntary liquidation, where a premium is payable on repayment on a fixed date or on notice.

Sometimes the words "with a view to reconstruction and amalgamation" are omitted. As to the meaning of these words, see *South African Supply, &c. Co.*, (1904) 2 Ch. 268.

Sometimes the following clause is adopted:—

The stock will be paid off when and so soon as the security hereby constituted becomes enforceable, and thereupon the company will, subject to these conditions, pay to the several holders of the stock the nominal value of the stock held by them respectively; but so that if this stock shall become payable owing to the voluntary winding-up of the company, the redemption value shall be calculated according to the average London market middle price per cent. of the stock [*or* mean market value in London of the stock] during the three years immediately preceding the date when the security aforesaid became enforceable; but in any event the value shall not be less than 110*l.* per 100*l.* of the stock.

And if any difference shall arise as to the average market price aforesaid [*or* mean average value aforesaid], the trustees shall procure some member of the London Stock Exchange to certify in writing what is the redemption value calculated as aforesaid, and the sum so certified shall be deemed to be the value calculated as aforesaid. Such payments will be made at the registered office of the company. For the purpose of this clause any notice may be given to any holder of stock in accordance with clause 42, above, and where any stock ought to be redeemed it shall cease to carry interest unless the company makes default in payment.

**Form 81.** The following is another somewhat special clause:—

The stock shall be redeemable as follows:—

(a) At any time after the 1st day of January, ——, the coy may redeem the stock or any pt thof, not being less than ——*l.*, at any one time.

(b) Should the coy at any time before the sd 1st day of January, ——, enter into a binding agreemt for the sale of its undertaking, it may redeem the whole of the stock.

(c) Whenever the coy at any time before the 1st day of January, ——, enters into a binding agreemt for the sale of any section of its undertaking, it may redeem a portion of the stock not exceeding one-third of the purchase money for such section, and not less than ——*l.* of such stock.

(d) Whenever any stock becomes redeemable as afsd, the coy may by notice in writing to the stockholders, or where the whole of the stock is not to be redeemed to the holders of such portions of the stock as the coy selects, declare its intention to redeem the stock or such portion at the price of 105*l.* for every 100*l.*, and at the expiration of the notice such stock will be redeemed accordingly.

(e) Any of the stock not previously redeemed will be redeemed at par when and so soon as the security hby constituted becomes enforceable, and the redemption price shall be par, save that if the security becomes enforceable by reason of an effective resolution for the voluntary winding-up of the coy [for the purposes of reconstruction or amalgamation] the redemption price shall be 105*l.* per 100*l.* of the stock.

(f) When any stock ought to be redeemed in accordance with these presents, the coy shall, subject to these conditions, pay to the several holders of the stock so to be redeemed the redemption moneys for the same, in the one case at 105*l.* p.c., and in the other case at par. Such payments shall be made at the registered office of the coy, but for the purposes of this clause any notice may be given, &c. (See p. 347 *supra*.)

**Interest.** 2. The stock shall carry interest at the rate of —— p.c.p.a., and the coy will pay to the stockholders interest on their respive shares therein at the rate of —— p.c.p.a. Such interest will be pd half-yearly, on the —— day of ——, and —— day of ——, the first payment thof to be made on the ——day of ——, 19—.

**Ordinary certificates.** 3. Every holder of a share in the stock will be entld to a certificate under the seal of the coy stating the amount of the stock held by him,

and every such certificate shall refer to these presents [and be in the form or to the effect following]:— **Form 81.**

Form (registered owner).

The —— Coy, Limtd.*

No. ——. ——*l.*

Issue of ——*l.* Debenture Stock, 19—, made pursuant to clause —— of the coy's arts of asson, and to a resolution of the board dated ——.

Bearing interest at the rate of —— p.c.p.a., payable —— January and —— July.

[The stock is redeemable at ——*l.* p.c. at any time after the —— day of —— on six months' notice from the coy. See notes to Form 37, *supra*.]

This is to certify that ——, of ——, is the registered holder of ——*l.* of the above stock, which stock is constituted and secured by trust deed dated the —— day of —— and made between the coy of the one pt and —— of the other pt [and secured by debentures issued to the trees pursuant to that deed], and is issued subject to the provisions contained in that deed.

Given under the common seal of the coy this —— day of ——.

NOTE.—The coy will not register a transfer of any stock without the production of the certificate relating to such stock, which certificate must be surrendered before any transfer, whether of the whole or any portion thof, can be registered, or a new certificate can be issued in exchange. The coy will not recognize any fraction of 1*l.* stock. A fee not exceeding 2*s.* 6*d.* will be charged on the registration of every transfer.

Where quotation is required it is better to omit the form and stop at the word "presents," for not uncommonly the Stock Exchange authorities object to the wording of the certificate.

Sometimes the deed provides for several issues with modified conditions. In such cases the words "but in the case of stock of a special issue, with such variations and additions, if any, as may be necessary" should be inserted just before the form.

Registered holder to be deemed absolute owner.

4. Save as in these conditions otherwise provided the coy will recognize the registered holder of any stock, his exors or admors, as the absolute owner or owners thof and all persons may act accordingly, and the coy shall not, save as herein otherwise provided and except as ordered by a Ct of competent jurisdiction or as by statute required, be bound to take notice of any trust or equity affecting the ownership

* *As to the requirements of the* London Stock Exchange in connection with such certificates, see note to Form 37 on p. 270, *supra*.

**Form 81.**

of the stock or the rights incident thto, and the receipt of such registered holder, his exors or admors, for the interest from time to time accruing due in respect thof, and for any moneys payable upon the redemption of the same shall be a good discharge to the coy.

**Survivorship.**

5. In case of the death of any one of the joint holders of any registered stock the survivor will be the only person recognized by the coy as having any title to or interest in such stock.

**Corporation may hold in joint tenancy.**

6. A body corporate may be registered as one of the joint holders of stock.

It was held in *Law Guarantee Soc.* v. *Bank of England*, 24 Q. B. D. 406, that a body corporate and an ordinary person could not hold in joint tenancy, but by the Bodies Corporate (Joint Tenancy) Act, 1899, it is enacted that—

1.—(1) A body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual or two or more bodies corporate become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants. Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

(2) Where a body corporate is joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

**Right of transfer.**

7. Every holder of registered stock will be entld to transfer the same or any pt thof [not involving a fraction of 1*l.*] by an instrument, in writing, in the usual common form, or in the form following, or as near thto as the circumstances will admit:—

The —— Coy, Limtd.

I, ——, of ——, in conson of the sum of ——*l.*, pd to me by ——, of ——, do hby transfer to the sd —— (hnftr called "the transferee") ——*l.* of the debenture stock of the above-named coy, To hold the same unto the transferee subject to the several conditions on which I held the same immediately before the execution hof, and I, the transferee, do hby agree to take the sd stock subject to the same conditions.

As witness our hands this —— day of ——.

Witness ——.

**Execution of transfer.**

8. Every such instrument must be signed both by the transferor and transferee, and the transferor shall be deemed to remain owner

of such stock until the name of the transferee is entered in the register (hnftr mentd) in respect thof.

Transfer to be left at office, &c.

9. Every instrument of transfer must be left at the registered office of the coy for registration, accompanied by the certificate of the stock to be transferred, and such other evidence as the directors may require to prove the title of the transferor, or his right to transfer the stock, and thereupon the transferee will be recognized as entld to the stock free from any equity, set-off, or cross-claim of the coy against the transferor.

As to the importance of this and the preceding clause, see *Rhodesia Goldfields, Partridge* v. *Same*, (1910) 1 Ch. 239.

And will be retained.

10. All instruments of transfer which shall be registered will be retained by the coy.

Fees on transfer.

11. A fee not exceeding 2*s*. 6*d*. will be charged for the registration of each transfer, and must, if required by the directors, be pd before the registration of the transfer.

Closing register of transfers.

12. No transfer will be registered during the fourteen days immediately preceding the sd —— day of —— or —— day of ——, in each year.

Transmissions.

13. The exors and admors of a decd holder of registered stock (not being one of several joint holders) shall be the only persons recognized by the coy as having any title to such stock.

Death or bankruptcy of stockholder.

14. Any person becoming entld to registered stock in consequence of the death or bankruptcy of any holder of such stock, upon producing such evidence that he sustains the character in respect of which he proposes to act under this condition, or of his title, as the directors shall think sufficient, and paying a fee of 2*s*. 6*d*., may be registered himself as the holder of such stock, or, subject to the preceding conditions as to transfer, may transfer such stock.

When interest may be withheld.

15. The coy shall be at liberty to retain the interest payable upon any share of registered stock which any person under the last preceding condition is entld to transfer until such person shall be registered, or duly transfer the same.

Certificates to bearer.

16. Upon the applicon of a holder of a share of registered stock the coy will issue to him a certificate to bearer specifying the share of such stock held by him. Every holder of registered stock will be entld at his discretion to several such certificates, each for a pt not being less than [100*l*.] of his registered stock. Every certificate to bearer shall refer to these presents, and shall be in the form or to the

**Form 81.** effect following [but in the case of stock of a special issue with such variations and additions, if any, as may be necessary]:—

**Form (bearer).**

The —— Coy, Limtd.

No. ——. ——*l.*

Debenture stock, carrying interest at the rate of —— p.c.p.a., payable —— January and —— July.

[See Form 38, *supra*.]

This is to certify that the bearer is the proprietor of ——*l.* of the above-mentd debenture stock, which stock is constituted and secured by trust deed, dated the —— day of ——, between the coy of the one pt and —— of the other pt, and is subject to the provisions contained in that deed.

Given under the common seal of the coy this —— day of ——.

**Form of coupon.**

(Form of Interest Coupon.)

The —— Coy, Limtd.

No. ——. Six months' interest on debenture stock.

Certificate to bearer, No. ——. For ——*l.* Payable at —— (less ——*l.* being income tax at the rate of —— in the pound). Secretary.

[Very commonly clauses 16—23 and 28 are omitted.]

**Request to issue.** 17. A certificate to bearer will not be issued except upon a request in writing signed by every person for the time being entered in the register hnftr mentd as the holder of the stock in respect of which the certificate to bearer is to be issued.

**Form of request.** 18. The request made must be in such form, and authenticated in such manner, as the directors shall from time to time require, and must be lodged at the office of the coy, and the certificates, if any, then outstanding in respect of the stock intended to be included in the certificate to bearer must at the same time be delivered up to the sd directors to be cancelled. There shall be pd to the coy for every certificate to bearer the sum of 1*s.*, and also the amount of any stamp duty payable thereon.

**Fee.**

**New certificates.** 19. If the bearer for the time being of a certificate to bearer shall surrender the same, together with the coupons for future interest belonging thto, to the directors to be cancelled, the directors will at his request issue to him several certificates to bearer, each for a pt not being less than [100*l.*] of the stock specified in the certificate so delivered up.

Form 81.

20. If the bearer of a certificate to bearer shall surrender the same, together with the coupons for future interest belonging thto, to the directors to be cancelled, and shall therewith lodge at the office of the coy a declaration, in writing, signed by him, and in such form as the directors shall from time to time direct, requesting that his name may be entered in the register hnftr mentd as the holder of the stock specified in the same certificate, or any pt thof, and stating in such declaration his name and condition or occupation and address, his name will be entered in the sd register in respect of the stock specified in the sd certificate.

Re-entry on register.

21. The coy will recognize the bearer of a certificate to bearer as the absolute owner of the share of the stock therein specified, and shall not, except as by some Ct of competent jurisdiction ordered, be bound to take notice or see to the execution of any trust, whether express, implied or constructive, to which such share of stock may be subject; and the receipt of such person for any moneys payable upon the redemption of the same share of stock shall be a good discharge to the coy, notwithstanding any notice it may have, whether express or otherwise, of the right, title, interest, or claim of any other person to or in such share of stock or moneys.

Bearer of certificate absolute owner.

22. With every certificate to bearer there will be issued coupons providing for the interest thereafter to accrue due in respect of the share of the stock therein specified up to the time fixed for the redemption [*or if no time fixed, or the time fixed is remote, the following words can be used instead of the last eight:* " during a period of ten years, and a voucher for fresh coupons; and whenever such coupons, or any coupons subsequently issued under this clause, are exhausted, the coy will, on presentation of the appropriate voucher, and on production, if required, of the certificate, issue to the person presenting the same further coupons providing for the interest thereafter to accrue in respect of the stock specified in the certificate during a further fixed period, and also a voucher for further coupons "].

Coupons.

23. The coy will recognize the bearer of each coupon as the absolute owner of the interest moneys therein specified, and shall not (except as by some Ct of competent jurisdiction ordered) be bound to take notice or see to the execution of any trust, whether express, implied or constructive, to which such moneys may be subject, and the delivery of such coupon shall be a good discharge to the coy for the same moneys.

Bearer of coupon only recognized.

**Conditions 16—23 and 28 are often omitted, and the other conditions modified accordingly.**

24. The interest upon the registered stock may be pd by cheque sent through the post to the registered address of the holder, or in

Interest, how to be paid.

**Form 81.**

the case of joint holders to the registered address of that one of the joint holders who is first named on the register in respect of such stock. Every such cheque shall be made payable to the order of the person to whom it is sent, and payment of the cheque shall be satisfaction of the interest.

Receipt of one of joint holders.

25. If several persons are entered in the register as joint holders of any share of stock, then, without prejudice to the last preceding clause, the receipt of any such person for the interest from time to time payable in respect of such share shall be as effective a discharge to the company as if the person signing the same receipt were the sole registered holder of such share of stock.

Loss.

26. If any certificate [or coupon] issued pursuant to these conditions be worn out or defaced, then, upon production thof to the directors, they may cancel the same, and may issue a new certificate [or coupon] in lieu thof: and if any such certificate relating to registered stock be lost or destroyed, then upon proof thof to the satisfaction of the directors, or, in default of proof, on such indemnity as the directors deem adequate being given, a new certificate in lieu thof may be given to the person entld to such lost or destroyed instrument. An entry as to the issue of the new certificate [or coupon] and indemnity (if any) will be made in the register hnftr mentd. There shall be pd to the coy, in respect of any new certificate [or coupon] issued under this clause, such sum as the directors shall determine, not exceeding the sum of 1*s.*, and also all stamp duty (if any) payable on the fresh certificate.

Register.

27. A register of the stock will be kept by the coy in one or more books, and there shall be entered in such register—

(1) The names and addresses and descriptions of the holders for the time being of the stock.

(2) The amount of the stock held by every such person.

(3) The date at which the name of every such person was entered in respect of the stock standing in his name, and every pt thof.

[(4) Stock of any special issue shall be distinguished in the sd register accordingly.]

Any change of name or address on the pt of any registered holder shall forthwith be notified to the coy, which, on being satisfied thof, shall alter the register accordingly.

How to be altered on issue of certificate to bearer.

28. On the issue of a certificate to bearer, the coy shall strike out of the sd register the name or names of the person (if any) then entered as the holder of the stock specified in such certificate, and shall enter the following parlars:—

(1) The fact of the issue of the certificate to bearer.

(2) A statement of the amount of the stock included in such certificate.

(3) The date of the issue of the certificate to bearer.

29. The trees and any holder of a share in registered stock or bearer of a certificate to bearer shall, without any payment, be entld, at all reasonable times, to inspect the sd register. Inspection.

30. No notice of any trust, express, implied, or constructive, shall be entered on the register in respect of any share in the stock. No notice of trusts.

31. In these conditions, unless there be something in the subject or context inconsistent therewith, Interpretation.

"The coy" means The —— Coy, Limtd.

"The directors" means the directors for the time being of the coy.

"The stock" means the sd debenture stock created as above mentd.

"Registered stock" means so much of the stock as shall not for the time being be represented by certificates to bearer.

Sometimes a clause is inserted in the above schedule to the effect that "each stockholder shall be entitled to receive a printed copy of these presents on payment to the company of the sum of one shilling." But see sect. 73.

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SECOND SCHEDULE.

First Part. (Freeholds.)

Second Part. (Leaseholds.)

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THIRD SCHEDULE.

*Meetings of Debenture* [*Stockholders*] (*holders*).

1. The trees or the coy may resply at any time convene a meeting of the [stockholders] (*debenture holders*). Whenever the coy is about to convene any such meeting, it shall forthwith give notice in writing to the trees of the place, day, and hour thof, and of the nature of the business to be transacted thereat. Who may convene.

It is now very common to provide, as mentioned above, p. 156, for the convention of meetings of debenture and debenture stockholders, and to vest in such meetings specified powers. Occasionally it is provided that the trustees shall convene such a meeting on the requisition in writing of a specified proportion of the debenture holders, thus:—

And the trees shall do so upon a requisition in writing of holders of [one-tenth] or more of the nominal amount of [stock] (*debentures*) for the time being outstanding.

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The London Stock Exchange authorities not uncommonly require the insertion of the above words just before the word "whenever."

As to the convening of meetings and the proceedings thereat generally, see Part I. (15th ed.) p. 648 *et seq.*

**Notice of meeting to the stock-holders.**

2. Seven days' notice at least to the [stockholders] (*debenture holders*), specifying the place, day and hour of meeting, shall be given previously to any meeting of the [stockholders] (*debenture holders*). Such notice shall be given in accordance with clause 42 of the trust deed. [It shall not be necessary to specify in any such notice the nature of the business to be transacted at the meeting thereby convened.]

**Quorum.**

3. Subject to clause 18*a* of this Schedule, at any such meeting persons [present in person or by proxy and] holding one-tenth of the [nominal amount of the stock] (*debentures*) for the time being outstanding shall form a quorum for the transaction of business, and no business shall be transacted at any meeting unless the requisite quorum be present at the commencement of business.

**Chairman.**

4. Some person nominated by the trees shall be entld to take the chair at every such meeting, and if no such person is nominated, or if at any meeting the person nominated shall not be present within fifteen minutes after the time appointed for holding the meeting, the [stockholders] (*debenture holders*) present shall choose one of their number to be chairman.

**Trustees and directors may attend.**

5. The trees, and their solors, and any directors or secretary of the coy, may attend any such meeting.

**When quorum not present.**

6. Subject to clause 18 of this Schedule, if within half an hour from the time appointed for any meeting of the [stockholders] (*debenture holders*) a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same time and place, and if at such adjourned meeting a quorum is not present [the [stockholders] (*debenture holders*) present shall form a quorum, and may transact any business which a meeting of [stockholders] (*debenture holders*) is competent to transact].

Sometimes, instead of the words in brackets, it is provided that "the meeting shall stand dissolved."

**How questions decided.**

7. Every question submitted to a meeting of the [stockholders] (*debenture holders*) shall be decided, in the first instance, by a show of hands, and in case of an equality of votes the chairman shall, both on the show of hands and at the poll, have a casting vote, in addition to the vote or votes (if any) to which he may be entld as a [stockholder] (*debenture holder*).

**Declaration by chairman.**

8. At any general meeting of the [stockholders] (*debenture holders*) unless a poll is demanded by the chairman or at least three [stockholders] (*debenture holders*) a declaration by the chairman that a resolution has been carried, or carried by a particular majority, or

lost, or not carried by a particular majority, shall be conclusive evidence of the fact. **Form 81.**

As to the meaning of "conclusive," see Part I. (15th ed.) p. 997.

9. If at any such meeting a poll is demanded as afsd, it shall be taken in such manner, and either at once or after an interval or adjournment as the chairman directs, and the result of such poll shall be deemed to be the resolution of the meeting at which the poll was demanded. Poll.

10. The chairman may, with the consent of any such meeting, adjourn the same from time to time and from place to place. Adjournment.

11. Any poll demanded at any such meeting on the election of a chairman, or on any question of adjournment, shall be taken at the meeting without adjournment. When poll taken without adjournment.

12. The registered holder of [stock] (*a debenture*), or in the case of joint holders that one whose name stands first on the register as one of the holders thof, shall be entld to vote in respect of such [stock] (*debenture*), either in person or by proxy, but every instrument appointing a proxy must be in writing under the hand of the appointor, or in case of a corporation under its common seal, and must be delivered to the chairman of the meeting, and every such proxy must be in the terms or to the effect following, that is to say, "I ——, of ——, a [debenture stock] (*debenture*) holder of the —— Coy, Lmtd, hby appoint ——, of ——, or failing him ——, of ——, to vote on my behalf at the meeting of the [debenture stock] (*debenture*) holders of the sd coy, which is to be held on the —— day of —— and at any adjournment thof. As witness my hand"; and no person shall be appointed a proxy unless he is a [debenture stock] (*debenture*) holder or one of the trees.

As to proxies generally, see Part I. (15th ed.) p. 656 *et seq.*

The possible objection to such provisions is that the trustees, if they call the meeting, are obliged to go to the company and inspect and copy the register of debenture stock [*or* debenture] holders, and to see that the circulars are properly sent out, and to verify the proxies, whereas by making the bearers of the stock certificates [*or* debentures] the voters they are relieved from all this trouble and risk.

A clause insisting on the production of the debentures or stock certificates, however, frequently gives rise to difficulty, owing to their being deposited with banks for safe custody or by way of security. Such a clause should, however, be used in case of bearer stock or bearer debentures, as follows:—

12. At any such meeting as afsd the respive bearers of the [stock certificates] (*debentures*), and no other person or persons, shall be recognized and treated as the legal holders of the stock therein mentd, whether such bearers are or are not, in fact, the owners thof; and such bearers shall accordingly be exclusively entld to vote in respect thof. Bearers of stock certificates only recognized.

**Form 81.** If the deed is to secure debentures, some of which are registered, the above clause may be in the following modified form:—

*At any such meeting as aforesaid the respective bearers of the debentures, and no other person or persons, shall be recognized and treated as the legal holders thereof, whether the same be payable to bearer or to the registered holder, and whether such bearers are or are not in fact the owners thereof, and such bearers shall accordingly be exclusively entitled to vote in respect thereof.*

The above provision is very commonly used, and in effect it enables the holder of a registered stock certificate [*or* registered debenture] to vote by proxy if he desires so to do, for he merely hands over his certificate [*or* debenture] to a friend who, as bearer thereof, can vote. Sometimes words are added to the effect following:—

"But for the purposes of this clause, the bearer of a certificate in writing under the seal of the trustees [*or* issued by any bank approved by the trustees], stating that the bearer of the certificate is entitled to a registered stock certificate [*or* a debenture of this series], and specifying the same by number, shall be recognized as the bearer of the stock certificate [*or* debenture] specified in such certificate."

§ Whichever clause is used, the other clauses will be modified accordingly.

Votes. 13. At every such meeting each voter shall, on a show of hands, be entld to one vote only, but at a poll he shall be entld to one vote in respect of every principal sum of [10*l.*] secured by [the stock certificate or stock certificates] (*debentures*) in respect of which he is entld to vote.

This means that the voting is according to the face value. *Kent Collieries, Ltd.*, 23 T. L. R. 559.

As to the figure 10*l.* see the London Stock Exchange Regulations, Part I., Appendix.

**When trustees may give up possession.** 14. When the trees shall have made entry or taken possession under the powers conferred by the above-written trust, they may, with the authority of an extraordinary resolution of the [stockholders] (*debenture holders*), at any time afterwards give up possession of the mortgaged premises or any pt thof to the coy, either unconditionally or upon any conditions that may be arranged between the coy and the trees.

**Powers by extraordinary resolution.** 15. A general meeting of the [stockholders] (*debenture holders*) shall, in addition to the powers hnbefore given, have the following powers exercisable by extraordinary resolution, namely:—

(1) Power to sanction the surrender or release of any of the mortgaged premises.

(2) Power to sanction any compromise or arrangement proposed to be made between the coy and the [stockholders] (*debenture holders*).

(3) Generally power to sanction any modification of the rights of the [stockholders] (*debenture holders*) against the coy or against its ppty, whether such rights shall arise under these presents or otherwise.

(4) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the coy and assented to by the trees as being necessary or proper for carrying into effect any transaction duly authorized under this clause.

The above clause is expressed widely, so as to meet the decisions referred to at pp. 158—160.

Extraordinary resolution binding.

16. An extraordinary resolution passed at a general meeting of the [stockholders] (*debenture holders*) duly convened and held in accordance with these presents shall be binding upon all the [stockholders] (*debenture holders*), whether present or not present at such meeting, and each of the [stockholders] (*debenture holders*) shall be bound to give effect thto accordingly, and the passing of any such resolution shall be conclusive evidence that the circumstances justify the passing thof, the intention being that it shall rest with the meeting to determine without appeal whether or not the circumstances justify the passing of such resolution. See p. 156.

Definition of "extraordinary resolution."

17. The expression "extraordinary resolution," when used in this schedule, means a resolution passed at a meeting of the [stockholders] (*debenture holders*) duly convened and held in accordance with the provisions herein contained [by a majority consisting of not less than three-fourths of the [stockholders] (*debenture holders*) voting thereat upon a show of hands, or, if a poll is duly demanded, then by a majority consisting of not less than three-fourths of the votes given on such poll].

Defect of quorum.

18. The quorum of any meeting convened for the purpose of passing an extraordinary resolution shall be a clear majority in value of the whole of the [stockholders] (*debenture holders*) present in person or by proxy, but so that if, within one hour from the time appointed for the meeting, holders of a clear majority in value of the [stockholders] (*debenture holders*) are not present so as to form a quorum, the meeting shall stand adjourned for [21] days, and shall accordingly be held on the corresponding day of the week, and at the same time and place as that originally fixed by the notice convening the meeting; and if at such adjourned meeting a quorum as above defined is not present, then those [stock] (*debenture*) holders who are present shall be a quorum, and may transact the business for which the meeting was originally convened, and a resolution passed thereat by a majority

**Form 81.** consisting of not less than three-fourths of the persons voting thereat upon the show of hands, or, if a poll is duly demanded, then by a majority consisting of not less than three-fourths of the votes given on such poll, shall be considered an extraordinary resolution within the meaning of this schedule. Notice of the adjourned meeting shall be given to every [stockholder] (*debenture holder*) and such notice shall state that if a quorum as above defined shall not be present at the adjourned meeting the [stockholders] (*debenture holders*) then present will form a quorum.

Clauses 17 and 18 are designed to comply with the requirements of the London Stock Exchange.

**Minutes.** 19. Minutes of all resolutions and proceedings at every such meeting as afsd shall be made and duly entered in books to be from time to time provided for that purpose by the trees at the expense of the coy, and any such minutes as afsd, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting of the [stockholders] (*debenture holders*), shall be conclusive evidence of the matters therein contained, and, until the contrary is proved, every such meeting in respect to the proceedings of which minutes have been made shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings taken, to have been duly passed and taken.

It is sometimes preferable to set out the form of certificate in the First Schedule to the trust deed. If so, clause 6 of Form 81 should run as follows:—

**Form 81a.**

**Stock certificate set out in First Schedule to trust deed. (Form 81.)**

6. The certificates for the stock shall be under the common seal of the coy and shall be autographically signed by at least one director and the secretary and shall be in the form or substantially in the form set forth in the first schedule hereto and shall have indorsed thon conditions in the form set forth in that schedule or to the like effect. The coy shall comply with the provisions of the stock certificates and shall observe and perform the conditions indorsed thon and the stock shall be held subject to such conditions which shall be binding on the coy and the stockholders and all persons claiming through or under them.

The form of certificate as on p. 348 will then be set out at the commencement of the First Schedule. Clause 3 (p. 349) will be omitted and the certificate will refer to "the conditions indorsed hereon" instead of "the provisions contained in that deed."

**Form 81b.**

**Trust deed to secure second debenture stock or second debentures.**

THIS TRUST DEED [*as in Form* 81].

WHEREAS on the —— day of —— the coy issued ——*l.* of first debenture stock, secured by a trust deed dated the —— day of ——, and made between the coy of the one pt, and —— and —— of the other pt.

AND WHEREAS [*add recitals as in Form* 81, *but referring to* "second debenture stock" *or* "second debentures"].

NOW THIS DEED [*continue as in Form* 81, *clauses* 1 *to* 6, *adding the following definitions in clause* 1:]

The "first debenture stock" means the sd debenture stock secured by the sd recited trust deed, dated the —— day of ——.

The "first trust deed" means the sd recited trust deed.

7. The coy as beneficial owner hby demises unto the present trees the freehold hereditaments specified in the first pt of the second schedule hto, to hold the same unto the present trees for the term of [500] years from the date of these presents without impeachment of waste, subject to the first trust deed and the term thereby granted, and to the principal moneys and interest thereby secured, and subject to the proviso for cesser hnftr contained.

The term should be longer than the term granted by the first trust deed. If both trust deeds are executed on the same day, the term granted by the second trust deed should be one day longer than the term granted by the first trust deed.

8. The coy as beneficial owner hby demises unto the present trees the leasehold hereditaments specified in the second pt of the second schedule hto to hold the same unto the present trees for all the respive residues now unexpired of the several terms for which the same premises were resply granted by the several leases mentd in the second pt of the same schedule, except the last two days of the sd terms, subject to the first trust deed and the terms thereby granted, and to the principal moneys and interest thereby secured, and subject to the proviso for cesser hnftr contained.

The term should, if possible, be one day longer than the term granted by the first trust deed. If, however, the first trust deed has granted a term only one day shorter than the term granted by the leases, a legal term can still be granted of the same or even of a shorter term. See *Re Moore and Hulm's Contract*, (1912) 2 Ch. 105; Law of Property Act, 1925, s. 149 (5).

A simpler method is to create a charge by way of legal mortgage. In this case one clause could be inserted to take the place of clauses 7 and 8 as follows:—

7A. The coy as beneficial owner hby charges by way of legal mortgage the freehold and leasehold hereditaments specified in the first and second pts of the second schedule hto, subject to the first trust deed and to the principal moneys and interest thereby secured.

This charge does not create a term, but gives to the trustees the same protection, powers and remedies as if a term of 3,000 years in the case of freeholds, and one day less than the full term in the case of leaseholds, were vested in the trustees. Law of Property Act, 1925, s. 87.

In this case, the last line of clause 48 (p. 345, *supra*), as to cesser of the term or terms granted will not be required.

**Form 81a.** 9. The coy hby charges in favour of the trees by way of second charge, subject only to the floating charge created by the first trust deed, its other assets [*continue as in clause* 9, *p.* 320, *supra*].

The rest of the clauses will be similar to the clauses in Form 81.

**Form 82.** *Short form of Trust Deed to secure debentures charged on specific leaseholds* (e.g., *a theatre*) *and chattels therein, but not on other property of the Company.*

THIS MORTGAGE DEED is made the —— day of ——, between the A. Coy, Limtd (hnftr called "the coy") of the one pt, and C. of —— and D. of —— (hnftr called "the trees," which expression shall where the context admits include the trees or tree for the time being of these presents) of the other pt. WHEREAS [*recite lease of the X. Theatre specified in First Schedule* (hnftr called "the mortgaged hereditaments") *and ownership of fixtures, fittings and furniture specified in Second Schedule* (hnftr called "the scheduled fixtures and chattels")]. AND WHEREAS the coy has decided to issue —— debentures of ——*l.* each secured upon the mortgaged hereditaments and the scheduled fixtures and chattels in the form of the print annexed hto, to be called the "X. Theatre debentures."

NOW THIS DEED WITNESSETH and it is hby agreed and declared as follows:—

1. In conson of the sums amounting to ——*l.* advanced or to be advanced to the coy on the security of the sd debentures, the coy as beneficial owner hby demises unto the trees all and singular the mortgaged hereditaments, to hold the same unto the trees henceforth for all the residue of the sd term granted by the sd lease except the last day thof, subject to the proviso for redemption hnftr contained.

2. The coy as beneficial owner hby assigns unto the trees the scheduled fixtures and chattels, to hold the same unto the trees absolutely subject to the proviso for redemption hnftr contained.

3. Provided always that if the coy shall repay to the holders of the sd debentures or to the trees on their behalf all moneys due in respect thof in accordance with the conditions endorsed thereon (for which payment the receipt or acknowledgment of the trees shall be a sufficient discharge to the coy and all persons dealing with the coy), the trees shall at any time thereafter, upon the request and at the cost of the coy, re-assign the fixtures and chattels assigned to the coy or its assigns, and thereupon the sd term hby granted shall forthwith cease and determine.

Form 82.

4. The trees may at any time, after the moneys secured by the sd debentures, or any of them shall have become due, exercise the statutory powers of sale and appointment of receivers conferred upon them by these presents or by the statutes in that behalf without giving any notice to the coy of their intention so to do, but no purchaser shall be concerned to see or inquire whether any moneys have become due under the sd debentures or any of them.

5. The trees shall hold the moneys to arise from any such sale upon trust to apply the same in or towards payment of, first, their costs, charges and expenses in relation to these presents; secondly, their remuneration; thirdly, all arrears of interest remaining due on the debentures *pari passu* in proportion to the amount due; and, fourthly, the principal moneys remaining due on the security of the sd debentures *pari passu*, and the balance, if any, shall be pd to the coy, but no purchaser or other person shall be concerned to see or inquire as to the applicon of such purchase-money, and the receipt of the trees for such purchase-money shall be a complete discharge to the person paying the same.

6. The sum of ——*l.* p.a. shall be pd by the coy to each of the trees as remuneration and shall continue to be payable notwithstanding the appointment of any receiver or manager.

IN WITNESS, &c.

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FIRST SCHEDULE.

(Leaseholds.)

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SECOND SCHEDULE.

(Fixtures, Fittings and Furniture.)

# MISCELLANEOUS CLAUSES IN TRUST DEEDS.

## Limits of Issue.

**Form 83.**

Limit of stock, power to issue further *pari passu* stock.

The stock to be issued is limtd in the first instance to 500,000*l.*, but the coy is to be at liberty to issue further stock ranking in point of security *pari passu* with the first issue, subject to the following provisions, that is to say:—

(a) Whenever the coy determines to issue such further stock, or any pt thof, it must give notice in writing to the trees stating such determination and the amount to be issued, and must execute and deliver to the trees an acknowledgment of indebtedness under the common seal of the coy, framed in accordance with clause [2] hof, and duly stamped if and so far as necessary, and must cause the requisite additional stamp (if any) to be impressed hereon, and must make arrangements satisfactory to the trees for vesting in the trees, as pt of the specifically mortgaged premises, ppty suitable for the purposes of the coy which, with the ppties already in this security, shall together, in the opinion of the trees, be worth at least — p.c. more than the amount of the stock then already issued and the further stock proposed to be issued, but with liberty for the coy to make up any deficiency in worth afsd by payment of cash to the trees, which cash shall become pt of the specifically mortgaged premises.

(b) Such further ppty may be freehold or leasehold, and may consist in pt of licences, goodwill, trade marks, and fixtures, and it shall rest with the trees to determine how such ppty shall be vested, whether by demise, sub-demise, assignment, or otherwise, and they may accept such title to such ppty as they may think sufficient, whether perfect or not.

(c) The trees shall be at liberty to accept the figures standing in the coy's books showing the amounts pd for any such ppty, or a certificate by any surveyor or valuer whom the trees believe to be competent to the effect that the ppty already vested, and to be vested, is suitable for the purposes of the

coy, and that the value or values of such ppty and the ppties already vested in the trees exceeds a specified sum or sums as sufficient evidence thof. **Form 83.**

(d) Such further stock shall not be issued or offered for subscription unless and until the trees shall have certified that the foregoing conditions have been complied with, and that the coy is entld to issue the further stock.

**Form 84.**

Stock limited to half the paid-up capital.

The stock is limtd in the first instance to 200,000*l.*, being an amount equal to half the present pd-up capital of the coy, and the coy is to be at liberty from time to time and at any time to issue further stock ranking *pari passu* with the sd 200,000*l.* stock, and entld to participate therewith in the benefit hof, subject to the following provisions, that is to say:—

(a) The total amount of the stock for the time being ranking *pari passu* and entld to participate in benefit hof shall not at any time exceed one-half of the pd-up capital for the time being of the coy.

(b) When it is proposed to issue any portion of the sd further stock the coy must give to the trees notice of its intentions to issue the same, and must satisfy the trees as to the amount of the coy's pd-up capital, and must state the amount of the proposed further issue, and must execute and deliver to the trees an acknowledgment of indebtedness, &c. See last form.

**Form 85.**

Limit of power to issue further stock for redeeming prior debenture stock.

The stock is limtd in the first instance to 300,000*l.*, but the coy is to be at liberty to issue further irredeemable 3½ p.c. debenture stock entld *pari passu* to the benefit hof, subject to the following provisions, that is to say:—

(a) Such further irredeemable 3½ p.c. debenture stock shall not exceed 540,000*l.* in amount, making with the 300,000*l.* stock above mentd a total of 840,000*l.*

(b) Such further stock shall only be issued for the purpose of redeeming or paying off the 4 p.c. debenture stock of 500,000*l.*

(c) Whenever it is proposed to issue any of the sd further irredeemable 3½ p.c. debenture stock, the coy must notify in writing to the trees the amount of the proposed further issue, and must satisfy the trees that by arrangement with the holders of a corresponding amount of the 4 p.c. debenture stock, or by reason of notice of redemption having been given, the coy is

**Form 85.**

in a position to pay off or redeem a corresponding amount of the 4 p.c. debenture stock, and must provide to the satisfaction of the trees for the applicon of such further debenture stock, or the proceeds thof, to such redemption or payment, and for the transfer of the 4 p.c. debenture stock to be redeemed or pd off and the securities for the same to the trees hof; and for the purposes of this clause the corresponding amount afsd is to be calculated on the basis that not more than 108*l.* of the further irredeemable 3½ p.c. debenture stock is to be issued in respect of every 100*l.* of the 4 p.c. debenture stock redeemed or pd off.

(d) The coy must, before any of the sd further debenture stock is issued or offered for subscription, execute and deliver to the trees an acknowledgment of indebtedness for the amount of the further proposed issue, &c. See Form 83.

(e) No such further stock shall be issued or offered, &c. See Form 83, clause (d).

**Form 86.**

The stock is to be limtd in amount to 550,000*l.*

Limit of issue where prior debentures which are to be paid off and kept on foot.

Each of the holders of the outstanding debentures may at any time be given the option of converting the same into stock, and, if he elects so to convert, he must transfer the outstanding debentures held by him to the trees to be held on the trusts hof, and the coy shall thereupon issue to him a like amount of the stock. Moreover, the coy may at any time procure the transfer to the trees on the trusts hof of any of the outstanding debentures, and thereupon stock to a like amount may be issued to the transferors of such debentures.

The coy may issue the stock or any pt or pts thof to such persons and on such terms and at such time or times and in such manner as the coy may think fit, and all moneys payable by the allottees of such stock shall be made payable to and be received by the trees or by bankers approved by the trees; and all moneys so pd shall, subject as hnftr provided, be deemed to belong to the trees and shall be carried to the credit of the trees, and such bankers shall be instructed to carry the same to such credit accordingly, and all such moneys shall be at the risk of the coy, and shall be applied in paying off outstanding debentures or in recouping the coy any sums not exceeding par expended by the coy in redeeming or paying off any of the outstanding debentures; and the coy shall procure the holders thof to transfer the same to the trees to be held on the trusts hof, the intention being that the stockholders shall not only have the benefit of the specific security hby created but also the benefit of the first general charge

created by the transferred debentures and may thus be placed on an equality in point of security with the holders of the outstanding debentures. If and when all the outstanding debentures shall have been pd, redeemed, or pd off, the balance of any moneys remaining in the hands of the trees shall be pd by them to the coy. All interest on moneys for the time being in the hands of the trees shall be pd over to the coy. **Form 86.**

### Application of Proceeds of Issue.

**Form 87.**

Proceeds of issue to be applied in paying off mortgage and purchase-money.

All moneys payable in respect of the present issue of the stock of the nominal value of 100,000*l.* shall be made payable to and received by bankers appointed by the coy and approved by the trees, and all moneys pd in respect of such first issue shall be carried to the credit of an account to be opened in the name of the trees, and such bankers shall be instructed to carry the same to such credit accordingly, and such moneys shall be at the risk of the coy, and shall be applied from time to time as and when required by the coy in clearing off the incumbrances now affecting each of the ppties hby covenanted to be demised or sub-demised and in paying the purchase-money for the same; and when and so soon as the whole of such incumbrances shall have been cleared off and purchase-money pd, and the ppty shall have been vested in the trees in accordance with clauses [10 and 11] hof, the balance of the moneys then in the hands of the trees shall be pd over to the coy; and it is expressly declared that the trees are from time to time to facilitate in every way the clearing off of such incumbrances and the payment of such purchase-money and the vesting of the ppties as afsd, and shall be at liberty to accept a certificate under the hand of the coy's solor to the effect that the title to any particular ppty has been investigated by him on behalf of the coy and found satisfactory as sufficient evidence thof.

**Form 88.**

Application of the proceeds of issue in paying off debts and purchasing property.

All moneys payable in respect of the first issue of 100,000*l.* of the stock, including any premiums, shall be made payable to and be received by bankers, &c. [see Form 87], and shall be dealt with as follows, that is to say:—

(1) The trees shall, out of such moneys, pay to the coy all moneys representing premiums on the issue of the stock, and shall pay to the coy's bankers a sum sufficient to pay off a loan of ——*l.* or thbts now owing by the coy to them, and a sum or sums sufficient to pay off the whole of the existing mortgages amounting to ——*l.* or thbts on certain ppties of the coy specified in the second schedule hto, and shall in

**Form 88.**

due course apply such moneys in paying off such mortgages, and the coy shall procure the release of such mortgages.

(2) The surplus moneys shall from time to time at the request in writing of the coy, be applied by the trees in or towards the purchase of any licensed or other ppties suitable for the purposes of the coy, which the coy, with the approval of the trees, may from time to time determine to acquire.

(3) Such ppties may be freehold or leasehold, with or without goodwill, licences, or fixtures, and it shall rest with the trees to determine how any of such ppties shall be vested in them, whether by demise, sub-demise, charge, or otherwise, and the coy shall vest the same or procure the same to be vested in the trees accordingly.

(4) Such further ppties shall become pt of the specifically mortgaged premises in priority to the A. stock and the securities for the same.

(5) The trees may accept such title to any such ppty as they may think sufficient, whether perfect or not.

(6) The price to be pd for any such ppty must be a fair one.

(7) The trees shall be at liberty to accept a certificate by any surveyor or valuer whom the trees may believe to be competent to the effect that the ppty to be purchased is suitable for the purposes of the coy, and that the price is a fair one as sufficient evidence thof.

(8) Pending the applicon and payment of any of the sd moneys as afsd the trees may invest or deal with the same in accordance with clause —— hof [see clause 24 of Form 81], and as occasion requires may realise and convert the securities for the time being representing the same.

**Form 89.**

**Company to clear off outstanding debentures.**

The coy as and when each of the outstanding 5 p.c. debentures becomes payable or previously thto, if practicable, shall pay off or satisfy such debenture either in cash or by issuing to the holder, if willing, a debenture or debentures hby secured or otherwise in such manner as shall be arranged, and as and when any outstanding debenture is so pd off or satisfied the coy shall procure the transfer thof to the trees to be held on the trusts hof, the intention being that the debenture holders hby secured shall not only have the benefit of the security hby constituted, but shall also be placed on an equality as far as practicable in point of security with the holders of the

outstanding 5 p.c. debentures for the time being. The debentures so transferred to the trees are hnftr referred to as the security debentures.

The above will be used with the following:—

**Form 90.**

Subject as aforesaid, company may issue the debentures on its own terms.

Subject as afsd, the coy may issue any of the debentures hby secured to such persons and on such terms and at such time or times and otherwise in such manner as the coy may think fit, but so much of the moneys as shall be necessary and shall arise from the issue of such debentures shall be applied by the coy in paying off the outstanding debentures as afsd or when they mature.

**Form 91.**

Trusts of security debentures.

The security debentures shall be held by the trees as a security for the payment of the debentures hby secured and the interest thereon, and the trees shall as and when the security hby constituted shall become enforceable as hnftr provided be at liberty to deal with and enforce such debentures and exercise all rights incident to the ownership thof in such manner as they think expedient, and the payment of each half-year's interest on the debentures hby secured shall operate in satisfaction of the corresponding half-year's interest on the security debentures.

**Form 92.**

Declaration of trust of the leasehold hereditaments specified in first schedule as a specific security.

The trees shall henceforth (subject and without prejudice to the outstanding debentures and all securities for the same) hold the leasehold hereditaments specified in the first schedule hto upon the trusts and for the purposes hnftr declared of and concerning the same as a specific security for the payment of all moneys for the time being owing on the security of these presents.

**Form 93.**

Prior debenture stock to be cleared off.

The coy having already given to the holders of the prior debenture stock notice of its intention to redeem the prior debenture stock held by them resply on the —— day of —— next shall on that day or within ten days afterwards or before that day duly redeem the same either by payment of the cash payable for redemption or by issuing debenture stock hby secured or otherwise as may be arranged, and shall before or within twenty-eight days after the sd —— day of —— prove to the satisfaction of the trees that the whole of the sd prior debenture stock has been satisfied and that the premises thereby charged are freed from such charge and from all claims in respect of the prior debenture stock, and when such proof has been given the trees shall certify hereon that such proof has been given to them or him, and such certificate shall be conclusive and shall absolve the trees from any further obligation in the matter.

**Form 93.**

In order to ensure the due performance by the coy of the obligations imposed on it by the last preceding clause hof, the coy shall not issue any of the 400,000*l.* stock hby created otherwise than—

(1) For cash payable by such instalments as the coy may determine, or

(2) In satisfaction of the prior debenture stock at such rate p.c. as the coy may determine and arrange;

and out of the cash obtained by the issue of the sd 400,000*l.* stock the coy shall appropriate and set apart, for the purpose of paying off the prior debenture stock for the time being outstanding, such a sum as shall be sufficient to redeem the same at the price of ——*l.* p.c and the moneys so set apart shall be regarded as specifically appropriated for the purpose of clearing off such outstanding prior debenture stock.

**Form 94.**

Application of stock proceeds in acquisition of assets to be vested in the trustees.

All moneys, &c. [see Form 87] shall be dealt with as follows, that is to say:—

(1) The sd moneys shall, from time to time upon the request in writing of the coy, be applied—

(a) Wholly or in pt to the payment of the purchase-money or pt of the purchase-money of ppty suitable for the purposes of and contracted to be purchased by the coy or already purchased by the coy; or

(b) Wholly or in pt in making advances upon mortgage of ppty or in acquiring any mortgage of ppty, whether vested in the coy or others, where such advance or acquisition shall seem desirable in the interests of the coy.

(2) Every such request must be accompanied by parlars of the proposed applicon, and in particular—

(a) In the case of ppty proposed to be purchased, the tenure and nature of such ppty and the price pd or to be pd for it; and

(b) In the case of a proposed advance, the tenure and nature of the ppty on which the advance is proposed to be made; and

(c) In the case of a proposed acquisition of a mortgage, the tenure and nature of the mortgaged premises.

(3) Every such request must also be accompanied by a certificate signed by at least two directors of the coy, certifying that in their opinion the proposed applicon is desirable in the interests of the coy.

(4) Pending the applicon of the moneys afsd in manner hnbefore provided, the trees may invest the same under clause 27 hof, and may, as and when occasion shall require, call in and realise such moneys and deal with the same under this clause. **Form 94.**

(5) All the ppty and mortgages acquired pursuant to the last preceding clause shall be vested in the trees, subject, nevertheless, to the A. stock, and the securities for the same shall become pt of the specifically mortgaged premises &c.

### The Land Registration Act, 1925.

Where the company owns registered land or land which comes within the provisions of the Act as to compulsory registration on sale, any specific charge should be made by registered charge.

The form of an unfettered floating charge on land is not affected, and nothing is usually done to fetter the company's powers under the Acts.

But where the floating charge fetters or restricts the company's power to mortgage or charge in priority (see p. 69, *supra*), and the land is registered, the trustees will probably be well advised to put a caution on the register under sects. 53 or 54 of the Act.

As to specific charges and securities—

(1) Where the land is not registered it may be desirable to insert a covenant by the company not to register without the consent of the trustees (see Form 95), and to put a caution on under sects, 53 or 54 of the Act.

As to registered land, it will generally be expedient to provide in the trust deed for the execution by the company of a charge to be registered under the Acts. See Form 96.

On registering the charge at the Land Registry a certificate of registration under sect. 79 of the Companies Act should be produced. See Land Registration Rules, 1925, r. 145.

**Form 95.**

**Covenant by company not to register.**

The coy hby covenants with the trees that the coy will not during the continuance of this security register its title to the sd hereditaments under the Land Registration Act, 1925, without the consent in writing of the trees, and it is hby agreed and declared that the trees shall be at liberty to give or withdraw such consent as they may think expedient.

**Form 96.**

**Covenant by company to execute charge.**

The coy shall forthwith execute in favour of the present trees a charge on the sd freehold hereditaments for securing the payment to the sd A. B. and C. D. of the principal sum of ——*l.* with interest thereon at the rate of —— p.c.p.a., payable half-yearly on the —— day of —— and —— day of ——, such charge to be effected in

**Form 96.**

accordance with the provisions of the Land Registration Act, 1925, and of the rules thereunder, and to the satisfaction in all respects of the trees, and the trees shall hold the sd charge as a security for the payment of the principal moneys and interest hby secured, and shall (subject to the proviso following) be at liberty to exercise all the rights incident to the ownership of the sd charge accordingly, and the payment by the coy of each half-year's interest on the debentures shall be regarded as in satisfaction of the interest for that half-year payable under the sd charge. Provided always, that until the security hby constituted shall become enforceable and the trees shall have become entld to enter and take possession of the mortgaged premises the trees shall not enter by virtue of the sd registered charge or exercise the power of sale thereunder or otherwise enforce such charge.

**Form 97.**

Charge on registered land.

H.M. LAND REGISTRY.

*Land Registration Act*, 1925.

District.

Title No.

Property.

[*Date.*]

In consn of ——*l.*, we, the —— Coy, Limtd, of ——, hby charge the land comprised in the title above referred to with the payment to A. B., of ——, and C. D., of ——, on the —— day of ——, of the principal sum of ——*l.*, with interest at —— p.c.p.a., payable on the —— day of —— and —— day of —— in every year; and we declare as follows:—

(1) The power of sale implied by sect. 101 of the Law of Property Act, 1925, is to be exercisable as if sect. 103 of that Act were repealed.

(2) The power of leasing conferred by sect. 99 of the sd Act shall not be exercised by us without the previous consent in writing of the sd A. B. and C. D., or their assigns.

(3) This charge is to secure all further advances made by the sd A. B. and C. D. or their assigns.

Signed, sealed, &c.

The charge must be executed as a deed.

[Where a registered charge is made in favour of trustees of a debenture trust deed the date of payment should be the same as in the trust deed; but if this involves a lengthy description of the circumstances in which the debenture stock may become enforceable, it would be simpler to fix a date, say, six months from the date of the charge. If the company desires to protect itself against premature

action by the trustees, it could register a caution or restriction; but this will hardly be necessary in most cases.] **Form 97.**

See, generally, the notes to Form 45 in the Land Registration Rules, 1925

### Property to be Conveyed.

**Form 98.**

Company to vest hereditaments in trustees.

The coy shall cause the hereditaments specified in —— schedule hto to be forthwith vested in the trees upon the trusts hof free from incumbrances (other that the chief and other rents mentd in such schedule and incidents of tenure, if any), and for that purpose the coy shall forthwith execute and do, or cause to be executed and done, all such assurances and things as the trees may reasonably require, and it is expressly declared as follows (that is to say):—

(1) The freeholds specified in the first and fourth pts of the sd schedule are to be demised to the trees for the term of 1,000 years from the date of such demise.

(2) The leaseholds specified in the second pt of the sd schedule are to be demised to the trees for the residue of the terms for which the same are resply held except the last three days of each of the same terms resply.

(3) The coy is to make out to the reasonable satisfaction of the trees a good title to the sd freehold and leasehold premises, but the trees may accept such title and such evidence of title to the sd premises resply as they may think sufficient, with full power to accept any certificate or report or opinion as sufficient notwithstanding that the same may not constitute legal evidence.

(4) The several assurances afsd are to be expressed to be made by the coy as beneficial owner, and are to contain all such covenants by the coy for the payment of all rents and otherwise as the trees may reasonably require.

(5) If the coy shall be unable to comply with para. (3) hof as regards any particular ppty, the coy shall pay to the trees such a sum in cash as shall be certified by Messrs. ——, of ——, surveyors, to be in their opinion the fair value of such ppty with a good title, and in that case such ppty shall be excluded from the operation of this clause, but the sd sum of cash shall become and be pt of the appropriated assets as above defined.

Where it is desired to constitute and issue the stock before the property can be transferred, the trust deed should contain a covenant to demise, *e.g.*, as above. In such case the trust deed very commonly requires the proceeds of the issue to be paid to the trustees as in Form 88.

**Form 99.**

Company to vest specified assets in the trustees in accordance with local laws.

The coy shall cause the assets specified in the first schedule hto to be forthwith vested in the trees upon the trusts hof, free from incumbrances, and for that purpose the coy shall forthwith execute and do or cause to be executed and done all such assurances and things as the trees may reasonably require for the purpose of effectually vesting the sd appropriated assets in the trees in accordance with the local laws relating thereto, and it is expressly declared as follows (that is to say):—

(1) The ppties specified in the first pt of the sd schedule shall, whether freehold or leasehold, be vested in the trees, by conveyance or demise, as the case may be, free from incumbrances, and accordingly the coy shall pay off or satisfy all mortgages or charges now affecting the same, and when any equity of redemption is outstanding shall buy up or foreclose or procure the release thof.

(2) The trees shall have full discretion as to what they shall require the coy to do or cause to be done under this clause.

(3) The trees may in any case in which they consider it expedient direct that the vesting afsd shall be effected by the creation in favour of the trees of a mortgage or charge of or on the particular asset instead of by an absolute conveyance or assignment.

(4) As regards any mortgages which may now rank as first mortgages on the ppties specified in the first pt of the sd schedule, or any of them, the trees may, in any case in which they think it expedient, direct that any such mortgages shall, in lieu of being absolutely pd off and extinguished, be kept alive and transferred to the trees as pt of the appropriated assets, and the same shall become pt of the appropriated assets accordingly.

(5) The trees may accept such title and such evidence of title to the sd premises resply as the trees may think sufficient.

(6) A certificate in writing by the trees to the effect that the coy has in their opinion duly complied with the provisions of this clause, or has duly complied with the same to any specified extent, shall be conclusive evidence in favour of the trees that the trees have made all reasonable requisitions on the coy under this clause, and that the coy has complied with the same fully or to such specified extent, but such certificate shall not preclude the trees from subsequently requiring the coy to do anything further under this clause if the trees think it expedient to make such further requisition.

**Form 100.**

Foreign assets may be vested in local trustees.

Inasmuch as it may in the interests of the stockholders be expedient from time to time to vest some pt or pts of the appropriated assets in local trees, whether with a view to facilitating realisation or disposal thof, or to avoid expense, outgoings, or imposts which can thus be avoided, or for any other reason which the trees may think sufficient, it is expressly declared that whenever the trees think such vesting expedient they may effectuate the same in such manner as they think fit, and may declare the trusts on which such local trees are to hold the premises vested in them, and may provide for the remuneration and indemnity of such local trees, and may invest them with such powers, authorities, discretions, and duties as to the trees may seem expedient, and the trees shall be in no way responsible for any *misconduct on the pt of any such local trees*. The trees shall not act under this clause without the approval of the coy, unless and until the security hby constituted becomes enforceable.

**Form 101.**

Company to create mortgage in a foreign country.

The coy hby covenants with the present trees that the coy will forthwith effect or cause to be effected in favour of the trees an effectual mortgage or effectual mortgages of the hereditaments specified in the second schedule hto in accordance with French law for securing the payment of the sd sum of ——*l.* and interest, and it is expressly declared that the trees shall have an absolute and uncontrolled discretion as to what they shall require the coy to do or cause to be done under this clause, and that they shall be at liberty to take steps through any bank or firm, or official, to obtain the advice of any local lawyer or other person who may be recommended by such bank, firm, or official, as competent to advise in regard to the premises, and that the trees may act on the advice given by any such person wholly or in pt, and that the trees shall be in no way responsible for any loss that may be incurred by reason of their acting on such advice or of their requirements under this clause not having been as extensive as might be or by reason of any such requirements not being the most suitable for effectually creating the sd mortgage or mortgages, and a certificate in writing signed by the trees to the effect that the coy has in their opinion duly complied with the provisions of this clause shall be conclusive evidence in favour of the trees that the trees have made all reasonable requisitions on the coy under this clause, and that the coy has complied with the same, but such certificate shall not preclude the trees from subsequently requiring the coy to do anything further under this clause if they think expedient so to do. And, in the meantime, until the sd local mortgage or mortgages shall have been so effected the sd hereditaments shall stand and be specifically charged in favour of the trees with the payment of all moneys intended to be hby secured.

**Mortgages of Uncalled Capital.** (See p. 53, *supra.*)

**Form 102.**

Mortgage of uncalled capital.

The coy, as beneficial owner, hby assigns unto the present trees all that portion of the capital of the coy which at present is uncalled, namely, the sum of 3*l.* in respect of each of the shares in the capital of the coy which have been issued and are outstanding, and all calls and sums hereafter made or received in respect thof. To hold the same unto the present trees, their exors, admors, and assigns absolutely to the intent that the same may be held as a specific and not a floating security for the payment of the moneys intended to be hby secured.

As regards the uncalled capital afsd, assigned by the last preceding clause hof, the following provisions shall have effect:—

(1) The trees may at any time hereafter permit the coy to call up such capital, or to receive the same or any pt thof in advance of calls;

(2) Such permission may be given on such terms and conditions as the trees may think expedient:

(3) All such moneys, if and when pd up, shall belong and be pd over to the trees, and shall be carried to the redemption fund mentd in clause —— hof:

(4) Save as herein provided, none of the mortgaged capital shall, during the continuance of this security, be called up or received in advance of calls:

(5) The coy shall not at any time during the continuance of this security create any charge on the uncalled capital afsd without giving previous notice in writing to the person or persons in whose favour such charge is created of the assignment thof hby made.

This is an example of the mode in which uncalled capital is sometimes dealt with. In such case the clause of the deed stating when the security is to become enforceable sometimes contains a paragraph as follows:—

"If the company shall not, within six months from the date hereof, pass a special resolution introducing a new clause into its articles of association expressly prohibiting any mortgage or charge on the uncalled capital assigned by clause —— hereof, ranking in priority or *pari passu* with the debentures."

The object is to fortify the security by incorporating a very important asset. See *supra*, p. 147.

**Form 103.**

Another.

That portion of the capital of the coy which is at present uncalled, and amounts to 100,000*l.*, shall stand charged with the payment to the trees of the stock, and the interest thereon, and all other moneys intended to be hby secured, and such charge shall be a specific security,

and the following provisions in regard thto shall have effect; that is to say:— **Form 103.**

(1) The coy may at any time and from time to time call up such capital, or allow payment in advance of calls of such capital or any pt thof, but only on the terms that any capital so called up or advanced shall be pd by the shareholders to the account of the trees with some bank to be nominated by them.

(2) All such moneys if and when pd up shall become pt of the appropriated assets.

(3) The coy shall not at any time during the continuance, &c.

See (5) of last form.

(4) As regards any shares in respect of which at the date hof any pt of the sd capital remains unpd, no surrender or forfeiture thof shall, so long as the sd capital remains unpd as afsd, be taken or made without the approval in writing of the trees.

### Debenture Service Fund.

The coy shall forthwith establish a debenture service fund, and the following provisions in regard thto shall have effect, that is to say:— **Form 104.**

Fund to pay interest and redeem debentures

(1) The coy shall in the month of May, 19—, and in each succeeding month of November and May, pay into such fund the sum of at least 20,000*l.*

(2) Out of the sd fund the coy shall from time to time pay the interest on the debentures falling due on the 1st of June and the 1st of December each year.

(3) In the month of December, 19—, and in each succeeding month of December and June the coy shall apply the sd fund to the redemption of so many of the debentures as the same shall be sufficient to redeem, and so that any fraction of 105*l.* shall be retained in the fund and carried forward.

(4) If, when it is proposed to redeem, the market price of the debentures shall be 105*l.* or upwards, the particular debentures to be redeemed on that occasion shall be determined by a drawing to be made in accordance with the provisions contained in the debentures, and the redemption price shall be 105*l.* for every 100*l.* debenture, together with all interest to date of payment.

(5) If, at the time for redemption, the market price of the debentures shall be less than 105*l.* per 100*l.* debenture, the

**Form 104.**

coy may effect the redemption by purchasing debentures in the open market.

(6) Should the security hby constituted become enforceable, any moneys then in the sd fund shall be regarded as money arising from the sale of a portion of the specifically mortgaged premises, and shall be applied and dealt with accordingly.

As to the power of a company to distribute by way of dividend any profit made in the purchase of its debentures, see *Wall* v. *London and Provincial Trust, Ltd.*, (1920) 1 Ch. 45.

### Redemption and Sinking Funds.

**Form 105.**

Redemption fund established by the trustees for debenture stock with drawings.

The following provisions as to redemption shall have effect, that is to say:—

(1) A redemption fund shall be established by the trees.

(2) In the month of ——, ——, and in the same month in each succeeding year whilst any of the stock remains outstanding, the coy shall pay to the trees the sum of 2,000*l.*, which shall be placed to the credit of the sd redemption fund.

(3) In the year ——, and in each succeeding year up to and including the year 19—, the trees shall forthwith, after the receipt of the sd annual sum of 2,000*l.*, apply the same in purchasing in the market, at the lowest price they or he can arrange, so much of the stock as such sum shall suffice for such purchase.

In framing provisions for a sinking or redemption fund, care must be taken to see that not only are the debentures redeemable, *i.e.*, liable to redemption, but, if so intended, that the company is under an obligation to redeem the same. *Re Chicago & N. W. Granaries Co., Morrison* v. *Same*, (1898) 1 Ch. 263.

(4) In the year ——, and in each succeeding year, the trees shall forthwith, after the receipt of the sd sum of 2,000*l.*, apply the same in purchasing in the market, at less than 107 p.c. so much of the stock as shall be obtainable at less than 107 p.c., and if and so far as for —— months after the payment of such sum the trees shall not have been able to purchase the required amount, or some pt thof, at less than 107 p.c., then and in such case the sd sum, or so much thof as shall not have been so applied, shall be applied in redemption of debenture stock, to be selected by drawings as hnftr provided.

(5) The stock to be redeemed on each occasion, where there is to be a drawing as afsd, shall be determined by a drawing

Form 105.

which the trees shall cause to be made, and for the purpose of every such drawing the stock for the time being outstanding shall be divided as nearly as may be into batches of about 1,000*l.* each, and every such batch (whether comprising one or several holdings) shall be represented by a lot bearing a denoting number, and in the first instance such lots shall be drawn as may be required to exhaust as nearly as possible the amount of the moneys available for redemption, and such amount shall be applied in redeeming the batches represented by the lots drawn, and if the redemption thof would not exhaust the moneys available as afsd, one fresh lot shall be drawn, and every 10*l.* of the stock represented thereby shall be represented by a fresh lot bearing a denoting number, and there shall be a fresh drawing on such further lots up to the requisite amount, and the stock represented by the further lots so drawn shall also be redeemed.

(6) Every such drawing as afsd shall be made at the registered office of the coy, or at some other place approved by the trees, and shall be made in the presence of one of the trees at least, and of a notary public of London.

(7) Forthwith after every such drawing, the trees shall notify to the coy in writing the stock which has been drawn for redemption, and the coy shall thereupon forthwith give to the stockholders, or those whose stock is to be redeemed as afsd, notice in writing of the coy's intention to redeem the stock held by them resply, or, as the case may be, so much of their stock as shall have been drawn for redemption, and fixing a time and place for payment, and for surrender of the stock to be redeemed.

(8) At the time and place so fixed, each stockholder shall be bound to surrender to the coy to be cancelled the amount of his stock which is to be so redeemed, and to give up his certificate of stock in order that the same may be cancelled, and upon receiving evidence of such surrender and cancellation, the trees shall cause to be pd to the stockholder the amount payable to him in respect of such redemption, and such payment shall be made through a bank if the trees shall think fit.

(9) All stock so redeemed shall be cancelled, and the coy shall not be at liberty to issue any stock in substitution for stock which has been so redeemed.

**Form 105.**

(10) All stock purchased in the market by the trees as afsd shall forthwith be surrendered to the coy, and the coy shall not be at liberty to issue any stock in substitution for the stock so surrendered.

As to re-issue under sect. 75, see *supra*, p. 140. Paragraph (9), *supra*, negatives the power.

**Form 106.**

**Another.**

The following provisions as to a sinking fund shall take effect, that is to say:—

(1) A sinking fund shall be established in the names of the trees.

(2) The trees shall carry to such fund (a) the capital moneys referred to in para. (B) of clause ——, and (b) all such other moneys as the coy shall provide out of the general assets.

(3) All such moneys pd in to such account may until the applicon thof in redemption be invested or otherwise dealt with in accordance with clause —— hof.

(4) The trees may at any time, on the request of the coy, apply any of the sinking fund in purchasing in the market at less than par so much of the stock as shall be obtainable, and whenever the sinking fund for more than one month shall have amounted to the sum of ——*l.* or upwards, the trees shall apply the same in redeeming so much of the stock as the fund shall be sufficient to redeem at the price of 110*l.* for every 100*l.* of the stock.

(5) The stock to be redeemed on each occasion shall be determined by a drawing, which the trees shall cause to be made, and for the purposes of such drawing every 5*l.* of the stock shall be assigned a number, and the numbers shall be drawn, and the holders of the stock corresponding with the drawn numbers shall exclusively rank for redemption on such occasion.

(6) The trees shall on each occasion cause notice in writing to be given to the stockholders whose numbers have been drawn, stating the amount payable to each, and calling on them resply to surrender to the coy the stock to be redeemed, and appointing a time and place in London, not being less than one month after the service of such notice, for such surrender.

(7) At the time and place, &c. See (8) of preceding form.

(8) Any notice to the stockholders for the purpose of this clause may be given by advertising the same in *The Times* newspaper, or by sending the same through the post,

addressed to the stockholders at their registered places of address, and any notice so advertised or sent shall be deemed to be served at the expiration of twenty-four hours after it is so given or advertised. **Form 106.**

(9) All stock purchased in the market pursuant to this clause must, on payment of the purchase-money for the same, be transferred to the trees, and shall thereupon be deemed to be cancelled.

3. During the continuance of the security the coy shall on the 15th day of December, ——, pay to the trees a sum sufficient to pay the interest on the debentures which will fall due on the 1st day of January and the 1st day of July which shall next follow such day for payment, and also a sum sufficient to pay the next half-yearly premium on the policy or policies hnftr mentd, and the sum so pd shall be applied first in payment of the interest afsd when due, and, secondly, in paying the premium or premiums afsd when due. And with a view to the payment of the interest on the debentures as afsd the coy shall from time to time, seven days before each half-year's interest falls due, furnish to the trees a list showing the names and registered addresses of the debenture holders resply and the amount of the interest which will be payable to them resply in respect of such half-year; and the trees shall in due course send cheques for the amount of such interest to the debenture holders, addressed to them resply at their registered places of address as set forth in the list so furnished, and the trees shall not be responsible for any loss in transmission whether caused by any inaccuracy in the sd list or otherwise. **Form 107.** Sinking fund and policy.

4.—(1) The payment of the principal moneys secured by the debentures shall be further secured by a sinking-fund policy or sinking-fund policies to be effected in the names of the trees with the —— Assurance Society, of ——, London, or some other insurance coy approved by the trees; and the coy shall from time to time at its own expense effect such policy or policies accordingly.

(2) The debentures for the time being issued and outstanding shall never exceed the amount of the principal moneys secured by such policy or policies, and before any debenture expressed to be entld to the benefit hof is issued the coy shall satisfy the trees that the same is covered by the policy or policies afsd, and the trees shall upon being so satisfied at the request of the coy certify the fact that the trees have been so satisfied on the debenture, and no debenture issued by the coy shall be effective unless and until such certificate shall have been placed thereon.

**Form 107.**

(3) Every policy to be effected as afsd shall be effected on the terms that the premium thereon shall be pd yearly or half-yearly, and that non-payment of any premium is not to forfeit the policy, but merely to reduce the amount payable in respect thof.

(4) The coy will, as and when it effects each policy as afsd, pay the first premium thereon, and the subsequent premiums shall be pd as provided by clause 3 hof.

(5) If at any time before the security hby constituted becomes enforceable the coy shall satisfy the trees that by reason of any of the debentures having been redeemed or pd off or otherwise satisfied the amount of the sinking fund policy or policies for the time being standing in the names of the trees exceeds the amount of the principal moneys secured by the debentures outstanding, the trees shall at the request and cost of the coy concur with the coy in reducing the amount of the sinking policy or policies to the amount of the outstanding debentures, but so that all moneys receivable from the insurance coy in respect of such reduction shall be pd over to the trees, and such moneys shall be dealt with as if the same arose from a sale under clause —— hof.

(6) If the security hby constituted shall become enforceable before the sd policy or policies shall become payable, the trees shall be at liberty to make such arrangement as they may think expedient with the insurance coy afsd for accelerating the payment thof subject to a discount or otherwise as may be arranged.

(7) All moneys received by the trees under or by virtue of the sinking-fund policy or policies afsd shall, save as provided by para. 5 of this clause, be held by them upon the trusts herein declared of and concerning the moneys to arise from a sale under the primary trust for conversion.

**Form 108.**

**Cumulative sinking fund.**

The coy shall establish a sinking fund for the redemption of the debentures, and with a view thto shall open at the —— Bank, Limtd, or some other bank selected by the trees, an account in the names of the trees and the coy. And such account shall be kept during the continuance of this security in the joint names of the trees and the coy. And the coy shall in the year —— and in each succeeding year pay into such account the sum of 10,000*l.*, and shall notify the payment thof to the trees, and the following provisions shall apply to such funds, that is to say:—

Sometimes the annual sum is made payable out of surplus profits of the company after paying specified dividends.

1. The moneys pd in to such account shall, subject as hnftr provided, be invested in such of the investments authorized by clause ——

hof as the coy, with the approval of the trees, may from time to time select; and such investments may from time to time be sold or disposed of or varied as the coy, with such approval as afsd, may from time to time think expedient. **Form 108.**

2. The income arising from the assets for the time being constituting the sinking fund shall be pd into the sd fund and be pt of it.

3. The sinking fund, and the assets for the time being constituting the same, shall be regarded as specifically appropriated to the redemption of the debentures, and if when the security hby constituted becomes enforceable there shall be any assets in the sinking fund, such assets shall be deemed to be pt of the specifically mortgaged premises, and shall be dealt with accordingly.

4. The coy, with the approval of the trees, is to be at liberty from time to time and at any time to apply any portion of the sinking fund in the purchase of any of the debentures either upon the open market or by private contract, and either at par or at a premium or at less than par.

5. The coy, with the approval of the trees, is to be at liberty to keep any debentures so purchased on foot by depositing the same in the sd account, or may cancel such debentures or any of them.

6. Where debentures so purchased are kept on foot as afsd they may at any time be sold with the consent of the trees, and the purchase-money arising therefrom shall be pd into the sd account, and where any debentures are cancelled as afsd the coy shall not be at liberty to issue any debentures in place thof, and the amount of the debentures issued shall be permanently reduced accordingly.

7. With the approval of the trees the coy is to be at liberty to effect with some insurance coy approved by the trees a sinking policy in a form approved by the trees for securing the redemption in due course of the debentures or any specified part of the debentures, and in such case the coy shall thenceforth out of the sd annual sum of 10,000*l.* pay the annual premium on such policy, and the sd policy shall become pt of the specifically mortgaged premises, and if the coy makes default in paying the sd premium the trees may pay the same out of the specifically mortgaged premises.

8. The surplus income of the sd fund not for the time being required for payment of the premium on the sd policy shall be added to the sinking fund and invested as afsd.

Sometimes the deed provides that debentures are to be purchased "at the lowest price." As to this, see *National Trust* v. *Whicher*, (1912) A. C. 377.

### Keeping up Stock-in-Trade.

**Form 109.**

Stock-in-trade to be kept up.

1. The coy shall at all times during the continuance of this security keep up its stock-in-trade taken at cost, and its good book debts after deducting current trade liabilities, and its cash in hand and at bankers, to a value of not less than 120,000*l.*

2. The coy shall in every month of January and July during the continuance of this security furnish to the trees a report certified by the auditors of the coy showing the amount and value of the coy's stock-in-trade taken at cost, good book debts and cash in hand and at bankers, as on the last day of the preceding month, and in every month of July such report shall be founded upon an actual stocktaking, and the trees may, if in their discretion they think fit so to do, and from time to time and at any time, appoint some person or firm to ascertain and check such report, and they shall allow such persons to examine the sd books and stock as and when he or they may require for that purpose, and shall furnish him or them with all reasonable facilities and assistance, and shall pay to such person or firm such fees on each occasion as the trees shall direct.

### Provisions as to Subsequent Securities.

**Form 110.**

Trustees not to be concerned with later security holders of the company.

The rights, powers, and securities hby vested in the trees are to be considered to be vested in them in trust to secure the stock as a first charge on the mortgaged premises, and those rights, powers, and securities shall be in nowise prejudiced or affected by the issue of any second or other debenture stock or other securities which the coy may issue or create, and such second or other debenture stock or other securities shall be so constituted and created that, notwithstanding the provisions of the trust deed or other instrument constituting or creating the same, the trees shall be able to exercise all their powers, authorities, and discretions thereunder without in any way consulting or giving notice to or procuring the consent of the trees for the holders of such second or other debenture stock, or of the owners of any other securities as afsd, and may treat the coy as the owner of the mortgaged premises, subject only to the stock hby constituted.

Where the trust deed securing the first debentures or debenture stock contains elaborate provisions as to interim dealings with the mortgaged premises at the request and with the concurrence of the company, and it is proposed to issue second debentures or debenture stock, a clause as above is requisite, as otherwise the trustees could not, after notice of the second issue, safely act at the request or by the direction of the company.

The provision in the second trust deed should run thus:—

"Notwithstanding the provisions herein contained, the trustees of the first trust deed shall be at liberty to exercise all their powers, authorities, and

discretions under that deed without in any way consulting or giving notice to or procuring the consent of the trustees for the holders of the second debenture stock hereby secured, and may treat the company as the owner of the mortgaged premises, subject only to the first debenture stock and the securities for the same." **Form 110.**

That such a provision is valid, see *Menzies* v. *Lightfoot*, 11 Eq. 459.

### Advances to Lessees.

**Form 111.**

Advances to lessees.

Where any lease is granted, or agreed to be granted, at a premium pursuant to clause —— hof, the coy may arrange with the lessee, or intended lessee, that the whole or some pt of the premium shall be advanced to the lessee on the security of a mortgage or charge on his interest under the lease, or that the whole or some pt of such premium shall without payment be secured by such mortgage or charge, and the trees shall have power to give effect to such arrangement, and shall have full discretion as to the terms of the mortgage or charge to be given as afsd; but so that if required by the coy such mortgage or charge shall contain such provisions as the coy may require for securing to the coy as far as may be the exclusive or especial right in regard to the supply of malt liquor, spirits, and other goods to the premises comprised in the mortgage or charge. All mortgages and securities so acquired shall become and be pt of the appropriated assets.

In the case of a brewery company leasing licensed premises as a tied house, a clause as above is sometimes inserted.

### Foreign Assets: Powers of Attorney.

**Form 112.**

Special provisions as to foreign assets.

Inasmuch as the mortgaged hereditaments are and will be wholly or for the most pt situate in the colony of ——, whilst the trees will be resident in the United Kingdom, and it is necessary to make special provision suitable to such circumstances, it is therefore expressly provided and declared as follows:—

(1) The trees may from time to time execute such powers of attorney as may seem to them best calculated to enable the trees promptly and from time to time as occasion may require, and more particularly in —— and elsewhere abroad, to execute and perform all or any of the powers, authorities, and discretions hby vested in or imposed on the trees.

(2) In selecting any such attorney, the trees may act on their own judgment, or may take and act on the opinion or recommendation of any person, coy, or firm in —— or in the United

Form 112.

Kingdom, and that whether such opinion or recommendation is or is not based on personal knowledge, and any such appointment may be made in favour of any coy or firm, or of the directors, nominees, or managers of any coy or firm, or in favour of any fluctuating body of persons, whether nominated directly or indirectly by the trees.

(3) It shall be no objection to any such attorney that he is in the employment of the coy, or is interested directly or indirectly, or under the influence, direct or indirect, of the coy, or that he is interested in any of the stocks, shares, or securities of the coy.

(4) The trees may require any such attorney to give security for the due performance of his duties, but shall be under no obligation to require security.

(5) Any such attorney may be invested by the trees with power to exercise and perform all or any of the powers, authorities, duties, and discretions hby, or by law, or by contract, or otherwise, from time to time vested in the trees, and as fully as the trees could exercise or perform the same if present, and with all incidental powers, including power to receive on behalf of the trees any notices, orders, judgments, requests, accounts, and the like.

(6) The trees may fix the remuneration of any such attorney, either directly or through some attorney or nominee of the coy, in ——, and may out of the mortgaged premises pay or satisfy all costs, charges and expenses of any such attorney, and may authorize him to take the same out of any moneys, or assets coming to his hands as such attorney.

(7) Any such power of attorney may contain such, if any, restrictions or qualifications as the trees may think fit, and may be expressed to be made subject to any further restrictions or qualifications which the trees may from time to time make.

(8) Any such power of attorney may contain such provisions in favour of purchasers, lessees, mortgagees, and other persons dealing with the attorney or attorneys as the trees may think fit.

(9) Any such power of attorney may empower the attorney or attorneys to appoint any substitute or substitutes, and to revoke any such appointment.

(10) Any such power of attorney may contain such other provisions as the trees shall think fit.

(11) The trees shall not be chargeable with breach of trust on the ground that any such power of attorney was in its terms too wide or general or unfetterd, or that the trees did not

sufficiently or at all supervise the proceedings of any such attorney. **Form 112.**

(12) The trees shall not be responsible for any loss sustained by the coy in consequence of any acts or defaults on the pt of any such attorney.

A clause as above is sometimes required when the property is abroad.

### Steamship Insurance Clauses.

**Form 113.**

Provision in trust deed for insurance of a fleet of steamships thereby made a security.

The following provisions in regard to each of the steamships for the time being forming pt of the specifically mortgaged premises shall have effect, that is to say:—

1. The coy, immediately after such steamship becomes subject to the provisions hof, shall effect and indorse over to and deposit with the trees time policies for the full value of such steamer against risks of every description, including war risks, and such policies shall be effected with such offices, firms or persons as shall be approved by the trees, and the coy shall one week at least before the expiration of every such policy for the time being on foot under these presents, or if and so often as any such policy shall, in the hands of the trees have for any reason lapsed or become insufficient or defective, forthwith effect and indorse over to and deposit with the trees a policy or policies for the full value of the description afsd to the intent and so that the steamer shall at all times during the continuance of this security be insured in the manner and for the value hnbefore mentd.

2. If, during the continuance of this security, the coy shall fail to perform any of its obligations under para. 1 of this clause, it shall be lawful for but not obligatory on the trees to effect an insurance or insurances of such steamer, and if they shall determine to effect any such insurance the same shall be for such amount and with such person, coy or firm and framed in such terms as the trees shall approve, and the coy shall, on demand, pay to the trees in cash all sums expended by the trees in relation to any such insurance.

3. The coy shall forthwith enter such steamer for her full tonnage in protecting and indemnity associations approved by the trees and shall at all times during the continuance of this security—

(a) Keep such steamer so entered to the satisfaction of the trees; and

(b) Give to every such association in which such steamer shall for the time being be entered all such notices of the security hby constituted and all such undertakings for payment of calls as may be required by the rules of such association;

**Form 113.**

(c) Pay all such calls or other moneys as may be payable by the coy as ship owner according to such rules.

And if the coy shall make default in the performance of any of the obligations imposed on it by this clause, it shall be lawful but not obligatory on the trees to enter and keep entered the steamer in any such associations or association as afsd either in their own names or in the name of the coy, and to give all such undertakings and make all such payments as the trees may think fit for the purposes of or in connection with any such entry, and any payment so made by the trees shall be repayable by the coy within seven days after demand in writing and shall bear interest at the rate of 10 p.c.p.a. until repayment.

4. The trees shall be entld to collect and give good discharges for all or any claims under any policy of assurance deposited with or effected by them or upon such associations afsd in respect of such steamer, and all moneys collected in respect of any such policy shall be pd over to the trees and shall be held by them on the trusts which would be applicable thto if the same had arisen from the sale of a proportion of the specifically mortgaged premises pursuant to clause —— hof.

**Reconstruction and Novation.**

**Form 114.**

Provision for reconstruction and novation.

If the coy shall at any time determine to reconstruct by transferring its undertaking to a new coy, whether under the power in that behalf contained in the coy's memdum of asson or by proceedings under sect. 234 of the Companies Act, 1929, or otherwise, and if by the agreemt for effectuating such reconstruction, provision shall be made that the new coy shall take the place of the existing coy as regards the debentures hby secured, and the new coy shall within —— weeks of its incorporation execute a deed-poll covenanting with the trees hof, and with the holders of debentures hby secured and with the old coy, that it shall from henceforth take the place of the existing coy in relation to the sd debentures, then and in such case the trees for the time being hof shall concur with the new coy and with the old coy in executing a supplemental trust deed providing that the new coy shall henceforth take the place of the old coy in relation to the debentures hby secured, and that these presents and the debentures shall thenceforth be read and construed accordingly, and such supplemental trust deeds shall have full effect and each of the holders of the debentures of the existing coy shall be bound forthwith, on the request of the new coy, to give up his debenture in order that a note may be placed thereon as to the execution of such supplemental trust deed, and if he fails to do so his debentures, whilst he remains in default, shall not carry interest.

Sometimes an issue of debentures or debenture stock is made at a time when the company contemplates reconstruction, and, in the circumstances, desires to make provision as above. **Form 114.**

As to what is a reconstruction, see *South African Supply, &c. Co.*, (1904) 2 Ch. 268.

## Meetings of Trustees.

**Form 115.**

Meetings of trustees (large number).

Inasmuch as it may be impracticable or inconvenient for all the trees to concur in the execution and exercise from time to time of the trusts, powers, and discretions hby vested in them, the following provisions shall have effect, that is to say:—

(1) The trees may meet together for dispatch of business, and otherwise regulate their meetings and proceedings as they think fit, and may determine the quorum for the transaction of business, and until otherwise determined by the trees two trees shall form a quorum.

(2) It shall not be necessary to give notice of a meeting of the trees to a tree who is not for the time being within the United Kingdom.

(3) A tree may at any time, and the secretary of the trees on the request of any tree shall at any time, convene a meeting of the trees. Meetings, unless otherwise determined by the trees, shall be held at the office of the trees in London. Questions arising at any meeting of the trees shall be decided by a majority of votes.

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

(5) A resolution in writing, signed by all the trees, shall be as valid and effectual as if it had been passed at a meeting of the trees duly called and constituted.

(6) A meeting of the trees for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions for the time being vested in or exercisable by the trees generally.

(7) The trees may delegate any of their powers to committees consisting of such member or members of their body as they think fit, and any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that from time to time may be imposed on it by the trees. Except so far as otherwise directed by the trees the provisions herein contained shall (*mutatis mutandis*) apply to meetings of any such committee.

**Form 115.**

(8) Minutes of proceedings of the trees shall be duly entered in books to be provided for the purpose by the trees. Such minutes of any meeting of the trees or of any committee, if purporting to be signed by the chairman of such meeting, or by the chairman of the next succeeding meeting, shall be receivable as *primâ facie* evidence of the matter set forth in such minutes.

A clause as above is sometimes required.

**Form 116.**

**Trustees may take an office with staff, &c.**

In order to facilitate the performance by the trees hof of the trusts and powers hby vested in them, the trees shall be at liberty to take a suitable office in London, and to provide therein a safe, or, if the trees think fit, to rent a safe elsewhere, and the trees may employ a secretary and such bankers, accountants, brokers, experts, and agents as they may from time to time think expedient with a view to obtaining the best advice and assistance in carrying out the trusts hof; and it shall rest with the trees to fix the remuneration of such persons, and all expenses incurred hereunder shall be pd by the coy.

**Form 117.**

**Special provisions where a trust company acts as trustee and guarantees the debentures or debenture stock.**

1. Notwithstanding its trusteeship hof the [Trust Coy] is to be at liberty—

(a) To accept office as tree of any deed for securing any other series of debentures or debenture stock of the coy, and on such terms as to remuneration and otherwise as may be arranged with the coy.

(b) To give any guarantee in relation to any such debentures or debenture stock on such terms and for such consideration as the society may think fit.

(c) To acquire on its own behalf or as tree for any other person or persons the equity of redemption in the mortgaged premises or any interest therein or any pt thof, and any shares in or debts, liabilities or securities of the coy, and generally to take any steps that may seem expedient with a view to obviating or minimising any loss by reason of the [Trust Coy] being liable as guarantors in respect of the debentures or debenture stock hby secured.

2. The discretion hby given to the [Trust Coy] to postpone the exercise of the primary trust for conversion is to be regarded as vested in the [Trust Coy] not solely for the benefit of the debenture holders, but also the protection and benefit of the [Trust Coy] as guarantors of the debentures, and accordingly there shall be no right in the debenture holders to interfere with the exercise of such discretion, whether by applicon to the Ct or otherwise.

**Form 118.**

**Trust deed to secure debentures on foreign railway, construction fund and application thereof.**

THIS TRUST DEED is made the —— day of ——, between the B. Railway Coy, Limtd (hnftr called "the coy") of the one pt, and —— and —— of the other pt: WHEREAS the coy proposes to construct a railway from —— to ——, and intends to construct such railway in sections, and intends forthwith to undertake and complete the construction and equipment of the first section of such railway, which will be about —— miles in length, and will commence at —— and end at ——. AND WHEREAS it is proposed to raise the funds for the construction and equipment of such railway by the creation and issue of debentures, and it is intended that the funds for the construction and equipment of the first section of such railway shall be provided by the creation and issue of ——*l.* of debentures of the coy framed in accordance with the form set forth in the first schedule hto. AND WHEREAS the coy has determined to secure such debentures in manner hnftr appearing. NOW THESE PRESENTS WITNESS AND DECLARE as follows:—

Interpretation clause.

1. In these presents, unless there be something in the subject or context inconsistent therewith—

"The debentures" means the ——*l.* debentures above referred to or such of the same as shall for the time being be outstanding.

"The debenture holders" means the registered holders for the time being of such debentures.

"The trees" means the said —— and ——, or other the trees or tree for the time being hof.

"The mortgaged premises" means the ppty charged by clause 3 hof.

"Extraordinary resolution" has the meaning assigned thto by clause 16 of the second schedule hto.

How debentures to be framed.

2. The ——*l.* debentures afsd shall be framed in accordance with the form set forth in the first schedule hto.

Specific charges.

3. The coy hby specifically charges the first section of the railway afsd, namely, the section of about —— miles, commencing at —— and ending at ——, and also all the stations, lands, sidings, warehouses, buildings, reservoirs, rolling stock, telegraphs, telephones, tools, rights and effects, both present and future, belonging to the coy in connection with such section, with the payment of the principal moneys and interest intended to be secured by the debentures, and of all other moneys payable hereunder.

Construction fund.

4. The debentures shall be offered for public subscription forthwith and all moneys received by the coy in respect of such debentures shall be placed in the —— Bank to an account to be opened there

**Form 118.**

in the names of the trees, and the trees shall invest such moneys or place the same on deposit as hnftr provided, and shall hold such moneys and the investment thof and the income thof (hnftr collectively referred to as "the construction fund") upon trust to apply the sd fund in paying the costs of and incident to the construction and equipment of the first section afsd; and any surplus which shall remain after the construction and equipment of such section shall be handed over to the coy.

**Supervision of expenditure.**

5. For the purpose of supervising the expenditure of the construction fund, the trees shall from time to time appoint an engineer who shall be instructed from time to time to certify in writing to the trees what sums, having regard to the work done towards the construction and equipment of the railway, ought to be pd over to the coy, and in so certifying, the sd engineer shall take into account the length of the line, the works carried out and to be carried out, and the total sum of ——*l.* afsd; and such engineer, in giving his certificate, shall be at liberty to act on such evidence of the expenditure as he may in his absolute discretion think proper, and without being bound to proceed to the site of the railway, or otherwise of his own knowledge to investigate the condition of affairs, and the trees shall be at liberty to act on the certificates of such engineer without being in any way bound to go behind such certificates, or to investigate the evidence on which the certificates were given, and shall be in no wise responsible for any losses occasioned by acting on any certificate improperly given.

**Trustees may use balance.**

6. If the security hby constituted shall become enforceable as hnftr provided, and the trees shall determine to enforce the same, then and in that case so much of the construction fund as shall not previously have been pd out shall be freed from the foregoing provisions, and shall be applicable by the trees or tree in such manner as they shall think fit towards the completion and equipment of the sd section, but if and so far as they shall determine not to expend the same in that way, such construction fund shall be held as if the same represented moneys arising from the sale of a portion of the section, and shall be dealt with in accordance with clause —— hof.

7. If the trees enter into possession of the mortgaged premises, or any pt thof, before the completion and equipment of the sd section, the trees may complete the construction and equipment of the sd section in such manner as they think fit, and for that purpose may use the construction fund, or so much thof as shall then remain unapplied, and for the purposes of such construction and equipment may employ contractors, engineers, surveyors, and others, and make all such contracts and arrangements as the trees may think fit.

8. If the trees enter into possession or remain in possession after the completion and equipment of the section, they may henceforth carry on the working of the section in such manner as they think fit, and for that purpose may enter into all such contracts and arrangements as they think expedient, and shall apply all moneys received by them from the working of the section, first in payment of the cost of and incident to the working, secondly, the surplus shall be held by them on the trusts by clause —— hof declared of and concerning the moneys therein mentd. **Form 118.**

9. When the whole of the sd railway shall have been completed and equipped, the coy may, by notice in writing to the trees hof and to the trees of any further deed or deeds executed pursuant to clauses —— and —— hof, declare that all the debentures entld to the benefit of these presents, and to the benefit of such further deed or deeds, shall thenceforth be consolidated as regards security, and thereupon and thenceforth all such debentures shall rank *pari passu* in point of charge, and the several specific charges on the several sections of the railway, and the several floating charges created as security for each series, shall collectively operate and enure for the equal benefit of all the debentures, and the provisions contained in the second schedule hto shall apply to all the debentures, and the coy and the several trees shall concur in executing all such instruments and things as shall be necessary or expedient for the purpose of effectuating such consolidation and amalgamation of securities; and in case any difference shall arise in regard thto, such difference shall be referred to the senior conveyancing counsel of the Chancery Division of the High Ct of Justice, whose decision shall be final. **Consolidation of debentures on all sections of railway being completed.**

The general provisions of the deed should follow Form 81, with suitable modifications, including the insertion of Form 112.

**Form 119.**

**Trust deed for securing prior lien debentures.**

THIS TRUST DEED is made the —— day of ——, between the coy (hnftr called "the coy") of the one pt and the —— Corporation, Limtd, of the other pt.

**Recitals.**

WHEREAS the coy has been registered as a coy limtd by shares under the Cos (Consoln) Act, 1908, to ——, with a capital of 2,000,000*l.*, divided into 200,000 shares of 10*l.* each, of which 100 are founders' shares and the remaining 199,900 are ordinary shares. AND WHEREAS the whole of the sd 200,000 shares have been issued and there have been, prior to the date of the presentation of the winding-up petons hnftr mentd, called up on each such share the sum of 5*l.* 10*s.*, leaving the sum of 4*l.* 10*s.* uncalled and unpd thereon. AND WHEREAS, by an indenture of lease, dated, &c., and made, &c., certain hereditaments,

**Form 119.**

situate, &c., more particularly described in such indenture of lease, were demised to the coy for the term of 999 years from the —— of ——, at the rent thereby reserved and subject to the covenants and conditions therein contained and on the pt of the lessees thereunder to be performed and observed. AND WHEREAS in the year —— the coy issued a series of First Mortgage Debentures for an aggregate amount of 500,000*l.* secured upon the capital then remaining uncalled of the coy and upon the sd leasehold hereditaments and by a floating charge upon the whole ppty, assets, and undertaking of the coy, and also by an Indenture of Trust (hnftr called "the sd trust deed"), dated the —— day of ——, and made between the coy of the one pt and —— of the other pt, whereby the sd leasehold hereditaments were demised by the coy to the sd —— and —— for the residue of the sd term of 999 years less the last day thof. AND WHEREAS in or about the year —— the coy issued Second Mortgage Debentures for an aggregate amount of 430,000*l.*, comprising in effect the same ppty as that comprised in the sd First Mortgage Debentures but expressed to be subject to the sd principal sum of 500,000*l.* and interest secured by the sd First Mortgage Debentures and to the sd trust deed. AND WHEREAS the coy has from time to time deposited the several securities the parlars whereof are specified in the third column of the first pt of the inventory mentd in clause 16 hof with the several creditors of the coy whose names are specified in the first column of the same pt of the sd inventory as security for the payment of the debts the amount whereof is set forth opposite the names of the sd several creditors in the second column thof. AND WHEREAS on the —— day of —— a call of 2*l.* 10*s.* per share was, with the consent of the trees of the sd trust deed, made on the shareholders of the coy, and upwards of ——*l.* has been received in respect thof and now stands to the credit of the trees in an account in their names at the Bank of England. AND WHEREAS on or about the —— day of —— an action was commenced in the Chancery Division of the High Ct of Justice on behalf of the holders of all the sd First Mortgage and Second Mortgage Debentures resply to enforce the security created by the sd trust deed and debentures resply, and in or about the month of —— petons were resply presented by —— for the winding-up of the coy. AND WHEREAS at the date of the sd proceedings the coy was and it now is indebted or alleged to be indebted to various persons whose names are specified in the first column of the third pt of the sd inventory who claim as unsecured creditors in respect of the sums set opposite their names resply in the second column of the sd third pt of the same inventory. AND WHEREAS in view of the sd proceedings a scheme of arrangement has been proposed of which scheme the following are the terms material to be here stated, namely:—&c.

Form 119.

AND WHEREAS in pursuance of the sd scheme the call of 1*l.* 10*s.* per share thereby contemplated has already been made with the consent of the trees of the sd trust deed and a sum exceeding ——*l.* has been received in respect thof and now stands to the credit of the trees of that deed in the account afsd. AND WHEREAS in accordance with the sd scheme the coy is about to issue a series of 250,000*l.* Prior Lien Debentures, in 2,500 debentures of 100*l.* each, in the form set forth in the first schedule hto.

NOW THESE PRESENTS WITNESS AND DECLARE AS FOLLOWS:—

Interpretation.

1. Unless there be something in the subject or context inconsistent therewith, the expressions following shall have the meanings hnftr mentd (that is to say):—

"The trees hof" means the —— Corporation, Limtd, or other the trees for the time being hof.

"The existing First Debentures" means the sd debentures of the coy for 500,000*l* secured by the sd indenture or trust deed of the —— of ——.

"The existing Second Debentures" means the debentures of the coy for 430,000*l.* issued as afsd.

"The existing secured creditors" means the several persons named in the first column of the first pt of the inventory afsd.

"The existing unsecured creditors" means the several persons named in the first column of the third pt of the inventory afsd.

"The arranging creditors" means the holders of the existing Second Debentures and the existing secured creditors and the existing unsecured creditors afsd.

"The debentures" means the debentures for the time being hby secured, being the above-mentd Prior Lien Debentures, and "the debenture holders" means the holders for the time being of such debentures.

"The appropriated assets" means the assets which for the time being shall be or ought to be entered in the register of appropriated assets in accordance with clause —— hof.

"The general assets" means any assets for the time being of the coy charged by clause —— hof.

"The mortgaged premises" means the uncalled capital assigned by clause —— hof, the premises demised by clause —— hof, the appropriated assets and the general assets.

"In writing" means written or printed or partly written and partly printed.

**Form 119.**

**Conversion of existing debentures.**

2. The coy shall forthwith procure the holders of the existing Second Debentures and the existing secured creditors to transfer their debts and securities for the same to the trees hof to be held on the trusts hby declared.

3. The coy shall as soon as possible procure the holders of the existing First Debentures of the coy to accept payment of the principal moneys and interest thereon, with a premium of 3 p.c. in satisfaction of such debentures, and the trees of the sd trust deed shall, with the concurrence of the coy, provide out of the sd cash in their hands at the Bank of England the sum necessary to make such payment, and when and so soon as such payments shall have been made or duly provided for, the balance of the moneys in the Bank as afsd shall be handed over to the trees hof.

**Trustees to certify when certain events occur.**

4. When and so soon as the coy shall have proved to the satisfaction of the trees hof:—

(a) That notice has been given by the coy of its intention to pay off the existing First Debentures, and that the sd moneys in the Bank of England are more than sufficient to clear them off:

(b) That the coy has procured or can procure the holders of the existing Second Debentures and the existing secured creditors to transfer their debts and securities to the trees hof in accordance with clause 2 hof:

(c) That the sd petons and action have been withdrawn and dismissed and that no other winding-up proceedings are pending:

the trees hof shall in writing certify that such proof has been given.

**Debenture moneys to be paid into bank.**

5. All moneys payable in respect of the debentures shall be made payable to and be received by the trees hof or by bankers approved by the trees hof, and all moneys so pd shall, subject as hnftr provided, be deemed to belong to the trees hof, and shall be carried to the credit of the trees hof, and such bankers shall be instructed to carry the same to such credit accordingly, and all such moneys shall be at the risk of the coy, and when and so soon as the certificate afsd has been given such moneys, together with any balance handed over pursuant to clause 3 hof, shall be applied from time to time in paying to the holders of the existing Second Debentures and to the existing secured creditors the cash payable to them resply under the scheme of arrangement afsd. And the trees hof shall be at liberty (with the sanction of such bankers) to permit the coy to draw cheques on such account in favour of any of the sd several persons for such cash. The balance shall be pd over to the coy when and so soon as the coy shall have satisfied the trees hof that it has issued to the sd holders of the existing

Second Debentures and to the sd existing secured creditors A. Debentures of the coy for the balance due to them resply or has otherwise satisfied the amount due to them resply. **Form 119.**

6. If the certificate afsd is not given within three months from the date hof the trees hof may give notice in writing to the coy that unless they are placed in a position to give such certificate within fourteen days from the date of such notice they will treat the scheme of arrangement as abandoned and return the money subscribed in respect of the debentures; and unless the coy within such period of fourteen days or such extended period (if any) as the trees hof may allow, place the trees hof in a position to give the certificate afsd, and the trees hof give such certificate accordingly, the sd scheme shall at the expiration of such period be deemed to be abandoned and the trees hof shall thereupon reassign the debts and securities assigned to them pursuant to clause 2 hof, and shall return to the subscribers for the debentures the amount pd up by them resply, and these presents shall thereupon become null and void save that the coy shall be bound to pay and indemnify the trees hof against all expenses and liabilities incurred by them in relation hto.

7. When and so soon as— **After certificate and conversion, fresh trusts.**

(a) the certificate afsd shall have been given, and

(b) the existing First Debentures shall have been pd off as afsd,

(c) the existing Second Debentures and the existing secured creditors shall have been pd off or satisfied as afsd,

all the securities for the same resply shall be deemed to be satisfied and discharged, and the trees of the sd trust deed and the holders of the existing Second Debentures and the existing secured creditors shall execute all such transfers and releases as the trees hof may require.

[*The rest of the deed will be on the lines of Form* 81.]

# CHAPTER XLI.

## REGISTRATION FORMS.

THE following Forms relate to the registration of mortgages, charges and debentures under sects. 79—91 of the Act. See Chap. XXIV., *supra*.

**Form 120.**

**Particulars of mortgage or charge.**

No. of coy ——. (Board of Trade Form No. 47.)

The Cos Act, 1929. [See below.]

PARLARS OF A MORTGAGE OR CHARGE CREATED BY A COY REGISTERED IN ENGLAND.

*Pursuant to sect.* 79.

Name of coy ——.

*The fee payable on registration of a mortgage or charge is* 10*s. if the amount secured does not exceed* 200*l., and* 1*l. if it exceeds* 200*l.*

Presented by ——.

Parlars of a mortgage or charge created by ——, Limtd, a coy registered in England.

| (1) Date and description of the instrument creating or evidencing the Mortgage or Charge (*a*). | (2) Amount secured by the Mortgage or Charge. | (3) Short particulars of the Property Mortgaged or Charged. | (4) Names, 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 (*b*). |
|---|---|---|---|---|
| | | | | |

Signature ——.

Designation of position in relation to the coy ——.

Dated the —— day of ——, 19—.

This is Form 47 of the Order of the Board of Trade, dated the 7th October, 1929.

A somewhat different form is used where the debentures are of different amounts or where a single debenture is registered. In more than one case

(*a*) A description of the instrument, *e.g.*, "trust deed," "mortgage," "debenture," &c., as the case may be, should be given.

(*b*) The rate of interest payable under the terms of the debentures should not be entered.

certain debentures, described in the certificate as "forming part of a series of debentures, all ranking *pari passu*, for a total amount not exceeding the nominal amount of the issued [or paid-up] capital of the company for the time being," have been registered.

**Form 120.**

No. of coy ——. (Board of Trade Form No. 47A.)

**Form 121.**

The Cos Act, 1929. [See below.]

**Particulars of a series of debentures (sect. 79 (8)).**

PARLARS OF 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 SD SERIES ARE ENTITLED PARI PASSU, CREATED BY A COY REGISTERED IN ENGLAND.

*Pursuant to sect.* 79.

Name of coy ——.

*The fee payable on the registration of these parlars is* 10*s. if the amount of the whole series does not exceed* 200*l., and* 1*l. if it exceeds* 200*l.*

*This Form (No.* 47A*) is to be used for registration of parlars of the entire series. When more than one issue of debentures in the series is made, parlars of each issue subsequent to the first should be sent to the registrar on Board of Trade Form No.* 48.

Presented by ——.

Parlars of a series of debentures created by ——, Limtd, a coy registered in England.

| (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 any Debenture 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 (*a*). |
|---|---|---|---|---|---|---|
| | | | | | | |

Signature ——.

Designation of position in relation to the coy ——.

Dated the —— day of ——, 19—.

(*a*) The rate of interest payable under the terms of the debentures should not be entered.

**Form 121.** The fees will be as follows (as prescribed by the Companies (Fees) No. 1 Order, 1929):—

| | £ | s. | d. |
|---|---|---|---|
| For registering particulars of a series of debentures under Part III. of the Companies Act, 1929— | | | |
| Where the total amount secured by the whole series does not exceed 200*l.* ... ... ... ... ... ... ... ... | 0 | 10 | 0 |
| Where it does exceed 200*l.* ... ... ... ... ... ... | 1 | 0 | 0 |
| For registering particulars of charges under sect. 91 of the Companies Act, 1929 ... ... ... ... ... ... ... ... ... | 0 | 5 | 0 |
| For registering the appointment of a receiver or manager of the property of a company under sect. 86 of the Companies Act, 1929 ... | 0 | 5 | 0 |
| For inspecting the register of charges— | | | |
| For each inspection ... ... ... ... ... ... ... | 0 | 1 | 0 |

**Form 122.**

**Particulars of a series of debentures.**

No. of Coy ——. (Board of Trade Form No. 48.)

The Cos Act, 1929.

[A 5*s.* cos registration fee stamp must be impressed here.]

PARLARS OF AN ISSUE OF DEBENTURES IN A SERIES BY A COY REGISTERED IN ENGLAND.

*Pursuant to sect.* 79 (8).

Name of coy ——.

*For registration of the entire series Board of Trade Form No.* 47A *must be used.*

Presented by ——.

Parlars of an issue of debentures in a series when more than one issue in the series is made by ——, Limtd, a coy registered in England.

| (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 (*a*). |
|---|---|---|
| | | |

Signature ——.

Designation of position in relation to the coy ——.

Dated the —— day of ——, 19—.

See sect. 79 (8), p. 187, *supra*.

Forms Nos. 47a and 48 referred to in Forms 121 and 122 are the forms so numbered prescribed by order of the Board of Trade of the 7th October, 1929.

(*a*) The rate of interest payable under the terms of the debentures should not be entered.

No. of coy ——. (Board of Trade Form No. 47B.) **Form 123.**

The Cos Act, 1929.

[See below.]

**Particulars of charge subject to which property is acquired.**

PARLARS OF A MORTGAGE OR CHARGE SUBJECT TO WHICH PPTY HAS BEEN ACQUIRED ON OR AFTER 1ST NOVEMBER, 1929, BY A COY REGISTERED IN ENGLAND.

*Pursuant to sect.* 81.

Name of coy ——.

*The fee payable on registration of a mortgage or charge is* 10*s. if the amount secured does not exceed* 200*l., and* 1*l. if it exceeds* 200*l.*

Presented by ——.

Parlars of a mortgage or charge subject to which ppty has been acquired on or after 1st November, 1929, by ——, Limtd, a coy registered in England.

| (1) Date and description of the instrument creating or evidencing the Mortgage or Charge (*a*). | (2) Date of the acquisition of the Property. | (3) Amount owing on security of the Mortgage or Charge. | (4) Short particulars of the Property Mortgaged or Charged. | (5) Names, Addresses and Descriptions of the Mortgagees or Persons entitled to the Charge. |
|---|---|---|---|---|
| | | | | |

Signature ——.

Designation of position in relation to the coy ——.

Dated the —— day of ——, 19—.

Sect. 79 of the Act, following sect. 93 of the Act of 1908, only applies to a charge created by the company. The registration provisions are now extended to charges on the company's property which is acquired by the company subject to the charge. See sect. 81, *supra*, p. 191.

(*a*) A description of the instrument, *e.g.*, trust deed, mortgage, debenture, &c., as the case may be, should be given.

A copy of the instrument certified as prescribed in paragraph (4) of this Order must be delivered with these particulars.

**Form 124.** No. of coy ——. (Board of Trade Form No. 54A.)

Particulars of charges on property acquired before 1st Nov., 1929.

The Cos Act, 1929.

[A 5*s*. cos registration fee stamp must be impressed here.]

PARLARS OF CHARGES CREATED AND CHARGES ON PPTY ACQUIRED BEFORE THE 1ST DAY OF NOVEMBER, 1929, BY A COY REGISTERED IN ENGLAND.

*Pursuant to sect.* 91.

Name of coy ——.

Presented by ——.

Parlars supplied by ——, Limtd, a coy registered in England:—

(a) Of mortgages or charges created by the coy before the 1st November, 1929, and remaining unsatisfied at that date which would have been required to be registered under the provisions of paras (g), (h) and (i) of sub-sect. (2) of sect. 79 of the Act if the mortgages or charges had been created on or after that date; and

(b) Of mortgages or charges to which any ppty acquired by the coy before the 1st November, 1929, is subject and which would have been required to be registered under the provisions of sect. 81 of the Act if the ppty had been acquired on or after that date.

| (1) Date and description of the instrument creating or evidencing the Mortgage or Charge (*a*). | (2) Date of acquisition of the Property (*b*). | (3) Amount owing on the security of the Mortgage or Charge at the 1st day of November, 1929. | (4) Short Particulars of the Property Mortgaged or Charged. | (5) Names, Addresses and Descriptions of the Mortgagees or Persons entitled to the Charge. |
|---|---|---|---|---|
| | | | | |

Signature ——.

Designation of position in relation to the coy ——.

Dated the —— day of ——, 19—.

(*a*) A description of the instrument, *e.g.*, "trust deed," "mortgage," "debenture," &c., as the case may be, should be given.

(*b*) This column should be completed only when the mortgage or charge is a mortgage or charge to which the property was subject when acquired by the company.

**Form 124.**

These particulars should have been delivered within six months after the commencement of the Act. See sect. 91, which contains the following provisions:—

**91.**—(1) It shall be the duty of a company within six months after the commencement of this Act to send to the registrar of companies for registration the prescribed particulars of—

(a) any charge created by the company before the date of the commencement of this Act and remaining unsatisfied at that date, which would have been required to be registered under the provisions of paragraphs (g) (h) and (i) of sub-section (2) of section seventy-nine of this Act or under the provisions of section ninety of this Act, if the charge had been created after the commencement of this Act; and

(b) any charge to which any property acquired by the company before the commencement of this Act is subject and which would have been required to be registered under the provisions of section eighty-one of this Act or under the provisions of section ninety of this Act, if the property had been acquired after the commencement of this Act.

(2) The registrar, on payment of the prescribed fee, shall enter the said particulars on the register kept by him in pursuance of this Part of this Act.

(3) If a company fails to comply with this section, the company and every director, manager, secretary or other officer of the company, or other person who is knowingly a party to the default shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Failure to register does not affect the validity of the charge. (Sect. 91 (3) proviso.)

**Form 125.**

Certificate of registration of debenture.

I hby certify that a series of debentures created by The —— Coy, Limtd, on the —— day of ——, for securing the sum of ——*l.*, was this day registered pursuant to sect. 79 of the Cos Act, 1929.

Given under my hand, at London, this —— day of ——,

——, Registrar of Cos.

**Form 126.**

Certificate of registration under sub-sect. 8.

Applcon having this day been made for the entry on the register of the parlars required by sub-sect. (8) of sect. 79 of the Cos Act, 1929, in relation to a series of debentures containing a charge (to the benefit of which the debenture holders of the sd series are entld *pari passu*) created by ——, Limtd, by resolution passed on the —— day of ——, 19— (and one of such debentures having been duly produced), I hby certify that the total amount secured or intended to be secured by the sd series is 100,000*l.*, and that all the parlars required by sub-sect. (8) of sect. 79 of the sd Act in relation to the sd series have been this day entered on the register.

Given under my hand, at London, this —— day of ——.

——, Registrar of Cos.

**Form 127.**

Certificate of registration of trust deed.

I hby certify that a mortgage or charge, dated, &c., and created by The —— Coy, Limtd, for securing debentures for the aggregate sum of ——*l.*, was this day registered pursuant to sect. 79 of the Cos Act, 1929.

Given, &c.

**Form 128.**

Certificate of registration of trust deed, statutory ship mortgages, and debentures.

I hby certify that a trust deed dated the 17th December, 1919, and two statutory ship mortgages dated the 2nd January, 1920, and 77 debentures, numbered, &c., each for securing 50*l.* with interest as therein mentd, and forming pt of a series of like debentures all ranking *pari passu* of a total of 4,000*l.* created, &c. [*as in above form*].

Given, &c.

The registrar's certificate is conclusive. *Yolland, Husson & Birkett*, (1908) 1 Ch. 152; *Cunard Steamship Co.* v. *Hopwood*, (1908) 2 Ch. 564; and sect. 82 (2).

**Form 129.**

Certificate of registration, Scotland or Northern Ireland.

No. of coy ——. (Board of Trade Form No. 47c.)

The Cos Act, 1929.

[A 5*s.* cos registration fee stamp must be impressed here.]

CERTIFICATE OF REGISTRATION IN SCOTLAND OR NORTHERN IRELAND OF A CHARGE COMPRISING PPTY SITUATE THERE.

*Pursuant to sect.* 79 (5).

Name of coy ——.

Presented by ——.

*Certificate.*

I [*or* We], ——, of ——, being (*a*) ——, hby certify that the charge (*b*) —— of which a true copy is annexed hto was presented for registration on —— day of ——, 19—, at (*c*) ——.

Signature ——.

See sect. 79 (5), p. 187, *supra*.

(*a*) This certificate must be given by a director or secretary of the company, or by a person interested in the charge otherwise than on behalf of the company, or by a solicitor acting on behalf of the company, or of some person so interested as aforesaid. The capacity in which the certificate is given must be stated.

(*b*) Give date and parties to charge.

(*c*) State description and situation of office of registration.

**Form 130.**

Certificate where a charge under Land Registration Act given.

I hby certify that a charge dated 13th January, 19—, and created by The —— Coy, Limtd, for securing the sum of 125,000*l.*, pursuant to the Land Registration Act, 1925, was this day registered pursuant to sect. 79 of the Cos Act, 1929.

Given, &c.

See p. 371, *supra*.

**Form 131.**

Certificate of proposed series and trust deed.

Applicon having this day been made for the registration of a trust deed dated ——, and executed by ——, Limtd, for the purpose of securing the series of debentures hnftr mentd, and applicon having been also made this day for the entry on the register of the parlars required by sub-sect. (8) of sect 79 of the Cos Act, 1929, in relation to a series of debentures containing a charge (to the benefit of which the debenture holders of such series are entld *pari passu*) created by the sd coy by resolution passed on the —— day of ——, 19—, and the sd trust deed having been brought in for registration (and one of the debentures of the sd series dated within twenty-one days of this date having been produced), I hby certify that the total amount secured or intended to be secured by the sd trust deed and series of debentures is ——*l.*, and that the sd trust deed has this day been registered pursuant to sect. 79, sub-sects. (1) and (8) of the sd Act; and that all the parlars required by sub-sect. (8) of sect. 79 of the sd Act in relation to the sd series have been entered on the register.

**Form 132.**

Certificate of proposed series and trust deed where debentures of different amounts.

Applicon having this day been made for the entry on the register of the parlars required by sub-sect. (8) of sect. 79 of the Cos Act, 1929, in relation to a series of debentures containing a charge (to the benefit of which the debenture holders of the sd series are entld *pari passu*) created by ——, Limtd, by resolution passed on the —— day of ——, 19—, each debenture of the sd series being also entld to the benefit of a trust deed dated the —— day of ——, 19—, and registered the —— day of ——, 19— (and one of the debentures of the sd series dated within twenty-one days of this date having been produced), I hby certify that the total amount secured or intended to be secured by the sd series is ——*l.*, and that all the parlars required by sub-sect. (8) of sect. 79 of the sd Act in relation to the sd series have been this day entered on the register.

**Form 133.**

Certificate of registration of debenture stock covering deed.

I hby certify that a mortgage or charge by way of trust deed, dated ——, and created by The —— Coy, Limtd, for securing the sum of ——*l.*, was this day registered pursuant to sect. 79 of the Cos Act, 1929.

Given, &c.

**Form 134.**

**Notice of satisfaction.**

MEMDUM OF SATISFACTION OF MORTGAGE OR CHARGE.

[A 5*s*. cos registration fee stamp must be impressed here.]

The ——, Limtd, hby gives notice that the registered charge being (*a*) ——, of which parlars were registered with the Registrar of Cos on the —— day of ——, 19—, was satisfied on the —— day of ——, 19—, to the extent of ——.

In witness whereof the common seal of the coy was hereunto affixed the —— day of ——, 19—.

——
——
} Directors.

——, Secretary.

(*a*) A description of the instrument(s) creating or evidencing the charge, *e.g.*, "mortgage," "charge," "debenture," &c., with the date thereof should be given. If the registered charge was a "series of debentures," or "debenture stock," the words "authorized by resolution," together with the date of the resolution, should be added.

Notice of satisfaction should not be entered where the company sells the equity of redemption and remains liable on the covenants. If this is done by inadvertence the Court can rectify under sect. 85 of the Act. *Re C. Light & Co.*, W. N. (1917) 77.

See sect. 84, *supra*, p. 197.

**Form 135.**

**Declaration verifying memorandum of satisfaction.**

No. of coy ——. (Board of Trade Form No. 49.)

The Cos Act, 1929. [No revenue stamp duty chargeable.]

DECLARATION VERIFYING MEMDUM OF SATISFACTION OF MORTGAGE OR CHARGE.

*Pursuant to sect.* 84.

Name of coy ——.

Presented by ——.

We, ——, of ——, a director of ——, Limtd, and ——, of ——, the secretary thof, do solemnly and sincerely declare that the parlars contained in the Memdum of Satisfaction annexed hto and dated the —— day of ——, 19—, 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 (*a*).

(*a*) *or* Notary Public *or* Justice of the Peace.

CHRONOLOGICAL INDEX OF CHARGES ENTERED IN THE REGISTER. No. 90.

| Date of Registration. | Serial Number of Charge in this Index. | Name of Company. | Number of Company. | Amount of Mortgage or Charge. | Date of Trust Deed. | Debentures. | | Other Mortgages, &c. | By whom Registered. | Fee Paid. | Remarks. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | First Issue. | Further Issues. | | | | |
| | | | | £ | | | | | | £ s. | |

Form 136.
Chronological Index (sect. 82 (4)).

**Form 137.**
Register of mortgages.

No. 91.

No. of coy ——.

REGISTER OF MORTGAGES AND CHARGES, AND OF MEMDUMS OF SATISFACTION OF ——, LIMTD.

| (1) Date of Registration. | (2) Serial Number of Document on File. | (3) Date of Creation of each Mortgage or Charge and Description thereof. | (4) Date of the acquisition of the Property. | (5) Amount secured by the Mortgage or Charge. | (6) Short particulars of the Property Mortgaged or Charged. | (7) Names of the Mortgagees or Persons entitled to the Charge. | Particulars relating to the issues of Debentures of a series. | | | (10) Dates of the Resolutions authorising the issue of the series. | (11) Date of the Covering Deed. | (12) General Description of the Property Charged. | (13) Names of the Trustees or the Debenture Holders. | (14) Memorandums of Satisfaction. | (15) Amount or Rate per cent. of the Commission, Allowance, or Discount. | (16) Receiver or Manager. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | (8) Total Amount secured by a series of Debentures. | (9) Date and Amounts of each issue of the series. | | | | | | | | Name and Date of Appointment. | Date of ceasing to act. |
| | | | | | | | | Date. | Amount. | | | | | Amount. | | | |
| | | | | £ | | | £ | | £ | | | | | £ | | | |
| | | | | | | | | | | | | | | | | | |

See sect. 82 (1), pp. 196, 197, *supra*.

No. of coy F ——. (Board of Trade Form No. 8F.)

**Form 138.**

Particulars of charge created by foreign company.

The Cos Act, 1929. [See below.]

PARLARS OF A MORTGAGE OR CHARGE ON PPTY IN ENGLAND CREATED ON OR AFTER THE 1ST NOVEMBER, 1929, BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sects.* 79 *and* 90.

Name of coy ——.

*The fee payable on registration of a mortgage or charge is* 10*s. if the amount secured does not exceed* 200*l. and* 1*l. if it exceeds* 200*l.*

Presented by ——.

Parlars of a mortgage or charge created by ——, a coy incorporated in (*a*) —— and which has established a place of business in England at ——.

| (1) Date and description of the instrument creating or evidencing the Mortgage or Charge (*b*). | (2) Amount secured by the Mortgage or Charge. | (3) Short particulars of the Property Mortgaged or Charged. | (4) Names, 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 (*c*). |
|---|---|---|---|---|
| | | | | |

Signature of persons authorised under sect. 344 (1) (c) of the Cos Act, 1929, or of some other person in Great Britain duly authorized by the coy. } —— —— —— ——

Dated the —— day of ——, 19—.

(*a*) Country of origin.

(*b*) A description of the instrument, *e.g.*, trust deed, mortgage, debenture, &c., as the case may be, should be given.

(*c*) The rate of interest payable under the terms of the debentures should not be entered.

**Form 138.**

The registration provisions of the Act are now extended to companies incorporated outside England. Sect. 90 provides as follows :—

**90.** The provisions of this Part of this Act shall extend to charges on property in England which are created, and to charges on property in England which is acquired, after the commencement of this Act by a company (whether a company within the meaning of this Act or not) incorporated outside England which has an established place of business in England.

**Form 139.**

**Particulars of charge subject to which property acquired. Foreign company.**

No. of coy F ——. (Board of Trade Form No. 9F.)

The Cos Act, 1929.

PARLARS OF A MORTGAGE OR CHARGE SUBJECT TO WHICH PPTY IN ENGLAND HAS BEEN ACQUIRED ON OR AFTER 1ST NOVEMBER, 1929, BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sects.* 81 *and* 90.

Name of coy ——.

*The fee payable on registration of a mortgage or charge is* 10*s. if the amount secured does not exceed* 200*l. and* 1*l. if it exceeds* 200*l.*

Presented by ——.

Parlars of a mortgage or charge subject to which ppty in England has been acquired by —— a coy incorporated in (*a*) —— and which has established a place of business in England at ——.

| (1) Date and description of the instrument creating or evidencing the Mortgage or Charge (*b*). | (2) Date of the acquisition of the Property. | (3) Amount secured by the Mortgage or Charge. | (4) Short particulars of the Property Mortgaged or Charged. | (5) Names, Addresses and Descriptions of the Mortgagees or Persons entitled to the Charge. |
|---|---|---|---|---|
| | | | | |

Signature of the persons authorized under sect. 344 (1) (c) of the Cos Act, 1929, or of some other person in Great Britain duly authorized by the coy. ——

Dated the —— day of ——, 19—.

(*a*) Country of origin.

(*b*) A description of the instrument, *e.g.*, "trust deed," "mortgage," "debenture," &c., as the case may be, should be given.

A copy of the instrument, certified as prescribed in paragraph (4) of this Order [The Companies (Forms) Order, 1929], must be delivered with these particulars.

No. of coy F ——. (Board of Trade Form No. 10F.)

**Form 140.**

Particulars of a series of debentures. Foreign company. Where trust deed.

The Cos Act, 1929. [See below.]

PARLARS OF A SERIES OF DEBENTURES CONTAINING, OR GIVING BY REFERENCE TO ANY OTHER INSTRUMENT, ANY CHARGE ON PPTY IN ENGLAND, TO THE BENEFIT OF WHICH THE DEBENTURE HOLDERS OF THE SD SERIES ARE ENTLD, PARI PASSU, CREATED BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sects.* 79 (8) *and* 90.

Name of coy ——.

(*The fee payable on the registration of these parlars is* 10*s. if the amount of the whole series does not exceed* 200*l. and* 1*l. if it exceeds* 200*l.*

This Form (No. 10F) is to be used for registration of parlars of the *entire* series. When more than one issue of debentures in the series is made, parlars of the date and amount of each issue subsequent to the first should be sent to the registrar on Form No. 11F).

Presented by ——.

Parlars of a series of debentures created by —— a coy incorporated in (*a*) —— and which has established a place of business in England at ——.

| (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 any Debenture 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 (*b*). |
|---|---|---|---|---|---|---|
| | | | | | | |

Signature of the persons authorized under sect. 344 (1) (*c*) of the Cos Act, 1929, or of some other person in Great Britain duly authorized by the coy. ——

Dated the —— day of ——, 19—.

(*a*) Country of origin.

(*b*) The rate of interest payable under the terms of the debenture should not be entered.

**Form 141.** No. of coy F ——. (Board of Trade Form 11F.)

Same where more than one issue in the series.

No trust deed.

The Cos Act, 1929.

[A 5*s.* cos registration fee stamp must be impressed here.]

PARLARS OF AN ISSUE OF DEBENTURES IN A SERIES BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sects.* 79 (8) *and* 90.

Name of coy ——.

*For registration of parlars of the entire series Form No.* 10F *must be used.*

Presented by ——.

Parlars of an issue of debentures in a series where more than one issue in the series is made by —— a coy incorporated in (*a*) —— and which has established a place of business in England at ——.

| (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 (*b*). |
|---|---|---|
| | | |

Signature of the persons authorized under sect. 344 (1) (c) of the Cos Act, 1929, or of some other person in Great Britain duly authorized by the coy. ——

Dated the —— day of ——, 19—.

(*a*) Country of origin.

(*b*) The rate of interest payable under the terms of the debentures should not be entered.

No. of coy F ——. (Board of Trade Form No. 12A.)

**Form 142.**

**Declaration verifying memorandum of satisfaction. Foreign company.**

The Cos Act, 1929.

[No revenue stamp duty chargeable.]

DECLARATION VERIFYING MEMDUM OF SATISFACTION OF MORTGAGE OR CHARGE BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sect.* 84.

Name of coy ——.

Presented by ——.

I [*or* We], of ——, the person[s] authorized under sect. 344 (1) (c) of the Cos Act, 1929, by (*a*) —— do solemnly and sincerely declare that the parlars contained in the memdum of satisfaction annexed hto and dated the —— day of ——, 19—, are true to the best of my/our knowledge, information and belief. And I [*or* 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 (*b*).

MEMDUM OF SATISFACTION OF MORTGAGE OR CHARGE.

[A 5*s*. cos registration fee stamp must be impressed here.]

Name of coy ——.

I [*or* We], ——, of ——, hby give notice on behalf of the above-named coy that the registered charge being (*c*) —— of which parlars were registered with the Registrar of Cos on the —— day of ——, 19—, was satisfied on the —— day of ——, 19—, to the extent of ——.

Signatures of the persons authorized ——
under sect. 344 (1) (c) of the Cos Act, ——
1929. ——

Dated the —— day of ——, 19—.

---

(*a*) Name of company.

(*b*) *or* Notary Public *or* Justice of the Peace.

(*c*) Description of the instrument(s) creating or evidencing the charge, *e.g.*, "mortgage," "charge," "debentures," &c., with the date thereof. If the registered charge was a "series of debentures," or "debenture stock," the words "authorized by resolution," together with the date of the resolution should be added.

**Form 143.**

**Particulars of charges created before 1st Nov., 1929. Foreign company.**

No. of coy F ——. (Board of Trade Form No. 13F.)

The Cos Act, 1929.

[A 5*s*. cos registration fee stamp must be impressed here.]

PARLARS OF CHARGES CREATED AND CHARGES ON PPTY ACQUIRED BEFORE THE 1ST DAY OF NOVEMBER, 1929, BY A COY INCORPORATED OUTSIDE ENGLAND.

*Pursuant to sect.* 91.

Name of coy ——.

Presented by ——.

## CHAPTER XLII.

### AGREEMENTS TO ACCEPT SHARES IN SATISFACTION.

As to the invalidity of an option to call for an allotment of fully paid-up shares at par contained in debentures issued at a discount, see *Moseley* v *Koffyfontein Mines*, (1904) 2 Ch. 108; and *Famatina Co.* v. *Bury*, (1910) A. C. 439; *supra*, pp. 204, 205.

**Form 144.**

**Agreement to accept shares in satisfaction.**

AN AGREEMT made the —— day of ——, 19—, Between A. B. & Coy, Limtd, of —— (hnftr called "the coy"), of the one pt, and C. D., of ——, of the other pt.

**Recitals.**

WHEREAS the coy has issued 2,000 first debentures of 50*l.* each, secured by a trust deed dated the —— day of ——, 19—, and made between the coy, of the one pt, and E. F. and G. H., as trees, of the other pt.

AND WHEREAS the sd C. D. holds [10] of the sd debentures.

AND WHEREAS the sd debentures each contain an option to exchange the same for pd-up shares in the coy, and the sd C. D. has given to the coy notice in writing of his desire to exercise such option.

NOW THEREFORE IT IS AGREED as follows:—

**Surrender.**

1. The sd C. D. shall forthwith surrender and give up to the coy to be cancelled his debentures afsd, which debentures are numbered —— to —— inclusive.

**Allotment.**

2. In conson of these provisions the coy shall allot to the sd C. D. 500 fully pd-up shares in the coy of 1*l.* each, numbered —— to —— inclusive.

**Satisfaction.**

3. The sd C. D. shall accept such shares in full satisfaction of the sd debentures.

AS WITNESS, &c.

**Form 145.**

**Request to allot shares.**

TO THE A. A. COY, LIMTD.

GENTLEMEN,

As the holder of ten of your first debentures, numbered —— to —— inclusive, and in exercise of the option therein, I request you to allot me 500 fully pd-up shares in your capital of 1*l.* each in satisfaction of such debentures, and I am prepared to concur in entering into the requisite agreement in writing.

Signature ——.
Name in full ——.
Address ——.

[*Date.*]

**Form 146.**

**Agreement pursuant to preceding agreement.**

AN AGREEMT made the —— day of —— between the A. B. Coy, Limtd (hnftr called "the coy"), of the one pt, and C. of —— (on behalf of the several persons named in the schedule hto), of the other or second pt.

WHEREBY IT IS AGREED as follows:—

**Allotment.**

1. The coy shall forthwith allot to each of the several persons named in the schedule hto the number of fully pd-up ordinary shares of 1*l.* each in the capital of the coy set opposite the name of such person in the second column of the sd schedule, and such person shall accept such shares in full satisfaction of the debentures of the coy, and all coupons issued therewith and not yet matured belonging to him or her, the parlars of which are set opposite his or her name in the fourth column of the sd schedule.

**Numbers of shares.**

2. The fully pd-up shares to be allotted pursuant to this agreemt shall be numbered —— to ——.

**Authority.**

3. The sd C. is duly authorized by the several persons named in the schedule hto to enter into this agreemt on their behalf.

**Cancellation of debentures.**

4. The coy is to be at liberty to cancel the sd debentures and all coupons issued therewith and not matured.

**Filing agreement.**

5. The coy shall cause this agreemt to be duly delivered to the Registrar of Cos for registration in accordance with sect. 42 of the Cos Act, 1929.

In witness whereof the A. B. Coy, Limtd, has hereunto caused its common seal to be affixed, and the sd C. has hereunto set his hand the day, &c.

THE SCHEDULE ABOVE REFERRED TO.

| (1) Names and Addresses of the Debenture Holders who are to receive Paid-up Shares. | (2) The number of Fully paid-up £1 Ordinary Shares in the Company to be allotted to each Debenture Holder. | (3) Distinctive Nos. | | (4) Particulars of the Debentures in satisfaction of which the Allotment is to be made. |
|---|---|---|---|---|
| | | From | To | |
| | | | | |

# CHAPTER XLIII.

## MODIFICATION OF RIGHTS.

DEBENTURES sometimes and trust deeds nearly always contain majority clauses (see pp. 358, 359) enabling a majority of the security holders to modify the rights of the class. Cases frequently occur for exercising the powers conferred by majority clauses, *e.g.*:—

(a) In order to modify the trust deed so as to comply with the requirements of the London Stock Exchange, there being no clause similar to clause 47 at p. 345.

(b) In order to make modifications in the provisions of the deed as to exchanges, leases, sales, &c., which have been found desirable.

(c) In order to relax some too stringent provision in the trust deed, *e.g.*, one prohibiting any prior mortgage or charge on the premises charged by way of floating security, so as to enable the company to grant prior mortgages or charges on landed property acquired after the execution of the trust deed.

(d) In order to enable the company to raise further funds on the mortgaged premises ranking in priority to or *pari passu* with original issues of debentures or debenture stock.

(e) In order to accelerate the time for redemption.

(f) In order to sanction a scheme for the reconstruction or amalgamation of the company and for the substitution of securities of the new company for the securities of the old company.

Where there is a trust deed it is generally desirable to effect the modification by supplemental trust deed executed pursuant to resolutions of the holders; this in a formal manner records the proceedings and carries them into effect. It is preferable to a provisional agreement for modification sanctioned by extraordinary resolution and to mere resolutions.

As to what compromises and modifications can be carried out by the company under the ordinary majority clause, see p. 156 *et seq.*, *supra*.

**Form 147.**

Agreement to extend time of redemption.

AN AGREEMT made the —— day of ——, between the A. B. Coy, Limtd (hnftr called "the coy") of the one pt and the persons whose names and addresses are set out in the schedule hto, being the registered holders of more than three-fourths of the [first] debentures issued by the coy, of the other pt, WHEREBY IT IS AGREED as follows:—

(1) the time for the payment of the principal moneys secured by the sd debentures shall be extended to the —— day of ——, and the sd debentures shall have effect as if that date for payment had originally been fixed thereby,

(2) the rate of interest on the sd principal moneys shall, as from the

**Form 147.**

date hof, be 6 p.c.p.a. in lieu of 5 p.c.p.a., and the sd debentures shall be read and construed accordingly.

As WITNESS the hand of the sd debenture holders, and of one of the coy's directors, on its behalf, this —— day of ——. (6*d.* stamp.)

See Forms 58 and 59, *supra*, p. 292.

When there are a number of debenture holders it is sometimes desired to make the contract under hand only as above, so that a 6*d.* stamp may suffice. Now, a contract under hand only is not binding, unless there is a reciprocal consideration. Clearly, the debenture holder who by such a contract agrees to give time for payment gives a valuable consideration; and the company, in raising the rate of interest, gives a valuable consideration. But even when the rate is not raised, it would seem that the contract by the company not to pay off till a specified period is a valuable consideration, seeing that it precludes the company from redeeming till the expiration of such period; and any actual or possible detriment or inconvenience undertaken by one party at the request of the other is a sufficient consideration.

Sometimes it is preferred to make the contract by indorsement instead of by a separate instrument. Where there are coupons, the agreement may provide for the issue of a fresh sheet.

It seems that an agreement for extension as above requires registration under sect. 79 of the Act. It in effect creates a charge for the extra interest. Not so where the interest is not increased. See p. 191, *supra*.

If the debentures were issued before the Act of 1900 (first requiring registration), they must be produced to the registrar, if the interest is increased, and the instrument providing for the increase must be registered, but the latter need not set forth, by way of schedule or otherwise, the contents of the original security.

The following is an example of a Notice where there is to be a Supplemental Trust Deed. See Form 151.

**Form 148.**

**Notice of meeting of stockholders to modify trust deed, &c.**

THE —— COY, LIMTD.

NOTICE IS HBY GIVEN that a general meeting of the holders of debenture stock of the above-named coy constituted by the trust deed dated the —— of ——, and made between the sd coy, of the one pt, and —— and ——, as trees, of the other pt, will be held at ——, on —— day, the —— day of ——, at —— o'clock in the afternoon, for the purpose of considering and, if thought fit, passing an extraordinary resolution assenting to certain proposed modifications of the rights of the stockholders against the coy and its property, and certain modifications of the sd trust deed which have been proposed by the coy and are recommended by the trees of the sd deed, and empowering the trees afsd, with a view to effectuating such modifications, to concur with the coy in executing a supplemental trust deed in the terms of the draft which will be submitted to the meeting.

This notice is issued pursuant to the provisions contained in the third schedule to the sd deed. **Form 148.**

Sometimes it is considered desirable to state generally the nature of the proposed modifications, *e.g.*, The principal object of the proposed modifications is to enable the company to issue ——*l.* further debenture stock, ranking *pari passu* in point of security with the existing debenture stock aforesaid, the new stock to carry interest at 4 per cent. per annum, and the interest on the existing stock to be reduced to the same rate; but in consideration of such reduction the holders to receive a free allotment of new stock, credited as paid up, equal to 20 per cent. on their respective holdings of the old stock; the stock, both old and new, to be made what is called irredeemable stock, and the powers of the trustees of the deed to be supplemented and modified in various other respects.

A copy of the draft supplemental trust deed above referred to may during business hours be inspected at any time before the meeting at the office of the coy.

Dated, &c. By order of the coy,
—— Secretary.

No. —, —— Street, E.C.

**Form 149.**

Notice convening meeting to modify trust deed.

NOTICE IS HBY GIVEN that a general meeting of the holders of debenture stock of the above-named coy, secured by trust deed dated the —— day of ——, 1927, and made between the sd coy of the one pt and —— as trees, of the other pt, as modified by supplemental trust deeds dated the —— day of ——, 1929, and the —— day of ——, 1929, will be held at —— on the —— day of ——, 1930, at 12 noon, for the purpose of considering and, if thought fit, passing the subjoined resolutions as extraordinary resolutions, in accordance with the provisions contained in the third schedule to the said trust deed.

*Resolutions.*

(1) "That this meeting of the holders of the debenture stock of ——, Limtd, secured by trust deed dated the ——, 1927, and supplemental trust deeds dated the —— and ——, 1929, hby sanctions and approves the modification of the rights of the holders of the sd stock and of the provisions of the sd deeds (a) by permitting the creation of 10,000*l.* further 7 per cent. debenture stock ranking *pari passu* with the present authorized issue of 60,000*l.* stock; (b) by authorizing the coy to satisfy any interest becoming payable on the stock down to and including the ——, 1933, by the issue of a corresponding amount of debenture stock of the same issue (subject to any deductions or provisions required for income tax purposes); (c) by extending the date of maturity of the stock to ——, 1948; (d) by giving the stockholders an option to convert their stock into fully pd shares at par until the ——, 1937, and at a premium of 1*s.* until the —— in place of their present options; and (e) by authorizing the trees to apply capital

**Form 149.** moneys coming to their hands in the redemption of stock at a price not exceeding par plus accrued interest, such modifications having been proposed by the coy and assented to by the trees, and authorizes the trees to concur with the coy in executing a further supplemental trust deed for effecting the above and other purposes in the form of the draft submitted to the meeting and for purposes of identification subscribed by the chairman thof with such variations or additions (if any) as may be deemed requisite or expedient and may be approved by the trees."

(2) "That this meeting further sanctions and approves the modifications of the rights of the holders of the sd debenture stock to such an extent and in such manner as may be requisite or proper in order to enable the coy to create and issue 30,000*l.* 7 per cent. Prior Lien Debenture Stock (redeemable on or before the —— at a premium rising from 5 per cent. to 9 per cent.) ranking in point of security in priority to the existing debenture stock and to the further stock authorized by the foregoing resolution, and hby authorizes and directs the trees to concur with the coy in executing a trust deed for constituting and securing such Prior Lien Debenture Stock and the premiums and interest thereon, and postponing thto the security for the existing debenture stock and the further stock authorized as aforesaid, in the form of the draft prior lien trust deed submitted to the meeting and for purposes of identification subscribed by the chairman thof, with such modifications (if any) as may be deemed requisite or expedient and may be approved by the trees, and hby further authorizes the trustees to execute and do all or any further documents and things which may be requisite or proper for rendering such postponement effective."

Copies of the proposed draft further supplemental trust deed and draft trust deed for securing prior lien debenture stock may at any time during business hours before the meeting be inspected at the office of the coy.

Dated the —— day of ——, 1930.

By order of the Board,

——
——
} Secretaries.

**Form 150.**

Resolution of debenture stockholders.

That this meeting of holders of debenture stock of the —— Coy, Limtd, constituted by trust deed dated the —— day of ——, and made between the coy of the one pt and —— and —— as trees of the other pt (which meeting has been duly convened pursuant to the provisions contained in the third schedule to the sd trust deed), hby assents to certain proposed modifications of the rights of the sd holders against the coy and its ppty and certain modifications of the sd trust

**Form 150.**

deed which have been proposed by the coy and are approved by the sd trees, and hby authorizes the trees of the sd trust deed with a view to effectuating such modifications to concur with the coy in executing a supplemental trust deed in the terms of the draft which has been submitted to this meeting and has for the purpose of identification been subscribed by the chairman thof.

Where there is no trust deed it is desirable to embody the proposed modifications in a provisional agreement between the company and A. B., on behalf of himself and all the other holders of the debentures or debenture stock of the particular issue, and let the agreement declare in the last clause that it is conditional on its being sanctioned within a specified period by the requisite majority, in accordance with the —— condition indorsed on the debentures. See *supra*, Forms 58 and 59, p. 292. In such case the agreement when sealed by the company and signed by A. B. should be printed verbatim, and a print should be sent to each debenture or debenture stockholder, with words at foot: "I sanction the agreement of which the above is a copy," and with an explanatory circular requesting him, if he approves, to sign his name at foot of the print in the place indicated and to return the same.

**Form 151.**

Supplemental trust deed to effectuate modification.

THIS DEED is made the —— day of ——, 19—, between the —— Coy, Limtd (hnftr called "the coy"), of the one pt, and —— and —— (hnftr called "the present trees"), of the other pt, supplemental to an indenture (hnftr called "the trust deed") dated the —— day of ——, 19—, and made between the coy, of the one pt, and the present trees, of the other pt, being a trust deed constituting and securing 100,000*l.* of debenture stock of the coy, carrying interest at the rate of 5 p.c.p.a. WHEREAS the whole of the sd stock has been issued, and the same is now outstanding. AND WHEREAS the present trees are the present trees of the trust deed. AND WHEREAS the coy, being desirous of obtaining power to increase the amount of the debenture stock secured by the trust deed to 200,000*l.*, and of fixing the rate of interest on all such 200,000*l.* stock at 4 p.c.p.a., and of modifying the trust deed accordingly, and in other respects as hnftr provided, duly convened, pursuant to the provisions contained in the third schedule to the trust deed, a general meeting of the holders of the sd stock, which meeting was held on the —— day of ——, 19—. AND WHEREAS at such meeting an extraordinary resolution was, in accordance with the provisions of the sd third schedule, duly passed assenting to the modifications hnftr set forth of the rights of the stockholders against the coy and its ppty and of the trust deed (proposed by the coy and [recommended] by the present trees), and empowering the trees of the trust deed, with a view to effectuating such modifications, to concur with the coy in executing a supplemental trust deed in the terms of the draft submitted to the meeting. AND WHEREAS these presents have been framed in accordance with the sd draft.

**Form 151.**

NOW THESE PRESENTS WITNESS AND DECLARE as follows:—

**Clause 4 of deed altered.**

1. Clause 4 of the trust deed shall be modified by the addition at the close thof of the following words:—

"But the coy may at any time give notice in writing to the trees or tree declaring its intention to increase the stock to 200,000*l.*, and thereupon the following provisions shall come into operation, that is to say:—

"(1) The coy shall be at liberty to issue further stock beyond the sd 100,000*l.* original stock up to 200,000*l.*

"(2) Such additional stock shall carry interest at the rate of 4 p.c.p.a., payable half-yearly on the 1st day of April and 1st day of October.

"(3) The rate of interest on the sd original stock shall, as from the date of such notice, be at the reduced rate of 4 p.c.p.a.

"(4) In consn of the sd reduction in the rate of interest, the coy shall forthwith allot to the holder or holders of every share in the original stock a share in the new stock credited as pd up equal to 20 p.c. of the nominal amount of such holding, but when such allotment would involve the allotment of a fraction of 1*l.* of the new stock the coy, in lieu of allotting such fraction, shall pay in cash a sum equal to the nominal amount of the fraction.

"(5) Clause 5 of these presents shall be deemed to re-operate as from the time of such notice, and the first schedule hto shall be deemed to include not only the hereditaments originally inserted therein, but also the hereditaments following, that is to say:—

[*Set out particulars.*]

Clause 5 was a covenant to create a valid local mortgage in a foreign country.

"(6) In clause 7 of these presents the words 'or covenanted' shall be considered to be inserted immediately after the word 'expressed,' and in clause 8 of the trust deed the words 'one-third' shall be considered to be substituted for the figure '15,000*l.*,' and in clause 18 of the trust deed the figure '6' shall be considered to be substituted for the figure '5.'

"(7) In the heading to the conditions set forth in the second schedule to these presents the sum of 200,000*l.* shall be deemed substituted for the sum of 100,000*l.*

"(8) In clause 1 of the sd conditions the first pt, commencing with the words 'On or at any time after' and ending with the words 'at par,' shall be deemed to be struck out, and

Form 151.

the words following shall be considered to be substituted for the same, that is to say:—

"'When and so soon as the security hby constituted becomes enforceable (and not before), the stock is to be redeemed by the coy, and the redemption price is to be 100*l.* per 100*l.* of stock unless the security becomes enforceable by reason of a resolution for winding up with a view to reconstruction, in which case the redemption price shall be 110*l.* per 100*l.* of stock; and as and when the stock is to be redeemed as afsd the coy shall pay to the several holders of the stock the redemption moneys payable in respect thof.'

"(9) In clause 2 of the sd conditions the word 'four' shall be considered substituted for the word 'five.'

"(10) In each of the forms of certificate set forth in clauses 3 and 15 of the sd conditions the sum of 200,000*l.* shall be considered inserted immediately before the words 'debenture stock,' and the figure '4' shall be considered to be substituted for the figure '5,' and the words 'as modified by a supplemental trust deed dated the —— day of ——, 19—, and made between the same parties,' shall be considered inserted immediately after the words 'of the other pt,' and the words 'in such trust deed as so modified shall be considered to be substituted in clause 3 asfd for the word 'therein,' and in clause 15 afsd for the words 'that deed.'

"(11) Subject as afsd, all the other provisions contained in these presents shall be read and construed on the footing that the stock to be secured thereby includes both the original and the new stock, together amounting to or not exceeding 200,000*l.*, and that the holders are all to rank *pari passu*."

Construction of deed.

2. The trust deed shall henceforth be read and construed in conjunction with these presents, and be regarded as modified accordingly.

Delivery of certificates.

3. Each of the stockholders shall forthwith give up to the coy the certificate or certificates of the stock held by him or her, in order that a notice of these presents may be indorsed thereon.

Indorsement of notice.

4. Notice of these presents shall also be indorsed on the trust deed.

IN WITNESS, &c.

## CHAPTER XLIV.

### CLAUSES IN ARTICLES OF ASSOCIATION AND TRUST DEEDS PROVIDING FOR DIRECTORS NOMINATED BY DEBENTURE HOLDERS OR THEIR TRUSTEES.

OCCASIONALLY, and especially where the financial position of the company is not so good, the trust deed contains some provisions as to appointment of "debenture directors" to represent the interests of the debenture holders on the board. This power must be given by the company's articles. The power should be to "appoint" trustees and not to "nominate" them. In the latter case it may be difficult to compel the company to give effect to the provision. *Plantations Rubber Trust, Ltd.* v. *Bila (Sumatra) Rubber Lands, Ltd.* (1916). 85 L. J. Ch. 801; 114 L. T. 676. See also *British Murac Syndicate, Ltd.* v. *Alperton Rubber Co., Ltd.*, (1915) 2 Ch. 186. The following three clauses are examples of clauses in articles of association to give effect to such provisions:—

**Form 152.**

**Clause in article as to debenture directors.**

Any trust deed for securing debentures or debenture stock may, if so arranged, provide for the appointment from time to time by the trees thof of some person nominated by such trees to be a director of the coy, and may empower such trees from time to time to remove any directors so appointed, and may provide that a director so appointed shall not be bound to hold any qualification shares and shall vacate office in any specified event, and shall not be entld to remuneration as a director so long as such trees are entld to remuneration under the trust deed, and shall not vacate office in rotation, and shall not be removed by the coy, and may contain such ancillary provisions as may be arranged between the coy and the trees, and all such provisions shall have effect notwithstanding any of the other provisions herein contained.

**Form 153.**

**Another as to debenture stock directors.**

The sd A., B., C. and D. shall be deemed to have been appointed by the trees of the trust deed constituting the first debenture stock of the coy, and they and their successors in office appointed under this clause shall be called the "debenture directors." The debenture directors shall be entld to hold office until requested to retire by the trees or tree for the time being of the sd trust deed, and accordingly they shall not be bound to retire by rotation or be subject to clauses —— or —— hof. As and whenever a debenture director vacates office, whether upon request as afsd or by death or otherwise, the

trees or tree afsd may appoint another director in his place. A debenture director shall not require any qualification. A debenture director may at any time by notice in writing to the coy resign his office. **Form 153.**

The holders of the debentures of the coy known as "prior lien bonds" shall be entld to have one nominee on the directorate of the coy, and the holders of the debenture stock of the coy shall be entld to have two nominees on the directorate of the coy. The nominee or nominees of each class so entld shall be appointed by a meeting of such class convened and constituted as hnftr provided, and may be removed at any time by a like meeting of the same class. A meeting of each class afsd may be convened by the coy whenever any nominee for the time being of such class vacates office, and a meeting of either class shall be convened by the coy whenever it is served with a requisition in writing specifying the purpose for which the meeting is required, and signed where the meeting is for the removal of a nominee by the holders of at least one-half in value of the class, or in any other case by the holders of at least one-tenth in value of the class; and if the coy fails for seven days after being so served to convene the meeting to be held within twenty-one days of such service, the requisitionists or the majority in value of them may themselves convene the meeting. Not less than ten days' notice must be given of every such meeting; but where it is convened by requisitionists the notice may be given by advertising the same twice in the *Times* newspaper. At any such meeting the holders of one-fifth in value of the class shall constitute a quorum, and the meeting may appoint a chairman. But subject as afsd all the provisions hof as to extraordinary general meetings of the coy including votes, adjournment, notices and minutes shall apply as nearly as may be to such meeting. Notice in writing of any such appointment or removal shall forthwith be given to the coy by such person as the meeting making the same shall authorize in that behalf. **Form 154.** Another.

The corporation shall during the continuance of this security, whilst it is a tree hof, be entld to be represented on the board of directors of the coy by a nominee from time to time appointed in writing under the common seal of the corporation, and the following provisions shall have effect, that is to say:— **Form 155.** Trustees may have representation on the board.

(a) The corporation may at any time by writing under its common seal remove from office any director so appointed:

(*b*) Any director so appointed shall vacate office so soon as the trusts hof are determined:

**Form 155.**

(c) If any director ceases by any means to hold office before the sd trusts are determined the corporation may in manner afsd appoint his successor:

(d) A director so appointed shall not be bound to hold any qualification shares. Any director so appointed shall not be entld to any remuneration from the coy for his services so long as the corporation is entld to remuneration as the tree or one of the trees hof:

(e) No director so appointed shall be entld to act as a director under this clause unless and until the instrument of his appointment is delivered to the coy, and such instrument may be retained by the coy until he ceases to be a director, whereupon the same shall be returned to the corporation.

**Form 155a.**

Clause in debenture. Debenture holders to have a right to vote at meetings.

The registered holder of each debenture of this series shall be entld to subscribe at par for one of the "A" shares of the coy of 1*s.* each. Each such "A" share shall confer upon the holder thof so long as he is the holder of any debentures of this series one vote on a poll at general meetings of the coy in respect of each debenture of this series for the time being held by him.

**Form 155b.**

Clause in articles conferring voting power on shares while held by debenture holders.

The shares numbered —— to —— in the coy's capital shall be called "A" shares, and each such share shall confer upon the holder thof, if and so long as he is the registered holder of debentures [*or* debenture stock] of the coy, [one] vote on a poll at general meetings of the coy in respect of each debenture [*or* each ——*l.* worth of debenture stock] held by him.

There appears to be no reason why a power to vote at general meetings should not be conferred upon persons who are not members of the company (see Part I., 15th ed., p. 649); but the votes of non-members cannot be counted in the majorities required by sect. 117 for a special or extraordinary resolution. It is, therefore, better, where debentures are to be issued carrying voting rights at general meetings, that special voting rights should be attached to certain shares, and that these shares should be allotted to the holders of debentures or to the trustees of a debenture trust deed.

# CHAPTER XLV.

## REMEDIES OF HOLDERS OF DEBENTURES AND DEBENTURE STOCK.

Remedies generally.

THE remedies of debenture and debenture stock holders may be divided into two principal classes, namely:—

1. Those connected with the issue of the debentures or debenture stock, including actions for rescission of contract, actions of deceit, and actions under sect. 37 of the Act. As to which, see sects. 1 to 4 of this Chapter.
2. Those connected with the enforcement, whether with or without the aid of the Court, of the rights conferred on the holders by the debentures or debenture stock, including actions for foreclosure, sale, receiverships, &c. As to which, see sect. 6 of this Chapter, *infra*, p. 469 *et seq*.

## SECTION I.

### Rescission of Contract to take Debentures or Debenture Stock.

Rescission of contract.

The general rule that a contract induced by misrepresentation is voidable at the election of the person deceived applies equally to a contract to take or purchase debentures or debenture stock and to a contract to take or purchase shares.

When there is a right to rescind.

The right to rescind a contract for misrepresentation arises only where the misrepresentation fulfils the following conditions:—

(1) Was a misrepresentation of a material fact. *Infra*, p. 430.
(2) Was made by the other party to the contract or by those for whose acts that party is responsible. *Infra*, p. 439.
(3) Was made with the intention that it should be acted on by the subscriber or purchaser. *Infra*, p. 441.
(4) Was in fact acted on by the subscriber or purchaser in ignorance that it was a misrepresentation. *Infra*, p. 441.

What is a misrepresentation.

The term "misrepresentation" is not confined to a positive direct untruth; it includes also disingenuous and misleading and tricky statements, as where facts are suppressed which, if disclosed, would render untrue or materially qualify that which is stated. As the old saying runs:—

"A lie which is half a truth is ever the blackest of lies."

Thus, in *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273, Lord Watson said: "In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers might be of opinion that these would have been of materiality as influencing the exercise of their judgment. But the statement of a portion of the truth, accompanied by suggestions and inferences which would be possible and credible if it contained the whole truth, but become neither possible nor credible whenever the whole truth is divulged, is, to my mind, neither more nor less than a false statement" (p. 287). See also *Heymann* v. *European Central Ry. Co.*, 7 Eq. 154.

In *Aaron's Reefs* v. *Twiss*, the prospectus standing alone did not contain any misrepresentation of facts, but read in conjunction with certain contracts offered thereby for inspection, it was false and misleading, and relief was granted accordingly; and the following words of Lord Halsbury are specially deserving of attention: "It is said that there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was this a misrepresentation? I do not care by what means it is conveyed—by what trick, or device, or ambiguous language: all these are expedients by which fraudulent people seem to think they can escape from the real conditions of the transaction. If, by a number of statements, you intentionally give a false impression, and induce a person to act upon it, it is not the less false, although, if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue" (p. 281).

**Fact.**

1. *The misrepresentation, to be a ground of rescission, must, subject to what is pointed out below, be of a fact or facts.*

**Law or fact. Law.**

A misrepresentation of law is not a misrepresentation of fact. *Beattie* v. *Lord Ebury*, 7 Ch. 777; *Henderson* v. *Lacon*, 5 Eq. 261. But a statement of something as a fact is not the less a representation of fact because it involves a representation of law. *West London Commercial Bank* v. *Kitson*, 13 Q. B. Div. 360; *Derry* v. *Peek*, 14 App. Cas. 337; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 711; *Eaglesfield* v. *Londonderry*, 4 Ch. D. 692, 702 (C. A.); 38 L. T. 303.

**Statements as to futurity.**

A representation that something will or should be done or come to pass is not necessarily a representation of fact—*e.g.*, that the company "will construct" something, or "will acquire further concessions," or "on these figures the profits should be very large." The authorities establish that a mere representation that something "will" be done is not a representation of fact; for, "there is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that

something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made; and although you may call it a representation, if it is anything, it is a contract or promise." Per Mellish, L. J., *Beattie* v. *Lord Ebury*, 7 Ch. 804; and see *Alderson* v. *Maddison*, 5 Ex. D. 293; and *Maddison* v. *Alderson*, 8 App. Cas. 467; *Bellairs* v. *Tucker*, 13 Q. B. D. 562; *Knox* v. *Hayman*, 67 L. T. 137. Thus a calculation as to future profits is not a statement of fact. *Bentley & Co.* v. *Black*, 9 T. L. R. 580.

Belief, opinion, expectation, intention.

But a representation of belief, opinion, expectation, or intention is a representation of fact. "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind, is, therefore, a misstatement of fact." Per Bowen, L. J., *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483. It is a psychological fact, however difficult of proof. See also *Peek* v. *Gurney*, L. R. 6 H. L. 377, 404, where Lord Cairns appears to have considered that a statement as to the opinion of the directors might, if false, have amounted to a misrepresentation of fact. And see *Karberg's case*, (1892) 3 Ch. 1, 11.

"I do not think," said Lord Halsbury, L. C., in *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273, 283, "any particular form of words is necessary to convey a false impression. Supposing a person goes to a bank where the people are foolish enough to believe his words, and says, 'I want a mortgage upon my house, and my house is not completed, but in the course of next week I expect to have it fully completed.' Suppose there was not a house upon his land at all, and no possibility, therefore, that it could be fully completed, can anybody say that that was not an affirmative representation that there was a house which was so near to completion that it only required another week's work upon it to complete it? . . . So here, when I look at the language in which this prospectus is couched, and see that it speaks of a property which requires only the erection of machinery to be either at once or shortly in a condition to do work, so as to obtain all this valuable metal from the mine, it seems to me that, although it is put in ambidextrous language, it means as plainly as can be that this is now the condition of the mine; that such and such additions to it will enable it shortly to produce all those great results, and that there is a representation of an actually existing fact. . . . If you are looking to the language as *only* the language of hope, expectation, and belief, that is one thing; but . . . you may use language in such a way as, although *in the form* of hope and expectation, it may become a representation as to

existing facts; and if so, and if it is brought to your knowledge that these facts are false, it is a fraud."

It is conceived that there is nothing inconsistent with these views in *Jorden* v. *Money*, 5 H. L. C. 185; *Citizens' Bank* v. *First National Bank*, L. R. 6 H. L. 352, 360; and *Maddison* v. *Alderson*, 8 App. Cas. 467. A man who truly states his intention is not estopped from changing that intention. The expression of intention may, in some circumstances, amount to a contract, but it does not give rise to an estoppel. And see *Re Moore Bros. & Co., Bartholomew's case*, (1899) 1 Ch. 627; and *Todd* v. *Millen* (1910), S. C. 868, Ct. of Sess.

**Careless language and ambiguous statements.**

As to careless language and ambiguous statements, the rule is that "if persons publishing a prospectus use such careless language that their statements, literally read, are untrue although this literal sense is different from what they intended, this amounts to a misrepresentation." Per Lord Chelmsford, *Hallows* v. *Fernie*, 3 Ch. 476.

A person who issues a statement is not only answerable for what he in his own mind intended to represent, but he is answerable for what anyone might reasonably suppose to be the meaning of the words he has used. *Arkwright* v. *Newbold*, 17 Ch. D. 322.

"If a man makes a statement, which according to its ordinary meaning bears a particular construction, he, in my opinion, is liable to those who, reading it and construing it reasonably, do put upon it the primary meaning and the fair construction of the words used." Per Cotton, L. J., *Peek* v. *Derry*, 37 Ch. D. 571, at p. 572.

And in the case of an ambiguous statement, it is immaterial that the words are intended by those who issue the prospectus to be understood in a sense in which they are true, if they are reasonably capable of being understood in a sense in which they are false, and the allottee shows that he understood them in that sense. *Smith* v. *Chadwick*, 20 Ch. D. 27, 45; 9 App. Cas. 187.

But a reasonable construction must be put on a prospectus, and an allottee is not permitted to say that he understood the words in a sense they do not fairly bear. And see *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, where it was held that the plaintiff had no right to assume that "debentures" imported any charge on the company's property.

**Materiality.**

2. *It is not enough that the misrepresentation is one of fact; it must also be a misrepresentation of a material fact.*

The materiality of a fact is to be gauged by reference to the circumstances of each case. Generally speaking, any statement of fact which may reasonably be expected to influence the mind of a contemplating subscriber is material, particularly, for instance, such

statements as bear on the position and prospects of the company, on the value of the property offered as security, or on the nature and terms of the securities; but mere high colouring in a prospectus is not a material misrepresentation. *Denton* v. *Macneil*, 2 Eq. 352. So, too, a trifling misstatement is not to be regarded as material.

Materiality is in some cases a question of recognition and degree.

"It is not every misstatement, although untrue, and although untrue in a sense to the defendant's knowledge, that will do. It may be that the misstatement is trivial—so trivial as that the Court will be of opinion that it could not have affected the plaintiff's mind at all or induced him to enter into the contract." Per Jessel, M. R., *Smith* v. *Chadwick*, 20 Ch. D. 45. The test is, how would the statement affect the mind of an average reasonable man in regard to the subject-matter of the proposed contract? Materiality is not, however, to be estimated exclusively from an abstract point of view. It is relative. What to one man's mind may be immaterial may to another's be material; and if a prospectus be issued containing misstatements, this contingency must be borne in mind. Thus, if the misstatement consists in this, that A. is stated untruly to be one of the directors of the company, that is not material to M., who never heard of A.; but it is or may be material to N., who knows A., or knows of him, and is to some extent induced to subscribe because A. is stated to be a director. "I agree that the names of the directors form an important element with many people as to whether or not they shall decide upon joining a company; but that must depend on their knowledge of the directors, their personal knowledge or knowledge of their names and positions: otherwise the mere fact of stating that such and such persons are directors will be nothing. Again, I agree that you may have names so well known, so notorious in connection with the subject-matter of the prospectus, that even the Court would come to the conclusion that the name, even of a single director, was an inducement to persons to join the concern." Per Jessel, M. R., *Smith* v. *Chadwick*, 20 Ch. D. 50 (C. A.).

Again, if the misrepresentation relied on is, that the company's mine is similar to some other mine, the statement is material to A., who knows the latter or knows about it, but not to B., who has no knowledge on the subject.

Ambiguous statements.

A statement as to a material fact may be ambiguous. It may have several meanings. If read in one way it may be strictly true, but if read in another way it may be false. In such a case the statement is not *primâ facie* to be regarded as a misrepresentation, for *non constat* that the subscriber did not understand it in that sense in which it was true; but, if he understood it in the sense in which it was false, it at once acquires materiality. See Jessel, M. R., *Smith* v. *Chadwick*, 20 Ch. D. 27, and the same case in the House of Lords, 9 App. Cas. 187.

It is for the subscriber, however, to show that he read it in the sense in which it was not true.

**Examples of material misrepresentation.**

The following are examples of misrepresentations of material facts which have been held sufficient to render voidable contracts induced thereby:—

(1) Where a company was formed to construct and work a railway, and it was (1) untruly stated that a contract for the execution of the works had been entered into with a responsible contractor; (2) untruly stated that the contract price was considerably within the available capital; (3) not mentioned that the concessions which the company was formed to carry out had been purchased from the original guarantees at a cost of 50,000*l.* See *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99.

(2) Where it was untruly stated that "more than half the first issue of shares has been already subscribed for," and that "upwards of 70,000*l.* has already been expended on the estate by the vendor in buildings and improvements in addition to the purchase-money paid by him for the land." See *Ross* v. *Estates Investments Co.*, 3 Eq. 122; 3 Ch. 682.

(3) Where it was stated that "one-half the required capital has been subscribed by the directors and their friends," whereas not one-fourth had been subscribed. *Kent* v. *Freehold Land Co.*, 4 Eq. 588; 3 Ch. 493. And see *Henderson* v. *Lacon*, 5 Eq. 249; and *Arnison* v. *Smith*, 41 Ch. D. 348.

(4) Where it was stated that a particular mine "containing very valuable claims, some of which are in full operation and make large daily returns," had been contracted to be purchased, whereas the mine was, in fact, worthless and there were no claims in operation. *Reese River Co.* v. *Smith*, L. R. 4 H. L. 64.

(5) Where, in the case of a banking company, it was untruly stated (a) that the bank had arranged to take over several successful banking businesses of old standing; and (b) that the directors had had an offer of support as to capital and business from a large and powerful bank in Paris. See *Re London and Leeds Bank, Ex parte Carling*, 56 L. T. 115.

(6) Where it was stated that "the surplus assets, as appear by the last balance-sheet, amount to upwards of 10,000*l.*," whereas in fact there was a deficit. See *Re London and Staffordshire Co.*, 24 Ch. D. 149.

(7) Where some of the directors named in the prospectus had not accepted office. *Blake's case*, 34 Beav. 639. Compare *Scottish Petroleum Co.*, 23 Ch. D. 413; and *Hallows* v. *Fernie*, 3 Ch. 467; and see *Wainwright's case*, 62 L. T. 30; 63 L. T. 429; *Karberg's case*, (1892) 3 Ch. 1.

(8) Where it was stated untruly that the profits had amounted to 17 per cent. on the capital employed. *Glasier* v. *Rolls*, 42 Ch. D. 436.

(9) Where the prospectus stated in effect that the company was formed to acquire an existing patent, whereas only provisional protection had been obtained for the invention in question. *Scott* v. *Snyder, &c. Co.*, 66 L. T. 278.

(10) Where it was stated that no promotion money was to be paid, whereas there was an agreement to pay large sums. *Lodwick* v. *Earl of Perth*, 1 T. L. R. 76. And see *Kent* v. *Freehold Land Co.*, 4 Eq. 588; *Capel & Co.* v. *Sims, &c. Co.*, 58 L. T. 807.

(11) Where the company was formed to buy a mine, and extracts from the report of an expert were set forth which gave a misleading impression of the report, and induced the belief that the mine was similar to a rich adjacent mine. *Mount Morgan Co.*, 56 L. T. 622.

(12) Where the company was formed to work an invention, and it was untruly stated that a contract had been made for the purchase from the company of 50,000 of the patented machines. *Snook* v. *Self-Acting Co.*, 3 T. L. R. 612.

(13) Where the prospectus stated that shares in several named companies had been acquired which "taken at this day's market quotation show a profit more than sufficient to pay a dividend of 20 per cent. on the total capital of the company for the current year," whereas in the case of two of the companies the shares had not been acquired. *McConnel* v. *Wright*, (1903) 1 Ch. 546. In the same case it was held that the misrepresentation was not the less a misrepresentation because the shares were acquired ten days after the issue of the prospectus.

(14) Where it was untruly stated that the company was the sole manufacturer of asbestos in France and had a practical monopoly. *Hyde* v. *New Asbestos Co.*, 8 T. L. R. 121.

(15) Where it was untruly stated that the company's process was a commercial success. *Stirling* v. *Passburg Grains*, 8 T. L. R. 71.

See other instances in Part I. Chap. III.

Examples of excusable misrepresentation and non-disclosure.

The following are instances in which the misrepresentation or non-disclosure relied on was held not to be material:—

(1) Where it was stated that an invention to be acquired by the company had been tested, and that according to the experiments the product could be obtained at a specified cost, but that it was intended to test the invention further, and it in fact turned out to be worthless. *Denton* v. *Macneil*, 2 Eq. 352.

(2) Where the prospectus omitted to state that the company would have to make a deposit of 20,000*l.* by way of guarantee with liability to forfeiture. *Central Ry. Co.* v. *Kisch*, L. R. 2 H. L. 99; and see *Smith* v. *Chadwick*, 20 Ch. D. 27; 9 App. Cas. 187.

(3) Where it was stated that the company was to have "a free grant of 30,000 acres in the provinces through which the railway is to pass," whereas the 30,000 acres were to be granted only out of the provinces benefited by the railway, and private property in those provinces was excepted. *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 115.

(4) Where it was stated that certain reports on the property had been prepared "for the directors," though really made for the promoters. *Angus* v. *Clifford*, (1891) 2 Ch. 449.

See other instances in Part I. Chap. III.

The allottee is not entitled to rescission unless he was induced to enter into the contract by the representation or suppression which he establishes, that is, unless it was *dans locum contractui*.

When a shareholder comes to the Court to be relieved of his shares on the ground of misrepresentation arising from non-disclosure, it is not enough for him to say that had he known the facts he would not have applied for shares; he must be prepared to put his finger on the statement which he relies upon as contradictory of or inconsistent with the facts not disclosed. *Christineville Rubber Estates*, 81 L. J. Ch. 63; *Brookes* v. *Hansen*, (1906) 2 Ch. 129.

It is not an inference of law that a party who takes shares on a prospectus containing a misrepresentation was induced to subscribe by that misrepresentation. Per Lord Blackburn, in *Smith* v. *Chadwick*, 9 App. Cas. 187. It is a question of fact to be determined with due regard to all the circumstances. But "if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." Per Lord Blackburn, *ibid.* p. 196. And the following passage from the judgment of Lord Halsbury, L. C., in *Arnison* v. *Smith*, 41 Ch. D. 369, points in the same direction. "It is," said his Lordship, "an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious; it assumes that a person who reads a prospectus and determines to take shares on the faith of it, can appropriate among the different parts of it, the effect produced by the whole. This can rarely be done even at the time, and for a shareholder thus to analyze his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, and on the whole he forms his conclusion. You cannot weigh the elements by ounces. It was said, and I think justly, by Sir G. Jessel, in *Smith* v. *Chadwick*, that if the Court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not." Lord Halsbury, in *Macleay* v. *Tait*, (1906) A. C. 24, gave expression to similar views. But this inference does not

arise when the statement, being ambiguous, is only false in one sense; in such a case it rests with the allottee to show that he understood the words in the sense in which it was false, and was thereby induced to subscribe. *Smith* v. *Chadwick*, 9 App. Cas. 187.

Usual stated grounds for relief.

What happens in most cases is that the allottee swears that he was induced by the particular misrepresentation or suppression to take the shares, or that he subscribed on the faith of the prospectus, and that he would not have subscribed had he known the facts. And where on this or other evidence a *primâ facie* case for rescission has been thus established, the onus of proving that the allottee was not so induced, or is otherwise not entitled to rescind, is cast on the company.

Onus of proof.

Reproducing reports.

Where the prospectus merely states that A. B. reports so-and-so, an applicant is not as between himself and those responsible for the prospectus entitled to assume that the authors of the prospectus guarantee the truth or accuracy of A. B.'s report. But it is otherwise if the authors of the prospectus choose to adopt the statements in the report as their own—choose to reassert them, that is—as in *Smith's case*, 2 Ch. 604, 611.

In that case the directors had, on hearsay, adopted certain statements as their own in the prospectus, and it was argued that the plaintiff was not entitled to relief. Turner, L. J., dealing with the objection, said: "Then it was said that the directors, when this representation was made, were as much deceived as the appellant himself, and that he ought not to be relieved for that he must have understood the representation to have been made by the directors upon mere report. But if a company will take upon itself to assume the authenticity of and give credit to the reports which are made to it and represent as facts matter stated in those reports, it must take the consequences. If the company had confined themselves to saying, 'We have received reports from which we believe and have reason to believe that these mines are in full operation and are making daily large returns,' it might, and no doubt would, have been very difficult for Mr. Smith to be relieved from the contract; but the company, instead of thus referring to the information received, stated the circumstances as facts." See also *Rawlins* v. *Wickham*, 3 De G. & J. 304; *British Burmah, &c. Co.*, 56 L. T. 815; *Bentley & Co.* v. *Black*, 9 T. L. R. 580. In the case last mentioned the prospectus set out a report by an accountant, and the Court of Appeal held that there was no representation by the directors that the report was correct. "It was true that Mr. L. was a chartered accountant, and that he had made a particular report, and that was all that the directors said in the prospectus. Per Lord Esher, M.R. But to come within this ruling the report or document must have

been frankly and honestly set out. If the prospectus misrepresents the contents of a report or other document, or states its contents in a deceptive manner, the subscriber is not bound to look at the document to see whether it bears out what is stated. *Redgrave* v. *Hurd*, 20 Ch. D. 1.

The applicant is entitled to say: "You at least, who have stated what is untrue, cannot accuse me of want of caution, because I relied upon your fairness and honesty." Per Lord Chelmsford, *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, 120, 121.

"The representation once made releases the party from an investigation, even if the opportunity is afforded." Per Baggallay, L. J., *Redgrave* v. *Hurd*, 20 Ch. D. 23; *Re Liberian Government Concessions*, 9 T. L. R. 136; *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273.

Hence it is no answer to a claim for rescission in such a case that the plaintiff was given the opportunity of investigation and made only a perfunctory and incomplete inquiry into the facts. *Redgrave* v. *Hurd*, 20 Ch. D. 1.

If the report is fraudulent, the company is *primâ facie* responsible for the fraud. *Mair* v. *Rio Grande Rubber Estates*, (1913) A. C. 853.

**Where representation only true at time.**

Sometimes a representation which was true when the prospectus was issued becomes false before the allotment is made. In such case the fact ought to be communicated to the applicant. *Scottish Petroleum Co.*, 23 Ch. D. 438; *Henderson* v. *Lacon*, 5 Eq. 249. See the observations of Lord Blackburn in *Brownlie* v. *Campbell*, 5 App. Cas. 950; *Re Kent County, &c. Co., Ex parte Brown* (1906), 95 L. T. 756. The representation is a continuing representation and, if the circumstances change materially, the change must be communicated. *With* v. *O'Flanagan*, (1936) Ch. 575.

**Single misrepresentation or suppression sufficient.**

A single misrepresentation may be sufficient to entitle the allottee to rescission. *Re London and Staffordshire Co.*, 24 Ch. D. 149; *Denton* v. *Macneil*, 2 Eq. 352, 355.

**Belief of directors in truth of statement.**

Where a representation as to a material fact in a prospectus is untrue in point of fact, it is no defence, where *rescission of contract* is sought, that the directors when they made it believed it to be true. See judgments of Lord Cairns in *Smith's case*, 2 Ch. 604, 615; and in *Reese River Co.* v. *Smith*, L. R. 4 H. L. 79; and see *Mathias* v. *Yetts*, 46 L. T. 502 (Court of App.); *Arkwright* v. *Newbold*, 17 Ch. D. 320.

"Where rescission is claimed," says Lord Herschell, in *Derry* v. *Peek* (14 App. Cas. 359), contrasting such a claim with a claim for damages in an action of deceit, "it is only necessary to prove that there was a misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand."

*As to rescission for non-disclosure of material facts.*

Non-disclosure of material facts.

The general rule is that a vendor is not bound to disclose material facts to a would-be purchaser or subscriber, and that silence does not give the subscriber or purchaser a right to rescind by reason of such non-disclosure; but this rule is subject to qualifications.

1. Silence cannot be justified where that silence makes what is stated misleading. See *supra*, p. 437.

2. Silence cannot be justified where there is a duty to disclose.

Duty as to disclosure before Companies Act, 1900.

"I think," said Rigby, L. J., in *McKeown* v. *Boudard, &c. Co.* (1896), 74 L. T. 712, "the law is this: that if you rely as a ground for rescission of a contract on the omission of a statement, you must show that the omission of that statement makes what is stated misleading. It is not the omission of material facts as an independent ground for rescission, but the omission must be of such a character as to make the statement actually made misleading. In other words . . . suppression of the truth may contain a suggestion of falsity."

A similar rule was applied in criminal proceedings in the case of *R.* v. *Kylsant*, (1932) 1 K. B. 442. In that case the company issued a prospectus offering debenture stock for subscription. The prospectus stated that during the previous ten years the "average annual balance available," after providing for depreciation, &c. was sufficient to pay the interest on the intended issue more than five times over. The prospectus also stated the dividends paid in each year. It was admitted by the prosecution that every statement in the prospectus in itself was true; but the prosecution alleged that the document as a whole was misleading and false in that it failed to state that, although the company made large profits in 1918, 1919 and 1920, when owing to the European War there was a shipping "boom, in 1921, 1922, 1923, 1924, 1925, 1926 and 1927 it made substantial trading losses and was only able to pay the dividends specified and to produce the "balances available" in those years by the introduction of items of a non-recurring nature earned in the abnormal war period.

Wright, J., held that the prospectus was false. "The document as a whole may be false not because of what it states, but because of what it does not state, because of what it implies."

This decision was upheld in the Court of Criminal Appeal. Avory, J., in delivering the judgment of the Court, said: "The falsehood in this case consisted in putting before intending investors as material on which they could exercise their judgment as to the position of the company figures which apparently disclosed the existing position, but in fact hid it. In other words, the prospectus implied that the company was in a sound financial position and that the prudent investor could safely invest his money in its debentures. This inference would

be drawn particularly from the statement that dividends had been regularly paid over a term of years although times had been bad—a statement which was utterly misleading when the fact those dividends had been paid not out of current earnings but out of funds which had been earned during the abnormal period of the war was omitted."

"The general rule," says Mr. Justice Story, in his work on Contracts, 5th ed., Vol, I., sect. 643, "both of law and equity, in respect of concealment is that mere silence with regard to a material fact, *where there is no legal obligation to divulge*, will not avoid a contract although it operates as an injury to the party from whom it is concealed . . . sect. 645. But an improper concealment or suppression of a material fact which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent and will invalidate a contract." This passage was cited with approval by Cockburn, C. J., in *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597; and see *Turner* v. *Green*, (1895) 2 Ch. 205.

The rule is tersely summed up by Lord Macnaghten in *Chadwick* v. *Manning*, (1896) A. C. 231: "Silence is innocent and safe where there is no duty to speak." And see *Brownlie* v. *Campbell*, 5 App. Cas. 950; *Christineville Rubber Estates*, 81 L. J. Ch. 63; and *Brookes* v. *Hansen*, (1906) 2 Ch. 129.

In marine insurance, omission to disclose a material fact, though without any fraudulent intention, vitiates the contract. *Ionides* v. *Pender*, L. R. 9 Q. B. 537; *Morrison* v. *Universal Marine, &c. Co.*, L. R. 8 Ex. 197; *Seaton* v. *Heath*, (1899) 1 Q. B. 782; reversed on evidence, (1900) A. C. 135. And it matters not how the omission was caused. *Carter* v. *Boehm*, 3 Burr. 1905; *Ionides* v. *Pender*, *supra*; *Davies* v. *London and Provincial Insurance Co.*, 8 Ch. D. 469; *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 73. And where there is a duty to disclose, a party bound to disclose ought to make reasonable inquiries with a view to obtaining information. *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511. The duty of disclosure in prospectuses is not so high (see per Lord Watson, *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273, *supra*, p. 428); but it has been largely extended by the Companies Acts, 1900, 1907, 1908, and 1929. Prior to those Acts there was, as already stated, no duty to disclose material facts to a person proposing to subscribe for or buy shares or debentures or debenture stock unless the omission to disclose would make what was stated untrue or misleading; but sect. 35 of the Companies Act, 1929, makes it the duty of those who issue a prospectus to disclose a long list of particulars. The non-performance of this duty as regards a particular prospectus does not, however, give to those who subscribe for shares or debentures on the faith of such prospectus a right to rescind. *Wimbledon Olympia, Ltd.*, (1910) 1 Ch. 630; and

*South of England Natural Gas Co.*, (1911) 1 Ch. 573. The remedy is an action for damages.

*Responsibility for Prospectus.*

On whom responsibility rests.

Where the misrepresentation is contained in a prospectus or circular inviting subscriptions or purchases, and addressed to the public, the representations in that prospectus must be attributed to those who issued the prospectus or circular. If it was issued by the directors on behalf of the company, the company is to be treated as making the representations; if the prospectus was issued by financiers who had bought the debentures or debenture stock and offered them for sale, such financiers are to be regarded as making the representations.

The difficulties incidental to settling this question of responsibility for a prospectus were much simplified by sect. 9 of the Companies Act, 1900 (now sect. 34 of 1929), requiring prospectuses to be dated and a copy delivered for registration, signed by every person named therein as a director or proposed director. Directors so signing can hardly dispute their agency and consequent responsibility.

It is no answer to an action for rescission against a company that the misrepresentation was made not by the company but by its agents without any authority from the company, for "the cases clearly show this: that any representations made by the agents of a company which form the foundation of a contract between the company and a third person—*those misrepresentations lying at the root of the contract —will entitle the other party to avoid the contract, and the company* must in that sense take upon themselves the consequences of the misrepresentations of their agents." Per Page-Wood, V.-C., *Henderson* v. *Lacon*, 5 Eq. 249, 261.

In *Lynde* v. *Anglo-Italian Hemp Co.*, *(1896) 1 Ch. 178*, *Romer, J.*, summarised the cases in which a company is to be held responsible for misrepresentation, thus:—

(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 shares [or debentures].

(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 authorized to obtain on behalf of the company subscriptions for shares [or debentures]. This heading, of course, includes the case of a person constituted agent by subsequent adoption by the company of his acts.

(3) Where the company can be held affected before the contract is completed with knowledge that it was induced by misrepresentation—as, for example, where the directors on allotting shares [or debentures] know in fact that the application for them has been induced by misrepresentation, even though made without any authority from the company.

(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 shares [or debentures] 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.

The principle involved in the fourth of these propositions is dealt with by Lindley, L. J., in *Karberg's case*, (1892) 3 Ch. 13, in these words: "Speaking generally, there is no doubt that a misrepresentation in order to vitiate a contract, must be made by a party to it or by his agent. But this rule is not without exception. *Stewart's case* (1 Ch. 574) and *Downes* v. *Ship* (3 H. L. 343) warrant the proposition that an application to a company, when formed, for shares [or debentures] based upon a prospectus issued by the promoters of the company before its formation cannot be dissevered by the company from such prospectus." In *Karberg's case* (*supra*) the application for shares was made on the faith of a prospectus issued before incorporation. The application was addressed to one of the promoters, and stated that the applicant desired to subscribe for 200 shares in the proposed company, and requested the promoters, "on the formation thereof, to obtain the allotment of such shares to me," but it did not refer to the prospectus. After its incorporation the company allotted the shares so applied for; and it was held that the allottee was entitled as against the company to rescission of the contract on the ground of misrepresentation in the prospectus.

*Karberg's case* is the more important, because the directors in allotting were not aware that the application was made on the basis of any prospectus. This was found as a fact by Kekewich, J. (p. 6).

For other cases in which a company has been held responsible for a prospectus, see *Henderson* v. *Lacon*, 5 Eq. 249; *Ross* v. *Estates Investment Co.*, 3 Ch. 682; *Peek* v. *Gurney*, L. R. 6 H. L. 377; *Re Denham & Co.*, 25 Ch. D. 752, 765; *Tamplin's case*, W. N. (1892) 94, 146.

3. *What is sufficient evidence that statement made with the intention that it should be acted on by the subscriber or purchaser?* Evidence of intention to induce.

Where the prospectus or circular is addressed to the public or to a class, any member of the public or of that class, who comes in and subscribes or purchases in response to the invitation addressed to him, is entitled to treat the statements contained in it as addressed to himself and as being made with the intention that it should be acted on by him; that is the very object of the prospectus.

"It is a prospectus," says Lord Cairns (*Peek* v. *Gurney*, L. R. 6 H. L. 410), alluding to the document there, "in this shape, addressed to the whole of the public, no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself by answering it upon the form upon which it was intended by the prospectus that it should be answered."

But, it is only those who have responded to the invitation addressed to them who have any *locus standi* to complain of misstatements contained in the prospectus. Hence, if A., after reading a prospectus offering debentures or debenture stock for subscription, goes into the market and purchases from a third party, he has no right to rescind as against the company, for the company never invited him to act on the prospectus for this purpose. Any right he may have to rescind against his vendor rests on wholly different grounds outside the prospectus. *Peek* v. *Gurney*, L. R. 6 H. L. 410; *Smith's case*, 2 Ch. 604.

It has been held that where A. takes shares as agent for B., but without disclosing to the company the agency, B. cannot claim relief unless A. was deceived. *Capel & Co.* v. *Sims, &c. Co.*, 58 L. T. 807; *Hyslop* v. *Morel*, 7 T. L. R. 263; *Collins* v. *Associated Greyhound Co.*, (1930) 1 Ch. 1.

4. *As to showing that the misrepresentation was in fact acted on by the subscriber or purchaser in ignorance that it was a misrepresentation.* Evidence of ignorance that fact misrepresented.

Of course, if the subscriber or purchaser knows that the statement, however material, is not true, he is not misled. He enters into the contract with his eyes open, and he has no right therefore to rescind.

Assuming, however, the subscriber to be ignorant of the falsity of the representation, he can still claim no relief by way of recission unless he in fact acted on the representation; and the onus of showing that he did so act rests on him. The mere fact of subscription affords, at any rate, *primâ facie* evidence that the subscriber acted on the material statements in the prospectus. It is then for the other side to disprove reliance. Acting on representation.

No rescission if allottee was not induced by the representation, &c., to contract to take the shares.

It is not an inference of law that a party who takes debentures or debenture stock on a prospectus containing a misrepresentation was induced to subscribe by that misrepresentation. Per Lord Blackburn, in *Smith* v. *Chadwick*, 9 App. Cas. 187. It is a question of fact to be determined with due regard to all the circumstances. See *supra*, pp. 433, 434. See also *Scott* v. *Snyder Dynamite Projectile Co. ,Ltd.*, 66 L. T. 278; 67 L. T. 104.

In *Macleay* v. *Tait*, (1906) A. C. 24, 26, Lord Halsbury said: "In the class of cases where misstatements have been made in a prospectus, and people have been led by attractive statements in the prospectus to take shares, the taking of which has led to loss, I . . . still think that it is quite a fair inference to draw, that if the prospectus is calculated to induce people to take shares, and they do take shares, the prospectus, tainted with falsehood as it is, has acted as a whole, and people cannot be expected to analyse their own mental sensations so minutely as to be able to expain what particular statement has induced them to become subscribers." And in *Smith's case*, 2 Ch. 611; L. R. 4 H. L. 64, Turner, L. J., says: "It was said that the representation ought not to be considered as the foundation of the contract, inasmuch as the company was formed not merely for working the particular mines which were purchased. But it is clear that this was a representation which, whether the company was confined to this one mine or not, was a representation necessarily inducing and influencing the contract."

Usual stated grounds for relief.

In most cases the allottee swears that he was induced by the particular representation or suppression to take the debentures or debenture stock, or that he subscribed on the faith of the prospectus, and that he would not have subscribed had he known the facts. And where this or otherwise a *primâ facie* case for rescission has been established, the onus of proving that the allottee was not so induced is cast on the company.

Onus of proof.

The misrepresentation need not be the sole moving cause or inducement to take the shares or debentures. It is sufficient that it is a material part of such cause. *Nicol's case*; *Royal British Bank*, 3 De G. & J. 387; *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459; *Re London and Leeds Bank, Ex parte Carling*, 56 L. T. 115; *Arnison* v. *Smith*, 41 Ch. D. 348; *Scott* v. *Snyder, &c., Co.*, 66 L. T. 278, 283; *S. C.*, 67 L. T. 104.

A contract induced by misrepresentation is voidable; the subscriber has an option to repudiate or not; and unless and until he does repudiate, the contract is valid and binding. That is the general rule as to voidable contracts. *Oakes* v. *Turquand*, L. R. 2 H. L. 325.

A person electing to avoid a contract on the ground of misrepresentation may give to the company or vendor a notice that he

repudiates the contract and requires repayment, and if the company or vendor assents to the avoidance, the contract is at an end. The company or vendor is bound to restore the money, and the debenture or debenture stock holder is bound to give up his security.

But if the company or vendor refuses to assent to the avoidance, the subscriber can apply to the High Court for relief, and the High Court will, if he makes out a case, declare the contract at an end, and compel the company or, as the case may be, the vendor to repay, with interest, what the subscriber has paid.

Conduct of shareholder apparently affirming contract.

The right to rescind may be lost not only by delay, but also by conduct which shows an intention on the part of the holder or subscriber to affirm the contract, as where the debenture holder, after discovery of the facts giving a right to rescind, treats the contract as subsisting; *e.g.*, by endeavouring to sell the debentures (*Ex parte Briggs*, 1 Eq. 483), by executing a transfer of them (*Crawley's case*, 4 Ch. 322), by paying instalments or receiving interest (*Scholey* v. *Central Ry. Co.*, 9 Eq. 266, n.; *Kent* v. *Freehold Land Co.*, 4 Eq. 588; *Shearman's case*, 75 L. T. 385). But he is allowed a reasonable time to obtain evidence. *Central Ry. Co. of Venezuela* v. *Kisch*, 2 H. L. 99; and *Re British Burmah Co.*, Kay, J., 21 June, 1888, 4 T. L. R. 631.

And a transfer of part of the debentures before discovery does not preclude relief as to the rest. *Mount Morgan West Co.*, 56 L. T. 622.

It is conceived that acting as a debenture or debenture stock holder will not operate to affirm the contract if, before so acting, the holder has definitely elected to avoid the contract, *e.g.*, by issuing his writ claiming rescission, or by putting in a defence that he was induced to take the debentures by misrepresentation, for if a man once determines his election it shall be determined for ever. Com. Dig. Election, C. 2. *Quod semel placuit in electionibus amplius displicere non potest:* Co. Litt. 146a; *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26. See also *Scarf* v. *Jardine*, 7 App. Cas. 345, 360, in which Lord Blackburn, referring to the above maxim, said: "That is Coke upon Littleton, and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon, from that time at least, down to the present. When once there has been an election to do one of two things, you cannot retract it and do the other thing; the election once made is finally made." This rule was recognized by the Court of Appeal in *Foulkes* v. *Quartz Hill Co.* (1884), 1 Cab. & Ellis, 156. In that case it was held that the issue of a writ claiming rescission of a contract was a definitive election by the plaintiff to avoid the contract and, accordingly, that in subsequently voting at a meeting of the company he did not prejudice his position. The case is not reported

on appeal, but the following note appears in the report above referred to: "The Court of Appeal reversed the above decision, and held that the issue of the writ was a definitive election to rescind, and that this election was not effected by the subsequent voting at the meeting."

This seems clear enough, and the rule was acted on by Wright, J., in *Tomlin's case*, (1898) 1 Ch. 104; but the learned judge appears to have doubted whether the Court meant to lay down the rule so absolutely as is stated in the note to the report. There seems, however, no ground for the doubt. What the Court held was in strict accordance with the decision of the Exchequer Chamber in *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26, *supra*.

In the matter of election the subscriber for or purchaser of debentures or debenture stock, who is entitled to rescind for misrepresentation, has greater latitude than the subscriber for shares. The subscriber for shares must act very promptly as soon as he discovers the misrepresentation, for in the meantime his name is on the register of members as a shareholder, and others may be acting on the faith of its being there. *Lawrence's case*, L. R. 2 Ch. 412. The subscriber for shares, moreover, cannot rescind after a winding-up, for the rights of creditors have then intervened. In the case of a subscriber or purchaser of debentures, neither of these reasons embarrasses his remedy, and the principle laid down by Mellor, J., in *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. at p. 35, and cited with approval by Lord Blackburn in *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 127, seems to be applicable:—

"Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he has the right to determine it either way, subject to this: that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But we cannot see any principle and are not aware of any authority for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission is such a change of position as would preclude the defrauded party from exercising his election to rescind. Neither can we see the principle or discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea."

A debenture or debenture stock holder who, after discovering that he has a right to rescind, has elected to affirm the contract, may yet be entitled to rescind in respect of some subsequently-discovered misrepresentation. Per Chitty, J., *London and Provincial Co.*, 55 L. T. 670. See, however, *Campbell* v. *Fleming*, 1 Ad. & E. 40. **Subsequent discoveries.**

*Restitution by Plaintiff.*

The right to rescind, as distinguished from the right to damages (as to which, see *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809), is conditional on restitution being possible. ***Restitutio in integrum.***

The general rule is that a contract cannot be rescinded where there cannot be *restitutio in integrum*; that is to say, where the other party cannot be restored to his original position. For example, if, after taking or purchasing debentures, the taker or purchaser sells them, he has parted with the subject-matter of the contract, and cannot afterwards claim the right to rescind, for he is not in a position to give back the debentures. But the rule has to some extent been modified by *Mutual Reserve, &c. Co.* v. *Foster*, 20 T. L. R. 715; and see *Cross* v. *Mutual Reserve*, 21 T. L. R. 15.

As to restitution generally, see *Erlanger* v. *New Sombrero, &c. Co.*, 3 App. Cas. 1218; *Adam* v. *Newbigging*, 13 App. Cas. 308; *Clarke* v. *Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. & D. 145; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, (1899) 2 Ch. 392.

But interim dealings with the subject-matter of the contract may in some cases be, without prejudice to the right of rescission, justified. Thus, where A., induced by the misrepresentation of B., purchased from B. certain debentures of a company, and brought an action to rescind the contract on the ground of misrepresentation, it was held that steps taken by A. for the benefit of all concerned, in an action to enforce the debentures, did not import an election by A. to affirm the contract, as such steps were reasonably necessary for the protection of the debenture holders' rights. *Imperial Ottoman Bank* v. *Trustees and Executors Co.*, W. N. (1895) 23.

Where the contract is severable, inability to rescind it as to part is not fatal to the right to rescind as regards another part. *Maturin* v. *Tredinnick*, 10 L. T. 331, where the subscriber, having sold part of the shares taken by him, was held entitled to rescind as to the rest. And see a similar case, *Mount Morgan (West) Gold Mine*, 56 T. L. R. 622.

A debenture or debenture stock holder who obtains rescission of his contract is entitled to have his money returned, and the Court will by way of *restitutio in integrum* give him interest at 4 per cent. thereon although no case of fraud is established. See *Karberg's case*,

(1892) 3 Ch. 17; *Smith's case*, 2 Ch. 604; *Newbigging* v. *Adam*, 34 Ch. D. 582; 13 A. C. 308. He is also *primâ facie* entitled to his costs. Where the misrepresentation is fraudulent, damages may be given in addition. *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Mathias* v. *Yetts*, 46 L. T. 497.

*Proceedings for Rescission.*

**Proceedings for rescission.**

To enforce rescission of contract an action must be brought in the High Court. In this action the subscriber or purchaser, or his legal personal representative, must be the plaintiff. If A. subscribes for debentures in his own name but in fact as agent for B., A. must be the plaintiff, and he must show that he, A., was misled by the prospectus. *Capel & Co.* v. *Sims, &c. Co.*, 58 L. T. 807. Whether B. was also misled or not is immaterial. In such actions it is not proper for one subscriber to sue on behalf of himself and all other persons who were induced to subscribe by the prospectus, for the right of rescission is a separate right of each shareholder—or debenture holder—misled (*Croskey* v. *Bank of Wales*, 4 Giff. 314); but it is competent for several persons who have separately subscribed on the same prospectus to join in one action for rescission of their contracts or for damages. See R. S. C. 1883, Ord. XVI. r. 1.

The company should *primâ facie* be the sole defendant in such an action unless the plaintiff is advised that he has also a cause of action against the directors or promoters personally either for deceit or for compensation under sect. 37, or under sect. 35 of the Act, and it is desired to combine that claim with the claim in the action: *e.g.*, where it is doubtful whether the company will be able to pay back the plaintiff's money. And see Part I. Form 674.

For form of writ and statement of claim, see *infra*, Forms 156 and 157.

**Charging fraud.**

It is not necessary in such an action to charge fraud—misrepresentation—quite innocent—as already said, is enough to found the action—and charging fraud only imposes on the plaintiff a superfluous burden; while to charge it without proving it is damaging to the plaintiff's case and may lead—though he wins on misrepresentation—to some adverse order as to costs.

**Death and bankruptcy.**

Where a person entitled to rescind for misrepresentation dies, his right to rescind passes to his legal personal representatives; if he becomes bankrupt, it passes to his trustee in bankruptcy; but in either case the cause of action vests subject to any disabilities or infirmities occasioned by lapse of time, laches, waiver, or other acts or defaults on the part of the subscriber prior to his death or bankruptcy. *Skottowe* v. *Williams*, 3 De G. F. & J. 535, 541.

To defend the action successfully the defendant must establish one or more of the following facts:— Defences.

1. That the representation relied on as untrue was in fact true.
2. That it was not a representation of a material fact.
3. That the document containing the representation was not issued by or on behalf of the defendant or by anyone for whom the defendant is responsible.
4. That the representation was not made with a view to inducing the plaintiff to subscribe. *Collins* v. *Associated Greyhound Racecourses, Ltd*, (1930) 1 Ch. 1.
5. That the plaintiff was not induced to subscribe by it, and was not misled by it.

This last point of defence—denial of inducement—may be formulated in various ways, *e.g.*, by showing:—

(1) That the allottee subscribed before he saw the prospectus. *Smith* v. *Chadwick*, 20 Ch. D 68.

(2) That he was really induced to subscribe by arrangement with promoters.

(3) That he was really induced to subscribe by representations made by parties for whom the company was not responsible.

(4) That he did not rely on the statements, but investigated the matter himself. *Jennings* v. *Broughton*, 5 De G. M. & G. 126; 17 Beav. 234; and see *Mathias* v. *Yetts*, 46 L. T. 497.

(5) That the prospectus itself showed that the statements were based on hearsay, and were to be verified subsequently. *British Burmah Co.*, 56 L. T. 815, *supra*.

(6) That the allottee is a person of such experience and character (*e.g.*, so constantly in the habit of underwriting shares) that it is not credible that he was misled by the statement relied on. "It is important to see whether the plaintiff was a person likely through inexperience to be misled by a prospectus, or to place implicit reliance on all that it contains." Per Lord Chelmsford, *Hallows* v. *Fernie*, 3 Ch. 467; and see *Bellairs* v. *Tucker*, 13 Q. B. D. 577; *Smith* v. *Chadwick*, 9 App. Cas. 191.

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## Forms.

**Form 156.**

Indorsement on writ claiming rescission of contract.

The plt claims:—

1. A declaration that he was induced to take ten debentures of 100*l.* each from the dft coy by misrepresentation and non-disclosure of material facts.
2. Rescission of the contract to take such debentures.

**Form 156.**

3. Repayment of the amounts pd by him in respect of such debentures, with interest thereon at the rate of 5 p.c.p.a. as from the time when the same were resply pd.

4. Costs.

5. Further or other relief.

**Form 157.**

**Statement of claim in action for rescission.**

[*Title, &c.*]

1. In the month of ——, 1921, the plt applied to the dft coy (hnftr called "the coy") for and was allotted by the coy ten debentures of the coy of 100*l.* each, and in accordance with the terms of allotment the plt pd to the coy the sum of 100*l.* in respect of each of the sd debentures.

2. The plt applied for the sd debentures in response to a prospectus, dated the —— day of ——, issued by the sd coy, inviting public subscriptions for —— debentures of ——*l.* each, and in reliance on the statements contained in the sd prospectus.

3. The sd prospectus contained the following misrepresentations, that is to say:—

(1) It stated, &c.

(2) It stated, &c.

4. All the sd statements were untrue. In particular—

(1) &c.

(2) &c.

5. The plt received a copy of the sd prospectus through the post, and on the faith thof, and induced by and relying on the statements and misrepresentations therein contained, the plt subscribed for and took up the sd —— debentures and pd thereon the sum of ——*l.*, making together the sum of ——*l.*

6. The plt recently discovered the misrepresentations afsd, and on or about the —— gave notice to the coy repudiating his sd contract and requiring the coy to return what he had pd thereon with interest. The sd coy has declined to comply with this demand, and has denied the plt's right to rescind.

The plt claims:—

[*As in writ.*]

## SECTION 2.

### Proceedings under Sect. 37 of the Act.

Principle of the section.

A misstatement being made fraudulently is, of course, an aggravation of the wrong; but the essence of the injury, for purposes of rescission, is the falsehood, not the fraud, for to the person who is misled it matters little what was the state of mind of the person who made the misstatement. The result to him is the same, whether it was fraudulent or innocent. Our law now recognizes this fact, and the recognition is now embodied in sect. 37, entitling a subscriber for debentures or debenture stock to claim compensation against the directors and others for damage sustained by reason of any untrue statement in the prospectus, even though not fraudulently made.

The section is as follows:—

Liability for statements in prospectus.

**37.**—(1) Where a prospectus invites persons to subscribe for shares in or debentures of a company—

(a) every person who is a director of the company at the time of the issue of the prospectus; and

(b) every person who has authorised himself to be named 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

(c) every person being a promoter of the company; and

(d) every person who has authorised the issue of the prospectus,

shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(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 allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor; or

(iv) that—

(a) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, 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) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the

statement, or was a correct and fair copy of or extract from the report or valuation; and

(c) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document:

Provided that a person shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making any such statement, report or valuation as is mentioned in paragraph (iv) (b) of this sub-section was competent to make it.

(2) 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 expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(3) 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.

(4) 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.

**Additional remedy.** The Directors' Liability Act, 1890, of which this section is a reproduction with some variations, altered fundamentally the law as to the consequences of misrepresentation in prospectuses and notices inviting subscriptions for shares, debentures, or debenture stock. The Act did not nor does the section purport or attempt to alter or extend the remedy afforded by the action of deceit. It created a new and much more effectual remedy in those cases to which it applies.

**Object of Act.** The decision of the House of Lords in *Derry* v. *Peek*, 14 App. Cas. 337, declared the law, and brought into clear relief the rule that, in an action against directors for deceit in a prospectus, the plaintiff was

bound to prove not only that the misrepresentation complained of was false, but that the defendants made it fraudulently—dishonestly, that is—not believing it to be true. In the case referred to, the Court of Appeal had held the directors liable because they had no reasonable ground for believing the statement they made to be true. The House of Lords, on appeal, held that, although a false statement made through carelessness, and without reasonable ground for believing it to be true, may afford some evidence of fraud, it does not necessarily amount to fraud, and that it rested with the plaintiff to prove that the defendant had not honestly believed what he stated to be true. "A man," said Lord Herschell, in that case, "who forms his belief carelessly or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act; but he is not, in my opinion, fraudulent." Per Lord Herschell, *Derry* v. *Peek*, 14 App. Cas. 369.

Operation of Act.

This obligation of proving dishonesty still remains in actions of deceit though not necessary to a claim for relief on the footing of breach of duty arising from fiduciary relationship (*Nocton* v. *Lord Ashburton*, (1914) A. C. 932), but it was not necessary to found a cause of action under the Directors' Liability Act, 1890, nor is it now under sect. 37. The Act, said Cozens-Hardy, L. J., in *McConnel* v. *Wright*, (1903) 1 Ch. 546, 558, "was passed in 1890, the year after *Derry* v. *Peek* had been decided in the House of Lords, and, as it seems to me, for the express purpose of getting rid of the effect of that decision, so far and so far only as directors and promoters issuing a prospectus on the one hand, and persons taking shares and debentures on the other hand, are concerned." The section following the Act in substance provides, that if the plaintiff proves an untrue statement in the prospectus, he shall not be bound to go further and prove that it was made by the defendants fraudulently. The falsity of the statement once proved, the section throws on the defendants the obligation of proving that they had reasonable ground to believe, and did up to the time of allotment of the shares, debentures, or debenture stock, as the case may be, believe that the statement was true. This shifting of the burden of proof makes it much easier than formerly for an aggrieved subscriber to obtain relief in respect of an untrue statement in a prospectus. But the section, following the Act, also enlarges the scope of his relief. Before the Act it was sufficient for the defendant director to have acted honestly. The Act now requires more of him: he must have acted honestly and he must show that he had reasonable grounds for believing the untrue statement he made to be true—and it is for him, as above stated, to prove that he acted honestly and had reasonable grounds.

*Cases in which the Section applies.*

Looking at the interpretation section (sect. 380), it is clear that this section is only to apply to prospectuses inviting subscriptions for shares, debentures, or debenture stock of companies governed by the Act. The section has no application to railway, gas, water, tramway, or other parliamentary companies, or to companies incorporated by royal charter, or to companies constituted under deeds of settlement and not brought within the operation of the Act, or to foreign and colonial companies (but, as to these, see sect. 354). Any right of action under the corresponding provisions of the repealed Acts is preserved by sect. 38 of the Interpretation Act, 1889.

It is not confined to prospectuses issued *by or on behalf* of the company.

The following points may be noted with reference to the Act:—

(i) The words "has authorized the issue" in sect. 37 of the Act have generally been considered to refer to the initial putting forth, and not to subsequent distribution by bankers, advertising agents and others.

(ii) As to what is a "statement" within the section: there appears to be no reason to doubt that any material statement of an existing fact would be a statement within the section. A misleading statement is an untrue statement. *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421; and *Drincqbier* v. *Wood*, (1899) 1 Ch. 393. See *Shepheard* v. *Broome*, (1904) A. C. 342; and *McConnel* v. *Wright*, (1903) 1 Ch. 546; and *supra*, pp. 432, 433.

(iii) The relief is by sub-sect. (1) given to "all persons who *subscribe* for any shares or debentures on the faith of the prospectus." This is now extended by sect. 38 to persons who accept an offer of shares or debentures which are offered for sale by a prospectus. A plaintiff who admits that had he known the real facts he would still have subscribed cannot succeed. *De La Cour* v. *Clinton*, *Trechmann* v. *Calthorpe*, 20 T. L. R. 420; *Macleay* v. *Tait*, (1906) A. C. 24.

(iv) As to the measure of damages: the section says that the defendant "shall be liable to pay compensation to all persons who subscribe for any shares or debentures, on the faith of the prospectus, for the loss or damage they may have sustained by reason of any untrue statement therein, *i.e.*, in the prospectus, &c." This must be taken to mean by reason of the plaintiff having been induced by the untrue statement to subscribe. See judgment of

Collins, M. R., in *McConnel* v. *Wright*, (1903) 1 Ch. 546. Presumably, the amount of compensation is the same as the measure of damages in an action of deceit, namely, the difference between the amount paid by the plaintiff and the real value of the debentures or debenture stock at the date of allotment. See *Peek* v. *Derry* (in Court of Appeal), 37 Ch. D. 591; *Broome* v. *Speak*, (1903) 1 Ch. 586; *Stevens* v. *Hoare*, 20 T. L. R. 407; *Nash* v. *Calthorpe*, (1905) 2 Ch. 237; and *Macleay* v. *Tait*, (1906) A. C. 24. At any rate, evidence of some damage should be given at the trial—*e.g.*, that the company soon failed and that the plaintiff lost the money he paid for the shares. The Court has then to decide whether the plaintiff has proved enough "to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such [untrue] statements. This is quite in accordance with the practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be useless if the plaintiff fails to establish any liability of the defendant to him." Per Lord Lindley in *Shepheard* v. *Broome*, (1904) A. C. 342, 348. And see *Arkwright* v. *Newbold*, 17 Ch. D. 301, 311, as to form of inquiry—and *McConnel* v. *Wright*, (1903) 1 Ch. 546.

An action under the Act is not for breach of contract but an action for tort, and the highest limit of damages is the whole extent of the plaintiff's loss, which "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." "So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged": per Collins, M. R., in *McConnel* v. *Wright*, *supra*.

(v) As to what are "reasonable grounds" of belief, this is a matter of fact. It is not enough that the defendant swears that he believed the statement to be true; it must appear that he had reasonable grounds for that belief—grounds which would satisfy a man of ordinary prudence and good sense. Thus, where directors sued under the Directors' Liability Act set up by their defence that they *bonâ fide* believed the statements to be true, and that they had reason for their belief, the Court of Appeal held

that they must deliver particulars of the grounds for their belief. *Alman* v. *Oppert*, (1901) 2 K. B. 576. The whole circumstances must for this purpose be looked at; and it must be considered what were the facts and information the directors had before them, and whether, as reasonable men, they could and did reasonably believe the statement to be true on those facts and on that information. And see *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. & D. 168; *Peek* v. *Derry*, 37 Ch. D. 541; *Glasier* v. *Rolls*, 42 Ch. D. 458; *Smith* v. *Chadwick*, 9 App. Cas. 190; *Drincqbier* v. *Wood*, (1899) 1 Ch. 393; *Thomson* v. *Lord Clanmorris*, (1899) 2 Ch. 523; (1900) 1 Ch. 718; *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421; *Shepheard* v. *Broome*, (1904) A. C. 342; *De la Cour* v. *Clinton*, 90 L. T. 615; 91 L. T. 474. As to refraining from inquiring as to the true prices paid to several concerns which have sold to an amalgamating company before that company issues a prospectus, see *J. & P. Coats, Ltd.* v. *Crossland*, 20 T. L. R. 800.

(vi) Where a material statement in the prospectus is untrue, it is no answer that if made some days later it would have been true. *McConnel* v. *Wright*, C. A., (1903) 1 Ch. 546; and *supra*, pp. 432, 433.

(vii) A misleading statement in a prospectus is untrue within the meaning of sect. 37, even though it may have been true in the sense in which it was used by those who issued the prospectus. *Greenwood* v. *Leather Shod Wheel Co.*, (1900) 1 Ch. 421; and see *Drincqbier* v. *Wood*, (1899) 1 Ch. 393.

(viii) As to "reasonable public notice" (sect. 37 (1)) of repudiation of the statements in a prospectus given by a director, it is too late to give such notice after action brought. *Drincqbier* v. *Wood*, (1899) 1 Ch. 393.

(ix) Several subscribers, on the faith of the same prospectus, may concur in a single action. *Drincqbier* v. *Wood*, (1899) 1 Ch. 393. But if the number of plaintiffs is numerous, difficulties may arise, and it is usually more convenient to commence separate actions, all of which can by arrangement be tried together, or one may be selected for trial as a test case.

(x) The fact that the relief claimed against the several defendants differs in detail is no reason for treating the action as bad as joining separate causes of action against several defendants, for in substance there is only one cause of action—the improper issue of the prospectus. *Frankenburg*

v. *Great Horseless Carriage Co.*, (1900) 1 Q. B. 504 (C. A.); and see *Davoren* v. *Wootton*, (1900) 1 Ir. R. 273. If one director is sued alone, he may bring his co-directors in by third party notice. *Gerson* v. *Simpson*, (1903) 2 K. B. 197; *Shepheard* v. *Bray*, (1906) 2 Ch. 235.

Before the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, the rule *Actio personalis moritur cum personâ* applied in case of a deceased director who had incurred liability under the Act, such liability being a liability in tort, and accordingly an action in respect of such liability did not lie against the legal personal representatives of the tortfeasor unless by the latter's tortious acts, property, or the proceeds or value of property belonging to the person injured, had been added to the tortfeasor's estate. *Geipel* v. *Peach*, (1917) 2 Ch. 108. But now by the Act of 1934 all causes of action subsisting against a deceased person survive against his estate if proceedings were pending at his death or the cause of action arose not more than six months before his death and proceedings are commenced not later than six months after his personal representatives have taken out representations. Sect. 1 (1) and (3). Apart from this Act the estate is liable to make contribution under sect. 37 (3), such contribution being made recoverable "as in cases of contract." *Shepheard* v. *Bray*, (1906) 2 Ch. 235 (in which case, however, an appeal was allowed by consent ((1907) 2 Ch. 571), Cozens-Hardy, M. R., stating that it was not to be assumed that the Court of Appeal was prepared to assent to all that Warrington, J., had decided); and *Geipel* v. *Peach*, (1917) 2 Ch. 108.

The period of limitation applicable to actions under the section was at first thought to be that which is pointed out by sect. 3 of 3 & 4 Will. 4, c. 42 (the Common Law Procedure Act, 1833), which applies to "actions for penalties, damages, or sums of money given to the party grieved by any statute now in force or hereafter to be in force"; and if this were so the action would be barred, unless brought within two years after the cause of action arises. But in *Thomson* v. *Lord Clanmorris*, (1900) 1 Ch. 718, in which it was argued that sect. 3 applied, the Court of Appeal decided otherwise, and was disposed to hold that the period was six years. This decision has not escaped criticism, and cannot be regarded as satisfactory. The words above quoted appear, certainly, on the face of them to comprehend such a proceeding as an action under sect. 37. The compensation under the section is a "sum of money given to the party grieved"—namely, to the subscriber who has sustained damage. The plaintiff in such an action, if his claim be well founded, is a person or "party grieved," and the "compensation" recoverable in the action surely comes within the category of "penalties, damages, or sums of money" given by the

statute to the party grieved. As Lord Coke says: "damages is the *recompense* that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." Co. Litt. (arg.) § 257 a. See further as to sect. 37 generally, Part I. of this work, 15th ed., p. 197 *et seq.*

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**Forms.**

**Form 158.**

Writ of summons in action under s. 37.

The plt claims:—

(1) Compensation for the loss sustained by him by reason of untrue statements contained in a prospectus of the —— Coy, Limtd, issued by the dfts, whereby the plt was induced to subscribe for 1,000*l.* debenture stock of the sd coy.

(2) Costs.

(3) Further or other relief.

**Form 159.**

Statement of claim.

1. [*Statements showing the issue of the prospectus by the dfts on behalf of the —— Coy, Limtd.*]

2. [*Statements showing that the plts subscribed for and took up debenture stock on the faith of such prospectus.*]

3. The sd prospectus contained several untrue statements of a material character, and the following are the parlars:—

[*Set them out*, e.g.]

The sd prospectus stated, &c., whereas, &c.

The plt recently discovered that the sd statements were untrue. The sd debenture stock is now worth less than one-half of the amount pd by the plt for the same, and the plt has in consequence sustained damage by reason of the sd untrue statements.

The plt claims:

(1) A declaration that the dfts are liable to pay compensation to the plt for the loss sustained by him by reason of the untrue statements afsd.

(2) Judgment against the dfts jointly and severally for the payment of such compensation.

(3) Costs.

(4) Such further or other relief as the nature of the case may require.

See other forms of claim and form of defence in Part I., 15th ed., p 1200, *et seq.*

## SECTION 3.

### Action for damages for breach of Sect. 35 of the Companies Act, 1929.

Action under Companies Act, 1929, s. 35.

By sect. 35 express provision is made for the disclosure in a prospectus of various matters which may be of importance to subscribers or purchasers of shares, debentures, or debenture stock. The Act does not say what are to be the consequences of non-compliance with this section: whether it entitles the subscriber to rescind his contract or to bring an action for damages, or both. It has been held that the remedy for non-compliance with the section is not rescission. *Wimbledon Olympia, Ltd.*, (1910) 1 Ch. 630; *South of England Natural Gas Co.*, (1911) 1 Ch. 573. And in the last-mentioned case it was suggested that the remedy is an action for damages.

In the former of these two cases the prospectus omitted to mention the fact that on two previous occasions the company had offered shares for public subscription and the number allotted in response to those offers, and it was contended that this omission entitled the applicant to rescission of contract. Neville, J., held that this was not so. "The section," said his Lordship, "does not in terms so provide, and I cannot attribute to the Legislature the intention that the mere fact of the omission of any of the facts required by this section to be stated should give the shareholders the right to get rid of their shares. Of course there may be omissions of such a character that they would on other grounds entitle the shareholders to this relief, but in this case we have only the bare fact of omission." This was followed by Swinfen Eady, J., in the second case. "There is no provision," said his Lordship, "of that kind in sect. 81 [now sect. 35] nor in any other section relating to the omission relied on in this case, but the section does contemplate the liability in damages on the part of the directors and other persons responsible for the prospectus." This seems the true view of the section, and in *Lynde* v. *Nash*, (1928) 2 K. B. 93, the Court of Appeal held that the plaintiff was entitled to damages for the omission to state in a prospectus the number of shares which had been issued for a consideration other than cash. But when this decision was reversed in the House of Lords (*Nash* v. *Lynde*, (1929) A. C. 158) on other grounds, the question whether an action for damages would lie was expressly left open.

In *Couch* v. *Steel*, 3 E. & B. 402, the broad principle was laid down that whenever a statutory duty is created any person, who can show that he has sustained injury from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed; but in *Atkinson* v. *Newcastle and Gateshead*

*Waterworks Co.* (1877), 2 Ex. Div. 441, it was decided that this proposition could not be supported—that it was too widely stated—and that in determining whether a person prejudiced by the non-performance of a statutory duty was entitled to bring an action for damages, regard must be had to the purview of the Legislature in the particular Act and the language employed therein. See *Cowley* v. *Newmarket Local Board*, (1892) A. C. 345; *Municipality of Pictou* v. *Geldert*, (1893) A. C. 524; *Saunders* v. *Holborn District Board of Works*, (1895) 1 Q. B. 64; *Johnston* v. *Consumers' Gas Company of Toronto*, (1898) A. C. 447, 454, in which last case the observations of Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* are cited with approval by Lord Macnaghten, delivering the judgment of the Privy Council. It is material, for instance, to consider for whose benefit the Act was passed, whether it was passed in the interest of the public at large or in those of a particular class. *Groves* v. *Wimborne* (*Lord*), (1898) 2 Q. B. 402 (C. A.), following the view of Kelly, C. B., in *Gorris* v. *Scott*, L. R. 9 Ex. 125. The fact, also, that there is a penalty imposed for the breach of the statutory duty affords evidence that it was not intended that individuals prejudiced should be entitled to a right of action, and the absence of any provision for a penalty goes to show that the general law is intended to apply. As to the Attorney-General suing where there is no statutory penalty, see *Att.-Gen.* v. *London & N. W. Ry. Co.*, (1900) 1 Q. B. 78.

Both these factors co-exist in the case of sect. 35 of the Companies Act, 1929—that section is for the benefit of a particular class (subscribers), and no penalty is affixed by the Act for breach of the duties thereby imposed. The fair inference is therefore that the Legislature intended the general law to apply, and accordingly that those who committed a breach of the section should be liable in damages. For an action for such damages, which failed on other grounds, see *Brookes* v. *Hansen*, (1906) 2 Ch. 129.

**What must be proved.**

In order to succeed in such an action for damages on the section —assuming it to lie—the plaintiff must show—

1. That the defendants issued the impeached prospectus complained of. This obligation is much simplified by sect. 34, requiring the registered copy of the prospectus to be signed by every person named in it as a director or proposed director of the company.
2. That the prospectus did not disclose some or one of the facts required by sect. 35 to be disclosed therein.
3. That in reliance on the prospectus, and in ignorance of the

undisclosed facts, the plaintiff subscribed for the debentures or debenture stock offered by the prospectus.

4. That the plaintiff has sustained damages thereby.

Defences.

The section itself recognizes three qualifications of a director's liability under the section: (i) ignorance; (ii) honest mistake; (iii) immateriality of the non-compliance with the section.

See sect. 35 (4).

But these are not the only available lines of defence: for instance—

1. The defendant may show that the plaintiff did not really subscribe or buy on the faith of the prospectus, or that had he known the facts he would none the less have subscribed. *Macleay* v. *Tait*, (1906) A. C. 24.
2. That the plaintiff was cognizant of the particular or particulars omitted, and therefore that the damage sustained was not caused by the non-compliance with the requirements of the Act. *Ibid.*
3. That he has not really sustained any damage. *Ibid.*

But if the prospectus fails to disclose any required particular, it is not open to the defendants to say that the plaintiff ought to have found out the facts. The plaintiff is entitled to assume that the defendants have discharged their statutory duty, and need not search any further. *Redgrave* v. *Hurd*, 20 Ch. D. 1. See *supra*, p. 436.

Measure of damages.

The measure of damages in such an action is the same, it would seem, as the measure of damages in an action of deceit (*infra*, p. 465); namely, the difference between the value of the debentures or debenture stock taken or purchased by the plaintiff and the amount which he has paid for the same.

Statute of Limitations.

As to the Statute of Limitations, the remedy being an action on the case, it would seem that sect. 3 of 21 Jac. 1, c. 16, applies, and accordingly that the period of limitation is six years from the time when the cause of action arose. That the remedy is on the case and not for debt, see *Tilson* v. *Warwick Gas Co.*, 4 B. & C. 962. If the remedy were for debt under the Act the period of limitation would be twenty years under sect. 3 of the Civil Procedure Act, 1833, for the debt is a specialty. *Cork and Bandon Ry. Co.* v. *Goode*, 13 C. B. 826.

*Bankruptcy.*

Bankruptcy.

In the event of the party entitled to sue for breach of the duty imposed by sect. 35 becoming bankrupt, his right of action is an asset, and passes as such to his trustee in bankruptcy.

In the event of a director or other person liable for the breach of the section becoming bankrupt, the action being one in tort, the case would fall under sect. 30 (1) of the Bankruptcy Act, 1914, providing

that demands in the nature of unliquidated damages arising otherwise than by reason of contract, promise, or breach of trust, shall not be proveable in bankruptcy. If judgment has been obtained in the action before a receiving order, the claim becomes a judgment debt and proveable; but a verdict in tort before receiving order, if judgment has not been signed till afterwards, is not sufficient.

*Death.*

**Death.** As to death, *Actio personalis*, see p. 455, *supra*.

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**Forms.**

**Form 160.**

**Writ of summons in action under sect. 35 of Act of 1929.**

The plt's claim is for damages for the loss occasioned to him by the dft's breach of duty in not complying with the requirements of sect. 35 of the Cos Act, 1929, as to disclosure in relation to a prospectus of the —— Coy, Limtd, whereby the plt was induced to subscribe for and take up ——*l.* debentures of the sd coy.

**Form 161.**

**Statement of claim under sect. 35 of Companies Act, 1929.**

1. [*Issue of the prospectus.*]

2. [*Subscription by plt for debentures and payment.*]

3. At the time when the sd prospectus was issued there were in existence three material contracts of which the following are the parlars, that is to say:—

(a) Contract dated, &c. whereby, &c.

(b) Contract dated, &c. whereby, &c.

(c) Contract dated, &c. whereby, &c.

4. The sd three contracts were not contracts entered into in the ordinary course of the business carried on or intended to be carried on by the coy, and they were all made within two years before the date of the publication of the sd prospectus.

5. Each of the sd contracts was a material contract within the meaning of para. 13 of Pt I. of the Fourth Schedule to the Cos Act, 1929.

6. The sd prospectus did not state the dates of and parties to the sd contracts, and did not specify a reasonable time and place at which the sd contracts or a copy thof might be inspected.

7. The dfts in not disclosing the sd contracts in the prospectus issued by them as afsd, committed a breach of the duty imposed on them by the sd section.

8. The plt subscribed for the sd debentures in reliance on the sd prospectus and in ignorance of the existence of the sd contracts.

9. The sd debentures are not and never were of any value.

The plt claims—

(1) ——*l.* damages for the breach of the dfts' statutory duty in omitting to specify in the sd prospectus the dates

and the parties to the sd contracts, and a reasonable time and place at which they or copies thof might be inspected. Form 161.

(2) Costs.

(3) Such further or other relief as the nature of the case may require.

As to material contracts: *Sullivan* v. *Metcalfe*, 5 C. P. D. 461, followed in *Cackett* v. *Keswick*, (1902) 2 Ch. 456. As to whether contract includes a contract which has been carried into effect or rescinded: *Broome* v. *Speak*, (1903) 1 Ch. 586; affirmed as *Shepheard* v. *Broome*, (1904) A. C. 342.

As to proving damage, see *Macleay* v. *Tait*, (1906) A. C. 24; *Marshall* v. *Morrison*, W. N. (1907) 29. Those were both cases under sect. 38 of the Act of 1867, but if it is necessary to prove damage in case of fraud, *à fortiori* in other cases.

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## SECTION 4.

### Action of Deceit.

Action of deceit.

A person who has been induced by a fraudulent misrepresentation to subscribe for debentures or debenture stock may, as an additional or alternative remedy, bring an action of deceit against those who have deceived him, or take proceedings against them under sect. 37 of the Companies Act, 1929. The Directors' Liability Act, 1890, which first introduced the provisions now contained in sect. 37, was intended to supplement the old common law action of deceit; and in cases where the present Act applies, it gives to the subscriber a more efficient remedy than an action of deceit, and it has consequently to a large extent superseded the remedy at common law; but there are still cases from time to time occurring in which the new remedy is not available, while the old remedy by action of deceit is. It will therefore be convenient to state here concisely some of the principal rules applicable in the case of an action of deceit.

Rules as to action for deceit.

The law as to such an action may be expressed thus:—

Where a prospectus or notice invites persons to subscribe for or buy, *e.g.*, debentures or debenture stock of a company, and such prospectus or notice contains any misrepresentation, whosoever issues, or authorizes the issue of, such prospectus or notice is liable to pay compensation to every person who in response to such prospectus or notice, and induced by such misrepresentation, subscribes for or buys any such debentures or debenture stock, for any damage sustained by him in consequence of such subscription or purchase, provided that the plaintiff proves:—

What to prove.

(a) That the defendant issued, or authorized the issue of, the prospectus or notice, or sanctioned its issue, or that the

misrepresentation relied on was made by the defendant to those who issued the prospectus with the intention that it should be used for the purposes of the prospectus.

(b) That the prospectus or notice contained a misrepresentation of fact.

(c) That the fact misrepresented was a material fact.

(d) That the plaintiff was induced by such misrepresentation to subscribe or buy.

(e) That the defendant made the misrepresentation fraudulently.

(f) That the plaintiff has sustained damage in consequence of such deceit.

It is no objection to an action of deceit that the defendant is a company; for a company, though not capable itself as an abstract person of fraud, acts—can only indeed act—by agents, and it is answerable for frauds committed by such agents when acting in its affairs. See Part I. of this work (15th ed., p. 30), and the following cases:—*Smith* v. *Chadwick*, 9 App. Cas. 187; *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459; *Derry* v. *Peek*, 14 App. Cas. 337; *Arnison* v. *Smith*, 41 Ch. D. 348; *Glasier* v. *Rolls*, 42 Ch. D. 436; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Mair* v. *Rio Grande Rubber Estates*, (1913) A. C. 853.

**Issue on behalf of company.**

As to (a), it is a question of fact. Where a man applies for debentures in response to a prospectus purporting to be issued by the company, and has debentures allotted to him by the directors, there is usually but little difficulty in proving that the directors issued, or authorized the issue of, the prospectus. Under sect. 34 of the Companies Act, 1929, there are their names appended to the registered prospectus, but even where this is not the case the directors can be interrogated, and are rarely in a position to deny responsibility. Even if a director denies the fact, evidence is generally forthcoming to countervail such denial (*e.g.*, that he distributed prospectuses or concurred in the allotment). See *Peek* v. *Derry*, 37 Ch. D. 541; *Glasier* v. *Rolls*, 42 Ch. D. 436; *Bellairs* v. *Tucker*, 13 Q. B. D. 562; *Ship* v. *Crosskill*, 10 Eq. 73; *Henderson* v. *Lacon*, 5 Eq. 249. But in the absence of some such evidence a director is not liable. *Watts* v. *Atkinson*, 8 T. L. R. 235. As to the cases in which a director may be held responsible for a fraud committed by his co-directors, see *Cargill* v. *Bower*, 10 Ch. D. 502; *Weir* v. *Bell*, 3 Ex. D. 238, 248.

**Issue on behalf of owners of the shares, debentures, &c.**

And so where, as occasionally happens, the prospectus is issued not on behalf of the company, but by some firm or company as the owners, or on behalf of the owners, of the shares, debentures, or debenture stock offered for subscription or sale, there is rarely any difficulty in proving the issue by the firm or company.

**Promoter's misrepresentation.**

Where A. (*e.g.*, a promoter of a company) makes false representations to B. and C. (*e.g.*, directors of a company), with the intention that

such representations shall be embodied in a prospectus of the company inviting public subscription, A. may be held liable in an action of deceit by an allottee, as having authorized the making of such false representations to the allottee. *Barry* v. *Croskey*, 2 J. & H. 1; approved in *Peek* v. *Gurney*, L. R. 6 H. L. 413; and see *Andrews* v. *Mockford*, (1896) 1 Q. B. 372, 378.

Responsibility for a misrepresentation may be incurred by ratification, for a tort may be ratified. *Carter* v. *St. Mary Abbot's Vestry* (1900), 64 J. P. 548; *Whitehead* v. *Taylor*, 10 A. & E. 210; *Becker v. Riebold*, 30 T. L. R. 142. But see *Hoole* v. *Speak*, (1904) 2 Ch. 732, where Kekewich, J., held that a director could not be made liable under sect. 38 of the Act of 1867 (now sect. 37) for ratification of an advance prospectus, the issue of which he had not authorised. Responsibility incurred by ratification.

But it must be borne in mind that *primâ facie* the representations contained in a prospectus of a company are made with a view of inducing persons to apply for and take *from the company* the securities thereby offered for subscription, and accordingly that those, and those only, who so apply and take up the same are entitled to rely on the statements, and can complain if they are incorrect. Hence a person who, after reading the prospectus, has bought debentures or debenture stock in the market is not *primâ facie* entitled to complain. *Peek* v. *Gurney*, L. R. 6 H. L. 413; *supra*, p. 441. Office of prospectus.

A prospectus may, however, go further, and invite people not only to subscribe, but to buy shares or securities in the market, and if it does then those who issued it may be held responsible to those who act on it. *Andrews* v. *Mockford*, (1896) 1 Q. B. 372.

As to (b), the misrepresentation relied on must be a misrepresentation of some existing fact. See as to this, *supra*, pp. 428, 429. Misrepresentation as to existing fact.

" Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding, at a proper time, for setting aside an allotment or purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false." Per Lord Cairns, *Peek* v. *Gurney*, L. R. 6 H. L. 403; and see *Aaron's Reefs* v. *Twiss*, (1896) A. C. 273.

As to (c), it must be shown that the misrepresentation is material. It is not every misrepresentation that gives a right of action. For misrepresentations which have been held material, see *supra*, p. 430. Material fact.

As to (d), it must be shown that the plaintiff was induced by such misrepresentation to subscribe or buy. *Macleay* v. *Tait*, (1906) A. C. 24. Generally the plaintiff swears to the fact, and when the Subscriber influenced by statement.

misrepresentation is material, and it is shown that the plaintiff took shares in response to the prospectus, it is a fair inference of fact that he was induced by the prospectus to subscribe. *Smith* v. *Chadwick*, 9 App. Cas. 187. See *supra*, pp. 434, 442. As to what is sufficient to prove or negative reliance on the misrepresentation, see *supra*, p. 442. A plaintiff may succeed even where the misrepresentation relied on was not the sole inducement to subscription. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459; *Re London and Leeds Bank, Ex parte Carling*, 56 L. T. 115; *Peek* v. *Derry*, 37 Ch. D. 541; *Arnison* v. *Smith*, 41 Ch. D. 348.

**Damage shown.**

As to (f), unless damage is shown, the plaintiff has no right to complain.

**Fraud.**

As to (e), fraud by the defendant is of the essence of the action of deceit, and must be established; and it is established when it is shown (1) that the representation relied on was false to the knowledge of the defendant; *or* (2) that it was made by the defendant recklessly, without caring whether it was true or false; *or* (3) that the defendant did not in fact believe it to be true. *Derry* v. *Peek*, 14 App. Cas. 337. The last alternative, in fact, covers both the others; and accordingly, in an action of deceit, the least that must be proved, in order to establish that a false statement was fraudulently made, is that the defendant did not, in fact, believe that the statement was true. *Knox* v. *Hayman*, 67 L. T. 137. But a false statement allowed to pass by culpable carelessness, but without fraud, is not enough. *Angus* v. *Clifford*, (1891) 2 Ch. 449; *Watts* v. *Atkinson*, 8 T. L. R. 235. Observe the difference in this respect between an action of deceit and an action for rescission. *Supra*, p. 436.

**Defendant himself deceived.**

If, on the other hand, in an action of deceit, the defendant proves that he did believe the statement to be true, the plaintiff must fail, even though he shows that the grounds on which that belief was founded were unreasonable. This was decided by the House of Lords in *Derry* v. *Peek*, 14 App. Cas. 337, reversing the decision of the Court of Appeal. Nevertheless, "A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made is not to be accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief he alleged." Per Lord Herschell, *ib.*, p. 369.

A person cannot make a misrepresentation with impunity by wilfully blinding himself to the truth.

"If I thought that a person making a false statement had shut his eyes to the facts or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just

as fraudulent as if he had knowingly stated that which was false." Per Lord Herschell, *Derry* v. *Peek*, 14 App. Cas. 376.

Where a subscriber is entitled to bring an action of deceit, he is, *à fortiori*, entitled to have his contract rescinded if that contract was one made with the company. Accordingly, an action will lie for the twofold remedy—for rescission of contract against the company, and also for damages for fraudulent misrepresentation against the directors and others responsible for the fraud. See *Frankenburg* v. *Great Horseless Carriage Co.*, (1900) 1 Q. B. 504.

But there is no obligation to rescind. The defrauded subscriber may, if he thinks fit, keep the contract and sue only for damages. In such a case the affirmance of the contract is a bar to rescission only, not to damages. *Milward* v. *Littlewood*, 5 Ex. 775; *Clarke* v. *Dickson*, El. Bl. & El. 148; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 323. The fact of the subscriber having sold the debentures or debenture stock (if he has done so at a loss) will not preclude him from bringing an action for damages.

Measure of damages.

In an action of deceit the measure of damages is the difference between the price paid for the debentures or debenture stock and the actual value at the time when the contract was made. This actual value is to be ascertained not by the market price at the date of the contract, but by the light of subsequent events. *Peek* v. *Derry*, 37 Ch. D. 541, 590; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Arnison* v. *Smith*, 41 Ch. D. 363; *Twycross* v. *Grant*, 2 C. P. D. 469; and see *Leeds and Hanley Theatres of Varieties*, (1902) 2 Ch. 809.

Limitation of time for action.

*As to the period of limitation in an action of deceit.*—An action of deceit is *primâ facie* barred under 21 Jac. 1, c. 16, unless it is brought within six years from the time when the cause of action accrued. *Peek* v. *Gurney*, L. R. 6 H. L. 377. But if the plaintiff can show that he did not discover, and had no reasonable means of discovering, the fraud until within six years before the action, and that the existence of such fraud was fraudulently concealed by the defendant until within the six years, time will not run until such discovery. *Gibbs* v. *Guild*, 9 Q. B. D. 59. See, however, *Imperial Gas Light Co.* v. *London Gas Light Co.*, 10 Ex. 39; and *Barber* v. *Houston*, L. R. 18 Ir. 475.

Death or bankruptcy of person defrauded.

*Survival of cause of action.*—On the death or bankruptcy of a person in whom there is vested a right of action for fraudulent misrepresentation, whereby he has lost money, the right of action passes to his legal personal representatives or trustee in bankruptcy, as the case may be, as part of his estate. *Twycross* v. *Grant*, 4 C. P. Div. 40; and see Law Reform (Miscellaneous Provisions) Act, 1934, s. 1.

Death or bankruptcy of person liable.

*As to death of director.*—The general rule of the common law, "*actio personalis moritur cum personâ*," applied to a claim for damages in respect of fraudulent misrepresentation. *Peek* v. *Gurney*, L. R. 6 H. L. 377. But the executors or administrators of a director or other person who made the misrepresentation might be liable to the extent to which the estate of the deceased benefited by the misrepresentation. *Phillips* v. *Homfray*, 24 Ch. D. 439; 11 A. C. 466; *Ramskill* v. *Edwards*, 31 Ch. D. 100; *Davoren* v. *Wootton*, (1900) 1 Ir. R. 273. And now the cause of action survives, if it arose within six months before the death, and the action is brought within six months after representation has been taken out. Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) and (3).

Proof in bankruptcy.

*As to bankruptcy.*—Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, are not proveable in bankruptcy. Sect. 30 (1) of the Bankruptcy Act, 1914. Hence damages for fraudulent misrepresentation by a director are not proveable in his bankruptcy, unless judgment is obtained before the receiving order. *In re Newman*, 3 Ch. D. 494. But the personal liability remains even after discharge, for the discharge of the bankrupt only releases him from debts proveable in the bankruptcy (sect. 28 (2) of the Bankruptcy Act, 1914); and the Bankruptcy Court will not restrain an action in such a case against the bankrupt. *Ex parte Coker*, 10 Ch. 652.

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**Forms.**

**Form 162.**

Indorsement of writ in action of deceit.

The plt's claim is for damages for loss caused by the fraudulent misrepresentations of the dfts contained in a prospectus of the —— Coy, Limtd, whereby the plt was induced to subscribe and pay for ——*l.* debentures of the sd coy.

**Form 163.**

Statement of claim in action of deceit.

1. In the month of ——, 19—, the —— Coy, Limtd (hnftr called "the coy"), issued a prospectus dated the —— day of —— offering for public subscription ——*l.* debenture stock of the coy.

2. The sd prospectus was signed by the dfts, and stated amongst other things—

(1) That, &c.

(2) That, &c.

(3) That, &c.

3. The sd statements were material statements, and each of them was false to the knowledge of the dfts, in particular, &c.

4. The plt, on the —— day of ——, subscribed for ——*l.* of the sd debenture stock, and pd up the full amount thof in cash, namely, ——*l.*, and the whole of the sd stock so subscribed for was in due course registered, and still is registered, in his name.

5. The plt was induced to subscribe for and pay for the sd stock in reliance on the sd prospectus and on the sd false statements contained in it. **Form 163.**

6. The present value of the sd stock is less than ——*l.*, and the plt has sustained damage by the false and fraudulent statements afsd.

The plt claims—

(1) ——*l.* damages for the sd false and fraudulent statements.

(2) Costs.

(3) Further or other relief.

In an action of deceit the plaintiff's difficulty is that he has to prove not only the statements to be false, but that the defendant made them *fraudulently*—the *mens rea*. Compare this with sect. 37 of the Companies Act, 1929, under which the plaintiff only has to prove the false statements, and the *onus* is then cast on the defendants of proving that they believed the statements to be true, and that they had reasonable grounds for that belief.

In an action of deceit there can of course be discovery.

Cases sometimes occur in which a number of persons, induced to take up debentures or debenture stock by the same prospectus, determine to sue for fraudulent misrepresentation. There is no legal difficulty in their suing together, though sometimes there are practical difficulties in such a course; but it must always be remembered that the right of action of each plaintiff is a personal and separate one. One cannot sue for all the rest as in a debenture holders' action. See *Gray* v. *Lewis*, L. R. 8 Ch. 1035, 1055; *Croskey* v. *Bank of Wales*, 4 Giff. 314; *Arnison* v. *Smith*, 41 Ch. D. 98.

As to substituting a person in place of a wrong person joined as plaintiff, see *Hughes* v. *Pump House Hotel Co.* (No. 2), (1902) 2 K. B. 485.

### *Statement in Lieu of Prospectus.*

A company having a share capital which does not issue a prospectus is bound to deliver to the registrar a statement in lieu of prospectus. Neglect by a company to do this will give the allottee of any debentures issued by the company the right to repudiate them. The section runs as follows:—

**40.**—(1) A company having a share capital which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures there has been delivered to the registrar of companies for registration 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 Fifth Schedule to this Act.

(2) This section shall not apply to a private company.

(3) If a company acts in contravention of this section, the company and every director of the company who knowingly authorises or permits the contravention shall be liable to a fine not exceeding one hundred pounds.

See further Part I. of this work, 15th ed., p. 226 *et seq.*

## SECTION 5.

### Criminal Liability.

Criminal liability.

Sect. 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), provides that:—

"Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, *any written statement* or account which he shall know to be *false in any material particular*, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, *or to intrust or advance any property* to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned."

The punishments referred to were:—"To be kept in penal servitude for any term not exceeding seven years and not less than three years, —or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." *Ibid.* sect. 75.

A prospectus is a "written statement" within the meaning of this enactment, and accordingly if a prospectus offering debentures or debenture stock for subscription is issued containing fraudulent misrepresentations, the directors issuing it appear to be liable to prosecution under the Act; they may also be prosecuted for conspiracy to commit the statutory offence. Moreover, any person, whether a director or not, who issues or takes part in the issue of a prospectus containing fraudulent misrepresentations, may be prosecuted for conspiracy to defraud. But of course such persons cannot be convicted, unless it can be proved that they knew the representations to be false, and, acting upon that knowledge and with the intention to deceive and defraud, issued the prospectus. It should, however, be borne in mind, that if a prospectus containing misrepresentations is issued, it may not be difficult to make out a *primâ facie* case against those who issued it; for "every man must be taken *primâ facie*, at least, to have intended what are the natural and necessary consequences of his acts; and if you find that there was misrepresentation, and that it has ended in defrauding the parties to whom it was addressed, the fair and legitimate inference is, that the intention was that the act done should carry with it the consequences that have followed from it." Per Cockburn, C. J., in *The Queen* v. *Gurney and others*, Finlason's Report, p. 254. The presumption is only a presumption, and may as such be rebutted, as it was in the case last mentioned;

but it is desirable that the prospectus should be so framed as to avoid any risk whatever to the directors—and especially any risk of criminal proceedings. A prospectus may be "false in any material particular" if it is misleading, though no single statement in it is false. *R.* v. *Kylsant*, (1932) 1 K. B. 442, *supra*, p. 437.

In addition to the above, a prosecution for obtaining money by false pretences may in some cases be instituted. See sect. 88 of the Larceny Act, 1861, and sect. 32 of the Larceny Act, 1916, by which Act sect. 88 of the Larceny Act, 1861, was repealed, and *Queen* v. *Aspinall*, 2 Q. B. D. 48; *Queen* v. *Silverlock*, (1894) 2 Q. B. 766. A breach of sect. 35 of the Companies Act, 1929—the disclosure in prospectuses section—would seem to be a misdemeanour for which the offending party may be indicted as a breach of a statutory provision. *Rex* v. *Harris*, 4 T. R. 202; *Reg.* v. *Price*, 11 A. & E. 727; *Reg.* v. *Hall*, (1891) 1 Q. B. 747; *Reg.* v. *Tyler*, (1891) 2 Q. B. 588. Where several persons combine to commit a breach of the law, they may be prosecuted for conspiracy.

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## SECTION 6.

### Remedies connected with the Enforcement of the Rights conferred by the Debentures or Debenture Stock.

Remedies.

The second division of remedies above referred to (*supra*, p. 427) of debentures and debenture stock holders may be divided into:—

(1) Those which are available without the aid of the Court.

(2) Those which are available only with the aid of the Court.

And those remedies again divide themselves into two classes, according as there is or is not a further security by way of mortgage or charge.

### Remedies available without the Aid of the Court.

Where debentures, &c. unsecured.

First, as to unsecured debenture and debenture stock holders:—

The remedies available to such holders without the aid of the Court are merely those of specialty creditors, with the double disadvantage of the debts not being presently payable and of no priority being gained except by execution. Almost the only remedy such holders have, without the aid of the Court, is to give the required notice calling in the principal moneys owing to them, and, if there be a winding-up, to claim and prove in it like other creditors, or otherwise sue the company.

Where secured.

Secondly, as to *secured* debenture and debenture stock holders.

The remedies of these persons are much more effective, and chief among them are the following:—

Receiver under power in debentures.

1. If, as commonly happens in the case of secured debentures, the debentures contain a power (see Form 40) to appoint a receiver, the debenture holders, or the proportion specified in the debenture conditions, can make the appointment so soon as the power becomes exercisable (*Henry Pound, Son & Hutchins*, 42 Ch. D. 402), and the receiver so appointed can exercise the powers given him by the debentures and the Act.

Receiver under trustees' power.

2. Where, by the debentures or the trust deed securing the debentures or debenture stock, a power is conferred on trustees to appoint a receiver, the debenture or debenture stock holders can take steps to procure the trustees to make such appointment.

Other trustees' powers in deed.

3. Similarly, if the trust deed empowers the trustees to enter and carry on the business, sell, lease and otherwise deal with the premises, the holders can procure the trustees to exercise the powers so vested in them.

Receivers appointed without aid of Court.

*As to Receivers appointed without the aid of the Court.*

4. Debentures and trust deeds commonly give power to appoint a receiver with express reference to sects. 19 and 20 of the Conveyancing Act, 1881, now replaced by sects. 101 and 109 of the Law of Property Act, 1925 (see these sections set out *supra*, pp. 111, 115.) The parties thus incorporate the powers of the Acts as part of the terms of their bargain, and any question of the inapplicability of the Acts by implication is avoided. Sometimes the power to appoint a receiver is given *simpliciter*—irrespective, that is, of these sections.

In either case—whichever form be adopted—the receiver derives his appointment and authority from the parties themselves in pursuance of the powers of the contract. A receiver so appointed is consequently in a very different position from that of a receiver appointed by the Court. Thus:—

(a) He is not an officer of the Court. Hence, interference with his possession is not a contempt of Court; but though this is so, the parties interested are not without remedy, for they can bring an action to restrain interference with the possession of their receiver, and if the receiver has been duly appointed and his title is superior to that of the person interfering, the Court will grant an injunction. See *Bayly* v. *Went*, 51 L. T. 764; W. N. (1884) 197; *Septimus Parsonage & Co.*, 17 T. L. R. 420.

(b) He is usually to be regarded, whilst the company remains a going concern, as the agent of the company, not of the debenture holders or of their trustees (*Bissell* v. *Ariel Motors*, 27 T. L. R. 73), if he is appointed under the Law of Property Act, 1925, or under a special contract or power which contains a provision to the effect of that in sect. 109 of the Act, viz., that a receiver "shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults," but not otherwise (*Vimbos, Ltd.*, (1900) 1 Ch. 470; *Robinson Printing Co.* v. *Chic, Ltd.*, (1905) 2 Ch. 123; *Deyes* v. *Wood*, (1911) 1 K. B. 806; *Cully* v. *Parsons*, (1923) 2 Ch. 512). A provision under which the receiver is to be the agent of the company or mortgagor protects the debenture holders or their trustees from liability as mortgagees in possession or principals. *Owen & Co.* v. *Cronk*, (1895) 1 Q. B. 265, C. A.; *Gosling* v. *Gaskell*, (1897) A. C. 575.

Where the company goes into liquidation after the receiver's appointment, the receiver thereupon ceases to be the agent of the company. *Gosling* v. *Gaskell*, (1897) A. C. 575. The debenture holders or their trustees do not thereupon become liable for transactions by the receiver unless there is some express or implied agency. *Ibid.*, p. 592. The same case left open the point whether if the company goes into liquidation after the receiver's appointment he is, as to subsequent transactions, to be regarded as under any personal liability (*e.g.*, for goods ordered by him as receiver), but it appears that he is liable. See *Thomas* v. *Todd*, (1926) 2 K. B. 511. He has ceased to be the agent of the company, and has not become the agent of the mortgagees. If he professes to be acting as an agent of the company, he may be sued for breach of warranty of authority. *Gosling* v. *Gaskell*, (1897) A. C. 592. But if he appears to have no principal, then he is, it would seem, under the same liability which attaches to a receiver appointed by the Court, viz., "it is implied . . . when he enters into a contract, that it is a real contract, by which he binds himself personally." Per Rigby, L. J., in *Burt, Boulton and Hayward* v. *Bull*, (1895) 1 Q. B. 276, 284.

(c) A winding-up does not put an end to the powers of a receiver appointed by the debenture holders. *Gough's Garages, Ltd.* v. *Pugsley*, (1930) 1 K. B. 615. Nor does a winding-up prevent the appointment of a receiver. Cf. *Henry Pound, Son & Hutchins*, 42 Ch. D. 402.

(d) The Court will not, on a winding-up commencing, displace the debenture holders' receiver in favour of the liquidator, although sometimes a receiver appointed by the Court i-

superseded where the winding-up is compulsory, in favour of the liquidator. See *infra*, pp. 500, 501. On the contrary, the Court, if the liquidator is in possession, will order him to give up possession to the receiver appointed by the debenture holders as the nominee of the persons substantially entitled to the assets. *Henry Pound, Son & Hutchins*, 42 Ch. D. 402. And see *infra*.

(e) The Court has jurisdiction, in a proper case, to displace a receiver appointed by a debenture holder under the powers of the debentures by its own receiver on the application of another debenture holder. *Re Slogger Automatic Feeder Co.*, (1915) 1 Ch. 478.

(f) The debenture holders' receiver is accountable, not to the Court, but to the debenture holders or trustees of the deed. He can be compelled to render such account by action, or perhaps by originating summons under Ord. LV. r. 3.

(g) His powers are limited by the deed and the Acts.

**Fiduciary position of appointor.**

The power to appoint a receiver, vested in some or one of a body of debenture holders ranking *pari passu*, is a fiduciary power to be exercised *bonâ fide* in the interests of all the debenture holders, and if it is not so exercised, the Court has jurisdiction to intervene and appoint a proper receiver. *Maskelyne British Typewriter Co.*, (1898) 1 Ch. 133. The same rule applies where the power is vested in the trustees.

**Notice to registrar.**

Under sect. 86 the appointment of a receiver has to be notified to the registrar. See p. 480, *infra*.

**Application *pro interesse suo*.**

Where an appointment is made under a power contained in the security, and some other person under the control of the Court is already in possession, *e.g.*, the official receiver or liquidator in winding-up, or a receiver appointed by the Court on behalf of a subsequent incumbrancer, application can be made to the Court which made the appointment by the debenture holders or their trustees for an order for delivery of possession to their receiver, and the requisite order will be made. *Henry Pound, Son & Hutchins*, 42 Ch. D. 402; *Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497. This is called an application *pro interesse suo*. *Semble*, such an application is unnecessary where the person in possession, *e.g.*, the official receiver, is prepared to recognise the appointment under the security and to give up possession. Back rents received since, but not before, the application, will be ordered to be paid to the applicant. *Preston* v. *Tunbridge Wells Opera House*, (1903) 2 Ch. 323; *Metropolitan Amalgamated Estates, Ltd.*, *supra*.

**Fiduciary position of receiver.**

A receiver appointed under debentures or a trust deed is, it need hardly be said, in a fiduciary position, and may not obtain any secret

advantage or benefit from his position beyond what the trust deed allows him. **Poor rates.**

It would appear that a debenture holder's receiver taking possession may in some cases be liable personally to pay the poor rates (*Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212; *Marriage, Neave & Co.*, (1896) 2 Ch. 663); but he is, of course, entitled to indemnity. As to his paying poor and other rates out of the assets in priority, see sects. 78 and 264 (1) (a), and *infra*, Chap. LXVI. The overseers cannot, by obtaining a distress warrant, obtain payment out of the proceeds of goods sold by the receiver. *British Fuller's Earth Co.*, 17 T. L. R. 232.

A receiver and manager is not entitled to demand a supply of gas without paying for arrears: *Paterson* v. *Gas Light & Coke Co.*, (1896) 2 Ch. 476; and the Court will usually give leave to distrain for gas supplied: *Adolphe Crosbie, Ltd., Johnson* v. *Crosbie*, 74 J. P. 25, applying *Marriage, Neave & Co.*, (1896) 2 Ch. 663; a similar rule applies as to arrears in respect of electric light: see *Husey* v. *London Electric Supply Corpn.*, (1902) 1 Ch. 411. **Gas and electric light.**

*Sales under Trust Deeds or Debentures without assistance of the Court.*

5. A trust deed to secure debentures or debenture stock usually contains a trust or power to sell, to be exercised or exercisable in certain specified events, and various powers ancillary to such trust or power of sale. **Sales under trust deeds or debentures without aid of Court.**

Debentures also frequently contain a clause providing for the appointment of a receiver and vesting in him a similar power of sale.

These powers can, of course, only be exercised as and when they become exercisable in accordance with the terms of the security. Usually the power of sale is not exercisable until the security becomes enforceable, *e.g.*, till a specified notice has been given to pay and default has been made in doing so. See pp. 322, 323. If the power to sell has not arisen, and the debenture holders or the trustees are proposing to sell, the company can obtain an injunction to restrain the sale, but where a mortgagee is selling in the due exercise of a power of sale conferred on him by the security, the Court is reluctant to interfere unless a case of fraud or breach of the terms of the security can be established. *Hill* v. *Kirkwood*, 28 W. R. 358; *Hickson* v. *Darlow*, 23 Ch. D. 690; *Gill* v. *Newton*, 12 Jur. N. S. 220; Seton, 7th ed., p. 719.

In *Planet* v. *Birmingham and Blakeley Hall Co.*, B. 716, before Jessel, M. R., the plaintiff applied for an injunction to restrain a sale by the trustee for the debenture holders on the ground of under-value. It was agreed that the motion should stand over for a month in order

that the plaintiff should have an opportunity of finding a purchaser who would give more. He failed to do so, and in the result the action was dismissed.

A premature sale if carried into effect may be valid where there is a clause protecting the purchaser against irregularities in the exercise of the power (see pp. 335, 336), or where the sale takes place under sect. 101 of the Law of Property Act, 1925; but to make good his title the purchaser must have bought without notice of any irregularity. *Dicker* v. *Angerstein*, 3 Ch. D. 600; *Selwyn* v. *Garfit*, 38 Ch. D. 273. The purchaser is not concerned to inquire whether proper notice has been given if the sale takes place under sect. 101. See Law of Property Act, 1925, s. 104 (2). This section overrides the decision in *Life Interest, &c. Corpn.* v. *Hand-in-Hand, &c. Soc.*, (1898) 2 Ch. 230.

Where the power or trust for sale is exercisable at the request of a certain proportion of the debenture or debenture stock holders, the Court will not appoint a receiver or enforce a sale at the instance of less than the proportion against the wishes of the trustees and of the majority of the debenture holders. *Mercantile, &c. Co.* v. *River Plate Trust*, (1892) 2 Ch. 303; *Kempe* v. *Jones*, W. N. (1884) 214. In the last-mentioned case the plaintiff seeking a sale had a majority in value but not in number also as required by the trust deed.

*As to a Sale by a Receiver.*

Sale by receiver.

6. A provision vesting in the receiver a power of sale is valid and not uncommon; but it would seem that the receiver can only pass an equitable title; unless, indeed, he is invested with special powers. See *supra*, p. 281. In the absence of such special powers the purchaser, if he wants the legal estate, should call for a conveyance (which the debenture holders as equitable mortgagees are entitled to require) from the company.

Vesting order.

If the company refuses to convey, the purchaser should obtain a vesting order under sect. 44 of the Trustee Act, 1925. Where the receiver has clearly sold under the powers conferred upon him by the debentures, the order has been made without first obtaining an order for specific performance. The company is considered as being a trustee for the purchaser. See *Re Richard Mills & Co.*, (1905) W. N. 36, and Form 165A, *infra*. If there is any doubt as to the power of the receiver to sell, it may be better to obtain an order for specific performance by summons under Ord. XIV. and a vesting order under sect. 48 of the Trustee Act, 1925.

*As to carrying on Business by a Receiver.*

Carrying on business.

7. *Primâ facie* a receiver of the company's property is not entitled to carry on the business of the company, but very commonly the debentures or trust deed empower him to carry it on. See p. 281.

Where the power is so conferred, he may do whatever is reasonably necessary for carrying on the business, including the buying and selling of goods, the employment of labour, and the incurring of debts and liabilities; and even though in the result loss is sustained, he will be entitled to indemnity, and the mortgagees for whom he acts will be entitled to bring the expenses of the receivership into account as against the subsequent incumbrancers and the company. *Bompas* v. *King*, 33 Ch. D. 279.

How far the power to carry on the business is affected by the winding-up of the company has not yet been settled. It would seem from the cases cited *supra*, p. 471, that after a winding-up the receiver cannot carry on the business any longer as agent for the company; but it is apprehended that the winding-up should not, contrary to the obvious intention of the parties, be held to determine and nullify altogether the power to carry on the business. It would seem consistent with principle to hold that the power subsists; that the business, though it can no longer be carried on for the company, may still be treated as carried on on behalf of the debenture holders. To hold otherwise would be to defeat the intention and to deprive the mortgagee of a material part of his security—a thing which the Court is extremely reluctant to do. *Re David Lloyd & Co.*, 6 Ch. D. 339; *Henry Pound, Son & Hutchins*, 42 Ch. D. 402.

Lien of receiver.

A receiver and manager has a lien for costs of management and, probably, for his remuneration, and, if removed, is entitled to be paid out of corpus (*Bernard* v. *Davies*, 7 L. T. 372; *Farquharson* v. *Balfour*, 8 Sim. 210); but he is not entitled to be paid out of corpus while his receivership continues. *Ibid.* His lien has priority over the claims of execution creditors. *Jennings* v. *Mather*, (1902) 1 K. B.

### *As to Borrowing by the Receiver.*

Borrowing and mortgaging.

8. It is apprehended that the receiver who has power to carry on the business may for the purposes thereof borrow money, *e.g.*, by overdraft; and can as security give to the lenders the benefit of his right to indemnity. Whether he can give a security on the assets over which the receivership extends is a more difficult question; but *semble*, he can. A power to carry on a business seems necessarily to involve, as incidental to it, a power to borrow to a reasonable amount. See *Byron* v. *Metropolitan, &c. Co.*, 3 De G. & J. 123; *Ex parte City Bank*, L. R. 3 Ch. 758; *General Auction Co.* v. *Smith*, (1891) 3 Ch. 432. If he has power, not only to carry on, but to sell (see p. 281), it would seem that he may mortgage the assets for securing money properly raised for the purpose of carrying on the business. *Robinson Printing Co.* v. *Chic, Ltd.*, (1905) 2 Ch. 123; *Deyes* v. *Wood*,

(1911) 1 K. B. 806; *Stroughill* v. *Anstey*, 1 D. M. & G. 635; *Re Dimmock, Dimmock* v. *Dimmock*, 52 L. T. 494; *Redman* v. *Rymer*, 60 L. T. 386.

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**Forms.**

**Form 164.**

Appointment of receiver under power in debentures.

THE —— COY, LIMTD.

*Appointment of Receiver.*

I, N., of ——, being the registered holder of —— debentures each for ——*l.* of the above-named coy, in respect of which the principal sum of ——*l.* is now due and payable, and with the consent in writing of the several other persons whose names are subscribed hto (being the holders of a majority in value of the outstanding debentures of the same series) hby appoint A. B., of ——, to be a receiver of the ppty charged by the debentures of the sd series, to the intent that such appointment may be as effective as if all the holders of debentures of the same series had concurred therein, and so that the sd A. B. shall have power—

(1) To take possession of, collect and get in the ppty charged by the debentures, and for that purpose to take any proceedings in the name of the coy or otherwise as may seem expedient.

(2) To carry on or concur in carrying on the business of the coy, and for that purpose to raise money on the premises charged by the debentures of the series in priority to the debentures or otherwise.

(3) To sell or concur in selling any of the ppty charged by the debentures after giving to the coy at least seven days' notice of his intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the coy or otherwise.

(4) To make any arrangement or compromise which he or they shall think expedient in the interest of the debenture holders.

And I declare that all moneys received by such receiver are to be dealt with in the manner provided in the sd debentures.

As witness my hand this —— day of ——.

Signature, A. B.

And we, the undersigned holders of the above-mentd series, hby consent to the appointment made as above.

Signatures ——.

Names and addresses ——.

Witness, &c.

**Form 165.**

Conveyance of property by receiver.

THIS DEED is made the —— day of ——, between the —— Coy, Limtd (hnftr called "the coy") of the first pt, A. B., of ——, the receiver appointed as hnftr mentd of the second pt, and C. D., of ——, of the third pt, Whereas in the year —— the coy issued a series of debentures, each for securing the sum of ——*l.* and interest charged upon (*inter alia*) the hereditaments hby assured, and by such debentures it was provided in clause 11 that at any time [recite power to appoint receiver, and power of receiver to sell, and appointment of receiver as attorney of the coy to convey], and whereas N., of ——, was on the —— day of —— the registered holder of —— of the sd debentures each for ——*l.*, and whereas the principal moneys secured by the sd debentures became payable on the —— day of ——, and the coy made default in payment thof, and whereas the sd N. by instrument in writing under his hand, dated the —— day of ——, duly appointed, with the consent of the registered holders of a majority in value of the outstanding debentures of the same series, the sd A. B., of ——, to be a receiver of the ppty charged by the sd debentures, and whereas the sd A. B. accepted the sd appointment and entered into possession of the premises so charged, and whereas the sd A. B. as such receiver has agreed to sell to the sd C. D. the ppty specified in the schedule hto, being pt of the premises charged by the sd debentures for the sum of ——*l.*, and has been requested by the sd C. D. to convey the same as hnftr provided, Now this Deed witnesseth that in conson of the sum of ——*l.* now pd to the said A. B. by the sd C. D. (the receipt, &c.) [the coy by the direction of the sd A. B. doth hby convey, and] the sd A. B. as trustee doth hby convey and confirm unto the sd C. D., all and singular the ppty specified in the schedule hto. To hold the same as to such of the sd hereditaments as are of freehold tenure unto the sd C. D. in fee simple, and as to such of the sd hereditaments as are of leasehold tenure unto the sd C. D., his exors, admors and assigns for the residue of the term of years mentd in the same schedule, but subject to the payment of the rents and the performance and observance of the covenants and conditions reserved by and contained in the several indentures of lease specified in the sd schedule, and to be pd, performed and observed by the lessees under the same resply, and as to the residue of the sd ppty absolutely. [*Add covenant to pay rent and observe covenants and indemnify the coy.*]

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

*Parlars of Properties sold.*

**Form 165a.**

**Vesting order on sale by receiver.**

In the matter of the trusts affecting certain freehold ppty (being ——, in the county of ——) under or by virtue of a contract dated the —— day of ——, 19—, and made between S. K., of the one pt, and T. & E., Limtd, of the other pt,

and

In the matter of the Tree Act, 1925.

Upon the applicon of T. & E., Limtd (the purchasers), and S. K. (the receiver), by originating summons dated ——, 19—, and upon hearing the solors for the applicants, and upon reading an office copy notice of appointment to hear the sd originating summons filed ——, 19—, against the respts, L. S. & Coy, Limtd, in default of appearance, an afft of S. K., and an afft of W. E., both filed ——, 19—, and the exhibits therein resply referred to.

And the judge being of opinion that the respts, L. S. & Coy, Limtd, are trees within the meaning of sect. 44 of the Tree Act, 1925, And it appearing from the sd afft of W. E. that they wilfully refused or neglected to convey the land comprised in the above-mentd contract dated ——, 19—, for twenty-eight days after being required so to do by the applicants, T. & E., Limtd.

It is ordered that the freehold hereditaments known as —— and comprised in the above-mentd contract dated ——, 19—, vest in the applicants, T. & E., Limtd, for all the estate therein of the respts. Clauson, J., 16th April, 1934. 1934, K. 179.

**Form 166.**

**Debentures issued by receiver in respect of loan.**

THE —— COY, LIMTD.

Issue of —— debentures, each for ——*l.*, made by the receiver of the coy's undertaking.

1. This is to certify that —— of ——, the receiver of the above-named coy's undertaking appointed by instrument in writing dated the —— day of ——, and under the power contained in a debenture under the coy's seal dated the —— day of ——, pt of the series below mentd, has received from —— of —— the sum of ——*l.*, and in conson of such advance the coy will pay the sd —— or other the registered holder for the time being hof, on the —— day of ——, the sum of ——*l.*

2. In the meantime and until payment the sd coy will pay to the sd —— or other the registered holder for the time being hof,

interest thereon at the rate of ——, p.c.p.a., payable on the —— day of —— and —— day of ——, the first of such payments to be made on the —— day of —— next. **Form 166.**

3. This certificate is issued subject to and with the conditions indorsed hereon.

IN WITNESS, &c.

The conditions within referred to:—

1. This debenture is one of a series of like debentures of the coy for securing principal sums not exceeding in the aggregate at any one time ——*l.* raised for the purpose of carrying on the coy's business. The debentures of the sd series are all to rank *pari passu* as a first charge on the undertaking and ppty of the coy, both present and future, without any preference or priority one over another, and such charge is to be a floating security and is to rank in priority to the charge created by the debentures for ——*l.* created by the coy and issued in the year ——. And the coy and the receiver afsd hby charge the same accordingly.

2. &c. (*Insert clauses from Form* 40.)

THE —— COY, LIMTD. **Form 167.**

Certificate of loan to receiver.

This is to certify that A. B., of ——, at the request of L., the receiver of the undertaking of the above-named coy (duly appointed by instrument in writing dated the —— day of ——), has advanced to the sd coy and to —— the receiver thof the sum of ——*l.*, which sum is to be repayable on the —— day of ——, and is in the meantime, until payment, to carry interest at the rate of —— p.c.p.a., payable half-yearly on the —— day of —— and the —— day of ——, the first of such payments to be made on the —— day of —— next: And it is hby agreed that the sd principal moneys and interest shall rank as a first charge on the undertaking and ppty of the sd coy, and in priority to the debentures of the sd coy for ——*l.*: And it is agreed that the sd —— is not to be under any liability for the payment of the sd principal moneys or interest.

AS WITNESS, &c.

Such an instrument, as also Form 166, may require to be registered under sect. 79, and is to be stamped as a debenture.

**Form 168.**

Notice of appointment of receiver.

No. of coy ——. (Board of Trade Form No. 53.)

[A 5*s.* cos registration fee stamp must be impressed here.]

THE COS ACT, 1929.

NOTICE OF APPOINTMENT OF A RECEIVER OR MANAGER.

*Pursuant to sect.* 86 (1).

Name of coy ——.

Presented by ——.

To the Registrar of Cos.

I, ——, of ——, with reference to ——, Limtd, hereby give notice that:—

(*a*) I have obtained an Order of the (*b*) —— dated the —— day of ——, 19—, for the appointment of Mr. ——, of ——, as (*c*) —— of the ppty of this coy.

(*a*) On the —— day of ——, 19—, I appointed Mr. ——, of ——, as (*c*) ——, of the ppty of this coy under the powers contained in an instrument dated (*d*) ——.

Signature ——.

Dated the —— day of ——, 19—.

Under sect. 86, any person obtaining the appointment of a receiver or manager of the property of a company, or appointing such a receiver or manager under any powers contained in any instrument, must within seven days from the date of the order or appointment, give notice of the fact to the Registrar of Companies, and the Registrar is to enter the fact in the Registrar of Mortgages and Charges on payment of the prescribed fee.

(*a*) Of these two paragraphs strike out that which does not apply.

(*b*) Name of Court making the order.

(*c*) "Receiver" or "manager" or "receiver and manager" as the case may be.

(*d*) Describe fully the instrument under which appointment is made.

**Form 169.**

Notice of ceasing to act as receiver.

No. of coy ——. (Board of Trade Form No. 57A.)

THE COS ACT, 1929.

[A 5*s.* cos registration fee stamp must be impressed here.]

NOTICE OF CEASING TO ACT AS RECEIVER OR MANAGER.

*Pursuant to sect.* 86 (2).

Name of coy ——.

Presented by ——.

To the Registrar of Cos.

I, ——, —— of ——, hereby give you Notice that I ceased to act as receiver and/or manager of —— Coy, Limtd, on the —— day of —— 19—.

Signature——.

Dated the —— day of —— 19 —.

### Remedies Available only with the Aid of the Court.

Remedies with aid of Court.

The following are some of the various litigious proceedings which holders of debentures or debenture stock may occasionally have to take with a view to enforcing or effectuating their security:—

(a) Actions against the company to compel it to observe the provisions of the security as regards drawings, sinking fund, &c.

(b) Actions against the company to compel it to observe the provisions of the debenture or trust deed as regards keeping a register or registering a transfer.

(c) Action against the company to restrain it from issuing debentures in priority to or ranking *pari passu* with the existing debentures or debenture stock in violation of the terms of the security.

(d) Action against the company to restrain it from creating a specific mortgage in priority to the charge in the debentures or debenture stock deed in violation of the terms of the security.

(e) Action against the company to restrain it from disposing of its undertaking in fraud of the debenture holders' rights.

(f) Action against the company for the appointment of a receiver, or receiver and manager, of the mortgaged or charged premises on the ground that the security is in peril.

(g) Originating summons, under Ord. LV. r. 3, to determine some question relating to the trusts of the trust deed or to enforce the security.

(h) Action to compel payment of interest in arrear.

(i) Action to compel payment of principal moneys overdue.

(j) Action by secured debenture or debenture stock holders to enforce their security.

(k) Winding-up petition, followed by proof in winding-up, whether compulsory or under supervision, and, if necessary, summons to admit claim.

(l) Action to restrain voluntary liquidator from distributing the assets in disregard of plaintiff's claim. *Lord Elphinstone* v. *Monkland Co.*, 11 App. Cas. 332.

(m) Misfeasance proceedings against voluntary liquidator so distributing. *Watchmakers' Alliance, &c. Stores*, 5 Tax Cases, 117.

(n) Action against company to prevent it from impairing the security—*e.g.*, by entering into a charter-party for the carriage of contraband of war. *Law Guarantee Society* v. *Russian Bank*, (1905) 1 K. B. 815.

*As to Action by Holders of Unsecured or Naked Debentures or Debenture Stock.*

Action by unsecured holder.

Where the company makes default in payment of any principal or interest due and payable to the holder of an unsecured debenture, the holder can bring an action to enforce payment.

When brought in the High Court the action may be commenced either by ordinary writ or by writ specially endorsed under Ord. III. r. 6. See Form 192.

If the debenture is to bearer, the bearer is the person to sue in his own name. If the debenture is to the registered holder, the registered holder, or, if dead, his executors or administrators are the proper persons to sue. If the debenture is neither to bearer nor registered holder the person entitled to give a receipt for the moneys thereby secured is the proper person to sue as plaintiff.

Where the debenture is in favour of A. and B. jointly and A. will not sue, B. can sue and make A. and the company defendants. *Cullen* v. *Knowles*, (1898) 2 Q. B. 380.

Default in payment of interest secured by a debenture does not, *ipso facto*, in the absence of a special condition, make the principal moneys immediately payable, but debentures commonly provide that if the interest is unpaid for a certain time—two, three, or six months, as the case may be—the holder may call in the principal moneys by notice to the company, and where this is the case the holders can exercise the right by giving the requisite notice, and then on default by the company at once sue for the amount.

Actions where unsecured debenture stock.

As regards an action to enforce payment of unsecured debenture stock, it may be premised that such stock is extremely rare. The right to sue in the case of such stock depends on the terms of the instrument constituting it. Where it is constituted, as it commonly is, by trust deed, the deed usually contains a covenant by the company with the trustees that the company will pay the stockholders, and in such cases the stockholder can generally sue in equity; *primâ facie* the trustees are the proper persons to do so, but if the trustees make any difficulty about suing, any stockholder as *cestui que trust* and beneficially interested, can maintain the action. See *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Empress Engineering Co.*, 16 Ch. D. 125; and see *Cullen* v. *Knowles*, (1898) 2 Q. B. 380, a case of joint promises; and compare these with *Uruguay Central Co.*, 11 Ch. D. 372.

Notwithstanding these cases—which apparently were not cited to him—Swinfen Eady, J., held in *Dunderland Iron Ore Co.*, (1909) 1 Ch. 446, that a holder of debenture stock secured by a trust deed

was not a creditor of the company competent to present a winding-up petition against it. See this case explained at p. 11, *supra*.

Defences.

As to defences available, see *infra*, Chap. LVI.

Judgment and execution.

Where judgment has been obtained it must be duly entered before execution can be issued. See Ord. XLI. r. 1.

Having obtained judgment and entered it, there is no need to serve the judgment before issuing execution. *Land Credit Co. of Ireland* v. *Lord Fermoy*, 5 Ch. 323. The judgment creditor may proceed, without service and without demand, to issue execution under Ord. XLII. r 3. See the Rule and Notes thereto in Ann. Pr.

In a simple case a writ of *fieri facias* or *elegit* is the best mode of enforcing a judgment for payment of money provided that there is reason to believe that the company has any chattels or land which can be taken in execution under either of such processes. Such a writ is issued as of course, and the fact that the defendant is a company does not render it necessary to apply for leave. *Coe* v. *Wise*, L. R. 1 Q. B. 711; *Worral Water Works* v. *Lloyd*, L. R. 1 C. P. 719.

But not uncommonly the company has mortgaged all its property present and future so that the sheriff is unable to levy or is ousted after levying.

Notwithstanding, however, the fact that land may by reason of being subject to a mortgage, or for some other reason be incapable of being delivered in execution under a writ of *elegit*, the registration of such a writ will create a charge on the land under sect. 195 of the Law of Property Act, 1925 (replacing sect. 13 of the Judgments Act, 1838). *Lord Ashburton* v. *Nocton*, (1915) 1 Ch. 274.

In cases where a writ of *fieri facias* or *elegit* is useless or proves to be abortive, the debenture holder may be able to satisfy his judgment by attaching some debt due to the company—in other words, by obtaining a garnishee order under Ord. XLV.; or he may find it possible to get a charging order or a stop order. Ord. XLVI. He cannot, however, attach uncalled capital, that not being a debt due to the company till called.

Failing these remedies he may—in a suitable case—obtain the appointment of a receiver by way of equitable execution. See Ord. L. rr. 15a and 16. See *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 Ch. D. 252; *Salt* v. *Cooper*, 16 Ch. D. 544; *Smith* v. *Cowell*, 6 Q. B. D. 75; *Wells* v. *Kilpin*, 18 Eq. 298. A receiver by way of equitable execution can be obtained in the action after judgment without bringing a fresh action. *Smith* v. *Cowell*, 6 Q. B. D. 75.

Merger of rights in judgment.

Where judgment on an unsecured debenture has been obtained it must be borne in mind that the rights of the debenture holder under

the debenture merge in the judgment—*transit in rem judicatam*—the plaintiff ceases to be a debenture creditor and becomes a judgment creditor. The result is that unless the covenant in the debenture is specially framed (*Agriculturist Cattle Insurance Co.*, 4 Ch. D. 34, n.; *Popple* v. *Sylvester*, 22 Ch. D. 98; *Economic Life Assurance Society* v. *Usborne*, (1902) A. C. 147), the amount secured by the judgment, as from the entry thereof, carries interest until payment at 4 per cent. per annum—the judgment rate of interest—however much higher may have been the rate of interest reserved by the debenture. 1 & 2 Vict. c. 110, s. 17; Ord. XLII. r. 16; *European Central Ry. Co.*, 4 Ch. D. 33; *Ex parte Fewings, Re Sneyd*, 25 Ch. D. 338, *supra*, p. 274.

Execution before winding-up.

Where execution is issued, and the sheriff on behalf of the execution creditor takes possession and sells before the commencement of a winding-up, the debenture holder will obtain a security ranking as regards the property taken in execution in priority to the claims of the unsecured creditors of the company. See sect. 268 and Part II., 15th ed., p. 392.

A creditor who attaches a debt does not, however, gain priority in a winding-up unless the debt is received before the commencement of the winding-up. Sect. 268 (2).

All the foregoing observations as to judgment and execution must be read subject to the *pari passu* principle explained above. If, that is to say, by the terms, whether express or implied, of the instrument sued upon, all the debenture holders are put upon an equality, without preference or priority *inter se*, any judgment obtained by one debenture holder, and equally any fruits of execution, must be held by him in trust for all the debenture holders. Keeping them for his own sole benefit would be a fraud on the contract. *Bowen* v. *Brecon Ry. Co.*, 3 Eq. 541; *Furness* v. *Caterham Ry. Co.*, 27 Beav. 358. See, however, *Potteries Ry. Co.*, L. R. 5 Ch. 67, 69.

### *Effect of a Winding-up on the Remedies in Court of Holders of Naked Debentures and Debenture Stock.*

Effect of winding-up on Court remedies of holders.

The principal object of the winding-up of a company is to effect an administration in due course of the company's assets, that is to say, a *pari passu* payment of the debts of its unsecured creditors (subject to the prior rights of the secured creditors, if any) and to distribute the surplus assets among the members. Hence a subsisting winding-up by or under the supervision of the Court is a bar to the holder of naked debentures or debenture stock, who is a mere unsecured creditor, bringing an action against the company without the leave of the Court. See sects. 174 and 177. His proper remedy is to prove in the winding-up, and even if he has obtained judgment before the commencement of the winding-up, he cannot after the commencement

thereof levy execution without the leave of the Court, a leave which will not be given except in very special circumstances. His remedy is to prove on his judgment, and if he levies execution after the commencement of the winding-up, and without leave, he will be ordered to withdraw and be visited with costs. If he threatens to levy he can be restrained by injunction.

In a voluntary winding-up the position is somewhat different. The Act does not in terms prevent a creditor from *bringing* an action after the commencement of the voluntary winding-up even without the leave of any Court, but as a creditor he can make an application to the Court under sect. 252. In *Currie* v. *Consolidated Kent Collieries Corpn.*, (1906) 1 K. B. 134, 136, Collins, M. R., said: "From the point of view suggested for the defendants it is difficult to see why the Legislature did not in the Companies Act, 1900, extend the provisions of sect. 87 of the Companies Act, 1862 (now sect. 177 of the Companies Act, 1929), to voluntary liquidations. I cannot see any reason why they stopped short of that, unless it were that they thought that *primâ facie* a plaintiff had a right to proceed with his action." And in the same case the Court of Appeal held that in the case of a voluntary winding-up the onus is thrown on the liquidator of showing that an action against the company should be stayed. That onus seems to be satisfied when the existence of a debt or liability is substantially admitted, although there may be some question of the exact amount due; but not so where there is a real dispute as to the existence of any liability. But in each case the Court has a discretion. *Ibid.* Nevertheless the holder of a naked debenture should be cautious in bringing an action; for the Court may restrain the action, and visit the creditor with the costs of it. See, further, Part II., 15th ed., p. 388 *et seq.*

Petition to wind up by holder of debentures.

As regards the remedy by a winding-up petition, the holder of a debenture is a creditor, and, as such, competent under sect. 170 to present a petition. *Olathe Silver Mining Co.*, 27 Ch. D. 278; *Uruguay Central Ry. Co.* (1879), 11 Ch. D. 372; *Borough of Portsmouth Tramways Co.*, (1892) 2 Ch. 362; *Chapel House Colliery Co.*, 24 Ch. D. 259. See, however, as to a debenture stockholder, *Dunderland Iron Co.*, (1909) 1 Ch. 446; commented on p. 11, *supra*.

To obtain a winding-up order, the petitioning debenture holder must show that his case falls within one of the classes of cases enumerated in sect. 168 of the Act as grounds for the Court ordering a winding-up. Where a debenture holder petitions he usually does so on the ground that the company is unable to pay its debts (sect. 168 (5)), and as evidence thereof he alleges and proves that he has made repeated demands to the company for payment and that the company has neglected to pay. A creditor in this position who cannot get paid is

entitled, as against the company, to a winding-up order *ex debito justitiæ*, but as between himself and other creditors of the same class he is not so entitled, and if a majority of creditors of that class object to a winding-up order the Court may decline to make the order. At one time it was held by the Court to be a good reason for refusing to make a winding-up order that the assets were overcharged by debentures, but by sect. 171 (re-enacting sect. 29 of the Act of 1907) "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." And see *Crigglestone Coal Co.*, (1906) 2 Ch. 327, 333; *Clandown Colliery Co.*, (1915) 1 Ch. 369; and *infra*, p. 511.

Under sect. 170 (1) the holder of a naked debenture not yet payable is able to petition for a winding-up order on the ground that the company is unable to pay its debts, creditor in the section including a creditor present, contingent or prospective. See *infra*, p. 512.

*As to Proof by such Holders in a Winding-Up.*

Proof by him.

Where there is a winding-up in progress, the holder of a naked debenture can prove, and whether the winding-up is by or under the supervision of the Court, or now even purely voluntary (sect. 252), he can, if necessary, apply by summons in the winding-up for an order that the liquidator do admit his proof for the claim, or do admit it for a specified amount, or for any other directions that may seem expedient.

## Actions* to Enforce Secured or Mortgage Debentures or Debenture Stock.

Actions to enforce secured debentures, &c.

Most of the actions in relation to debentures and debenture stock are brought by holders of mortgage debentures and mortgage debenture stock to compel payment and to enforce the security.

The holder of a debenture creating a floating security is entitled to issue a writ for the protection of his interest before the principal money secured by the debenture has become payable. If when the case comes on for hearing the money has become due, or the security has crystallized, the Court has jurisdiction to make an order for realization of the security, and, so far as necessary, for foreclosure. *Dictum* in *Bonham* v. *Newcomb*, 1 Vern. 232; commented on, *Carshalton Park Estate*; *Turnell* v. *Same*, (1908) 2 Ch. 62.

* The procedure by originating summons is but rarely used for the enforcement of debentures; one reason for this is, that the Court will not determine questions of priority on such a summons. *Re Giles*, 43 Ch. D. 391.

The nature of the relief claimed depends on the character of the security, thus:— Claim in writ where no trust deed.

Where there is no trust deed the writ usually claims a declaration that the debentures are a charge, payment, foreclosure or sale and a receiver and manager. See Form 182.

Where there is a trust deed the writ should claim a declaration as to and the enforcement of the charge, to have the trusts of the deed carried into execution, and the appointment of a receiver and in some cases also a manager. See Form 189. Claim in writ where trust deed.

Where there is a general charge in the debentures and a specific charge in a trust deed, the writ is modified to suit the circumstances and will claim a declaration and payment, and to have the charge enforced and the trusts of the deed carried into execution, and a receiver [and manager] appointed.

Where there is no trust deed securing the debentures, and the charge or security is given by the debentures themselves, debenture holders, or one of them suing on behalf of himself and all the other holders of debentures of the same issue, will be plaintiffs or plaintiff, and the company will be defendant. If there are dissentient debenture holders they will be made defendants with the company. Parties where no trust deed.

Where there is a trust deed the action will generally be by one of the debenture or debenture stock holders, on behalf of himself and all the other holders of debentures or debenture stock of the same class, against the company and the trustees of the deed. So, too, where the security is contained partly in the debentures and partly in the trust deed, the action will be by one of the debenture or debenture stock holders, suing on behalf of himself and all the other holders of debentures or debenture stock of the same class against the company and the trustees. Parties where trust deed.

Occasionally it is found desirable to join several plaintiffs, each suing on behalf of himself and all the other holders of a separate and distinct class, *e.g.*, first debentures and second debentures. Different classes of holders.

Where the plaintiff is the holder of debentures of both classes he can sue on behalf of both. *Borough of Portsmouth, &c. Tramways Co.*, (1892) 2 Ch. 362.

Sometimes the trustees of a trust deed themselves bring the action to enforce the security (*Campbell* v. *Compagnie Générale*, 2 Ch. D. 181; *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841; *Tottenham* v. *Swansea Zinc Co.*, 51 L. T. 61), or one of the trustees is plaintiff and sues on behalf of himself and the other holders, and Action by the trustees.

also as a trustee of the deed. In such case the other trustee must be made a defendant.

**Action by one holder on behalf of class.**

In an action by one debenture or debenture stock holder, on behalf of himself and other members of a class, care should be taken that the plaintiff has personally a good cause of action, otherwise the action may fail—*e.g.*, where the company has a set-off; for a good defence to the plaintiff's claim is a sufficient answer to the other persons on whose behalf he sues (*Burt* v. *British Nation Life Association*, 4 De G. & J. 158, 174; *Huggons* v. *Tweed*, 10 Ch. D. 359; *Wolff* v. *Van Boolen*, 94 L. T. 502); such "other persons" are not to be considered plaintiffs (*Watson* v. *Cave* (No. 1), 17 Ch. D. 19). And see *Re Smith & Co.*, (1901) 1 Ir. Rep. 73.

Even after judgment the plaintiff as *dominus litis*, may discontinue by leave of the Court. *Alpha Co.*, (1903) 1 Ch. 203. But see *Viola* v. *Anglo American Co.*, (1912) 2 Ch. 305.

The plaintiff cannot compromise without the sanction of the Court, and still less can he voluntarily give away any of the rights to which the persons whom he represents are admittedly entitled. See *Calgary and Medicine Hat Land Co., Ltd.*, (1908) 2 Ch. 659.

As to the right of one of several plaintiffs to withdraw, see *Re Kent Coal Concession, Ltd.*, W. N. (1923) 328.

*As to Defendants.*

**Company a proper defendant.**

The company, if at the time when the action is brought it is still in existence and liable, is the proper defendant; but of course when the company has been dissolved (sects. 221, 236 and 245 of the Act) it cannot be sued (see *Coxon* v. *Gorst*, (1891) 2 Ch. 73), unless it is a foreign company which has been ordered to be wound up in this country. *Russian and English Bank* v. *Baring Bros. & Co., Ltd.*, (1936) A. C. 405. But it must be remembered that winding-up, as distinguished from dissolution, does not determine the company's corporate existence. And where the dissolution takes place under sect. 295, the company's name may be restored to the register (sub-sect. 6); *Anglo-American Exploration and Development Co.*, (1898) 1 Ch. 100; and under sect. 294, the Court has now power, where a company has been dissolved at any time within two years, to declare such dissolution to have been void.

**Trustees defendants.**

The trustees of any trust deed should also be defendants unless they are plaintiffs, and if one only sues, the other or others should be joined as defendant or defendants.

**Other defendants.**

Lastly, all other persons interested in the equity of redemption should be made defendants. It must be remembered that as regards

the joinder of subsequent incumbrancers there is no difference between a debenture holder's action and an ordinary mortgagee's action. *Wilcox & Co.*, W. N. (1903) 64. Hence holders of debentures ranking in priority to those held by the plaintiff, or the trustees for such prior debenture holders need not be made defendants; but where there are subsequent incumbrancers, they must be made defendants, even if they are debenture holders of a subsequent issue having only a floating security, and no event has happened to render their principal moneys actually payable. *Wallace* v. *Evershed*, (1899) 1 Ch. 891. Where there is a class of persons interested in the equity of redemption, it may suffice to make some or one of them defendants on behalf of themselves and the class. See Ord. XVI. r. 9, and note to Rule in Annual Practice; *Fairfield, &c. Co.* v. *London, &c. Co.*, W. N. (1895) 64; *Cadogan, &c. Estate, Ltd.*, W. N. (1906) 112; *Re Continental, &c. Co.*, (1897) 1 Ch. 511. See, however, *Grith* v. *Pound*, 45 Ch. D. 553, in which Stirling, J., held that in an action for foreclosure all the debenture holders of the class must be made defendants. Where debentures charging the equity of redemption are secured by trust deed, it will now suffice to make the trustees thereof defendants along with the company.

Ord. XVI. r. 8, in its amended form, provides as follows:—

Trustees, executors, &c. suing or being sued.

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, executors and administrators sued in proceedings to enforce a security by foreclosure or otherwise.*

The words in italics were added in consequence of the decision in *Francis* v. *Harrison*, 43 Ch. D. 183, that where a second mortgagee was a trustee, he did not, for the purposes of a foreclosure action, represent the *cestui que trust*, but that they were also necessary parties to the action.

Assignee of company's equity of redemption must be a defendant.

Where the company which issued the debentures or debenture stock has parted with the equity of redemption, the purchaser or owner thereof should be made one of the defendants. *Mercantile Investment, &c. Co.* v. *River Plate Trust, &c. Co.*, (1892) 2 Ch. 303.

Whether second debenture holders should make any first debenture holders defendants.

Although second mortgage debenture-holders bringing an action to enforce their securities are not bound to make the first debenture holders parties, the plaintiffs can only realise subject to the prior charge, and if the first debentures are due, or the company is being wound up, a first debenture holder can, if desired (subject to what is said above as to Ord. XVI. r. 9) be made a defendant on behalf of the class, with a

view to selling the property free from the first debentures; and see Form 213.

Principal not necessarily due by reason of interest being in arrear.

Where the company has only made default in payment of interest and the principal is not yet payable, it seems that the security cannot (apart from a special agreement making it immediately payable on such default) be enforced as regards the principal (*Edwards* v. *Martin*, 25 L. J. Ch. 284) if the company is still a going concern; but if it is not—*i.e.*, if the company has resolved to wind up or been ordered to be wound up—this accelerates the debenture holders' rights, and the security can be enforced both for principal and interest. *Hodson* v. *The Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Co.*, (1894) 2 Ch. 547; *Re Crompton & Co., Ltd.*, (1914) 1 Ch. 954.

Enforcing security where winding-up before principal due.

In the case of *Wallace* v. *Universal Co.*, the company had issued debentures charging its undertaking by way of floating security, and providing for payment of the principal moneys on a specified day, and for the payment of interest in the meantime half-yearly; but there was no stipulation making the principal money immediately payable in the event of a winding-up. The company made default in payment of a half-year's interest due to the plaintiff on 1st January, 1890, and on 2nd July, 1890, he issued the writ in the action on behalf of himself, &c., to enforce the debentures, and on 19th July, 1890, an order was made for the winding-up of the company. The action came on before Kekewich, J., on motion for judgment in default of defence, and the plaintiff asked for judgment declaring the charge and directing an inquiry what debentures had been issued by the defendant company, and which of them were still outstanding and unpaid and what persons were the holders of the same respectively, and an account of what was due for principal and interest to the plaintiff and the other holders of the said debentures. Kekewich, J., was willing to make an order that the debentures were a charge, but, considering that the principal moneys were not made payable by reason of the winding-up, declined to direct any account of the principal moneys due in this respect, disregarding the decision of Hall, V.-C., in *Hodson* v. *The Tea Co.*, 14 Ch. D. 859. On appeal, it was held that the winding-up gave to the debenture holders the right to enforce their security both for principal moneys and interest. "The undertaking," said Lindley, L. J., "on the security of which the money was borrowed has, in fact, come to an end by the winding-up and this circumstance entitles the debenture holders to realise their security at once." See the report, (1894) 2 Ch. 553, and Form 286, *infra*.

In the case of *Re Crompton & Co., Ltd.* (*supra*), Warrington, J., came to a similar decision where the winding-up was for the purposes of reconstruction and the debentures contained a condition that the principal moneys should become immediately payable in the event of a winding-up otherwise than for the purposes of reconstruction.

Actions after winding-up or supervision order obtained

A holder of debentures or debenture stock desiring to commence an action against the company to enforce his securities must, if the company is being wound up by or under the supervision of the Court, apply for and obtain liberty to commence the action; sect. 177 provides that, "when a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose," and by sect. 260 this provision is made applicable where the winding-up is under supervision. The policy of this section and of the analogous sects. 172 and 174 of the Act is to protect the assets for equitable distribution among those entitled, and to prevent the administration being embarrassed by a general scramble of creditors; but the sections were never intended to interfere with the rights of secured creditors seeking to realise what is no longer the company's property but the creditor's property. Hence a mortgagee or mortgage debenture holder or holder of mortgage debenture stock will be given liberty as of course to enforce his security by bringing an action. *Re David Lloyd & Co.*, 6 Ch. D. 339; *Hamilton's Windsor Iron Works*, 12 Ch. D. 707; *Wanzer, Ltd.*, (1891) 1 Ch. 305.

Action pending at commencement of winding-up

If the action has been already brought, *i.e.*, before the commencement of the winding-up (compulsorily or under supervision), liberty to proceed with the action must in like manner be obtained. See Form 178, *infra*.

In *Re David Lloyd & Co.* (1877), 6 Ch. D. 339, above referred to, the plaintiff, a mortgagee of the company, had commenced an action to enforce his security, and subsequently a supervision order was made. The plaintiff then gave notice of motion, in the winding-up and in the action, for an order that he might be at liberty to proceed with the action notwithstanding the supervision order. Malins, V.-C., refused to make the order, but on appeal liberty to proceed with the action was given.

James, L. J., said: "The mortgagee says, 'There is some property upon which I have a certain specific charge, and I want to realize that charge. I have nothing to do with the distribution of your property among your creditors: this is my property.' Why a mortgagee should be prevented from doing that, I cannot understand. Power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons—persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not, therefore, *quasi* parties to the winding-up proceedings. The Court would have due regard to the rights of

independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up" (pp. 344, 345).

**Debenture issued after winding-up.**

A debenture issued after the commencement of the winding-up is void, unless the Court otherwise orders. Sect. 173. But where a debenture was issued after the presentation of the petition for providing funds to pay wages, the Court made an order validating the debenture. *Park, Ward & Co.*, (1926) 1 Ch. 828.

## Sketch of Proceedings in a Debenture Action.

**Sketch of proceedings in a debenture action.**

The first step in an action to enforce mortgage debentures, whether secured exclusively by a charge in the debentures, or by a trust deed, or by both, is to issue the writ of summons. See Forms 182 and 189.

When issued, the writ is to be served on the defendants. See Ord. IX. rr. 2, 8; Companies Act, 1929, s. 370; and *White* v. *Land and Water Co.*, W. N. (1883) 174; but cases sometimes arise in which it is necessary, before appearance entered, to apply *ex parte* to the Court for liberty to serve notice of motion for a receiver, or receiver and manager, with the writ. See p. 502; and *Jarvis* v. *Hemmings*, 56 Sol. J. 271; and occasionally, but rarely, it is necessary before *service* of the writ to apply for and obtain the appointment of an interim receiver. This can under special circumstances be done on motion *ex parte* upon an undertaking as to damages. *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Re H.'s Estate*, 1 Ch. D. 276.

After the issue of the writ the first step usually is to apply for a receiver, and where there is a going business comprised in the security for a receiver and manager also.

The application is made by motion on notice to the defendants, and should be supported by the requisite affidavit evidence showing the necessity for the appointment. Leave is frequently given, on *ex parte* motion, to serve the notice of motion with the writ, and to give short (*i.e.*, less than two clear days) notice of motion. See Form 170, *infra*, p. 523.

**Receiver.**

The receiver is often appointed by the Court, with liberty to act at once, on an undertaking by the plaintiff to be answerable for his receipts until security is given, and by the order he is directed to give security within a fixed time or forthwith. The amount of such security, the recognizances, and securities are settled in chanbers, and pending the completion of his security the receiver is, if the order is in proper form, entitled forthwith to take possession of the assets over which he is appointed; and in any difficulty arises as to possession

the plaintiff* will make any applications to the Court which may be rendered necessary for orders for delivery, injunctions, or committals.

As to the form of order when the mortgagor is in occupation see *Husey* v. *London Electric Supply Corpn.*, (1902) 1 Ch. 411. If the company is in possession and the plaintiff wishes to issue a writ of possession, the order should direct the company to deliver up possession and should contain the words, "if you . . . neglect to obey this order, &c.," set out in Ord. XLI. r. 5. *Savage* v. *Bentley*, W. N. (1904) 89. But a writ of possession is not usually necessary, since an order to give possession to a receiver may be made on an interlocutory application. *Ind, Coope & Co.* v. *Mee*, W. N. (1895) 8; *Charrington* v. *Camp*, (1902) 1 Ch. 386.

What takes place next depends to some extent on whether the defendants have appeared, and, if they have, on the order made on the return of the summons for directions under Ord. XXX. [See Chap. LI.] If no appearance has been entered, even if plaintiff has stated in his writ that he wants a trial without pleadings, the statement of claim will be prepared and filed against the company.

If the company appears, the master or registrar may direct the usual inquiries and accounts to be made and taken, or may direct a statement of claim to be delivered. See Chap. LI., *infra*.

The directions usually given on the summons for the directions under Ord. XXX. are that pleadings be delivered. If the defendant company will appear at the hearing and consent to the usual accounts and inquiries the action can be set down on motion for judgment without pleadings to be heard as a short cause on minutes. *Re Pringle & Co.* (1903) 89 L. T. 743; *Gutta Percha Corpn.*, W. N. (1899) 251; but otherwise a statement of claim should be delivered. *Re Dupont*, W. N. (1906) 14; *Re Kitson & Co.*, W. N. (1910) 154.

Copies of affidavits in support should be left with the papers for the judge. *Church Stretton Mineral Waters Co.*, 52 W. R. 375.

Defence. A defence is rarely put in, and the action in ordinary course (where inquiries and accounts have not been directed as above) comes on for hearing on motion for judgment against the company in default of defence, or on admissions in the pleadings, or by consent, and is entered as a short cause. See pp. 614 *et seq.*

Judgment. Upon the motion for judgment the Court usually makes an order directing accounts and inquiries as to the amount due on the debentures, as to other incumbrances and as to the property charged, and gives liberty to apply in chambers as to sale. It was for many years usual in such cases to make a declaration that the debentures constitute

* It must be borne in mind that the plaintiff, not the receiver, is the proper person to take any steps in the action. See *infra*, p. 508.

a charge as a preliminary to the accounts and inquiries, but the Court will not now as a rule make such a declaration, since such a declaration might prejudice the rights or priorities of the incumbrancers, and the Court will not make a declaration unless satisfied by the proper evidence that the declaration is correct. See p. 617.

Companies or liquidators should not therefore consent to a judgment declaring a charge on motion, except in cases where it is absolutely clear that an indefeasible charge has been created. *Re Gregory, Love & Co.*, (1916) 1 Ch. p. 209.

Where the action is defended, and has been fought out in the ordinary way, there is no objection to making a declaration, even of a first charge. The minutes of judgment now usually direct inquiries as to other incumbrances and, if other incumbrances are known to exist, as to their priorities. If the defendant company is being wound up, the practice is to require the official receiver or liquidator to appear and consent to the judgment: to admit, that is, that he sees no ground for impeaching the debentures.

**Chambers.** The judgment having been obtained and duly entered, the next step is to take out a summons in chambers to proceed with the accounts and inquiries. *Infra*, Form 312. Upon this summons, and adjournments thereof, directions will be given as to the persons who are to answer the inquiries and accounts, and generally the course to be pursued in working out the accounts and inquiries, and as to the advertisements, if any, to be published for claimants.

The advertisements, if any, for this purpose are settled in chambers, and in due course published. See Chap. LXV., *infra*.

Disputed claims are adjudicated on by the master or registrar, any question being adjourned, at the wish of any of the parties, to the judge, and the master or registrar then makes first the draft of and then his certificate in answer to the accounts and inquiries directed. See Forms 327 and 329.

**Certificate.** As it generally takes some considerable time for the master to make his certificate, a number of subordinate matters require to be dealt with before it is ready, more especially in relation to the getting in, sale, and realization of the assets. Among other matters, application has commonly to be made to the Court for liberty for the receiver to sue debtors; for liberty to borrow money with which to pay off the prior liens of preferential creditors, or with which to carry on the business; for liberty to compromise with debtors; for liberty to sell the property; for liberty to employ auctioneers, valuers, and other experts; for the sanction of provisional contracts; for the payment of interim dividends to the debenture or debenture stock holders; and for a variety of other matters. These, or such of them as may have been found necessary, having been disposed of, the assets

realized, and the master's or registrar's certificate obtained, the action can be brought on for further consideration (Chap. LXXXVII.), and an order will then be made for taxation and payment of costs, and for a distribution by way of dividend amongst the holders of the debentures or debenture stock. Indeed, if all the assets have been realized and the matter is clear, the order, on further consideration, may be for immediate distribution of the fund and for the discharge of the receiver; but it not uncommonly happens that the order on further consideration does not conclude matters, and in such cases the further consideration is again adjourned with a view to realizing still outstanding assets or settling some remaining questions in dispute. The matter is, upon an adjourned further consideration, finally wound up and completed, and the receiver is discharged.

There are, of course, many subsidiary matters which have to be dealt with—incidentally—in the course of the action. For example: besides giving security on his appointment (Chap. LVIII.), the receiver has to bring his accounts into chambers and get them passed. Chap. LXXVI.

Foreclosure.

Foreclosure is a remedy available in the case of mortgage debentures not secured by trust deed where the security proves deficient. *Sadler* v. *Worley*, (1894) 2 Ch. 170; see Form 563, *infra*. But an order for foreclosure cannot be made in the absence of or against the wish of any one debenture holder (*Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 127; *Re Continental Oxygen Co.*, (1897) 1 Ch. 511), nor can it apparently be made in chambers. *Halifax, &c. Co.* v. *Radcliff, Ltd.*, W. N. (1895) 63. In the case of debentures and debenture stock secured by trust deed, the remedy of foreclosure is not generally available. *Schweitzer* v. *Mayhew*, 31 Beav. 37; *Locking* v. *Parker*, 8 Ch. 30, at p. 39; *In re Alison*, 11 Ch. D. 284. The remedy in such a case is sale, not foreclosure.

Discontinuance.

As to the right of a plaintiff debenture holder, as *dominus litis*, to discontinue the action after judgment, see *infra*, p. 532.

## Receivers and Managers.

Object of appointment.

When the Court appoints a receiver of property it, in effect, takes the custody of the property into its own hands—for the receiver is an officer of the Court—and thus assumes the protection and safe-keeping thereof for the benefit of the parties interested in it. The receiver being an officer of the Court, and interference with him, whether by a party to the action or by a stranger, is an a contempt of Court, and punishable accordingly.

A receiver and manager stands in the same position; for, by the appointment, the Court in effect not only takes possession, but

also takes the management of the company's business into its own hands.

**Jurisdiction to appoint.**

The jurisdiction of the Court to appoint a receiver in an action to enforce the securities for debentures or debenture stock is inherited from the Court of Chancery (*Perry* v. *Oriental Hotels Co.* (1870), 5 Ch. 420; *Hopkins* v. *Worcester, &c. Canal*, 6 Eq. 437; *Wildy* v. *Mid-Hants Ry. Co.*, 16 W. R. 409), and is supplemented and extended by sect. 25 (8) of the Judicature Act, 1873 (now replaced by sect. 45 of the Judicature Act, 1925), which provides 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, and the order may be made either conditionally or upon such terms and conditions as the Court may think just. As to the Court's discretion, see *John* v. *John*, (1898) 2 Ch. 573.

**In what cases Court will appoint.**

As a general rule, the cases in which the Court appoints a receiver, or receiver and manager, are cases where the company is in default as regards principal or interest; but these by no means exhaust the jurisdiction, and an appointment may be made—

(a) Where the security is in jeopardy. *McMahon* v. *North Kent Co.*, (1891) 2 Ch. 148; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574 (in which case judgments had been obtained and execution threatened). And see *Victoria Steamboats Co.*, (1897) 1 Ch. 158, and *London Pressed Hinge Co.*, (1905) 1 Ch. 576, in which a receiver and manager was appointed.

(b) Where the company threatens to dispose of its whole undertaking in violation of the rights of the debenture or debenture stock holders. *Hubbuck* v. *Helms*, 56 L. T. 232. The case is different where a company is only selling one of several businesses which it carries on. *Foster* v. *Borax Co.*, (1899) 2 Ch. 130; (1901) 1 Ch. 326.

(c) Where a winding-up of the company takes place or is imminent. *Victoria Steamboats Co.*, (1897) 1 Ch. 158; *Hodson* v. *The Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Co.*, (1894) 2 Ch. 547; *Re Crompton & Co., Ltd.*, (1914) 1 Ch. 954.

(d) At the instance of the company or a director, where disputes between the directors have led to a dereliction of the management of the company's affairs. *Stanfield* v. *Gibbon*, W. N. (1925) 11.

**Jeopardy.**

The more recent cases show that the Court is inclined rather to extend than to limit or restrict the "jeopardy rule," and it is proper that it should, for debenture holders have a right to determine the licence which they give the company to trade with their property

when they see such property imperilled, and the only way in which they can determine the licence and protect themselves is by obtaining a receiver. See *Re Tilt Cove Copper Co.*, (1913) 2 Ch. 588, where the company proposed to distribute among its members a reserve fund which was its only remaining asset; and *Higginson* v. *German Athenæum*, 32 T. L. R. 277, where the company was in a state of suspended animation; and *Re Braunstein & Marjolaine, Ltd.*, W. N. (1914) 335; 58 Sol. J. 755 where part of the business had been closed down and the employees dismissed.

The mere fact, however, that the assets would, if realized, be insufficient to pay the debenture holders in full has been held not to be a ground for the appointment of a receiver. *New York Taxi Cab Co.*, (1913) 1 Ch. 1; and see *Lawrence* v. *W. Somerset Ry.*, (1918) 2 Ch. 250, where the only asset was rent payable under an agreement for a fixed term for a railway which had been abandoned, and the company was paying the balance of rents, after payment of debenture interest, to the shareholders as dividend, and an injunction was refused. The principle of this case was applied to a company to which the Companies Clauses Consolidation Act, 1845, applied. *Cross* v. *Imperial Continental Gas Assocn.*, (1923) 2 Ch. 553.

For a case where the receivership was limited to property specifically charged, see *Grigson* v. *Geo. Taplin & Co.*, 112 L. T. 985.

Property abroad.

Where the company is registered in this country, it is no objection to the appointment of a receiver that the property is abroad. *Cranstown* v. *Johnston*, 3 Ves. 170; *Coote* v. *Jecks*, 13 Eq. 597, and *supra*, p. 58. Such an appointment is no infringement of the jurisdiction of the foreign Court. The order does not *per se* put the receiver in possession, and until what is necessary thereto has been done, in accordance with foreign law, a person (Briton or foreigner), not a party to the suit, is not guilty of contempt in proceeding abroad in the foreign Courts against the property. *Maudslay* v. *Maudslay, Sons and Field*, (1900) 1 Ch. 602. Furthermore, when part of the mortgaged premises is here, the Court here has jurisdiction to appoint a receiver, although the company may be out of the jurisdiction. The Court has, in many cases, appointed receivers, or receivers and managers, of property abroad. See Forms 240, 280, 290; *Re Arauco Co.*, 79 L. T. 336. But the Court will not appoint a receiver of property abroad when it is shown that such appointment cannot usefully be made. *Mercantile Investment Co.* v. *River Plate Co.*, (1892) 2 Ch. 303.

Execution creditors.

The fact that creditors have levied or are threatening to levy execution against the company is a reasonable ground for appointing a receiver and is recognised as such by the Court; see *McMahon* v. *North Kent Co.*, (1891) 2 Ch. 148; *Edwards* v. *Standard Rolling Stock*

*Syndicate*, (1893) 1 Ch. 574; for an execution creditor can stand in no better position than the company, and takes subject to all prior equities affecting the property, so that if the property is mortgaged or charged to debenture holders or others, and they intervene by the appointment of a receiver, the sheriff—at all events, before he has sold and handed over the proceeds—must withdraw; for the incumbrancers have the better equity. *Davey* v. *Williamson*, (1898) 2 Q. B. 194, and *London Pressed Hinge Co.*, (1905) 1 Ch. 576 (cases of floating charge); *Standard Manufacturing Co.*, (1891) 1 Ch. 627; *Opera, Ltd.*, (1891) 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire*, (1895) 2 Ch. 319; *Robson* v. *Smith*, (1895) 2 Ch. 118. And this is the case, although before execution put in there is only an agreement to issue debentures. *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 Q. B. 771. But a creditor who attaches a debt of the company under a garnishee order before intervention by the debenture holders getting a receiver is entitled to keep the debt. *Evans* v. *Rival Granite Quarries*, (1910) 2 K. B. 979. See also *Heaton* v. *Cutting Bros., Ltd.*, (1925) 1 K. B. 655.

**Notice to registrar.**

As to giving notice to the registrar of the appointment of a receiver or manager, see *supra*, p. 480.

**Receiver when manager.**

The appointment of a receiver, as distinguished from a receiver and manager, does not import any power to carry on the business of the company. The duty of a receiver is merely to take possession and protect the property over which he is appointed. *Manchester and Milford Ry. Co.*, 14 Ch. D. 645. But, if there is a going business comprised in the security, the Court has jurisdiction (except as regards statutory undertakings below mentioned) to appoint a receiver and manager, that is, a receiver with power to manage and carry on the business. *Peek* v. *Trinsmaran Co.*, 2 Ch. D. 115. During the last fifty years many hundreds of such orders have been made; and during the sittings of the High Court scarcely a week passes without the exercise of this jurisdiction in several cases. Debenture and debenture stock holders, in this respect, stand in the same position as other mortgagees, and mortgagees, when their security comprises expressly or impliedly a business, are entitled to the appointment of a receiver and manager. *Whitley* v. *Challis*, (1892) 1 Ch. 64; *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629. Where the Court exercises the power to appoint a receiver it almost always appoints the same person to be receiver and manager, but occasionally it will appoint one person to be receiver and another to be manager, or two persons to be receivers and one of them to be manager. *Collins* v. *Barker*, (1893) 1 Ch. 578.

**Right of plaintiff to appointment**

The appointment of a receiver, or of a receiver and manager (when necessary), is not a mere matter of discretion, for the plaintiff

is in a proper case entitled to the appointment *ex debito justitiæ*. Thus, when Bacon, V.-C., refused to appoint, on the ground that the liquidator would sufficiently protect the debenture holders' interests, the Court of Appeal reversed that decision, holding that the debenture holders were entitled to special protection (*Willmott* v. *London Celluloid Co.*, 52 L. T. 642); and where a receiver had been appointed at the instance of debenture holders, and after the appointment of the official receiver to be liquidator of the company, the judge had simply discharged the receiver, the Court of Appeal reversed the order, holding that the debenture holders were entitled to have a receiver. *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268. And see *British Linen Co.* v. *South American and Mexican Co.*, (1894) 1 Ch. 108, *infra*, p. 501. of receiver [and manager].

Default in payment of interest gives a right to a receiver, even though the debenture provides that the principal shall not become payable until such interest is in arrear for a period not yet expired, at any rate if the company cannot say when the interest will be paid, *Bissell* v. *Bradford Tramways Co.*, W. N. (1891) 51. "If he holds valid debentures and his interest is in arrear, he is entitled to a receiver." Per Lindley, L. J., *Strong* v. *Carlyle Press*, *supra*.

In the case of a statutory undertaking, constituted by Act of Parliament, or by provisional order confirmed by Act of Parliament, and not assignable, the Court can appoint a receiver (*Gardner* v. *London, Chatham & Dover Ry. Co.*, 2 Ch. 201), but cannot, even by consent, appoint him manager. *Blaker* v. *Herts & Essex Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Trams*, (1895) 2 Ch. 36; *Pegge* v. *Neath Tramways Co.*, (1895) 2 Ch. 508; *Ticehurst, &c. Co.* (1910), 128 L. T. J. 516. These decisions were grounded on that in *Gardiner* v. *L. C. & D. Ry. Co.*, 2 Ch. 201. Lord Cairns' objection to the appointment of a manager in that case was that it was a statutory undertaking, and that there was no power to sell the undertaking or to delegate the management. His Lordship said: "When the Court appoints a manager of a business or undertaking it in effect assumes the management into its own hands; for the manager is the servant 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 this 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 that nothing is better settled that 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* Receiver where company constituted by statute.

*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." Obviously this reasoning does not apply where the Court has jurisdiction to sell the undertaking. *Crystal Palace Co.*; *Fox* v. *The Company*, 104 L. T. 898; affirmed *sub nom. Saunders* v. *Bevan*, 107 L. T. 70. When the business has ceased to be carried on and the undertaking is sold, the debenture holders have a charge on the proceeds of sale. *Re Glyn Valley Tramway*, (1937) 1 Ch. 465. A receiver and manager of a railway can be appointed on the application of a judgment creditor. Railway Companies Act, 1867, s. 4.

**Who to be appointed.**

In *Lespinasse* v. *Ball*, 2 Jac. & W. 436, it was laid down by the Court that the fittest person should be appointed, without regard to his proposer, for a receiver is appointed for the benefit of all parties (*Davis* v. *Duke of Marlborough*, 2 Swan. 118), but in practice the Court generally appoints the plaintiff's nominee, if he is a fit and proper person. Nevertheless, another person proposed is occasionally preferred, where his qualifications are conspicuously greater than those of the plaintiff's nominee. The plaintiff's solicitor is not a proper person to be appointed. *Re Lloyd*, 12 Ch. D. 447.

Any party to the action may propose a person for appointment. *Att.-Gen.* v. *Day*, 2 Mad. 246.

In an urgent case the plaintiff himself may be appointed (*Taylor* v. *Eckersley*, 2 Ch. D. 302); but in most cases some chartered accountant, or other expert, is appointed. Sometimes, however, the chairman or secretary has been appointed. See *Gardner* v. *L. C. & D. Ry. Co.*, 2 Ch. 201, where the chairman of the board was appointed.

A receiver may be appointed upon an interlocutory application, although there is a question whether it may not be necessary to bring in other parties. *Fripp* v. *Chard Ry. Co.*, 11 Ha. 264.

The Court can appoint one person or several persons, and when several are appointed it can appoint them all to be receivers and managers, or may appoint all, or both, to be receivers, and one to be manager.

Only individuals can be appointed and not a company or corporation. See sect. 306.

**When liquidator appointed receiver**

When the Court is asked to appoint a receiver, and at the time of the application there is an officer of the Court in possession as liquidator, the usual practice has been to appoint the liquidator to be receiver, so as to avoid expense and waste. *Perry* v. *Oriental Hotels Co.*, 5 Ch. 420; *Tottenham* v. *Swansea Zinc Ore Co.*, 32 W. R. 716;

*Strong* v. *Carlyle Press*, (1893) 1 Ch. 268; but there may be objections to this on behalf of the unsecured creditors. *Re Karamelli & Barnett, Ltd.*, (1917) 1 Ch. 203.

The question whether the same person shall be both liquidator and receiver is a matter for the discretion of the judge, and the Court of Appeal will not, except in special circumstances, interfere with that discretion.

"As a general rule, when a company is being wound up and application is made by the plaintiffs in a debenture holder's action for the appointment of a receiver, the Court will appoint the liquidator receiver unless there be some special circumstances rendering it undesirable that he should be appointed, *e.g.*, if he has assumed a position of hostility to the debenture holders; and if the judge of first instance has come to the conclusion that there are such circumstances, the Court of Appeal will not overrule the exercise of his discretion." Per Cotton and Fry, L.JJ., *Giles* v. *Nuthall, In re House Improvement Supply Association*, W. N. (1885) 51.

Uncalled capital.

Where there is much unpaid capital to collect, the Court may be disposed to appoint a liquidator receiver (*Bartlett* v. *Northumberland Avenue Hotel*, 53 L. T. 611), as his is the hand to make a call; but where the unpaid capital is of small amount, the Court will not force the liquidator on the debenture holders (*Re Joshua Stubbs & Co.*, (1891) 1 Ch. 475); and the Court is not disposed to appoint as receiver a liquidator who desires to impeach the validity of the debentures.

Split appointment between official receiver and another person.

Occasionally the appointment is split, as in *British Linen Co.* v. *South American and Mexican Co.*, (1894) 1 Ch. 108. There, application was made to discharge the receiver in the action and appoint the official receiver who was provisional liquidator in the winding-up of the company, and Vaughan Williams, J., made the order; but the Court of Appeal, being satisfied that a considerable part of the assets consisted of securities which were of such a nature that negotiations, bargainings, and compromises would be necessary for the purposes of realization, discharged the order in respect of such assets and confirmed the appointment of the official receiver as to the other assets, consisting principally of 300,000*l.* of uncalled capital.

In the Court below, Vaughan Williams, J., said: "It seems to me, that whenever there is a business to be carried on, whenever 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 these cases, and many other similar cases, the official receiver cannot, in the nature of things, perform these 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 better performed by an accountant than by an officer of the Court, even though assisted by a great department like the Board of Trade."

The Court of Appeal, whilst assenting to the principle thus laid down, differed from the learned judge as to the facts.

**Rule of Court as to appointing official receiver.**

It must be borne in mind that, by sect. 307 of the Act, it is provided, 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 so appointed." It is, however, but rarely that this power is exercised.

**Voluntary liquidation.**

If the winding-up is voluntary, the liquidator, not being an officer of the Court, has no *locus standi* to displace the receiver appointed in a debenture holder's action. *Boyle* v. *Bettws Llantwit Co.*, 2 Ch. D. 726. And the *liquidator* has no title to displace a receiver appointed by the debenture holders or their trustees. In such case, unless the security is impeached, the Court will not attempt to interfere with that security, or to force the liquidator on parties who prefer to employ a stranger; and further, even if the assets are in the hands of a liquidator appointed by the Court, the Court will, on proper application, order him to give up possession to the receiver. *Henry Pound, Son & Hutchins*, 42 Ch. D. 402; *Re Joshua Stubbs*, (1891) 1 Ch. 475. See further, p. 472, *supra*. But the power in the security is a fiduciary one, and if not exercised *bonâ fide* the Court will displace such receiver, and appoint a proper person in his place. *Maskelyne British Typewriter, Ltd.*, (1898) 1 Ch. 133, *supra*, p. 472.

**Receiver appointed under the security.**

**How appointment obtained.**

In most cases the plaintiff in the action applies for the appointment by motion immediately after the commencement of the action. Sometimes liberty to serve short notice of motion with the writ is obtained under Ord. LII. r. 5. In the absence of such liberty there must be at least two clear days between the service of the notice of motion and the day named in the notice for hearing the motion. Ord. LII. r. 5. See p. 515, *infra*.

When, by special leave, the motion is given on shorter notice, the notice of motion should mention this fact. *Dawson* v. *Beeson*, 22 Ch. D. 504. And the fact that leave has been obtained to serve the notice of motion with the writ should also be mentioned in the notice.

As regards the defendant company, if the company has appeared by a solicitor, the notice should be served on him, otherwise the notice should be served in accordance with sect. 370, *infra*, p. 540.

As regards any other defendants, *e.g.*, the trustees, the notice should be served on the solicitors of the defendants appearing by solicitors

or on the party himself if he appears in person, in manner provided by Ord. LXVII. But where the party to be served has not entered an appearance or has omitted to give a proper address for service, the notice of motion may be served by filing it under Ord. LXVII. r. 4. *Dymond* v. *Croft*, 3 Ch. D. 512.

If the defendant does not appear, the order on the motion may be granted on production of an affidavit of service. *Freeman* v. *Cox*, 8 Ch. D. 148. See Forms 193, 194, and *Jarvis* v. *Hemmings*, 56 Sol. J. 271.

*Ex parte* application.

The Court has jurisdiction to appoint a receiver upon an *ex parte* application (Ord. LII. r. 3), and where the security is in peril or the circumstances are very special, the Court will exercise this jurisdiction, but, as a general rule, the Court is reluctant to appoint a receiver on an *ex parte* application: *Connolly Bros., Ltd., Wood* v. *Company*, (1911) 1 Ch. 731 (C. A.); and if it makes such an appointment it usually makes it only until next motion day, with liberty to serve short notice of motion in the meantime.

Evidence.

Evidence on a motion may be by affidavit (Ord. XXXVIII. r. 1), which must (except by leave of the Court) be filed before the motion is moved (R. 19). See Form 230, p. 584, *post*, and Ord. XXXVIII. r. 19 (as to *ex parte* applications).

The evidence must establish a proper case for the appointment, *e.g.*, default by the company in payment of principal or interest, or that the security is in danger.

Answering affidavits.

Where the application is not *ex parte* the defendants may, of course, answer the evidence by affidavits, and the Court may order the motion to stand over in order to give time to answer either unconditionally or upon an undertaking by the defendants.

In many cases an application for a receiver, or receiver and manager, is not opposed, it being felt by all parties concerned that the appointment is necessary or expedient.

Occasionally, where there is a trust deed, the trustees oppose, on the ground that they desire to exercise their powers under the deed, and that no sufficient case has been made out for interfering with them; but such opposition is rarely successful where a fair case for appointment is made.

Limit of time for receiver to act as manager.

Where a receiver and manager is appointed it is the usual practice now to direct that he is not to act as manager for more than say, three months without the leave of the Court. See Forms 232, 233. Chitty, J., first established this practice many years ago, and it has been generally adopted. Where it is desired to extend the time, application is made for an order accordingly (see Form 340), and thus the Court keeps control over and prevents needless delay in realization.

A manager who acts as such after the expiration of the time fixed does so at his own risk, and his expenses and remuneration as manager may be disallowed. *Re Wood Green Laundry*, (1918) 1 Ch. 423.

**Duties of receiver.**

The duties of a receiver must depend on the circumstances of the order and the character of the property. The ordinary duty of the receiver is to take such steps as may be necessary to protect the property and preserve it for the parties interested. In the case of land let to tenants, he should not take possession of the lands, but give notice to the tenants and endeavour to procure them to attorn. In the case of lands and buildings not so let, he should take actual possession. In the case of chattels also, actual possession should be taken.

In the case of choses in action, *e.g.*, book debts, bank deposits and balances, &c., he should give the requisite notices and thus take constructive possession, and collect and get in any that he can. And a manager is bound to manage and carry on the business in a prudent and judicious manner, subject to the terms of the order appointing him. Where any tenant refuses to attorn, application should be made to the Court for an order to attorn (*Reid* v. *Middleton*, 1 T. & R. 455); and where any party to the action refuses to give possession, an application for an injunction, or for an order to commit for contempt, can be made. See Form 259.

All letters, invoices, &c., on which the name of the company appears must show that a receiver has been appointed. See sect. 308 of 1929.

**His bailiffs and agents.**

For the purpose of performing his duties, the receiver may appoint bailiffs and agents. He should also, whenever any special steps appear desirable, inform the plaintiff, or the person who obtained his appointment, in order that he may apply to the Court for directions. See Forms 344 *et seq.*

As a general rule, it is not for the receiver, but for the plaintiff or other party to the action who has the conduct of the proceedings, to apply to the Court for directions. The receiver's duty to account as required by the order is obvious.

**When receiver entitled to possession.**

**His position as regards outside creditors.**

Where the receiver is appointed "upon his giving security," he is not entitled to take possession until he has given security, and until then he is not to be deemed to be in possession as against third parties (*Edwards* v. *Edwards*, 2 Ch. D. 291); but where the order appoints the receiver out and out and orders him to give security, the appointment takes effect at once, and he is entitled to take possession before security given, and as against third parties is to be deemed to be in possession as from the time the order is perfected. See *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588, in which case the appointment was held good as against execution creditors; and *Ex parte Evans*,

11 Ch. D. 691; 13 Ch. D. 252. And see *Savage* v. *Bentley*, W. N. (1904) 89; *Ind, Coope & Co.* v. *Mee*, W. N. (1895) 8, as to directing defendants to give possession.

The usual practice is to order the security to be completed within a definite time (two or three weeks), and it is now the practice to provide by the order that if security is not given within the specified time (generally twenty-one days) the appointment will lapse and will not take effect. *Rowley* v. *Desborough*, W. N. (1916) 152; *Re Sims and Woods, Ltd.*, W. N. (1916) 223. An extension of the time for giving security may, however, in a proper case be obtained from the judge in chambers.

When the plaintiff, in a debenture holder's action, undertakes to be answerable for the receiver's receipts pending his giving security, a direction has been given that the undertaking shall be so framed as to extend to all liabilities which would be covered by the security when complete. Practice Note, W. N. (1900) 58.

The appointment, when it becomes effective, imposes on the parties to the action the duty of giving up possession to the receiver although a person claiming by paramount title is not so bound. *Evelyn* v. *Lewis*, 3 Hare, 472.

In *Re Roundwood Colliery Co.*, (1897) 1 Ch. 373 (C. A.), it was held that a landlord who had distrained after the making of a receivership order, but before it was drawn up, should not be disturbed.

And in *Aurauco Co.*, 79 L. T. 336, bankers were held entitled to a charge on remittances from abroad after the appointment of a receiver.

**Interference with receiver.**

A receiver appointed by the Court is its officer, and any interference with his possession, even by a person claiming under title paramount, is a contempt of Court. *Ames* v. *Birkenhead Docks*, 20 Beav. 332; *Russell* v. *East Anglian Ry. Co.*, 3 Mac. & G. 104; *Hawkins* v. *Gathercole*, 1 Drew, 12; *Tink* v. *Rundle*, 10 Beav. 318; *Helmore* v. *Smith* (2), 35 Ch. D. 449; *Ex parte Cochrane*, 20 Eq. 282; *Searle* v. *Choat*, 25 Ch. D. 723. Those who claim, by paramount title or otherwise, a right to interfere should apply to the Court for liberty. *Richards* v. *Mayor of Kidderminster*, (1896) 2 Ch. 212; *Marriage, Neave & Co.*, (1896) 2 Ch. 663; *Henry Pound, Son & Hutchins*, 42 Ch. D. 402; *Re Slade*, 18 Ch. D. 653; Seton, 7th ed. pp. 743—745. And see p. 472, *supra*. The receiver should not be made a party to such an application. *General Share, &c. Co.* v. *Wetley Brick, &c. Co.*, 20 Ch. D. 260. The publication of a criticism of an application to the Court for the appointment of a receiver may be a contempt of Court if it is unfair and misleading and made without proper investigation of the facts. *Re William Thomas Shipping Co., Ltd.*, (1930) 2 Ch. 368.

**Independent proceedings.**

If the writ in the debenture action claims payment, independent actions by debenture holders against the company after the appointment of a receiver will usually be stayed (see *Hope* v. *Croydon and Norwood Tramways Co.*, 34 Ch. D. 730); but not where the writ does not claim payment. See *Cleary* v. *Brazil Ry.*, W. N. (1915) 178.

**Writ of possession.**

A receiver, if necessary, may be put in possession by writ of possession (R. S. C. Ord. XLVII. r. 1); see pp. 492, 493, *supra*); and in some cases a writ of assistance can be obtained. *Wyman* v. *Knight*, 39 Ch. D. 165; *Re Taylor*, W. N. (1913) 212.

**Appointment crystallizes a floating charge.**

As appears above, the appointment of a receiver of assets comprised in a floating charge crystallizes the charge and in effect renders it specific. *Supra*, pp. 65, 73.

**Receiver appointed by Court is nobody's agent, but officer of Court.**

A receiver appointed by the Court is not an agent of anybody, but, although an officer of the Court, is a principal. *Gardner* v. *L. C. & D. Ry. Co.*, 2 Ch. 201; *Bacup Corpn.* v. *Smith*, 44 Ch. D. 395; *De Grelle Co.* v. *Bull*, 10 T. L. R. 198; *Burt, &c.* v. *Bull*, (1895) 1 Q. B. 276; *Glasdir Copper Mines, Ltd.*, (1906) 1 Ch. 365.

**Personal liability of receivers.**

**Right to indemnity.**

When a receiver and manager is appointed by the Court he "accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate." Per Rigby, L. J., *D. Owen & Co.* v. *Cronk*, (1895) 1 Q. B. 265; *Burt* v. *Bull*, (1895) 1 Q. B. 276; *Rylands Glass Co.* (1904), 49 Sol J. 67; *Glasdir Copper Mines, Ltd., supra*; *British Power, &c. Co.*, (1907) 1 Ch. 528. Compare this with *Gosling* v. *Gaskell*, (1897) A. C. 575, where a receiver and manager was appointed by the trustees of a debenture trust deed; and as to indemnity, see *Strapp* v. *Bull & Co.*, (1895) 2 Ch. 1. Entering into contracts "as receiver and manager" will not absolve him from personal liability. *Burt, &c.* v. *Bull, supra*. And see *Levy* v. *Davis*, W. N. (1900) 174 (application for indemnity after passing final, account).

Where the liability of the receiver is expressly negatived by agreement, the creditor may be in a difficult position. He has been held not to be entitled to claim payment out of the assets by a summons in the debenture action. *Re Hawkins (Ernest) & Co., Ltd.*, 31 T. L. R. 247.

**Rent.**

A receiver is not liable to the landlord for rent in respect of the company's leasehold property. *Hay* v. *Swedish, &c. Ry. Co.*, 8 T. L. R. 775 (hire of wagons). Payment of rent by him on the company's behalf does not make him tenant by estoppel. *Justice* v. *James*, 15 T. L. R. 181; *Re J. W. Abbott & Co.*, W. N. (1913) 284; 30 T. L. R. 13; and the landlord is not entitled to be paid rent, out of the proceeds of goods on lands in the hands of a receiver, which the debenture trustees hold by mortgage by sub-demise. *Hand* v.

*Blow*, (1901) 2 Ch. 721. If the rent is not paid, the lessor can as a rule obtain judgment for possession (see *Re Westminster Motor Garage Co.*, 84 L. J. Ch. 753); but the receiver can sometimes arrange with the landlord to pay the current rent so as to retain possession. In such a case he has been held to be entitled to deduct income tax in respect of arrears of rent. *Re Hayman, Christy & Lilly, Ltd.*, (1917) 1 Ch. 545.

A specific charge in a trust deed applies to arrears of rent when the trustees take possession. *Re Ind, Coope & Co., Ltd.*, (1911) 2 Ch. 223.

Rates.

Where a receiver, pursuant to an order of the Court, actually takes possession of mortgaged hereditaments, he may become liable for rates in respect thereof. *Re Marriage, Neave & Co.*, (1896) 2 Ch. 663; just as a receiver appointed by trustees for debenture holders may be held liable. *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212.

Position as to contracts.

A receiver, who partly performs a continuing contract of the company to supply goods and then declines to proceed, cannot sue for purchase money except subject to purchaser's right to set off claim for damages for breach of the contract. *Forster* v. *Nixon's Navigation Co.*, 23 T. L. R. 138; *Parsons* v. *Sovereign Bank of Canada*, (1913) A. C. 160 (where the position of a receiver as to contracts entered into by the company is explained).

A receiver and manager cannot, while retaining the goodwill of the company's business, disregard "forward" contracts of the company if they have become unprofitable. *Newdigate Colliery Co.*, (1912) 1 Ch. 468; but a mere receiver is not concerned with such contracts.

At the same time the Court will not sanction borrowing by a receiver and manager to complete a contract where no direct profit can result from completion. *Thames Ironworks Co.*, 28 T. L. R. 273. And where the breach of a contract would not prejudice the goodwill, the receiver and manager was authorized to disregard it. *Re Great Cobar, Ltd.*, (1915) 1 Ch. 682.

If the receiver does not apply within a reasonable time for the sanction of the Court to a conditional contract, the other party to the contract may rescind. *Sandwell Park Colliery Co.*, (1929) 1 Ch. 277.

As to receiver's liability in respect of gas and electric light, see p. 473, *supra*.

Workmen's Compensation Act, 1925.

Where a receiver appointed by the Court is an employer within the Workmen's Compensation Act, 1925 (15 & 16 Geo. V. c. 84), he may, if he carries on business, be liable to compensate workmen as provided by the Act. Insurance against the liability should at once

be effected, and the premiums will be allowed in his accounts. As to the priority of claims for compensation in a winding-up, see sect. 264 of the Companies Act, 1929, and as to the liability of a receiver to pay similar claims out of assets in priority to other creditors, see sect. 78 of the last mentioned Act.

**Appointment operates as discharge of company's servants.**

The appointment of a receiver and manager of the undertaking operates as a discharge of the company's servants. *Reid* v. *Explosives Co.*, 19 Q. B. D. 264; *Midland Counties Bank* v. *Attwood*, (1905) 1 Ch. 362.

**Application by receiver for directions of Court.**

Questions constantly arise in a receivership upon which it is necessary or expedient to obtain the directions of the Court, *e.g.*, as to sale of property; as to borrowing; as to legal proceedings; as to appointing attorneys and agents; as to giving up possession, &c., &c. See Forms 344 to 551, *infra*, by way of example. As a general rule the receiver is not the proper person to apply to the Court for such directions. It is for the plaintiff or other the party who has the conduct of the proceedings in the action to apply, and the receiver should accordingly communicate with the plaintiff or other party aforesaid and get him to apply. *Parker* v. *Dunn*, 8 Beav. 497; *Windschuegl* v. *Irish Polishes, Ltd.*, (1914) 1 I. R. 33. If he makes default the receiver may be justified in making application.

**Originating summons.**

A receiver or receiver and manager may be appointed in proceedings commenced by originating summons. *Re Francke*, 57 L. J. Ch. 437; *Gee* v. *Bell*, 35 Ch. D. 160; Annual Practice, notes to Ord. LV. r. 5a.

**Action against receiver for interference with rights of third parties.**

Where the receiver exceeds his powers or improperly interferes with the rights of third parties, the proper course is for them to apply in the action for the requisite direction to the receiver and not to bring a separate action against him. *Searle* v. *Choat*, 25 Ch. D. 723. In that case a receiver had been appointed to receive the rents of land without prejudice to the rights of any prior incumbrancer. He gave notice to the tenants to pay their rents to him although he was aware that the plaintiff was a prior incumbrancer. It was held that this was interference with such incumbrance, but that the plaintiff should have applied in the pending action and not brought a fresh one. The Court has jurisdiction to issue an injunction restraining anyone from commencing an action against a receiver with regard to his conduct as such. *Maidstone Palace of Varieties*, (1909) 2 Ch. 283.

A person who has advanced money to the receiver cannot apply by summons to be repaid out of the assets. *Re Hawkins (Ernest) & Co., Ltd.*, 31 T. L. R. 247.

As to a receiver's remuneration, see p. 780 *et seq.*, *infra*.

## Winding-up.

### *As to a Winding-up Petition.*

When a debenture holder, &c. may petition for winding-up.

A secured debenture or debenture stockholder to whom the company is indebted in a sum presently due can demand payment of his debt, and if default be made, can present a petition and obtain an order—subject to what is said below—for the winding-up of the company, and this remedy he is entitled to pursue whether he be the registered holder of a debenture or the holder of a debenture to bearer. *Olathe Silver Co.*, 27 Ch. D. 278; *Uruguay Central Ry. Co.* (1879), 11 Ch. D. 372. And the mere fact that *quâ* debenture holder he has obtained a receiver does not preclude him from applying, in his capacity of an ordinary creditor, for a winding-up order (*Borough of Portsmouth Tramways*, (1892) 2 Ch. 362, *infra*, p. 510), or in any way prejudice his security (*Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681). On such a petition he is entitled, as against the company, to a winding-up order *ex debito justitiæ*, but he is not so entitled as between himself and other creditors, at any rate if of the same class. *Western of Canada Co.*, 17 Eq. 1; *St. Thomas' Dock Co.*, 2 Ch. D. 116; *West Hartlepool Ironworks Co.*, 10 Ch. 618; *Chapel House Colliery Co.*, 24 Ch. D. 259; *Crigglestone Coal Co.*, (1906) 2 Ch. 327, 333; and see *Bishop & Sons*, (1900) 2 Ch. 254.

Not against the wishes of the majority of the creditors.

In *Western of Canada, &c. Co.*, 17 Eq. 1, the company had issued 200,000*l.* of debentures carrying interest at 12 per cent. The interest having fallen into arrear, an action was brought by a debenture holder for realization, and a receiver was appointed. Afterwards one of the debenture holders served the company with a demand under sect. 80 of the Companies Act, 1862, for payment of the interest due to him, and default having been made by the company, he presented a petition for winding it up. The debts of the company, other than the indebtedness on the debentures, amounted to only a very small sum, but a large majority of the debenture holders were opposed to a winding-up order and desired that the petition should stand over. The petition was therefore ordered to stand over until the ensuing Michaelmas Term (about three months). Subsequently in November, the petition came on again before Jessel, M. R., and no further evidence having been filed and nothing having been done in the way of payment, a winding-up order was made.

The argument in favour of the wishes of the majority of the creditors prevailing in such a case against a petitioner of their own class, is stronger where the creditors are secured debenture holders, because the assets really belong to them and they have a right to say how they shall be dealt with.

But see *Crigglestone Coal Co.*, *infra*, p. 511.

In *Chapel House Colliery Co.*, 24 Ch. D. 259, the company had issued debentures for 40 000*l.*; the interest thereon had fallen into arrear but the principal had not become payable. A petition for winding-up was presented by a debenture holder for 100*l.* and a large majority of the debenture holders opposing it, the petition was ordered to stand over, and, on appeal, was dismissed.

In *Borough of Portsmouth, &c. Tramways Co.*, (1892) 2 Ch. 362, the company had issued debentures charging its undertaking. The interest had fallen into arrear. The petitioner had brought an action, on behalf of himself and all the holders of the first and second debentures, against the company to enforce his security, and had obtained the appointment of a receiver and judgment for the payment of the particular sums. Not satisfied with this relief, he presented a petition for the winding-up of the company. The company did not oppose, but the second debenture holders did, and the substance of their contention was that the petitioner's remedy was a receiver and nothing more. Stirling, J., however, declined to adopt this view, and made a winding-up order.

In the course of his judgment the learned judge said: "No doubt a person who comes to enforce a security cannot get anything more than his security gives him, and I take it to be decided that a debenture in the form of those now in question gives the holder no greater security, than the undertaking, as defined in *Gardner* v. *London, Chatham & Dover Ry. Co.* (L. R. 2 Ch. 201). . . . In the present case the petitioner does not come to enforce the security, but as a judgment creditor of the company. It is admitted that an ordinary creditor of the company might present a petition to wind up the company and obtain an order upon it. I fail to see why a debenture 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. It seems to me that 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 judgment for his debt but cannot obtain payment."

**Security not affected by the holder applying for winding-up order.**

The holder of a mortgage debenture can apply for and obtain a winding-up order without giving up or affecting his security. *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

**Overwhelming debenture charge no protection against a**

Although, as appears above, the Court has in several cases shown reluctance to make a winding-up order at the instance of a secured debenture holder where other creditors of the same class opposed, the position is somewhat different when the petitioner is an unsecured creditor and the secured debenture holders oppose on the ground

that there will be no surplus for the unsecured creditors. Thus the Court has in the past often refused an order on this ground, but Vaughan Williams, J., struck a new note in *Krasnapolsky Restaurant, &c., Co.*, (1892) 2 Ch. 174, 178, laying it down that where such an objection is taken those who take it "must show that the petitioner will obtain no advantage from it if the order is made" and that it is not enough "to show that no money payment will result from making an order," and in some subsequent cases this view has been adopted by other judges. See *Chic, Ltd.*, (1905) 2 Ch. 345, and *Alfred Melsom & Co.*, (1906) 1 Ch. 841, in which winding-up orders were made where, although the assets were covered by debentures, the companies' businesses were being carried on solely for the benefit of the debenture holders. winding-up order.

This view was confirmed in *Crigglestone Coal Co.*, (1906) 2 Ch. 327, in which case the Court of Appeal made a winding-up order at the instance of an unsecured creditor, although the assets were all covered by debentures and there was little prospect of any surplus for the unsecured creditors: the Court considered that in such circumstances a winding-up order might properly be made, *e.g.*, on the ground that investigation was desirable, and that the official receiver would have the defence of the debenture action; and that the Court ought not to be astute to find that there would be no surplus.

These decisions were given the force of statute law by sect. 29 of the Act of 1907, now replaced by sect. 171 (1) of the Act of 1929, which concludes as follows :—

171.—(1) . . . 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. Winding-up where no assets or no surplus assets.

For a case in which an order was made since the Act of 1907, though it was opposed by the debenture holders and a large number of unsecured creditors, see *Re Clandown Colliery Co.*, (1915) 1 Ch. 369.

The Court, however, still has a discretion, and may still refuse to make an order, *e.g.*, where it is affirmatively shown that the debentures were validly issued, that there will be no surplus, that no case for investigation is shown, and that a winding-up order would *in effect imperil or grievously damage or destroy the security of* the debenture holders. After all they are creditors of the company —and it is not the duty of the Court to ignore their interests where the unsecured creditors have only a nominal interest.

Not only is a debenture holder whose debenture is overdue as to principal or interest entitled to petition for a winding-up, but he can before his debenture matures, present a petition on the ground that the company is unable to pay its debts. This power was first Prospective and contingent creditors.

conferred by sect. 28 of the Act of 1907, which provided that any contingent or prospective creditor should be entitled to present a petition for winding-up the company.

This enactment, which is now embodied in sect. 170 (1) of the Act of 1929, remedied a great injustice. It made it impossible for a company whose assets are wholly insufficient to meet its debentures to keep the debenture holders at arms' length until maturity simply by paying their interest, whilst the assets are being wasted on a decaying business or the remuneration of incompetent directors and officials or in vain speculation. See *British Equitable Bond, &c Co.*, (1910) 1 Ch. 574.

*As to Proceeding in a Winding-up.*

**Proceedings in winding-up.**

But though a secured debenture holder may, he is in no way bound to come in and enforce his rights in a winding-up. *Re David Lloyd & Co.*, 6 Ch. D. 339; *Gaudet Frères*, 12 Ch. D. 882; *Dry Docks Corpn.*, 39 Ch. D. 315; *Joshua Stubbs, Ltd.*, (1891) 1 Ch. 475; *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268. He may rest on his security and take steps to put in force the powers and remedies which the security confers on him, but he may, if he choose, come in and claim in the winding-up.

**Present procedure.**

Formerly it was not uncommon for debenture holders in a winding-up to take out a summons for a declaration of their charge and for realization of their security (see *General South American Co.*, 2 Ch. D. 337; *Colonial Trust Corpn.*, 15 Ch. D. 465); but this process is now rarely adopted, and a debenture holder usually proceeds to enforce his rights by an action. But if he comes in as a secured creditor in the winding-up he must remember that he comes in —where the company is *insolvent*—on the same terms as if he were proving as a secured creditor in the bankruptcy of an individual.

**Rules of bankruptcy administration.**

**Solvent and insolvent companies—valuation of securities on proving.**

In the case of a *solvent* company a debenture or debenture stock holder can prove for principal and interest, and is not bound to value his security before thus proving (*Kellock's case*, 3 Ch. 769); but in the case of an insolvent company (and a company in winding-up is *primâ facie* insolvent (*Milan Tramways Co.*, 25 Ch. D. 587)), the rules of bankruptcy administration apply (see sect. 262), and the holders of secured debentures must make their election among the following courses:—1. They may rely on their securities and not prove. 2. They may give up their securities and prove for the whole debt. 3. They may value their securities and prove for the balance. 4. They may realise their securities and then prove for the balance, if any. Inasmuch, however, as debentures and debenture stock usually cover all the property and assets of the company, including its uncalled capital, there is nothing to be gained in the majority of cases by

**Four courses where secured debentures.**

proving. On the contrary, a good deal of risk may attend the doing so, for the debenture holder may be treated as having elected to abandon his security.

As to proving in bankruptcy on a guarantee of debenture interest after the company has been dissolved, see *Re FitzGeorge, Ex parte Robson*, (1905) 1 K. B. 462.

*Costs.*

Costs.

Debenture holders and debenture stock holders are entitled, like any other mortgagees, to take their principal, interest and costs out of their securities (*Cotterell* v. *Stratton*, L. R. 8 Ch. 302; *In re Talbott*, 39 Ch. D. 567); and it makes no difference for this purpose whether the company mortgagor is solvent or insolvent. Even if the liquidator realises the securities on their behalf, he can claim only the costs of realisation in priority to the charge (*Marine Mansions Co.*, 4 Eq. 601; *Regent's Canal Ironworks*, 3 Ch. D. 411). See also *Johnstone* v. *Cox* (1881), 19 Ch. D. 17.

Costs of realisation do not include costs of preservation (*Lathom* v. *Greenwich Ferry Co.*, 72 L. T. 790); nor the costs of any step or proceeding in the action (*Callender* v. *Paper Manufacturing Co.*, unreported, see Ann. Pr. 1938, p. 2651); costs of realisation have priority over debts incurred by the receiver in carrying on the business (*London United Breweries, Ltd.*, (1907) 2 Ch. 511).

Costs of representative plaintiff.

When a debenture holder commences an action, on behalf of himself and all other debenture holders, to realize the security, though he is *dominus litis* and can, if no other debenture holder has intervened, discontinue the action (*Re Alpha Co.*, (1903) 1 Ch. 203), yet he is in some respects in a position analogous to that of a creditor bringing an action for administration on behalf of creditors generally; and so far as the action benefits not merely the plaintiff but the other persons interested in the property charged by the debentures, the plaintiff will be allowed the costs of the action in priority out of the property or its proceeds. *Wright* v. *Kirby*, 23 Beav. 463; *Ford* v. *Earl of Chesterfield*, 21 Beav. 426. And even where the plaintiff's individual right is defective or non-existent his right to costs as a salvor is allowed. See *infra*. If necessary, the taxing master may be directed to distinguish what costs have been so incurred, *i.e.*, for the benefit of all the interested parties (*Batten* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612); and these, and these only, will then be allowed priority. The other costs the plaintiff must add to his security in the ordinary way. The working out of this rule is curiously illustrated in *Carrick* v. *Wigan Tramways Co.*, W. N. (1893), 98.

Where persons other than those on whose behalf the plaintiff sues are interested in the fund, the plaintiff is, as a rule, only entitled

to party and party costs. *Queen's Hotel Co., Cardiff*, (1900) 1 Ch. 792. But when the property proves insufficient for the payment in full of the debentures or of the class of debentures represented by the plaintiff, he is entitled to costs as between solicitor and client. *New Zealand Midland Ry. Co.*, (1901) 2 Ch. 357; *Clayton Engineering, &c. Co.*, W. N. (1904) 28; and see *Bristol Collieries Co.*, 54 S. J. 376; *Re W. C. Horne & Sons, Ltd.*, (1906) 1 Ch. 271. When the trustees of the trust deed are defendants, and they and the company appear by the same solicitor, although the company is not entitled to costs, all the costs of the defendants, except any separate costs of the company, ought to be paid out of the assets before distribution amongst the debenture holders, upon the ground that, subject to that exception, those costs must be treated as incurred by the trustees; and for this purpose the order directing taxation should contain a direction that in taxing the costs of the trustees the taxing master should allow them a full set of costs except as regards any separate costs of the company, notwithstanding that the trustees and the company have appeared by the same solicitor. *Mortgage Insurance Co* v. *Canadian, &c. Co.*, (1901) 2 Ch. 377. As to the order of priority of other costs, see *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; *Clayton Engineering, &c. Co.*, W. N. (1904) 28; 90 L. T. 283.

The company and subsequent incumbrancers who are made defendants are not entitled to costs unless there is a surplus or the action fails. *Clayton, &c. Co., supra.*

Proof in winding-up.

Where a debenture is not payable when a winding-up commences, the holder can nevertheless prove for the full amount of the principal where, by the terms of the instrument, such principal carries interest at 5 per cent. per annum. *Re Browne and Wingrove, Ex parte Ador*, (1891) 2 Q. B. 574. Where the rate of interest is more or less than 5 per cent. it may be necessary to set off the rebate required by Rule 22 of the Second Schedule to the Bankruptcy Act, 1914, against the proof for interest. *Ibid.*

A debenture holder or debenture stock holder may prove for the whole nominal amount—the face value—though the debenture or stock was issued at a discount, see *Robinson* v. *Montgomeryshire Brewery Co.*, (1896) 2 Ch. 481; *Regent's Canal Ironworks Co.*, 3 Ch. D. 411.

Interest.

In proving for the balance, the debenture holder must, if the company is insolvent, apply the proceeds of his security in reduction of the amount due for capital and interest accrued up to winding-up. *Quartermaine's case*, (1892) 1 Ch. 639. See further as to interest, Part II., 15th ed., p. 437 *et seq.*

# CHAPTER XLVI.

## COMMON FORMS IN ACTION.

### Notice of Motion.

A debenture holder's action is usually commenced by writ and an application is frequently made in the action by motion for the appointment of a receiver or a receiver and manager, and sometimes for an injunction.

Applications by motion are governed by R. S. C. Ord. LII., which contains the following rules:—

Application by motion.

**R. 1.**—Where by these rules any application is authorized to be made to the Court or a judge, such application, if made to a Divisional Court or to *a judge in Court*, shall be made by motion.

Restriction on rules *nisi* and orders to show cause.

**R. 2.**—No motion or application for a rule *nisi* or order to show cause shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) against a sheriff to pay money levied under an execution.

Where notice of motion to be given.

**R. 3.**—Except where according to the practice existing immediately before the 1st November, 1875, any order or rule might be made absolute *ex parte* in the first instance, and except where notwithstanding Rule 2 a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside.

*Ex parte* application.

Length of notice of motion.

**R. 5.**—Unless the Court or a judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

As to computation of time, see Ann. Pr. notes to Ord. LXIV. r. 1, and as to "short notice," see Ann Pr., notes to Ord. LII. r. 5.

A notice is not bad because it is for a day falling in vacation if the notice says "or as soon after as counsel can be heard." *Re Coulton*, 34 Ch. D. 22. Where leave to serve short notice has been obtained, the notice of motion should so state. See *Dawson* v. *Beeson* (1883), 22 Ch. D. 504.

Motions may be dismissed or adjourned where necessary notice not given.

**R. 6.**—If on the hearing of a motion or other application the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice

may be given, upon such terms, if any, as the Court or judge may think fit to impose.

Adjournment of hearing.

**R. 7.**—The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

Service of notice on defendant served with writ but not appearing.

**R. 8.**—The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear, has not appeared within the time limited for that purpose.

Service of notice of motion with writ.

**R. 9.**—The plaintiff may, by leave of the Court or a judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant.

The notice must state that the leave has been obtained. See Form 170, *infra*.

*Summons.*

Applications by the receiver appointed in the debenture action for the directions of the Court or for leave to borrow are usually made in chambers. Sometimes also the question who is to be appointed receiver is referred to chambers.

Applications in chambers are made by summons and the following provisions of R. S. C. Ord. LIV. apply:—

Applications by summons.

**Ord. LIV. r. 1.**—Every application at chambers not made *ex parte* shall be made by summons.

But see Ord. XXX. (Chap. LI.) as to summonses for directions.

*Ex parte* applications by summons.

**R. 2.**—Every application for payment or transfer out of Court made *ex parte* and every other application made *ex parte* in which the judge or proper officer shall think fit so to require, shall be made by summons.

Altering.

**R. 3.**—Summonses shall not be altered after they are sealed, except upon application at chambers.

Service.

**R. 4E.**—Every summons, not being an originating summons to which an appearance is required to be entered, shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered. Provided that in case of summonses for time only, the summons may be served on the day previous to the return thereof.

Proceeding *ex parte* where any party fails to attend.

**R. 5.**—Where any of the parties to a summons fail to attend, whether upon the return of the summons, or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do; no affidavit of non-attendance shall be required or allowed, but the judge may require such evidence of service as he may think just.

Reconsideration of *ex parte* proceeding. Costs.

**R. 6.**—Where the judge has proceeded *ex parte*, such proceeding shall not in any manner be considered in the judge's chambers, unless the judge shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence; and in such case the costs occasioned by his non-attendance shall be in the discretion of the judge who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to

have such proceeding reconsidered, or make such other order as to such costs as he may think just.

Costs thrown away by non-attendance of any party.

**R. 7.**—Where a proceeding in chambers fails by reason of the non-attendance of any party, and the judge does not think it expedient to proceed *ex parte*, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the absent party or by his solicitor personally.

Further attendance where summons not fully disposed of.

**R. 8.**—Where matters in respect of which summonses have been issued are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed, for the consideration or further consideration of the matter.

What matters to be included in the same summons

Adjournment into Court, or into chambers.

**R. 9.**—In every cause or matter where any party thereto makes any application at chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the Court or judge; and upon the hearing of such application it shall be lawful for the Court or judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; any such application may, if the judge thinks fit, be adjourned from chambers into Court, or from Court into chambers.

By the Practice Masters' Rule, 26th November, 1895 (see Annual Practice, 1938, Part IX., P. M. R. 3, p. 2732 *et seq.*), where a company is in process of being compulsorily wound up in the High Court, a debenture holder's action against it is to be assigned to the judge having jurisdiction in the matter of the winding-up. There are now three such judges who exercise the jurisdiction by turns.

This provision applies to the commencement of debenture actions *after* a winding-up order has been made. Where the action was commenced before the making of the winding-up order, the following rule applies:—

Transfer of actions.

**Companies (Winding-up) Rules, 1929, r. 42.**—(1) Where an order has been made for the winding-up of a company, then, if such order was made by the High Court or if the proceedings have been transferred to the High Court, the judge shall have power, without further consent, to order the transfer to him of any action, cause or matter pending in any other Court or Division brought or continued by or against the company, and any action or proceeding by a mortgagee or debenture holder of the company against the company, for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the company's assets or property, which is pending in the High Court or before any judge thereof shall without further order be transferred to the judge of the High Court. In the case of application in chambers in actions so transferred where the practice in winding-up is different from the practice in the Chancery Division, the practice in winding-up shall prevail.

(2) Where any action brought by or against a company against which a winding-up order has been made is transferred to the judge of the High Court, the registrar may, under the general or special directions of the judge, hear, determine, and deal with any application, matter, or proceeding which if the action had not been transferred would have been determined in chambers. These provisions shall apply to the proceedings in any action in which by the

Rules of the Supreme Court or otherwise the chamber proceedings are directed to be dealt with by the registrar.

The last sentence evidently refers to the following rule:—

**R. S. C. 1883, Ord. XLIX. r. 5a.**—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 assigned shall be dealt with by the Registrar in Companies Winding-up.

And that rule embraces the following:—

**R. S. C. 1883, Ord. LV. r. 2.**—The business to be disposed of in chambers by judges of the Chancery Division shall consist of (*inter alia*) the following matters:—

(16) 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.

**R. 4 (3) of the Companies (Winding-up) Rules, 1929.**—In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act or by transfer or otherwise, the registrar shall, in addition to his powers and duties under the rules, have all the powers and duties of a master, registrar, or taxing master.

In debenture actions before a winding-up judge the rules of 1929 apply to some extent. Rule 8 clearly applies, and probably some at least of the other rules of 1929 set out below.

**Companies (Winding-up) Rules, 1929, r. 8.**—(1) Every application in Court other than a petition shall be made by motion, notice of which shall be served on every person against whom an order is sought not less than two clear days before the day named in the notice for hearing the motion, which day must be one of the days appointed for the sittings of the Court.

(2) Every application in chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.

*Proceedings.*

Title in High Court.

**R. 11 (1) of the Companies (Winding-up) Rules, 1929.**—Every proceeding in a winding-up matter shall be dated, and shall with any necessary additions, be intituled in the matter of the company to which it relates and in the matter of the Companies Act, 1929, and otherwise as in Forms 2 and 3. Numbers and dates may be denoted by figures.

Form 2 is as follows:—

*General Title (High Court).*

In the High Court of Justice.
Chancery Division.
Companies Court. No. —— of 19—.
Mr. Justice ——.
In the matter of (*insert here full name of company*) Limited.
and
In the matter of the Companies Act, 1929.

**R. 11.**—(2) The first proceeding in every winding-up matter shall have a distinctive number assigned to it in the office of the registrar, and all proceedings in any matter subsequent to the first proceeding shall bear the same number as the first proceeding.

**R. 12.**—All proceedings shall be written or printed or partly written or partly printed on paper of the size of thirteen inches in length and eight inches in breadth, or thereabouts, and must have a stitching margin; but no objection shall be allowed to any proof or affidavit on account only of its being written or printed on paper of other size. Written or printed proceedings.

By an earlier Practice Direction (15th February, 1892), it is provided that "all summonses, affidavits, and other documents to be filed in this office (*i.e.*, the office of the Registrar, Companies Liquidation, 66, Bankruptcy Buildings, Carey Street, W.C.), must have a stitching margin of at least one inch, and no document will be accepted for filing without such stitching margin, unless by leave of the registrar."

**R. 13.**—All orders, summonses, petitions, warrants, process of any kind (including notices when issued by the Court), and office copies in any winding-up matter shall be sealed. Process to be sealed.

**R. 14.**—Every summons in a winding-up matter in the High Court shall be prepared by the applicant or his solicitor, and issued from the office of the registrar. A summons, when sealed, shall be deemed to be issued. The person obtaining the summons shall leave in the registrar's office a duplicate which shall be stamped with the prescribed stamp and filed. Summonses.

Rule 15 only applies to orders "in the winding-up of a company." An application may be made by summons in a voluntary winding-up to determine any question arising therein: see sect. 252. This does not enable questions relating to claims against outsiders to be determined by summons. *Re Centrifugal Butter Co.*, W. N. (1912) 291.

**R. 16.**—All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs, and other proceedings in the High Court in a winding-up matter shall be kept and remain of record in the office of the registrar, and, subject to the directions of the Court, shall be placed in one continuous file, and no proceeding in any winding-up matter shall be filed in the Central Office. File of proceedings in office of registrar.

**R. 18.**—In every Court all office copies of petitions, affidavits, depositions, papers, and writings, or any parts thereof, required by the official receiver or any liquidator, contributory, creditor, officer of a company, or other person entitled thereto, shall be provided by the registrar, and shall, except as to figures, be fairly written out at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken. Office copies.

### Practice Directions of May, 1892.

A copy of the notice of motion before the judge must be left at the office of the registrar [Room 66, Bankruptcy Buildings, Carey Street], not later than two days before the day named for hearing the same. A list of motions will be prepared and they will be taken in the order in which they appear in such list.

*Affidavits.*

The evidence on a motion or summons is by affidavit. The following provisions of R. S. C. Ord. XXXVIII. apply:—

Evidence on motions, &c.

**Ord. XXXVIII. r. 1.**—Upon any motion, petition or summons, evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Title of affidavits.

**R. 2.**—Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer.

Contents of affidavits.

**R. 3.**—Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter or copies of or extracts from documents, shall be paid by the party filing the same. Provided that on interlocutory proceedings or with leave under Ord. XXX. r. 7, an affidavit may contain statements of information and belief with the sources and grounds thereof.

As to giving the sources of information, see *Re J. L. Young Manufacturing Co.*, (1900) 2 Ch. 753, and *Lumley* v. *Osborne*, (1901) 1 K. B. 532; also notes to rule in Ann. Pr.

Before whom affidavits may be sworn.

**R. 4.**—Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths.

Time and place of taking affidavits.

**R. 5.**—Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognizance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the Court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

Affidavits, &c. how to be taken in Scotland, Ireland, the Channel Islands, colonies, and foreign parts.

**R. 6.**—All examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of His Majesty in foreign parts, before any judge, Court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of His Majesty's consuls or vice-consuls in any foreign parts out of His Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document.

Form of affidavits.

**R. 7.**—Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every

affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

**R. 8.**—Every affidavit shall state the description and true place of abode of the deponent. Description and abode of deponent to be stated.

"Director of Public Companies" or "Merchant" is not a proper description of a deponent in an affidavit and does not conform to the rule. *Re Church Press, Ltd.*, W. N. (1917) 39.

**R. 9.**—In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same office it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. Affidavits to be made by two or more deponents.

**R. 10.**—Every affidavit or other proof used in Admiralty actions shall be filed in the Admiralty Registry: every affidavit used in Probate actions shall be filed in the Probate Registry: every affidavit used on the Crown side of the King's Bench Division shall be filed in the Crown Office Department; every affidavit used in a cause or matter proceeding in a District Registry shall be filed there: and every other affidavit used shall be filed in the Central Office. There shall be *indorsed* on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct. Affidavits to be filed in proper office.

Affidavits in actions by debenture holders transferred to the winding-up jurisdiction must be filed in the Registrar's Office, Room 66, Bankruptcy Buildings, and must bear Judicature fee stamps. Practice Direction, October, 1892.

**R. 11.**—The Court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client. Scandalous matter.

**R. 12.**—No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure, shall without leave of the Court or a judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it. Alterations in affidavits.

**R. 13.**—Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illerate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. Affidavits by illiterate or blind persons.

**R. 14.**—The Court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by mis-description of parties or otherwise in the title or jurat, or any other irregularity Use of defective affidavit.

in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

Stamping of affidavits and use of office copies.

**R. 15.**—In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

Affidavit sworn before solicitor or his agent.

**R. 16.**—No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

Affidavit sworn before clerk or partner of solicitor.

**R. 17.**—Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner.

Special times for filing affidavits.

**R. 18.**—Where a special time is limited for filing affidavits, no affidavits filed after that time shall be used, unless by leave of the Court or a judge.

Affidavits in support of *ex parte* applications.

**R. 19.**—Except by leave of the Court or a judge no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

Verification of new trustee's consent to act.

**R. 19a.**—The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by the signature of his solicitor. Form 1 in the Appendix hereto shall be used with such variations as circumstances may require, and may be cited as Form 29 in Appendix L.

Notice of intention to use affidavit in chambers.

**R. 20.**—The party intending to use any affidavit in support of any application made by him in chambers in the Chancery Division shall give notice to the other parties concerned of his intention in that behalf.

Use in chambers of affidavits used in Court.

**R. 21.**—All affidavits which have been previously made and read in Court upon any proceeding in a cause or matter may be used before the judge in chambers.

Alterations in accounts to be initialled.

**R. 22.**—Every alteration in an account verified by affidavit to be left at chambers shall be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations shall not be made by erasure.

Exhibits.

**R. 23.**—Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, shall not be annexed to the affidavit, or referred to in the affidavit as annexed, but shall be referred to as exhibits.

Certificate on exhibit.

**R. 24.**—Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter.

### Time for Filing in Companies' Registrar's Office.

On all applications by summons the evidence in support must be filed, and notice of such filing must be served on the opposite party, at the time of the service of the summons.

The opposite party must file his evidence in answer within eight days of the service of the summons, and the said notice and the

applicant's evidence in reply must be filed within three days from such last mentioned time. Practice Direction, June 2nd, 1892.

When an affidavit is presented for filing out of time, such affidavit is only to be received on the undertaking of the solicitor to abide by the order of the Court as to the costs of any adjournment occasioned thereby, and as to the solicitor's right to charge any such costs against his client. W. N. (1894) 368.

**Form 170.**

Notice of motion.

In the High Ct of Justice, Chancery Division. 19—, No. —.

Mr. Justice ——.

In the matter of the —— Coy, Limtd.

Between A. B., on behalf of himself and all other the holders of the First Debentures of the Dft Coy —— ... ... ... ... Plt.

and

The —— Coy, Limtd ... ... ... ... Dfts.

Take notice, that this Ct will be moved on ——day the —— day of —— at the sitting of the Ct, or so soon thereafter as counsel can be heard.

[*Here state on whose behalf the motion is to be made, as* by counsel on the pt of the plt that, *here state the object of the motion.*]

[*If special leave has been obtained to give notice for a non-motion day or for a motion day short of the ordinary two clear days after service, or for a special hour and place, state the fact, as:* And also take notice that special leave (see p. 516, *supra*) to give this short notice of motion for the day [and hour and place] afsd has been obtained from Mr. Justice ——, *or as the case may be.*]

[*If special leave has been obtained under Ord. LII. r. 9, state the fact thus:* And also take notice that special leave to serve this notice of motion on the dft with the writ of summons in this action has this day been obtained from Mr. Justice ——, *or as the case may be.*]

Dated this —— day of ——, B. C., of ——, solor for [the above-named plt, *or as the case may be*].

To ——. [*Insert names of solors or parties to whom the notice is to be given.* See R. S. C. 1883, Appendix B., Part II., No. 18].

Where notice of motion is given for a particular date, counsel for the applicant may save the motion, to be heard on the next motion day, on mentioning it to the Court at any time before the Court has risen for the day. See *Yapp* v. *Williams*, W. N. (1901) 91, and Ann. Pr., notes to Ord. LII. r. 3.

**Form 171.**

Summons, ordinary, for Chancery Division.

In the High Ct of Justice,
Chancery Division.
Mr. Justice ——.

In the matter, &c. [*and give reference to record*].

Between A. B., on behalf, &c.

Let all parties concerned attend at the chambers of the judge, Room No. —, Royal Courts of Justice, Strand, London, on —— the —— day of ——, at —— o'clock in the ——noon [*if a short return is granted, add:* by special leave], on the hearing of an applicon on the pt of [*state on whose behalf the applicon is made, e.g.*] the above-named plt, that [*state the nature of the applicon and as to costs, e.g.*] the costs of this applicon may be costs in the action.

Dated this —— day of ——.

This summons is taken out by A., of ——, in the county of ——, solor for the applicant.

To ——. [*Insert the names of the solor or persons, if any, to be served with this summons, e.g.*, To the dft coy and Messrs. ——, solors.]

**Form 172.**

Summons (winding-up).

In the High Ct of Justice,
Chancery Division.
Cos Ct.
Mr. Justice ——.

In the matter of the —— Coy, Limtd.
and
In the matter of the Cos Act, 1929.

[Between A. B., on behalf, &c.]

Let [*name of respt*] attend at the chambers of the Registrar, Bankruptcy Buildings, Carey Street, London, on the —— day of ——, at —— o'clock in the ——noon, on hearing of an applicon of [*name and description of applicant*] for an order that [*state object of applicon*].

Dated the —— day of ——.

This summons was taken out by ——, of ——, solors for ——.

NOTE.—If you do not attend either in person or by your solor at the time and place above mentd such order will be made and proceedings taken as the judge (or registrar) may think just and expedient.

### Applications in Winding-up.

Where, as often happens, an application, whether by motion or summons, is to be made in the action and in the winding-up, it must be intituled both in the action as above and in the winding-up. See Winding-up Rules, 1929, r. 11. Application in winding-up.

### Practice Direction as to Adjournments to Winding-up Judges.

When an application is adjourned to the judge to be heard either in Court or chambers the applicant must lodge in Court with the judge's clerk, not less than one clear day before the summons is to come into the paper, the original or a copy of the summons and office copies of all his affidavits. The respondents are to lodge office copies of their affidavits in like manner and within the same time.

(*Title and reference to record.*)

**Form 173.**

Affidavit by one person.

I, ——, of [*place of residence and description and addition*], make oath and say as follows:—

1. On the —— day of ——, I, &c.

[*Here set out the parlars.*]

Sworn, &c.

This afft is filed on the pt and behalf of the plt above named.

(*Title, &c.*)

**Form 174.**

Affidavit by more than one person.

We, A. B., of [*place of residence and description and addition*], and C. D., of [*place of residence and description and addition*], jointly and severally make oath and say as follows:—

1. On the —— day of ——, &c.

2. We have not, &c.

*Or*, severally make oath and say:—

And first I, the sd A. B., for myself, say as follows:—

1. I did, &c.

2. When, &c.

And I, the sd C. D., for myself, say as follows:—

3. I, &c.

4. I have not, &c.

And we, the sd A. B. and C. D., further jointly say as follows:—

5. We have not, &c.

6. Notwithstanding, &c.

Sworn, &c.

This afft is filed, &c.

# CHAPTER XLVII.

## PROCEEDINGS RELATING TO DEBENTURES IN CASE OF WINDING-UP.

WHERE a company is being wound up by or under the supervision of the Court, an action to enforce debentures or debenture stock cannot be commenced without the leave of the Court; and where, after the commencement of an action to enforce debentures or debenture stock, an order is made for the winding-up of the defendant company by or under the supervision of the Court, the action cannot be "proceeded with" except by the leave of the Court.

This is the result of the following sections (174 and 177 of 1929):—

**174.**—(1) Where any company registered in England is being wound up by 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.

(2) The provisions of this section shall so far as relates to any estate or effects of the company situate in England, apply in the case of a company registered in Scotland as it applies in the case of a company registered in England.

**177.** When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

Sect. 174 is to some extent controlled by sect. 177. See *Higginshaw Mills and Spinning Co.*, (1896) 2 Ch. 544, 551. The result of the two sections taken together is that sect. 174 only makes void such attachments, sequestrations, distresses, and executions as are not sanctioned by the Court under sect. 177.

Sect. 260 provides (subject as therein provided) as follows:—

Where an order is made for a winding-up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

The Court having jurisdiction to wind up companies is defined by sect. 163.

The Court from which the leave is to be obtained is not necessarily the High Court; it may be a Palatine Court or a County Court, for the winding-up may be pending there, and leave must be obtained from the Court in which the winding-up is conducted. Part II., 15th ed., Chap. XXXIV.

By Rule 42 (1) of the Companies (Winding-up) Rules, 1929:—

> Where an order has been made for the winding-up of a company then if such order was made by the High Court or if the proceedings have been transferred to the High Court . . . any action or proceeding by a mortgagee or debenture holder of the company against the company for the purposes of realising his security . . . 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.

It is somewhat doubtful whether this rule applies where merely a supervision order has been made, so as automatically to transfer a debenture holder's action in such a case to one of the winding-up judges. But whether that is so or not, the rule does not seem to dispense with the necessity for obtaining leave from the winding-up Court to commence or continue a debenture holder's action.

Where the debenture holder's action is not in the High Court, or the winding-up is not in the High Court, there is no automatic transfer; but the High Court has power to transfer to itself, under the earlier part of Rule 42 (1), "*any action, cause or matter pending in any* other Court or Division brought or continued by or against the company." If a compulsory order has been obtained before the action is commenced, it must be assigned to one of the winding-up judges. Practice Masters' Rules, 26th November, 1895.

A holder of mortgage debentures or mortgage debenture stock will, almost as a matter of course, be given liberty to bring or proceed with an action to enforce the security. *Re David Lloyd & Co.*, 6 Ch. D. 339; *Hamilton's Iron Works*, 12 Ch. D. 707; *Joshua Stubbs, Ltd.*, (1891) 1 Ch. 475.

The application for leave is usually made by summons.

Where the winding-up is purely voluntary no leave of the Court is necessary, and the action will not as a rule be stayed, nor will an injunction be granted to restrain its continuance. See Part II., 15th ed., p. 772.

In every action against a company in a purely voluntary liquidation whether to enforce debentures or otherwise, and whether commenced before or after the commencement of the winding-up, the onus lies on the liquidator to show that the action should be stayed. *Currie* v. *Consolidated Kent Collieries Corpn.*, (1906) 1 K. B. 134. In such a case the application to stay is properly made to the Court or Division in which the action is pending. *Ibid.*

And see further Part II., 15th ed., Chaps. XXXIII. and XXXIV.

**Form 175.**

Summons for liberty to commence proceedings.

Let, &c. (*see Form* 172), on the hearing of an applicon of ——, of ——, for an order that, notwithstanding the order of this Ct dated, &c. to wind up the sd coy, the applicant may be at liberty to commence an action in the [Chancery] Division of this honourable Ct against the sd coy for [*state nature of action*], and that the costs of this applicon may be costs in the sd action.

If a compulsory winding-up order has been made in the High Court, the debenture action must be assigned to the winding-up judge. See Ann. Pr. notes to Ord. V. r. 9A.

**Form 176.**

Affidavit in support.

(*Title, &c.*)

I, ——, &c. (*see Form* 173).

1. I am the registered holder of ten debentures of the above-named coy, numbered —— to —— inclusive, each dated the —— day of ——, and each for securing the payment of the principal sum of ——*l.*, with interest in the meantime at the rate of —— p.c.p.a. The sd debentures are now produced and shown to me marked, &c.

2. The principal moneys secured by such debentures became in accordance with the terms thof payable on the —— day of ——, when an order was made by, &c. for the winding-up of the sd coy by the Ct, and there is an arrear of interest due in respect of such debentures.

3. The sd debentures are pt of an issue of —— like debentures of the coy and the holders of such debentures are numerous.

4. All the sd debentures charge the undertaking of the coy, and are further secured by a trust deed dated, &c., and made between the coy of the one pt and A. and B. of the other pt. The document now produced and shown to me marked —— is a copy of the sd trust deed.

5. I desire to bring an action in the Chancery Division of this honourable Ct to enforce the sd debentures, and to have the trusts of the sd deed carried into execution by the Ct.

**Form 177.**

Summons for liberty to proceed with action.

Let, &c. (*see Form* 172), on the pt of A., the plt in the action of —— *v.* ——, for an order that he may be at liberty to proceed with the sd action against the above-named coy.

**Form 178.**

Liberty to debenture holders to proceed with action.

Upon the applicon of S. and H., the plts in the action "*S.* v. *The Carlyle Press, Limtd* (1892), S. 3868," now pending in the Chancery Division of this honourable Ct before the Hon. Mr. Justice Chitty, and upon hearing the solors for the applicants and for the off recr and prov liqr of the sd coy, and upon reading the order to wind up dated the 25th day of October, 1892, and the writ of summons in the sd action dated the 18th day of October, 1892. It is ordered that

**Form 178.**

notwithstanding the sd order to wind up the above-named coy, the applicants, the plts in the sd action, "*Strong* v. *The Carlyle Press, Limtd* (1892), S. No. 3868," be at liberty to proceed with the sd action. And it is ordered that the costs of the applicants of this applicon be costs in the sd action. *Carlyle Press, Ltd.* (00133 of 1892). Registrar, 28th October, 1892.

An order in this form would not now be drawn up, but the order giving liberty to proceed would be indorsed on the summons.

**Form 179.**

Charge declared invalid under sect. 266.

Upon the applicon by summons dated ——, 19—, of H. de V. B., the off recr and liqr of the above-named coy, and upon reading the order (to wind up), &c., and the respts by their counsel stating that they cannot resist the applicon so far as it relates to the debentures Nos. 7 and 8, this Ct doth declare that a charge on the undertaking and ppty of the above-named coy contained in the eight several debentures, Nos. 1 to 6, each for 500*l.*, and Nos. 7 and 8, each for the like amount, or a total amount of 3,000*l.* and 1,000*l.* resply created by the above-named coy and issued to the respts is invalid under sect. 266 of the above-mentd Act, and that such debentures are void accordingly, and doth order that the sd S. & Co. do forthwith deliver up the sd debentures to the sd H. de V. B., the off recr and liqr for the above-named coy, by whom such debentures are to be cancelled. And it is ordered that the costs of the applicant, the off recr and liqr of the sd applicon, be taxed and pd out of the assets of the sd coy. *J. W. Draper, Ltd.* Neville, J., 2nd May, 1911.

**Form 180.**

Order affirming validity of debentures—liquidator to pay respondents' costs without prejudice to his claims against assets of the company.

Upon the applicon by summons dated ——, 19—, of B., the off recr and liqr of the above-named coy, for a declaration that the issue by the directors of the above-named coy on the ——, 19—, to the respts, the X. Coy, of 15,000*l.* bearer debentures pursuant to a resolution dated ——, 19—, and the transfer of the same to the respt, the Y. Coy, were invalid and accordingly that the sd debentures are void, and which, upon hearing, &c., and upon hearing counsel, &c., and upon reading, &c., and upon hearing the evidence of the sd —— and —— upon their cross-examination and re-examination resply taken orally before this Ct this day, This Ct doth not think fit to make any order on the sd applicon, but doth order that the applicant, the sd B., do pay to the respts, X. Coy and Y. Coy, their costs of the sd applicon, such costs to be taxed. But this order is without prejudice to any applicon by the sd off recr and liqr that as between himself and the assets of the above-named coy such costs be allowed to him out of the assets of the sd coy. *The Express Engineering Works, Ltd.* (00111 of 1919). Astbury, J., 2nd December, 1919.

## CHAPTER XLVIII.

### WRITS OF SUMMONS.

A DEBENTURE action is usually commenced by writ, though it is possible to get relief in the nature of foreclosure by originating summons under Ord. LV. r. 5a. See p. 532, *infra*.

The following Orders apply to writs:—

Writ of summons.

**Ord. II. r. 1.**—Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the notice of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

**Ord. II. r. 8.**—Every writ of summons and also (unless by any statute or by these rules it is otherwise provided) every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or, if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

**Practice Rule, 29 Nov., 1885.**—Every writ of summons in a debenture holder's action shall be intituled "In the matter of the company," and in cases in which 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.

See Ann. Pr., Pt. IX.

Whether there is or is not a winding-up in progress, the writ is to be intituled—

In the High Court of Justice,
Chancery Division.
Mr. Justice .
In the matter of the —— Company, Limited,

and is issued from the Central Office, and not from the chambers of the winding-up registrar. If prior to the issue of the writ a compulsory order has been made for the winding-up of the company, the action will be assigned to one of the winding-up judges (Bennett, Crossman and Simonds, JJ.), but the title will be as above, *not* "Companies Court."

Where a winding-up order is made in the High Court after the commencement of an action, the action will be automatically transferred to the winding-up Court by the force of rule 42 (1) of the Companies

(Winding-up) Rules, 1929. As to obtaining leave to commence the action when the company is in liquidation, see p. 526, *supra*.

The following rules apply to the indorsement of the claim on the writ:—

**Ord. III. r. 1.**—The indorsement of claim shall be made on every writ of summons before it is issued.

**R. 2.**—In the indorsement required by Ord. II. r. 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. Indorsements under Ord. II. r. 1.

**R. 3.**—The indorsement of claim shall be to the effect of such of the Forms in Appendix A, Part III., as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require. Indorsement, forms of.

**R. 4.**—If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show, in manner appearing by such of the Forms in Appendix A, Part III., sect. vii., as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued. Indorsements to show representative capacity.

As to indorsement of address, see Ord. IV.; *Stoy* v. *Rees*, 24 Q. B. D. 748; *Hawkins* v. *Black*, 14 T. L. R. 398; *Mee* v. *Denbigh*, 27 Sol. J. 617.

As to issue of writs of summons and assignment, see Ord. V.

As to mode of service, see Ord. IX., *infra*, p. 540. Service.

As to amendment of writ, see Ord. XXVIII.

An amended writ may be served on a defendant who has not appeared by filing it with the proper officer. *Jamaica Ry. Co.* v. *Colonial Bank*, (1905) 1 Ch. 677.

*As to Parties.*

The question of parties is dealt with *supra*, p. 487, and *infra*, p. 552; and for descriptions of the class on whose behalf plaintiff sues, see Forms 182 to 190.

In debenture holders' actions, strictly speaking, second debenture holders or any subsequent incumbrancers should be parties (see *supra*, p. 488), and if foreclosure is asked an order can only be made in their presence. There is no difference in this respect between a debenture action and an ordinary mortgagee's action. *Wilcox & Co.*, W. N. (1903) 64.

Where there are inconsistent interests or subsequent incumbrances, the necessary defendants should be added, and, if desirable and practicable, a representation order (Ord. XVI. r. 9), p. 553, *infra*, should be obtained. *Fraser* v. *Cooper, Hall & Co.*, 21 Ch. D. 718. A person, *e.g.*, a secretary, may be appointed, although against his own will. *Wood* v. *Macarthy*, (1893) 1 Q. B. 775. See p. 554, *infra*. Subsequent incumbrances.

**Representation order.**

Stirling, J., went so far as to hold that all debenture holders having an interest in the equity of redemption must be made parties to a foreclosure action, and not merely some of them as representatives of the whole under Ord. XVI. r. 9. *Griffith* v. *Pound*, 45 Ch. D. 553. In practice, however, a debenture holder frequently sues and gets a receiver without adding subsequent incumbrancers. And the difficulty raised by *Griffith* v. *Pound* is to some extent obviated by r. 1*b* of Ord. LI. (November, 1893). A sale may be ordered, before or after judgment, before all the persons interested are ascertained, whether served or not. And see *infra*, Chap. LXX. Where there is a representation order, the defendant will be sued accordingly, *e.g.*, "B., on behalf of himself and all other holders of the 'B' debentures of the defendant company."

As to amending the writ in such a case and referring to the order, see *Fairfield, &c. Co.* v. *London, &c. Co.*, W. N. (1895) 68. But Buckley, J., held that where a man was joined as defendant "on behalf of himself and all others the holders of the second debentures of the company," it was unnecessary to make an order appointing him to represent the second debenture holders. *Cadogan and Hans Place Estate* (No. 2), *Ltd.*, W. N. (1906) 112. *Sed qu.*

A person authorized to defend on behalf of others cannot consent to judgment against them, but he may submit to judgment on their behalf. *Rees* v. *Richmond*, 62 L. T. 427.

As to obtaining foreclosure on originating summons, see *Oldrey* v. *Union Works*, W. N. (1895) 77.

The remedy by foreclosure is generally available in the case of mortgage debentures *not* secured by trust deed. *Sadler* v. *Worley*, (1894) 2 Ch. 170. But foreclosure may be impracticable where some of the class on whose behalf plaintiff sues are out of the jurisdiction. *Re Continental, &c. Co.*, (1897) 1 Ch. 511, *supra*, p. 495.

As to a declaration of a charge, see Form 269.

As to obtaining a declaration that the holders of the debentures are entitled to stand in the position of judgment creditors, see Form 287.

**Plaintiffs.**

The form of indorsement below is for use in a simple case.

In actions by one on behalf, care should be taken that the plaintiff has personally a good cause of action, otherwise the action may fail, *e.g.*, where the company has a set-off. *Burt* v. *British Nation Life Association*, 4 De. G. & J. 158, 174; *Huggons* v. *Tweed*, 10 Ch. D. 359. *Supra*, p. 488.

Where the company has, after granting debentures, been dissolved and reconstituted, the description of the plaintiff's class may require modification. See *Marshall* v. *South Staffordshire Co.*, (1895) 2 Ch. 36.

In an action by one on behalf the plaintiff is *dominus litis*, and before judgment can compromise or discontinue the action as he thinks fit.

And the company before judgment may pay the plaintiff and get rid of the action; see *Re Alpha Co., (1903) 1 Ch. 203*, in which it was held that plaintiff was entitled to discontinue even after judgment subject to the right of any other debenture holder to come in and claim the benefit of the action.

But where a receiver has been appointed by the Court, the plaintiff cannot direct the receiver not to proceed with an action against the plaintiff in another capacity to recover assests alleged to be due to the company. *Viola* v. *Anglo-American Cold Storage Co.*, (1912) 2 Ch. 305.

As to the costs of a representative plaintiff, see *supra*, p. 513, and *infra*, Chap. LXXXVII.

**Form 181.**

Common form writ of summons.

In the High Ct of Justice,
Chancery Division.

Mr. Justice ——.

In the matter of the —— Coy, Limtd.

Between [A.], [*if so, on behalf, &c.*] ... ... Plt.
and
[The —— Coy, Limtd, B., C., and D.] ... ... Dfts.

George the Sixth, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith.

To [The —— Coy, Limtd, of ——; B., of ——; C., of ——; and D., of ——]:

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A., and take notice that in default of your so doing the plt may proceed therein, and judgment may be given in your absence.

Witness, Frederick Herbert, Baron Maugham, Lord High Chancellor of Great Britain, the —— day of —— in the year of our Lord one thousand nine hundred and ——.

N.B.—This writ is to be served within twelve calendar months from the date thof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The dft [or dfts] may appear hto by entering an appearance [or

**Form 181.**

appearances] either personally or by solor at the Central Office, Royal Cts of Justice, London.

Indorsements to be made on the writ before issue thof.

The plt's claim is for, &c.

[See Forms 182 *et seq.*, *infra*.]

This writ was issued by the sd plt, who resides at ——; *or*, This writ was issued by E. F., of ——, whose address for service is ——, solor for the sd plt, who resides at ——; *or*, This writ was issued by G. H., of ——, whose address for service is ——, agent for —— of ——, solor for the sd plt, who resides at —— [*mention the city, town, or parish, and also the name of the street and number of the house of the plt's residence, if any*].

Indorsement to be made on the writ after service thof:

This writ was served by me at —— on the dft on —— the —— day of ——, 19 —.

Indorsed the —— day of ——, 19—.

(Signed)
(Address)

As to the title and assignment of action in debenture actions, see notes, *supra*, p. 518.

**Form 182.**

**Title of writ and indorsement of claim (action on behalf).**

In the High Ct of Justice,
Chancery Division.
Mr. Justice ——.

In the matter of the —— Coy, Limtd.

Between A. B., on behalf of himself and all others the holders of First Mortgage Debentures of the Dft Coy ... ... ... ... Plt.
and
The —— Coy, Limtd ... ... ... ... Dft.

The plt claims as a debenture holder of the dft coy:—

1. A declaration that the mortgage debentures issued by the dft coy, and now outstanding, constitute a [first] charge upon all the ppty of the coy comprised therein.
2. All necessary accounts and inquiries.
3. Payment.
4. Foreclosure or sale.
5. A receiver and manager.

**Form 182.**

The Court will not, as a rule, declare a first charge unless satisfied that all possible incumbrancers are before the Court; and will not, as a rule, on a consent order declare a charge at all. *Gregory, Love & Co.*, (1916) 1 Ch. 203, at p. 209.

If the writ does not include a claim for payment, other debenture holders may proceed to separate judgments. *Cleary* v. *Brazil Ry. Co.*, W. N. (1915) 178.

Before applying for a receiver, inquiry should be made whether a controller has been appointed by the Board of Trade. *Re William Denton, Ltd.*, W. N. (1916) 405.

**Form 183.**

Title in action on behalf. A. series.

In the matter of the —— Coy, Limtd.

Between A. B., on behalf of himself and all other the holders of the Debentures of the Series A issued by the Dft Coy ... ... Plt.

and, &c.

**Form 184.**

Title where two plaintiffs suing.

In the matter, &c.

Between A. B. and C. D., on behalf of themselves and all the other holders of the A Debentures of the Dft Coy ... ... Plts.

and, &c.

**Form 185.**

Title—one plaintiff on behalf of two classes.

In the matter, &c.

Between A. B., on behalf of himself and all the other holders of the First [Mortgage Debentures of the Dft Coy] and [on behalf of himself and all others the holders of the] Second Mortgage Debentures of the Dft Coy ... ... ... ... ... Plt.

and, &c.

**Form 186.**

Title where substituted plaintiff.

In the matter, &c.

Between A. B., whose claim has been dismissed by order dated ——, on behalf of himself and all other the debenture holders of the Dft Coy, and W., the off recr and tree in bankruptcy, of ——, added by order dated, &c., on behalf of himself and all other the debenture holders of the Dft Coy ... ... ... ... ... Plts.

and, &c.

**Form 187.**

Title—plaintiff suing as specific mortgagee and on behalf.

In the matter, &c.

Between A. B., suing as specific mortgagee in his own right and also as a debenture holder on behalf of himself and all the other holders of debentures of the Dft Coy ... ... ... ... ... ... Plt.

and, &c.

**Form 188.**

Title where company suing on behalf.

In the matter, &c.

Between The A. Coy, Limtd, on behalf of themselves and all other the First Mortgage Debenture Holders of the B. Coy, Limtd ... Plts.

against

The B. Coy, Limtd, and C. on behalf of himself and all others the holders of the Second Mortgage Debentures of the B. Coy, Limtd ... ... ... ... ... ... Dfts.

Subsequent incumbrancers and other persons interested in the equity of redemption should be made defendants.

In May, 1909, the judges of the Chancery Division gave the following direction:—"All incumbrancers (other than debenture holders) subsequent in order of priority to the plaintiff's debentures should be made parties, and not served with notice of the judgment under Ord. XVI. r. 40."

**Form 189.**

Title where trust deed and claim.

In the matter, &c.

Between A. B., on behalf of himself and all other the holders of debentures [*or*, debenture stock] entld to the benefit of the Indenture mentd in the indorsement on writ in this action ... ... ... ... ... ... Plt.

and

The —— Coy, Limtd, and H. and B. ... ... Dfts.

The plt claims as a debenture holder of the dft coy:—

1. To have an account taken of what is due from the dft coy to the plt and the other holders of debentures entld to the benefit of an indenture dated, &c., and made, &c.

2. To have the trusts of the sd indenture carried into execution under the order of the Court.

3. To have a receiver and manager of the ppty comprised in the sd indenture appointed.

The dfts, —— and ——, are sued as trees of the sd indenture.

In the case of debentures and debenture stock secured by trust deed, the remedy of foreclosure is not generally available. *Schweitzer* v. *Mayhew*, 31 Beav. 37; *Locking* v. *Parker*, 8 Ch. D. 30; *Re Alison*, 11 Ch. D. 284. **Form 189.**

The decision in *Francis* v. *Harrison*, 43 Ch. D. 183, is met by Ord. XVI. r. 8, which, as amended by Rule 4 of November, 1893, provides that trustees are to represent beneficiaries where the former are "sued in proceedings to enforce a security by foreclosure or otherwise." See Ann. Pr., notes to Ord. XVI. r. 8.

As to directing a sale before or after judgment, see Chap. LXX., *infra*.

**Form 190.**

Where two trust deeds.

In the matter, &c.

Between A. and B., on behalf of themselves and all other the holders of First Mortgage Debenture Stock of the Dft Coy and the sd B. also on behalf of himself and all other the holders of B Mortgage Debenture Stock of the Dft Coy ... ... Plts.

and

The —— Coy, Limtd, C., D., E. and F. ... ... Dfts.

The plt's claim is:—

(1) To have the trusts of a trust deed dated, &c., and made between the dft coy of the one pt and the dfts C. and D. of the other pt, under which the first mortgage debenture stock of the dft coy has been issued, and of a trust deed dated, &c., and made, &c., under which the B Mortgage Debenture Stock of the dft coy has been issued, carried into execution by and under the order of the Ct.

(2) To have the securities created by the sd trust deeds and the sd debentures and debenture stock enforced by foreclosure or sale.

(3) All necessary and proper accounts and inquiries.

(4) To have a receiver and manager appointed of the ppty comprised in the sd trust deeds.

(5) The dfts C. and D. are sued as trees of the sd trust deed dated, &c., and the dfts E. and F. are sued as trees of the sd trust deed dated, &c.

**Form 191.**

Endorsement of claim where trustees of trust deed suing.

The plts claim (1) administration and execution by the Ct of trusts of an indenture dated, &c., and made, &c., whereby certain ppty and assets of the dft coy therein mentd were vested in or charged in favour of the plts as trees upon the trusts therein mentd for securing the A First Mortgage Debentures, the B Second Mortgage Debentures, and the C Third Mortgage Debentures of the dft coy, and that all

**Form 191.** necessary and proper accounts, inquiries, and directions may be made and given.

The appointment of a receiver and manager of the ppty and assets of the dft coy comprised in or subject to the trusts of the sd indenture of the —— of ——, 1900, and also of the undertaking of the dft coy and of all its ppty charged by the sd mortgage debentures but not comprised in or subject to the trusts of the sd indenture.

The plts sue as trees of the sd indenture of the —— of ——. The dft B. is sued on behalf of himself and all other holders of B Second Mortgage Debentures of the dft coy; the dft H. is sued on behalf of himself and all other holders of C Third Mortgage Debentures of the dft coy. The dfts D. and E. are holders of all the First Mortgage Debentures of the dft coy.

**Form 192.** **Specially Indorsed Writ. (Ord. III. r. 6).**

**Specially indorsed writ on naked debenture.**

In the High Ct of Justice,
King's Bench Division.

Between Thomas Jones ... ... ... ... Plt.
and
The —— Coy, Limtd ... ... ... ... Dfts.

George the Sixth, &c.

We command you, &c. [See Form 181.]

Witness, &c.

N.B.—This writ is to be served and appearance is to be entered at the Central Office, Royal Cts of Justice.

STATEMENT OF CLAIM.

[Plts: the debenture holders. Dfts: the coy.]

The plts' claim is for principal and interest due under a covenant contained in a debenture dated the —— of ——, and sealed by the dft coy.

Particulars:—

| | |
|---|---|
| Principal ... ... ... ... ... | 1,000*l.* |
| Interest ... ... ... ... ... | 50*l.* |
| Amount due ... ... ... | 1,050*l.* |

Place of trial, ——.

(Signed, delivered, &c.)

And the sum of ——*l.* [or such sum as may be allowed on taxation] for costs. If the amount claimed is pd to the plt or his solor or

agent within four days from the service hof, further proceedings will be stayed. **Form 192.**

This writ was issued, &c.

This writ was served, &c.

Indorsed the —— day of ——.

(Signed)
(Address)

Money due upon a naked debenture can be sued for on a writ specially indorsed in accordance with Ord. III. r. 6 of Supreme Court. And then application can be made under Ord. XIV. for an order to enter judgment forthwith. See further, Ann. Pr., notes to Ord. XIV.

Formerly an indorsement of a claim for interest on a writ of summons, in order to be a *good special indorsement within the meaning of* Ord. III. r. 6, and Ord. XIV. r. 1, had to show either that the interest claimed was payable under an agreement, or that it was fixed by statute; but the scope of a specially indorsed writ has been enlarged by R. S. C. 1933, (No. 1), and the power of the Court to allow interest has been extended by the Law Revision (Miscellaneous Provisions) Act, 1934, s. 3. See Ann Pr., notes to Ord. III. r. 6 and Ord. XIV. r. 1 (b).

As to cases where defendants are out of the jurisdiction, see Ord. XI., and *Deutsche National Bank* v. *Paul*, (1898) 1 Ch. 283.

The New Procedure Rules, Ord. XXXVIIIA., are available if the action is commenced in the King's Bench Division; but, unless the claim is for payment only, in which case the procedure under Ord. III. r. 6, is usually the quickest, the ordinary procedure in the Chancery Division is generally found to be the most appropriate, and the necessary relief can usually be obtained without any delay.

# CHAPTER XLIX.

## SERVICE OF WRIT OF SUMMONS.

WHERE a company is defendant, the writ is usually served at the registered office unless the company's solicitor has agreed to accept service. By sect. 370 any document may be served on a company by leaving it at or sending it by post to the registered office.

This section is permissive and does not preclude other modes of service if the company has expressly or impliedly agreed to accept another method of service. *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, (1898) 1 Q. B. 487 (agreement by person out of England for service in England).

The following rules apply to service of writs:—

**Undertaking to accept service.**

**Ord. IX. r. 1.**—No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance.

**When service required, how effected.**

**R. 2.**—When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a judge, that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just. See Ann. Pr., notes to rule.

**Service on corporations, &c.**

**R. 8.**— . . . Where by any statute [see sect. 370 of the Companies Act, 1929] provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided.

By sect. 370 of the Act of 1929, "a document," which by sect. 380 includes summons, notice, order, and 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." A writ of summons is within the section. *White* v. *Land and Water Co.*, W. N. (1883) 174. The service should be at the registered office, and not at a branch. *Watkins* v. *Scottish Imperial Insurance Co.*, 23 Q. B. D. 285; *Pearks, Gunston & Tee, Ltd.* v. *Richardson*, (1902) 1 K. B. 91. Instead of posting the writ it may be served by handing it to a director at the head office. *Watson* v. *Sheather, Sons & Co.*, 2 T. L. R. 473. See further, notes to Ord. IX. r. 8, in Ann. Pr.

The affidavit of service must show that the letter was prepaid. *Walthamstow Council* v. *Henwood*, (1897) 1 Ch. 41.

**R. 15.**—The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service. Indorsement on service.

Omission to indorse the writ vitiates the service. It is not an irregularity which can be waived. *Hamp-Adams* v. *Hall*, 27 T. L. R. 531.

As to service of amended writ. Where no defendant has appeared, no re-service is as a rule required; where defendant has made default in appearance the amended writ may be filed. *Jamaica Ry. Co.* v. *Colonial Bank*, (1905) 1 Ch. 677.

As to treating service as valid notwithstanding irregularities, see Ord. LXX. r. 1. *Dickson* v. *Law*, (1895) 2 Ch. 62.

As to substituted service, see Ord. X.

As to service out of the jurisdiction, see Ord. XI., and notes in Ann. Pr.

A company out of the jurisdiction which has issued debentures is within the order. *Rawtree* v. *Great North West Central Ry. Co.*, 14 T. L. R. 448.

As to appearance, see Ord. XII., *infra*, p. 543.

As to default of appearance, see Ord. XIII.

As to amendment of writ, see Ord. XXVIII.

Where a winding-up order has been made the writ must be served personally on the liquidator. Ann. Pr., notes to Ord. IX. r. 8.

**Form 193.**

Affidavit of service of writ on defendant company.

(*Title.*)

I, ——, of ——, make oath and say as follows:—

1. I did, on the —— day of ——, 19—, serve the above-named dfts, The —— Coy, Limtd, with the writ of summons in this action which appeared to me to have been regularly issued out of the Central Office of the Supreme Ct of Judicature against the above-named dfts at the suit of the above-named plt and which was dated on the —— day of ——, by leaving a true copy of the sd writ of summons at the registered office of the dfts the sd —— Coy, Limtd, situate at —— with a clerk [*or* servant] of the sd dft coy, *or*, by putting into the post-office receiving house, situate at No. ——, in —— Street, in the (City) of ——, a letter duly addressed to the sd dfts, The —— Coy, Limtd, at their registered office, situate at ——, such letter having the proper postage stamp affixed thto as a

**Form 193.** prepaid letter, and containing at the time of the same being posted as afsd a true copy of the sd writ of summons.

2. At the time of the sd service the sd writ and the copy thof so delivered and left [*or*, so left; *or*, so sent by post as afsd] were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Ct.

3. I did afterwards, namely, on the —— day of ——, 19—, indorse on the sd writ the day of the month and week of the sd service on the sd dfts.

**Form 194.**

**Affidavit of service. (Another).**

I, &c., clerk to Messrs. ——, of the same place, solors for the above plt, make oath and say as follows:

1. On —— day, the —— day of ——, before six of the clock in the evening, I served Messrs. ——, who had acted as solors for the dft coy and for the off recr acting as liqr of the sd coy, with the summons in the action dated, &c., issued from and under the seal of the chambers of Mr. Justice ——, and addressed to the sd dft coy, by delivering to and leaving with the clerk of the sd Messrs. ——, at the address for service of the sd Messrs. ——, situate at, &c., in the City of London, a true copy of the sd summons, and I at the same time showed the sd summons to the person to whom such true copy was delivered as afsd, by which summons all parties concerned were required to attend at the office of Registrar Cos Winding-up, Bankruptcy Buildings, Carey Street, London, on —— the —— of ——, at twelve o'clock [on the hearing of an applicon on the pt of the plt that this matter might be further considered and that an order might be made in the terms of the minutes, a copy of which accompanied the sd summons].

2. There was at the foot of the copy of the sd summons to be served and at the foot of the sd summons so produced as afsd a memorandum and statement that such summons was taken out by P. and R., of —— Street, in the county of London, solors for the applicant.

## CHAPTER L.

### APPEARANCE.

A CORPORATION aggregate can only appear by a solicitor, and the appearance of a company by its secretary, &c. is refused at the Central Office. Ann. Pr., notes to Ord. XII. r. 1.

If the company is in liquidation, voluntary or otherwise, the liquidator cannot appear in person, and appearance should be entered for "The A. B. Co., Limtd., in liquidation, by C. D., its liquidator, duly appointed." Ann. Pr., notes to Ord. XII. r. 1.

Ord. XII. deals with appearance, and the following are the principal rules applicable in debenture and debenture stock actions:—

**Ord. XII. r. 1.**—Except in the cases otherwise provided for by these rules, a defendant shall enter his appearance in London. — Appearance in London.

**R. 2.**—Appearances entered in London shall be entered in the Central Office. — Central Office.

[This is the case although the action has been originally assigned or has been transferred to the winding-up jurisdiction.]

**R. 4.**—If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry. — Defendant resident in district.

**R. 5.**—If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or at the Central Office. — Where defendant does not reside, &c. in district.

**R. 6.**—If a sole defendant appears, or all the defendants appear, in the district registry, or if all the defendants who appear, appear in the district registry and the others make default in appearance, then, subject to the power of removal in Ord. XXXV. rr. 13 to 16, provided, the action shall proceed in the district registry. — Action to proceed in registry.

**R. 7.**—If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London; provided that if the Court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London. — Action to proceed in London.

**R. 8.**—A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, — Appearance. Memorandum and duplicate.

showing the date on which it is sealed, and then return it to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal.

**R. 8a.**—(R. S. C. No. 1, 1929) refers to a defendant entering appearance in person. See Ann. Pr., 1938, p. 134.

**Notice of appearance.**

**R. 9.**—A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance (Form No. 2, in Appendix A., Part II.; see Ann. Pr.) to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service (which, in the case of a writ issued out of a district registry must be the address for service within the district), or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum.

(2) This rule shall not apply to a defendant entering an appearance in person through the post under Rule 8A of this order.

**Defendant's address for service.**

**R. 10.**—The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and if the appearance is entered in the Central Office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district; and where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

**Defendant in person.**

**R. 11.**—A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the Central Office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district.

**Memorandum irregular, address fictitious.**

**R. 12.**—If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff.

**Memorandum of appearance.**

**R. 13.**—The memorandum of appearance shall be in the Form No. 1, in Appendix A, Part II., with such variations as circumstances may require.

**Officer to enter memorandum.**

**R. 14.**—Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the Cause Book.

**Defendants appearing by same solicitor.**

**R. 17.**—If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

**R. 17a** gives facilities for transferring to the New Procedure List.

**R. 18.**—A solicitor not entering an appearance . . . in pursuance of his written undertaking so to do shall be liable to an attachment.

See *Re Kerly*, (1901) 1 Ch. 467, and Ann. Pr., notes to Ord. IX. r. 1.

**Time for appearance.**

**R. 22.**—A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance [viz., eight days, inclusive of the day of service, if within the jurisdiction] he shall not, unless

the Court or a judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

Where service is effected through the post the writ is deemed to be served on the day following that on which the letter was posted.

As to default of appearance, see Ord. XIII.

**Form 195.**

Memorandum of appearance.

(*Title, &c.*)

Enter an appearance for [The —— Coy, Limtd] in this action.

Dated ——.

N., of ——,
Solor for the dft [coy], whose
address for service is ——.

If the company is in liquidation, whether voluntary or compulsory, appearance should be entered for "The A. B. Company, Limited, in liquidation." Ann. Pr., note to Ord. XII. r. 1.

# CHAPTER LI.

## SUMMONS FOR DIRECTIONS.

IN an ordinary debenture action the first step after the close of the pleadings (see Chap. LVI.) is to take out a summons for directions.

See Ord. XXX. of R. S. C. 1883, which runs as follows:—

**Summons for directions.**

**R. 1.**—(a) Within seven days from the time when the pleadings shall be deemed to be closed, the plaintiff shall take out a summons for directions returnable in not less than seven days.

As to the practice generally under this Order, see Ann. Pr., notes to Ord. XXX. r. 1.

(b) Where under Ord. XIV. and Ord. XIVA. the plaintiff applies for judgment, the judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

(c) This rule shall not apply to Admiralty actions within the meaning of sect. 56 of the [Judicature Act, 1925], or to actions in which the plaintiff has applied for judgment under Ord. XIV. and directions have been given, or to actions in which an application for transfer to the Commercial List is pending or in which transfer to such List has been ordered, or to any proceeding commenced by originating summons, but in any such action or proceeding a summons for directions may be taken out at the instance of any party thereto.

**Interlocutory proceedings.**

**R. 2.**—(1) Upon the hearing of the summons the powers of the Court or a judge shall include those specified in this Rule.

(2) The Court or a judge may—

(a) make such order as may be just with respect to any of the following matters, that is to say, discovery and inspection of documents, interrogatories, inspections of real or personal property, and admissions of fact or of documents;

(b) make such order with respect to the place and mode of trial as is provided by Rules 1 and 1A of Ord. XXXVI.;

(c) Subject to paragraph (3) of this Rule, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before a Commissioner or Examiner;

(d) order that evidence of any particular fact or facts, to be specified in the order, shall be given at the trial by statement on oath of information

*and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct;*

(e) order that no more than a specified number of expert witnesses may be called;

(f) appoint a Court expert under Ord. XXXVIIA;

(g) record any consent of the parties either wholly excluding their right of appeal or limiting it to the Court of Appeal or limiting it to questions of law only;

(h) make such order as may be just with respect to pleadings and particulars;

and may revoke or vary any such order.

(3) Where it appears to the Court or judge that any party reasonably desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be specially reserved.

Substituted for Rules 2 and 2A by R. S. C. (No. 3) 1937, December 17th, 1937.

No affidavit to be made.

**R. 3.**—No affidavit shall be used on the hearing of the said summons except by special order of the Court or a judge.

Parties to apply for directions.

**R. 4.**—On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire.

As to what constitutes a step in the proceedings within the Arbitration Act, 1889, see notes to this rule in Ann. Pr.

Subsequent applications.

**R. 5.**—Any application subsequently to the original summons *and before judgment* for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party, stating the grounds of the application.

For instance, under this rule, an order may be made to strike out a statement of claim on the ground that it discloses no reasonable cause of action and to dismiss the action with costs as frivolous and vexatious. *Pepperell* v. *Hird*, (1902) 1 Ch. 477. After judgment applications must be made by ordinary summons. *Brown* v. *Haig*, (1905) 2 Ch. 379.

Cost of subsequent applications.

**R. 6.**—Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying, unless the Court or a judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

Evidence.

**R. 7.**—On the hearing of the summons or at the trial, the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given at the trial by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the Court or judge may direct.

**R. 8.**—In any action to which Rule 1 of this order applies, if the plaintiff does not within seven days from the time when the pleadings shall be deemed to be closed take out a summons for directions under this order, the defendant shall be at liberty to apply for an order to dismiss the action, and upon such application the judge may either dismiss the action on such terms as may be just, or may deal with such application in all respects as if it were a summons for directions under this order.

Ord. XXX. is applicable to actions to enforce debentures and debenture stock, and applications must be made accordingly. Sometimes the order directs that there shall be no pleadings, and that the plaintiff shall apply by summons under Ord. XV. for an order for accounts and inquiries. More commonly the order is to set the action down for hearing without pleadings, and as a short cause on affidavit evidence, but sometimes pleadings are ordered, or at any rate a statement of claim, and then later on further directions can be given, *e.g.*, to set down on motion for judgment in default of defence or as the case may require. Where the master ordered the action to be "set down for hearing without pleadings and as a short cause," the Court was of opinion that the order should have contained a direction that evidence should be by affidavit, but if the defendant did not consent, that there should be a statement of claim. But in the particular case the evidence on the application for a receiver was allowed to be used and an order for the usual accounts and inquiries made. *Gutta Percha Corpn., Ltd.; Thornton* v. *Same*, W. N. (1899) 251. Where all the parties appear on the summons for directions the master may either:—

(a) Direct action to be set down for trial without pleadings, on notice of trial, with affidavit evidence, as a short cause, on minutes.

In such a case plaintiff must be directed to serve notice of trial, which shall be a ten days' notice, unless a shorter time is directed under Ord. XXXVI. r. 14; or (which is more convenient)

(b) Direct action to be set down, on motion for judgment, without pleadings, as a short cause on minutes, and (although not necessary) with affidavit evidence.

In this case only two days' notice is required. Directions as to affidavit evidence seem only necessary where a party is under disability.

See per Buckley, J., in *Pringle & Co.*, W. N. (1903) 207, and *Cadogan, &c. Estate, Ltd.*, W. N. (1906) 112.

Other judges have required a statement of claim to be delivered. The existing practice may be stated thus: If the defendant company will appear at the hearing and consent to the usual accounts and inquiries, the action can be set down on motion for judgment without pleadings to be heard as a short cause on minutes, but otherwise a

statement of claim should be delivered. *Re Dupont, Ltd.*, W. N. (1906) 14; *Kitson Empire Lighting Co.*, W. N. (1910) 154. The directions usually given on the summons for directions are that pleadings be delivered.

An application for a receiver, as in the case above, is very commonly made some time before the summons for directions is heard, and in many cases upon the hearing of such application (for a receiver), the defendants consenting, the motion is treated as the hearing, and the usual order for accounts and inquiries made. See Form 275.

Where this course is adopted, the order on summons for directions will generally merely dispense with pleadings.

As to putting parties under conditions, see *Baxter* v. *Holdsworth*, (1899) 1 Q. B. 266.

In case of default in appearance a master cannot dispense with a statement of claim. *Re Norman*, W. N. (1900) 159; and see *Green* v. *St. John's Mansions, Ltd.*, W. N. (1900) 9.

The ordinary charge for a notice under Ord. XXX. r. 5, is 5*s*., but if the notice is a special one, a special allowance may be made under item 51 in Appendix N. to R. S. C. 1883. *Macguare* v. *Milligan*, (1903) 1 Ch. 145.

**Form 196**

Summons for directions.

Let all parties concerned attend the Master in Chambers, Royal Cts of Justice, Strand, London, on —— day, the —— day of —— 19—, at —— o'clock in the —— noon, on the hearing of an applicon on the pt of the plt to show cause why an order for directions should not be made in this action as follows:—

Discovery.—That the plt and dft do resply file an afft of documents within ten days after notice requiring the same. [*If payment into Ct is asked for, but not otherwise, add here*—and service of copy receipt.]

Place of Trial.

Mode of Trial.

(a) [*Insert any application as to the mode by which particular facts may be proved at the trial.*]

(b) [*Any other applications.*]

*Liberty to either party to apply.*

That the costs of this applicon be costs in the cause.

Dated the —— day of ——, 19—.

This summons was taken out by —— [agents for —— of ——], solor for the plt.

To the dft and to —— his [*their*] solor.

[NOTE.—This form was prescribed under Ord. LXI. r. 33, and is an amended form of the statutory form of summons for use in

**Form 196.** K. B. D. The Ch. form, though substantially the same, is printed with more space.]

Official Form C. 4.

**Form 197.**
**Order for directions.**

Upon hearing the solors on both sides, and upon reading the affts of ——, the following directions are hby given, and it is ordered:—

That the plt and dft do, resply, within ten days after notice requiring afft of documents answer on afft stating what documents are or have been in their possession or power relating to the matters in question in this action.

(a) [*Mode in which particular facts may be proved at the trial.*]

(b) [*Any other directions.*]

That the action be tried at —— with a judge and —— jury.

That the costs of this applicon be costs in the cause.

Liberty to either party to apply.

Dated the —— day of ——, 19—.

This form (No. 4B, Appendix K. to R. S. C.) is now in official use in lieu of No. 4A.

**Form 198.**
Notice for further directions. (Chancery Division.)

Take notice that the above-named [*plt or dft*] intends to apply before Master —— at the chambers of the judge, Room No. —, Royal Cts of Justice, Strand, London, on ——, the —— day of ——, 19—, at —— o'clock in the ——noon, for further directions in this action as to [*here state what is required*].

**Form 199.**
Same. (King's Bench Division.)

Take notice that the above-named [*plt or dft*] intends to apply to Master —— in Chambers, or in his room, No. —, at the Central Office, Royal Cts of Justice, Strand, London, on —— the —— day of ——, 19—, at —— o'clock in the ——noon, for further directions in this action as to [*here state what is required*].

**Form 200.**
Summons for third party directions.

Let all parties concerned attend the Master in Chambers, at the Central Office, Royal Cts of Justice, Strand, London, on ——day the —— day of ——, 19—, at —— o'clock in the ——noon on the hearing of an applicon on the pt of ——, for an order for third party directions as follows:—

That the dft deliver a statement of his claim to the sd third party within —— days from this date, who shall plead thto within ——

**Form 200.**

days. And that the sd third party be at liberty to appear at the trial of this action, and take such pt as the judge shall direct, and be bound by the result of the trial.

And that the question of the liability of the sd third party to indemnify the dft be tried at the trial of this action, but subsequent thto.

Dated the —— day of ——, 19—.

This summons was taken out by ——, solor for ——.

To ——.

**Form 201.**

Notice for third party directions.

Take notice that the above-named dft —— intends to apply to the Master in Chambers at the Central Office, Royal Cts of Justice, Strand, London, on the —— day of ——, 19—, at —— o'clock in the ——noon, on the hearing of an applicon for an order for third party directions, as follows:—

That the dft deliver a statement of his claim to the sd third party within —— days from this date, who shall plead thto within —— days. And that the sd third party be at liberty to appear at the trial of this action, and take such pt as the judge shall direct, and be bound by the result of the trial.

And that the question of the liability of the sd third party to indemnify the dft be tried at the trial of this action, but subsequent thto.

Dated the —— day of ——, 19—.

This summons was taken out by ——, solor for ——.

To ——.

Upon a summons for directions orders are frequently made for accounts, inquiries and foreclosure on the authority of *Horton* v. *Bosson*, 80 L. T. 435 (C. A.), 1899; W. N. (1899) 38, deciding that such relief is within the rule.

Very commonly the order on the summons is not drawn up.

Where the master or registrar on the summons directs that the action shall be tried as a short cause without pleadings, the order should also direct that evidence is to be by affidavit. *Gutta Percha Co.*, *Thornton* v. *the Same*, W. N. (1899) 251; and see *Church Stretton, &c. Co.*, W. N. (1904) 48; and see *supra*, p. 547.

As to moving to discharge the order, see *Horton* v. *Bosson*, 80 L. T. 435.

# CHAPTER LII.

## JOINDER OF AND ADDING AND STRIKING OUT PARTIES—REPRESENTATION ORDERS.

IN debenture and debenture stock actions, where there are other holders besides the plaintiff, and such holders are numerous, the plaintiff always sues on behalf of himself and the other holders of the same class, and this he can do under Ord. XVI. r. 9 below. See further, *supra*, pp. 535 to 537.

Suing thus, he is considered to represent such holders, and the Court will not listen to an application by a debenture holder so represented. If the dissatisfied person considers that the applicant does not properly represent him, he should apply to be added as a defendant. *Watson* v. *Cave* (*No.* 1), 17 Ch. D. 19.

In such an action a defendant may be added without the plaintiff's consent. *Wilson* v. *Church*, 9 Ch. D. 552.

All the parties interested in the equity of redemption must be parties or represented, and accordingly if the plaintiff sues on behalf of the first debentures, and there are second debentures of the company outstanding, the holders of the second debentures must be made parties, or, if numerous, one of them on behalf of the class; and where a person is so sued on behalf of the class, this should appear on the writ. There will then be no necessity for a representation order; see *Cadogan, &c. Estate, Ltd.*, W. N. (1906) 112. If it does not appear that the person added as defendant is sued on behalf of the class, an order may be obtained appointing some person to represent the class. *Fraser* v. *Cooper, Hall & Co.*, 21 Ch. D. 718, *supra*, p. 531.

Joinder of parties is dealt with in R. S. C. Ord. XVI. as follows:—

**Persons claiming jointly, severally, or in the alternative may be plaintiffs.**

**Ord. XVI. r. 1.**—All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the Court or a judge in disposing of the costs shall otherwise direct.

**R. 2.**—Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just. Action in name of wrong plaintiff.

**R. 3.**—Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon. Counterclaim. Misjoinder.

**R. 4.**—All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment. All persons may be joined as defendants.

As to this rule and r. 6, see Part I., 15th ed., p. 1169 *et seq.*

**R. 5.**—It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest. Defendant need not be interested in *all* the relief claimed.

**R. 6.**—The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes. Joinder of persons severally, or jointly and severally liable.

**R. 7.**—Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties. Plaintiff in doubt as to person from whom redress is to be sought.

**R. 8.**—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. Trustees, executors, &c. may sue and be sued as representing estate.

This rule shall apply to trustees, executors and administrators, sued in proceedings to enforce a security by foreclosure or otherwise.

As to *cestuis que trustent* suing where their trustees refuse to sue, see Ann. Pr., notes to Ord. XVI. r. 8.

**R. 9.**—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 authorized by the Court or a judge to defend in such cause or matter on behalf or for the benefit of all persons so interested. Representation actions.

Applications to add a defendant are not uncommon, *e.g.*:—

(a) By the plaintiff for liberty to add some person as a defendant; for instance, a second debenture holder to represent the

second debenture holders, or the trustees of a debenture trust deed, or some person interested in the equity of redemption.

(b) By a debenture holder to be added as a defendant, *e.g.*, on the ground that plaintiff does not properly represent him. *Watson* v. *Cave* (*No.* 1), 17 Ch. D. 19.

A person may be appointed against his will to represent a class. *Wood* v. *McCarthy*, (1893) 1 Q. B. 775.

The rule says " may be authorized by the Court or the judge *to defend* " on behalf, &c.

Where a person is ordered or is authorized to defend on behalf of himself and others, he is not entitled to consent to judgment, but he may submit to judgment on behalf of himself and the persons he represents. *Rees* v. *Richmond*, 62 L. T. 427.

The class of persons sought to be represented must be defined in the writ with sufficient clearness. *Markt & Co.* v. *Knight, Ltd.*, (1910) 2 K. B. 1021.

See also *Duke of Bedford* v. *Ellis*, (1901) A. C. 8; and Ann. Pr., notes to Ord. XVI. r. 9.

Power to approve compromise in absence of some of the persons interested.

**R. 9a.**—Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts.

Absent and non-assenting persons may be bound under the rule, but not *dissentient* persons. *Collingham* v. *Sloper*, (1894) 3 Ch. 716; (1901) 1 Ch. 769.

Where some of the absent parties are unascertained, the Court may limit a time within which they must come in, or be held to have elected to rely on their rights independently of the scheme of compromise. *Saragossa & Mediterranean Ry. Co.* v. *Collingham*, (1904) A. C. 159, reversing on this point *Collingham* v. *Sloper*, *supra*; *Re Wigglesworth*, W. N. (1901) 172.

Misjoinder and non-joinder.

**R. 11.**—No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary

in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice. Striking out and adding parties.

See Ann. Pr., notes to rule.

**R. 12.**—Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner. Application to strike out.

Where a summons for directions has been taken out, application should be made under Ord. XXX. See Ann. Pr., notes to order.

**R. 13.**—Where a defendant is added or substituted the writ of summons shall be amended accordingly, and the plaintiff shall, unless otherwise ordered by the Court or a judge, file a copy of the writ as amended and serve the new defendant with such amended writ or notice in lieu of service thereof in the same manner as original defendants are served. And the proceedings shall be continued as if the new defendant had originally been made a defendant. Where defendant added.

As amended by R. S. C. (July), 1925.

**R. 36.**—Any one of several *cestuis que trust* under any deed or instrument entitled to a judgment or order for the execution of the trusts of the deed or instrument, may have the same without serving any other *cestui que trust*. *Cestui que trust.*

**R. 38.**—Any . . . trustee entitled thereto may have a judgment or order against any one . . . *cestui que trust* for the . . . execution of the trusts. Executor, administrator, trustee.

**Ord. XVII. r. 4.**—Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence. Order to carry on proceedings.

See Ann. Pr., notes to rule.

**R. 5.**—An order obtained as in the last preceding rule mentioned shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons. Service of order to continue action.

Solicitor of plaintiff to give notice of abatement.

**R. 9.**—Where any cause or matter becomes abated or in the case of any such change or interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the Cause-Book opposite to the name of such cause or matter.

Bankruptcy.

Where the plaintiff sues as a debenture or debenture stock holder in his own right and then becomes bankrupt, his trustees in bankruptcy should obtain an order under Ord. XVII. r. 4, *supra*. *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; *Wolff* v. *Van Boolen*, 94 L. T. 502. If the plaintiff is only a trustee of the debentures or debenture stock the new trustees should be substituted.

Death.

So also if the plaintiff dies and the cause of action passes to his representatives, they should obtain an order under Ord. XVII. r. 4; and even before probate the executors of a deceased plaintiff may as such be appointed to represent the deceased's estate. *Scott* v. *Streatham, &c. Co.*, W. N. (1891) 153; *Aylward* v. *Lewis*, (1891) 2 Ch. 81.

**Form 202.**

Order to revive when plaintiff dead.

Upon the peton of E. S., of ——, widow, it was alleged that this action was commenced on the 6th May, 19—, by the late plt, W. S., on behalf of himself and all other the holders of mortgage debentures of the dft coy for an account of what was due and owing to the plt and others the holders of mortgage debentures of the sd coy, and to have the sd debentures enforced by foreclosure and sale and for the appointment of a receiver and manager; and that the statement of claim was delivered on the 15th June, 19—; and that the dfts, C. and S., delivered their defence the 17th November, 19—; and that no defence has been put in by the other dfts; and that the action has not been entered for trial, but the accounts of the respive receivers have been passed. That the plt, W. S., died on the 5th May, 1895; and that on the 1st July, 1895, letters of administration of the estate of the late plt, W. S., were granted to the petr, E. S., widow, whereby she became and is now the legal personal representative of the sd late plt, W. S., and the action having become defective as afsd, it was prayed and it is ordered that the proceedings in this action be carried on and prosecuted by the petr as such legal personal representative as plt against the dfts. *Strapp* v. *Bull*, Vaughan Williams, J., 9th July, 1895.

After such an order the title of the action was altered as to plaintiff thus:—"William Strapp, now deceased, and Elizabeth Strapp (added, by order dated 9 July, 1895) —— Plaintiffs."

**Form 203.**

Order on bankruptcy of a defendant.

Upon the peton of the plts this day referred unto this Ct, it was alleged that this is a debenture holders' action, that on the 3rd August, 1898, an order on further conson was made, that the dft B. G. L. was

**Form 203.**

adjudicated a bankrupt on the 14th July, 1900, and F. W. is now the tree in bankruptcy of the ppty of the sd dft. It was therefore prayed, and it is accordingly ordered that the further proceedings in this action be carried on by the petrs as plts against the dft The Latigue Ry. Construction Coy, Limtd, and the sd F. W., under the official name of the tree of the ppty of B. G. L. the bankrupt, as dfts. *Munro* v. *Latigue Ry., &c. and others*, Buckley, J., 9th July, 1902.

**Form 204.**

Order substituting one of the defendants as plaintiff. [See Form 186, *supra*.]

Upon the applicon of the dfts, Lloyds Bank Limtd, by ——, &c., and upon hearing, and upon reading, &c., and the consent in writing of the dft, Lloyds Bank Limtd, to be added as plt to this action, &c., and the plts by their solors admitting that the amount due to the holders of the first mortgage debentures of the dft coy for principal and interest has been paid.

It is ordered that H. J. B., R. A. J. W. and O. M. B. (spinster), be dismissed from these proceedings and that the applicant, Lloyds Bank Limtd, be added and substituted in the place of the sd H. J. B., R. A. J. W. and O. M. B., as plts in this action.

*And it is ordered that all proceedings be discontinued against the* applicant as a dft without prejudice to any claim for costs incurred as *such dft.*

And it is ordered that the costs of the sd H. J. B., R. A. J. W. and O. M. B. as plts in this action, including therein any costs properly incurred in carrying this order into effect be taxed as between solor and client from the foot of the last taxation.

And it is ordered that the funds in Ct be dealt with as directed in the payment schedule hto.

SCHEDULE.

[*Here follow provisions for payment of taxed costs.*]

*John Brinsmead & Sons, Ltd., Brinsmead & Other* v. *The Company & Lloyds Bank Ltd.* Arthur Stiebel, Reg., 17th July, 1922.

The amended title of the action was as follows:—

In the matter of John Brinsmead & Sons, Limtd

and

In the matter of the trees of an indenture dated the 13th November, 1916, made between John Brinsmead & Sons (1916), Limtd, of the one pt and H. J. B. and R. A. J. W. of the other pt.

**Form 204.**

Between H. J. B., R. A. J. W. and O. M. B. (spinster) suing on behalf of herself and all other the holders of first mortgage debentures of the dft coy (dismissed by Order dated the 17th July, 1922), and Lloyds Bank, Limtd (added and substituted by the sd Order dated the 17th July, 1922) Plts.

and

John Brinsmead & Sons, Limtd, and Lloyds Bank Limtd (against whom all further proceedings have been discontinued by the sd Order dated the 17th July, 1922) ... Dfts.

**Form 205.**

Another.

Upon the applicon by summons dated the 8th May, 1911, of the dft P., and upon hearing the solors for the applicant, for the plts, &c., and upon reading the orders, &c., and the affts, &c., and the consent in writing dated this day of the sd P. to be substituted as plt in this action, and the certificate of the fund, and the sd G. and M., by their solors, admitting that all principal and interest has been pd pursuant to the sd order of the 5th May, 1911, it is ordered that the above-named G. and M. be dismissed from these proceedings, and that the applicant, the sd P., be added and substituted in the place of the sd G. and M. as plt in this action; and it is ordered that all further proceedings against the applicant as a dft be discontinued without prejudice to his claim for costs incurred as such dft, and that this action be continued, carried on, and prosecuted in the name of the sd P. in the place of the sd G. and M. as the plt in the sd action; and it is ordered that the costs of the sd G. and M. of this action, not already taxed or allowed or provided for, and including in such costs any costs reasonably and properly incurred by them after the date of this order, be taxed and pd out of the funds in Ct as directed in the payment schedule hto. *Gunn* v. *Piccadilly Hotel and others*, Neville, J., at Chambers, 20th June, 1911.

**Form 206.**

Summons to add applicants as defendants.

Let, &c. On the hearing of an applicon on the pt of —— and ——, trading as ——, holders of debentures issued by the above-named coy for an order that the above applicants may be added as dfts to this action on the ground that the plt has an interest adverse to them and to other debenture holders, and also that the conduct of the proceedings in this action, and of the order dated the —— of ——, may be committed to the applicants.

Let, &c.

**Form 207.**

Another, by executors of deceased defendant.

On hearing of an applicon on the pt of C., widow, and D., exors of the will of the dft A., that they may be added as dfts in this action, on behalf of themselves and all other holders of Second Mortgage Debentures in the dft coy, in the place of the late A., and that the costs of the applicon be costs in the action.

**Form 208.**

Order adding plaintiffs.

Upon the applicon, &c., Order that the U. Coy, Limtd, be added as plts in this action, and that the writ of summons in this action, and that the copy filed at the Central Office, and all subsequent proceedings be amended accordingly. *House and Land, &c.* v. *Brading Harbour Co.*, Vaughan Williams, J., 30th January, 1896.

Upon the applicon of the plt by ——, &c.

**Form 209.**

Order amending reference to plaintiff in title.

It is ordered that the writ and pleadings in this action be amended by striking out after the plt's name in the title the words "on behalf of himself and all other holders of mortgage debentures in the dft coy" and substituting therefor the words "sole holder of debentures in the dft coy" with all consequential amendments.

And the costs of the plt of the sd applicon are to be included in his costs of action. *Oowana Soap Co., Ltd., Maisel* v. *The Company.* Arthur Stiebel, Reg., 23rd April, 1920.

**Form 210.**

Order to add applicant as defendant.

Upon the applicon by summons dated the 7th March, 1896, of P., and upon hearing solors for the applicant, for the plt, and for the dfts, and upon reading the affit of P. filed, &c., It is ordered that the applicant P. be added as a dft to this action, he by his solor undertaking to abide by any order this Ct may make with reference to the additional costs, if any, of the attending parties or any of them caused by the joinder of the applicant as a dft. *Rosher* v. *Rosher & Co.*, V. Williams, J., April, 1896.

**Form 211.**

Order to add defendants and appoint them to represent second debenture holders.

Upon the applicon by summons dated the 17th November, 1892, of C. & S., trading as, &c., holders of second debentures issued by the above-named dft coy, and upon hearing the solors for the applicants, for the plts and for the dfts, and upon reading the writ of summons, &c. It is ordered that the sd C. and S. be added as dfts in this action, and that they do represent therein all holders of second debentures issued to unsecured creditors in pursuance of the order made in the matter of the Cos Acts and of Joseph Bull, Sons &

**Form 211.** Coy, Limtd, and dated the 1st June, 1892. And it is ordered that the plt do within seven days amend the writ of summons in this action, and the copy thof filed at the Central Office and all subsequent proceedings by adding the sd C. and S. as dfts, and the costs of and consequent on this applicon are reserved. *Strapp* v. *Bull & Co., Ltd.*, Vaughan Williams, J., 21st November, 1892.

**Form 212.**

Appointment of defendant to represent.

Upon the applicon of J., &c., It is ordered that the writ in each of the sd actions be on or before the —— of —— amended by adding the sd J. as a party dft to the sd consolidated actions, and the judge doth appoint the sd J. to represent all other holders of the debentures of dft coy who are opposed to the view of the plts and object to the appointment of a receiver and manager and [meeting of debenture holders directed]. *Howard* v. *Iron, &c., Co.*, Kekewich, J., 6th July, 1891. A. 685.

Where there is a class having adverse interests to the plaintiff, an order as above should be obtained. See *Fraser* v. *Cooper, Hall & Co.*, 21 Ch. D. 718; and Ann. Pr., notes to Ord. XVI. r. 9. See also *Fairfield, &c. Co.* v. *London, &c. Co.*, W. N. (1895) 64, that the record should bear the words "authorized by order dated —— to defend on behalf of himself and all others the debenture holders." Compare *Cadogan, &c. Estate, Ltd.*, W. N. (1906) 112.

**Form 213.**

Order adding holders of first debentures as defendants and appointing them to defend on behalf of their class.

Upon the applicon by summons dated the 6th June, 1895, R. H. W., of ——, and T. B. H., of ——, on behalf of themselves and all other the holders of the First Mortgage Debentures issued by the dft coy, and upon hearing the solors for the applicant, the plt and the dfts, and on reading the judgment dated the 2nd March, 1895, and an afft of D. filed, &c., It is ordered that the sd W. and H., they submitting to be bound by the sd order dated the 2nd March, 1895, in the same manner as if they had originally been made parties to the action, be added as dfts and be allowed to defend the sd action on behalf of themselves and all other the holders of the sd First Mortgage Debentures. *Davidson (on behalf, &c.)* v. *Davidson and Sons, Ltd.*, North, J., 12th June, 1895. A. 2272.

In the above case the plaintiff sued on behalf of the second debenture holders. To effectuate the realization of the assets it was considered expedient to make the first debenture holders by their representative parties to the action.

**Form 214.**

Judgment appointing R. to defend on behalf and usual inquiries, &c.

Upon motion for judgment in default of the dfts in delivering a defence this day made unto this Ct by counsel for the plt, and upon hearing counsel for plt and for the dfts, and upon reading plt's statement of claim having the certificate of the plt's solor indorsed thereon, showing that such statement of claim was delivered on the

9th May, 1896, and that neither of the sd dfts has delivered his statement of defence. This Ct doth order that the dft F. R. be at liberty to defend on behalf of himself and all other the holders of the series of Second Mortgage Debentures issued by the dft coy, and the sd dft F. R., on behalf of himself and all other the holders of the series of Second Mortgage Debentures, by his consent submitting to the judgment, This Ct doth declare *[declaration of charge and usual accounts and inquiries]*. *Rosher (on behalf, &c.)* v. *Romer*, 22nd June, 1896. **Form 214.**

The above is an instance of an order (not uncommon) appointing a representative at the hearing.

# CHAPTER LIII.

## CONDUCT OF ACTIONS.

CASES sometimes arise in which it is desirable to take away the conduct of the action from the plaintiff, *e.g.*, where he is not duly prosecuting the action, or where he has some conflicting interest. Thus in *Rhodesia Goldfields, Ltd.*, (1910) 1 Ch. 239, a debenture stockholder's action, the plaintiff was indebted to the company, and the conduct of the action was, after judgment, given to another debenture stockholder. In such cases another party interested, *e.g.*, a debenture or debenture stockholder, commonly applies to be made a defendant, and, having been added, then applies for the conduct of the action.

**Ord. XVI. r. 39.**—The Court or a judge may require any person to be made a party to any action or proceeding, *and may give the conduct of the action or proceeding to such person as he may think fit*, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Where the action is brought by the trustees of a covering deed the Court will be disposed to give the conduct to a defendant debenture holder, as the trustees are accounting parties. *Allen* v. *Norris*, W. N. (1884) 118; *Wicks* v. *Wicks*, W. N. (1887) 15.

Where two or more actions are consolidated the Court gives the conduct to one of the plaintiffs, usually the party who commenced the first of the actions. This rule applies to a case where one of the actions is transferred from an inferior Court, unless the actions are practically simultaneous, in which case the action commenced in the superior Court may be given priority. *The Mersey*, (1901) P. 369.

The question of conduct is within the discretion of the Court, and accordingly the Court of Appeal will not interfere with that discretion (*Dowbiggin* v. *Trotter*, 20 W. R. 1024), unless in special circumstances. (*Re Swire*, 21 C. D. 647.)

**Form 215.**

Summons by a defendant for conduct of action in place of plaintiff.

Let, &c., on the pt of the above-named dft A. that the future conduct of this action be committed to the sd dft in the place of the plt.

**Form 216.**

Affidavit in support.

I, ——, of ——, make oath and say as follows:—

1. I was by order, dated, &c. made a dft in this action.

2. I am the holder of —— First Mortgage Debentures of the dft coy, each for ——*l.*

3. The plt in this action is not only a holder of some of the First Mortgage Debentures of the dft coy, but he is largely interested as a member of the dft coy and holds —— shares therein of ——*l.* each. In the result he is not duly prosecuting this action and in particular, &c.

4. I am not a member of the coy and am only interested therein as a holder of the —— First Mortgage Debentures afsd, and I submit that the conduct of the action should be given to me.

**Form 217.**

Liberty to unsecured creditors to defend debenture action.

Upon applicon of H. & Co., unsecured creditors of the above-named coy, &c., Order that upon the applicants indemnifying W., the liqr of the dft coy, against all costs to be incurred by him or which he may become liable to pay by reason of this action being defended in the name of the sd coy, the amount and the form of such indemnity to be settled by the judge or by the Registrar (Cos Winding-up) in case the parties differ, the future conduct of the defence in this action, on behalf of the dft coy, be committed to the sd H. & Co., and order that applicants have ten days from the date of this order within which to deliver the statement of defence of dft coy, and order that applicants pay to the dfts, the coy, their costs of this applicon, such costs to be taxed, and order that applicants be at liberty to apply to be recouped the amount they shall pay out of the assets and subject-matter of this action, and the costs of plt and of the dfts B. and C. of this applicon are to be their costs in this action. *Waites (on behalf, &c.)* v. *Hemp Yarn, &c. Co.*, Vaughan Williams, J., 7th May, 1896.

For order for consolidating two actions and giving conduct to one of the plaintiffs, see Form 218.

For order giving to P. conduct of action, he having taken a transfer of the debentures of A. to whom the conduct of the action has previously been committed, see *Harline* v. *Hull Street Trams Co.*, Chitty, J., 2 May, 1892, A. 669.

For an order giving liberty to a purchaser of the plaintiff's debentures to conduct the action, see Form 307, *infra*, p. 645.

See also *Services Club Estate Syndicate*, (1930) 1 Ch. 78, where the company was a one-man company and the plaintiff was the holder of nearly all the shares and there were circumstances requiring investigation, and the Court gave the conduct of the action to an independent debenture holder who had been added as a defendant.

## CHAPTER LIV.

### CONSOLIDATION.

WHERE separate actions have been brought arising out of the same subject-matter and involving a common question of law or fact, application may be made to consolidate them. (R. S. C. Ord. XLIX. r. 8.)

An order to consolidate will usually be made in cases where the parties are the same, or where they could all have properly been joined in one action. See *Bailey* v. *Marchioness Curzon*, W. N. (1932) 143.

Where several persons claim relief by reason of the same transaction or series of transactions, and where if separate actions were brought any common question of law or fact would arise, they may all join as plaintiffs in one action (Ord. XVI. r. 1), and where a right to relief is alleged to exist against several persons whether jointly, severally, or in the alternative, they may all be joined as defendants. (Ord. XVI. r. 4.)

Further parties may be added, where necessary, after an order for consolidation. *Re Wortley*, 4 Ch. D. 180.

Where a consolidation order is made, the Court has a discretion and must give directions as to the future conduct of the action. See Forms 218 and 307. The application can be made by summons or motion.

As to set-off of costs, where actions are consolidated, see *Bake* v. *French*, (1907) 1 Ch. 428, and Ann. Pr., notes to Ord. LXV. r. 14.

Where several actions cannot properly be consolidated, an order is sometimes made that all the actions shall be set down so as to be heard either consecutively or all together.

**Form 218.**

Consolidation order.

Upon the applicon by summons dated ——, of the first above-mentd plt, and upon hearing counsel for the applicant and for the plt in the second above-mentd action and the solors for the dfts in both the above-mentd actions, and upon reading the writs of summons in both the above-mentd actions and an order dated ——, appointing receiver in the second above-mentd action, It is ordered that the above-mentd actions be consolidated and proceed as one action. And it is ordered that the conduct of the sd consolidated actions be committed to the plt J. in the first above-mentd action. *Alexander Timber Co., Ltd., Jardine (on behalf, &c.)* v. *Same*, Wright, J., 15th January, 1901.

(*Title both actions.*)

**Form 219.**

Another.

Upon the applicon of the plts by summons, &c., and upon hearing, &c., and upon reading the originating summons dated the 1st January, 1931, in the first-mentd action, &c., and the writ of summons dated the 17th April, 1931, issued in the second above-mentd action.

It is ordered that the above-mentd actions be consolidated and do proceed as one action. *Carlisle* (*Builders*), *Ltd.* v. *Hopkinson* (*Middlesex*), *Ltd. and Others* and *Same* v. *Same.* Arthur Stiebel, Reg., 11th May, 1931.

**Form 220.**

Order to stay one of two actions, costs of second action to be paid.

Upon the applicon of the plts in the first-mentd action by summons, dated, &c., and upon hearing the solors for the applicants, the plts in the second-mentd action, and for the dfts in both actions, and upon reading the writs of summons in both actions, the order dated, &c., made in both actions, and the consent in writing of F. T. B. and A. B., who with the plts in both actions are the debenture holders in the dft coy, It is ordered that all further proceedings in the second-mentd action of *Courthope* v. *Middleton's, &c.* be stayed. And it is ordered that E. W. and C. F. K., the receivers and managers appointed in the above-mentd action of the *Land Securities, &c.* v. *Middleton's, &c.*, do, without prejudice to the question how such costs are to be ultimately borne out of funds in their hands, pay the costs of the plts in the second-mentd action, such costs to be taxed by the taxing master, and the sd receivers and managers are to be allowed the amount thof in passing their accounts in the sd first-mentd action. And it is ordered that the dfts' costs of the second-mentd action are to be their costs without reduction. Stirling, J., 31st December, 1894, *Land Securities Co., &c.* v. *Middleton's, &c.*

# CHAPTER LV.

## CHANGE OF SOLICITORS.

**Disclosure of authority.**

**Ord. VII. r. 1.**—Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith in writing whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge.

**Change of solicitor by notice.**

**R. 2.**—A party suing or defending by a solicitor shall . . . be at liberty to change his solicitor in any cause or matter, without an order for that purpose, but unless and until notice of any change of solicitor is filed and copies of the notice are lodged and served . . . the former solicitor shall be considered the solicitor of the party until the final conclusion of the cause or matter, whether in the High Court or the Court of Appeal.

Rr. 3 and 4, which came into force on 1st April, 1932, make provision for the removal of a solicitor from the record at the instance of another party and for the withdrawal of a solicitor who has ceased to act for a party.

See further, Ann. Pr., notes to Ord. VII.

In a debenture holder's action, the managing director of the defendant company purported to appoint a solicitor to act for the company in the place of one appointed by the directors: Held, that he had no authority to do so, and the notice of change was taken off the file. *De Reuter* v. *Morris Process Co.*, 39 Sol. J. 399.

**Form 221.**

**Notice of change of solicitor.**

(*Title, &c.*)

Take notice that the undersigned A. B., of ——, has been appointed to act as solor of the above-named plt in the place of C. D. decd. The address for service of the sd A. B. is ——.

Dated this —— day of ——.

Yours faithfully,
A. B.

To the above-named dfts, and to
Messrs. ——, their solors.

(*Title, &c.*)

**Form 222.**

Another, where firm appointed with London agents.

Take notice that Messrs. ——, of ——, have been appointed to act as solors of the above-named plt in this action in the place of Messrs. ——, and that the undersigned ——, of ——, have been appointed to act as the London agents of the sd —— in this action, in the place of Messrs. ——. The address for service of the above-named is, &c., in the county of, &c.

Dated, &c.

Yours, &c., ——,
Agents for ——.

To the above-named dfts and to Messrs. ——, their solors.

(*Titles of Actions.*)

**Form 223.**

Another, by defendant company in two actions.

Take notice that Messrs. A. and B. have been appointed to act as the solors of the above-named dft coy in these actions, in the place of R. and C. in the first above-mentd action and in the place of M. in the second above-mentd action, and that the undersigned B. and B. have been appointed to act as the London agents of the sd A. and B. in the first-mentd action and in the place of M. in the second above-mentd action, in the place, &c.

The address for service of the above-named B. and B. is No. —, —— Street, London, E.C.

Dated, &c.

Yours, &c.,
B. and B.,

No. —, —— Street, London, E.C., agents to H. B., of C., solor to the dft coy and D., liqr thof.

To the above-named plts and their respive solors and the above-named dfts other than the dft coy and their respive solors.

## CHAPTER LVI.

### PLEADINGS.

NOT uncommonly in actions to enforce debentures or debenture stock, judgment is taken upon a motion for a receiver, which is treated by consent as a motion for judgment. There are then no pleadings. In other cases, except where the writ is specially indorsed under Ord. III. r. 6, or where the proceedings were commenced by originating summons, a statement of claim must be delivered with the writ or (in the Chancery Division) within twenty-one days after appearance. Where there is no appearance a statement of claim must be filed. See Ord. XX.

As to pleadings, see also Ord. XIX. and XXI.

It is sometimes necessary to amend the claim.

Ord. XX. r. 4 provides as follows:—

> Whenever a statement of claim is *delivered* the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ.

But this does not apply where the claim is *filed* (*Kingdon* v. *Kirk*, 37 Ch. D. 141), or the statement of claim is specially indorsed on the writ under Ord. III. r. 6. See further, Ann. Pr., notes to rule.

As to reply and subsequent pleadings, see Ord. XXIII. as altered by R. S. C. (No. 1) 1933 (which replaced the former rule requiring leave to deliver a reply), and notes thereto in Ann. Pr.

**Form 224.**

**Statement of claim in action by debenture holders to enforce security.**

In the High Ct. of Justice,
Chancery Division.
Mr. Justice ——.

In the Matter of A., B. and Coy, Limtd.

Between R. C. B. (on behalf of himself and all other holders of mortgage debentures of the dft coy) ... ... ... ... ... Plt,
and
A., B. and Coy, Limtd ... ... ... ... Dfts.

*Statement of Claim, delivered, &c.*

1. The dft coy (hnftr called "the coy") was incorporated in April, 1902, under the Cos Acts, 1862 to 1900, for the purposes, among other objects, of acquiring and working the business of the firm of A., B. and Coy, of ——, in the county of ——, slate merchants.

Form 224.

2. The objects of the coy as stated in the memdum of asson included power to borrow or raise money, and to secure the same by mortgage or charge upon all or any of the ppty and rights of the coy, or by the issue of debentures or debenture stock.

3. On or about the 3rd February, 1915, the coy borrowed and raised for the purposes of the coy a sum of 25,000*l.* by the issue of a series of mortgage debentures for that amount, which were duly registered in accordance with sect. 93 of the Cos (Consoln) Act, 1908.

4. The sd mortgage debentures were all in the same form for 100*l.* each, and by each such debenture the coy agreed to pay to the registered holder thof the principal thereby secured on the 1st February, 1942, and in the meantime to pay interest thereon at the rate of 6 p.c.p.a. by equal half-yearly payments, and the coy thereby charged with the payment of such principal and interest its undertaking, and all its ppty, both present and future, and each debenture was described as one of a series of debentures for securing the principal sum of 25,000*l.*, and was stated to be issued upon and subject to the conditions indorsed thereon.

5. By the conditions indorsed on each of the sd mortgage debentures it was, among other things, provided that the sd debentures should rank *pari passu* in point of charge on the ppty therein within mentd, and that the charge created by the debentures should be a floating security.

6. By the sd indorsed conditions, it was also provided that if the coy should make default for six calendar months in the payment of any interest thereby secured, the registered holder of such debenture might, at any time thereafter, before such interest was pd, by notice in writing to the coy, call in the principal moneys thereby secured, and that such principal moneys should immediately become payable.

7. The plt is (and has for upwards of —— months been) the registered holder of fifteen of the sd debentures, all dated the —— day of ——, for securing principal sums amounting in the aggregate to 1,500*l.*

8. The coy made default in payment of the half-year's interest due to the plt on his sd debentures on the —— of ——, and on the —— of ——, and the plt on the —— of —— duly served, at the registered office of the coy, a notice calling in the principal money secured by the sd fifteen debentures. The plt subsequently demanded payment of such principal money, but without success.

9. The whole of the sd principal money, together with interest thereon from the —th of ——, is still unpd and owing to the plt.

10. The coy is carrying on the business of ——, and it is necessary for the protection of the plt and the other debenture holders that a

**Form 224.** receiver and manager of the ppty and assets of the coy should be appointed.

The plt claims:—

(1) A declaration that the sd mortgage debentures constitute a [first] charge upon all the undertakings and ppty of the coy.

(2) An account of what is due to the plt and the other holders of the sd mortgage debentures for principal, interest and costs.

(3) That the sd mortgage debentures may be enforced by foreclosure or sale.

There are cases in which it may be well to claim payment. See p. 506, *supra*.

As to declaring a charge, see *Marwick* v. *Lord Thurlow*, (1895) 1 Ch. 776; *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493; *Crigglestone Coal Co.*, (1906) 1 Ch. 523. In the last case the declaration was made by Swinfen Eady, J. See also *Gregory, Love & Co.*, (1916) 1 Ch. 203, at p. 209. It is unusual now to press for a declaration of *first* charge unless there is some dispute as to priorities.

It is safer to ask in the writ and statement of claim for a declaration of a "*first charge*." This will entitle the plaintiff, as between himself and other defendants having charges who do not appear, to a declaration that his charge has priority to theirs. Such defendants are often added by amendment after settling claim, and the matter may then be overlooked.

(4) A receiver and manager of the ppty and business of the coy.

To such an action as this a defence is rarely put in. If the debentures are to be disputed, the line of defence must depend on the special facts. It may be that the debentures were issued in excess of the borrowing powers, or that they were obtained by fraud, or that they do not charge all the property, or there may be subsequent incumbrancers who ought to be made defendants.

If the company is in process of being compulsorily wound up in the High Court the action may be assigned to the winding-up judges. See note, *supra*, p. 530. As to the special words on the record, when a debenture holder is authorized to defend in a representative capacity, see *Fairfield, &c. Co.* v. *London, &c. Steamship Co.*, W. N. (1895) 64.

**Form 225.**

**Another, where trust deed.**

In the matter of the —— Coy, Limtd.

Between A. B., on behalf, &c. [*as in Form* 189] ... Plt,

and

The —— Coy, Limtd, and C. D. and E. F. ... Dfts.

*Statement of Claims, &c.*

1. The plt is the registered holder of, and beneficially entld to, debentures under the common seal of the dft coy for securing the payment of the principal sum of ——*l.*, and forming pt of a debenture loan borrowed by the sd coy in the year ——.

Form 225.

2. By each of the sd debentures it was declared that the sd coy [*here set out the material provisions*].

3. Upon each of the sd debentures there were indorsed divers conditions, and amongst others the following [*here set out such of the conditions as may be material, including the reference to the trust deed, with its date*].

4. The following are the short parlars of the indenture of the —— day of ——, 19—.

5. By the sd indenture, &c. [*set out the trust deed so far as may be necessary*].

6. The sd indenture was duly executed by the parties, and the dfts C. D. and E. F. are still the trees of such indenture.

Where the trust deed and debentures were executed after the 31st December 1900, state registration in accordance with sect. 93 of Companies (Consolidation) Act, 1908, or sect. 79 of the Companies Act, 1929. See p. 186, *supra*.

7. The sd debentures and trust deed were duly registered in compliance with sect. 79 of the Cos Act, 1929.

8. On the —— day of —— an extraordinary resolution of the sd coy was passed to the effect that it had been proved to the satisfaction of the coy that the coy could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same, and accordingly that the sd coy should be wound up voluntarily, and N. was thereupon duly appointed liqr of the sd coy for the purposes of such winding-up.

9. By an order in this action, made the —— day of ——, the sd N. was appointed the receiver and manager of the undertaking and ppty of the sd coy.

10. Besides the debentures issued to the plt as afsd, divers other debentures, forming pt of the same loan, have been issued by the sd coy, and the holders of such debentures are numerous.

11. The plt sues on behalf of himself and all others the holders of the debentures issued by the sd coy.

The plt claims:—

(1) A declaration that the plt and the other holders of the debentures of the sd coy are entld to a first charge on all the ppty to which the sd coy was entld at the commencement of the winding-up thof, for securing the principal and interest in the debentures mentd;

(2) That the trusts of the sd indenture may be carried into execution under the order and direction of the Ct;

(3) That an account may be taken of what is due to the plt and the other holders of the sd debentures in respect thof;

**Form 225.**

(4) That the charge contained in the sd debentures may be enforced by sale or otherwise;

(5) That the sd —— may be continued as receiver and manager of the assets and undertaking of the sd coy.

It may be that the trust deed in effect qualifies or suspends the plaintiff's right to sue, or that a meeting of debenture holders has been held pursuant to the provisions of the deed, and has deprived the plaintiff of his cause of action. The trustees usually submit to act as the Court may direct. They may, however, submit that no action is necessary, and that all that is required could have been obtained by an originating summons.

**Form 226.**

Another form, where a dispute as to priorities.

[*Title as in Form* 225, *the action being assigned to the winding-up judge.*]

1. The above-named dft, the —— Coy, Limtd (hnftr referred to as "the coy"), is a coy limtd by shares, and duly registered under the provisions of the Cos Acts [1862 to 1893].

2. On the 9th December, 1906, the coy, under the power in that behalf contained in its arts of assn, duly issued to the dft H., in pt payment for certain ppty sold by him to the coy, fifty debentures of the coy of 100*l.* each, making together the sum of 5,000*l.*

3. Each of the sd debentures was dated, &c., and was under the seal of and duly executed by the coy, and was in the following form, namely, &c., &c. [*state registration*].

4. The sd debentures were numbered consecutively 1 to 50. No other debentures have been issued by the coy.

5. By way of further security for the sd fifty sums of 100*l.* each secured by the sd debentures, and the interest thereon, an indenture dated the same 9th December, 1906, was duly made and executed by and between the dft H. of the first pt, the coy of the second pt, and the dfts J. and M. of the third pt, whereby certain freehold hereditaments, &c. were conveyed unto and to the use of the defendants J. and M. in fee simple, upon trust to secure the due payment of the sd fifty several sums of 100*l.* each and interest secured by the sd debentures, and subject thereto upon trust for the coy. [*State registration.*]

6. The royalties and premises comprised in the sd indenture were not comprised in the mortgage to E. W. in the sd debentures referred to.

7. The coy was on the same 9th December, 1906, entld to considerable real and personal ppty, including certain ironworks, collieries, and mines, and the machinery and plant therein. The greater portion of the sd ppty still belongs to the coy.

Form 226.

8. The coy has also, since the sd 9th December, 1906, acquired other considerable real and personal ppty, and it is now entld thto.

9. The mortgage to E. W. referred to in the sd debentures is still subsisting. It only affects a portion of the ppty to which the coy was entld at the date of the issue of the sd debentures.

10. The dfts other than the coy and dft M. were at the time of the issue of the sd debentures, and had been for some time previously thto, the directors of the coy, and the dfts —— and ——, &c., are now still its directors. The dft J. was also at the time of the issue of the sd debentures, and had been for some time previously thto, the solor of the coy.

11. At the time of and previously to the issue of the sd debentures the coy, and also the dft directors, represented to the dft H. that the sd mortgage to the sd E. W. was the only incumbrance so charged upon the coy's ppty, and it was on the footing of this representation that the dft H. accepted the sd debentures as the conson for his ppty. The dft directors, however, now allege that previously to the issue of the sd debentures the coy had mortgaged its ppty to the dft directors or to a tree or trees for their benefit for considerable amounts. The plt does not admit that any such mortgage was ever executed, but even if it was so executed the same ought to be postponed to the sd debentures and to the principal and interest thereby secured, inasmuch as the dft directors concealed the existence thof from the dft H. and induced him to believe that no such mortgage or mortgages had been executed.

12. [Transfer of some of H.'s debentures to plt.]

13. The dft H. has assigned to several other persons others of the sd debentures, but is himself still entld to a portion thof.

14. On the —th ——, 19—, it was ordered that the coy should be wound up by the Ct under the provisions of the Cos Act, 1929, and C. D. has since been duly appointed liqr thof. Leave to bring this action has been duly obtained in the matter of the sd winding-up.

15. No interest has been pd on the sd debentures issued by the coy as afsd since the —— day ——. The whole of the interest since that date on the sd debentures, numbered 41 to 50 inclusive, as well as the principal sums thereby secured, is now due and owing to the plt.

16. The plt submits that the sd debentures and the principal and interest thereby secured constitutes a first charge on all the real and personal ppty of the coy, whether the same belonged to the coy on the sd 9th December, 1906, or has been acquired by the coy since that date, subject only as to such pt thof as is affected thereby to the sd mortgage to the sd E. W., dated, &c., and in priority to any alleged mortgage or mortgages executed by the coy in favour of the dft

**Form 226.**

directors, and that a receiver of such real and personal ppty ought to be appointed, and that the trusts of the sd indenture of the 9th December, 1906, ought to be carried into execution.

The plt claims:—

(1) To have a declaration that the sd fifty debentures of the 9th December, 1906, constitute a first charge upon all the real and personal ppty of the coy, subject only as to such pt thof as is comprised therein to the sd mortgage, dated, &c., to the sd E. W., and that the sd debentures are entld to priority over any mortgage or mortgages, whether prior or not to the 9th December, 1906, executed or alleged to have been executed in favour of the dft directors, or any of them.

(2) To have an account taken of what is due and owing to the plt, and to the other holders of the sd debentures, for principal, interest and costs, including the costs of this action.

(3) To have the trusts of the sd indenture of the 9th December, 1906, carried into execution under the direction of the Ct.

(4) That the coy be ordered to pay to the plt and to the other holders and persons entld to the sd debentures by a short date the amount found due to them resply on taking the sd account, and that in default of such payment the coy may be foreclosed of and from all equity of redemption in the sd premises comprised in the sd debentures, or in the sd indenture of the 9th December, 1906, or that the sd premises may be sold and the proceeds thof applied in payment of the sd account.

(5) To have a receiver appointed of the real and personal ppty of the coy, and a manager of its business.

(6) [Further and other relief.]

**Form 227.**

**Defence by defendant trustees in a debenture stockholders' action putting plaintiff to proof.**

DEFENCE OF THE ABOVE-NAMED DFTS, A. AND B.

1. These dfts will refer to the memdum and arts of asson of the dft coy (The X. Coy, Limtd) when produced.

2. These dfts will also refer to the debenture trust deed dated the 15th February, 1898, when produced. They do not know the exact amount of the plt F.'s holding of debenture stock issued under that deed.

3. These dfts do not admit that the resolution of the dft coy in para. 10 of the statement of claim referred to was passed as alleged, and that 100,000*l.* B Debenture Stock was issued as alleged and will refer to the debenture trust deed dated 31st August, 1900, when produced.

**Form 227.**

4. These dfts admit that of the sd 100,000*l.* B Debenture Stock, 56,000*l.* was issued to the public and the remaining 44,000*l.* to the dft (The —— Bank, Limtd); but save as afsd they have no information as to, and do not admit, any of the allegations in para. 16 of the statement of claim. They do not know whether the figures in para. 17 are correct.

5. These dfts have no definite information as to, and therefore do not admit, any of the allegations in paras. 18, 19 and 20 of the statement of claim, save and except that they are informed and believe that on the 13th February, 1892, an order was made by the High Ct of Justice for a compulsory winding-up of the dft coy.

6. These dfts submit to act in all respects as this Ct may direct.

For the following case, see *Nelson* v. *Faber*, (1903) 2 K. B. 367.

*Defence and Counterclaim.*

**Form 228.**

Defence and counterclaim by debenture holder (set-off).

1. The dfts admit that the plts sold and delivered to them, between the 1st July, 1900, and the 1st October, 1901, goods to the amount of 27,826*l.* 10*s.* 1*d.*, as in the statement of claim alleged.

2. The dfts admit and allege that they have pd to the plt 24,900*l.* in cash on account of the sd indebtedness, and that they (the dfts) are entld to credit for a further sum of 38*l.* 19*s.* 6*d.*, making 24,938*l.* 19*s.* 6*d.* as in the statement of claim alleged, but they wholly deny that the sd 24,938 19*s.* 6*d.* comprises all the credits to which they are entld.

3. For the reasons and under the circumstances hnftr appearing the dfts deny that on the sd 1st October, 1901, being the latest date in the statement of claim mentd, or at the date of writ issued, or at any date material hto they were or are now indebted to the plts in the alleged balance of 2,887*l.* 10*s.* 7*d.* or any pt thof or any sum of money whatsoever. On the contrary on all the sd dates (as hnftr appears) the plts were and they still are largely indebted on bills to the dfts.

4. On or about the 14th May, 1900, the dfts became, and they ever since have been, and still are, the holders of the three debentures of the plt coy numbered 1, 2 and 3 resply, each bearing date as afsd and duly issued and sealed and delivered to the dfts in their afsd trading name of F. & Co., whereby the plt covenanted (*inter alia*) to pay to the dfts the following respive sums at the respive dates:—

| Number of Debenture. | Amount Covenanted to be paid. | Date of Payment. |
|---|---|---|
| 1 ..... | 1,500*l.* ..... | 1st October, 1900. |
| 2 ..... | 1,500*l.* ..... | 1st October, 1901. |
| 3 ..... | 3,000*l.* ..... | 1st October, 1902. |

Form 228.] 5. The plts did not on the sd 1st October, 1900, pay, and they never have pd, to the dfts any pt of the 1,500*l.* payable as afsd under the covenant contained in the sd No. 1 debenture.

6. The plts did not on the sd 1st October, 1901, or on the sd 1st October, 1902, resply, pay, and they never have pd, to the dfts any pt of either of the two sums of 1,500*l.* and 3,000*l.* payable as afsd under the covenants contained in the sd Nos. 2 and 3 resply.

7. The dfts submit that they are entld to interest on the sd 3,000*l.* at the rate of 5 p.c.p.a., such interest in the case of the sd No. 1 debenture for the two years from the sd 1st October, 1900, to the 1st October, 1902, amounts to 150*l.*, and in the case of the sd Nos. 2 and 3 debentures for the one year from the 1st October, 1901, to the 1st October, 1902, 225*l.* or 375*l.* in all. The plts have not pd any pt of the sd 375*l.* or any interest whatsoever, or any of the three sums covenanted to be pd as afsd by the sd three debentures resply.

8. The sd sums of 1,500*l.*, 1,500*l.*, 3,000*l.* and 375*l.* amount to 6,375*l.* in all, whereof the dfts claim the right to set-off 2,887*l.* 10*s.* 7*d.* against the amount of the claim herein, leaving the residue thof, or 3,487*l.* 9*s.* 5*d.*, to form the subject of their counterclaim. And by way of such COUNTERCLAIM the dfts say as follows:—

9. They repeat the defence, and they claim against the plts—

(1) The sd balance of 3,487*l.* 9*s.* 5*d.*

(2) Interest at the rate of 5 p.c.p.a. on 6,000*l.*, the total amount of the sd three debentures from the sd 1st October, 1902, until payment of judgment.

A. B.

Delivered, &c.

### DEFENCES.

In an action to enforce debentures or debenture stock a defence is rarely put in. Occasionally, however, cases arise in which the company is able to raise a defence, and the following are defences which are sometimes available:—

1. That the debenture or debenture stock certificate is a forgery, and that plaintiff is not entitled to relief.
2. That the issue of the debentures or debenture stock was *ultra vires* the company.
3. That the issue of the debentures or debenture stock was *ultra vires* the directors of the company.
4. That the issue of the debentures or debenture stock was obtained by fraud or misrepresentation.
5. That there was an irregularity in the issue of the debentures or debenture stock of which the plaintiff was aware.
6. That the plaintiff has been paid off or satisfied.
7. That the plaintiff is not the party entitled to sue, *e.g.*, the transfer under which he claims is a forgery, and that he was registered by a mistake.

8. That the plaintiff's right to sue has been taken away or suspended by an arrangement sanctioned by the Court under sect. 153 of the Companies Act, 1929, or operating under sect. 251 of the Companies Act, 1929. **Form 226.**
9. That the company is being wound up by or under the supervision of the Court, and that no leave to bring or proceed with the action has been obtained. [This objection, however, will probably be taken, not by pleading, but by an application to stay proceedings.]
10. That the plaintiff's right to sue has been taken away or suspended by an arrangement or compromise sanctioned by the requisite majority of the debenture or debenture stock holders under the provisions of the trust deed or debenture.
11. That the company has a set-off or counterclaim against the plaintiff. *Christie* v. *Taunton, Delmard & Co.*, (1893) 2 Ch. 175, *supra*, p. 25, and *infra*, pp. 577, 578 and 654.
12. That the debentures have not been registered under sect. 79 of the Companies Act, 1929.

### As to Set-off and Counterclaim.

Prior to the Judicature Acts, 1873 and 1875, the right of set-off was limited. No doubt under sect. 5 of 2 Geo. 2, c. 22, the right of set-off was given where there were mutual debts between the plaintiff and the defendant, and by sect. 5 of 8 Geo. 2, c. 24, this was extended so as to apply, although such debts might be of a different nature; but the decisions put rather a strict construction on the enactments. It was held that a set-off could only be of a liquidated sum, and not unliquidated damages (*Morley* v. *Inglis*, 5 Scott, 314; *Thomson* v. *Redman*, 11 M. & W. 487; *Grant* v. *Royal Exchange*, 5 M. & S. 439); and only of a sum due and in arrear when action brought (*Dendy* v. *Powell*, 3 M. & W. 442; *Richards* v. *James*, 2 Ex. 471); and that the debts must be due in the same right (*Grant* v. *Royal Exchange, supra*; *Gordon* v. *Ellis*, 2 C. B. 821; *France* v. *White*, 8 Scott, 257). Hence a defendant sued by several could not set off a debt due to him from one of the plaintiffs (*Middleton* v. *Pollock*, 20 Eq. 515; *Bowyear* v. *Pawson*, 6 Q. B. D. 540); and although the rights of set-off thus conferred by statutes were supplemented by equity that did not go very far, though it enabled an equitable debt to be set off against a legal debt as well as an equitable debt. *Cavendish* v. *Greaves*, 24 Beav. 163.

But under Ord. XIX. r. 3, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39, a defendant may set off or set up by way of counterclaim against the claim of the plaintiff any right or claim whether such set-off or counterclaim sounds in damages or not, subject only to the power of the Court or a judge on the application of the plaintiff before trial to refuse permission to the defendant to avail himself of such set-off or counterclaim if in the opinion of the Court or judge it could not be conveniently disposed of in the pending

action or ought not to be allowed. Thus the widest door is now open for defence by way of set-off or counterclaim in an action. See Ann. Pr., notes to Ord. XIX. r. 3.

Where a defendant has a cross claim which under the old law could be pleaded as a set-off, it is usually pleaded as such, and then the counterclaim goes on to claim the balance, if any; but a defendant is not bound to plead part of his claim as a set-off, he may prefer to counterclaim for the full amount (*Huggons* v. *Tweed*, 10 Ch. D. 359), and where a cross claim is not for a liquidated sum or for other reasons cannot be pleaded as a set-off under the old practice the defendant should counterclaim for the amount. The counterclaim need not be related or analogous to or connected with the original claim. *Beddall* v. *Maitland*, 17 Ch. D. 174; *Stooke* v. *Taylor*, 5 Q. B. D. 576; *Atwood* v. *Miller*, W. N. (1876) 11. And it matters not how large the defendant's claim is (*Winterfield* v. *Bradnum*, 3 Q. B. D. 324); but if the plaintiff sues in his own right the defendant cannot counterclaim against him as trustee or *vice versâ*. *Macdonald* v. *Carington*, 4 C. P. D. 28; *Stumore* v. *Campbell & Co.*, (1892) 1 Q. B. 314. Where, however, the plaintiff sues as trustee for A., the defendant can set off a debt due to him from A. *Bankes* v. *Jervis*, (1903) 1 K. B. 549.

*Huggons* v. *Tweed*, 10 Ch. D. 359, is a good instance of set-off and counterclaim. In that case the plaintiff's were the executors of M., a holder of debentures of the defendant company for 2,000*l.*, and they claimed to have the trusts of a covering deed carried into effect. The defendant company alleged that more than 2,000*l.* was due to them in respect of illegitimate profits pocketed by M. as a promoter of the company and claimed a set-off, and also counterclaimed for the balance of such profits. The plaintiffs sought to have the counterclaim excluded, on the ground that it could not be conveniently disposed of in the action, and ought to be disallowed; but the Court refused the application. "The defence," said Jessel, M. R., "set up by the company is, 'Your testator was a promoter and director of the company, and in that capacity he sold property to the company at a profit, concealing the fact that he was one of the owners, and he received as his share of the profit the sum of 2,600*l.*, which ought to be set off against his claim upon the company.' The case thus set up is one of an act wrongful indeed, but which does not give a mere claim for damages arising from a tort, but creates an equitable debt, and I cannot see any reason why the Court should say that it is not to be allowed to be set up in the action . . . The case raised by the counterclaim is the same as that raised by the defence, and I think it right that the company should be allowed to bring it forward by way of counterclaim."

Set-off by debenture holder.

Where a holder of debentures of a series, containing a *pari passu* clause, owes money to the company, he cannot on a distribution of the

proceeds of sale of the company's assets, set off his debt against the amount due to him on his debentures. The principle to be applied is that where a person entitled to participate in a fund (viz., the proceeds of sale) is also bound to make a contribution (viz., his debt) in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute. *Cherry* v. *Boultbee*, 4 My. & Cr. 442; *Re Brown & Gregory, Ltd.*, (1904) 1 Ch. 627; and cf. *Peruvian Ry. Co.*, (1915) 2 Ch. 144; and *Re H. Wilkins & Elkington, Ltd.*, 32 T. L. R. 618. See, further, as to set-off by a debenture or debenture stock holder, pp. 654, 655, *infra*.

As to the provisions for dealing with inadmissible counterclaims, see Ann. Pr. note to Ord. XIX. r. 3.

### Reply and Subsequent Pleadings: Notice of Trial.

**Ord. XXIII.**, as altered by R. S. C., 1933, of 2nd and 28th June, is as follows:—

(1) Where the plaintiff desires to deliver a reply, he shall deliver it within seven days from the delivery of the defence.

(2) Where a counterclaim is pleaded, a reply thereto shall be subject to the Rules applicable to defences.

Close of pleadings on default.

**Ord. XXVII. r. 13.**—Where a pleading subsequent to a reply is not ordered, then, at the expiration of seven days from the delivery of the defence or reply (if any), or, where a pleading subsequent to the reply is ordered, and the party who has been ordered or given leave to deliver the same fails to do so within the period limited for that purpose, then at the expiration of the period so limited, the pleadings shall be deemed to be closed and material statements of fact in the pleadings last delivered shall be deemed to have been denied and put in issue; provided that this Rule shall not apply to a reply to a counterclaim and that, unless the plaintiff delivers a reply to a counterclaim, the statements of fact contained in such counterclaim shall, at the expiration of fourteen days from the delivery thereof, or of such time (if any) as may by order be allowed for delivery of a reply thereto, be deemed to be admitted, but the Court or a judge may at any subsequent time give leave to the plaintiff to deliver a reply.

Reply to counterclaim.

**Ord. XXI. r. 14.**—Any person [other than the plaintiff] named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

The reply is subject to the rules applicable to a defence. Ord. XXIII. r. 2, *supra*.

Notice of trial

Debenture actions do not often proceed to *trial*, using that word in its technical sense; but as occasionally such actions are *tried*, some of the rules applicable may be referred to.

The order made on the summons for directions will direct whether the matter is to be tried with a special jury or with a common jury or without a jury and also where the matter is to be tried, and the mode and place of trial so directed may be subsequently altered for

sufficient cause on a summons or a notice under the summons or order for directions issued by either party without any appeal from the former direction. See Ord. XXXVI. r. 1. Notice of trial may be given (a) in actions to which Ord. XXX. r. 1 applies, at any time after an order made on the summons for directions or after an order under Ord. XIV. giving directions as to the place and mode of trial, and (b) in other proceedings at any time after a reply has been delivered or after time for delivery of a reply has expired. Ord. XXXVI. r. 11.

Mode and place of trial.

**Ord. XXXVI. r. 1.**—The order made on the summons for directions in every cause or matter, and every order giving leave to defend under Ord. XIV., shall direct whether the cause or matter is to be tried with a special jury, or with a common jury, or without a jury (whether by a judge or otherwise), and shall also direct where the cause or matter is to be tried, but the mode and place of trial so directed may be subsequently altered for sufficient cause on a summons or a notice under the summons or order for directions issued by either party without any appeal from the former direction. If the mode or place of trial is so altered the cause or matter shall thereupon be transferred to the appropriate list.

There follows a proviso (added by R. S. C. (No. 3), 1933) as to the time at which an application may be made to have an action assigned to the King's Bench Division tried with a jury.

In the Chancery Division the usual place of trial is London, subject to any arrangements which may from time to time be made for special sittings in Liverpool and Manchester under Ord. XXXVI. r. 22c. The Master may, however, direct trial at the assizes of any action which can be there tried more conveniently than in London. In the Chancery Division the action is tried without a jury unless otherwise ordered. Ord. XXXVI. r. 3. As to ordering trial before a jury, see Ann. Pr., notes to Ord. XXXVI. r. 6.

Length of notice of trial.

**Ord. XXXVI. r. 14.**—Ten days' notice of trial shall be given, unless the party to whom it is given has consented, or is under terms or has been ordered to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a judge. Short notice of trial shall be four days' notice, unless otherwise ordered.

Notice of trial by defendant. Motion to dismiss for want of prosecution.

**Ord. XXXVI. r. 12** (as altered in July, 1903).—If the plaintiff does not within six weeks after the time when he first becomes entitled to give notice of trial under [r. 11 of the same Order, *supra*] or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or judge to dismiss the action for want of prosecution; and on the hearing of such application,

Entry of trial.

the Court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or judge may seem just.

**R. 15.**—Notice of trial shall be given before entering the trial; and the trial may be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given.

**R. 16.**—In London and Middlesex, Manchester and Liverpool, and such other places as the Lord Chancellor shall from time to time direct, unless within six days after notice of trial is given the trial shall be entered by one party or the other, the notice of trial shall be no longer in force. **Avoidance of notice of trial.**

See further, as to notice of and entry for trial, Ann. Pr., notes to Ord. XXXVI. r. 11 *et seq.*

As a rule debenture-actions come before the Court, not on notice of trial, but on motion, of which only two days' notice is required. See Chap. LI.

# CHAPTER LVII.

## APPOINTMENT OF RECEIVER AND MANAGER.

**Motion for receiver.**

IN all actions to enforce debentures or debenture stock one of the earliest steps is, very commonly, to apply for the appointment of a receiver, or of a receiver and manager.

### Direction as to Preferential Payments.

The judges of the Chancery Division on the 7th March, 1900 (Practice Note, W. N. (1900) 58), issued directions as follows:—

In all cases where a receiver is appointed in a debenture holders' action, a direction is to be inserted [in the order] that the receiver do forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture holders under "The Preferential Payments in Bankruptcy Amendment Act, 1897," and that the receiver be allowed all such payments in his accounts. Inquiry No. 6 in the common form of judgment in these actions is to be omitted in the future [viz., "an inquiry whether there are any, and if any what, debts of the company which have priority over the claims of the debenture holders under the Preferential, &c. Act, 1897"]. The undertaking given by the plaintiff in a debenture action, on the appointment of a receiver who is to act at once, is to be so framed as to extend to all liabilities which would be covered by the security when completed and not only to the receivers' receipts.

Sect. 107 of the Act of 1908 provided that the preferential debts were to be paid *forthwith* "out of any assets coming to the hands of the receiver . . . in priority to any claim . . . in respect of the debentures," while sect. 209 (3) provided that on a winding-up such debts were to be discharged forthwith "so far as the assets are sufficient to meet them" and "subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up." It was, however, held in *Glyncorrwg Colliery Co., Ltd.*, (1926) Ch. 951; that where there is no winding-up, the costs of realization and the remuneration of the receiver have priority over the claims of preferential creditors. The common form of order formerly provided that these preferential claims be paid "forthwith." But in 1929

the judges of the Chancery Division resolved as a consequence of *Re Glyncorrwg Co.* (*supra*) that the practice prevailing before 1900 should be resumed and that *in the order appointing a receiver* the *direction as to preferential debts* should be omitted. But that the *usual judgment in a debenture holder's action should contain an inquiry* as to preferential debts. See Form 232, *infra*.

The word "forthwith" is now omitted from sect. 78, which replaces sect. 107 of 1908.

Where receiver has been appointed under the debenture.

Where the receiver who has already been in possession under the debentures is appointed by the Court, the order should include a direction to him to include in the accounts to be brought in by him all his receipts, payments and liabilities as receiver in respect of his appointment by the debenture holder. Where another person is appointed by the Court, the order should reserve liberty to the retiring or superseded receiver to apply in the debenture-holders' action to have his accounts taken. Practice Note, W. N. (1932), 79.

As sect. 78 only applies to registered companies, it would appear that no direction for payments of such debts should be inserted in an order for the appointment of a receiver in the case of a statutory company.

A receiver who has paid rates due at the commencement of the winding up is entitled to be recouped by the liquidator out of the assets of the company available for the unsecured creditors, where the rates are properly payable as preferential payments. See *Mannesmann Tube Co.*, (1901) 2 Ch. 93.

The section does not apply to a fixed charge. *Lewis Merthyr Consolidated Collieries, Ltd.*, (1929) 1 Ch. 498.

**Form 229.**

Notice of motion for receiver [and manager].

(*Title, &c. See Forms* 182—190.)

Take notice that this Ct will be moved before his Lordship Mr. Justice ——, on ——day, the —— day of ——, at —— o'clock in the forenoon, or so soon thereafter as counsel can be heard, by counsel on the pt of the plt that ——, of ——, or some other fit and proper person, may be appointed receiver and manager on behalf of the plt and other debenture holders of the dft coy of the undertaking and ppty of the dft coy comprised in or subject to the charges created by the First Mortgage Debentures issued by the dft coy, and now held by the plt and the other sd debenture holders, and also to manage and work the business and undertaking of the coy with all usual directions and with liberty to act forthwith.

And take further notice that special leave to give this [short] notice for the day afsd (*if so, add* and to serve this notice of motion

**Form 229.**

with the writ of summons in this action] has been obtained from Mr. Justice ——.

Dated the —— day of ——.

To the dft coy.

Solors for the plt.

If there is a trust deed the form will require variation. The application must be supported by proper affidavit evidence, showing that the plaintiff is entitled to have a receiver [and manager] appointed. See *supra*, p. 503; and as to the fitness of the proposed appointee, see Form 231, *infra*. The usual practice is to appoint a specified person upon the hearing of the motion, and the whole practice of referring the matter to chambers is but rarely followed, for the reference to chambers causes a delay, which may defeat the very object of the motion, as well as expense.

**Form 230.**

**Affidavit in support of motion for receiver.**

(*Title*, &c.)

I, ——, of ——, make oath, &c.

1. The above-named coy (hnftr called "the coy") was incorporated on the ——, with a capital of ——*l.*, divided into —— shares of ——*l.* each.

2. The objects for which the coy was incorporated were ——, and other objects specified in the memdum of asson thof.

3. By clause —— of the memdum of asson of the coy (*set out power to borrow on security of debentures*).

A print of the memdum and arts of asson of the coy is now produced and shown to me marked ——.

4. In the month of —— the coy issued —— debentures each for securing ——*l.*, with interest thereon at the rate of —— p.c.p.a. Such debentures were all in like form. One of the sd debentures is now produced and shown to me marked ——. [Particulars of] the sd debentures were duly registered under sect. 79 of the Cos Act, 1929, on the ——, 19—.

5. By each debenture the coy covenanted (*set out the covenant to pay the principal and interest and the charge*).

6. By clause —— of each such debenture it was provided (*set out such of the events on which the debenture became payable as are material*).

7. I am the registered holder of —— of the sd debentures for securing principal sums amounting to ——*l.*

8. The coy made default in payment of the interest on the sd debentures which fell due on the —— (*set out further reasons for appointment of receiver, jeopardy, &c.*).

[9. On the ——, 19—, I caused to be served on the coy a notice in writing calling in the principal moneys secured by the sd

debentures. A true copy of such notice is now produced and shown to me marked ——.] **Form 230.**

[10. The coy has entered into many important contracts and it is essential that such contracts should be properly carried out, with a view to the sale of the business of the coy as a going concern.]

*This clause should be added if a manager is required.*

Sworn, &c.

(*Title, &c.*) **Form 231.**

Affidavit of receiver's fitness.

I, ——, of ——, make oath, &c.

1. I have for more than twenty years last past known and been well acquainted with D., of ——, chartered accountant, the person proposed to be appointed receiver and manager of the assets and business of the above-named coy.

2. The sd D. is a member of the firm of D. & Co., chartered accountants, and has been a member of such firm for many years. The sd D. is a person of respectability and integrity and of good credit, and in my judgment he is a fit and proper person to be appointed receiver and manager as afsd.

A misleading affidavit of fitness may be a ground for discharging the receiver. *Re Church Press, Ltd.*, W. N. (1917) 39.

**Form 232.**

Order appointing receiver and manager. Judgment by consent.

Upon motion this day made unto this Ct by counsel for the plt, and upon hearing counsel for the dft coy, and upon reading the writ of summons issued in this action on the —— of ——, 19—, an afft of ——, filed ——, 19— (*of fitness of receiver*), an afft of —— filed the —— of ——, and the exhibits A., B. and C. in the last-mentd afft referred to; And the plt by his counsel undertaking to be answerable for all sums which W. hnftr named shall receive *or become liable to pay*, until he shall have given security as hnftr directed, this Ct doth appoint W. of ——, chartered accountant, receiver on behalf of the plt and other holders of the sd mortgage debentures of the dft coy, of [all ppty whatsoever, whether present or future, *or as may be, following the words of the debenture*] [except uncalled capital] *or* [including its uncalled capital] comprised in or subject to the security created by the sd debentures, and to manage the business of the dft coy. And it is ordered that the sd W. do, on or before the —— day of ——, 19— [or forthwith], give security as such receiver and manager to the satisfaction of the judge. And it is ordered that the said W. do pass his accounts and pay any balances which might

**Form 232.**

be certified to be due from him as the judge shall direct. And it is ordered that the following accounts and inquiries be taken and made:—

1. An account of what is due to the plts as the holders of the mortgage debenture issued by the dft coy under or by virtue of such debenture.
2. An inquiry of what the ppty comprised in and specifically charged by the sd debenture consists and in whom the same is vested.
3. An inquiry of what the ppty comprised in and charged by way of floating charge only by the sd debenture consists and in whom the same is vested.
4. An inquiry what other incumbrances affect the ppty comprised in and charged by the sd debenture or any and what parts thof.
5. An inquiry whether there are any and if any what debts and liabilities of the dft coy which under sects. 78 and 264 of the Cos Act, 1929, or sect. 7 of the Workmen's Compensation Act, 1925, were payable out of the ppty comprised in or subject to the floating charge created by the sd debenture in priority to the moneys secured by the sd debenture.

And in case the sd W. shall not have given security as afsd within the time afsd, or within such further time as the judge shall allow, his appointment as such receiver and manager is on the expiration of such time to forthwith determine, and in any event he is not to act as such manager after the —— day of ——, 19—, without the leave of the judge.

As to uncalled capital, see pp. 698, 699, *post*.

See *Re Burradon and Coxlodge Coal Co.* W. N. (1929), 15. The learned judge in this case directed the master to answer inquiry No. 5 first if he could see his way to do so and to make an interim certificate, and that, if possible, the inquiry should be shortened by agreeing the workmen's compensation figures with representatives of the workmen.

This form of order can be made on motion if the company consents to judgment.

As to a declaration of charge, see *Marwick* v. *Lord Thurlow*, (1895) 1 Ch. 776; *Brinley* v. *Lynton Hotel Co.*, W. N. (1895) 53; *Sadler* v. *Worley*, (1894) 2 Ch. 170; *Re Crigglestone Coal Co.*, (1906) 1 Ch. 523.

**Form 233.**

Order on motion appointing receiver and manager (liberty to borrow).

Upon motion on the —— day of May, 19—, and this day made unto this Ct by counsel for the above dfts, and upon reading the writ of summons issued in this action, dated the 1st May, 19—, the afft of the plt filed, &c., and the order to wind up the dft coy, dated the 9th May, 19—, made in the matter, &c., and the plt by his counsel undertaking to be answerable for what L. M., the receiver and manager hnftr appointed, shall receive or become liable to pay as such receiver and manager until he shall have given security as hnftr directed, this Ct doth appoint the sd L. M. of ——, chartered accountant, receiver on the pt of the plt and all other, if any, the holders of the first mortgage debentures issued by the dft coy, the

Express Motor Cab Coy, Limtd, of all its undertaking, including the goodwill of its business and all its ppty and assets whatsoever and wheresoever, present and future, including its uncalled capital for the time being comprised in or subject to the security created by the sd first mortgage debentures and to manage the business and undertaking of the dft coy with liberty to the sd L. M. to act at once, but the sd L. M. is not to act as such manager after the 16th October, 19—, without the leave of the judge, And it is ordered that the sd L. M. do forthwith give security as such receiver and manager on or before the —— day of ——, 19—, to the satisfaction of the judge [*order to pay preferential debts, now omitted*], and it is ordered that the sd L. M. do, on the 19th November, and the 19th May in each year, leave and pass in the chambers of the Registrar of Cos Winding-up his accounts as such receiver and manager, the first of such accounts to be left on the 19th November, 19—, and it is ordered that the sd L. M. do within fourteen days after the date of the certificate of the result of every such account, or at such other times as shall be directed by such certificate, pay the balance which shall be thereby certified to be due to him, or such pt thof as shall be certified to be proper to be pd into Ct as directed in the lodgment schedule, and it is ordered that the sd L. M. be at liberty for the purpose of carrying on the business of the dft coy to borrow a sum not exceeding 500*l.* at a rate of interest not exceeding 6*l.* p.c.p.a. for the security of the undertaking, ppty and assets of the dft coy, such sum or sums when borrowed, together with the interest thereon, to rank in priority to the sd mortgage debentures. [Provision determining appointment if security not given, see p. 586.] *Swanston (on behalf)* v. *Express Motor Cab Co., Ltd., and Others.* Neville, J., 26th May, 1911. (Amended.) **Form 233.**

LODGMENT SCHEDULE.

In the High Ct of Justice, Chancery Division. [Date and Number.]

(*Short title.*)

Ledger Credit: as above.

| Particulars of Funds to be Lodged. | Person to make Lodgment. | Amount. | |
|---|---|---|---|
| | | Money. | Securities. |
| Balances to be from time to time certified to be due on passing the receiver's accounts or so much as shall be certified to be payable. | W. (receiver) | £ s. d. | £ s. d. |
| Invest and accumulate in New Consols amount paid in. | | | |

**Form 234.**

Order on motion appointing receiver and manager (security already given).

Upon motion on the 21st December, 19—, made unto this Ct (1) by counsel on behalf of the plt, and (2) by counsel on behalf of S. and K., the trees of the ppty of W. and P., who carried on business as —— bankrupts, and (3) of H., the liqr of the —— Coy, Limtd, and upon hearing counself for the dfts, and upon reading the writ issued in this action and dated the 8th January, 19—, the afft of, &c., this Ct doth order that the sd writ of summons in this action be amended by adding the names of the sd S. and the —— Coy, Limtd, as dfts in this action, and H., hnftr named, having given security to the satisfaction of the Ct by entering into the sd bond, appoint H. to be receiver on behalf of the plt and all other holders of first mortgage debentures issued by the dft Fraser, &c. Coy, entitled to the benefit of the indenture hnftr mentd of the undertaking and ppty of the sd coy comprised in or subject to the charges created by the first mortgage debentures issued by the sd dft coy, and also the ppty comprised in and subject to the trusts of the sd indenture dated, &c. and to manage the business and undertaking of the sd dft coy, but the sd H. is not to act as such manager as afsd for more than three months from the date of this order without leave of this Ct. [*Direction to pay preferential debts, now omitted.* See p. 583, *supra.*] And it is ordered that the dft coy do deliver over to the sd H., as such receiver, all cash and books, deeds, papers and documents relating to the sd ppty and assets comprised in the sd debentures and the sd trust deed, except such books, papers and documents as the off recr may require for the purpose of carrying out his statutory duties in the liquidation of the dft coy, but such books, papers and documents are to be produced to the sd H. as such receiver at any time on reasonable notice. And it is ordered that the sd receiver do, on the 1st January and the 1st July in each year, leave and pass in the chambers of the Registrar of Cos Winding-up his accounts of his receipts and payments as such receiver, the first of such accounts to be so left on the 1st June, 19—, and that he do, within the time fixed by the certificate of the sd registrar of the result of each such account, pay the balances appearing due on the accounts so left or much thof as shall be certified as proper to be pd by him into Ct, as directed in the lodgment schedule hto..

LODGMENT SCHEDULE.

Balance to be from time to time certified to be due on passing the receiver's accounts, or so much as shall be certified as proper to be lodged. *Horlick* v. *Fraser South Extended, &c. Co.* Warrington, J., 19th January, 1905. (Amended. See p. 582, *ante.*)

The direction to pay preferential debts forthwith will now be omitted. See p. 583, *supra.*

**Form 234.**

The appointment of a receiver may be obtained on motion, although there may be objections as to want of parties or the frame of the action. See *Evans* v. *Coventry*, 5 D. M. & G. 911; *Swale* v. *Swale*, 22 Beav. 584; *Re Johnson*, L 1 Ch. 325; *Hamp* v. *Robinson*, 3 D. J. & S. 109; *Crigglestone Coal Co.*, (1906) 1 Ch. 523.

**Form 235.**

Order to appoint a receiver and manager and for appointment of interim receiver.

Upon motion this day made unto this Ct by counsel for the plt, &c., this Ct doth order that a proper person be appointed receiver on behalf of the plt and the other holders of mortgage debentures of the dft coy of the undertaking, and all the ppty, both present and future, of the dft coy comprised in and subject to the debentures issued by the dft coy to the plt and other debenture holders, and also to manage the business of the dft coy comprised in the sd security, but such receiver and manager to be appointed is not to act as manager after the 25th October, 1897, without the leave of the judge in chambers, and it is ordered that the person to be so appointed receiver and manager do from time to time pass his account and pay his balances as the judge shall direct; and the sd W., having undertaken to be answerable for all moneys which shall come to the hands of N. in his capacity of interim receiver and manager as hnftr mentd, and having signed the registrar's book to that effect, accordingly this Ct doth hby appoint N., of ——, electrical engineer, interim receiver and manager until a receiver and manager shall be appointed under this order on behalf of the plt and all other holders of the mortgage debentures issued by the dft coy and all the ppty, &c., and to manage and carry on the business of the dft coy comprised in the sd security, and it is ordered that the dfts, the Epstein, &c. Coy, Limtd, do deliver over to the sd N., as such interim receiver and manager, all books, leases, deeds, papers, and documents relating to the sd ppty and assets, and it is ordered that the sd N. do pass his account and pay his balance as the judge shall direct. *Epstein, &c. Co., Wood* v. *Epstein, &c. Co.* Stirling, J., 30th July, 1897.

Where an order is made in general terms as above, it is still the practice for a summons to be taken out in chambers as follows, and an order obtained thereon, and not even before judgment for a receiver to be appointed on the summons for directions.

**Form 236.**

Summons to proceed.

Let, &c. on the pt of the plt to proceed on the order dated the —— day of ——, and that A., of ——, or some other fit and proper person may be appointed receiver and manager pursuant thto.

**Form 237.**

Order appointing receiver pursuant to order.

Upon applicon by summons dated the 25th August, 1897, of the plt, and upon hearing the solors for the plt and for the dfts, and upon reading the order dated the 30th April, 1897, and afft, &c., and the judge having approved of N., of ——, electrical engineer, as a fit and proper person to be appointed receiver and manager in this action, and the sd N. having given security as such receiver and manager by entering into his recognizances dated the 12th August, 1897, and also by entering into a bond together with the —— Coy, Limtd, as his sureties, and dated the 12th August, 1897, which such recognizance and bond having been approved by the vacation judge and duly enrolled, the judge doth hby appoint the sd N. receiver, on behalf of the plt and other holders of mortgage debentures of the dft coy, of the undertaking and all the ppty, both present and future, of the dft coy comprised in or subject to the debentures issued by the dft coy to the plt and other debenture holders, and also to manage the business of the dft coy comprised in the sd security, but he is not to act as manager after the 25th October, 1897, without the leave of the judge in chambers; and it is further ordered that the sd N. do on the 24th April, 1898, and on the same day in each succeeding year, leave in the chambers of the judge *his accounts as such receiver, and do within fourteen days* after the allowance of each such account [*or* at such other time as shall be provided for by such certificate] lodge in Ct the balance which shall be thereby certified to be due from him on such account, or so much thof as shall be certified to be so found into Ct, as directed by the lodgment schedule hto [the schedule as in Form 234]. *Re Epstein Co., Wood (on behalf)* v. *Epstein Co.*, Stirling, J., 24th August, 1897, and an order of Vaughan Williams, J., 21st May, 1896.

**Form 238.**

Interim appointment of receiver and manager.

Upon motion this day made unto this Ct by counsel for the plt, and upon reading the writ of summons issued this day, and the order to wind-up the dft coy dated the ——, 19—.

And the plts by their counsel undertaking to be answerable for what A. E. J. the receiver and manager hnftr appointed shall receive or become liable to pay until he shall have given security as hnftr directed.

This Ct doth order that A. E. J., of ——, in the City of London, chartered accountant, be and he is hby appointed until after the 25th November, 1932, receiver and manager on behalf of the plts of the undertaking and ppty of the dft coy in or subject to the charges created by the debenture dated the ——, issued by the dft coy and now held by the plt.

And it is ordered that the sd A. E. J. do give security as such receiver and manager to the satisfaction of the judge, and do pass his accounts

as such receiver and manager and pay the balances which may be certified to be due from him as the judge shall direct. **Form 238.**

Liberty to the plts to serve notice of motion for the ——, 19—, for the continuance of the receiver and manager together with the writ of summons. *Re George Lunn's Tours, Ltd.* (G. 2696 of 1932). Stiebel, Reg.

**Form 239.**

Order appointing receiver and manager.

Upon motion this day made unto this Ct by counsel for the plts, and upon hearing counsel for the dft, and upon reading the writ of summons issued in this action on the 21st November, 1932, the order dated the 21st November, 1932 (appointing interim receiver and manager (see *last form*)), the afft of F. H. W. filed the 22nd November, 1932, and the exhibits therein referred to and the afft of C. W. T. filed the 23rd November, 1932.

And the plts by their counsel undertaking to be answerable for what A. E. J. the receiver and manager hnftr appointed shall receive or become liable to pay until he shall have given security as hnftr directed.

This Ct doth hby appoint A. E. J., of ——, in the City of London, chartered accountant, receiver on behalf of the plts of all the undertaking and ppty of the dft coy comprised in or subject to the securities and charges created by the debenture dated the 26th July, 1932, issued by the dft coy and now held by the plts and to manage the undertaking and business of dft coy, but the sd A. E. J. is not to act as such manager after the 24th February, 1933, without the leave of the judge.

And it is ordered that the sd A. E. J. do on or before the 12th December, 1932, give security as such receiver and manager to the satisfaction of the judge, but in case he shall not have given security within the time afsd or within such further time as the Ct or judge shall allow his appointment as such receiver and manager shall on the expiration of such time forthwith cease and determine.

And it is ordered that the sd A. E. J. do pass his accounts as such receiver and manager, including therein all receipts, payments and liabilities as the receiver appointed by the plts, and pay the balance which may be certified to be due from him as the judge shall direct.

**Form 240.**

Another. Plaintiff appointed without remuneration.

Upon motion, &c. And the plt and the dfts by their counsel consenting to this order. This Ct doth order that the plt W. T. W. be appointed, on giving security, receiver and manager without remuneration on behalf of the plt and all other holders of mortgage debentures issued by the dft coy of the undertaking of the dft coy and all its ppty excluding uncalled and unpd capital comprised in the

**Form 240.** mortgage debentures issued by the dft coy. But the sd plt W. T. W. is not to act as such manager after the 1st March, 1921, without the leave of the judge in chambers. And it is ordered that the sd plt W. T. W. do forthwith, &c. (*as in Form* 233). And it is ordered that the sd plt W. T. W. do pass his accounts and pay any balances which may be certified to be due from him as the judge shall direct. *Re Rynes-Wilson, Ltd.*, 1920, R. 2164. Sargant, J., 30th November, 1920.

For order by consent appointing receivers and managers without security plaintiffs undertaking to supply funds not exceeding 15,000*l.* to carry on the business, see *Rodewald* v. *Wayne's, &c. Iron Works*, Malins, V.-C., 25th May, 1876, B. 1524.

For order appointing receiver and manager, "subject and without prejudice to the rights of any prior incumbrancers (if any), and also to manage and work the business of the defendant company," &c., see order of Chitty, J., *Pontifex* v. *Wood*, 30th October, 1888.

**Form 241.**

Clerk of company to be receiver and manager without security.

Upon motion, &c. Appoint H., of ——, the managing clerk of the dft coy, without his being required to give security, and at his present salary of 2*l* 5*s*. per week, to manage the real and personal ppty and business of the dft coy comprised in the indenture dated, &c., in the writ in this action mentd, and to receive the rents and profits and produce of the sd ppty and business until further order of this Ct: And order that the dfts, The —— Coy, T. and G. deliver over to the sd H., as such receiver, all securities in the hands of them or any of them, together with all books and papers relating to the real and personal ppty and business of the coy. [*Accounts. Payment. Investment. Accumulation.*] *Perry* [*on behalf of, &c.*] v. *Clutton Hall Coal Co.*, Malins, V.-C., 22nd June, 1876, B. 1698.

For order appointing chairman of directors of defendant company (without salary and without security) to be receiver and manager, and ordering the company's late solicitor to deliver over to him books and papers, see *Morrell* v. *Lodyna Petroleum Syndicate*, 5th March, 1892.

Where a receiver appointed out of Court is subsequently appointed by the Court, the order should direct accounts to contain receipts, payments and liabilities, as receiver appointed by debenture holders; or, if another person is appointed, give liberty to the first receiver to have his accounts taken in the action. (Practice Note, W. N. (1932) 79.)

# CHAPTER LVIII.

## RECEIVER'S SECURITY.

In a debenture action a receiver, or a receiver and manager, is usually appointed on motion soon after the commencement of the action, with liberty to act at once, the plaintiff by his counsel undertaking to be answerable for what such receiver and manager may receive under this order until he shall have given security as hereinafter directed; and the order then directs the receiver and manager to give security within (generally) twenty-one days. See Form 232, *supra*.

The following rules of R. S. C. Ord. IV. apply:—

**Ord. L. r. 16.**—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 to be allowed by the Court or a judge, 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. Such security shall be by guarantee in the Form No. 21, in Appendix L., unless the Court or a judge shall otherwise order.

**R. 16a.**—Where the amount for which security is to be given does not exceed 500*l*., such security may be given by an undertaking in the form specified in the appendix to these Rules, which may be cited as Form 21A of Appendix L. of the Rules of the Supreme Court. Such undertaking shall be signed by the receiver, and his surety or sureties, or in the case of a guarantee or other company, shall be sealed with the seal of such company or otherwise duly executed. The undertaking shall be filed in the Central Office, or where the proceedings are pending in a District Registry in such Registry, and kept as of record until the same shall have been duly vacated.

This rule was added by R. S. C. (July) 1911, r. 7.

**R. 17.**—Where any judgment or order is pronounced or made in Court appointing a person therein named to be receiver, the Court or a judge may adjourn to chambers the cause or matter then pending, in order that the person named as receiver may give security as in the last preceding rule mentioned, and may thereupon direct such judgment or order to be drawn up.

"Receiver" includes a manager appointed by or under an order of the Court. Ord. LXXI. r. 1.

It is now the usual practice to provide in the order that unless the security be completed within the time specified the appointment

shall lapse. See *Re Simms & Woods, Ltd.*, W. N. (1916) 223; and p. 505, *supra*.

In such cases the plaintiff should in due course take out a summons to proceed under the order dated, &c., and to settle the security to be given pursuant thereto. See Form 243.

This summons should be served on the other parties to the action, and should be supported by an affidavit as to the solvency of the surety. For form of affidavit, see Forms 245, 246, *infra*.

At the hearing of the summons the Master or Registrar in Companies Winding-up, as the case may be, will settle the security, usually a guarantee by the receiver in the prescribed form, R. S. C., Ord. L. r. 16, App. L., No. 21, with a bond by a guarantee society as surety; but sometimes the sureties are ordinary individuals. In either case evidence of the solvency has to be given by affidavit. Rule 16A, *supra*, now gives power, where the amount of the security does not exceed 500*l*., to provide it by way of a signed undertaking.

The Court may accept the security of a foreign company. *Aldrich* v. *British Griffin, &c. Co.*, (1904) 2 K. B. 850.

As to security to be given by Scotch guarantee companies, see Ann. Pr., notes to Ord. L. r. 16.

When security has been given the Master or registrar gives the usual certificate that security has been given. See Form 248.

Occasionally the order appoints a person therein named to be receiver *upon first* giving security, and adjourns the matter to chambers, as contemplated by Ord. L. r. 16, and the plantiff then takes out a summons to proceed, Form 243, and in due course a receiver is selected and gives security, and an order is drawn up reciting that the receiver has given security.

A receiver is not allowed to enter into any agreement with his sureties by which he minimises their risk by providing that the receivership funds shall be placed in joint names. The Court has a right to a security quite independent of the receivership, and not a security which is to be, as it were, worked out of the estate itself. *White* v. *Braugh*, 3 Cl. & Fin. 44, 59.

Unless the receiver is appointed without remuneration, he has to pay all expenses in finding security and pay the premiums himself, but if appointed without remuneration he is allowed, out of the assets, the amount of premium paid by him to a guarantee society. *Harris* v. *Sleep*, (1897) 2 Ch. 80. Ann. Pr., notes to Ord. L. r. 16.

Security may be dispensed with by consent of all parties, and the Court will sometimes of its own accord appoint an interim receiver without security in order to enable him to take possession at once. *Hyde* v. *Warden*, 1 Ex. D. 309; *Taylor* v. *Eckerley*, 2 Ch. D. 302. In debenture holders' actions the undertaking to be answerable for a

receiver's receipts must extend to all liabilities which would be covered by the security when completed. Practice Note, W. N. (1900) 58.

The liability of a receiver for moneys received by him does not depend on the perfecting of his title by giving security; both he and his surety must account for all moneys received and expended by the receiver, as such, whether before or after the giving of his security. *Smart* v. *Flood*, 49 L. T. 467.

The surety is liable for all sums of money which the receiver was liable to pay into Court or account for (*Re Graham*, (1895) 1 Ch. 66); but creditors for debts incurred by the receiver cannot claim against the surety. *British Power Co.*, (1910) 2 Ch. 470.

(*Title.*)

**Form 242.**

Undertaking as to security. See Ann. Pr. App. L. 21A.

I, —— of ——, in the county of ——, receiver and manager appointed by order, dated, &c. (*or* proposed to be appointed), in this action hby undertake with the Ct to duly account for all moneys and ppty received by me as such receiver and manager, and for which I may be held liable, and to pay the balances from time to time found due to me, and to deliver any ppty received by me as such receiver and manager at such times and in such manner in all respects as the Ct or the judge shall direct.

And we, ——, hby jointly and severally (in the case of a guarantee or other coy strike out "jointly and severally") undertake with the Ct to be answerable for any default by the sd —— as such receiver or manager, and upon such default to pay any person or persons or otherwise, as the Ct or judge shall direct, any sum or sums not exceeding in the whole ——*l.* that may from time to time be certified by a Master of the Supreme Ct to be due from the sd receiver, and we submit to the jurisdiction of the Ct in this action to determine any claim made under this undertaking.

Dated this —— day of ——.

(*Signatures of the receiver and his surety or sureties. In the case of a surety being a guarantee or other coy it must be sealed or otherwise duly executed.*)

Let, &c. (See Forms 171, 172.)

**Form 243.**

Summons to settle receiver's security.

On the hearing of an applicon on the pt of the plt to proceed on the order, dated the —— day of —— [and to settle the security to be given by——, the receiver [and manager] pursuant thto].

Where the order appoints the receiver out and out the words in brackets will stand; but if the order only directs the appointment of a receiver the words in brackets may be omitted.

**Form 244.** Receiver's guarantee. Ann. Pr. App. L. 21.

In the High Ct of Justice, ——19—. No. ——.
—— Division.

Title of Action. *Re* ——, —— *v.* ——.

Guarantee for ——*l.* Annual premium ——*l.*

This guarantee is made the —— day of——, 19—, between (receiver) —— of —— in the county of —— (hnftr called " the receiver ") of the first pt, the above-named ——, the registered office of which is at —— in the county of —— (hnftr called " the surety "), of the second pt and His Majesty King George VI. of the third pt.

Whereas by an order of the —— Division of the High Ct of Justice, dated the —— day of ——, 19—, and made in the above-mentd action the receiver has been appointed to receive (and manage) [*follow words of the order*]. And it was ordered that the receiver should give security to the satisfaction of the judge on or before the —— day of ——, 19—.

And whereas the surety has agreed at the request of the receiver to issue this guarantee in conson of the annual premium above mentd (the first payment of which the surety hby acknowledges) which guarantee has been accepted by the judge as a proper security pursuant to the sd order, in testimony whereof one of the Masters of the Supreme Ct (or a Registrar of the Cos Ct or a District Registrar) has signed an allowance in the margin hof.

Now this guarantee witnesses as follows:—

1. The receiver and the surety hby jointly and severally covenant with His Majesty the King and his successors that the receiver shall and will from time to time duly account for what he has already received since the date of the sd order appointing him and shall hnftr receive or for what since the date of the sd order appointing him he has or shall hnftr be or become liable to pay or account for as such receiver (and manager) as afsd including as well every sum of money or other ppty so received during the period for which he has been appointed as also every sum of money or other ppty so received in respect of any extended period for which he may be appointed and shall and will pay or deliver every such sum or ppty as the Ct or judge thof shall direct.

2. Provided always that it is hby mutually agreed as follows:—

(a) If the receiver shall not for every successive twelve months to be computed from the date of his appointment as such receiver as afsd or within fifteen days after the expiration of such twelve months pay at the office of the surety the annual premium or sum of ——*l.*, then the surety shall be at liberty to apply by summons at chambers in the sd action to be relieved from all further liability as such surety under this guarantee save and except in respect of any damage or loss occasioned by any act or default of the receiver in

relation to his duties as such receiver (and manager) prior to the hearing and determination of such summons. **Form 244.**

(b) A statement under the hand of any Master of the Supreme Ct (or of a Registrar of the Cos Ct or of a District Registrar) of the amount which the receiver is liable to pay and has not pd under this guarantee and that the loss or damage has been incurred through the act or default of the receiver shall be conclusive evidence in any action or information by His Majesty against the receiver and surety or either of them or by the surety against the receiver of the truth of the contents of such statement and shall constitute a binding charge not only against the receiver and his personal representatives but also against the surety and its funds and ppty without its being necessary for His Majesty to take any legal or other proceedings against the receiver for the recovery thof and without any further or other proof being given in that behalf in any action to enforce this guarantee.

(c) The liability of the surety under this guarantee is limited to the sum of ——*l*. Provided nevertheless that a Master of the Supreme Ct (or a Registrar of the Cos Ct or a District Registrar) may by his signature to the indorsement on this guarantee (in the form printed thereon) reduce the sd liability of the surety still further or (but only with the consent of the surety by an instrument in writing executed in the manner prescribed by its arts of asson) increase such liability as may be necessary and upon such indorsement this guarantee shall continue in full force but in that case the premium shall be correspondingly reduced or increased.

3. It is hby further agreed between the receiver and the surety as follows:—

(a) The receiver will on being discharged from his office or on ceasing to act as such receiver (and manager) as afsd forthwith give written notice thof to the surety through the Post Office and also within seven days of such notice furnish to the surety free of charge an office copy of the order (if any) of the judge discharging him.

(b) The receiver and his personal representatives shall and will at all times indemnify the surety and its property and funds against all loss, damage, costs and expenses which the surety or its funds or ppty may or might otherwise sustain by reason of the surety having executed this guarantee at his request.

In witness whereof the receiver has hereunder set his hand and seal

**Form 244.** and the surety has caused its common seal to be affixed the —— day of ——, 19—.

In the matter of —— increased liability.

To be attached by way of indorsement to guarantee.

The liability of the surety under the within-written guarantee has with the consent of the receiver and the surety been increased from ——*l.* to ——*l.* in respect of any acts or omissions to which the within-written guarantee relates committed by the receiver subsequent to the date hof the total liability of the surety in respect of both the within-written guarantee and this indorsement being limtd to the increased sum above stated.

Sealed with the seal of the receiver and also the common seal of the surety this —— day of ——, 19—, as evidence of such increased liability and the admission thof by the receiver and the surety resply.

Signed, sealed and delivered by the receiver in the presence of ——.

The common seal of the surety was hereunto affixed in the presence of ——.

**Form 245.**
**Affidavit of sureties.**

We, C. D., of ——, and E. F., of ——, the proposed sureties for A. B., of ——, chartered accountant, the person proposing to be appointed receiver and manager in this action, severally make oath and say as follows:—

1. First, I, the sd C. D., for myself say that I am well and truly worth the sum of ——*l.* after payment of all my just debts and liabilities.

The sum to be inserted should be the amount for which he is to be bound.

2. And I, the sd E. F., for myself say that I am well and truly worth the sum of ——*l.* after payment of all my just debts and liabilities.

Sworn, &c.

**Form 246.**
**Affidavit by secretary of a guarantee society as to the society.**

1. I am now and have, since the —— of ——, been the acting assistant secretary of the —— Society, Limtd, and I was, previously to that date and since the —— of ——, the acting chief clerk of the sd society, which was incorporated in the year —— under the provisions of the Cos (Consoln) Act, 1908.

2. The sd society was registered on the —— of —— as a coy limtd by shares, and now carries on business at ——.

3. The subscribed capital of the sd society is 1,500,000*l.*, divided into 150,000 shares of 10*l.* each, and the sum of 1*l.* has been pd on

*each of the sd shares, and such shares are held by a responsible body of proprietors, so that there is an uncalled capital of 1,350,000l.,* added to which, the whole of the sd society's investments in the Government funds and otherwise, amounting to the sum of 500,000*l.* and upwards, are now available for settlement of claims and demands of the sd society in respect of its guarantees. **Form 246.**

4. The funds of the sd society are invested in the names of —— and ——, as trees, as follows:—

| | £ |
|---|---|
| British Government securities ... ... ... | |
| Indian Government securities ... ... ... | |
| Colonial securities ... ... ... ... ... | |
| Metropolitan Board of Works Stock ... ... | |
| Total... ... ... ... ... ... | £ |

Other securities—

| | £ |
|---|---|
| Foreign Government securities ... ... ... | |
| Miscellaneous debentures and Bank deposits, estimated value ... ... ... ... ... | |
| Premises, No. —, —— Street, E.C. ... ... | |
| House property ... ... ... ... ... | |

5. And I further say that all claims and demands properly arising out of the guarantees of the sd society have been regularly pd and satisfied within the prescribed time after the same have become payable, and the present outstanding claims and demands do not exceed ——*l.* The memdum and arts of asson of the sd society contain no regulation as to affixing the common seal to bonds or other instruments. The execution of instruments required by law to be sealed with the common seal is regulated by a resolution passed by a board of directors on the —— of ——, which provides that bonds and all other documents required to be under the common seal of the society may be executing by affixing the sd common seal and by the signature of any two of the directors and of the manager, or, in the absence of the manager, of any three directors, and by a further resolution passed by the board of directors on the —— of ——, which provides that the fidelity guarantee bonds and policies may in future be signed by any two of the directors and the manager or by any two of the directors and the assistant manager.

6. Save as hnbefore first mentd there is no provision in the sd society's arts of asson as to the due execution of the bonds or guarantees issued by the sd society, and all bonds or guarantees to which the common seal has been affixed and which are signed by any two directors and the manager or, in the absence of the manager, by the secretary or assistant secretary, are binding on the society.

**Form 246.**

7. The bond now produced and shown to me marked A. was duly sealed by the seal of the sd society by the authority of the board of directors of the sd society, and the names and signatures of —— and —— set and subscribed to the sd bond are the respive handwritings of —— and ——, who are two of the directors of the sd society, and the name and signature of —— is my handwriting, and I am the assistant secretary of the sd society as afsd.

8. No peton or other proceeding is pending in any Ct for the purpose of winding-up the sd society.

**Form 247.**

**Bond of guarantee society.**

(*Title and reference to record as in Form* 244.)

—— day of ——, 19—.

—— *v.* ——.

Mr. Justice ——, the judge to whom this action is attached, has approved and allowed this bond, this —— day of ——, 19—.

——, *Master.*

KNOW ALL MEN BY THESE PRESENTS that I, ——, and we, —— Society, Limtd, whose office is situated at No. —, —— (hnftr called "the society"), are jointly and severally held and firmly bound unto —— and ——, two of the Masters of the Supreme Ct, in the sum of ——*l.* of lawful money of the United Kingdom of Great Britain and Ireland, to be pd unto the sd —— and ——, or one of them, or the exors or admors of them, or one of them, for which payment well and truly to be made I, the sd ——, for myself, my heirs, exors and admors, 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 sealed with the seal of the sd ——, and also with the seal of the sd society, and signed by two of the directors thof.

Dated the —— day of ——, in the year of our Lord one thousand nine hundred and ——.

Whereas by an order of the High Ct of Justice, Chancery Division, made in an action in the matter of the —— Coy, Limtd, wherein —— are plts and —— are dfts, 19—, No. ——, and dated the —— day of ——, 19— (the above bounden —— was appointed), *or* (it was ordered that a proper person should be appointed) to receive (*or* that upon the above bounden —— first giving security he should be appointed receiver of) [the business and assets of the —— Coy, Limtd, &c., and also to manage the sd business, but by the sd order the sd —— is not to act as manager beyond the —— day of ——, 19—, without the leave of the judge]. And it was ordered that the sd —— should give security to the satisfaction of the judge on or before the ——, 19—.

Form 247.

And whereas the judge hath approved of the sd —— as a proper person to be such receiver [*or* receiver and manager], and hath approved of the society as surety for the sd —— in the sd sum of ——*l.*, and has also approved of the above bond with the under written conditions [together with a recognizance entered into by the sd —— in the penal sum of ——*l.*, and bearing date the —— day of ——, 19—] as a proper security to be entered into by the sd —— and the sd society pursuant to the sd order, and the Rules of the Supreme Ct in that behalf, as well in respect of the period for which the sd —— has been appointed such receiver [*or* receiver and manager] as afsd, as also in respect of any extended or further period during which such receiver [*or* receiver and manager] may be continued either under the sd order or under any further order, in the sd action, and in testimony of such approval one of the Masters of the Supreme Ct hath signed an allowance in the margin hof [and of the sd recognizance resply]. Now the condition of the above written bond or obligation is such that if the above bounden ——, his exors or admors, or some or one of them, do and shall duly account for what the sd —— has received and shall receive or [has or] shall become or be held liable to pay or account for as such receiver [and manager] as afsd, including as well all and every the sum and sums of money or other property so received in respect of the period for which the sd —— has been appointed such receiver [*or* receiver and manager] as afsd, as also all and every the sum and sums so received in respect of any extended or further period, during which the sd —— may be continued or appointed as receiver [*or* receiver and manager], either under the sd order or under any further order in the sd action, at such period and in such manner as the Ct or the judge thof shall appoint, and do and shall pay or deliver the same as such Ct or judge hath directed, or shall hereafter direct, and shall give immediate notice to the Ct if the society shall become insolvent or go into liquidation, then the above written bond or obligation shall be void, otherwise the same shall, subject to the provisions hnftr contained, be and remain in full force and virtue. Provided always, that if the sd —— shall not for every successive term of twelve months to be computed from the —— day of ——, 19—, within fifteen days after the —— day of ——, in each and every year pay or cause to be pd at the office of the society the annual premium or sum of ——*l.*, 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 surety as afsd, and such summons having been served upon such persons as the judge shall direct, and being finally heard, all further liability of the sd society as such surety as afsd 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

**Form 247.**

in respect of any loss or damage occasioned by any act or default of the sd —— in relation to his duties as such receiver [*or* such receiver and manager] as afsd, previously to such cesser and determination of liability. Provided always, that a certificate or certificates under the hand of a Master of the Supreme Ct or of a Registrar in Cos Winding-up, of the amount which the sd ——, as such receiver [*or* receiver and manager] as afsd, is liable to pay and has not pd, shall be sufficient and conclusive evidence against the sd ——, his heirs, exors, and admors, and against the society and also as between the society and the sd —— and— of the truth of the contents of the sd 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 not only against the sd ——, his heirs, exors, and admors, but also against the society and the funds and ppty thof without its being necessary for the sd —— and ——, or either of them, their or either of their exors or admors first to take legal or other proceedings against the sd ——, his heirs, exors, or admors for the recovery thof, and without any further or other proof being given either by or on the pt of the sd —— and ——, or either of them, their or either of their exors or admors in any action, suit, or proceeding to enforce this bond against the society or against the sd ——, his heirs, exors, or admors, or by or on the pt of the sd society in any action or proceeding against the sd ——, his heirs, exors, or admors, 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 sd —— while in office. Provided always, and it is further agreed between the sd —— and the society that the sd —— shall and will, on being discharged from his office, or on ceasing to act as such receiver [*or* receiver and manager] as afsd, forthwith give notice hof in writing, and also furnish to the society free of charge an office copy of the order of the Ct or judge discharging him from his office as such receiver [*or* receiver and manager] as afsd, and further that he, the sd ——, his heirs, exors and admors, shall and will from time to time, and at all times, save, defend, and keep harmless the sd society and their successors, and the ppty and funds of the sd society from and against all loss and damage, costs and expenses which the sd society, or the funds or ppty thof shall or may or otherwise might at any time sustain or be put unto, for or by reason, or in consequence of the sd society having entered into the above written bond for and at the request of the sd ——.

In witness whereof the sd —— has hereunto set his hand and seal, and the sd society have hereunto caused their common seal to be affixed, and the sd [two] directors thof have set their hands the day and year first above written.

**Form 247.**

See Ann. Pr., App. L., Form 21B, and notes. If there is to be a bond as well as a guarantee (Form 244, *supra*) the surety does not join in the guarantee.

For forms of summonses (a) to appoint receiver after security given (usually dispensed with), and (b) to settle security to be given by receiver pursuant to an order, see D. C. F. (6th ed.), Forms 1746, 1747.

**Form 248.**

Certificate that receiver has given security.

Where action before winding-up judge.

In pursuance of the directions given me by the judge, I hereby certify that the result of the proceedings which have been taken in pursuance of the order in this action, dated the 28th June, 1932, is as follows:—

The plt and His Majesty's Attorney-General have attended by their respive solors.

M. C. S., of ——, Old Jewry, in the city of London, chartered accountant, who was by the sd order appointed receiver and manager on behalf of the plt of the ppty and assets of the dft coy (except uncalled capital) comprised in or subject to the securities and charge in favour of the plt, created by the deed of security, dated the 4th December, 1930, made between the dft coy of the first pt, the plt of the second part, and the Board of Trade acting through the Export Credits Guarantee Department of the third pt, and the debenture, dated the 10th November, 1922, issued by the dft coy to the plt in the writ of summons in this action mentd in place of Sir Gilbert Garnsey and who was by the sd order directed to give security to the satisfaction of the judge on or before the 19th July, 1932, or within such future time as the Ct or judge should allow, which time was by order, dated the 18th July, 1932, extended to the 22nd July, 1932, has given security pursuant to the sd orders and the Rules of the Supreme Ct in that behalf.

Such security consists of two several bonds each in the sum of 12,500 both dated the 21st July, 1932, entered into by the sd M. C. S. together with the Eagle Star and British Dominions Insurance Coy, Limited, and the Gresham Fire and Accident Insurance Society, Limtd, as his respive sureties.

The said bonds each of them identified by my signature in the margin thof have been approved by the Ct and duly filed.

And I certify that the Ct has appointed the 12th October, 1932, and the 6th March, 1933, and the same days in each succeeding year to be the days on which the sd M. C. S. is to cause his accounts made up to the 19th August and the 20th February immediately preceding to be delivered into the chamber of the registrar, Cos Ct.

The evidence adduced consists of the afft of M. C. S. filed the 15th July, 1932, the afft of S. E. R. and the afft of R. A. M., both filed the 22nd July, 1932, the exhibits in the sd affts respively referred to and the receipt of the filing and record department of the Central

**Form 248.** Office, dated the 22nd July, 1932. *Agricultural and General Engineers, Ltd.* (A. 537 of 1932). Stiebel, Reg., 4th August, 1932.

For form of certificate when the action is not before a winding-up judge, see D. C. F. (6th ed.), Form 1748.

**Form 249.**

**Summons to reduce security.**

REDUCTION OF SECURITY.

(*Title, &c.*)

Let, &c. (*see Forms* 171 *and* 172, *supra*), upon the applicon of the plt that the security given by ——, the receiver and manager in this action, may be reduced from ——*l.* to ——*l.*

As the action proceeds and the mortgaged premises are realized and paid into Court, occasion commonly occurs for an application to reduce the security. See specimen affidavit and order, *infra*.

For form of summons where bond of guarantee society has been given, see D. C. F. (6th ed.), Form 1779.

**Form 250.**

**Affidavit as to reduction of security.**

AFFIDAVIT BY RECEIVER.

1. I am the receiver and manager appointed under the order of Mr. Justice —— herein dated the 6th August, 19—.

2. As appears by the registrar's certificate dated the 14th July, 19—, the sum of ——*l.* was found to be due and payable to me on passing my first account in this action. The amount of receipts referred to in such certificate included book debts due to the coy amounting to 6,000*l.*, and excluding bad or doubtful debts there is not now more than 6,000*l.* due to the coy in respect of outstanding book debts.

3. The freehold and leasehold properties, plant and stock-in-trade referred to in my previous affit filed herein the —— of ——, will, I am advised and believe, shortly be sold by private contract, but the proceeds of sale, including the deposit, will be pd direct into Ct, and will not come into my hands or come under my control as receiver herein.

4. My second account, made up to the 6th July, 19—, shows that apart from my remuneration a sum of 300*l.* is due to me in respect thof, and there is also a sum of 225*l.* due to me on my first account, making a total of 525*l.* due to me. On an average I receive the sum of 400*l.* or 500*l.* per week, and have to pay away in respect of wages, salaries, travellers' commissions, &c., 300*l.* or 400*l.* and I also have to pay large sums of money weekly or fortnightly for materials to be used in the business, and the utmost that I ever have in hand at any one time would not be more than 600*l.*

5. When the freehold and leasehold properties, plant, stock-in-trade and the business are sold, I shall then have to collect the outstanding

debts, and to the best of my knowledge, information, and belief, I could not at any time have more than 5,000*l.* in hand. Under these circumstances, I respectfully submit that the security given by me pursuant to the sd order dated the —— of —— should be reduced. **Form 250.**

Upon the applicon, &c., And upon hearing, &c., And upon reading the judgment dated the 23rd July, 1930, the order dated the 20th November, 1930 (appointing E. W. J., receiver in the place of J. W. M.), the certificate filed the 17th December, 1930 (of completion of security), the certificate under judgment filed the 13th March, 1931, the two several affts of E. W. J. filed the 11th October, 1932, and this day, and the consent in writing of the Northern Assurance Coy, Limtd, dated the 5th October, 1932. **Form 251.** Order to reduce security.

It is ordered that the security given by the sd E. W. J., the receiver appointed in this action, be reduced from the sum of 12,000*l.* to the sum of 2,500*l.*, and that the bond entered into by the sd receiver, together with the Northern Assurance Coy, Limtd, as his surety and dated the 3rd December, 1930, shall as from the date of this order stand as security for the sum of 2,500*l.* and no more, instead of the sum of 12,000*l.* in respect of any sum or sums of money to be received by the sd receiver after the date of this order, but subject and without prejudice to the liability of the sd receiver and the sd Northern Assurance Coy, Limtd, or either of them under the sd bond in respect of any sum or sums of money received by the sd receiver prior to and including the date of this order.

And it is ordered that a memdum in the words and figures following be endorsed on the sd bond:—

"The amount for which this bond is to stand security has been reduced to 2,500*l.* as from the 24th October, 1932." *James McLellan, Ltd.* (J. 784 of 1930). Stiebel, Reg.

Upon the application by summons dated ——, of the plt. **Form 252.**

And upon hearing, &c. Another. Order reducing security.

And upon reading, &c.

It is ordered that M. J. P., the receiver appointed in this action be at liberty so far as may be necessary to complete the contract with the Central Electricity Board referred to in the sd afft, to employ a trained mechanic, labourers and a skilled engineer, and to expend moneys not exceeding 400*l.* in wages and the purchase of material.

And it is ordered that the security given by the sd M. J. P. as such receiver as afsd be reduced from the sum of 10,000*l.* to the sum of

**Form 252.**

2,000*l.* and that the bond for the sum of 10,000*l.* dated the 9th November, 1931, entered into by the sd receiver, together with the Commercial Union Assurance Coy, Limtd, as his surety, shall henceforth stand as security for the sum of 2,000*l.* in respect of any sum or sums of money to be received by the sd M. J. P. as such receiver as afsd after the 10th August, 1932, but subject and without prejudice to the liability of the sd M. J. P. and the sd Commercial Union Assurance Coy, Limtd under the sd bond in respect of any sum or sums of money received by the sd M. J. P. as such receiver as afsd prior to and including the 10th August, 1932.

And it is ordered that a memdum in the words and figures following be endorsed on the sd bond:—

"The amount for which this bond is to stand as security has been reduced to the sum of 2,000*l.* as from the 10th day of August, 1932." *Metafilters* (1929), *Ltd.* M. 3464 of 1931. Mellor, Reg.

**Form 253**

**Order further reducing receiver's security.**

Upon the applicon by summons dated the 6th December, 1911, of the plts, and upon hearing the solors for the sd plt and for the dfts, and upon reading the order appointing receiver dated the 18th March, 1910, the judgment dated the 21st June, 1910, the order reducing the receiver's security dated the 8th March, 1911, and the afft of J. S. filed the 11th December, 1911, and the consent of the Guarantee Society dated the 7th December, 1911, to the further reduction of the security hnftr mentd, It is ordered that the security given by the sd R. S. as such receiver be further reduced as from the 25th December, 1911, from the sum of 3,000*l.*, the amount named in the bond hnftr mentd to the sum of 1,000*l.*, and that the bond entered into by the sd R. S., together with the Guarantee Society as his sureties, dated the 14th day of April, 1910, which bond was by the order dated the 21st June, 1910, reduced from the sd sum of 10,000*l.* to the sd sum of 3,000*l.*, do stand as security for the sum of 1,000*l.* instead of for the sum of 3,000*l.*, in respect of any sum or sums of money to be received by the sd R. S. as such receiver as afsd after the sd 25th December, 1911, but subject and without prejudice to the liability of the sd R. S. and the sd Guarantee Society or either of them under the sd bond in respect of any sum or sums of money received by the sd R. S. or otherwise prior to the sd 25th December, 1911, and it is ordered that a memdum in the words and figures following be endorsed on the sd bond:—

"Amount for which this bond is to stand security has been further reduced from 3,000*l.* to 1,000*l.* as from the 25th December, 1911, and the costs of this applicon are to be costs of the action." Swinfen Eady, J., 12th December, 1911.

**Form 254.**

Order relieving sureties from liability.

Upon the applicon of the —— Society, Limtd, &c., and upon reading, &c., order that the sd applicants be and they are hby relieved from all further liability as such sureties as afsd under their sd bond, dated the 17th May, 1893, as from the expiration of five weeks from the date of this order, subject and without prejudice to the liability of the applicants under the sd bond in respect of any loss or damage occasioned by any act or default of the sd W. in relation to his duties as such receiver and manager as afsd previously to the expiration of such five weeks, and order that the costs of the plt, assessed at 11*l.* 5*s.* 10*d.*, and the dfts, assessed at 4*l* 10*s.* 8*d.*, of this applicon be pd by the applicants the —— Society, Limtd. *Spicer Bros., Ltd.* v. *Woodrow, Hooper & Co.*, Vaughan Williams, J., 25th July, 1894.

**Form 255.**

Order appointing new receiver on failure to give security.

Upon motion on the ——, made unto this Ct by counsel on qehalf of ——, and no one appearing for the dft coy, although it has been served with notice of this motion as by afft appears.

And upon reading the order dated the —— (appointing receiver and manager), the afft of —— filed the —— (as to fitness of the receiver hnftr appointed) and the two several affts of —— both filed the ——.

And it appearing by the sd affts of —— that the sd —— has failed to give security as such receiver and manager within the time limited by the sd order dated the ——.

And the plt by its counsel undertaking to be answerable for what ——, the receiver and manager hnftr appointed shall receive or become liable to pay until he shall have given security as hnftr directed.

This Ct doth hby appoint ——, of ——, receiver and manager on behalf of the plt and all other the holders of the mortgage debenture of the dft coy of the undertaking of the dft coy and all its ppty (except uncalled capital) comprised in or subject to the security and charge created by the debenture issued by the dft coy to the plt and the other debenture holders with liberty to act at once.

And it is ordered that the sd —— do on or before the ——, give security as such receiver and manager to the satisfaction of the judge. But in case he shall not have given security within the time afsd or within such further time as the Ct or judge shall allow his appointment as such receiver and manager shall on the expiration of such time forthwith determine and in any event he is not to act as such manager after the —— without the leave of the judge.

And it is ordered that the sd receiver do pass his accounts and pay any balances which may be certified to be due from him as the judge shall direct.

## CHAPTER LIX.

### ENFORCING DELIVERY OF BOOKS AND PAPERS TO RECEIVER.

WHERE the Court appoints a receiver of an undertaking, or a receiver and manager, he is impliedly entitled to the possession of the requisite books and accounts, and the order sometimes expressly directs delivery to him, but cases sometimes occur in which it is necessary to apply for an order for delivery. It is for the plaintiff, not the receiver, to obtain or enforce such an order. Dan. Ch. Pr. (8th ed.), p. 1481.

As to varying the order from time to time, *e.g.*, by ordering delivery to the liquidator, see *Engel* v. *South Metropolitan, &c. Co.*, (1892) 1 Ch. 442.

**Form 256.**

**Summons against defendant company's solicitors to deliver up books to receiver.**

Let all parties concerned attend at the office of the registrar, &c., (*see Form* 172, *supra*), on the pt of the plt, for an order that the respts, Messrs. ——, the late solors for the dft coy, do within seven days from the making of the order hereon deliver up to the receiver all deeds, documents, papers, and books in their possession or power, such deeds, documents, papers, and books being pt of the security comprised in the first and second mortgage debentures issued by the dft coy, or that such other or further order may be made as the Ct shall think fit.

**Form 257.**

**Order to pay off company's solicitor and for delivery of books to receiver.**

Upon the applicon by summons, &c., it is ordered that the sd M. J., as such receiver and manager, do out of any of the assets of the coy in his hands as such receiver and manager, pay to Messrs. W. H. and W., the solors of the above-named coy, the sum of 327*l.* 16*s.* 3*d.* in full discharge of the ascertained amount due to them from the coy for costs or otherwise, and in discharge of any lien they may have upon the deeds, books, and documents belonging to the sd coy; and it is ordered that upon such payment being made the sd W. H. and W. do deliver up to the receiver and manager, on oath if required, all deeds, books, papers, and documents in their possession belonging to the coy; and it is ordered that the costs of the applicant and of the dft coy, F. Rosher & Co., Limtd, of this applicon be taxed and pd out of the assets of the sd dft coy. *Rosher* v. *Rosher & Co.*, Vaughan Williams, J., 14th April, 1896.

**Form 258.**

Order to receiver to hand over property to receiver appointed in another action.

Upon the applicon by summons dated the 15th December, 1931, &c.

And upon hearing, &c., and no one appearing for the dft ——, Limtd, although it has been duly served with the sd summons as by afft appears.

And upon reading the order dated the 1st August, 1930 (appointing receiver), the sd judgment dated the 25th November, 1931, the order dated the 30th November, 1931, made in an action now pending in this Ct of which the short title is " *Re Burnards Dairy Equipment, Limtd, Chilton and Another* v. *The Coy* (C. 1339 of 1930)," the Master's certificate (as to completion of receiver's security pursuant to the last mentd order) filed the 23rd December, 1931, the afft of L. R. filed this day and the exhibits therein referred to.

And the sd S. G. H., by his solor undertaking to be bound by any order which this Ct may make as to the further remuneration and/or costs of L. W. R. hnftr named.

It is ordered that L. W. R., the person by the sd order dated the 1st August, 1930, appointed receiver on behalf of the plt and the other debenture holders of the dft, Burnards (Established 1899), Limtd, and also on behalf of the debenture holders of the dft, Burnards Dairy Equipment, Limtd, of all the ppty and assets of the sd dft cos (except uncalled capital) comprised in or subject to the securities and charges created by the debentures issued by the dft cos resply do within seven days from the date hof deliver to S. G. H., of ——, Strand, in the County of London (the receiver appointed by the sd order dated 30th November, 1931) all the assets of the dft, Burnards Dairy Equipment, Limtd, comprised in or subject to the security and charge created by the debentures issued by the sd dft coy to the applicants, O. H. C. and J. C. G. S., now in the possession or under the control of the sd L. W. R., And that thereupon the sd L. W. R. be discharged as such receiver so far as concerns such assets. *Burnards (Established* 1899), *Ltd.* (B. 3246 of 1930). Stiebel, Reg.

# CHAPTER LX.

## INTERFERENCE WITH RECEIVER: CONTEMPT.

ANY interference with a receiver appointed by the Court is a contempt of Court: for instance, inducing employees to leave a business carried on by a receiver is an interference with the receiver; *Dixon* v. *Dixon*, (1904) 1 Ch. 161; or sending the customers of a business circulars amounting to a libel on the business, and tending to prejudice the receiver in the management of it (*Helmore* v. *Smith* (No. 2), 35 Ch. D. 449); but it is no interference with a receiver for creditors to take steps against foreign assets, unless the receiver is in complete possession of such assets. *Maudslay, Sons & Field*, (1900) 1 Ch. 602; *Derwent Rolling Mills* (1904), 21 T. L. R. 81, 701. See *supra*, p. 505.

The contempt may be punished by committal or restrained by injunction. Seton (7th ed.), p. 745. The Court can grant an injunction to restrain acts amounting to, or which would amount to, a contempt. *Kitcat* v. *Sharp*, 31 W. R. 227; *Coats* v. *Chadwick*, (1894) 1 Ch. 347.

In the case of a motion to commit for contempt there must be at least two clear days' notice. Ord. LII. r. 5.

The notice must be personally served on the party alleged to be in contempt. *Mander* v. *Falcke*, (1891) 3 Ch. 488; *Re Evans*, (1893) 1 Ch. 261.

As Ord. LII. r. 4, does not apply to motions to commit, it is not necessary to serve with the notice of motion copies of affidavits intended to be used. *Taylor, Plimston Bros. & Co., Ltd.* v. *Plimston*, (1911) 2 Ch. 605.

The person alleged to be in contempt is entitled to see and answer the applicant's affidavit in reply. *Dodge* v. *Brown*, 24 S. J. 108.

Where service of personal notice is impracticable the Court will make an order for substituted service. *Mander* v. *Falcke*, 35 Sol. J. 697; *Re A Solicitor*, W. N. (1892) 22. But appearance by the party alleged to be in contempt is not a waiver of personal service. *Mander* v. *Falcke*, (1891) 3 Ch. 488.

A prior mortgagee or other person desiring to exercise his rights over property in the hands of a receiver appointed by the Court should apply to the Court for liberty to exercise his rights notwithstanding the appointment of the receiver. See Form 265, *infra*.

(*Title.*)

**Form 259.**

Notice of motion to commit for interfering with receiver's possession.

Take notice that this Ct will be moved on ——day, the —— day of —— [*If the motion is to be heard at a specially appointed hour state the fact, as:* at eleven of the clock in the forenoon of that day], or so soon thereafter as counsel can be heard.

[*Here state on whose behalf the motion is made, as:* by counsel on the pt of the above-named plt] that A. B., of ——, may be ordered to stand committed to Holloway Prison for his contempt in [*here state the nature of the contempt*].

Dated, &c.

**Form 260.**

Notice of motion to restrain interference with receiver.

Take notice, &c. that this Ct will be moved, &c. for the above-named plt for an injunction to restrain R. of —— from remaining in possession of certain stock-in-trade, chattels, and effects belonging to the above-named coy, in respect of which the sd R. and A. claim to have a lien, and from otherwise interfering with the receiver and manager appointed in this action in this discharge of his duties, and that the sd R. and A. may be ordered to pay the costs of this applicon.

Not uncommonly in cases of continuing contempt application is made for an injunction as above. And an injunction is the proper remedy where there is interference with a receiver appointed under a power in the debentures or a trust deed. *Bayly* v. *Went*, 51 L. T. 764; W. N. (1884) 197; *Septimus Parsonage & Co.*, 17 T. L. R. 421.

**Form 261.**

Notice of motion for injunction and sequestration against railway company.

Take notice that this Ct, &c., On behalf of the above-named plt and of J. P. of ——, the voluntary liqr of the above-named —— & Co., Limtd, that the North Metropolitan Railway and Canal Co., their servants and agents, may be restrained by injunction from detaining and selling any barges or merchandise sent by M. J., receiver and manager appointed in this action, and from otherwise interfering with the sd M. J. in the discharge of his duties as such receiver and manager, and that a commission of sequestration may issue to sequester the personal estate and the rents, profits, and issues of the real estate of the sd North Metropolitan Railway and Canal Co., until the sd coy shall make good all such damage, costs, and expenses caused by their having detained the barges and merchandise sent by the sd receiver and manager, and shall otherwise clear their contempt, and that the sd North Metropolitan Railway and Canal Co. may be ordered to pay the costs of this motion. And take notice that special leave has been given by his Lordship to serve you with this notice for the day above mentd.

**Form 262.**

Order on motion to pay costs where contempt committed. Interference with receiver.

Upon motion this day made unto this Ct by counsel on behalf, &c. that the North Metropolitan Railway and Canal Co., their servants, &c. might be restrained by injunction, &c. And upon hearing counsel for the applicant and for the respts, and upon reading the order dated, &c., and the affts, &c., and the judge being of opinion that a contempt of Ct has been committed by the respts, the North Metropolitan Railway and Canal Co., it is ordered that the sd North Metropolitan, &c., do pay to the applicants P. and P. their costs of this motion, such costs to be taxed. *Rosher* v. *Rosher & Co.*, V. Williams, J., November, 1896.

Where the only order, on motion to commit, is to pay the costs, the respondent cannot be committed for non-payment of them. *Mickelthwaite* v. *Fletcher*, 27 W. R. 793; *Weldon* v. *Weldon*, 10 P. D. 72; *Re Jarvis*, W. N. (1886) 118.

**Form 263.**

Order to commit.

Upon motion this day made unto this Ct by counsel on behalf of C. S. G., one of the liqrs of the above-named coy on the voluntary winding-up thof, and upon hearing counsel for W. E. B., the other liqr of the sd coy, and upon reading the order dated the 4th July, 1932, whereby it was ordered that the assets of the above-named coy be sold by public auction, that the reserves and the remuneration of the auctioneer be fixed by the Ct, that Messrs. L. F. & Sons, auctioneers, be and they were thereby appointed to conduct the sale, and that the sd W. E. B. be at liberty to take such steps as he might think fit (except by advertising) to obtain a purchaser for the whole or any pt of the assets, the affts of H. L. F. and the two sealed affts of C. J. C. all filed the 20th July, 1932, and the exhibits in the sd affts or some of them resply referred to.

And it appearing by the sd affts that the sd W. E. B. has obstructed the sd auctioneers in preparing for the sale directed by the sd order and inserted an advertisement in the —— newspaper of ——, inviting offers for the purchase of the freehold factory belonging to the above-named coy.

And the Ct being of opinion that the sd W. E. B. has by such conduct been guilty of a contempt of this Ct doth order that the sd W. E. B. do stand committed to Brixton Prison for his sd contempt.

And it is ordered that the sd W. E. B. do pay to the applicant the sd C. S. G. his costs of this motion, such costs to be taxed. *George G. Bussey & Co., Ltd.* (00414 of 1932). Eve, J.

**Form 264.**

Order for sequestration for contempt.

Whereas by a judgment dated the 28th March, 1895, the plts the Kensington, &c., Limtd, by their counsel undertook on or before the 28th April, 1895, to convey and procure the conveyance by all necessary parties of the inheritance in fee simple, free from incumbrances

(except the rights in the sd judgment expressly referred to in favour of the plt coy) of the piece of land, not less than eighteen feet in width, inclusive of the pathway, &c., &c.; and the plts also undertook by their counsel within two years from the date of the sd judgment and by way of substitution for any liability in that behalf created by the conveyance of the 8th August, 1892, in para. 5 of the amended statement of claim mentd, to set out and make on such piece of land a properly walled and curbed roadway so constructed, &c. Now upon motion this day made unto this Ct for the dfts, who allege that it appears by an afft of B. and B., filed the 14th December, 1897, and the exhibits therein referred to, and an afft of W., filed the 19th January, 1898, that the plt coy has not complied with its sd undertaking by completing the sd roadway and pathway, and upon hearing counsel for the plt coy, and upon reading the sd judgment and affts, and this Ct being of opinion that the plt coy has committed a contempt of this Ct in not complying with their sd undertaking to set out and make the sd roadway and footway in the sd judgment mentd, doth order that a commission of sequestration do issue directed to certain commissioners to be therein named to sequester the personal estate and the rents, dues, and profits of the real estate of the plt coy until further order; and it is ordered that the plts do pay to the dfts, J. Lyons & Co., Limtd, their costs of the sd motion to be taxed by the taxing master. *Kensington, &c. Stores and others* v. *Lyons & Co.*, North, J., for Romer, J., 20th January, 1898. A. 147.

**Form 264.**

Although the above order does not relate to interference with a receiver, it is here inserted by way of illustration.

Take notice, &c. [Form 259.] On the pt of A. B. that notwithstanding the appointment by order dated the —— of C. D. to receive the assets and ppty of the above-named coy comprised in the debentures mentd in the sd order the sd A. B. may be at liberty to enter into possession or receipt of the rents and profits of the hereditaments situate at —— comprised in an indenture of mortgage dated the ——, and made between the above-named coy of the one pt and A. B. of the other pt and that the sd receiver may be directed to deliver up possession of the sd hereditaments to the sd A. B.

**Form 265.**

Notice of motion by first mortgagee for liberty to take possession.

# CHAPTER LXI.

## MOTION FOR JUDGMENT.

WHERE the defendant in a debenture holders' action fails to deliver a defence, the plaintiff can apply to the Court by motion for judgment.

Defendant in default.

**Ord. XXVII. r. 11** *provides* as follows as to cases where the rule applies:—

> If the defendant makes *default* in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled.

In the cases to which the rule applies the defendant can only make *default* where—

(a) After an order on summons for directions that a statement of claim shall be delivered, a defence is not delivered within the time mentioned in the order, or, if no time is specified, within ten days of the delivery of the claim (see Ord. XXI. r. 8); or

(b) After an order on summons for directions that a defence, without a previous statement of claim, shall be delivered within a specified time, and it is not delivered within the time.

(c) After an order has been made by the judge under Ord. XXX. r. 1 (b), on the plaintiff's application for judgment under Ord. XIV., for delivery of a statement of claim, in which case the defence must be delivered within the time specified in the order, or, if no time specified, within ten days or there will be default.

(d) Where defendant has not entered appearance in time, and plaintiff has filed a statement of claim under Ord. XIII. r. 12, and the defendant has not complied with Ord. XXI. r. 8 (July, 1902), viz.:—"Unless otherwise ordered [has delivered] his defence within such time (if any) as . . . specified in such order, or if no time be specified, within ten days from the . . . filing in default of the statement of claim unless . . . the time is extended." [The defendant must appear before he can deliver a defence to a filed statement of claim. Ann. Pr., notes to Ord. XXI. r. 8.]

(e) After, as a defendant to a counterclaim, the plaintiff has not delivered a reply to the counterclaim within time. (As to which see Ord. XXI. r. 14, *i.e.*, time ordered, or otherwise ten days.)

**Ord. XXVII. r. 12.**—Where, in any such action as mentioned in rule 11, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either (if the cause of action is severable) set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants. (As altered in May, 1906.)

**One of several defendants in default.**

Where the cause of action is severable, and one defendant is in default, the notice of motion need not be served on the other defendants. Ann. Pr., notes to Ord. XXVII. r. 12.

**Ord. XXXII. r. 6.**—Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a judge may upon such application make such order, or give such judgment, as the Court or judge may think just.

**Judgment or order upon admissions of facts.**

If there are two or more plaintiffs all must move. The motion is made on an ordinary motion day, on two clear days' notice, unless leave to serve a shorter notice is given. See Ann. Pr., notes to Ord. XXXII. r. 6.

**Ord. XL. r. 1.**—Except where by the Acts or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

**Judgment on motion for judgment.**

The existing practice as stated in the Ann. Pr., see notes to Ord. XL. r. 1, is as follows:—

In a proper case an order may be made on summons for directions directing an action to be set down on motion for judgment without pleadings, to be heard as a short cause. In such case two days' notice of motion will be required. *Re Pringle*, 89 L. T. 743; *Re Cadogan Estate, Ltd.*, W. N. (1906) 112. Both these cases were debenture holders' actions. But pleadings should be ordered, unless the company appears before the Master and states that it will appear by counsel, and consents to the order. In that case liberty will be given to prove the facts by affidavit, if no party objects. *Re Kitson Empire Lighting Co.*, W. N. (1910) 154. Swinfen Eady, J., in such cases, considered that there should always be a statement of claim (*Dupont, Ltd.*, W. N. (1906) 14), and the course usually adopted is to direct pleadings to be delivered.

The judges in the Chancery Division require any cause intended to be heard as a short cause to be so marked in the cause book at least

one clear day before the same can be put on the paper to be so heard, and the necessary papers, including two copies of the minutes of the *proposed judgment or order, to be left with the judge's clerk* one clear day before the cause is to be put into the paper. Unless the papers are so left the cause will be struck out. Practice Note, W. N. (1901) 78. If minutes are not so left, the notice of motion should set forth the precise words of the order asked for. *De Jongh* v. *Newman*, 56 L. T. 180; *Chapman* v. *Brooke*, 46 Sol. J. 215. Even where the common form of judgment in a debenture holder's action is asked for, the minutes must be left. *Automatic Machines, Ltd.*, W. N. (1902) 236.

Where an action is directed to be set down to be heard as a short cause on minutes with affidavit evidence, copies of the affidavits ought to be left for the use of the judge. *Re Church Stretton Mineral Water Co.*, 52 W. R. 375.

Motions for judgment are not brought on as ordinary motions, but are set down in the cause book in Room 136. Fee £1. But it is presumed that if motion for judgment against one defendant comes on with the trial against other defendants this fee is not payable.

They can be marked "short" on production of the usual certificate of counsel (see Form 266, *infra*), and will then be placed in the paper on the first short cause day after the notice is given. *Green* v. *Moore*, 39 W. R. 421. If not marked "short" they will come into the paper in their regular turn.

Motion to be set down within one year.

**Ord. XL. r. 9.**—No motion for judgment shall, except by leave of the Court or a judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

Where judgment given, &c., on motion for trial, &c.

**R. 10.**—Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit.

**Form 266.**

Counsel's certificate short cause.

*(Short title and references to record.)*

I certify that the motion for judgment in this action is fit to be heard as short.

Dated —— day of ——. A. B., counsel for the plt.

**Form 267.**

Another.

I certify that the trial of this action is proper to be heard on motion for judgment as a short cause.

(*Title, &c.*)

**Form 268.**

**Notice of motion for judgment.**

Take notice that this Ct will be moved before his Lordship Mr. Justice ——, on Friday, the —— day of ——, 19—, at 10.30 of the clock in the forenoon, or so soon thereafter as counsel can be heard, by [Mr. A. B., as] counsel on the pt of the plt for judgment in the terms set forth in the schedule hto, *or* [*in default of defence:*] in the terms of the minutes annexed hto, or for such other order as the judge on reading the statement of claim may hold the plt entld to. And further take notice that this action will be marked as short, and will be set down in the short cause list for the first short cause day after the —— day of ——, and that no further notice thof will be given.

THE MINUTES above referred to.

[*Here set out the minutes.*]

Dated the —— day of ——, 19—.

A. B. & C.,
1, —— Street, E.C.,
Solors for the plt.

To the dfts and their solors.

Sometimes the minutes of the proposed judgment are referred to as such, but some persons prefer to set them out in a schedule.

PROPOSED MINUTES OF JUDGMENT.

**Form 269.**

**Minutes where no trust deed.**

——: Declare that the plt and all other the holders of the ["A"] [*or of* mortgage] debentures of the dft coy are entld to a charge upon [*as in the debenture* (*which must be produced to the Registrar*), *e.g.*, the undertaking and ppty, both present and future, of the dft coy], for securing the repayment of the principal moneys and interest in the debentures mentd.

For more than twenty years it was the general practice on a motion for judgment in a debenture action, whether contested or not, to make an appropriate declaration of charge; but in *Marwick* v. *Lord Thurlow*, (1895) 1 Ch. 776, Vaughan Williams, J., being much impressed with the undesirability of letting debentures go unchallenged by inserting the declaration, when the company was in winding-up and insolvent, refused to make the declaration unless the official receiver or liquidator appeared and consented. The Court is now reluctant to declare a charge, even if the liquidator consents, unless it is absolutely clear that an indefeasible charge has been created or unless the charge is proved by the proper evidence. See *Crigglestone Coal Co.*, (1906) 1 Ch. 523; and *Re Gregory, Love & Co.*, (1916) 1 Ch. p. 209.

**Form 269.** And let the following accounts and inquiries be taken and made, namely:

[1A. An inquiry what debentures issued by the dft coy are now outstanding and unpaid and who are the holders of the same resply.]

It was usual in the past to order an inquiry as above, but now the order is generally omitted on the ground that the account impliedly renders it necessary for the master to answer the inquiry; and the inquiry is omitted from the general form used by the Chancery Registrars. The insertion, however, of the inquiry causes no additional expense—the evidence in answer will be the same—and it is submitted that the insertion of the inquiry, sanctioned as it is by long practice and approved by eminent judges, should be resumed.

1. An account of what is due to the plts and other holders of the sd debentures [*or* of mortgage debentures issued by the dft coy] under or by 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 resply.]

This inquiry brings out what is due for principal, interest, and costs, and is the proper form.

It also determines questions as to the validity of the charge. Cf. *Gregory, Love & Co.*, (1916) 1 Ch. at p. 210.

2. An inquiry of what the ppty comprised in and charged by the sd [mortgage] debentures consists, and in whom the same is vested.

3. An inquiry what other incumbrances affect the ppty comprised in or charged by the sd debentures, or any and what pts thof [*and in whom the same are vested.*

4. An account of what is due to such other incumbrancers resply.

5. An inquiry what are the priorities of such other incumbrances and the sd debentures resply, and what ppty other than that comprised in the sd debentures is comprised in such other incumbrances.]

The words in italics in 3 and the account 4 and inquiry 5 are not inserted unless other incumbrances are known to exist, but can be added afterwards if necessary. *Re Addressograph, Ltd.*, W. N. (1909) 260.

If a receiver has been appointed, a sixth inquiry should now be added as to whether there are any debts having priority over the claims of the debenture holders under sects. 78 and 264 of the Act. See Form 232, p. 586, *supra.*

Adjourn further conson [in chambers]. Liberty to apply [in chambers as to a sale or realization of the ppty comprised in or charged by the sd debentures and generally].

See *Wolverhampton District Brewery, Ltd.*, W. N. (1899) 229; and *Wissner* v. *Levison*, W. N. (1900) 152, as to the above form.

The above is in accordance with the form now commonly used by the Chancery Registrars, and settled by the Chancery Judges.

PROPOSED MINUTES OF JUDGMENT. **Form 270.**

Minutes where there is a trust deed.

Declare that the trusts of the trust deed dated the —— of —— in the statement of claim mentd ought to be performed and carried into execution, and order and adjudge the same accordingly.

Declare that the plt and other holders of the debentures in the statement of claim referred to are entld to a charge upon [*description, e.g.*, the undertaking and ppty of the dft coy] for securing the repayment of the principal moneys and interest in such debentures mentd.

Let the following accounts and inquiries be taken and made:—

1. An account of what is due to the plt and the other holders of debentures issued by the dft coy and entld to the benefit of the sd deed under and by virtue of such debentures and deed.

2. An inquiry of what the ppty comprised in the sd deed consists, and in whom the same is vested.

3. An inquiry of what the ppty charged by the sd debentures and not comprised in the sd deed consists, and in whom the same is vested.

4. An account of the trust estate and effects comprised in the sd deed come to the hands of the dfts A. and B., or any person or persons by the order or for the use of the sd dfts.

5. An inquiry what other incumbrancers affect the ppty resply comprised in or charged by the sd deed and debentures or any pt thof.

[6. An account of what is due to such other incumbrancers resply.

7. An inquiry what are the priorities of such other incumbrances and the sd debentures resply, and what ppty other than that comprised in the sd debentures and deed is comprised in such other incumbrances.]

See note on p. 618, *supra*.

[8. An account of what (if anything) is due to the dfts A. and B. as trees of the sd deed.]

The clause in brackets is only inserted in special cases.

Adjourn further conson [in chambers].

Liberty to apply [in chambers for a sale or realization of the ppty comprised in or charged by the sd deed and debentures resply, or any pt thof, and generally].

**Form 271.**

Summons for order for inquiries (winding-up chambers).

Let all the parties concerned attend the Registrar in Chambers, Cos Winding-up, Bankruptcy Buildings, Carey Street, London, on ——day, the —— day of ——, at —— o'clock in the forenoon, on the hearing of an applicon on the pt of the plt for an order in the terms of the minutes of judgment hereunto annexed.

Dated this —— day of ——.

This summons, &c.

To the Off Recr, 33, Carey Street, W.C., and to Messrs. —— & ——.

If you do not attend, either in person or by your solor, at the time and place above mentd, such order will be made and proceedings taken as the judge or registrar may think just and convenient.

# CHAPTER LXII.

## JUDGMENTS AND ORDERS FOR ACCOUNTS, INQUIRIES, ETC.

THE following are specimens of the preliminary parts of judgments and orders suitable to special circumstances.

### JUDGMENT WHERE DFT COY DOES NOT APPEAR AT HEARING.

**Form 272.**

Judgment default in appearance.

Upon motion for judgment this day made unto this Ct by counsel for the plt and no one appearing for the dfts although they have been duly served with notice of motion for judgment, and that this action would be marked short as by an afft of T. filed the —— day of —— appears, and upon reading the writ of summons issued on the —— day of ——, the statement of claim and the order dated the —— of ——, this Ct doth declare, &c.

### JUDGMENT ON COY'S DEFAULT IN DELIVERING DEFENCE.

**Form 273.**

Judgment default in defence.

Upon motion for judgment in default of the dfts delivering a statement of defence, this day made unto this Ct by counsel for the plt, and upon reading the plt's statement of claim delivered the —— day of ——, with a certificate of the plt's solors endorsed on such statement showing that the dfts have not delivered a statement of defence, and the indenture dated the —— of —— and made, &c., and upon hearing counsel for the plt and the dfts this Ct doth declare, &c.

### JUDGMENT WHERE DFT COY DOES NOT APPEAR AT HEARING AND HAS NOT DELIVERED DEFENCE.

**Form 274.**

Judgment default in appearance and defence.

Upon motion for judgment this day made unto this Ct by counsel for the plt, and upon hearing counsel for the dft coy, and no one appearing for or on behalf of the dfts ——, Limtd, although having been duly served with notice of the sd motion as by afft appears, and upon reading the plt's statement of claim, with the certificate of the plt's solors endorsed on such statement, showing that the dfts ——. Limtd, have not delivered any statement of defence of the dft coy, and the order dated the —— of —— appointing receiver and manager, this Ct doth declare, &c.

**Form 275.**

**Judgment by consent on motion for receiver treated as motion for judgment at hearing.**

(*For the first part of this Order see* Form 239.)

And the plts and the dft by their counsel consenting that the hearing of this motion should be treated as a motion for judgment and consenting to this judgment.

This Ct doth order that the following accounts and inquiries be taken and made, that is to say:—

1. An account of what is due to the plts as the holders of the sd debenture under or by virtue of that debenture.

2. An inquiry of what the ppty comprised in or charged by the sd debenture consists and in whom the same is vested.

3. An inquiry what other incumbrances affect the ppty comprised in and charged by the sd debenture or any and what pts thof.

4. An inquiry whether there are any and what debts and liabilities of the dft coy which under sect. 264 of the Cos Act, 1929, are payable out of the ppty comprised in or subject to the floating charge created by the sd debenture in priority to the money secured by that debenture.

And the further consideration of this action is adjourned, and the parties are to be at liberty to apply. *George Lunn's Tours, Ltd.* (G. 2696 of 1932). Stiebel, Reg.

**Form 276.**

**Order for accounts and inquiries under Ord. XV. r. 1.**

ORDER FOR ACCOUNTS UNDER ORD. XV. R. 1.

Upon the applicon of the plt by summons dated the —— of —— under Ord. XV. r. 1 of the Rules of the Supreme Ct and upon hearing the solors for the applicant and the dft coy by the off recr and liqr thof in person, and upon reading the writ of summons issued on the —— day of ——, and an afft of the plt sworn the —— of —— and filed the —— of ——, and an order dated the —— of —— appointing —— receiver and manager in this action, and the statement of claim delivered in this action on the —— of ——, it is ordered that the following accounts and inquiries be taken and made, that is to say, &c. [*as in Form* 269].

See Ann. Pr., notes to Ord. XV. rr. 1, 2.
This mode of proceeding under Ord. XV. is not very often resorted to.

**Form 277.**

**Usual judgment debenture action.**

Upon motion for judgment this day made unto this Ct by counsel for the plts, and upon hearing counsel for the dfts and upon reading the writ of summons issued in this action on the —— of ——, 19—, an afft filed, &c., and the order dated, &c. [*This Ct doth declare that the plts and other holders of the mortgage debentures of the dft coy of the same issue are entld to a charge upon the undertaking of the coy and all its*

*present and future properties and assets for securing the repayment of the principal moneys and interest in the sd first mortgage debentures mentd.*] **Form 277.**

See note on p. 617, *supra*.

This Ct doth order that the following accounts and enquiries be taken and made:—

1. An account of what is due to the plt coy and the other holders of 7 per cent. debentures of the dft coy under and by virtue of such debentures.

2. An inquiry of what the ppty comprised in or charged by the sd 7 per cent. debentures consists and in whom the same is vested.

3. An inquiry what other incumbrances affect the ppty comprised in or charged by the sd 7 per cent. debentures or any and what pts thof.

4. An inquiry whether there are any and what debts of the dft coy which under sects. 78 and 264 of the Cos Act, 1929, are payable out of the ppty comprised in or subject to the floating charge created by the sd 7 per cent. debentures in priority to the money secured by such debentures.

And the further consideration of this action is adjourned, and either of the parties is to be at liberty to apply. *Metalfilters* (1929), *Ltd.* (M. 3164 of 1931). Bennett, J., 15th February, 1932.

**Form 278.**

**Same where a trust deed.**

Upon motion, &c. [*as in Form* 277], this Ct doth declare that the trusts of the trust deed dated the 31st December, 1926, in the statement of claim mentd ought to be performed and carried into execution by the Ct, and doth order and adjudge the same accordingly and it is ordered that the following accounts and inquiry be taken and made:—

[1. An inquiry what debentures have been issued by the dft coy and which of them are now outstanding and unpaid and entld to the benefit of the trust deed dated, &c., in the indorsement on the writ mentd and what are the priorities thof and who are holders or the persons entld to the benefit of such outstanding debentures resply.]

See note on p. 618, *supra*.

2. An account of what is due for principal and interest to the plt and the other holders of such debentures in respect thof.

3. An inquiry of what the ppty comprised in the sd trust deed consists and in whom the same is vested.

**Form 278.**

4. An inquiry of what the ppty charged by the sd debentures and not comprised in the sd trust deed consists and in whom the same is vested.

5. An account of the trust estate and effects comprised in the sd trust deed come to the hands of the dfts E. and P. or any person or persons by the order or for the use of the sd dfts.

6. An inquiry what other incumbrances affect the ppty resply comprised in or charged by the sd trust deed and debentures or any pt thof [and in whom the same are vested].

[7. An account of what is due to such other incumbrancers resply.

8. An inquiry what are the priorities of such other incumbrancers and the sd debentures resply and what ppty other than that comprised in the sd debentures and trust deed is comprised in such other incumbrances.]

See note on p. 618, *supra*.

9. An account of what if anything is due to the dfts E. and P. as trees of the sd trust deed.

And the judge not requiring any trial of this action other than the hearing of this applicon, the further conson of this action is adjourned and the parties are to be at liberty to apply as they may be advised. *Horlick (on behalf, &c.)* v. *Fraser South Extended Gold Co.*, Buckley, J., 7th November, 1905.

**Form 279.**

**Another. Several defendants.**

This action coming on for trial this day before this Ct in the presence of counsel for the plt and for the dft J. K., and no one appearing for or on behalf of the dft coy or the dft Branch Nominess, Limtd, on whom notice of trial has been served as by afft appears, and upon reading the pleadings delivered in this action, and upon hearing the evidence and what was alleged by counsel for the plt.

This Ct doth declare that the trusts of the trust deed dated the 14th September, 1928, in the statement of claim mentd ought to be performed and carried into execution and doth order and adjudge the same accordingly.

And it is ordered that the following accounts and inquiries be taken and made:—

1. An account of what is due by the dft, John Knill & Coy, Limtd (hnftr called "the dft coy"), to the plt as holder of all the debentures issued by the dft coy and entld to the benefit of the sd trust deed for principal, interest, premium and costs under and by virtue of such debentures and deed.

2. An account of what is due by the dft, J. K., to the plt under and by virtue of the transfer of mortgage dated the 14th September, 1928, and the two transfers of registered charges of the same date in para. 9

**Form 279.**

of the statement of claim mentd and for his costs of this action, such costs to be taxed.

3. An inquiry of what the ppty comprised in or charged by the sd trust deed consists and in whom the same is vested distinguishing between the ppty thereby demised or charged by way of legal mortgage or otherwise specifically charged and the ppty thereby charged by way of floating charge only.

4. An inquiry of what the ppty comprised in the sd transfer of mortgage dated the 14th September, 1928, and the sd two transfers of registered charges of the same date consists and in whom the same is vested.

5. An account of the trust estate and effects comprised in the sd trust deed or the sd transfer of mortgage and registered charges come to the hands of the plt or any person or persons by the order or for the use of the plt.

6. An inquiry what other incumbrances affect the ppty resply comprised in or charged by the sd trust deed and debentures or the sd transfer of mortgage and registered charges resply or any pt thof.

7. An account of what is due to such other incumbrancers resply.

8. An inquiry what are the priorities of such other incumbrancers and of the sd debentures resply and what ppty other than that comprised in the sd trust deed transfer of mortgage and registered charges resply is comprised in such other incumbrances.

9. An inquiry whether there are any and what debts and liabilities of the dft coy which under sects. 78 and 264 of the Cos Act, 1929, are payable out of the ppty comprised in or subject to the floating charge created by the sd trust deed in priority to the moneys secured by the sd debentures.

And the further consideration of this action is adjourned.

Liberty to apply for sale or foreclosure as against the dft, J. K., and generally. *John Knill & Co., Ltd.* (J. 2161 of 1930). Maugham, J.

**Form 280.**

Declaration. A and B debentures. Liberty to attend.

Upon motion for judgment, &c., declare that the plt and the other holders of the mortgage debentures of the 1st series, issued by the dft coy, are entld to a first charge upon the undertaking, moneys and ppty of the dft coy; and declare that the holders of the mortgage debentures of the 2nd series issued by the dft coy are entld to a second charge upon the undertaking, moneys and ppty of the dft coy. Let an account be taken of what is due from the dft coy to the holders of the sd debentures of the 1st and 2nd series resply, for principal and interest on their respive debentures. And let the

**Form 280.** undertaking, ppty and effects of the dft coy be sold, with the approbation of the judge, and let the proceeds of sale be pd into Ct to the credit of ——, &c. And let —— and —— (receivers and managers) be continued until further order; and order that Messrs. —— and ——, and any other members of the committee of debenture holders of the 1st series, and Messrs. —— and ——, or any other members of the committee of the debenture holders of the 2nd series, be at liberty to attend the proceedings in these actions (their costs as between solor and client, as from the dates of the respive appointments, being costs in these actions), and that the sd S. S. and P., debenture holders of the 1st series, be at liberty to attend the proceedings at their own expense; and order that the first above-mentd action be dismissed as against the dft Bower with costs, to be taxed as hnftr mentd; and order that the costs of the respive plts and of the above-Mentd respive committees of debenture holders, and of the sd dft Bower, up to and including judgment, be taxed by the taxing master as between solor and client, and the taxing master is to include in such taxation the costs of the sd S. S. and P. of the motion upon which the order of the 20th April, 1877, was made. And declare that all the afsd costs are payable out of the proceeds of the afsd sale; but no pt of the difference between party and party costs and solor and client costs is to be pd out of the surplus moneys (if any) which would otherwise be payable to the dft coy out of the proceeds of such sale. Adjourn further conson. Liberty to supply. *Barry (on behalf, &c.)* v. *Sao Pedro Brazil Gas Co.* and *Upward, &c.* v. *Same Co.*, M. R., 20th April, 1877. A. 855.

Foreign property sale.

In this case the property consisted almost entirely of land, with gasworks thereon, situated in South America. There was no trust deed; the debentures were to bearer, and purported to charge the undertaking, moneys, and property of the company. See *supra*, pp. 55, 56. See also Form 290.

So, too, in *Statham* v. *London and Jagersfontein Mining Co.*, Chitty, J., declared the debentures [no trust deed] a first charge on the company's mines [situate in South Africa] and other property. 28th July, 1883.

**Form 281.**

Judgment declaring rights and continuing receiver.

Upon motion for judgment this day made unto this Ct by counsel for the plt, and upon hearing counsel for the plt and for the dfts, and upon reading the writ of summons issued, and the three orders dated resply, &c., declare that the plts and the other holders of the mortgage debentures forming pt of the issue of 30,000*l.* first mortgage debentures of the dft coy are entld to a first charge on all the real and personal ppty, whatsoever and wheresoever, both present and future (including the uncalled capital), of the dft coy for the time being, for securing the repayment of the principal moneys and interest in the sd mortgage debentures mentd.

**Form 281.**

And order that the following accounts and inquiries be taken and made, that is to say:—

1. An account of what is due for principal and interest to the sd plts and the other holders of the sd mortgage debentures on the security thof.

2. An inquiry what ppty or assets of the dft coy are comprised in the sd mortgage debentures and the charge or security thereby created.

[3. An inquiry in what way the ppty comprised in and charged by the sd debentures can best be realized or otherwise dealt with for the benefit of the plts and the sd other debenture holders.]

And order that the receiver and manager appointed by the sd order dated the 2nd of April, 1891, be continued.

There is no need, nor is it regular, to order the continuance of a receiver unless he was only appointed until the hearing, or otherwise for a limited period which is up. *Davies* v. *Vale of Evesham Preserves*, W. N. (1895) 105; Ann. Pr., notes to Ord. L. r. 16. For order enlarging the time for a manager to act, see *infra*, p. 688.

And order that further conson be adjourned. And any of the parties are to be at liberty to apply in chambers as to the sale of any of the ppty comprised in the sd debentures, and generally as they shall be advised. *Cockshott* v. *Doré Gallery, Ltd.*, North, J., 9th May, 1891. A. 656.

**Form 282.**

Judgment. Two series of debentures.

Upon motion for judgment, &c., This Ct doth declare that the plt and the dft P. and the other holders of the series of First Mortgage Debentures issued by the dft coy are entld to a charge upon the undertaking, ppty and assets of the dft coy whatsoever and wheresoever, both present and future, including its uncalled capital, for securing the repayment of the moneys secured by the sd series of First Mortgage Debentures.

And this Ct doth declare that subject and postponed thto the dft F. R. and the other holders of the series of Second Mortgage Debentures issued by the dft coy are entld to a second charge on the undertaking, ppty and assets of the dft coy, whatsoever and wheresoever, both present and future, including its uncalled capital, for securing the repayment of the moneys secured by the sd series of Second Mortgage Debentures.

And it is ordered that the following accounts be taken, that is to say:—

1. An account of what is due to the plt and the dft P. and the other holders of the sd series of First Mortgage Debentures on the security thof.

**Form 282.**

2. An account of what is due to the dft F. R. and the other holders of the sd series of Second Mortgage Debentures on the security thof, but the account No. 2 is not to be proceeded with without the leave of the judge.

Adjourn further conson.

Liberty to apply in chambers. *Rosher* v. *Rosher, &c.*, Romer (for Vaughan Williams), J., 22nd June, 1896.

**Form 283.**

Judgment in default of defence.

This action coming on for trial this day before this Ct against the dfts S. Bros. in the presence of counsel for the plt and for the dfts S. Bros., and counsel for the plts this day also moving for judgment in default of the dft coy delivering a defence and upon hearing counsel for the dfts S. Bros., and upon reading the writ of summons issued on the 19th December, 1911, the statement of claim delivered the 15th January, 1912, having the certificate of the plts' solors indorsed thereon showing that the dft coy have not delivered a defence, and the defence of the dfts S. Bros. delivered the 25th February, 1912, and the afft of W. P. of service of notice of this motion on the dft coy, and that this motion would be marked short, this Ct 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 plts and to the other holders of the 1,050 second debentures of 10*l.* each of the dft coy under and by virtue of such debentures.

(2) An account of what is due to the defendants S. Bros. for principal, interest, costs, charges and expenses properly incurred under and by virtue of the mortgage debentures of the dft coy for 7,500*l.*

(3) An inquiry of what the property comprised in and charged by the sd debentures consists.

(4) An account of what has been received or might have been received on account of the sale by the dfts S. Bros. in respect of the ppty of the dft coy sold by them in purported exercise of their power of sale under the sd first mortgage debenture of the dft coy for 7,500*l.*, and it is ordered that the costs of this applicon are to be costs in the action, and the further conson of this action is adjourned [to be heard in chambers], and any of the parties are to be at liberty to apply as they may be advised. *Industries Conversion and Finance Corpn. on behalf, &c.* v. *The Premier Electrical Theatres. Ltd.*, Hood, Reg., 26th March, 1912.

**Form 284.**

Debenture and debenture stock: order for inquiries and accounts.

Upon the applicon of the plt by summons dated the 20th July, 1899, and upon hearing the solors for the applicants and for the dfts, and upon reading the writ of summons issued on the 16th July, 1897, the order dated the 24th August, 1897, appointing receiver, and the plt's statement of claim delivered the 20th May, 1898, It is ordered that the following inquiries and accounts be made and taken, that is to say:—

[1. An inquiry what, if any, debentures or debenture stock have been issued by the dft coy and which of them are now outstanding and unpaid and what are the priorities thof and who are the holders of or the persons entld to the benefit of such outstanding debentures or debenture stock resply.]

See note on p. 618, *supra*.

2. An account of what, if anything, is due for principal and interest to the holders of or the persons entld to the benefit of such outstanding debentures or debenture stock resply.

3. An inquiry of what the ppty comprised in and charged by the sd debentures or debenture stock resply consists.

4. An inquiry what, if any, incumbrances other than the sd debentures or debenture stock affect the ppty of the dft coy [and what is the ppty comprised in such other incumbrances resply and what are the priorities of such incumbrances and the sd debentures and debenture stock resply.]

See note on p. 618, *supra*.

5. An inquiry whether there are any and what creditors of the dft coy remaining unpaid whose debts, so far as the assets of the dft coy available for the payment of its general creditors may be insufficient to meet the same, have priority over the claims of holders of debentures or debenture stock under any floating charge created by the dft coy or other incumbrances resply, pursuant to [sect. 264 of the Cos Act, 1929], and what is due to such creditors resply.

And this order is without prejudice to any question that may be raised as to the validity of all or any debentures or debenture stock issued by the dft coy, and this Ct not requiring any trial of this action other than the hearing of this applicon, It is ordered that the further conson of this action is adjourned to be heard in chambers with liberty to any of the parties to apply as they may be advised. *Epstein Electric Cumulator Co., Ltd.*, Wright, J., 26th July, 1899.

**Form 285.**

Liberty to receiver and manager to litigate abroad.

UPON MOTION FOR JUDGMENT, &c.

[*Declaration of charge.*]

And it is ordered that an account be taken of what is due to the sd plt and the other holders of the sd first mortgage debentures on the security of such debentures, but such account is not to be proceeded with except under the direction of the judge in chambers. And the sd plt is to be at liberty to apply in chambers as to the sale or realization of or other dealing with the ppty comprised in or charged by the sd debentures. And it is ordered that S., the receiver and manager appointed by the order dated the 3rd of August, 1891, be continued, and that he do pass his accounts and pay his balances as directed by the sd order. And it is ordered that he be at liberty to commence and prosecute on behalf of the holders of the first mortgage debentures of the coy such proceedings as he may be advised in the proper local Ct in Minnesota or elsewhere in the United States of America, to foreclose the lands situate in the Vermilion Range, Saint Louis, Minnesota, afsd, and other the ppty of the coy in the sd United States comprised in or charged by the sd debentures, and to have the priorities of the sd debentures and the other incumbrances or alleged incumbrances on the sd lands and ppty determined and adjusted, and for that purpose to use the name of and represent the sd coy in the sd proceedings in such manner as he may be advised.

And it is ordered that the costs properly incurred by him in such proceedings be the sd plt's costs in this action, and the sd plt is to be at liberty to apply in chambers as to any moneys disbursed by the receiver in respect of such costs out of any moneys subscribed or contributed by holders of the sd debentures or otherwise provided by the sd receiver being declared a charge on any ppty or moneys recovered in or by means of such proceedings and as to repayment thereout of such moneys together with interest at the rate of 5*l.* p.c.p.a from the respive dates of their being so disbursed in priority to all other charges and payments. And the costs of and incidental to the sd summons are to be costs in this action. And the further conson of this action is adjourned with liberty for any of the parties to apply as advised. *Howard (on behalf, &c.)* v. *Iron and Land Coy of Minnesota, Ltd.*, Kekewich, J., 14th May, 1892. A. 776.

**Form 286.**

Judgment where principal secured by debenture

Upon motion by way of appeal, on the 5th day of May, 1894, made unto this Ct by counsel for the plt from the judgment dated the 14th March, 1894, no one appearing for the dfts, the Universal Automatic Machines Coy, Limtd, although they were duly served

**Form 286.**

not due, but winding-up gives right to enforce security.

with notice of the sd motion, as by afft appears, and upon reading the sd judgment dated the 14th March, 1894, this Ct did order that the sd appeal should stand for judgment, and the same standing this day in the paper for judgment in the presence of counsel for the plt, this Ct doth order that the sd judgment dated the 14th March, 1894, be varied in so far as the same declares that the plt and all other the holders of the debentures in the statement of claim mentd are entld to a charge on all the undertaking and ppty of the dft coy for securing the principal moneys and interest intended to be secured by the sd debentures, and this Ct doth declare instead thof that upon the occurrence of the winding-up of the dft coy the plt and all other the sd debenture holders became entld to realize their security for the full amount of the principal and interest secured by their respive debentures, notwithstanding that the day mentd therein for repayment of the capital had not arrived.

And it is ordered that instead of the Account No. 2 directed to be taken by the sd judgment an account be taken of what is due for principal and interest to the plt and the other holders of the sd outstanding debentures to the time of actual payment on the footing of the above declaration and for the plt's costs of this action, such costs to be taxed by the taxing master. And it is ordered that with these variations the sd judgment dated the 14th March, 1894, be affirmed.

And it is ordered that the plt's costs occasioned by the sd appeal be costs in the action.

The above is a copy of the judgment of the Court of Appeal in *Wallace* v. *Universal Automatic, &c. Co.*, (1894) 2 Ch. 547; see *supra*, p. 490, as to the decision.

**Form 287.**

Judgment where there are some assets outside the debentures.

Upon motion for judgment this day made unto this Ct, &c., This Ct. doth declare that the plt H. and the other holders of mortgage debentures issued by the Croydon Tramways Coy under the Croydon Tramways Act, 1878, are entld to stand and be treated as judgment creditors of the dft coy for the principal sums amounting together to 15,000*l.* which became due to them from the dft coy on the 1st January, 1887, together with 375*l.* in respect of one half-year's interest thereon, and the sum of 86*l.* 6*s.* for subsequent interest on the sd principal sums from the sd 1st day of January, 1887, down to the date of this judgment, and this Ct doth hby appoint W., the receiver and manager appointed by the order made in the action of *Grover* v. *Croydon and Norwood Tramways Coy*, dated the 24th January, 1887, and in the order in both actions dated the 4th February, 1889, without giving further security, the receiver and manager of all the ppty and effects of the coy, if any, not comprised in or subject to the sd order appointing him receiver and manager of the ppty and undertaking of

**Form 287.** the dft coy, and it is ordered that the following accounts and inquiries be taken and made:—

1. An inquiry what mortgage debentures or mortgage securities have been issued or created by the Croydon Tramways Coy, the Norwood Tramways Coy in the statement of claim named, and by the dft coy resply or the directors thof other than and in addition to the mortgage debentures for 15,000*l.* above mentd.

2. An inquiry which of the mortgage debentures or securities so issued or created by the sd cos resply are still unpaid or subsisting and what persons are the holders of the same resply, and also what persons are the holders of the sd mortgage debentures for 15,000*l.* above mentd.

3. An inquiry what ppty, moneys or assets of the dft coy are included or comprised in the sd several mortgage debentures referred to in inquiry 2.

4. An account of the principal and interest moneys secured by or due under or in respect of the sd mortgage debentures resply and to whom the same resply are due and what are the respive priorities.

5. An inquiry in what way the ppty comprised in or charged by the sd respive securities can best be realized and dealt with for the benefit of the plt and the other holders of the sd mortgage debentures, having regard to their respive interests and priorities. And it is ordered that the sd W. be at liberty to take the necessary proceedings for the purpose of making the rights of the plt and the other holders of the mortgage debentures to the above-mentd sum of 15,000*l.* and interest under this judgment available for the further security of the persons entld thto against the ppty and effects of the dft coy, if any, not comprised in the sd mortgage debentures or any of them and adjourn for further conson. Liberty to apply.

*Hope (on behalf, &c.)* v. *The Croydon and Norwood Tramways Co.*, North, J., 11th February, 1887. A. 214.

The object of the above declaration was to enable the debenture holders to get a charge on the assets not charged by the debentures. See the case reported in 34 Ch. D. 730. For similar order, see *Borough of Portsmouth, &c. Tramways Co.*, (1892) 2 Ch. 362.

Usually debentures and debenture stock cover all the assets, and where that is the case a judgment as above is needless. Such a judgment will not be given where the company is being wound up.

**Form 288.** Judgment in favour of subscribers for debentures.

Upon motion for judgment, &c., and upon hearing counsel, &c., and upon reading, &c., This Ct doth declare that the plt and all other the persons to whom the dft coy has agreed to issue debentures are entld to such rights as they would have had if debentures in the form attached to a certain agreement dated the 28th October, 1891, and

made between the dft coy of the one pt and the several persons mentd in the schedule thto of the other pt, had been sealed by the dft coy and issued to them in accordance with such agreemt, and that the plt and all other the sd persons are entld to a charge upon the undertaking, copyrights, ppty, chattels and effects, both present and future, of the dft coy, not specifically charged for the time being, for securing the repayment of the principal moneys and interest advanced or due under the sd agreemt for the issue of debentures to them resply. **Form 288.**

And this Ct doth by consent order that the following accounts and inquiries be taken and made, that is to say:—

1. An inquiry who are the persons to whom the dft coy has agreed to issue debentures.

2. An inquiry whether any of the persons referred to in the answer to inquiry 1. have forfeited their rights by non-payment of instalments.

3. An account of what is due to the plt and the other persons to whom the dft coy has agreed to issue debentures, and who have not forfeited their rights on the security of such agreemt and the charge afsd.

4. An inquiry what ppty of the dft coy is comprised in and subject to the sd charge or security afsd.

5. An inquiry what incumbrances have been created upon the ppty of the dft coy comprised in and subject to the sd charge or security, which rank in priority to the sd charge or security, and in what persons resply the sd incumbrances are vested.

6. An inquiry in what way the ppty comprised in and subject to the sd charge or security can best be realized or otherwise dealt with for the benefit of the plt and the sd other persons entld as afsd.

Adjourn further conson [to be heard in chambers]. *Davis* (*on behalf*) v. *New Publishing Co., Ltd.*, Chitty, J., 1898.

See *supra*, p. 180, as to the right in equity of subscribers for debentures to rank as if they were debenture holders.

**Form 289.**

**Judgment trust deed and several series of debentures.**

Upon motion for judgment, &c., This Ct doth declare that the trusts of the trust deeds dated —— and ——, mentd in the indorsement on the writ in this action resply, ought to be carried into execution, and doth order and adjudge the same accordingly, and it is ordered that the following inquiries and account be made and taken, that is to say:—

[An inquiry what, if any, debentures entld to the benefit of the sd two trust deeds have been issued by the dft coy, and which of them are now outstanding, and what are their respive priorities, and who are

**Form 289.** the holders of or the persons entld to the benefit of such outstanding debentures resply.]

See note on p. 618, *supra*.

An inquiry what ppty is comprised in the security created by the sd deeds resply, and the ppty comprised in both the sd deeds and in each of them resply.

An inquiry what ppty is comprised in the security created by the debentures entld to the benefit of the sd trust deed dated ——.

An inquiry what incumbrances other than the sd debentures and deeds securing the same resply affect any and what pt of the ppty of the dft coy [and what are the priorities of such other incumbrances as between themselves and as between the sd debentures and deeds securing the same].

See note on p. 618, *supra*.

An account of what, if anything, is due to the holders of or the persons entld to the benefit of the debentures entld to the benefit of the sd deed dated ——, and to the holders of or the persons entld to the benefit of the debentures entld to the benefit of the sd deed dated —— resply for principal and interest.

And this order is without prejudice to any question that may be raised as to the validity of any of the debentures issued by the dft coy, and the further conson of this action is adjourned, and any of the parties are to be at liberty to apply for a sale and generally as they may be advised. *Re Kensington, McClintock (on behalf, &c.)* v. *The Kensington and others*, Wright, J., 28th April, 1898.

**Form 290.** Judgment with special liberty to apply for appointment of agent abroad.

Upon motion, &c., This Ct doth declare that the trusts of the trust deed, &c., and doth order and adjudge the same accordingly, and [accounts and inquiries and appointment of receiver with liberty *inter alia*] to apply for the appointment of an agent to superintend the carrying on of the business of the dft coy in Burmah on such terms and conditions as may be ordered by the judge. *Halket (on behalf, &c.)* v. *South Australian Petroleum Trust, Ltd.*, 1897, North, J.

**Form 291.** Trust deed debenture stock.

Upon motion for judgment, &c., Declare that the trusts of the trust deed dated —— ought, &c. [*as in Form* 289] and order:—

(1) An inquiry what debenture stock has been issued by dft coy since date of sd deed.

(2) An account of what is due for principal and interest to the holders of such stock, distinguishing 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 for interest in respect thof. [(4) and (5) Special.] **Form 291.**

(6) An inquiry in what way the ppty comprised or charged by sd deed can best be realized or dealt with for the benefit of the holders, &c., to Continue receiver and manager appointed by order dated ——.

Liberty to apply in chambers as to raising money for the purpose of preserving the ppty subject to the trusts of the sd deed, until a sale or realization thof, or other dealing therewith, and as to the sale or realization of, or other dealing with, such ppty, Adjourn further conson. Liberty to apply. *The Swedish & Norwegian Ry. Co., Ltd.* [and *Trustees*] (H. 821 of 1889). Stirling, J., 1st February, 1890.

(*Title, &c.*) **Form 292.**

Summons for additional accounts and inquiries.

Let, &c. (*see Forms* 171 *and* 172) on the pt of ——, that, in addition to the accounts and inquiries directed by the order in this action dated the —— of ——, the following accounts and inquiries may be directed to be taken and made, that is to say [*set them out*].

1. An account, &c.
2. An account, &c.
3. An inquiry, &c.

See Form 293, for instance.

Upon applicon of the plts order that in addition to the account directed by the judge in this action dated the 21st July, 1893, the following inquiry be made, that is to say:—An inquiry who are the persons entld to participate in the benefit of the debenture in the judgment mentd, and to what extent and in what order of priority resply, and in what shares or proportion the money to be recovered under the sd debenture ought to be divided amongst such persons *Magniac* v. *Arbitrage & Finance*, Vaughan Williams, J., 16th January, 1896. **Form 293.**

Order to add inquiry to judgment.

# CHAPTER LXIII.

## SERVICE OF NOTICE OF THE JUDGMENT ON DEBENTURE AND DEBENTURE STOCKHOLDERS.

IN May, 1896, the Judges of the Chancery Division gave the following directions to the Masters. "In ordinary cases the judgment in a debenture holder's action should not be served on the debenture holders, but they should have notice given to them by circular or letter, or by advertisement, if the case so requires, full discretion being reserved to serve the judgment formally."

Where formal notice is necessary Ord. XVI. r. 40 applies, which provides as follows:—

Notice of judgment to be served on certain persons. Effect of.

**Ord. XVI. r. 40.**—Wherever, in any action for the administration of the estate of a deceased person or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—

(a) Under Ord. XV. [Accounts];

(b) Under Ord. XXXIII. [Accounts and Inquiries];

(c) Affecting the rights or interests of persons not parties to the action;

the Court or a judge may direct that any persons interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order, and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or judge to discharge, vary, or add to the judgment or order.

The practice in ordinary actions, as stated in the Annual Practice, is to send by post a copy of the Circular App. L. No. 9A. See Form 294, *post*. This notice is not the formal "Notice of Judgment" mentioned in Rule 40 and does not require personal service or indorsement of the memorandum prescribed by Rule 43. As to the cost of posting the notice, see *Re Commonwealth Oil Corpn.*, (1917) 1 Ch. 404.

If the debentures are sent by post in accordance with the last paragraph of the notice, the costs of the plaintiff's solicitors of acknowledging the receipt and returning the debentures ought to be allowed out of the fund, even if insufficient to pay all claims in full. *Re W. Mate & Sons, Ltd.*, (1920) 1 Ch. 551. The persons served with such notices cannot properly enter appearances, but must, if they desire to attend the proceedings, apply by summons for leave to do so. *S. C.* at p. 562.

When a formal notice under Rule 40 is necessary, personal service is necessary, and all the requirements of Rules 42 and 43 must be strictly followed.

In May, 1909, a further Direction by the judges (Ch. D.) was added—"In a debenture holder's action where the usual judgment has been made, prior and subsequent incumbrancers ought not to be served with the notice of the judgment under Ord. XVI. r. 40; subsequent incumbrancers should be added as parties under Ord. XVI. r. 11, and where a sale is directed with the consent of prior incumbrancers (as in the form used in the case of a creditor's action for sale of real estate), informal notice with a view to obtaining such consent may be given."

Where formal notice has been served under Ord. XVI. r. 40, the following rules of Ord. XVI. apply:—

Order for liberty to attend not necessary. Appearance to be entered.

**R. 41.**—It shall not be necessary for any person served with notice of any judgment or order, to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance.

Memorandum of service to be entered in Central Office.

**R. 42.**—A memorandum of the service upon any person of notice of the judgment or order in any action under Rule 40 shall be entered in the Central Office, upon due proof by affidavit of such service.

Form of memorandum.

**R. 43.**—Notice of a judgment or order served pursuant to Rule 40 shall be entitled in the action, and there shall be endorsed thereon a memorandum in the Form No. 28 in Appendix G.

See Form 295, *infra*.

Service of notice of judgment on infants, &c.

**R. 44.**—Notice of a judgment or order on an infant or person of unsound mind, not so found by inquisition, shall be served in the same manner as a writ of summons in an action.

Copies of certificates of Central Office.

**Ord. LV. r. 31.**—A copy of every certificate of the Central Office of entry of a memorandum of service of notice of a judgment or order, and of every appearance entered by a person served with such notice [to attend the proceedings] certified by the solicitor, shall be left at chambers.

**R. 33.**—(see *infra*, p. 648) provides, *inter alia*, that the judge, if satisfied *that all necessary parties* have been served with notice of the judgment, shall thereupon give directions, &c.

Where service of notice of judgment or order dispensed with

**R. 35.**—Where, upon the hearing of the summons to proceed, it appears to the judge that by reason of absence, or for any other sufficient cause, the service of notice of the judgment or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may at his discretion order any substituted service or notice by advertisement or otherwise in lieu of such service.

See Form 296 *et seq.*; and see *Printers and Transferrers, &c. Soc.*, (1899) 2 Ch. 184; *Lead, &c. Soc.*, (1904) 2 Ch. 196.

Power to bind persons, service on whom is dispensed with.

**R. 35a.**—Where service of notice of a judgment or order for accounts and inquiries is dispensed with, the judge in person may, if he thinks fit, order that the persons as to whom service is dispensed with shall be bound as if served, and they shall be bound accordingly, except where the judgment or order has been obtained by fraud or non-disclosure of material facts.

See Form 302.

Stoppage of proceedings where all necessary parties have not been served with notice of judgment or order.

**R. 36.**—If, on the hearing of the summons to proceed, it shall appear that all necessary parties are not parties to the action or have not been served with notice of the judgment or order, directions may be given for advertisement for creditors, and for leaving the accounts in chambers, but the adjudication on creditors' claims and the accounts are not to be proceeded with, and no other proceeding is to be taken, except for the purpose of ascertaining the parties to be served, until all necessary parties shall have been served, and are bound, or service shall have been dispensed with, and until directions shall have been given as to the parties who are to attend on the proceedings. *Infra*, Form 298.

As to ordering a sale in debenture actions "before all the persons interested are ascertained whether served or not," see Ord. LI. r. 1b, and *Crigglestone Coal Co.*, (1906) 1 Ch. 523. In that case third debenture holders were not represented in the action, but the Court directed—under Ord. LI. r. 1b—that the property should be sold with the approbation of the judge, and the proceeds brought into Court: the absent debenture holders to be served with notice of the application in Chambers for approval of any conditional contract.

In debenture holders' actions the practice in ordinary cases in most of the chambers of the judges of the Ch. D. is not to serve the judgment but the following notice.

**Form 294.**

Notice of judgment or order.

[*Title of action in full.*]

Pursuant to a judgment of the High Ct of Justice, Chancery Division, dated the —— day of ——, 19—, in an action in the matter of —— Coy, Limtd, E. B. on behalf of himself and all others the holders of debenture bonds forming pt of the issue of —— Bearer Debenture Bonds of the *Dft Coy* v. —— *Coy, Limtd* (J. 1687 of 1928), whereby it was ordered that the following account be taken, namely:—

An account of what is due to the plt and other holders of the sd debenture bonds under or by virtue of such debenture bonds.

Notice is hby given that all persons claiming under the sd account to be the holders of debenture bonds issued by the dft coy are required on or before the —— day of ——, 19—, to send in their claims in writing giving their names and addresses, parlars of their claims (including the amount due for principal and interest thereon), the distinctive numbers of their debenture bonds and the names and

addresses of their solors (if any) to Messrs. S. H. & B. (solors for F. W., the recr appointed in the sd action) at their office, ——, ——, in the City of London, England, or in default thof they will be excluded from the benefit of the sd judgment. **Form 294.**

**Form 294a.**

Notice of judgment and to produce securities.

[*Title of action in full.*]

Take notice, that a judgment [order] dated the —— day of ——, 19—, has been pronounced [made] in this action (which has been instituted for the purpose of ascertaining who are the holders of debentures (*or as may be*) of the dft coy, to realize the ppty charged thereby, and to divide the proceeds amongst the persons entld thto), and by such judgment [order] the inquiries and accounts (*or as may be*) necessary for the afsd purpose are directed.

The material pts of the judgment [order] are set forth in the schedule hto.

A list of the debenture holders (*or as may be*), with the parlars of the debentures held or believed to be held by them resply, has been left in the chambers of the registrar (Cos Winding-up), [or the judge's chambers], and your name is included therein as the holder of (*state how many*) First (*or as may be*) Debentures numbered —— and all dated the ——, 188— (*or as may be*), for ——*l.* each, bearing interest at ——*l.* p.c.p.a.

[*Set out the numbers and dates of the debentures.*]

From the sd list it also appears that interest is due on your sd debentures (*or as may be*) from the ——, 189—, down to which date all interest is believed to have been pd.

If you are such holder, it will be necessary, in order that you may participate in the benefit of the sd judgment [order], that your debentures (*or as may be*) should be produced before the Registrar (Cos Winding-up), [*or* the Master in the chambers of the judge], and ——day, the —— day of ——, 19—, at —— o'clock in the ——noon, is appointed for this purpose, when you must attend either personally or by your solor or agent at the chambers of the sd Registrar, situate at Bankruptcy Buildings, Carey Street, London, W.C. [*or* the Hon. Mr. Justice ——, Room No. —, in the Royal Cts of Justice, Strand, London], and produce your debentures (*or as may be*).

If you are no longer the holder of the debentures (*or as may be*) or any of them, you are requested to let me know at once the names and addresses of the person or persons to whom you transferred such of the sd debentures (*or as may be*) as are no longer held by you.

**Form 294a.** If you desire it, you can forward the debentures by post, or otherwise, to me for production. I will return them by post in due course.

Plt's solor.

Dated, &c.

THE SCHEDULE.

[*Here insert material parts of judgment or order.*]

For a more modern form, see Form 317, *infra*.

A creditor who comes in after the time limit has expired will not be excluded from participation, if there are funds in Court, although he will not be allowed to disturb dividends already paid. *Harrison* v. *Kirk*, (1904) A. C. 1; *Re McMurdo*, (1902) 2 Ch. 684. See Ann. Pr., notes to Ord. LV. r. 44.

**Form 295.**

Notice of judgment served under Ord. XVI. r. 40.

Take notice that from time of the service of this notice you [*or as the case may be*, the infant *or* person of unsound mind] will be bound by the proceedings in the above cause in the same manner as if you [*or* the sd infant *or* person of unsound mind] had been originally made a party, and that you [*or* the sd infant *or* person of unsound mind] may, on entering an appearance at the Central Office, attend the proceedings under the within-mentd judgment [*or* order] and that you [*or* the sd infant *or* person of unsound mind] may, within one month after service of this notice, apply to the Ct to add to the judgment [*or* order].

The following is the form of notice by advertisement used by the winding-up registrar:—

**Form 296.**

Notice by advertisement of judgment where debentures to bearer.

Take notice, that by an order of his Lordship, Mr. Justice ——, made in an action in the High Ct of Justice, Chancery Division, —— v. —— *Steam Tramways Coy, Limtd, and others*, 1894, C. 4455, and dated the ——, it was ordered that publication by advertisement in the following newspapers, namely:—Once in the *London Gazette*, the *Times*, the *Daily Telegraph*, and the *Financial News*, of notice of the judgment in the sd action dated ——, and of an order dated ——, and of the memdum prescribed by Ord. XVI. r. 43, of the Rules of the Supreme Ct, and of the reciting order, should be deemed good service of the sd judgment and order dated ——, upon all the holders of debentures issued by the sd coy secured by trust deeds dated resply —— and ——, who had not prior to the date of the sd order of the —— been served with notice of the sd judgment and order dated ——, and that the time within which the sd holders of debentures not already served with notice as afsd were to apply to discharge, vary, or add to the sd judgment and order dated ——, was to be one month after the date of the last publication of the sd notice.

Form 296.

And further take notice, that by the sd judgment dated ——, it was ordered that the following inquiries be made, namely:—

(1) An inquiry what 5 p.c. debentures have been issued by the dft coy on the security of the sd indenture of the ——, and are now outstanding, and by whom the sd debentures are resply held.

(2) An inquiry what 6 p.c. debentures have been issued by the dft coy on the security of the sd indenture of the ——, and are now outstanding, and by whom the sd debentures are resply held.

(3) An inquiry of what the ppty, subject to the trusts of the sd respive indentures of the —— and the ——, consists.

And further take notice, that by the sd order dated —— it was ordered that the following inquiry should be made, namely:—

An inquiry what incumbrances prior to the debentures referred to in the sd judgment affect the ppty comprised in the sd two several indentures in the sd judgment resply mentd or any and what pts thof, and what are the priorities of such incumbrances.

And further take notice, that from the date of this advertisement you will be bound by the proceedings in the sd action in the same manner as if you had been originally made a party; and that you may, on entering an appearance at the Central Office of the Supreme Ct, attend the proceedings under the sd judgment and order dated ——, and that you may within one month after the publication of the last of the advertisements authorised as afsd apply to the Ct to discharge, vary, or add to the sd judgment or order dated ——. And further take notice that you are required on ——, the ——, at —— o'clock in the forenoon, to produce the debentures held by you at the chambers of the sd judge, Room 625, at the Royal Cts of Justice, London, or in default you will be peremptorily excluded from the benefit of the sd judgment.

Dated this —— day of ——.

——, Plt's solors.

Form 297.

Affidavit of service of notice of order on debenture holders.

I, ——, of ——, clerk to Messrs. ——, of the same place, solors for the plt, make oath and say as follows:—

1. On the respive days mentd in the first column of the schedule hto, I served the several persons whose names are set forth in the second column of the sd schedule opposite to the sd respive days with a notice in writing of the order made in this action, dated the —— day of ——, and of which notice the paper writing marked "A," now produced and shown to me, is a true copy, by sending true copies of

**Form 297.**

such notice by prepaid post to them at the respive places set forth in the third column thof opposite to their respive names.

2. Each of such copy notices had at the time of posting as afsd indorsed thereon a memdum addressed to the person or persons to whom I addressed the envelope containing same resply, and of which memdum the paper writing now exhibited to me marked —— and indorsed on the sd exhibit marked "A" is a true copy, except that the sd address is not set forth in the sd exhibited copy, and I verily believe that notice of the sd order has been received by the parties named in the respive schedules.

THE SCHEDULE ABOVE REFERRED TO.

*Holders of Debentures.*

| Date of Service. | Names of persons served with Notice. | Place of Service. |
|---|---|---|
| | | |

Date, ——.

Sworn, &c.

**Form 298.**

Order as to service by post.

Upon the applicon of the above-named plts, and upon hearing the solors for the applicants, and upon reading an order dated, &c., order that service of notice of the sd order dated the 16th March, 1889, upon the debenture stock creditors having charges on the undertaking of the dft coy and the tolls arising therefrom specified in the fourth pt of the schedule marked as exhibit C. H. B. 1 to the sd afft of the sd ——, filed on the 22nd January, 1891, other than such of the sd debenture stock creditors as have already entered appearances in this action by sending to each of such debenture stock creditors notice of the sd order with an indorsement thereon in the form prescribed by Ord. XVI. r. 43, together with a copy of this order, through the post office in a prepaid letter addressed to such debenture stock creditors at their respive addresses specified in the sd fourth pt of the sd schedule, be deemed good service of such notice on all such debenture stock creditors.

And it is ordered that the time to be specified in the indorsement on such notice within which any such debenture stock creditors may apply or add to or vary the sd order is to be one month after such service. *Halifax* v. *Symonds & Co.*, Chitty, J., 3rd February, 1891.

(*Title.*)

**Form 299.**

Summons to dispense with service of notice of judgment on debenture holders.

Let the dfts, &c. (*see Forms* 171 *and* 172), on the hearing of an applicon of the plt that service of notice of the judgment made in this action, and dated ——, upon the persons named in the schedule hto, being debenture holders of the sd coy, whose names and addresses appear in the list marked ——, referred to in the afft of the applicant filed in this action the —— day of ——, may be wholly dispensed with.

That the costs of this applicon may be costs in the action.

**Form 300.**

Order dispensing with service of judgment on certain debenture holders.

Upon the applicon of the plt by summons dated the 18th January, 1896, and upon hearing the solors for the applicant and for the dft, and upon reading, &c., it is ordered that service of notice of the sd judgment, dated the 1st July, 1895, upon the holders of debentures issued by the dft coy, Veuve Monnier, &c., whose names are set forth in the schedule hto, be dispensed with, and it is ordered that the costs of the applicon be costs in the action. *Akers* v. *Veuve Monnier*, Hood, Reg., 3rd February, 1896.

**Form 301.**

Service of notice of judgment on debenture holders dispensed with.

Upon the applicon of the plt, and upon hearing the solors for the applicants and for the dfts M. and H., and upon reading the judgment in this action, dated the 29th July, 1891, and an afft, &c., It is ordered that service of notice of the sd judgment, dated the 29th July, 1891, upon all the holders of "A" debentures, issued by the dfts The Tivoli, Limtd, and referred to in the sd judgment, be dispensed with. *Barrett's Brewery, &c. Co.* v. *The Tivoli, Ltd.*, Chitty, J., at Chambers, 17th June, 1892. A. 883.

**Form 302.**

Order binding stockholders not served with judgment.

Upon the applicon of the plt, &c., order that M., whose name appears in the register of debenture stockholders of dft coy, and R. (one of the parties claiming an interest in the debenture stock for 2,000*l.* appearing in the sd register of debenture stockholders, as standing in the name of the dft T.), upon whom resply service of the sd judgment dated the 3rd April, 1895, has been dispensed with, be and they are hby resply bound by the sd judgment as if served therewith. *Markwick* v. *Thurlow*, Romer, J., 8th June, 1896.

## CHAPTER LXIV.

### LIBERTY TO ATTEND.

WHERE a person who has not been served with notice of the judgment desires to attend and watch proceedings, he must apply for liberty to attend, which will only be given in special circumstances.

*Re Schwabacher*, (1907) 1 Ch. 719.

A solicitor should have a clear authority from his client, in writing, before he applies for liberty to attend proceedings. *Bird* v. *Harris*, 29 W. R. 45.

Where notice of judgment has been served, no application is necessary. See Ord. XVI. r. 41, p. 624, *supra*.

**Form 303.**

Summons for liberty to attend.

(*Title, &c.*)

Let, &c. (*see Forms* 171 *and* 172), on the hearing of an applicon on the pt of ——, of ——, who claims to be interested in the matters in question in this action as a holder of —— debentures of the dft coy each for ——*l.*, for an order that he may be at liberty to attend the proceedings under the judgment [*or* order] in this action, dated the —— day of ——, and that the plt be directed to give notice from time to time to the applicant of all proceedings under the sd judgment [*or* order].

**Form 304.**

Liberty to debenture holder to attend.

Upon the applicon of L. by summons dated, &c., and hearing the solors for the applicant and for the plts, and reading, &c., and it being alleged that the sd applicant is a mortgagee of the dft coy, and that the plt on the 22nd April, 1891, obtained an order for inquiries and account, that the applicant hath not been served with a copy of the sd order [and is desirous of having liberty to attend the proceedings under the same], and upon reading the sd order, It is ordered that the sd L. be at liberty at his own expense to attend the proceedings under the sd order dated, &c. *Manchester, &c. Banking Co.* v. *Paragon Works, Ltd.*, Kekewich, J., at Chambers, 15th July, 1892. B. 919.

**Form 305.**

Another. Notice of proceedings to be given.

Upon the applicon of A., of ——, in the Province of Ontario and Dominion of Canada, a debenture holder of the above-named coy (holding 1,200 debentures), by summons dated the 25th day of January, 1899, and upon hearing the solors for the plts and the dfts, It is ordered that the applicant be at liberty to attend the proceedings in

**Form 305.**

this action at his own expense, and that the plts do give notice from time to time to the applicant's solors of the proceedings to be had and taken in this action, and that the plts' costs of giving such notices be pd by the applicant, the applicant's solors, Messrs. A. & B., undertaking personally to pay such costs. *Consolidated Trust and The Bell Organ, &c. Co.*, Wright, J., 9th February, 1899.

**Form 306.**

Another. Liberty to apply for payment of costs.

Upon the applicon by summons dated the 26th November, 1897, of S. & S., trading as, &c., and upon hearing counsel for the applicants and for the plt, and the dft coy appearing in person by G. S. B., the off recr and prov liqr thof, and upon reading the order dated the 6th August, 1897, appointing the receiver and the afft of S. filed the 1st December, 1897, It is ordered that the applicants be at liberty to attend all further proceedings in this action at their own expense in the first instance, but the applicants are to be at liberty to apply for payment of any costs properly incurred by them in attending such proceedings out of the assets of the dft coy comprised in the debentures the subject-matter of this action, and that they may be at liberty to apply generally as they may be advised, and it is ordered that the rest of the sd summons do stand over generally, with liberty to restore as an when the applicants may be advised. *Clark* v. *Mealy & Co.*, Hood, Reg., 14th December, 1897.

The summons in the above case was that the applicants might be added as defendants to the action, on the ground that the plaintiff had an interest adverse to that of the other debenture holders, and also that the conduct of the proceedings in the action and of the order dated the 6th August, 1897, might be given to them.

**Form 307.**

Liberty for purchaser of plaintiff's debentures to conduct the action.

Upon the applicon of P., of, &c., and upon hearing counsel for the applicant and for A., and the solors for the plt and the dft coy, and upon reading, &c., and A. to whom by the sd order dated, &c., the conduct of this action was committed, except as to the conduct of the sale or realization of the ppty of the dft coy, by his counsel admitting that the applicant has pd to the sd A. the sum of ——*l.* for principal and interest due upon the debenture held by the sd A., and is now the transferee thof, and the applicant undertaking to pay forthwith to the sd A. 150*l.* and such further sum (if any) as may be allowed on taxation of his costs of this action and of this applicon and as a mortgage debenture holder, and the sd A. undertaking to refund to the applicant such pt (if any) of the 150*l.* as may be the difference between 150*l.* and his taxed costs as afsd, It is ordered that the sd P. be at liberty to attend the proceedings in the action in the place of the sd A. And it is ordered that the conduct of this action be committed to the applicant in

**Form 307.** the place of the sd A., except as to the conduct of the sale or realization of the ppty of the dft coy, which is to be conducted by B., the liqr of the dft coy, and this order is to be without prejudice to the question as to whether the applicant is eventually to be allowed out of the assets of the above-named coy any pt of the costs of the sd A. *Harland* v. *Hull Street Tramways Co.*, Chitty, J., at Chambers, 2nd May, 1892. A. 669.

**Form 308.**

Liberty to attend by counsel public examination of defendant company's officials.

Upon the applicon by summons dated 19th January, 1912, of the plt in the first above-mentd action and upon hearing the solors for the applicant and for the dft coy, and upon reading the orders dated resply the 4th October, 1905, appointing receiver, the 2nd February, 1911, and the 18th July, 1911, and the certificate of funds, it is ordered that S., the receiver in this action, be at liberty on behalf of the plt and all other the debenture holders of the dft coy [named] to appear at the public examination of H. B., the late chairman of directors of the —— Corporation, Limtd, and to emply a junior counsel for such purpose, and it is ordered that the fund in Ct be dealt with as directed in the payment schedule hto, the sum of 50*l.* thereby directed to be pd, being further on account of the plt's costs of this action. *Nash* (*on behalf, &c.*) v. *The Selected Gold Mines, &c.*, Neville, J., 25th January, 1912.

**Form 309.**

Order discharging order giving liberty to attend.

Upon the applicon by summons dated, &c., of A. B., and C., the trees of the will of B., decd, claiming to be debenture holders of the above-named dft coy, and upon hearing counsel for the applicants, for the plt and dfts, and upon reading the pleadings delivered in this action, and an afft of ——, filed, &c., It is ordered that the liberty to attend the proceedings given to the applicants on the 14th March, 1895, be discharged, and that nothing done or to be done in this action or counter-claim is to prejudice the applicants' rights as holders of debentures issued by the dft coy or any remedies of the dft coy against the applicants. And it is ordered that the costs of all parties to this action be reserved, with liberty to apply. *Agg-Gardner* (*on behalf, &c.*) v. *Gresley Brewery, Ltd.*, Vaughan Williams, J., 6th August, 1895.

## CHAPTER LXV.

### PROCEEDINGS IN CHAMBERS UPON JUDGMENT OR ORDER FOR ACCOUNTS AND INQUIRIES.

WHEN a judgment has been obtained in a debenture action, the plaintiff, as the person who is as a rule entitled to prosecute the proceedings under the judgment, should leave a copy of the judgment at the judges' chambers, or the office of the registrar in a winding-up, and he should take out a summons to proceed.

Upon the summons to proceed, and adjournments thereof, the master or registrar reads the judgment or order, takes notes of the parties attending and of their solicitors, and from time to time gives directions (a) as to service or notice of the judgment or order; (b) as to obtaining any order dispensing with service, &c.; (c) as to taking steps to add additional parties; (d) as to what persons shall receive the accounts and inquiries respectively, and within what time; (e) as to whether there shall be advertisements for claimants; (f) as to how disputed claims shall be dealt with; (g) as to liberty to attend; and (h) generally as to all other matters which may arise in the course of the proceedings, the object being to obtain a satisfactory and workable certificate in answer to the judgment or order.

It must not be supposed that the matters aforesaid are dealt with in the order in which they are mentioned; for circumstances differ and the procedure varies accordingly. Not uncommonly, for example, the master or registrar, before deciding as to service or advertisements, may desire to see the evidence in answer to inquiry as to the debenture holders; for that, when the debentures are registered, will show how many there are and whether the holders can all be identified without advertisement, and whether there are any disputes which will have to be dealt with. On the other hand, where the debentures are to bearer, one of the first steps is to give directions as to advertising for claims.

A stay of inquiries directed by a judgment, pending an appeal, will only be granted under very special circumstances. *Shaw* v. *Holland*, (1900) 2 Ch. 305; *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. D. 478.

Where there had been a delay for three years the action was stayed and the plaintiff ordered to pay costs. *Re Cornish Tin Sands, Ltd.*, W. N. (1918) 377.

The procedure in chambers after a judgment has been obtained is regulated by Rules 28 to 60 of R. S. C. Ord. LV. These rules provide as follows:—

*As to Documents to be left at Chambers.*

Copy of judgment or order.

**Ord. LV. r. 28.**—In all cases of proceedings in chambers under any judgment or order, the party prosecuting the same shall leave a copy of such judgment or order at the judge's chambers, and shall certify the same to be a true copy of the judgment or order as passed and entered.

Registrar's note where order not drawn up.

**R. 29.**—Whenever any matter is adjourned from the Court to chambers, or any directions are given in Court to be acted upon at chambers, whether upon a matter adjourned into Court from chambers, or upon any other occasion, without an order being drawn up, a note signed by the registrar, stating for what purpose such matter is adjourned to chambers, or the directions given, shall be procured from the registrar and left at chambers.

Names of solicitors.

**R. 30.**—A note stating the names of the solicitors for all the parties, and showing for which of the parties such solicitors are concerned, shall be left at chambers with every judgment or order.

**R. 31.**—[As to copies of certificates of Central Office, see Chap. LXIII.]

*Summons to Proceed.*

Bringing in judgment, &c. directing accounts and inquiries

**R. 32.**—Every judgment or order directing accounts or inquiries to be taken or made shall be brought into the judge's chambers by the party entitled to prosecute the same within ten days after the same shall have been passed and entered, and in default thereof any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such judgment or order unless the judge shall otherwise direct.

Summons to proceed with accounts and inquiries directed.

Directions.

**R. 33.**—Upon a copy of the judgment or order being left, a summons shall be issued to proceed with the accounts or inquiries directed, and upon the return of such summons the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the judgment or order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken, and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied, by addition thereto or otherwise, as may be found necessary.

Settling deed in case parties differ.

**R. 34.**—Where by a judgment or order a deed is directed to be settled by the judge in chambers in case the parties differ, a summons to proceed shall be issued and upon the return of the summons the party entitled to prepare the draft deed shall be directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto, and the party so entitled to object shall be directed to deliver to the other party a statement, in writing, of his objections (if any) within eight days after the delivery of such copy, and the proceeding shall be adjourned until after the expiration of the said period of eight days.

Where service of notice of judgment or order dispensed with.

**R. 35.**—Where, upon the hearing of the summons to proceed, it appears to the judge that, by reason of absence or for any other sufficient cause, the service of notice of the judgment or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such

service, or may at his discretion order any substituted service or notice by advertisement or otherwise in lieu of such service.

Power to bind persons, service on whom is dispensed with.

**R. 35a.**—Where service of notice of a judgment or order for accounts and inquiries is dispensed with, the judge in person may, if he thinks fit, order that the persons as to whom service is dispensed with shall be bound as if served, and they shall be bound accordingly, except where the judgment or order has been obtained by fraud or non-disclosure of material facts.

[See Form 299 *et seq.*]

Stoppage of proceedings where all necessary parties have not been served with notice of judgment or order.

**R. 36.**—If, on the hearing of the summons to proceed, it shall appear that all necessary parties are not parties to the action, or have not been served with notice of the judgment or order, directions may be given for advertisement for creditors, and for leaving the accounts in chambers, but the adjudication on creditors' claims and the accounts are not to be proceeded with, and no other proceeding is to be taken, except for the purpose of ascertaining the parties to be served, until all necessary parties shall have been served, and are bound, or service shall have been dispensed with, and until directions shall have been given as to the parties who are to attend on the proceedings.

Course of proceeding at chambers.

Papers for use of judge and chief clerk.

**R. 37.**—The course of proceeding in chambers shall ordinarily be the same as the course of proceeding in Court upon motions. Copies, abstracts, or extracts of or from accounts, deeds, or other documents and pedigrees and concise statements shall, if directed, be supplied for the use of the judge and his master, and where so directed copies shall be handed over to the other parties. But no copies shall be made of deeds or documents where the originals can be brought in, unless the judge shall otherwise direct.

### *Attendances.*

Classifying interests of parties.

**R. 40.**—Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the judgement or order, it appears to the judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor, and may direct what parties may attend all or any part of the proceedings; and where the parties constituting any class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him, and where any one of the parties constituting such class declines to authorize the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

Costs of party appearing separately.

Where persons, served in the notice of judgment, do not enter an appearance in the action under Ord. XVI. r. 41, it is not necessary, before signing the certificate, to serve them with a summons to proceed. *Green* v. *Measures*, W. N. (1866) 122, and see Ann. Pr., notes to Ord. LV. r. 40.

Judge may require distinct solicitor to represent parties.

**R. 41.**—Whenever, in any proceeding before a judge in chambers, the same solicitor is employed for two or more parties, such judge may, at his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented.

Attendance of parties not directed to attend.

**R. 42.**—Any of the parties, other than those who shall have been directed to attend, may attend at their own expense, and upon paying the costs, if any, occasioned by such attendance, or, if they think fit, they may apply by summons for liberty to attend at the expense of the estate, or to have the conduct of the action either in addition to or in substitution for any of the parties who shall have been directed to attend.

This rule only applies to parties to the action. Per Parker, J., in *Re Schwabacher*, (1907) 1 Ch. 719. If a creditor desires to contest a particular claim and the defendants do not dispute it, he can apply in chambers for leave to conduct the proceedings on that particular claim. (*Ibid.*)

Order stating parties who have been directed to attend.

**R. 43.**—An order is to be drawn up on a summons to be taken out by the plaintiff or the party having the conduct of the action, stating the parties who shall have been directed to attend, and such of them (if any) as shall have elected to attend at their own expense, and such order is to be recited in the master's certificate.

Advertisements.

**R. 44.**—Upon the hearing of a summons to proceed on a judgment or order directing an account of debts, claims or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, the judge may direct an advertisement or advertisements for creditors or other claimants to be issued.

A creditor may bring forward his claim as long as there are assets in hand, see *Harrison* v. *Kirk*, (1904) A. C. 1; *Re McMurdo*, (1902) 2 Ch. 684; *In re Metcalfe*, 13 Ch. D. 236.

By whom prepared and signed.

**R. 45.**—Every advertisement for creditors shall be prepared by the party prosecuting the judgment or order, and signed by his solicitor, or if he has no solicitor by the master, and such signature shall be sufficient authority to the printer of the *London Gazette* to insert the same. Every advertisement for claimants other than creditors shall be prepared by the party prosecuting the judgment or order and submitted to the master for approval, and when approved shall be signed by the master, and such signature shall be sufficient authority to the printer of the *London Gazette* to insert the same.

Substance and form of advertisements.

**R. 46.**—Every advertisement (Forms 2 and 3, Appendix L, with such variations as may be required) shall fix a time, within which each claimant is to send to such person as the judge shall direct, to be named and described in the advertisement, the name and address of such claimant, and the full particulars of his claim. Notice of the time appointed for adjudicating on the claims shall be inserted in the advertisement, and at such appointment and at any adjournment thereof (subject in the case of creditors to the provisions of Rule 54) every claimant shall attend personally or by his solicitor to support his claim. The advertisement shall contain a direction that a claimant not residing in England or Wales must send with particulars of his claim the name and address of a person in England or Wales to whom notices to the claimant required by these rules or directed by the judge can be sent. Any such claimant not complying with this direction shall not be entitled to receive any further notice, and in the case of any claimant complying therewith a notice to the name and address mentioned by him shall be equivalent to a notice sent to the claimant himself.

Claimants not sending particulars of claim excluded.

**R. 47.**—Claimants who do not send full particulars of their claims to the person named and within the time fixed by the advertisement shall be excluded from the benefit of the judgment or order unless the Court or judge upon application

made by summons shall otherwise order. Any such order may be made upon such terms and conditions as to costs and otherwise as the Court or judge shall think fit.

**R. 48.**—Every notice by this order required or by the judge directed to be given to or served upon claimants shall, unless the judge shall otherwise direct, be deemed sufficiently given and served if transmitted prepaid through the post addressed to the claimant at the address given in the claim sent in by him pursuant to the advertisement, or in case such claimant is represented by a solicitor, to such solicitor at the address given by him. Service of notices on claimants.

**R. 49.**—Every claimant shall, if required by notice in writing (Form No. 4, in Appendix L), given by such party as the judge shall direct, produce all deeds and documents necessary to substantiate his claim before the master at such time as shall be specified in such notice. Claimants to produce documents if required.

**R. 50.**—Claimants required to file affidavits under the subsequent rules of this order shall not be bound to take office copies, but shall forthwith give notice of filing to the person to whom particulars of claims are to be sent, and such person shall take office copies and produce the same at the hearing, unless the judge shall otherwise direct. Claimants' affidavits.

## *Claims of Creditors.*

**R. 51.**—Such party as the judge shall direct shall examine the claims of persons claiming to be creditors sent in pursuant to the advertisement, and shall ascertain so far as he is able, to which of such claims the estate of the deceased is justly liable, and he shall, at least seven clear days before the time appointed for adjudication or within such other time as the judge shall direct, file an affidavit (Form No. 5, in Appendix L) made by the executors or administrators of the deceased and by the person to whom claims are required by the advertisement to be sent (or by such person or persons as the judge shall direct) verifying lists (Forms Nos. 6, 6A and 6B in Appendix L)— Examination and verification of claims.

(1) of claims which have been sent in pursuant to the advertisement;

(2) of claims which have been received by the executors or administrators or any of them, other than claims sent in pursuant to the advertisement;

(3) of sums of money which were or may have been due and owing by the deceased at the time of his death and are or may be still due and owing and which have come to the knowledge of the executors or administrators or any of them, but in respect of which no claim has been received or sent in as aforesaid.

Such affidavit shall state to which of such claims or sums of money or parts thereof respectively the estate of the deceased is in the opinion of the deponents justly liable, and their belief that such claims or sums of money or parts thereof respectively are justly due and proper to be allowed and the reasons for such belief.

**R. 52.**—When adjudicating upon the claims of persons claiming to be creditors the judge in his discretion may allow any of such claims, or any part thereof respectively, without proof by the claimants, and may direct all or any of the claims not so allowed to be investigated in such manner as he may think fit, and may require any further particulars, information, or evidence, relating to such claims, and may require any claimant to attend and prove his claim, or any part thereof, and may adjourn the adjudication upon such claims as are not then allowed. Adjudication on claims.

**R. 53.**—Where on the day appointed for adjudicating upon the claims of persons claiming to be creditors any of such claims are adjourned or remain undisposed of, another day for adjudicating upon such claims shall be fixed, and where further Adjournment. Further evidence.

evidence is to be adduced, the times for filing evidence in support of and in opposition to the claims may be fixed, and in that case the proceedings shall be adjourned until the evidence is completed.

Notice of claims allowed or disallowed.

**R. 54.**—Notice of allowance (Form No. 7, in Appendix L) shall be given by such party, as the judge shall direct, to every creditor whose claim, or any part thereof, has been allowed. Notice (Form No. 8, in Appendix L) shall be given by such party as aforesaid to every person claiming to be a creditor whose claim or any part thereof shall not have been allowed to prove his claim or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein mentioned, being the time appointed for adjudicating on the claim; and in case the claimant shall not comply with such notice, his claim, or such part thereof as aforesaid, may be disallowed. No person claiming to be a creditor need make any affidavit nor attend in support of his claim (except to produce his security) unless he is served with a notice requiring him to do so as provided by this rule. Every person claiming to be a creditor shall produce the security (if any) held by him before the master at such time as shall be specified in the advertisement for adjudicating on the claims.

Unless served with notice claimant need not attend.

Costs.

**R. 55.**—A creditor who has established his debt in the judge's chambers under any judgment or order shall be entitled to the costs of so establishing his debt, unless the judge shall otherwise direct, and the sum to be allowed for such costs shall be fixed by the judge, unless he shall think fit to direct the taxation thereof, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established. The judge may disallow any costs of a claimant unnecessarily or improperly incurred and may order a claimant to pay the costs of any party or parties incurred in opposing any claim or any part of a claim which the claimant has failed to establish.

List of claims allowed.

**R. 56.**—A list of creditors' claims allowed shall be made out and left in the judge's chambers by such party as the judge shall direct.

Payment of creditors.

**R. 57.**—Where any judgment or order is made for payment by the Paymaster-General to creditors, the party prosecuting such judgment or order shall send to each such creditor or to his solicitor (if any) a notice in the form prescribed by or under the Supreme Court Funds Rules that the cheques may be received from the Paymaster-General, and such party shall, when required, produce any documents necessary to enable such creditors to receive their cheques.

### *Claims of Persons other than Creditors.*

Affidavit verifying claims.

**R. 58.**—In the case of claimants other than creditors such party as the judge shall direct shall, at least seven clear days before the time appointed for adjudication or within such time as the judge shall direct, file an affidavit (Form No. 8A in Appendix L) to be made by the executors or administrators of the deceased or by the trustees and in each case by the person to whom claims are required by the advertisement to be sent (or by such persons as the judge shall direct) verifying lists of the claims (Forms Nos. 8B and 9 in Appendix L), the particulars of which have come to the knowledge of the executors, administrators or trustees or any of them or which have been sent in pursuant to the advertisement.

Adjudication on claims.

**R. 59.**—At the time appointed for adjudicating upon the claims of claimants other than creditors the times for filing evidence in support of and in opposition to the claims may be fixed, and in that case the proceedings shall be adjourned until the evidence is completed.

**R. 60.**—Where a claimant other than a creditor has established his claim he shall, if not already a party, and unless the Court or a judge shall otherwise direct, be served with notice of the judgment or order pursuant to Order 16, Rule 40, and when he has been so served and has entered an appearance he shall, unless the Court or a judge shall otherwise direct, be entitled as part of his costs of action (if allowed) to costs properly incurred in proving his claim previously to his having entered an appearance. Claimants who have established their claims to be served with notice of judgment.

*Inquiries and Accounts.*

Inquiries and accounts are regulated by the following rules of R. S. C. Ord. XXXIII.

**Ord. XXXIII. r. 2.**—The Court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. Inquiries and accounts, when directed.

**R. 3.**—The Court or a judge may, either by the judgment or order directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that, in taking the account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. Special directions as to mode of taking account.

**R. 4.**—Where any account is directed to be taken, the accounting party, unless the Court or a judge shall otherwise direct, shall make out his account and verify the same by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and be left in the judge's chambers, or with the official or other referee, as the case may be. Accounts to be verified by affidavit, numbered and left in chambers or with referee.

**R. 4a.**—Upon the taking of any account, the Court or a judge may direct that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any other convenient place, and that only such items as may be contested or surcharged shall be brought before the judge in chambers. Mode of vouching accounts.

**R. 5.**—Any party seeking to charge any accounting party beyond what he has by his account admitted to have received shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner. Surcharge.

**R. 7.**—Where by any judgment or order, whether made in Court or in chambers, any accounts are directed to be taken or inquiries to be made, each such direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such judgment or order shall be in the Form No. 28, Appendix L, with such variations as the circumstances of the case may require. Accounts and inquiries to be numbered.

**R. 8.**—In taking any account directed by any judgment or order, all just allowances shall be made without any direction for that purpose. Just allowances.

**R. 9.**—If it shall appear to the Court or a judge, on the representation of any master or otherwise, that there is any undue delay [as to which, see r. 8a] in the prosecution of any accounts or inquiries, or in any other proceedings under any judgment or order, the Court or judge may require the party having the conduct of the proceedings, or any other party, to explain the delay, and may thereupon Expediting proceedings in case of undue delay.

make such order with regard to expediting the proceedings or the conduct thereof, or the stay thereof, and as to the costs of the proceedings, as the circumstances of the case may require; and for the purposes aforesaid, any party or the official solicitor may be directed to summon the persons whose attendance is required, and to conduct any proceedings and carrying out any directions which may be given; and any costs of the official solicitor shall be paid by such parties or out of such funds as the Court or judge may direct; and if any such costs be not otherwise paid, the same shall be paid out of such moneys (if any) as may be provided by Parliament.

Where a debenture or debenture stock holder claims under a judgment for inquiries and accounts, the company can set up any cross-claim it has against such claimant, *e.g.*, that the claimant is indebted to the company. See *Christie* v. *Taunton, Delmard & Co.*, (1893) 2 Ch. 175. Moreover, in cases where the plaintiff is a transferee, and the debenture or debenture stock is not made transferable free from equities, the company can set up as a defence to the claim any cross-claim it may have against the original holder, there being an equity attaching to the debenture or debenture stock. *Newfoundland Government* v. *Newfoundland Ry.*, 13 App. Cas. 199; and see *supra*, pp. 24, 25; *South Blackpool Co.*, 8 Eq. 225. "It has," said Stirling, J., in *Re Goy & Co.*, (1900) 2 Ch. 149, 153, "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 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 out of that.' 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. *Willes* v. *Greenhill* (No. 1) (1860), 29 Beav. 376; *In re Akerman*, (1891) 3 Ch. 212; *In re Watson*, (1896) 1 Ch. 925."

On the same principle a receiver and manager cannot claim remuneration out of a fund until he has made good to the fund what he is accountable for. *British Power Traction Co; Halifax Bank Co.*, 2 Ch. 470.

But the rule of equity is subject to the terms of the contract; and accordingly, if the debenture provides for transfer, and declares that the principal money and interest thereby secured are to be transferable free from equities (*supra*, p. 24), the debenture holder can transfer even in the winding-up, or after judgment in an action, and the transferee is entitled to participate in the distribution without regard to any set-off or counter-claim as against the transferor. See *Re Goy & Co.*, (1900) 2 Ch. 149. In that case it appeared that the debentures were in terms made transferable free from equities. The action was brought by a debenture holder on behalf, &c., to enforce the debentures. After judgment, C., a debenture holder, transferred to

R. It was afterwards found that C. was indebted to the company in respect of a misfeasance, but it was held that this could not be set off as against R.

It was contended that, though the company might not, the debenture holders could, insist on the set-off; but the learned judge held that this was not so.

It seems, however, doubtful whether the conditions used in *Re Goy & Co.* are in fact so fully effective. See *Palmer's Decoration and Furnishing Co.*, (1904) 2 Ch. 743, which points to the conclusion that in order to protect the unregistered transferee from a refusal by the company to register on the ground of its equities as against the transferor further words are wanted; see pp. 24, 25, *supra*, and *Re Tasker & Sons*, (1905) 2 Ch. 587.

**Form 310.**

Certificate verifying copy of judgment or order for chambers.

(*Title, &c.*)

We [*or* I] hby certify that the above is a true copy of the original [*or* of an office copy of the original] judgment [*or* order] as passed and entered.

Dated this —— day of ——.

[*Add name, &c. of solicitor or party leaving the copy.*]

*As to this, see* Ord. LV. rr. 28 and 32, *supra*, p. 648; and Ann. Pr., *note to* Ord. LV. r. 28.

**Form 311.**

Note of names of solicitors concerned to be left at chambers.

(*Short title and reference to the record.*)

The names of the solors concerned, and for whom, in this action are as follows:—

| Names of solicitors. | For whom concerned. |
|---|---|
| Messrs. —— ... ... ... | Plaintiff. |
| Messrs. —— ... ... ... | The defendant company. |
| Mr. —— ... ... ... | The defendants —— and ——. |
| Mr. —— ... ... ... | N., having liberty to attend the proceedings. |

NOTE.—The dft P. appears in person.

The dft. Q. has not attended.

[*Names, &c. of solicitor or party leaving the same.*]

**Form 312.**

Summons to proceed with account and inquiries ordered.

(*Title—See Form* 171.)

Let all parties, &c., on the hearing of an applicon on the pt of the plt for an order that he may be at liberty to proceed with the accounts and inquiries directed by the judgment in this action.

See Ord. LV. r. 33, p. 648, *supra*.

**Form 313.**

Affidavit of service of summons on defendant company.

(*Title, &c.*)

I did, on the —— day of ——, before the hour of 6 o'clock in the afternoon, serve the above-named dfts, the —— Coy, Limtd, with a true copy of the summons now produced and shown to me marked "A," by leaving the same at the address for service in this action of the sd —— Coy, Limtd, situate at, &c., with a clerk of Messrs. ——, their solors there.

**Form 314.**

Advertisement for claims.

**Advertisements.**

In the case of debentures to bearer, and in other cases, where necessary, directions are given for advertising for claims. See *supra*, Ord. LV. rr. 36, 44—50, and Ann. Pr., notes to these rules.

(*Short title.*)

To all persons being holders of debentures issued by the dft coy.

Take notice that by an order of the Hon. Mr. Justice Parker in this action dated the 12th March, 1911, personal service upon you of notice of judgment in this action dated the 11th April, 1910, was dispensed with, and it was ordered that publication by advertisement in the following newspapers, viz., once in the *London Gazette*, once in *The Times*, and once in *The Financial Times*, of notice of the sd judgment and of the memdum prescribed by Ord. XVI. r. 43 of the Rules of the Supreme Ct and of the reciting order should be deemed good service of notice of the sd judgment upon all holders of debentures issued by the sd coy, and that the time within which the sd holdrs of debentures were to apply to discharge, vary, or add to the sd judgment was to be one [calendar] month after the date of the last publication of the sd notice of judgment.

And further take notice that by the sd judgment it was ordered that the following account and inquiries be taken and made, namely:—

1. An account of what is due to the plt and other holders of the sd debentures under or by virtue of such debentures.

2. An inquiry of what the ppty comprised in and charged by the sd debentures consist and in whom the same are vested.

3. An inquiry what other incumbrances affect the ppty comprised in or charged by the sd debentures or any and what pts thof.

And further take notice that from the date of this advertisement you will be bound by the proceedings in the sd action in the same manner as if you had been originally made a party and that you may on entering an appearance at the Central Office of the Supreme Ct attend the proceedings under the sd judgment. And that you may within one [calendar] month after the publication of the last of the advertisements authorised as afsd apply to the Ct to discharge, vary, or add to the sd judgment.

And further take notice that you are required on the 4th, 5th, 9th and 10th days resply of May, 1911, between the hours of 1.30 and

3 o'clock in the afternoon, to produce the debentures held by you at the chambers of the sd judge, Room No. 256, at the Royal Cts of Justice, London, or in default you will be peremptorily excluded from the benefit of the sd judgment. **Form 314.**

The holders of debentures whose surnames or titles commence with letters A to D (both inclusive) are to produce such debentures on Thursday, the 4th of May next.

The holders of debentures whose surnames or titles commence with letters from E to K (both inclusive) on Friday, the 5th of May next.

The holders of debentures whose surnames or titles commence with letters from L to R (both inclusive) on Tuesday, the 9th of May next, and those whose surnames or titles commence with letters from S to Z (both inclusive) on Wednesday, the 10th of May next. *Re The Antenior (Matabele) Gold Mines, Limtd, Johns Maddocks v. The Company.* 1910 A. No. 52.

Dated this 1st day of April, 1911.

A. B., Master.

W. W. S. & H., 54, —— Street, London, E.C.,
Plt's solors.

**Form 315.**

Another.

PURSUANT to a judgment of the High Ct of Justice, Chancery Division, made on the 29th of March, 1912, in an action *In the Matter of the Bibi-Eybat Petroleum Coy (Limtd), between Samuel Charles Rogers (on behalf of himself and all other holders of the* 5½ p.c. *Debentures of the first-named dft coy)*, plt, *and the Bibi-Eybat Petroleum Coy (Limtd) and the London Trust Coy (Limtd)*, dfts (1911, B. No. 3574), whereby it was ordered that the following accounts and inquiries be taken and made:—

1. An account of the trust estate and effects comprised in the sd trust deed and the sd debentures or any of them come to the hands of the dfts, the London Trust Coy (Limtd), or any person or persons by the order or for the use of the sd dfts, the London Trust Coy (Limtd), as trees of the sd indentures.

2. An account of what is due to the plt and the other holders of the debentures issued by the first-named dft coy and entld to the benefit of the sd trust deed agreemt and supplemental indentures under or by virtue of such debentures and the sd trust deed agreemt and supplemental indentures.

3. An inquiry of what the ppty comprised in the sd trust deed and supplemental indentures consists.

4. An inquiry of what the ppty charged by the sd debentures and not comprised in the sd trust deed or supplemental indentures or any of them consists.

**Form 315.**

5. An inquiry what other incumbrances affect the ppty comprised in or charged by the sd debentures and the sd trust deed and supplemental indentures, or any and what pts thof.

Notice is hby given, that all persons claiming to be the holders of the sd debentures are required on or before the 23rd day of May, 1912, to send in their claims, with their full names, addresses, descriptions, and the serial numbers of the debentures held by them, to Mr. H. A., c/o the Bibi-Eybat Petroleum Coy (Limtd), of —— House, Bishopsgate, in the City of London, the receiver in the sd action, or in default thof they will be excluded from the benefit of the sd judgment.

And further take notice, that the master attached to the chambers of Mr. Justice Swinfen Eady will, on Thursday, the 6th day of June, 1912, at 2 o'clock in the afternoon, at Room No. 700, Royal Cts of Justice, Strand, London, proceed to settle the list of the holders of the sd debentures, when the original debentures must be produced by the holders thof or by their solors or agents.

Dated this 7th day of May, 1912.

J. H. P. Chitty, Master.
D. G. & M., Plts' solors.

**Form 316.**

Claim in response to advertisement.

(*Title, &c., as in the advertisement.*)

SIR,—I, the undersigned, ——, of —— (*set out in full, name, address, and description*), beg to inform you that I claim to be the holder of —— debentures of the above-named coy, each for ——*l.*, numbered —— to —— inclusive, carrying interest at the rate of —— p.c.p.a., which debentures are pt of a series of debentures, secured by an indenture dated the —— day of ——, and made between the coy of the one pt and —— and ——, as trees, of the other pt.

The sd debentures were originally issued by the coy to me in the month of ——, 19—, in conson of a sum of ——*l.* then pd by me to the coy.

[The sd debentures were originally issued to ——, of ——. I purchased them in the year ——, from ——, of ——, who was the then registered holder of such debentures, and such debentures were thereupon transferred by the sd —— to me, and were duly registered in the books of the coy, as appears by a memdum endorsed thereon.]

Signature ——.
Debenture holder ——.
Date ——.

To (*here state the name and address of the receiver or other person to whom the notice is by the advertisement directed to be sent*).

(*Title, &c.*)

**Form 317.**

**Notice to produce security.**

Take notice that a judgment dated the 10th day of November, 1926, has been pronounced in this action (which has been instituted to ascertain who are the holders of the dft coy's debentures, to realise the ppty charged thereby and to divide the proceeds amongst the parties entld) and by such judgment the inquiries and accounts necessary for the purpose are directed.

A list of the debenture holders, with the parlars of the debentures held or believed to be held by them resply, has been left in the judge's chambers, and your name is included therein as the holder of debentures numbered —— for ——*l.* each bearing interest at 8 p.c.p.a.

If you are such holder it will be necessary, in order that you may participate in the benefit of the judgment, that your debentures should be produced before the master in chambers of the judge. Tuesday and Wednesday, the 18th and 19th days of January, 1927, at 2 oclock in the afternoon, are appointed for this purpose, on either of which days you should attend, either personally or by solor or agent, at the chambers of Mr. Justice Clauson, Room No. 168, in the Royal Cts of Justice, Strand, London, and produce your debentures.

If you are no longer the holder of the debentures, or any of them, you are requested at once to let us know the names and addresses of the person or persons to whom you transferred such as are no longer held by you.

If you desire it, you can forward the debentures by post, or otherwise, to us for production. We will return them by post in due course. The production will not involve you in any expense whatever.

Dated the 13th day of December, 1926.

——, Plt's solors.

To (*name and address of debenture holder*).

**Form 318.**

**Affidavit as to claims made.**

We, ——, of ——, and ——, of ——, severally make oath and say as follows:—

I, the sd ——, for myself, say as follows:—

1. I have, in the paper writing now produced and shown to me and marked A, set forth a list of all the claims, the parlars of which have been sent in to me by persons claiming to be debenture holders of the dft coy, pursuant to the advertisement issued in that behalf, dated the —— day of ——.

And I, the sd ——, for myself, say as follows:—

2. I have examined the parlars of the several claims mentd in the paper writing now exhibited to me and marked A, and I have compared the same with the books and accounts of the dft coy, in order

**Form 318.** to ascertain, as far as I am able, to which of such claims the sd coy is justly liable.

3. From such examination I am of opinion and verily believe that the coy is justly liable in respect of the debentures, parlars of which are set forth in the —— column of the first pt of the sd paper writing marked A, and, to the best of my knowledge and belief, the principal sums expressed to be secured by such debentures resply, with interest thereon as from the —— of ——, are justly due from the coy and proper to be allowed to the respive claimants named in the sd schedule.

4. I am of opinion that the coy is not justly liable to the claims set forth in the second pt of the sd paper writing marked A, and that the same ought not to be allowed without proof of the respive claimants.

5. Except as hnbefore mentd, there are not, to the best of my knowledge, information, and belief, any other claims against the sd coy in respect of debentures issued by it.

**Form 319.**

*(Title.)*

**List of claims.** List of claims, parlars of which have been sent to——, the receiver and manager in the action, by persons claiming to be debenture holders of the dft coy [under the enquiry —— directed by the judgment [*or* order] in this action dated ——] pursuant to the advertisement issued in that behalf, dated the —— day of ——.

This paper writing, marked A, was produced and shown to —— and is the same as is referred to in his afft sworn before me this —— day of ——, 19—.

FIRST PART.

*Claims proper to be Allowed without further Evidence.*

| Serial Number. | Names of Claimants. | Address and Description. | Particulars of Claim. | Amount. | Amount proper to be allowed. |
|---|---|---|---|---|---|
| | | | | | |

SECOND PART.

*Claims which ought to be proved by Claimants.*

[Tabular form as above, omitting the last column.]

(*Title, &c.*)

**Form 320.**

**Notice to prove.**

To ——, of ——.

You are hby required to prove the claim sent in by you against the —— Coy, Limtd.

You are to file such affts as you may be advised in support of your claim, and give notice thof to me on or before the —— day of ——, and to attend [personally or] by your solor at the chambers of Mr. Justice ——, situate at the Royal Cts of Justice, on the —— day of ——, at —— o'clock in the ——noon, being the time appointed for adjudicating on the claim.

Dated, &c.

(*Title, &c.*)

**Form 321.**

**Affidavit of service of same.**

I, ——, of ——, make oath and say as follows:—

1. On the —— day of —— I served, in manner hnftr mentd, the several persons resply named in the second column of the schedule hto, with a notice in writing to prove their claims in the action, which notice is now produced and shown to me marked ——.

2. I served the sd notice, by posting it, at the post-office receiving house situate at ——, in sealed envelopes, addressed to the sd several persons resply according to their respive names and addresses set forth in the second and third columns of the sd schedule, with the proper postage stamps affixed thto as prepd letters, and each of the sd envelopes, at the time I posted the same as afsd, had enclosed therein a true copy of the sd notice, with the addition at the foot thof of the name of the person to whom the envelope enclosing such copy was then addressed.

I have, in the fourth column of the sd schedule, set forth the names of the persons by whom, according to the only notices received by ——, the solor for ——, pursuant to the notices posted as afsd, affts have been made in support of the sd claims of the sd persons resply.

SCHEDULE.

| Serial Number of Claim. | Name of Claimant. | Address of Claimant. | Name of Deponent. |
|---|---|---|---|
| | | | |

**Form 322.**

Notice of allowance.

(*Title, &c.*)

The claim sent in by you against the dft coy in this action has been allowed as follows, that is to say:—

—— debentures of ——*l.* each, making a total of . . ——*l.*,

and interest thereon as from the —— day of ——— up to this day at —— p.c.p.a. . . . . ——*l.*,

and ——*l.* for costs.

**Form 323.**

Representation orders.

Upon the applicon, &c., it is ordered that, for the purposes of the inquiry No. 2 by the sd order dated 19th July, 1904, directed to be made, the sd C. Coy, which claims to be a creditor of the sd H. W., as such receiver and manager in the sum of 213*l.* for goods sold and delivered to him, as such receiver and manager, together with certain interests and costs, be appointed to represent as a class such of the creditors of the sd H. W., as such receiver and manager, as claim in respect of goods sold and delivered, and also to represent as a class such of the creditors of the sd H. W., as such receiver and manager, as claim damages for the non-repair by him of motor cars sold by him as such receiver and manager under warranty, and that for the purposes of the sd inquiry the sd W. D., of ——, who as tree for the benefit of the creditors of ——, lately trading as, &c., claims to be a creditor of the sd H. W., as such receiver and manager, in the sum of 891*l.* for goods bargained and sold to him as such receiver and manager, but not delivered to or accepted by him be appointed to represent as a class such of the creditors of the sd H. W., as such receiver and manager, as claim in respect of goods bargained and sold, but not delivered or accepted. And it is ordered that the costs of the sd C. Coy and the sd W. D. of this order and of attending the proceedings under the sd inquiry be provided for out of the assets of the dft coy comprised in the debentures in the judgment mentd, but without prejudice to any question as to how such costs are ultimately to be borne other than by the sd C. Coy, Limtd, and the sd W. D. *Halifax, &c. Co.* (*on behalf, &c.*) v. *The British Power Traction, &c. Co.*, Buckley, J., at Chambers, 14th April, 1905.

**Form 324.**

Affidavit proving claim.

(*Title, &c.*)

I, ——, of ——, make oath and say as follows:—

1. By a debenture dated the —— day of ——, under the common seal of the dft coy, which debenture is now produced and shown to me marked ——, the sd coy covenanted to pay to me on ——day, the —— day of ——, the sum of 100*l.*, and by the same debenture the coy covenanted that it would, until such payment was made, pay to me

Form 324.

interest at the rate of —— p.c.p.a. on the sd principal moneys, and that such interest should be pd half-yearly on the —— day of —— and —— day of ——. The sd debenture is numbered ——.

2. The sd coy is now justly and truly indebted to me in the sum of 100*l.*, with interest on the sd sum at the rate afsd from the —— day of ——, upon and by virtue of the sd debenture.

And I, speaking positively for myself and to the best of my knowledge and belief as to other persons, lastly say that I have not, nor hath nor have any other person or persons by my order, or for my use, received any satisfaction or security whatever for the sd sum of ——*l.* and interest, or any pt thof resply, save and except the sd debentures.

Form 325.

Affidavit of execution of transfer of debentures.

I, ——, of ——, make oath and say as follows:—

1. I was present and did see A. B., the transferor named in the deed of transfer now produced and shown to me, marked ——, sign and seal such deed of transfer.

2. The signature A. B. to such deed of transfer is that of A. B. therein named, and the signature —— in such deed of transfer as the attesting witness to the signature of A. B. is the signature of me this deponent, and my address and description were also affixed by me thto.

Sworn, &c.

Form 326.

Affidavit in answer to inquiries ordered.

I, ——, of ——, until lately the secretary of the above-named dft coy, make oath and say as follows:—

1. I was, until the —— day of ——, on which day an order was made for the compulsory winding-up of the above-named coy, The ——, Limtd, hnftr called "the coy," the secretary of the coy, and had charge of and kept the books of the coy, and the facts hnftr deposed to are stated from my own knowledge as such secretary of the coy, and from a recent inspection of the books of the coy made by me for the purpose of making this my afft.

2. I have read a copy of the judgment in this action, dated the 28th April, 1899.

3. In answer to the first inquiry by the sd judgment directed, I say that the debentures entld to the benefit of the indenture of the 21st July, 1895, in the sd judgment mentd, are set forth in the first pt of the schedule hto, and are held as security for the advances set out in the third pt of the same schedule, and that the debentures entld to the benefit of the indenture of the 29th April, 1897, are set forth, &c., in the second pt of the same schedule, and are

**Form 326.**

held as security for the advances set out in the third pt of the same schedule, and that all such debentures have been issued by the coy and are now outstanding, and that the holders of or persons entld to the benefit of such debentures are described in the second column of the first, second and third pts of the sd schedule.

4. I say, further, that the debentures set forth in the third pt of the same schedule are held by the persons described in the second column of such third pt as security for advances or moneys owing, the parlars whereof are therein set forth. As regards the respive priority of the sd debentures, I am advised and submit that such priorities depend upon the construction which may be placed by the Ct upon the sd two indentures resply, though having regard to the payment into Ct of the sum of 28,000*l.* made in pursuance of the order in this action and in winding-up on the 6th July, 1898, the question of such priorities is no longer material.

5. In answer to the second inquiry by the sd judgment directed, I say that the ppty comprised in the security created by the indenture of the 21st July, 1896, is set forth in the first pt of the second schedule hto, and that the ppty comprised in the security created by the indenture of the 29th July, 1896, is set forth in the second pt of the second schedule hto. I am advised and submit that it is a matter of doubt whether the portion of the ppty in the second above-mentd indenture stated to be comprised in that indenture only, as distinguished from the first above-mentd indenture, was not in fact comprised in the first above-mentd indenture upon the true construction of that indenture. But for the reason stated in the last preceding para of this my affit, I submit that this question is no longer material.

6. In answer to the third inquiry by the sd judgment directed, I say that the ppty comprised in the security created by the debentures entld to the benefit of the indenture for the 21st July, 1894, is set forth or described in the third schedule.

7. In answer to the fourth inquiry by the sd judgment directed, I say that the parlars of the incumbrances, other than the sd debentures and indentures securing the same affecting the ppty of the coy, are set forth in the fourth schedule hto, and that such parlars include the amount of such incumbrances resply, the names of the incumbrancers, the pts of the ppty of the coy affected by such incumbrances resply, and the priority of such incumbrances as between themselves and as against the sd debentures and indentures securing the same. I say further that there may be certain sums having priority to the sd debentures, the amount of which I am unable to specify, which may be found due to the receiver and manager appointed on behalf of the debenture holders in this action on taking his account, and also the amount of the costs, charges and expenses, and the

remuneration of the trees of the sd two indentures which are by the sd indentures resply charged upon the ppty of the coy. **Form 326.**

8. In answer to the fifth inquiry by the sd judgment directed, I say that the amount due to the respive holders of, or the persons entld to the benefit of, the debentures in the sd inquiry mentd for principal and interest, is set forth in the first, second and third pts of the first schedule hto.

## Masters' or Registrars' Certificates.

**R. S. C., Ord. LV. r. 65.**—The directions to be given for or touching any proceedings before the master shall require no particular form, but the result of such proceedings shall be stated in the shape of a concise certificate to the judge. It shall not be necessary for the judge to sign such certificate, and unless an order to discharge or vary the same is made, the certificate shall be deemed to be approved and adopted by the judge. Master's certificate. Judge need not sign.

**R. 66.**—The certificate of the master shall not, unless the circumstances of the case render it necessary, set out the judgment or order or any documents or evidence or reasons, but shall refer to the judgment or order documents and evidence or particular paragraphs thereof, so that it may appear upon what the result stated in the certificate is founded. Reference to judgment, &c.

**R. 66a.**—The certificate shall, when the judge shall so direct, be prepared by the solicitor of one of the parties, who shall obtain an appointment to settle the certificate, and shall give notice of such appointment to the other parties. No summons to settle the certificate of the master shall hereafter be issued. Preparation and settlement of master's certificate.

**R. 67.**—The certificate of the master shall be in the Form No. 10, in Appendix L, with such variations as the circumstances may require and when prepared and settled shall be transcribed in such form, and within such time as the master shall require, and shall be signed by the master either then or (if necessary) at an adjournment to be made for the purpose. Form of certificate.

No party need attend an appointment to sign the certificate. Ann. Pr., notes to this rule.

**R. 68.**—Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify by the numbers attached to the items in the account which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge or otherwise, and where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the judgment or order, and shall then be referred to by the certificate. The accounts and the transcripts (if any) referred to by certificate shall be filed therewith, or retained in chambers and subsequently filed, as the judge in chambers may direct. No copy of any such account shall be required to be taken by any party. Contents of certificate in cases of accounts. Transcript. Filing of accounts and transcripts.

**R. 69.**—Any party may, before the proceedings before the master are concluded, take the opinion of the judge upon any matter arising in the course of the proceedings without any fresh summons for the purpose. Taking opinion of judge.

Where debenture actions have been transferred to the winding-up judges under r. 42 (2) of the Companies' (Winding-up) Rules, 1929, the

practice is for the registrar not to adjourn the application to the judge without making the order, but to make such order as he thinks fit, leaving the dissatisfied party to move the judge in Court to discharge it. Practice Note, W. N. (1905) p. 128.

When certificate becomes binding. Application to discharge or vary it.

**R. 70.**—Every certificate, with the accounts (if any) to be filed therewith, shall be transmitted by the master to the central office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons to be made before the expiration of eight clear days after the filing of the certificate: provided that the time for applying to discharge or vary certificates, to be acted upon by the Paymaster-General without further order, or certificates on passing receivers' accounts, shall be two clear days after the filing thereof.

A creditor may come in after certificate if there are still undistributed assets, see *Re McMurdo*, (1902) 2 Ch. 684; *Harrison* v. *Kirk*, (1904) A. C. 1.

Discharge or variation of certificate after lapse of any time.

**R. 71.**—The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

**Form 327.**

Registrar's certificate of result of accounts and inquiries.

I hby certify that the result of the inquiries and accounts which have been made and taken in pursuance of the order in this action dated the 13th January, 1898, is as follows:—

The plt has attended by his solor.

The dft coy have attended in person by G. S. B., the off recr and liqr thof.

S. and S., trading as ——, who have liberty to attend the proceedings in this action pursuant to an order dated the 14th December, 1897, have attended by their solors.

Notice of the proceedings in this action has been given to the several persons other than the plt and the sd S. and S., who are resply named in the first column of the first schedule hto, as appears by the afft of C. filed the 15th July, 1898, and the exhibits therein referred to.

The dft coy created an issue of First Mortgage Debentures of 100*l.* each, payable in accordance with the conditions indorsed thereon, with interest thereon in the meantime at the rate of 5 p.c.p.a. by half-yearly payments on the 30th June and the 31st December in each year, and such issue was limtd to an aggregate sum not exceeding an amount equal to half the pd-up capital of the dft coy; the total pd-up capital of the dft coy was 32,415*l.*

The dft coy issued altogether 176 First Mortgage Debentures, but twenty of such debentures were subsequently returned by the holders and cancelled by the dft coy. Of the sd First Mortgage Debentures 156 only are now outstanding and unpd, and the parlars of such

outstanding debentures, other than those numbered 63 and 64 hnftr referred to, are set forth in the fourth column of the first schedule hto, and the names of the persons who are the holders of or entld to the benefit of such outstanding debentures resply are set forth in the second column of the sd first schedule. Form 327.

The whole of the sd outstanding First Mortgage Debentures specified in the first schedule rank *pari passu* with each other.

All the sd outstanding First Mortgage Debentures specified in the sd first schedule have been produced before me.

By an order dated the 3rd January, 1899, the plt C., upon the terms therein stated, withdrew all claim under or in respect of the two mortgage debentures of the dft coy, numbered 63 and 64, for 100*l.* each, which had been lost or misland, and undertook that in the event of the sd two debentures being found by him or coming into his possession he would deliver them up to be cancelled.

The sixty First Mortgage Debentures held jointly by S. and S. were issued to them by the dft coy together with other debentures of the dft coy as collateral security for moneys due to them by the dft coy; and the sum of 9,018*l.* 17*s.* 6*d.*, together with interest thereon at the rate of 5 p.c.p.a. from the 7th August, 1897, is due to the sd S. and S. from the dft coy, for which sum and interest they claim to hold the sd debentures as security.

The dft coy also created an issue of Second Mortgage Debentures, but as it appears that the ppty and assets of the dft coy are insufficient for the payment in full of the amounts due to the First Mortgage Debenture holders I have forborne to proceed with the inquiry No. 1, so far as it relates to debentures issued by the dft coy other that the sd First Mortgage Debentures.

There is due to the holders of, or to the persons entld to the benefit of, the sd outstanding First Mortgage Debentures, whose names are set forth in the sd first schedule hto, for principal and interest, the amount set forth in the fourth column of the sd first schedule hto upon the security of such outstanding debentures resply.

Interest has been calculated at the rate of 5 p.c.p.a. from the dates mentd in such first schedule, to which date all interest had been pd down to the date of this certificate.

The ppty and assets of the dft coy comprised in or subject to such outstanding First Mortgage Debentures consisted on the 6th August, 1897, the date of the appointment of the receiver in this action, of the parlars set forth in Pt I. of the second schedule hto.

By an order dated the 9th February, 1898, the ppty and assets comprised in items 1, 2, 3 and 4 of Pt I. of the sd second schedule were directed to be sold with the approbation of the Ct free from incumbrances of such of the incumbrancers (if any) as should consent

**Form 327.**

to the sale and subject to the incumbrancers or such of them as should not consent, and the money to arise by such sale was directed to be pd into Ct to the credit of this action subject to further order.

The sd ppty and assets comprised in the sd items 1 to 4 inclusive were offered for sale pursuant to the sd order by public auction on the 7th July, 1889, but no sale was then effected.

The same ppty and assets were subsequently offered for sale by tender, and the tender of 4,000*l.* of R. for Lot 2, comprising, &c., was accepted, and by my certificate dated the 2nd December, 1898, the sd W. J. R. has been allowed the purchaser thof.

The sd 4,000*l.*, together with ——*l.* the amount of the valuation of the stock-in-trade upon which the sd premises were sold, has been pd into Ct to the credit of this action by the sd R.

By an order dated the 17th February, 1899, an additional contract dated, &c. and made, &c. for the sale to the sd S., for the sum of 9,000*l.* of item 2, and the residue of item 3 of Pt I. of the sd second schedule hto, was directed to be carried into effect.

The sum of 900*l.* has been pd as a deposit on such sale by the sd S., which sum of 900*l.* has been pd into Ct to the credit of this action.

The receiver appointed in this action has collected a portion of the book debts comprised in item 5 of the sd Pt I.

The ppty and assets of the dft coy comprised in and subject to the sd outstanding debentures now consist of the parlars set forth in Pt II. of the second schedule.

By an order dated the 6th August, 1897, H. was appointed receiver on the pt of the plt and the First and Second Debenture holders in the dft coy of all the ppty and assets of the sd coy comprised in or subject to the securities or charges issued by the dft coy to the plt and the sd other debenture holders.

The sd receiver has passed his accounts down to the 6th July, 1898, to which date there was a balance of 980*l.* 17*s.* 6*d.* due to him.

By an order dated the 31st October, 1898, liberty was given to the sd receiver for the purpose of carrying on the business of the dft coy until the 31st December, 1898, to obtain advances of sums of money not exceeding in the aggregate the sum of 500*l.*, and for that purpose the sd receiver was to be at liberty to create a first charge upon the assets, ppty and effects of the dft coy in priority to the charges created by the debentures issued by the dft coy.

The evidence produced on the sd inquiries and account consists of the afft of, &c., the memdum and arts of asson of the dft coy, the register of debentures of the dft coy, the several debentures referred to in the first schedule hto, the several certificates of the Paymaster-General of lodgment in Ct dated resply, &c., the probate of the will

of B., granted, &c., on the —— day of ——, the Paymaster-General's certificate of the fund in Ct, dated the 1st March, 1899. **Form 327.**

THE FIRST SCHEDULE ABOVE REFERRED TO.

PART I.

*First Mortgage Debentures.*

| Serial Number. | Name of Debenture holder. | Address and Description. | Particulars of Debentures and Amounts due thereon. | Total Amount Due. |
|---|---|---|---|---|
| | | | | |

THE SECOND SCHEDULE BEFORE REFERRED TO.

PART I.

*Property and Assets of the Defendant Company comprised in and subject to the outstanding First Mortgage Debentures on the 6th August*, 1897.

PART II.

*Present particulars of the said Property and Assets.*

Dated 3rd March, 1899.

H. J. HOOD,
Registrar (Cos Winding-up).

(*Title.*) **Form 328.**

1. In pursuance of the directions given to me by Mr. Justice ——, I hby certify that the result of the accounts which have been taken in pursuance of the judgment in this action dated the 22nd day of June, 1899, is as follows:— **Registrar's certificate of result of account.**

2. The plts and dfts have attended by their respive solors.

3. The several debenture holders named in the first and second schedules hto have had notice of the proceedings under the sd

Form 328. judgment, as appears by the afft of J., filed the —— of ——, and exhibits, and the afft of, &c.

4. The dft coy issued 240 First Mortgage Debentures of 50*l.* each, amounting to 12,000*l.*; the sd debentures rank *pari passu* together and as a first charge on the undertaking of the dft coy and all its ppty and assets whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

5. The dft coy also issued 200 Second Mortgage Debentures of 50*l.* each, amounting to 10,000*l.* The last-mentd Second Mortgage Debentures rank *pari passu* together and as a charge on the undertaking, ppty and assets of the dft coy, as hnbefore mentd, including its uncalled capital for the time being, subject to the charge created by the sd First Mortgage Debentures. The whole of the sd First and Second Mortgage Debentures are still outstanding.

6. There is due to the plt and to the dft P. and the other holders of the series of First Mortgage Debentures, on the security thof, for principal, bonus and interest, less tax, the several sums set opposite to their respive names in the first schedule hto. Interest has been calculated at the rate of 5 p.c.p.a. on the sd principal from the 30th September, 1895, to the date of this certificate, all interest having been pd down to the sd 30th September, 1895.

7. There is due to the dft R. and the other holders of the sd series of Second Mortgage Debentures, except as hnftr mentd, on the security thof for principal, the several sums of money set opposite to their respive names in the second schedule hto. Interest has not been calculated thereon at present, as there will be insufficient to satisfy the principal due on the sd Second Mortgage Debentures, and all the holders thof stand on the same footing as regards interest. All the sd First and Second Mortgage Debentures, except as hnftr mentd, have been produced before me.

8. The debentures numbered —— of the sd series of Second Mortgage Debentures have not been produced to me, and no sufficient evidence has been adduced to enable me to certify who are now the present holders thereof, and what, if anything, is due in respect thof.

9. The evidence adduced consists of the afft of J. P., filed, &c. The affts, &c., the exhibits in the sd affts, or some of them, resply referred to, the several debentures particularised in the first and second schedules hto and the debenture register of the dft coy.

Dated 10th May, 1899.

H. J. HOOD,
Registrar (Cos Winding-up).

FIRST SCHEDULE. **Form 328.**

*First Mortgage Debentures.*

| Name. | Address. | Date of Debenture. | Number of Debenture. | Distinctive Number of Debentures inclusive. | Amount of Debenture. | Amount due in respect of Bonus | Interest due from 3rd Sept., 1895, to date of Certificate, less Tax. |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

Total amount due, ——*l.*

SECOND SCHEDULE.

(*As above as to Second Mortgage Debentures.*)

**Form 329.**

Registrar's certificate.

Result of accounts and inquiries.

I hby certify that the result of the accounts and enquiries which have been taken and made in pursuance of the judgment in this action dated the ——, 19—, is as follows:—

The plt and the dfts, ——, Limtd (hnftr called "the dft coy"), and J. K., have attended by their respive solors.

The dft, ——, Limtd, has not attended, although it has been duly summoned as appears by the afft of ——, filed ——, 19—.

1. There is due by the dft, ——, Limtd, to the plt as holder of all the debentures issued by the sd dft coy and entld to the benefit of the trust deed dated the ——, 19—, in the statement of claim mentd, under and by virtue of such debentures and deed for principal the sum of ——*l.* and for premium the sum of ——*l.*, together with interest at the rate of 7 p.c.p.a. on the sd principal sum from the ——, 19—.

The sd trust deed and parlars of the sd debentures have been registered with the Registrar of Cos pursuant to the statute in that behalf.

2. There is due by the dft, J. K., to the plt under and by virtue of the transfer of mortgage dated the ——, 19—, and the two transfers of registered charges of the same date in para. 9 of the statement of

**Form 329.** claim mentd for principal the sum of ——*l.*, and for premium the sum of ——*l.*, together with interest at the rate of 7 p.c.p.a. on the sd principal sum from the ——, 19—.

3. The ppty comprised in or charged by the sd trust deed now consists of the parlars set forth in the first schedule hto. The ppty referred to in Part I. of the sd schedule is by the sd trust deed demised or charged by way of legal mortgage or otherwise specifically charged and the ppty referred to in Pt II. of such schedule is by the sd trust deed charged by way of floating charge only. The sd ppty is vested as in the fifth column of the sd first schedule stated.

4. The ppty comprised in the sd transfer of mortgage dated the ——, 19—, and the sd two transfers of registered charges of the same date now consists of the parlars set forth in the second schedule hto, and such property is vested as in the second column of the sd second schedule stated.

5. No pt of the trust estate and effects comprised in the sd trust deed or in the sd transfer of mortgage and registered charges has come to the hands of the plt or any person or persons by the order or for the use of the plt.

6, 7 and 8. The dft coy also created and issued to the dft ——, Limtd, as trees for the —— Bank, Limtd, a Second Debenture for ——*l.* bearing interest at the rate of 5 p.c.p.a., payable by half-yearly payments on the 30th June and the 31st December in each year and constituting a second floating charge on the undertaking and all the ppty of the dft coy present and future including its uncalled capital to secure the repayment by the dft coy of all moneys from time to time owing by it to the sd bank.

There was owing by the dft coy to the sd bank on the ——, 19—, the sum of ——*l.*, together with interest on such sum at the London bankers' customary loan rate.

The sd Second Debenture has been registered with the Registrar of Cos pursuant to the statute in that behalf.

The sd Second Debenture ranks after the charge created by the sd trust deed and First Mortgage Debentures, and no ppty other than that comprised in the sd trust deed is comprised in the sd Second Debenture.

By two several orders in this action dated resply the ——, 19—, and the ——, 19—, liberty was given to the receiver to borrow sums not exceeding in the aggregate ——*l.*, and it was ordered that the ppty and assets of the dft coy and the freehold ppties of or belonging

to the dft, J. K., comprised in and charged by the sd trust deed, transfer of mortgage and transfers of registered charges do stand charged with the payment of the sums so advanced (with interest not exceeding in the aggregate 1 p.c. above bank rate with a minimum of 5 p.c.p.a.). **Form 328.**

There is due to the plt in respect of the moneys so borrowed the sum of ——*l.*, together with interest at the rate afsd from the date of the respive advances.

Except as afsd there are no incumbrances affecting the ppty resply comprised in or charged by the sd trust deed and debentures or the sd transfers of mortgage and registered charges resply.

9. The only debt or liability of the dft coy which under sects. 78 and 264 of the Cos Act, 1929, is payable out of the ppty comprised in or subject to the floating charge created by the sd trust deed in priority to the moneys secured by the sd debentures is as follows:—

Inland Revenue Schedule D 1928/29 ... ... ——

The evidence produced consists of the order dated the ——, 19— (appointing receiver, leave to borrow); the order dated the ——, 19—; (leave to borrow); the judgment dated ——, 19—; the afft of ——, filed the ——, 19—; the afft of ——, filed the ——, 19—; the land certificate of the ppty No. 1 in the second schedule hto (Title No. ——), officially examined to the ——, 19—; the memdums and arts of asson, the minute book and the debenture register of the dft coy; the sd trust deed and First Debentures thby secured, and the certificate of registration thof dated the ——, 19—; the sd transfers of mortgage and registered charges; the sd Second Debenture and the certificate of registration thof, dated the ——, 19—.

Dated this —— day of ——, 19—.

——, Registrar.

*John Knill & Co., Ltd.* (J. 2161 of 1930).

See Schedules, pp. 674, 675, *infra*.

## FIRST SCHEDULE.

### PART I.

Leasehold premises specifically charged under or by virtue of the sd trust deed.

| | Date. | Parties. | Short Description of Premises. | Term and Rent. | Vested in. |
|---|---|---|---|---|---|
| 1 | 30th December, 1925. | 1. L. C. B., Ltd.<br>2. J. K.<br>J. S. K. | Wharf known as —— and warehouses on —— Street and basement floors of and forming part of —— aforesaid. | 30 years from the 24th June, 1924, at ——*l.* per annum. | The plaintiff for all the residues of the respective terms less nominal reversions of three days and as to such nominal reversions in the defendant company. |
| | NOTE.—By an order in this action, dated the 21st October, 1932, liberty was given to the receiver to vacate the above-mentioned premises. Such premises have been vacated by the receiver and the keys of the said premises handed to the landlord, the said L. C. B., Ltd. | | | | |
| 2 | 30th December, 1925. | 1. L. C. B., Ltd.<br>to<br>J. K. | Right of way over the way or passage on the eastern side of —— aforesaid from —— to —— registered in the Land Registry under Title No. ——. | 99 years less one day from the 25th March, 1920, at 1*s.* per annum. | |
| 3 | 24th March, 1916. | 1. Corporation of London.<br>2. E. W.<br>J. K. | Vaults under arches adjoining ——. | Quarterly tenancy at ——*l.* per annum. | |
| 4 | 21st April, 1922.<br>18th June, 1923. | 1. G. G. L. G.<br>2. Port of London Authority.<br>3. J. K. | License to construct jetty ... ... ... | Rent, ——*l.* per annum ... | J. K. |

PART II.

| | Property charged by the said Trust Deed by way of floating charge only. | Vested in. |
|---|---|---|
| 1 | Cash in hand ... ... ... ... ... ... ... ... ... ... ... ... ... ... | In the possession of the receiver. |
| 2 | The movable plant and machinery, fixtures, fittings and office furniture, &c. ... ... ... ... ... | |
| 3 | Moneys from time to time in the hands of the receiver ... ... ... ... ... ... ... ... | |
| 4 | The book debts due to the company and securities for the same ... ... ... ... ... ... ... | The defendant company. |
| | The goodwill of the company. The benefit of subsisting contracts ... ... ... ... ... ... | |

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SECOND SCHEDULE.

| | Property comprised in the said Transfer of Mortgage dated the 14th September, 1928, and the said two transfers of registered charges of the said date. | Vested in. |
|---|---|---|
| 1 | Freehold premises known as —— Wharf, —— Street, in the City of London, and the piece of land known as the Campshed, and a piece of land reclaimed from the River Thames adjoining same, and the gateways and passages from —— Street to the aforesaid premises. | J. K. subject to the term created by the said transfer of mortgage. |
| 2 | The leasehold right of way being No. 2 of the properties mentioned in the first part of the Second Schedule. | As in the First Schedule stated. |
| | The wharf and warehouses, being No. 1 of the properties mentioned in the first part of the Second Schedule. | |

Form 190.

**Form 330.**

Master's certificate—two series of debentures.

1. I hby certify that the result of the inquiries and accounts which have been made and taken in pursuance of the judgment in this action dated 16th January, 1901, is as follows:—

2. The plt and the dft H. have attended by their respive solors; the dfts, the —— Coy, Limtd, have attended in person by G. S. B., off recr and liqr thof.

3. The dft coy created an issue of twenty First Mortgage Debentures of 25*l.* each, subject to and with the benefit of the indenture dated 7th April, 1898, in the judgment referred to, bearing interest at the rate of 6 p.c.p.a. payable by half-yearly payments on the 1st April and 1st October in every year.

4. The whole of the sd twenty First Mortgage Debentures have been issued, but twelve only of such debentures are now outstanding and unpd, and parlars of such outstanding debentures are set forth in the fourth column of the first schedule hto.

5. The dft coy also created an issue of twelve Second Mortgage Debentures of 50*l.* each subject to and with the benefit of the indenture dated the 20th October, 1899, in the judgment referred to, bearing interest at the rate of 6 p.c.p.a. and payable, &c.

6. The whole of the sd twelve Second Mortgage Debentures have been isuued and are now outstanding and unpd, and the parlars thof are set forth in the fourth column of the second schedule hto.

7. The whole of the sd twelve outstanding First Mortgage Debentures rank *pari passu* with each other, and the whole of the sd Second Mortgage Debentures rank *pari passu* with each other, but the sd Second Mortgage Debentures are all subject to the sd twelve outstanding First Mortgage Debentures.

8. The said twelve outstanding First Mortgage Debentures the parlars of which are set forth in the first schedule hto and the sd Second Mortgage Debentures have all been produced before me.

9. Except such of the First Mortgage Debentures as were subsequently to their issue pd off, no debentures other than the sd outstanding First Mortgage Debentures and the sd Second Mortgage Debentures have been issued by the dft coy.

10. The plt is the holder of and entld to the benefit of all the outstanding First Mortgage Debentures and all the sd Second Mortgage Debentures the parlars of which are set forth in the first and second schedules hto.

11. There is due to the plt, as the holder of the debentures, &c.

12. The interest has been calculated at the rates which such debentures resply carry from the 31st December, 1900, to which date all interest has been pd down to the date of this certificate.

13. The ppty comprised in the sd two several indentures of, &c., now consists of the parlars set forth in the third schedule hto. **Form 330.**

14. The dft D. H. has received down to the 3rd February, 1901, sums on account of the trust estate and effects comprised in the sd indentures resply to the amount of 83*l.* 17*s.* 2*d.*, which amount is due from him on that account. The parlars of the above receipts appear in the joint afft of, &c.

15. The ppty comprised in and charged by the sd debentures now consists of the parlars set forth in the sd third schedule hto, being the same ppty as is comprised in the sd two indentures.

16. Other than what may be due to the plt for rent under and by virtue of the distresses levied by the plt upon the premises occupied by the dft coy, there are no incumbrances other than the sd several indentures and debentures affecting the ppty of the dft coy comprised in or charged by the sd indentures and debentures.

17. The plt does not claim priority over the sd indentures and debentures in respect of what may be due to him by virtue of the distresses levied as afsd.

18. By an order, &c. (appointment of receiver).

19. No account has yet been passed by the sd receiver.

20. The evidence produced, &c.

(*Schedules.*)

VARYING CERTIFICATE. **Form 331.**

See Ord. LV. r. 71, *supra*, p. 666, as to varying certificate. **Summons to vary.**

Let, &c., on the pt of ——, of —— [*see Form 171 or 172*], for an order that the [Master's] certificate in this action, dated the —— of ——, may be varied [*state how*].

The applicon by summons dated the 2nd August, 1898, of N., a debenture holder of the dft coy, to vary the certificate of the Registrar (Cos Winding-up), dated the 20th July, 1898, which, upon hearing the solors for the applicant and for the plt in chambers, was adjourned to be heard in Ct coming on on the 27th October, 1898, and this day to be heard accordingly, and no one appearing for or on behalf of the dft coy in chambers or in Ct, although the sd coy has been duly served with the sd summons, as by afft appears, and upon hearing counsel for the applicant and for the plt, and upon reading the order dated the 4th May, 1898, the registrar's sd certificate, dated the 20th July, 1898, and the certificate of the fund in Ct, and upon hearing the evidence of P., on his examination taken orally before this Ct this **Form 332.** **Order to vary.**

**Form 332.**

day, and upon production of the exhibit marked T. P. 1, being the debentures issued to the applicant.

This Ct doth order that the registrar's sd certificate dated the 20th July, 1898, be varied by striking out in the second clause of para 2 thof the following words, *videlicet*, "but they all rank subsequently to the sd debentures for nine hundred pounds," and by substituting therefor the following words, *videlicet*, "and with the sd debentures for nine hundred pounds."

And it is ordered that the registrar (Cos Winding-up) do ascertain by taxation and otherwise what amount is due to the sd N. upon the security of the ten debentures for 10*l.* each held by him for costs and for moneys advanced by him as solor for the dft, and do certify the result thof.

And it is ordered that the costs of the applicant of the sd applicon to vary the sd registrar's certificate be taxed.

And it is ordered that the funds in Ct be dealt with as directed in the Payment Schedule hto.

And the plt's costs of the sd applicon are to be included in his costs of this action.

The Payment Schedule provided for payment to the applicant: "Out of cash and money on deposit, pay costs of N. of applicon to vary registrar's certificate to be taxed under this order." *Hubbard (on behalf, &c.)* v. *Hubbard & Co.*, Wright, J., 16th November, 1898.

**Form 333.**

**Another.**

The applicon by summons dated the ——, 19—, of —— (*&c. as in last Form*).

This Ct doth order that the sd certificate be varied by substituting the sum of ——*l.* for the sum of ——*l.* found due to the applicants for principal under and by virtue of the seventy-seven debentures of the dft coy for 50*l.* each held and numbered 89 to 165 inclusive.

And it is ordered that the costs of the applicants and of the respts of the sd applicon be taxed and pd out of the assets of the dft coy. *Metafilters* (1929), *Ltd.* (M. 3464 of 1931). Eve, J., 8th February, 1933.

# CHAPTER LXVI.

## PREFERENTIAL CREDITORS.

THE provisions for payment of certain debts preferentially in the winding-up of a company apply to the distribution by a receiver of assets subject to a floating charge by reason of sect. 78 of the Act. This section, which should receive the careful attention of receivers, imposes obligations upon them which may expose them to risk of liability and may sometimes place the receiver in a difficult position.

Sect. 78 provides as follows:—

**78.**—(1) Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part V. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V. of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid as the case may be.

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

The provisions of Part V. of the Act which are referred to in this section are contained in sect. 264 of the Act, which provides as follows:—

**264.**—(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 relevant date, 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 (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the company during four months next before the relevant date, not exceeding fifty pounds;

(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 next before the relevant 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 relevant date;

(d) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has at the commencement of the winding up under such a contract with insurers as is mentioned in section seven of the Workmen's Compensation Act, 1925, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act accrued before the relevant date;

(e) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due in respect of contributions payable during the twelve months next before the relevant date by the company as the employer of any persons under either—

(i) the National Health Insurance Acts, 1924 to 1928; or

(ii) the Widows', Orphans' and Old Age Contributory Pensions Act, 1925; or

(iii) the Unemployment Insurance Acts, 1920 to 1929.

(2) Where any compensation under the Workmen's Compensation Act, 1925, is a weekly payment, the amount due in respect thereof shall, for the purposes of paragraph (d) of subsection (1) of this section, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(3) Where any payment on account of wages or salary has been made to any clerk, servant, workman or labourer in the employment of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(4) 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, 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.

(5) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by paragraph (e) of subsection (1) of this section formal proof thereof shall not be required except in so far as is otherwise provided by general rules.

(6) 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.

(7) In this section the expression " the relevant date " means—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and

(b) in any other case, the date of the commencement of the winding up.

The priority given by sect. 78 to preferential debts only applies to a floating charge. A fixed charge retains its priority over unsecured preferential debts. *Re Lewis Merthyr Consolidated Collieries*, (1929) 1 Ch. 498.

The corresponding section (107) of 1908 provided that the preferential payment should be paid " forthwith " out of any assets coming to the hands of the receiver.

The difficulty of complying with this provision was emphasized in the case of *Re Glyn-Corrwg Colliery Co.*, (1926) Ch. 951, where it was held that the preferential payments rank after (1) costs of realization, (2) costs and remuneration of receiver, (3) costs, charges and expenses of debenture trustees, (4) plaintiff's costs of action. The word " forthwith " is now omitted.

Where a receiver is appointed under a power in the debentures he is, in effect, appointed on behalf of the debenture holders within sect. 78. It was contended that he was appointed " by," not on behalf. *Re Barnby's, Ltd.*, W. N. (1899) 103.

**Liability of receiver.**

Where a receiver after notice of a preferential claim paid away the assets to other creditors, he was held liable in damages. *Woods* v. *Winskill*, (1913) 2 Ch. 303. The receiver should therefore see that he retains sufficient assets in hand to meet the proper claims of preferential creditors.

Where the receiver carries on the business under a power in the debentures or trust deed to carry on the business, it may be impossible to pay the preferential debts out of the first assets coming to his hands. If he uses these assets in carrying on the business, he should see that he is fully indemnified by the debenture holders or by the assets covered by the debentures.

By the Workmen's Compensation Act, 1925, s. 7 (2) (replacing the Workmen's Compensation Act, 1923, s. 19 (2)), the amount due in respect of compensation under the Act is included among debts having priority.

The limit of 100*l.* imposed by the Act of 1906 was repealed by the Act of 1923 as regards liquidations commencing on or after the 1st January, 1924. *Snowdown Colliery Co.*, W. N. (1925) 64; *Re Clemmons Aluminium*, 41 T. L. R. 138. The absence of this limit often makes the workmen's compensation claim amount to a very large sum.

Sect. 110 of the National Insurance Act, 1911 (1 & 2 Geo. V. c. 55), must also be borne in mind, for that section in effect also gives priority to all contributions payable under the Act by the company in respect of contributors or workmen in an insured trade, during four months from the commencement of the winding-up.

In *In re Simms*, (1934) Ch. 1, a builder assigned his business to a company. The company issued debentures to a bank. The bank appointed a receiver, who took possession of the plant, &c., and completed various contracts. The builder became bankrupt, and the assignment to the company was set aside. The trustee in bankruptcy elected to treat the receiver as a trespasser. It was held that the trustee could get damages for conversion to the extent of the value of the plant, machinery and other chattels converted to his own use by the receiver, but that he could not get the profits made by the receiver in carrying out the contracts.

**Rates.**

Where the company went into liquidation in December, 1898, and the receiver in a debenture holder's action paid the poor rate and district rate made in October, 1898, it was held that he was, under the Preferential Payments in Bankruptcy Amendment Act, 1897, entitled to be recouped the whole out of the company's general assets, but that the water rate should be apportioned. *Mannesmann Tube Co.*, (1901) 2 Ch. 93.

An amended rate dates from the date of the original rate, and accordingly, where a receiver was appointed on the 28th January, 1931, and paid the rates as originally assessed for the period between the 1st April, 1930, and 28th January, 1931, it was held that the local authority were entitled to priority for an increased rate due to the assessment being increased on appeal, the revised demand being served on the 13th November, 1931. *Re Airedale Garage Co.*, (1933) 1 Ch. 64.

A receiver was appointed in a debenture holder's action, and not directed to take possession, and it was held that a distress put in for the parish rates during the half-year in which the appointment of the receiver was made did not prevent the Court from giving the parish authorities liberty to proceed with the distress, inasmuch as the debentures were a mere floating charge on the goods distrained upon. *Marriage, Neave & Co.*, (1896) 2 Ch. 663; *National Provincial Bank* v. *United Electric Theatres, Ltd.*, (1916) 1 Ch. 132.

Where a receiver was appointed, and took possession as ordered, it was held that there had been a change of occupation, although the

receiver was, by the deed, declared to be agent of the company, and that he was therefore only liable to pay an apportioned part of the rate from taking possession. *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212. But these decisions were before the Act of 1897.

Highway rates are within sect. 264. *Re Heywood*, (1897) 2 Ch. 593.

As to claims to be paid poor rates after the receiver has taken possession, out of the proceeds of sale of assets, see *British Fuller's Earth Co.* (1901), 17 T. L. R. 232.

Assessed taxes include income tax and formerly included Corporation profits tax. *Re Winget, Ltd.*, (1924) 1 Ch. 550. Income tax need not be assessed before the appointment of the receiver. *Gowers* v. *Walker*, (1930) 1 Ch. 262. See Part II., 15th ed., p. 434. Assessed taxes.

A director or even a managing director of a company is not a clerk or servant, and is not therefor a creditor in respect of his salary having as such any preferential rights. *Newspaper Proprietary Syndicate*, (1900) 2 Ch. 349. But a director employed as editor may be. *Re Beeton & Co., Ltd.*, (1913) 2 Ch. 279. A secretary is, generally speaking, a servant within para (b) of sect. 264. *Re Anglo-French, &c. Co., Ex parte Pelly* (1884), 50 L. T. 754. It may be otherwise where he is appointed on special terms as to the quantum of service he is to give. *Cairney* v. *Back*, (1906) 2 K. B. 746. As to a foreman and over-worker in a brickyard, see *Ex parte Hollyoak* (1889), 35 W. R. 396. An analytical chemist employed at a fixed salary and bound to attend at fixed hours and subject to the orders of the company is a servant. *G. H. Morison & Co.* (1912), 106 L. T. 731. So is an artiste engaged to sing during an opera season, at a certain fixed sum for each performance. *Re Winter German Opera, Ltd.*, 23 T. L. R. 662. A contributor to a paper is not a servant, if not working at the company's office, not exclusively employed by the company, only bound to do a particular class of work and not under the company's control. *Re Ashley & Smith, Ltd.*, (1918) 2 Ch. 378, Sargant, J., stating that any one of the four circumstances above mentioned, except possibly the last, might not be entirely conclusive. Clerk or servant.

A clerk, it has been held, is entitled to prove although entitled in addition to his ordinary remuneration to a share of profits for assisting in perfecting an invention. *Ex parte Hickin*, 3 De G. & Sm. 662.

So where a part owner of a ship and ship's master concur in the appointment of a ship's mate, such mate is, it seems, a servant. *Ex parte Homborg*, 2 Mont. D. & De G. 642; see *Ex parte Neal*, Mont. & M'A. 194. On the other hand an accountant who gave up all his time as bookkeeper to a business man was held not to be a clerk or servant. *Ex parte Butler*, 28 L. T. (O. S.) 375.

A commercial traveller who receives commission will be regarded as receiving the same in respect of wages. *Re Klein* (1906), 22 T. L. R. 664. Commission payable to workmen and calculated on the output of the yard will be regarded as part of their wages. *Earle's Shipbuilding and Engineering Co.*, W. N. (1901) 78. The existence of a contract of service is essential. *Re General Radio Co., Ltd.*, W. N. (1932) 172.

Where a voluntary winding-up is succeeded by a compulsory order to wind up, the four months in respect of which a claim for preferential payment of wages or salary can be made are the four months next before the resolution for a voluntary winding-up. *Re Havana Exploration Co.*, (1916) 1 Ch. 8.

**Form of order.** Every order in a debenture holder's action appointing a receiver must contain a direction that the receiver do, out of the assets coming to his hands and available for that purpose, pay the debts of the company which have priority under the Act. See p. 582, *supra*.

**Marshalling.** Where a debenture did not charge all the assets, and the costs of the winding-up had been paid out of the excepted assets, it was held that rates were payable out of the property charged by the debentures in priority to the debentures. *Westminster Corpn. &c., Ltd.* v. *Chapman*, (1916) 1 Ch. 161.

**Stannaries.** Sect. 298 of the Act provides for the payment of preferential claims in the Stannaries, as to which see sect. 163 (4).

**Form 334.**

**Affidavit as to result of advertisement for claims in priority to debenture holders.**

We, H., of ——, the receiver and manager of the dft coy, and C., of ——, a member of the firm of ——, of the same place, solors for the sd receiver and manager, severally make oath and say as follows. And first I, the sd C., for myself say:—

1. I have in the paper writing now produced and shown to me and marked A set forth the only claim of which parlars have been sent in to my firm by a person seeking to be a creditor of the dft coy in priority over the claims of the holders of the debentures issued by the dft coy, pursuant to the advertisement issued in that behalf dated the 14th day of June, 1899. Such claim is No. 12 in the same second pt of the sd list.

2. The claims numbered 1 to 11 and 13 to 18 inclusive have been sent in to my firm pursuant to the sd advertisement, but I am informed and believe that the persons named in the sd list A have lodged proofs with the liqr claiming to be preferential creditors of the dft coy; the list now produced and shown to me, marked B, is a list of such persons as supplied by the off recr as liqr to my London agents, but I have omitted from the list A the claims made by N., as these have, I am informed, been pd by the receiver.

**Form 334.**

And I, the sd H., myself say:—

3. I have examined parlars of the several claims mentd in the paper writing now produced and shown to me, marked A, and I have compared the same with the books, accounts, and documents of the dft coy in order to ascertain, as far as I am able, to which of such claims the assets of the dft coy comprised in the security of the first and second debentures held by the plt and the other debenture holders are justly liable.

4. From such examination, and from my knowledge as receiver and manager of the dft coy, I am of opinion and verily believe that the sd assets are justly liable to the amount set forth in the sixth column of the first pt of the sd paper writing marked A; and to the best of my knowledge and belief such amount is justly due from the dft coy and proper to be allowed to the claimant named in the sd schedule as a preferential creditor or otherwise as a person claiming priority as afsd.

5. I am of opinion that the assets of the dft coy comprised in the security of the sd debentures are not justly liable to the claims set forth in the second pt of the sd paper writing marked A, and that the same ought not to be allowed without proof by the respive claimants.

6. I am not aware of any claim outstanding, except those mentd in the sd list A.

(*Title, &c.*)

**Form 335.**

Summons to admit preferential creditor.

Let, &c., on the pt of ——, that he may be admitted as a preferential creditor of the above-named coy in priority to the debenture holders in respect of the sum of 26*l.* arrears of salary due to him from the coy, and that the receiver may be ordered out of the assets now in or coming to his hands to pay such sum to the applicant, and that the costs of and subsequent upon his applicon be the applicant's.

**Form 336.**

Order allowing claim to rank as a preferential creditor.

Upon the applicon by summons dated the 9th March, 1899, of E., and upon hearing counsel for the applicant and for the plt and dft coy by B., the off recr and liqr thof appearing in person, and upon reading the order, &c., It is ordered that the applicant, the sd E., be allowed as a preferential creditor of the dft coy in respect of arrears of salary due to him from the dft coy the sum of 40*l.*, such sum to include the applicant's costs of the sd applicon in priority to the holders of the first and second mortgage debentures of the dft coy, and it is ordered that H., the receiver appointed in this

**Form 336.** action, do pay to the sd E. the sd sum of 40*l.* out of the first assets of the dft coy available for the purpose, such sum to be in full discharge of all claims of the sd E. against the dft coy in respect of salary and expenses. Wright, J., at Chambers, 10th May, 1899.

**Form 337.**
Order dismissing claim, leave to appeal.

This Ct doth declare that the claim of the B. Corporation to be a preferential creditor of the dft coy for 84*l.* 5*s.* 2*d.* such sum representing the proportion of increased rates for the period from the 1st April, 1930, to the 28th January, 1931, assessed on the premises belonging to the dft coy situate in —— B., cannot be sustained.

And it is ordered that the B. Corporation do pay to the plt the —— Bank, Limtd, its costs of the sd applicon, such costs to be taxed.

And the B. Corporation by its counsel applying for leave to appeal from this order, it is ordered that the sd Corporation be at liberty to appeal if so advised. *Airedale Garage Co., Ltd.* (A. 252 of 1931). Eve, J., 3rd May, 1932.

**Form 338.**
Order on appeal reversing above.

Upon motion by way of appeal this day made unto this Ct by counsel for the Lord Mayor, Aldermen and citizens of the city of B. from the order dated the 3rd May, 1932, and upon hearing counsel for the respts and the plts and no one appearing for the dfts, and upon reading the sd order, This Ct doth order that the sd order be discharged and doth declare that the B. Corporation are preferential creditors of the dft coy for 84*l.* 5*s.* 2*d.*, such sum representing the proportion of increased rates for the period from the 1st April, 1930, to the 28th January, 1931, assessed on the premises belonging to the dft coy situate in B.

And it is ordered that the dfts do pay to the sd Lord Mayor, Aldermen and citizens their costs of the applicon of the plts by summons dated the 12th January, 1932, and occasioned by this appeal such costs to be taxed by the taxing master. *Airedale Garage Co., Ltd.*, Court of Appeal. 25th May, 1932.

**Form 339.**
Liberty to pay preferential claims.

It is ordered that M. C. S., the receiver and manager appointed in this action be at liberty to withdraw the sum of —— from the moneys deposited with the plt (—— Bank, Limtd) pursuant to the sd order dated the 5th October, 1932, and to expend such sum in paying the preferential claims against the dft coy, parlars whereof are set forth in the list being the sd exhibit "M. C. S. 49." *Agricultural and General Engineers, Ltd.* (A. 537 of 1932). Stiebel, Reg.

## CHAPTER LXVII.

### CONTINUING MANAGER.

It is usual in appointing a manager to direct him not to act as manager for more than, say, three months without leave of the judge. See *Day* v. *Sykes*, 55 L. T. 763; and *supra*, p. 587 *et seq.* If it becomes necessary to extend the time, a summons should be taken out as follows:—

**Form 340.**
Summons for continuing manager.

Let, &c., (*Form* 171 *or* 172) on the pt of the plt, that H., the receiver and manager appointed herein by the Hon. Mr. Justice —— on the —— day of August, ——, do continue as manager of the business of the sd dft coy for a further period of three months, and that the costs of this applicon be costs in the action.

*The summons should be supported by an affidavit, and the following is a specimen:—*

**Form 341.**
Affidavit as *to continuing* manager.

I, H., *of* ——, *make oath and say as follows*:—

1. By an order of the Ct (Mr. Justice ——) made herein, I was *appointed receiver and also manager of the business of the above-*named dft coy, M. & Co., Limtd, but to act as manager for three months only.

2. I have since that date and still am acting as such receiver and manager, but the period for which I was appointed manager, namely, three months, expires on the 6th of November inst.

3. A scheme of arrangement in connection with the above-named dft coy, under which it is proposed to sell the undertaking of such coy to a new coy as a going concern, is now under conson, but some time must elapse before a final settlement thof is arrived at owing to several meetings having to be called.

*Or,* "Negotiations are now in progress for the sale of the company's business as a going concern on favourable terms, and it is anticipated that a provisional contract for sale will soon be concluded."

4. In the interest of the holders of debentures of the dft coy it is necessary to continue the carrying-on of the business of the sd dft coy pending a settlement of the sd scheme, and the discontinuance of such business would seriously damnify the sd debenture holders.

Sworn, &c.

A receiver appointed on an interlocutory application before judgment need not be continued by the judgment unless the appointment was only an interim one. *Cruse* v. *Smith*, 24 Sol. J. 121; and see *Re Underwood* (1889), 37 W. R. 428. Where a receiver and manager has been appointed by an interim order with a limitation as to the time during which he should act as manager, the proper form of order on the hearing is to extend the time during which the receiver shall act as manager. *Davies* v. *Vale of Evesham Preserves*, 43 W. R. 646.

**Form 342.**

Order to continue manager.

Upon the applicon of the plt by summons dated the ——, 19—, and upon hearing counsel for the plt and the solors for the dfts, ——, and no one appearing for or on behalf of the dft ——, although it has been duly served with the sd summons as by afft appears, And upon reading the order dated the ——, 19— (appointing receiver and manager), the judgment dated the ——, 19—, the order dated the ——, 19— (continuing receiver and manager), and the afft of ——, filed the ——, 19—, it is ordered that G. R. F., the receiver and manager appointed by the sd order of the ——, 19—, do continue to act as manager of the business of the dft coy (——, Limtd) until the ——, 19—, or further order.

And the further hearing of the sd applicon stands adjourned. *John Knill & Co., Ltd.* (J. 2161 of 1930). Stiebel, Reg.

**Form 343.**

Order to continue with special powers.

It is ordered that W. R. W., the receiver and manager appointed in this action, do continue to act as such manager of the business of the dft coy until the —— day of ——, 19—, or further order.

And it is ordered that the sd W. R. W. be at liberty to continue to employ so long as may be necessary the persons whose names and parlars of whose duties are set out in para 6 of the afft of the sd W. R. W. filed the —— day of ——, 19—, at the wages or salaries set opposite their respive names, but such employment is in no case to continue beyond the —— day of ——, 19—, without further order.

And it is ordered that the sd W. R. W. be at liberty to continue to employ the operatives and other persons employed in the mills of the dft coy not exceeding those at present employed by the sd receiver and manager, but in no case is such employment to continue beyond the —— day of ——, 19—, without further order.

And it is ordered that the receiver be at liberty to employ at a fee not exceeding 25*l.* a qualified valuer to value the leasehold premises being pt of the assets of the dft coy situate in —— Street, ——. *R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Stiebel, Reg.

# CHAPTER LXVIII.

## BORROWING BY RECEIVER.

It is well settled that in an action to enforce debentures or debenture stock the Court has jurisdiction to authorize the receiver to raise money on the mortgaged premises, and to give the lenders a security in priority to the debenture and debenture stockholders. *Greenwood* v. *Algeciras (Gibraltar) Ry. Co.*, (1894) 2 Ch. 205.

Such orders have been made frequently during the last forty years. Thus in *Murrietta* v. *Nevada Land Co.*, 93 L. T. 442, leave was given to a receiver-manager of land in India to borrow 1,500*l.* at 5 per cent. by a first charge for the purpose of getting in crops and paying Government taxes. Similar leave was given in *Masson* v. *Ottoman Paper Manufacturing Co.*, 93 L. T. N. 458, to borrow 15,000*l.* by a first charge to save a Turkish concession and equip the company that the property might be sold as a going concern.

Merely speculative expenditure will not, however, be authorized. It must be such as will lead to an advantageous sale. *Securities Corpn.* v. *Brighton Alhambra*, W. N. (1893) 15.

Sometimes the receiver, in respect of the moneys so raised, issues certificates. See Form 350. Sometimes he gives a charge, and sometimes the amount is raised by the issue of debentures of the company secured by charge, or by charge and mortgage to trustees. See Form 82.

In *Lathom* v. *Greenwich Ferry*, 72 L. T. 790, Kekewich, J., held that where the Court gives leave to a receiver and manager to raise a certain sum for the purpose of carrying on the business of the company, this expression gives the receiver by implication a power to raise the same on the security of the subject-matter of the action, but usually the order expressly so provides.

An authority to borrow up to a specified limit may impart a power to re-borrow within the limit (*Millward* v. *Avill*, 4 Manson, 403); but the order should preclude doubt.

In giving leave the Court may annex conditions, *e.g.*, that the receiver is not to spend more than, say, 200*l.* without the leave of the judge in Chambers. *Masson* v. *Ottoman Paper Manufacturing Co.*, *supra*.

Leave to borrow a specific sum of money is impliedly a limitation of the receiver-manager's authority. If he incurs liabilities exceeding the limit, he is not entitled to indemnity in respect of such liabilities unless he shows special circumstances. *British Power, &c. Co.*, (1906) 1 Ch. 497; and see (1907) 1 Ch. 528. His proper course, if the amount authorized proves insufficient, is to go to the Court to sanction further borrowing.

**Receiver's costs, charges and expenses.**

The expenses of realisation rank before the securities given by the receiver and manager. *Strapp* v. *Bull*, (1895) 2 Ch. 1.

As between a receiver and manager and persons who have lent money to carry on the business, the rule is that the receiver and manager is *primâ facie* entitled to priority over such lenders for his costs, charges and expenses properly incurred, whether the lenders are themselves debenture holders or strangers. *Strapp* v. *Bull, supra; Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; *Re Glasdir Copper Mines*, (1906) 1 Ch. 365, C. A.; *Re Boynton, Ltd., Hoffman* v. *Same*, (1910) 1 Ch. 519.

Commissions paid by the receiver, appointed by the Court, to agents employed by him are not recoverable as part of his costs, charges and expenses, unless the Court has authorised the payment of a commission; but the Court may authorise the payment of a reasonable commission. *Re National Flying Services, Ltd.*, (1936) Ch. 271.

**Priority of borrowed money.**

The order giving leave to borrow should state whether or not the borrowed money is to have priority over the receiver-manager's indemnity. *Re Glasdir Copper Mines*, (1906) 1 Ch. 365.

The question whether the borrowed money is to have priority over the claims of the preferential creditors should also be considered. See *Re Glyncorrwg Colliery, Ltd.*, (1926) Ch 951, and notes, p. 582, *supra*.

A receiver and manager appointed by the Court cannot without leave of the Court create a lien for an existing debt of the company. *Moss Steamship Co.* v. *Whinney*, (1912) A. C. 254.

As to the personal liability of a receiver and manager appointed by the Court in a debenture action as regards borrowing, see *Re Boynton, Ltd.*, (1910) 1 Ch. 519, and *supra*, p. 506.

**Form 344.**

**Summons, receiver to borrow.**

Let, &c. (*Form* 171 *or* 172), on the pt of the plt, that H., the receiver, may be at liberty for the purpose of carrying on the business of the dft coy, to borrow or raise at interest any sum or sums of money upon mortgage of the ppty and assets comprised in the debentures of the plt and the other debenture holders of the dft coy in priority thto, but so that the aggregate amount at any one time owing in respect of the moneys so raised shall not exceed 1,000*l.*, and that the rate or rates of interest shall not exceed [5] p.c.p.a.

**Form 345.**

Liberty to receiver to borrow in priority to debentures.

It is ordered that G. H. D., the receiver and manager appointed in this action, be at liberty for the purpose of paying wages and other necessary expenses of the business of the dft coy to borrow such further sum or sums as may be necessary not exceeding 500*l.* in the aggregate.

And it is ordered that the ppty and assets of the dft coy comprised in or subject to the securities and charge created by the debentures issued by the dft coy do stand charged with the payment of the further sum or sums so to be borrowed (not exceeding in the aggregate 500*l.*) for the purpose afsd, together with interest at a rate not exceeding 1 p.c. above current bank rate, with a minimum of 5 p.c.p.a. on the respive advances from the respive dates thof, subject to any overriding mortgage or charge, but in priority to the charge created by the sd debentures, and subject to the right of the sd G. H. D. to indemnity as such receiver and manager out of the sd ppty and assts in respect of his remuneration to be allowed by the judge and his costs and expenses properly incurred. And it is ordered that the charge hby created be not enforced except in this action and with the leave of the judge. *Acorn Colliery Syndicate, Ltd.* (A. 1255 of 1931). Stebel, Reg.

**Form 346.**

Receiver to borrow 2,000*l.*

Upon the applicon of the plt, and upon hearing the solors for the applicant and for the dfts, and upon reading an order dated the 15th October, 1915, an affit of H. filed the 2nd November, 1915, and the Master's certificate dated the 9th November, 1915.

It is ordered that H., the receiver and manager appointed in this action, be at liberty from time to time for the purpose of carrying on the business of the dft coy to borrow such sum or sums as may be necessary not exceeding 2,000*l.* in the aggregate.

And it is ordered that the ppty and assets comprised in and charged by the mortgage debentures issued by the dft coy do stand charged with the payment of the sum or sums so advanced for the purpose afsd together with interest at a rate not exceeding seven pounds p.c.p.a. on the respive advances from the respive dates thof in priority to the charge created by the mortgage debentures and subject to the right of the sd receiver and manager to indemnity as such receiver and manager out of the sd ppty and assets in respect of his remuneration to be allowed by the judge and his costs and expenses properly incurred.

And it is ordered that the charge hby created be not enforced except in this action and with the leave of the judge. *Re Karamelli and Barnett, Ltd.* (K. 734 of 1915). Eve, J., 19th November, 1915.

**Form 347.**

Receiver to borrow a further 1,000*l.*

Upon the applicon by summons dated the 5th April, 1911, of the plt, and upon hearing the solors for the applicant and for the dfts, and upon reading, &c., it is ordered that H., the receiver and manager appointed in this action, be at liberty, for the purpose of carrying on the business of the dft coy, to borrow a further sum not exceeding 1,000*l.*, with interest thereon, at a rate not exceeding 5 p.c.p.a., and that such sum, when raised, and interest thereon be a first charge upon the assets of the sd coy and all other ppty and effects included in the debentures issued by the dft coy in priority to the sd debentures but subject to all prior existing charges. And it is ordered that the costs of this applicon be costs in the action. Liberty to apply. *Bailey (on behalf, &c.)* v. *E. Harmer & Co.*, Swinfen Eady, J., at Chambers, 7th April, 1911.

**Form 348.**

Liberty to defendant company to raise 20,000*l.* on railway abroad.

Upon the applicon of the dfts, and upon hearing the solors for the applicants and for the plt, and upon reading, &c.

It is ordered that the dfts be at liberty, notwithstanding the appointment of the receiver and manager, to borrow the sum of 20,000*l.* for the purpose of carrying out the construction and equipment of the Reinach branch of the above railway, and for the payment of such claims in Switzerland as the receiver and manager may in the interest of the undertaking consider necessary and expedient, and to enter into such contracts and do and concur in all such acts as may be necessary for the purpose of raising the sd loan and carrying out the construction and equipment of the sd branch. And the dfts are to be at liberty to secure payment of the money so to be borrowed and the interest thereon by a first charge upon the sd branch and the rolling stock and all other ppty to be pd for out of the proceeds of the sd loan. The costs of this applicon to be costs in the action. *Davis* v. *Lake Valley of Switzerland Ry. Co.* (A. 1468 of 1886). North, J., 3rd November, 1886.

**Form 349.**

Liberty to receiver to issue debentures in respect of money borrowed.

Upon the applicon of the plt, &c., Order that S., as receiver and manager, and also as liqr of the dft coy (hnftr called the coy), be at liberty to issue, in the name and on behalf of the coy and under the coy's seal, such debentures as he shall think fit to the —— Corporation, Limtd, or as they shall direct, for sums together amounting to 20,000*l.* in respect of sums of 11,000*l.* and 9,000*l.* borrowed by him from them under the authority of the sd orders of the 3rd November and the 13th December, 1888, and interest on the sd sum of 20,000*l.* at a rate not exceeding 5 p.c.p.a., and be at liberty to execute any

mortgage, or security, or trust deed which he shall think fit of all or any pt of the coy's undertaking and real and personal estate and assets (*excepting certain book debts*) for further securing the sd sum of 20,000*l.* and the interest thereon subject as to the ppty comprised therein to the mortgage of the 17th December, 1880, for 45,000*l.* and interest, the debentures to be issued as afsd, being framed so as to be redeemable on payment of the principal and interest at a day not later than three calendar months from the 11th May, 1889, the date of this order. Liberty to S. to arrange for limtd renewal at commission not exceeding 1 p.c. Direction to S. to pay the sd corporation 1 p.c. commission for renewing the loan of 20,000*l.* for three months. Declaration that the securities for the 20,000*l.* and interest shall have priority over the debentures of several series and various securities vested in parties to action; and S., as receiver, to pay out of the assets of the coy costs, in accordance with [Schedule 2 of the Rules under the Solicitors' Remuneration Act, 1881], to the sd corporation of and incident to the loans and the securities therefor, and to obtaining sanction of judge, such costs to be taxed. *Pontifex* v. *Pontifex & Wood, Ltd.* Chitty, J., 11th May, 1889.

**Form 349.**

See now Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37).

Upon the applicon, &c., it is ordered that the receiver and manager appointed in this action be at liberty to give a receipt or certificate (in the form set forth in the schedule hto) for the sums to be raised by him pursuant to the order dated the 17th day of May, 1889.

**Form 350.**

Liberty to receiver to issue certificates in respect of money raised.

THE SCHEDULE.

The Swedish and Norwegian Railway Coy, Limtd.

Loan of 50,000*l.*

*Receiver and Manager's Certificate.*

No ——.

Received from ——, of ——, the sum of ——*l.*, pt of a sum of 50,000*l.* authorised to be raised by an order of the High Ct of Justice dated the 17th day of May, 1889, and made in an action of *Hay* v. *The Swedish and Norwegian Railway Coy, Limtd*, 1889, H. No. 821, under which order every pt of the sd sum of 50,000*l.* is to rank *pari passu* as a first charge upon the assets of the sd coy comprised in or charged by a certain trust deed for securing debenture stock of the sd coy dated the 5th day of April, 1886, and referred to in the sd order, in priority to the holders of the sd debenture stock and their trees, and is to bear interest commencing as to the sd sum (the

**Form 359.**

2. In my judgment proceedings should be taken against the shareholders whose names appear in the first pt of the sd schedule to recover the amounts so due from them.

3. The shareholders whose names are set out in the second pt of the sd schedule are also holders of "C" debentures. A proposal has been made on their behalf by Messrs. N. and M. that they should be allowed to surrender their debentures at 75 p.c. of their nominal value in discharge of the amounts due from them for calls. The letter from Messrs. N. and M. to my solors in which they make this proposal and the list referred to in that letter are now produced to me marked A and B resply. In my judgment this proposal should be accepted conditionally on the consents of the holders of all the debentures having priority to the "C" debentures being obtained.

4. In the third pt of the sd schedule I have set out a list of those shareholders whose ability to pay the amount due from them is doubtful, and whom I propose to deal with as follows:—

(a) H. R. has filed an affit herein on —— showing his present pecuniary circumstances and making a proposal for a compromise of the claim against him. In my judgment this proposal should be accepted.

(b) As to D., letters which he has written to my solors are contained in the bundle now produced to me and marked C. In my judgment the sd D. should be given time for payment until after the sale of the ppty in France has been effected, and interest upon the amounts payable by him should be accepted at the rate of 4 p.c. instead of 10 p.c.p.a., &c., &c.

5. The following shareholders have pd the amounts due from them in respect of their calls, and have pd no interest thereon—namely, &c. In my judgment proceedings should be taken for the recovery of such interest.

6. No interest has ever been pd on the debentures for 10,000*l.* held by the plts in the —— Coy, Limtd. In my judgment immediate steps should be taken to enforce payment of the amount due in respect of such debentures.

THE SCHEDULES, &C.

**Form 360.**

**Summons as to prosecution of action.**

Let, &c. (*Form* 171 *or* 172), on the hearing of an applicon on the pt of the plt for directions as to the prosecution of the action commenced against D., of ——.

Dated ——.

To the off recr and to Messrs. ——, solors.

**Form 361.**

Order giving liberty to receiver to sue for a debt due to the company.

Upon the applicon of the plt by summons dated the 20th December, 1898, and upon hearing the solors for the applicant and for the dft W. A., and no one appearing for the dfts the Gresley Brewery, Limtd, although having been duly served with the sd summons, as appears by the afft of H., filed, &c., and upon reading the afft of M., filed, &c., It is ordered that M., the receiver and manager appointed in this action by order dated the 17th October, 1894, be at liberty to commence an action in the name of the dft W. A., as plt, against J., of ——, as dft, to recover the sum of 48*l.* 1*s.* 11*d.*, the balance due in respect of a loan granted to the sd J. by the dft coy. And it is ordered that the sd M. do apply in such action for judgment under Ord. XIV. of the Rules of the Supreme Ct, and that if upon the hearing of such applicon, the sd J. be given leave to defend the action, then that the sd M. be at liberty to apply in the sd action to remove the same to the proper Ct for trial, and that the sd M. and W. A. be indemnified in respect of the sd proceedings out of the funds in Ct to the credit of this action. *Gardner* v. *Gresley Brewery, Ltd. and Others*, 1894. A. 1309.

**Form 362.**

Order as to collection of debts partly by liquidator and partly by receiver.

Upon the applicon by summons dated the 26th July, 1895, of the above-named plt, which, upon hearing the solors for the applicant and for the dft in chambers, was adjourned to be heard in Ct, and coming on this day to be heard accordingly, and upon motion this day made unto this Ct on behalf of F., the liqr of the above-named coy, and upon hearing counsel for the respive applicants and for the above-named dft, and upon reading, &c., and all parties by their counsel consenting to the following order, this Ct doth order as follows:—

1. The receiver to have the control and conduct of all litigation, in the name of the liqr, as to calls on ordinary shares and as to liability on preference shares of the above-named coy, &c., limtd, where the amount of the liability of the shareholder, or alleged shareholder, is 1,000*l.* or over.

2. The liqr to have the control and conduct of all litigation as above where the amount is below 1,000*l.*

3. The dft coy and the liqr thof to be indemnified to the reasonable satisfaction of the liqr's solors or of the Ct.

4. No compromise to be accepted and no action or appeal to be set down for hearing by the liqr or receiver without the other's approval or that of the Ct.

5. In addition to the costs already provided for by the order of the 15th August, 1895, the costs and expenses and renuneration of the

**Form 362.** liqr as to all the above matters, and the costs of the pending summons by the receiver and the motion by the liqr to be paid out of the assets in priority to the debentures, if and when the judge shall so direct.

6. Each to render to the other all information as to the progress of the above matters, and any information and assistance which may be necessary or desirable, not only as to the above matters, but generally as to the receivership and liquidation resply.

7. Any of the parties are to be at liberty to apply as he or they may be advised. *Akers* v. *Veuve Monnier, &c. Ltd.*, and in winding-up, V. Williams, 6th November, 1895.

**Form 363.** Summons to settle liquidator's indemnity.

Let, &c. (*Form* 172), on the hearing of an applicon of F., the liqr of the above-named coy, for an order that the indemnity ordered to be given to F., the liqr of the sd coy under the orders dated, &c., may be settled.

**Form 364.** Order giving receiver liberty to collect debts.

Upon the applicon by summons dated the 3rd June, 1896, of the plts and upon hearing counsel, &c., It is ordered that R., the receiver in this action, be at liberty to collect any outstanding calls or sums of money due from the shareholders of the dft coy, but the sd R. is not to commence or prosecute any action or proceeding in his own name or in the name of the plt for the purpose of getting in such calls or sums of money without the leave of the judge, and the applicants are to be at liberty to make such further applicon as they may be advised with reference to the collecting and getting in of such calls or sums of money. *Law Guarantee* v. *Lartigue Co.*, V. Williams, 8th July, 1896.

**Form 365.** Liberty to sue debtors.

It is ordered that upon the off recr and liqr of the dft coy being indemnified to his satisfaction, S. W. T., the receiver appointed in this action be at liberty in the name of the dft coy to take such proceedings as he may be advised against the debtors of the dft coy whose names and addresses and parlars of whose debts are set out in the list being the sd Exhibit "S.W.T. 1." *Dominion Gramophone Records, Ltd.* (D. 1135 of 1930). Stiebel, Reg.

**Form 366.** Summons for liberty to receiver to sue in name of company for calls.

[*Intituled in the Action and in the Cos Ct as in Winding-up.*]

Let A. B., of, &c. (*Form* 172), the [off recr and] liqr of the above-named coy, and the dft X. attend, &c. [*Form* 172], on the hearing of an applicon of the plt C., of, &c., for an order that the sd [off recr and] liqr, upon being indemnified in such manner as the Ct shall direct,

shall take such proceedings as may be necessary to call up any uncalled capital on the shares held by the contributories resply of the sd coy. And that W., the receiver in the above action, shall be at liberty, in the name of the sd coy, to bring such actions or take such other proceedings as may be necessary for getting in such call and any other moneys due and remaining unpd in respect of shares held by the contributories resply of the sd coy. **Form 366.**

**Form 367.**

Order to make calls which are charged by debentures (after winding-up order).

Upon the applicon of the plt, and upon hearing the solors for the applicant and Mr. S., the off recr and liqr of the dft coy in person, and upon reading the order in the above matters, dated the 4th July, 1891, to wind up the above-named coy, the order in the above action dated the 3rd July, 1891, appointing receiver, It is ordered that, subject to the leave of the Ct, the off recr and liqr be at liberty to call up any uncalled capital on the shares held by the contributories of the above-named dft coy resply. And it is ordered that B., the receiver and manager appointed in this action, be at liberty, in the name of the sd coy, or of the off recr and liqr, to take all such steps as may be necessary to enforce payment of any calls now made and remaining unpd, and of any calls to be made, such calls, when recovered, to be pd into Ct to the credit of this action without prejudice to any question. *In re Kinnears & Co.* (C. 2443 of 1891). And *Compton* v. *Kinnears & Co.*, Kekewich J., at Chambers, 4th December, 1891.

**Form 368.**

Another. Receiver directed to take proceedings.

[*Intituled in the Action and in the Cos Ct as in Winding-up.*]

Upon the applicon of the plt in the above action by summons, dated, &c., which, upon hearing counsel for the applicant and the solors for the dft B. and for the off recr and liqr of the above-named coy in chambers, was adjourned to be heard in Ct, and coming on accordingly, &c.; and upon hearing counsel for the applicant, for the dft B., and for the off recr and liqr of the sd coy, and upon reading, &c., It is ordered that upon the off recr and liqr of the above-named coy being properly indemnified (such indemnity to be settled in the Chambers of the Registrar in Cos Winding-up in case the parties differ) against all costs, charges, and expenses which the off recr and liqr may be put to or may become liable to pay in respect of the proceedings in the winding-up, and in respect of such actions or other proceedings as are hnftr referred to, the off recr and liqr of the sd coy do take such proceedings as may be necessary to call up any uncalled capital on the shares held by the contributories resply of the sd coy; And it is ordered that W., the receiver in the above action, be at liberty, in the name of the sd coy, to bring such actions or take such other proceedings as may be necessary (except in respect of the shares in the sd coy held

**Form 368.** by the plt and the dft B.) for getting in such call and any other moneys due and remaining unpd in respect of shares held by the contributories resply of the sd coy; And it is ordered that the amounts due and to become due from the plt and dft B. in respect of the shares held by them resply in the sd coy be set off against the amounts due to them resply in respect of the debentures held by them in the sd coy; And it is ordered that the applicant, the plt F., do pay to the off recr and liqr his costs of this applicon, such costs to be taxed, but in such taxation the off recr and liqr is to be allowed no costs of his sd afft, filed, &c.; And it is ordered that the costs of the plt and of the dft B. (including in the costs of the plt the amount hnbefore directed to be pd by him or to the off recf and liqr in respect of his costs of this applicon) be their costs in this action. *Fowler* v. *Broad's Patent, &c. Co.* (1891), F. 1883; Vaughan Williams, J., 26th January, 1893, reported (1893); *Fowler* v. *Broad's Patent*, (1893) 1 Ch. 724.

As a general rule, another person is not to be allowed to sue in the liquidator's name. *Harrison* v. *St. Etienne Co.*, W. N. (1893) 108.

**Form 369.**

Order for liquidator to pay calls to debenture holders' receiver.

Upon the applicon of D. Corporation, Limtd, the trees for first mortgage debentures of the above coy, &c., order that B., the off recr and liqr of above-named corporation, do pay over to H. as such recr as afsd, all moneys in his hands or to come to his hands from calls or otherwise, and forming pt of the assets of the above coy, subject to the payment thereout to the sd B. as such off recr and liqr of all his fees, costs, charges, and expenses incurred by him in the realization of the assets above referred to. Such costs to be taxed, &c. In winding-up of *General Phosphate Corpn., Ltd.*, Vaughan Williams, J., 13th May, 1896.

**Form 370.**

Declaration that second debentures only entitled to charge on uncalled capital.

The applicon by summons dated the 4th May, 1911, of S. of —— and H. of ——, the joint liqrs in the voluntary winding-up of the above-named coy, which upon hearing the solors, &c., in chambers was adjourned to be heard in Ct, coming on this day to be heard accordingly, and upon hearing, &c., and upon reading the Order dated the 16th November, 1910, whereby the sd D. and the sd E. were appointed to represent all the holders of the First Mortgage Debentures of the above-named coy, the afft, &c., this Ct doth declare that the holders of the second debentures of the above-named coy are alone entld to a charge on the proceeds of the call of 2*l.* per share on 4,300 shares of the above-named coy made by the applicants as such liqrs as afsd. And it is ordered that the costs of the applicants and of the sd respts be taxed as between solor and client and pd out of the proceeds of the call above referred to. *Andrew Handyside*, Neville, J., 30th May, 1911.

### Misfeasance and Breach of Trust.

Where the debentures or debenture stock which are being enforced by action charge all the property, present and future, of the defendant company, part of that property may consist of a claim for misfeasance or breach of trust against the directors or promoters of the company. *Park Gate Wagon Co.*, 17 Ch. D. 234. In such case care should be taken that this asset is mentioned in the master's certificate to answer the inquiry of what the property consists, and the question how best to enforce the claim will have to be considered. Where the company is not being wound up, an action in the name of the company will be the proper course, but where there is a winding-up proceedings by summons under sect. 276 of the Companies Act, 1929, are generally the most convenient and desirable mode of enforcing the claim. See Part II. of this work, Chap. XLIV.

Claims in respect of misfeasance and breach of trust: enforcement.

**Form 371.**

Upon applicon, &c., order that B., the off recr and liqr of dft coy, be at liberty to institute and prosecute such proceedings under sect. 276 of the Cos Act, 1929, against R. and D., the above-named plts and two of the directors of the sd coy, and against W. & Co., the auditors of the sd coy, and each or any of them as he may be advised, and order that the sd B. be indemnified against any costs to be incurred by him in connection with such proceedings out of the funds in Ct to the credit of this action and any assets of the above-named coy included in the debenture holders' charge, and order that the costs of applicant and of plts and dfts of this applicon be costs in this action.

Liquidator to proceed under sect. 276 of Act of 1929, and be indemnified.

**Form 372.**

Upon applicon by summons, dated, &c., of F., a debenture holder of dft coy, having leave to attend the proceedings in this action by order dated ——, and upon hearing counsel, &c., order that B., the off recr and liqr of the dft coy, be at liberty to compromise the proceedings commenced by him under sect. 276 of the Cos Act, 1929, against R. and D., the above-named plts and two of the directors of the sd coy, and against W. & Co., the auditors of the sd coy, on the terms of the memdum dated, &c., and being the exhibit —— to the sd afft of M., and order that the costs of all parties of this applicon be their costs in this action.

Liberty to compromise misfeasance proceedings.

For order for sale by tender of the interest of the debenture holders and debenture stock holders in any moneys that may be recovered from the directors and others in respect of any claim by the official receiver and liquidator of the company under sect. 10 of the Companies (Winding-up) Act, 1890 (now sect. 276 of the Companies Act, 1929), with several extraordinary provisions with a view to compelling the purchaser to proceed under penalty of forfeiture of his rights to the liquidator, see order of Vaughan Williams, J., in *Wood* v. *Woodhouse and Rawson*, 17th January, 1896; W. N. (1896) 4 (4); see also *Park Gate Wagon Co.*, 17 Ch. D. 234.

Sale of right to proceed for misfeasance.

In the above case the debenture holders were unwilling to have the proceedings taken, and in the end the judge made an order for sale of the asset as above mentioned.

**Form 373.**

Order on application to enforce proceedings for misfeasance.

Upon applicon, &c., of liqr [*for injunction to restrain plt from committing breach of undertaking to proceed against directors for misfeasance*], and the debenture holders afsd by their counsel undertaking to proceed with due diligence with the pending summons against directors of the coy under sect. 276 of the Cos Act, 1929, and undertaking not to compromise with any director without the leave of the Ct, and to present a report to the Ct every two months, and also undertaking that if the Ct at any time should consider that the sd debenture holders are not proceeding with due diligence with the sd proceedings, the Ct should be at liberty to take the conduct of the sd proceedings out of such hands as they might then be in, and to place them in the hands of such person as the Ct might nominate for the purpose. No order on the applicon, and costs of liqr reserved. *Graham (on behalf, &c.)* v. *Bywater, Tanqueray, Ltd.*, Vaughan Williams, J., 6th February, 1896 (*varied*).

# CHAPTER LXX.

## SALE.

### Jurisdiction of Court.

In an action to enforce debentures or debenture stock the Court (save as regards statutory undertakings, see p. 52) has, under sect. 91 of the Law of Property Act, 1925, power (irrespective of its inherent jurisdiction) to make an order for the sale of the mortgaged premises or any part thereof. This section provides as follows:— Jurisdiction.

Sale by Court.

(1) Any person entitled to redeem mortgaged premises may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding that (a) any person dissents; or (b) the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5) This section applies to actions brought either before or after the commencement of this Act.

(6) In this section "mortgaged property" includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.

(7) (Vesting orders.)

The following rules are also in some cases available:—

Order for sale of perishable goods, &c.

**R. S. C. Ord. L. r. 2.**—It shall be lawful for the Court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may

think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just or sufficient reason it may be desirable to have sold at once.

Shares and bonds of a company are "goods" within this rule. *Evans* v. *Davies*, (1893) 2 Ch. 216; *Coddington* v. *Jacksonville Ry. Co.*, 39 L. T. 12.

Conduct of sale of trust estates.

**R. 10.**—Whenever in an action for the administration of the estate of a deceased person, or execution of the trusts of a written instrument, a sale is ordered of any property vested in any executor, administrator, or trustee, the conduct of such sale shall be given to such executor, administrator, or trustee, unless the Court or a judge shall otherwise direct.

Power of Court to order sale of real estate.

**R. S. C. Ord. LI. r. 1.**—If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a judge may order the same to be sold, and any party bound by the order and in possession of the estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed.

Moreover, where there is a trust deed for securing debentures or debenture stock containing a trust for sale or a power for sale, expressed or implied, the Court can, in an action for the execution of the trusts of such deed, order a sale in execution of such trusts or powers. See Ann. Pr., notes to rule.

Mode of carrying out sale, mortgage, partition or exchange, when ordered by Court.

**R. S. C. Ord. LI. r. 1a.**—In all cases where a sale, mortgage, partition or exchange is ordered, the Court or a judge shall have power, in addition to the powers already existing, with a view to avoiding expense or delay, or for other good reason, to authorize the same to be carried out, either as at present—

(a) by laying proposals before the judge in chambers for his sanction; or

(b) by proceedings altogether out of Court, any moneys produced thereby being paid into Court or to trustees, or otherwise dealt with as the judge in chambers may order.

Provided always, that the judge shall not authorize the said proceedings altogether out of the Court, unless and until he is satisfied, by such evidence as he shall deem sufficient, that all persons interested in the estate to be sold, mortgaged, partitioned or exchanged are before the Court or are bound by the order for sale, mortgage, partition or exchange, and every order authorizing the said proceedings altogether out of Court shall be prefaced by a declaration that the judge is so satisfied as aforesaid, and a statement of the evidence upon which such declaration is made.

These stipulations in the order do not make the sale one under the direction of the Court. See *Cumberland, &c. Co.* v. *Maryport, &c. Co.*, (1892) 1 Ch. 92. The necessity for inserting this declaration sometimes causes considerable embarrassment—for instance, where a conditional contract for sale out of Court has been entered into, and one of the parties entitled to redeem dies. If a sale out of Court is directed, the reserved biddings and auctioneer's remuneration must be fixed by the Court, and the purchase-money brought into Court. *Pitt* v. *White*, 57 L. T. 650; *Re Stedman*, 58 L. T. 709.

**R. 1b.**—In debenture holders' actions, where the debenture holders are entitled to a charge by virtue of the 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. Power to make order for sale in debenture holders' action at any time.

See *Crigglestone Coal Co.*, (1906) 1 Ch. 523.

**R. 2.**—Before any estate or interest shall be put up for sale under a judgment or order, an abstract of the title shall, unless otherwise ordered, be laid before some conveyancing counsel approved by the Court or judge for his opinion thereon, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale. The conditions of sale shall specify a time for the delivery of the abstract of title to the purchaser or to a solicitor. Abstract before sale

**R. 3.**—Where a judgment or order is given or made, whether in Court or in chambers, directing any property to be sold, unless otherwise ordered, the same shall be sold, with the approbation of the judge to whom the cause or matter is assigned, to the best purchaser that can be got for the same, to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge shall direct. Sale with the approbation of the judge.

**R. 3a.**—No order for the payment of purchase-money into Court shall be necessary, but a direction for that purpose signed by the Master shall be sufficient authority for the Paymaster-General to receive the money. Order for payment of purchase-money into Court not necessary.

**R. 4.**—Affidavits for the purpose of enabling the judge to fix reserved biddings shall state the value of the property by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed. Form of affidavit of value.

**R. 5.**—As soon as particulars and conditions of sale settled at chambers have been printed, two prints thereof, certified by the solicitor to be correct prints of the particulars and conditions settled at the judge's chambers, shall be left at chambers. Prints of particulars and conditions of sale.

**R. 6.**—An office copy of the affidavit of the person appointed to sell of the result of the sale, with the bidding paper and particulars therein referred to, shall be left at chambers at least one clear day before the day appointed for settling the certificate of the result of the sale. Office copy of affidavit as to result of sale.

**R. 6a.**—In the case of sales under the direction of the Court the particulars of sale shall be signed by and the result of the sale shall be certified under the hands of the auctioneer and the solicitor of the party having the conduct of the sale. It shall not be necessary to file any affidavit verifying the particulars or the result of the sale. Form 2 in the Appendix hereto shall be substituted for Form 16 in Appendix L, which is hereby annulled. Certificate of result of sale to be made by auctioneer and solicitor in lieu of affidavit.

As to references to the conveyancing counsel of the Court, see rr. 7 to 13.

When a sale is ordered under sect. 91 of the Law of Property Act, 1925, the sale may be ordered— When sale may be ordered.

(a) On an interlocutory application before judgment. *Woolley* v. *Colman*, 21 Ch. D. 169.

(b) At the hearing of the action, whether as a short cause or otherwise.

(c) After judgment in the action.

The application may be made at any time before foreclosure absolute (*Union Bank of London* v. *Ingram*, 20 Ch. D. 463), or, *semble*, on application for final foreclosure. *Weston* v. *Davidson*, W. N. (1882) 28; Ann. Pr., notes to Ord. LI. r. 1.

A sale before the hearing is not uncommon. See Form 375. It is generally on summons, but sometimes on motion. An order for sale at the hearing is not uncommon. See *Davies* v. *Wright*, 32 Ch. D. 220. But where an order for sale has not been made before the hearing the ordinary practice now is at the hearing to give liberty to apply in chambers for a sale. See Form 277.

Before r. 1b of Ord. LI. came into operation, a difficulty sometimes arose as to ordering a sale where besides the debenture holders, on whose behalf the plaintiff sued, there were a number of other holders of debentures of a different series (*e.g.*, Second Debentures) interested in the equity of redemption (see *Griffith* v. *Pound*, 45 Ch. D. 553, and *Francis* v. *Harrison*, 43 Ch. D. 183); but under rule 1 (b) these difficulties are to a great extent removed. When the property comprised in the debentures is in jeopardy, an immediate sale will be ordered under Ord. LI. r. 1b on motion for judgment on admissions in the pleadings (*Wallace* v. *Universal, &c. Co.*, (1894) 2 Ch. 547; *Day and Night Advertising Co.*, 48 W. R. 362), but unless all the debenture holders subsequent to the plaintiff are parties, the order will be for sale with the approbation of the judge, so that absent debenture holders may be brought in in chambers on the application to approve the conditional contract for sale. *Crigglestone Coal Co.*, (1906) 1 Ch. 523. See *supra*, p. 636, as to service of a judgment or order, and as to dispensing with service. The rule does not apply where the plaintiff improperly sues on behalf (*e.g.*, where there is only one other debenture holder). *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493. See also *Day and Night Advertising Co.*, 48 W. R. 362.

Conduct of the sale.

The company though in liquidation has no equity to have the conduct of the sale. Thus, in *Langdendale Co.* (1878), 8 Ch. D. 153, Jessel, M. R., said: "Then the third objection is that the mortgagors are themselves desirous of selling the property, and that if the mortgagee sells the property in the action the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights."

Where there are trustees of a debenture trust deed the trustees are entitled to the conduct of the sale (Ord. L. r. 10, *supra*, p. 708), unless there is a special reason for giving the conduct to someone else; but

the Court has a discretion with which the Court of Appeal will not interfere. *Re Love*, 29 Ch. D. 348. The action does not nullify the trustees' power to sell, but they can only sell with the sanction of the Court and the Court can direct a sale in exercise of their power. *Re Tunis Ry. Co.*, 31 L. T. 264 (C. A.).

Between foreclosure *nisi* and absolute a mortgagee cannot sell without the Court's leave, but a *bonâ fide* purchaser without notice may get a good title. *Stevens* v. *Theatres, Ltd.*, (1903) 1 Ch. 857.

In *Woolley* v. *Colman*, 21 Ch. D. 169, and *Brewer* v. *Square*, (1892) 2 Ch. 111, both of which were redemption actions, the conduct of the sale was given to the mortgagor as being the person most interested in obtaining as large a price as possible for the property. As a rule, in actions to enforce debentures without a trust deed the chance of a surplus is small, and the ordinary rule of giving the conduct of the sale to the plaintiff is followed.

Purchase by receiver.

A receiver cannot, without special leave, purchase the property of which he is receiver. *Nugent* v. *Nugent*, (1908) 1 Ch. 546.

Liberty to bid.

As a general rule, a party to the action is not allowed to bid and purchase without obtaining previous leave (*Elworthy* v. *Billing*, 10 Sim. 98); and, in general, leave to bid is not given to the party having the conduct of the action. *Domville* v. *Berrington*, 2 Y. & C. 723. See further, Seton, 7th ed. 331.

Where a sale is directed with the consent of prior incumbrancers, informal notice with a view of obtaining such consent may be given. Chancery Judges' Direction, May, 1909.

Reserve biddings.

The general rule in the Chancery Division is to require that the reserve biddings and the auctioneer's remuneration should be fixed by the Master and the purchase-money paid directly into Court. *Pitt* v. *White*, 57 L. T. 650; *Re Stedman*, 58 L. T. 709.

This rule is not always adhered to in the Companies Winding-up Division of the Court. A question has been raised whether in such a case the sale can be said to be altogether out of Court, but in practice the judge requires to be satisfied as above, and the order is prefaced with the required declaration. *Cumberland Union Banking Co.* v. *Maryport, &c. Co.*, (1892) 1 Ch. 92.

By sect. 204 of the Law of Property Act, 1925:—

> An order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

But this enactment does not give a good title to a purchaser under an order made by the Court under the supposition that it was dealing with an interest belonging to a judgment debtor, but which in fact

belonged to a person who was not a party to or bound by the proceedings. *Jones* v. *Barnett*, (1900) 1 Ch. 370; and Ann. Pr., notes to Ord. LI. r. 3. The enactment relates, however, to cases where there has been irregularity in the form of the order (*Re Hall Dare's Contract*, 21 Ch. D. 41), or irregularity in the machinery. *Mostyn* v. *Mostyn*, (1893) 3 Ch. 376.

Setting aside contract for sale.

A contract for sale approved by the Court will not be set aside in favour of a better offer; but only in the case of fraud of improper conduct. *Munster and Leinster Bank* v. *Munster Motor Co.*, (1922) 1 I. R. 15.

**Form 374.**

Order for sale.

It is ordered that the premises comprised in the head lease granted to H. S., and situate at ——, together with the stock in trade, trade fixtures and fittings and effects of the dft coy and the goodwill of the dft coy's business comprised in or subject to the first mortgage debentures issued by the dft coy, together with the right to use the name of the dft coy be sold with the approbation of the judge.

And it is ordered that the conditional contract dated the —— day of ——, 1932, and made between H. S. of the first pt, T. D. (the receiver and manager) of the second pt, R. C. (the liqr) of the third pt and L. K. (the purchaser) of the fourth pt (a) for the sale to the sd L. K. at the sum of ——*l.* of the head lease of the premises ——, in the county of London, granted to the sd H. S., and the trade fixtures and fittings in and about the sd premises belonging to the sd H. S.; (b) for the sale to the sd L. K. at the sum of ——*l.* of the underlease granted by the sd H. S. to the dft coy, the goodwill of the business of the dft coy together with the right to use the name of W. S. & Son, and the tenants and trade fixtures and fittings referred to in the list signed on behalf of all the parties to the sd contract, and the stock mentd in the sd list which will be unsold at the date of completion of the sale and the bunches and samples relating to such stock, pt of the ppty comprised in or charged by the first mortgage debentures issued by the dft coy referred to in the judgment dated the 21st March, 1932, and the registrar's sd certificate filed ——, be and the same is hby sanctioned, and that the sd T. D., the receiver and manager appointed in this action, be at liberty to pay out of the proceeds of such sales the amount due in respect of principal and interest under the first mortgage on the sd premises ——, dated the 10th March, 1921, and made between the sd H. S. of the one pt, and the —— Insurance Society of the other pt, together with the mortgagees' costs and the costs of the sd H. S. relating to such sale.

And it is ordered that the conditional contract dated the —— day of ——, 1932, made between the sd H. S. of the one pt, and G. W.

of the other pt, for the sale to the sd G. W. for the sum of ——*l.* of freehold premises, ——, in the county of —— together with land adjoining thereto (which sd land and premises form pt of the security held by the dft coy under the mortgage dated ——, 1922), be and the same is hby sanctioned and that the sd T. D., the receiver and manager appointed in this action, be at liberty to pay out of the proceeds of such sale the proper costs of the sd H. S. relating to such sale. **Form 374.**

And it is ordered that the balance of the proceeds of such sales be pd into Ct to the credit of this action "*Re Wain Shiell & Son, Limtd, Hargreaves* v. *The Coy and Another*, 1931, W. No. 4169, proceeds of sale." Warrington, Reg., 26th August, 1932.

**Form 375.**

Sale of statutory undertaking.

The applicon by summons dated the 20th January, 1911, adjourned and coming on for hearing, and upon hearing counsel for the applicants and for the dfts, and upon reading the order to wind up the dft coy dated the 14th November, 1909, intituled in the liquidation proceedings, No. 00215 of 1909, the judgment dated the 12th February, 1909, and the order appointing the receiver dated the 6th March, 1909, the certificate of the Registrar (Cos Winding-up) dated the 3rd June, 1910, the order of the Ct of Appeal dated the 4th November, 1910, the affit of S. filed the 24th January, 1911, &c., this Ct doth order that the undertaking and ppty of the dft coy be sold with the approbation of the judge, And it is ordered that the money to arise by such sale be pd into Ct to the credit of this action, *The Crystal Palace, &c.*, and the costs of the applicants, the Prudential, &c. and of the dfts of this applicon, are to be their costs in the sd action, and the sd dfts S. & B. by their counsel desiring to appeal from this order, it is ordered that they be at liberty to appeal therefrom if so advised. *Fox* v. *Crystal Palace Co., Ltd.*, Swinfen Eady, J., 8th March, 1911. See the above case reported, W. N. (1911) 74 (C. A.); W. N. 1911) 104.)

**Form 376.**

Order for sale of undertaking, conditional contract confirmed.

Upon the applicon by summons dated the 26th May, 1911, of the plt, and upon hearing the solors for the plt and for the dfts, and upon reading the order appointing receiver dated the 1st July, 1910, the judgment dated the 9th July, 1910, the certificate dated and filed the 19th May, 1911, and the affit of W. filed the 29th May, 1911, and the several exhibits therein referred to, the exhibit G. U. W. 2, being the conditional contract hnftr mentd, It is ordered that the undertaking and ppty comprised in and charged by first mortgage debentures issued by the dft coy, be sold with the approbation of the Ct free from incumbrances of such of the incumbrancers as shall

**Form 376.** consent to such sale, and subject to the incumbrances of such of them as shall not consent thto, and it is ordered that the proceeds of the sale be pd into Ct to the credit of this action [*short title*], proceeds of sale subject to further order. And W. A. S., the purchaser hnftr named, by his solor declaring himself content with the title of the ppty comprised in the conditional contract thereinafter mentd, it is ordered that the conditional contract dated the 25th May, 1911, and made between W., the receiver and manager appointed in this action of the one pt, and W. A. S. of —— of the other pt, for the sale to the sd W. A. S. at the price of 13,000*l.*, of the gas undertaking and works and ppty of the dft coy, situate at ——, be sanctioned and carried into effect, and any of the parties are to be at liberty to apply as they may be advised. *E. B. Leigh, spinster (on behalf of herself and all other the holders of the First Mortgage Debentures of the defendant company)* v. *Bucks and Oxon District Gas and Coke Co. and Others*, Neville, J., at Chambers, 30th May, 1911.

**Form 377.**
Liberty to receiver to sell and assign.

Upon the applicon by summons dated the 21st July, 1911, of the plt, and upon hearing the solors for the applicant and for the dfts, and upon reading the order dated the 5th May, 1911, appointing receiver, the judgment dated the 18th July, 1911, and the affts of, &c., and the exhibits, &c., It is ordered that H. B., the receiver in this action, be at liberty to sell the undertaking and ppty of the dft coy, including the plant and machinery, being pt of the ppty comprised in and charged by the debentures issued by the dft coy to F. J. I. for the sum of 600*l.*, and that the sd H. B. be at liberty to join with the dft coy in executing a proper assignment to the sd F. J. I. of the sd undertaking and ppty at the price afsd. And it is ordered that the proceeds of sale, when received by the sd H. B., be lodged in Ct to the credit of this action free, &c. *Irwin (on behalf of, &c.)* v. *The New Southern Rubber Co., Ltd.*, Neville, J., at Chambers, 15th August, 1911.

**Form 378.**
Order for sale under Ord. LI.

Upon the applicon by summons dated the 1st June, 1911, of the plt, and upon hearing counsel for the applicant and for the dfts, and upon reading the order dated the 26th May, 1911, appointing receiver, and the afft of L. M., filed the 2nd June, 1911, and the judge being of opinion that there must eventually be a sale. It is ordered that the ppty and assets of the dfts the Express, &c., Limtd, comprised in or subject to the security created by the debentures issued by the sd coy be sold with the approbation of the judge. And it is ordered that the moneys to arise by such sale be pd into Ct to the credit of the action, *Re The Express Motor Cab Coy, Limtd, Swanston* v. *The*

*Express Motor Cab Coy, Limtd* G. 435 of 1911), subject to further order. *Swanston (on behalf)* v. *The Express Motor Cab Co., Ltd., and others*, Neville, J., at Chambers, 2nd June, 1911. **Form 378.**

Upon the applicon, &c. And upon hearing, &c. And the Ct being of opinion that there must eventually be a sale and notwithstanding that the persons interested in the ppty hnftr authorized to be sold are not ascertained. **Form 379.** Another. Parties interested not ascertained.

It is ordered that the ppty and assets of the dft coy comprised in and charged by the Mortgage Debenture dated the 26th October, 1927, issued by the dft coy to the plt, be sold with the approbation of the judge free from the incumbrances of such of the incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

And it is ordered that the moneys to arise by such sale be pd into Ct to the credit of this action, "*Re The N. C. Syndicate, Limtd, Lloyds Bank, Limtd* v. *The N. C. Syndicate, Limtd* (N. 851 of 1932)," "proceeds of sale" subject to further order. Stiebel, Reg., 26th July, 1932.

Upon the applicon of the plts by summons dated the 10th April, 1911, and upon hearing the solors for the applicants and for the dfts, and upon reading the judgment dated the 26th May, 1908, the master's certificate dated the 15th July, 1909, and order dated the 24th January, 1910, and the afft of U., filed this day, and the exhibit U 1 therein referred to, being a print of the Padron Generale de Minas or General Register of Mining Properties in the Republic of Peru, It is ordered that the two mining concessions mentd in the schedule hto being ppty comprised in and charged by the indenture dated the 18th July, 1907, on the debentures in the sd judgment mentd, be sold with the approbation of the judge, along with the ppty by the sd order dated the 24th January, 1910, directed to be sold. And it is ordered that the cost of this applicon be costs in the action. Schedule. *Mathieson & Co. (on behalf of Huinac Copper Mines, Ltd., and others)*, Swinfen Eady, J., at Chambers, 12th April, 1911. **Form 380.** Order for sale of concessions.

Upon motion this day made, &c., and upon hearing, &c., and upon reading order dated the 23rd June, 1896, &c. Order that the undertaking of the dft coy and all the ppty whatsoever and wheresoever comprised in the above-mentd debentures be sold as a going concern, with the approbation of the judge in chambers, and that the moneys to arise by such sale be pd into Ct to the credit of this action. Costs of **Form 381.** Another order for sale as going concern.

**Form 381.** motion to be costs in action. Liberty to apply as to such sale. *Re Olympia, Ltd., Peacock* v. *Olympia, Ltd.* subject to further order. Vaughan Williams, J., 3rd July, 1896.

**Form 382.**

Order for sale of water-works. Liberty for debenture holders to bid.

Upon the applicon, &c., It is ordered that J. S., the liqr of the dft coy, be at liberty to put up the land and buildings, fixed plant, machinery and works thereon at Barton-upon-Humber belonging to the sd coy, for sale by public auction, subject to the reserve price being fixed by the judge, or to sell the same by private contract subject to the approval of the judge; and it is ordered that the sd J. S. have the conduct of such sale with liberty to any of the debenture holders of the sd coy to bid at the sd sale or to purchase the sd ppty. *Buttonshaw (on behalf)* v. *Barton-upon-Humber District Water Co.*, North, J., 6th April, 1892.

**Form 383.**

Order for sale by tender in debenture action and liberty to bid.

Upon applicon by summons dated the 5th June, 1899, of the plts, and upon hearing counsel for the applicants and the solors for the dfts, and upon reading the order dated the 24th day of March, 1899, two affts, &c., It is ordered that the liqr of the dft coy be at liberty to sell the English and foreign letters patent and other ppty belonging to the dft coy save and except the book debts by tender with the approbation of the judge and the plts, and all other holders of first and second debentures of the dft coy are to be at liberty to tender for and become the purchaser or purchasers of the sd letters patent and all other ppty save as afsd of the dft coy, such sale to be subject to any incumbrances, if any, affecting the ppty of the dft coy and payment of any rents due to the landlord; and it is ordered that the moneys to arise by such sale be pd by the liqr into Ct to the credit of this action as directed in the schedule hto.

LODGMENT SCHEDULE.

Ledger credit as above.

| | |
|---|---|
| Proceeds of sale of English and Foreign Patents and other property save and except book debts belonging to the defendant Company. The amount to be certified. | H.<br>The Liquidator of the Company. |
| | |

*The London and Foreign Contract Corpn., Ltd.* v. *Anglo-Indian, &c. Co., Ltd.*, North, J., 19th June, 1899. A. 791.

**Form 384.**

Liberty to debenture holder to bid and set off.

Upon the applicon of C. and other members of a purchasing committee of debenture holders for the reorganization of the coy, order that the applicants and any other holders of debentures of the dft coy, other than the plt, be at liberty to bid at the sale of the sd canal and other ppty ordered to be sold by the sd order of the 10th March, 1883, and to become the purchasers thof, and to set off against so much of the purchase-money as may be in excess of the sum of 2,000*l.*, the estimated costs of this action, such a proportion of the nominal amount of the sd debentures held by the persons so purchasing the sd canal and other ppty as the purchase-money in excess of 2,000*l.* may bear to the nominal amount of the debentures of the dft coy outstanding, and costs of all parties to be costs in action. *Douglas (on behalf, &c.)* v. *Surrey and Hampshire Canal Co., Ltd.*, Chitty, J., 13th July, 1883. A. 1302.

Where there is a difficulty as to making a foreclosure order as in *Re Continental Oxygen Co.*, (1897) 1 Ch. 511, by reason of a few of the debenture holders objecting, an order as above can generally be obtained and will in substance give the desired relief.

**Form 385.**

Order on summons for sale of all the property.

Upon the applicon of the plts, by summons dated the 14th March, 1898, and upon hearing the solors for the applicants, for the dfts, and for the Canadian Fibre Chamois Coy, Limtd, who have entered an appearance in this action, and upon reading the judgment dated the 17th December, 1897, the certificate of the Registrar (Cos Winding-up), dated the 28th March, 1898, and the afft of H., filed the 22nd March, 1898:

It is ordered that H., the receiver appointed in this action, do sell by public auction or private treaty all the ppty, assets and effects (other than the book debts) of the dft coy, situate resply in England, in the United States of America, and in Canada, comprised in the mortgage debentures issued by the dft coy, subject to the reserve prices and the auctioneer's charges and expenses of sale being fixed by the Ct:

And it is ordered that H., the sd receiver, do within seven days after the receipt of the proceeds of any such sale, lodge the same, less the amount (if any) allowed in respect of the auctioneer's charges and expenses of sale, in Ct, as directed in the lodgment schedule hto, the amount to be verified by afft. *The American Fibre Chamois Co., Ltd.* and *The International Fibre Chamois Co., Ltd.*, Wright, J., at Chambers, 31st March, 1898.

The first column of schedule contained the words, "Proceed of sale or sales of property of defendant company, less amount (if any) allowed and expenses of sale, the amount to be lodged to be verified by affidavit." *American Fibre Co.* v. *International Fibre Co.*, Wright, J., 31st March, 1898.

**Form 386.**

Order for sale, liquidator to receive purchase-money and pay into Court proceeds of property comprised in debentures.

Upon the applicon of D., the liqr of the above-named dft coy, by summons dated the 16th March, 1901, and upon hearing counsel for the applicant, the plt J., and the dft H., and upon reading the order dated, &c., It is ordered that all the ppty and assets of the dft coy be sold with the approbation of the Ct, free from the incumbrances of such of the incumbrancers thereon as shall consent to such sale, and subject to the incumbrances of such of them as shall not consent. And ordered that the sd D., as receiver in this action, be at liberty to receive the money to arise by such sale, and that he do within ten days after the receipt thof pay so much of the sd money as represents proceeds of the ppty and assets of the dft coy comprised in the debentures issued by the dft coy and the trust deed of the 11th March, 1899, in the sd order of the 26th March, 1901, mentd into Ct to the credit of this action.

And the sd D. is at liberty to retain the balance of the sd proceeds of sale, and account for same as liqr of the sd coy. *Jardine* (*on behalf, &c.*) v. *Alexander's Timber Co., Ltd.*, Wright, J., 27th March, 1901.

**Form 387.**

Order for sale out of Court with reserve price. Liberty to bid.

Upon the applicon of the plt by summons, &c., and the Ct being satisfied that all the persons interested in the ppty to be sold hnftr mentd are before the Ct or are bound by the sd proceedings, It is ordered that the freehold and leasehold premises and the plant, machinery, loose plant and implements of trade, stock-in-trade, book debts, and all other the ppty and assets of the dft coy comprised in or charged by the debentures for 17,500*l.*, registered in the name of the plt, other than and except unpaid calls and the unpaid capital of the coy, be sold out of Ct, subject to a reserve price and the auctioneer's remuneration being fixed by the Ct free from the incumbrances of such of the incumbrancers (if any) as shall assent to the sale, and subject to the incumbrances of such of them as shall not assent. And it is ordered that the moneys to arise by such sale be pd into Ct to the credit of this action, —— v. ——. And it is ordered that the plt and the dfts, and any of the parties having liberty to attend the proceedings are to be at liberty to bid at any sale of the sd ppty. And it is ordered that F., the receiver and manager appointed in this action, be at liberty to pay to Messrs. ——, out of the funds in his hands, the sum of 70*l.*, their fees and expenses for their valuation intended for the purpose of the proposed sale. *Vaughan* v. *Swindon and North Wilts Breweries, Ltd.*, Romer, J., 23rd June, 1896.

**Form 388.**

Order confirming contract for sale and ordering deposit to be paid into Court.

Upon the applicon by summons dated ——, of the plts and upon hearing counsel for the applicants, for the dfts, and for K. and M., the liqrs, and upon reading the order dated, &c., two affts of B., filed, &c., and the exhibits referred to in the first afft, It is ordered that the conditional contract dated, &c., and made between B., for and on behalf of the plts of the one pt, and C., of ——, for the sale to the sd C. at the sum of 4,500*l.*, of the hereditaments and premises therein described or referred to being the premises directed to be sold by the sd order, dated, &c., be carried into effect.

And it is ordered that B. do lodge the sum of 450*l.* received by him as a deposit in Ct as directed in the schedule hto.

LODGMENT SCHEDULE.

In the High Ct of Justice,
Chancery Division. Date of order, ——, 1919.

*Re A. & B., Limtd.*

Ledger Credit as above.

| Particulars of Funds to be Lodged to the Account of the Paymaster-General. | Person to make the Lodgment. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| | | £ *s.* *d.* | £ *s.* *d.* |
| Deposit. | B. | 450 0 0 | |
| Invest in National War Registered Coupon Bonds, 1929. | | | |
| The above funds are not to be paid, transferred or otherwise dealt with except as above with notice to C. | | | |

*Re Karamelli and Barnett, Ltd.* (K. 734 of 1915). Peterson, J., 19th March, 1919.

**Form 389.**

Order confirming contract for sale (modified) and ordering payment into Court.

It is ordered that (subject to the modification of the agreemt hnftr mentd by substituting for clause 2 thof a new clause in the form set forth in the order schedule hto) the agreement dated the 20th July, 1932, made between H. F. K. (the receiver and manager appointed by the sd judgment) and P. S., for the sale of the whole of the assets of the dft, Davey, Paxman & Coy, Limtd, for the sum of ——*l.*, be and the same is hby confirmed, and that the sd receiver and manager be at liberty to carry the same into effect. And it is ordered that the cash and securities to be received in respect of such sale be lodged by the sd receiver in Ct to the credit of this action as directed in the lodgment schedule hto.

——, Registrar.

**Form 392.**

Order confirming contract for sale providing for payment to receiver and for payment off of an incumbrance and of costs of abortive auction.

Upon applicon by summons, &c., and the sd S. by his solors declaring himself content with the title to the sd premises mentd in the conditional contract hnftr referred to, It is ordered that the conditional contract dated the 6th December, 1901, and made between L., the receiver and manager appointed herein, of the one pt and S. of the other pt, for the sale to the sd S., at the price of 2,555*l.*, of the freehold hereditaments and other ppty of the dft coy described in the sd agreemt, be carried into effect; and it is ordered that, notwithstanding the judgment dated the 18th November, 1899, the sd receiver and manager be at liberty to receive the balance of the purchase-money payable under the sd conditional contract, and that he do account for the same, together with the deposit already received by him, on passing his next account as such receiver and manager; and it is ordered that the sd L. do pay to W. F., out of the purchase-money payable under the sd contract, a sum not exceeding 1,750*l.* in full satisfaction and discharge of the equitable lien claimed by the sd W. F. on the title deeds relating to the freehold hereditaments mentd in the conditional contract, and that the sd receiver be allowed such payment on passing his accounts as receiver and manager in this action; and it is ordered that the dft coy, by the off recr and liqr thof, upon payment of the proper costs of the dft coy in connection therewith, do execute or concur in executing any proper assurances to the purchasers of the premises by the sd conditional contract agreed to be sold; and it is ordered that the sd receiver be at liberty to pay to W. and Son, of ——, auctioneers, out of the balance of the sd purchase-money, the sum of 67*l.* 17*s.* 8*d.*, being the amount of the costs, charges and expenses in connection with the attempted sale by auction of the freehold premises comprised in the sd agreemt, and that the sd receiver be allowed such payment on passing his accounts as such receiver and manager as afsd, and the sd S. by solors consenting, it is directed that the time limited by the sd conditional contract for completion of the sale and purchase thereby agreed to be made be, and the same is hby, extended to the 13th February, 1902.

**Form 393.**

Payment of balance and payment of mortgage.

Upon the applicon by summons dated this day of the plts, and upon hearing the solors, &c., It is ordered that, notwithstanding the sd order of the 29th August, 1901, B., the purchaser of the leasehold hereditaments known as C. in the sd order mentd, be at liberty and he is hby authorized and directed to pay the balance of the purchase-money of the sd ppty to D., the receiver appointed by the sd order dated the 2nd November, 1899, and that such receiver be at liberty to pay and he is hby authorized and directed to pay to S. and J. and J.,

mortgagees of the sd ppty, out of the sd purchase-money, the several sums resply due to them in respect of principal, interest and costs. *Re Offord Smith, Ltd., Illustrated London News, Ltd. (on behalf, &c.)* v. *The Company*, Byrne, J., 16th January, 1902. **Form 393.**

**Form 394.**

Tender to purchase property.

To the Registrar of Cos Winding-up, Room 66, Bankruptcy Buildings, Carey Street, London, W.C.

*Re* ——, *Limtd: A.* v. *B., Limtd.*

We, the undersigned, of ——, in the county of ——, do hby tender for and agree to purchase at the sum of ——*l.* the whole of the ppty comprised in the within parlars of sale, or the ppty comprised in Lot —— in the within parlars of sale, subject to the approval of the Ct, and upon the terms and subject to the conditions stipulated in the within parlars and conditions of sale, and I [we] enclose herewith a cheque for the sum of ——*l.*, being 10 p.c. of the amount of such purchase-money.

Dated the —— day of ——.

Witness to the signature of the sd ——.

**Form 395.**

Memorandum of agreement to purchase.

We, whose names are hereunto subscribed, resply bid at the sale by auction in the above action, on the 27th day of March, 1901, the sum set opposite to our respive names for, and became the purchasers of, the respive lots specified in the parlars produced at such sale, the numbers of which are set opposite to our respive names, subject to the conditions also produced at such sale.

[*Add tabular form in four columns headed:*—(1) No. of Lot; (2) Amount of highest bidding; (3) Signature of the purchaser of the Lot sold; (4) Purchaser's address and description.]

**Form 396.**

Summons for liberty to employ valuer of property.

Let all parties concerned attend on the hearing of an applicon on the pt of the plt that L., the receiver and manager appointed in this action, be at liberty to employ E., of the firm of ——, of ——, to survey and value the freehold hereditaments known as, &c., and situate, &c., being a portion of the estate the subject-matter of this action, and also the plant and machinery in or about the factory afsd, in view of the offer of 5,250*l.* made by S. for the purchase thof, and that the sd L. be at liberty to pay to the sd E. a fee of 26*l.* 5*s.* for such survey and valuation and his report, and that the sd receiver and manager may be allowed such payments in his accounts in this action.

**Form 397.**

Summons for appointment of valuers.

Let, &c., on the hearing of an applicon on the pt of the plt for an order that Messrs. ——, of ——, valuers and chartered accountants, be appointed to make, on behalf of the vendors, the valuations referred to in conditions of sale No. ——, —— and —— attached to the tender of the —— Breweries, Limtd, dated the 17th March, 1896, and that the remuneration of the sd —— be at the rate of 2½ p.c. on the amount of such valuation.

Dated, &c.

**Form 398.**

Affidavit as to fitness of auctioneer.

(*Title, &c.*)

1. I have for fifteen years last past known and been well acquainted with H., of ——, auctioneer, valuer and surveyor, and during all that time the sd H. has carried on business as an auctioneer, valuer and surveyor, as a partner in the firm of —— of the same address.

2. I have on several occasions employed the sd H. as an auctioneer, valuer and surveyor, and am also acquainted with several persons who are in the habit of employing him in that capacity, and he has invariably given satisfaction to me and, I believe, also to such other persons.

3. The sd H. is a person of respect and integrity, and of considerable ability as an auctioneer and valuer, and in my judgment is a fit and proper person to be employed to sell the business and ppty at — proposed to be sold in this action.

**Form 399.**

Summons for liberty for receiver to sell by tender or otherwise.

Let the plt and the off recr in Cos Winding-up attend at the office of the registrar, &c., on the hearing of an applicon of S. and S., debenture holders, parties having liberty to attend proceedings for an order that the receiver may be at liberty to sell the goodwill of the business of —— & Co., Limtd, and the stock, plant, and machinery, and also the warehouses, mills and other premises on which the sd business is carried on, by tender, such tenders to be sent to the receiver, H., at ——, E.C., or as the Ct may direct, or in the alternative that the sd business and premises may be sold by public auction on the usual terms, or that such other order may be made as the Ct may think fit.

**Form 400.**

Bidding paper.

(*Title, &c.*)

This is the bidding paper, marked B, referred to in the annexed certificate of result of sale, dated the 7th July, 1898.

Signed ——, Auctioneer.

Signed ——, Solor for the parties having the conduct of the sale.

I, ——, bid at the sale by auction in the above action or matter, on the —— day of ——, the sum of ——*l.* for, and became the purchaser of, the ppty specified in the parlars produced at such sale, subject to the conditions also produced at such sale. **Form 400.**

THE SCHEDULE ABOVE REFERRED TO.

Dated the 7th July, 1898.

To the best of my belief, the above certificate is correct.

——, Solors for the parties having the conduct of the above-mentd sale.

**Form 401.**

Affidavit by auctioneer as to value and reserve prices

1. I am a member of the firm of ——, of ——, auctioneers, valuers and surveyors, and have been for fifteen years last past engaged in such business, and I have had considerable experience in the mode of letting and selling mills, manufactories, plant, stock and machinery, the valuation for sale of this class of ppty being a speciality of my firm.

2. I know and am well acquainted with the freehold ppty situate at ——, and the mills, &c., &c., and plant, &c., described in the paper writing marked A, and now produced and shown to me.

3. On the —— day of —— I went over the sd ppty and business, and made a careful survey thof for the purpose of forming an opinion, as to the best mode of selling, and, if necessary, dividing into lots the sd assets for the sd sale thof. I am of opinion that the sd ppty should be offered for sale by auction in one lot on the market as a going concern, there being included in the sale the whole of the fixed and loose plant and machinery, together with the patent for the manufacture of —— meal and the goodwill of the biscuit works. In the event, however, of the bidding not reaching the required price hnftr mentd, the ppty should be withdrawn and immediately offered in two lots, the first lot being the biscuit manufactory, with the machinery and goodwill, and the second lot being the flour mill, the patent and the goodwill of that pt of the business.

4. The sd paper writing marked A sets forth a true and correct description of the sd assets, to the best of my knowledge and belief, and the mode in which, subject to my opinion as before mentd, it will be desirable to offer the same for sale.

5. I have, in the paper writing marked B, now produced and shown to me, set forth in the first column the number of lots in which the sd assets have been divided for the purpose of the sd sale, and in the second column, opposite the numbers of the sd lots resply, the full value of the sd lots resply, and in the third column, opposite the

**Form 401.** numbers of the sd lots resply, the amounts which, in my judgment, should be fixed as the reserve biddings for the sd lots resply on the sd sale. In the event, however, of the ppty being sold in one lot as indicated in para 3 of this my afft, then the full and reserve biddings should be taken at the two sums resply referred to in the second and third columns. The document now produced and shown to me marked C is a report under my hand dealing more fully with the value of the sd ppties, and to which I crave leave to refer.

6. In my judgment and belief the sd ppty and business will be sold to most advantage, and will be likely to realise the best price, if the scheme indicated above, and set forth in the paper writing marked A, be adopted.

See Ord. LI. r. 4, *supra*, p. 709.

**Form 402.**

Summons to fix reserve and auctioneer's remuneration.

Let all parties concerned attend the registrar, &c. (*see Form* 172), on the hearing of an applicon on the pt of the plt, that the reserve price or prices of the freehold and leasehold premises and all other the ppty and assets of the dft coy directed by the order in this action, dated the 23rd June, 1896, to be sold out of Ct, subject to a reserve price and the auctioneer's remuneration for such sale, may be resply fixed by the Ct, and that the costs of this applicon may be costs in the action.

**Form 403.**

Order fixing reserve prices, &c.

Upon the applicon of the plt, and upon hearing the solor for the applicants, and upon reading an office copy summons filed the 3rd April, 1890, as against the dft coy; an order dated the 12th April, 1889; an order dated the 14th May, 1889; an order dated the 15th February, 1890; an afft of M. filed the 6th April, 1889, and the exhibits therein referred to; and an afft of Joseph Smith filed the 10th April, 1890, and the exhibit therein referred to, It is ordered that the undertaking of the dft coy be sold out of Ct free from the incumbrances of such of the incumbrancers (if any) having priority over the debentures created or issued by the dft coy as shall consent to the sale, and subject to the incumbrances of such (if any) of them as shall not consent. And it is ordered that the reserve prices and the remuneration of the auctioneer be fixed by the judge. And it is ordered that the money to arise by such sale be pd into Ct to the credit of the Debenture Corporation, Limtd *v.* The Hartlepools Steam Tramways Coy, Limtd D. 627 of 1889), proceeds of sale of undertaking and assets of the dft coy, and that the costs of this applicon and consequent thereon are to be costs in the action. *Debentures Corpn. (on behalf, &c.)* v. *Hartlepools Steam Tramways Co., Ltd.*, North, J., 12th May, 1890.

**Form 404.**

Certificate of auctioneer of result of sale.

Dan. Ch. F. 7th ed. 954.

I, A. B., of ——, auctioneer, the person appointed to sell the estate comprised in the parlars hnftr referred to, hby certify as follows:—

1. I did at the time and place, in the lots, and subject to the conditions specified in the sd parlars and conditions of sale hto annexed and marked A, put up for sale by auction the estates described in the sd parlars.

2. The result of the sale is truly set forth in the bidding-paper hto annexed and marked B.

3. I have received the sums set forth in the fourth column of the schedule hto as deposits from the respive purchasers, whose names are set forth in the second column of the sd schedule opposite the sd sums in respect of their purchase-money, leaving sums set forth in the fifth column of the sd schedule due in respect thof.

| Number of Lot. | Name, Address and Description of Purchaser. | Amount of Purchase-money. | Amount of Deposit received. | Amount remaining due. |
|---|---|---|---|---|
| | | | | |

Dated the —— day of ——, 19—.

(Signed) A. B.
Auctioneer.
(*Date.*)

To the best of my belief the above certificate is correct.

(Signed) C. D.
The solor for ——, the party having conduct of the above-mentd sale.

**Form 405.**

Another.

I, ——, of ——, auctioneer, the person appointed, &c., hby certify as follows:—

1. I did, at the time and place, &c.

2. The result of the sale, &c.

3. No person bid any sum whatever for Lot 1, opposite the number of which I have in the sd column of the sd bidding-paper written the words "No bidding."

4. Lot 2, opposite to the number of which I have in the third column of the sd bidding-paper written the words "Not sold," was not sold, no person having bid a sum equal to or higher than the reserve bidding fixed by the sd judge,

**Form 405.**

5. The sd sale was conducted by me in a fair, open and candid manner, and according to the best of my skill and judgment.

Dated, &c.

——, Auctioneer.

To the best of our belief the above certificate is accurate.

(*Signatures.*)

Solors for S. L. E., the party having the conduct of the above-mentd sale.

(*Title of Action.*)

This bidding-paper marked B was produced and shown to us, the undersigned S. W., the auctioneer, and K. E., the solor of the party having the conduct of the sale, and the same is referred to in our certificate of the result of the sale.

(*Signatures.*)

**Form 406.**

Registrar's certificate as to result of sale by tender.

I hby certify that the result of the sale which has been made in pursuance of the order in this action dated the 9th day of February, 1898, is as follows:—

The plt and Messrs. S., parties attending the proceedings, have attended by their respive solors.

W. J. R., the purchaser hnftr named, has also attended by his solor.

The real and leasehold ppty at Reading, in the county of Berks, together with the stock-in-trade, plant, machinery, patents and effects, and the goodwill of the business of the dft coy carried on thereat and elsewhere, in the sd order dated the 9th February, 1898, referred to and thereby directed to be sold, have been offered for sale by tender either in one or two lots, with the approbation of the Ct and according to certain parlars and conditions of sale. The tenders were sent to the Registrar of Cos Winding-up on or before the 14th November, 1898.

The only tender received for the sd ppty was that of W. J. R., of ——, manager of Meaby & Coy, Limtd, of 4,000*l.* for Lot 2, and he is allowed by the Ct to be the purchaser of the ppty comprised in the sd Lot 2 at the sd price of 4,000*l.* The sd tender is filed herewith.

The sd W. J. R. has pd the sum of 400*l.* by way of deposit, and such sum of 400*l.* has been lodged in Ct to the credit of this action (*Re &c., A.* v. *B., Ltd.*), and there is due from the sd W. J. R. as the balance of his purchase-money the sum of 3,600*l.*

The parlars of the ppty so sold as afsd, comprising the sd Lot 2, are set forth in the printed parlars and conditions of the sd sale filed herein.

The evidence produced consists of the printed parlars and conditions of sale, the tender of the sd W. J. R., dated the 12th November, 1898, and the office copy certificate of the Paymaster-General of lodgment, dated the 2nd of December, 1898. **Form 406.**

Dated the 2nd of December, 1898. H. J. Hood, Registrar (Cos Winding-up).

I hby certify that the result of the sale which has been made in pursuance of the order in this action dated the ——, 19—, is as follows:— **Form 407.** Registrar's certificate of result of sale by auction.

The plt and the dfts have attended by their respive solors.

No one has appeared for or on behalf of W. F., the purchaser hnftr named.

The freehold ppty, with frontages to —— and ——, comprising two retail shops and dwelling-houses, Nos. ——, ——Strect, ——, area 670 square yards or thbts (which ppty is subject to a fee farm rent of 1*l.* per annum payable to the Corporation of Coventry), being Lot 2 referred to in the parlars and conditions of sale hnftr mentd, has been offered for sale in one lot by public auction with the approbation of the Ct and according to certain parlars and conditions of sale (a printed copy whereof signed by me is to be filed with this certificate).

And W. F., of —— (house furnisher), was the highest bidder for and he is allowed by the judge to be the purchaser of the sd ppty at the price or sum of ——*l.*

The sd W. F. has pd the sum of ——*l.* by way of deposit to W. S. E., the person appointed by the judge to receive the same, who is to lodge such sum of ——*l.* in Ct to the credit of this action, *Re Swift, of Coventry, Limtd* v. *The Coy and Others* (S. 679 of 1931), "proceeds of sale," on or before the —— day of ——, 19—.

And there is due from the sd W. F. as the balance of his purchase-money the sum of ——*l.*

No bid was received for Lots 1, 3, 3A, 3B, 3C.

The evidence produced consists of the certificate dated the ——, 19—, of the sd W. S. E. and the parlars and conditions of sale and the bidding paper therein resply referred to.

Dated this —— day of ——, 19—.

*Swift, of Coventry, Ltd.* (S. 1679 of 1931). Stiebel, Reg.

Upon the applicon of D., liqr of the above-named coy, by summons dated, &c., and upon hearing the solors, &c., the afft of, &c., and the two separate tenders of the sd W. C. resply dated the 28th March, 1901, and the parlars and conditions of sale referred to in such last-mentd afft and admitted by the parties, a print of which parlars **Form 408.** Orders accepting tenders.

**Form 408.** and conditions are identified by the signature of the Registrar (Cos Winding-up) and filed by this order, It is ordered that the sd two tenders of the sd W. C. for the sale of Lot 1 at the price of 7,000*l.* and Lot 2 at the price of 2,500*l.*, subject as to Lot 2 to the condition as in the tender for such lot mentd, be accepted. It is ordered that, notwithstanding the sd order of the 27th March, 1901, the sd C. do make lodgments in Ct as directed in the lodgment schedule hto, such lodgment to be without prejudice to and not to be taken as acceptance by the sd W. C. of the vendor's title to the ppty comprised in the sd lots. And it is ordered that the abstract of title to such ppty be delivered to the sd W. C. by D., liqr to the dft coy, on or before the 6th May, 1901.

THE LODGMENT SCHEDULE.

List of creditors as above.

Proceeds of sale of Lot 1 and Lot 2.

| Purchase price of Lot 1 under tender of 28th March, 1901. | Name of the Purchaser. | The Amount. |
|---|---|---|
| | | |
| Purchase price of Lot 2 under tender of 28th March, 1901. | Name of the Purchaser. | The Amount. |
| | | |

The above funds not to be pd and transferred or otherwise dealt with without notice to the sd W. C.

**Form 409.**

Reference to counsel to advise as to special conditions of sale.

The judge has directed that an abstract of title to the leasehold ppties by the order in this action dated the —— day of ——, 19—, directed to be sold and which are comprised in the parlars to which I have put my initials and the abstract of title to be laid before Mr. P. J. S. of counsel for his opinion thereon with a view to such sale, and to advise what, if any, special conditions of sale are rendered necessary or proper by the state of the title, and that such special conditions, if any, and the other conditions necessary be settled by such counsel.

Dated this —— day of ——, 19—.

*R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Warmington, Reg.

**Form 410.**

Order that official receiver concur in assignment to purchaser.

Upon motion of K. & B., the trees for the debenture holders of the coy and upon hearing, &c., It is ordered that the off liqr do concur in the assignment or assignments to the purchaser or purchasers from the applicants of the ppty included in their mortgage dated the 5th February, 1875, and the sd order of the 3rd April, 1876, mentd, or any pt or pts thof, for the purpose of vesting in such purchaser or purchasers, less the last days of the respive terms created by the leases of the same ppty, and the option of purchasing the freehold of such ppty contained in such leases resply, and that the sd off liqr do convey, assign, demise and assure or join in conveying, assigning, demising, and assuring the ppty included in the sd mortgage in such manner as the applicants may direct. *Globe, &c. Co.*, Jessel, M. R., 4th May, 1877. A. 906. [This was in the winding-up.]

**Form 411.**

Order that defendant company shall execute conveyance on payment of costs.

Upon the applicon of the plt by summons, &c., It is ordered that upon payment to the solors of I., the liqr of the sd G. Brewery, Limtd, of his proper costs in relation to the conveyance and assignment, hnftr mentd, and of this applicon, he is to be at liberty to affix the seal of the sd G. Brewery, Limtd, to an indenture of conveyance and assignment to the —— Brewery, Limtd, in respect of the following ppties, so as to pass the interest of the dft coy therein to the sd —— Brewery, Limtd:—

1. The freehold, &c.
2. The leasehold, &c.
3. The leasehold, &c.

And it is ordered that the plt's costs of this applicon be costs in the action. *Agg-Gardner* v. *Gresley Brewery Co.*, Vaughan Williams, J., 10th November, 1896.

**Form 412.**

Order that trustees of deeds join in conveyance.

On the applicon by summons, dated the 28th April, 1899, of the dft coy, &c., This Ct doth order that each of them, the plt M., and the dfts ——, as the trees of the indentures of the 5th June, 1894, and the 29th July, 1896, in the sd judgment resply mentd, do join in and execute a proper conveyance and assignment of the freehold and leasehold hereditaments and premises, referred to in the contract confirmed by the sd order of the 5th July, 1898, to the sd J. H., the purchaser, or as he may direct, such conveyance and assignment to be settled by the Ct in case the parties differ, such joining in and execution to be at the expense of the purchaser as provided by the sd contract. *Liffert* v. *Kensington Stores*, Wright, J., 7th July, 1899.

An order in this form will not, as a rule, now be necessary, since the trustees will usually have a term of years only, which will cease on payment of the moneys secured by the debentures.

**Form 413.**

Order allowing claim for commission on sale of property.

Upon the applicon of the plt, &c., It is ordered that the claim of C., of ——, brewery agent and valuer, for 810*l.* in respect of commission on the sale of the Gresley Brewery to the —— Breweries, Limtd, be allowed at the sum of 250*l.* And it is ordered that the sd sum of 250*l.* be pd to the sd C. out of the funds in Ct, to the credit of this action as directed in the payment schedule hto. And it is ordered that the costs of the plt and of the dft, W. and G., of the sd applicon, be costs in this action.

[The payment schedule provided: in the first column, out of money on deposit pay in respect of claim of payee for commission on the sale of the Gresley Brewery Coy to the —— Breweries, Limtd; second column, name of payee; third column, 250*l.*]

Order of Wright, J., at Chambers, 10th November, 1897.

**Form 414.**

Order to forfeit deposit and resell.

Upon the applicon by summons, &c., and upon hearing the solors, &c., and upon reading the order of the 23rd January, 1902, and the sd E. by his solors submitting to the jurisdiction of this Ct and consenting to be bound by this order, It is ordered that the sd E. do, on or before the 28th April, 1902, pay to L., the receiver and manager appointed herein, the sum of 2,430*l.*, being the balance of the purchase-money payable under the contract for sale dated the 6th December, 1901, sanctioned by the sd order dated the 23rd January, 1902, after deducting 125*l.* pd by the sd E. as deposit, together with interest thereon at the rate of 5 p.c.p.a. from the 13th February, 1902, until payment, and it is ordered that in default of such payment being made by the sd E. within the time afsd the sd L. be at liberty, pursuant to clause 6 of the sd contract, to forfeit the sd deposit and rescind the sd contract and to resell the sd premises mentd in the sd contract, but without prejudice to the liability of the sd E. to make good any deficiency in price resulting from such resale and all costs and expenses occasioned by his default; and it is ordered that the sd E. do pay to the plt L. his costs of the sd applicon, such costs to be taxed. *Evans (on behalf, &c.)* v. *Lavington, Evans & Co., Ltd.*, Buckley, J., 15th April, 1902.

See further, as to sales, Dan. Ch. F., 7th ed., pp. 525 *et seq.*; Dan. Ch. Pr., 8th ed. chap. 16, sect. 3 (17); Seton, chap. 19.

**Form 415.**

Order withdrawing acceptance of tender.

Upon the applicon of the plt by summons dated the 8th February, 1921, and upon hearing the solors for the applicant and for the dfts and J. J. L., the respt to the sd summons, appearing in person, and upon reading the order dated the 6th October, 1920 (appointing receiver), the judgment dated the 14th December, 1920, and the order

for sale dated the 20th December, 1920, and the certificate of the result dated the 31st January, 1921. **Form 415.**

It is ordered that the acceptance by the Ct of the tender of the sd J. J. L. referred to in the sd certificate dated the 31st January, 1921, be and it is hby withdrawn and that the deposit of 32*l.* 10*s.* by the sd J. J. L. be forfeited.,

And it is ordered that T. F. B., the receiver appointed by the sd order dated the 6th October, 1920, be at liberty pursuant to the sd order dated the 20th December, 1920, to sell the stock and fixtures, fittings, and shop furniture therein referred to at the price mentd in the tender next highest to that of the sd J. J. L., but without prejudice to the liability of the sd J. J. L. to make good any deficiency in price resulting from such resale and all costs and expenses occasioned by his default. *Lingwood, Ltd* (L. 1908 of 1920). Stiebel, Reg.

**Form 416.**

Order discharging order to stop sale.

Whereas by an order made in the above matter, and dated the 24th August, 1905, B. as the off recr and manager of the above-named coy was ordered to refrain from selling freehold or leasehold ppty of the sd coy until after a peton to sanction a scheme of arrangement had been disposed of, which peton H. by his counsel undertook to submit to the off recr and liqr within four weeks from the date of the sd order and to proceed with due diligence to present such scheme to the sanction of the Ct, under [sect. 153 of the Cos Act, 1929], and liberty was given to the sd off recr and manager to apply to discharge the sd order after the expiration of four weeks from the date thof.

Now upon motion this day made unto this Ct by counsel on behalf of the sd B., and no one appearing for or on behalf of the sd H., the respt, although he has been duly served with notice of this motion, as by afft appears, and upon reading the order to wind up the sd coy dated the 7th March, 1905, &c., this Ct doth order that the sd order dated the 12th August, 1905, be and the same is hby discharged, and it is ordered that the respt H. do pay to the sd B. his costs of this motion and of the sd order dated the 12th August, 1905, such costs to be taxed. *The London Riverside Cold Storage Co.*, Buckley, J., 14th November, 1905.

**Form 417.**

Vesting order after sale.

Upon the applicon of the plt by summons dated the 13th January, 1922, and upon hearing the solors for the applicant and for both dfts and for G. W., of Old Street, London, importer (the person by the registrar's certificate, filed the 18th August, 1921, allowed the purchaser of the lands and hereditaments described in the schedule hereto), and upon reading the order for sale dated the 26th April,

**Form 417.**

1921, the conditions of sale, the registrar's sd certificate and an office copy paymaster's certificate of lodgment whereby it appears that the sd G. W. pd into Ct on the 26th September, 1921, to the credit of "*Re Cliftonville Improvement Syndicate, Ltd., Tyler* v. *The Company*, 1921, C. 956, Proceeds of Sale," the sum of——*l.*, being the balance of his purchase-money for the sd lands and hereditaments (after deducting the sum of ——*l.* the amount of the deposit pd by him in respect thof), with interest on such balance and apportionment of outgoings and upon reading the afft of R. J. P. filed the 26th January, 1922, and the Ct being of opinion that the persons and corporations mentd in the second column of the schedule hto are respively entld to the lands and hereditaments described in the first column of the schedule hto upon a trust within the meaning of the Trec Act, [1925], and that it is expedient for the purpose of carrying such sale into effect that an order should be made vesting the sd lands and hereditaments in the sd purchaser.

It is ordered that the lands and hereditaments described in the first column of the schedule hto do respively vest in the sd G. W. (the purchaser) for all the respive estates and interests therein of the persons and corporations named in the second column of the schedule hto.

A. S., Registrar.

THE SCHEDULE ABOVE REFERRED TO.

| Description of Land and Hereditaments. | Names of Persons or Corporations having any estate or interest therein. |
|---|---|
| The freehold premises known as ——. | (1) The defendant company, The Cliftonville Improvement Syndicate, Ltd. (in liquidation).<br>(2) The defendant bank.<br>(3) The plaintiff and all others the holders of First Mortgage Debentures of the first-named defendant company. |

*Cliftonville Improvement Syndicate, Ltd.* (C. 956 of 1921). Stiebel, Reg.

## CHAPTER LXXI.

### PROCEEDINGS IN NAMES OF COMPANY OR TRUSTEES.

Occasion not uncommonly arises for proceedings for the protection or enforcement of the rights of the company or the trustees in relation to the mortgaged premises, and the following forms illustrate the practice.

All applications to the Court in respect of assets in the hands of receivers should, as a general rule, be made on behalf of persons beneficially interested in the assets, and not by the receiver. A receiver ought not to present a petition or originate any proceedings in the cause. If an application to the Court become necessary, the receiver should apply to the party conducting the proceedings, or to any other party in the suit, at whose instance he may have been appointed, to make the necessary application. If, after he has done so, no application be made, and no proper means be taken to relieve the receiver from his difficulty, he may apply himself, and will be entitled to his costs.

**Form 418.**

Summons for order that receiver take action to restrain infringement of patent.

Let, &c. (*Form* 171 *or* 172), on the applicon of the plt [*or*, of B. & C. debenture holders, parties having leave to attend proceedings] for an order that H., the receiver, &c., may be at liberty to take all necessary proceedings against N. & Coy, of ——, to restrain them from infringing the letters patent, No. ——, vested in the dft coy and from imitating the goods of the dft coy, and from circularising the customers thof, and from sending out and publishing circulars in the forms specified in the afft of H., sworn herein on the —— of ——, or such other proceedings as he may be advised by counsel and that the costs of such proceedings and of this applicon may be provided for.

**Form 419.**

Summons that receiver do pay defendant company's costs of an action and of opposing a motion to rectify register of trade marks.

Let all parties, &c., on the hearing of an applicon on the pt of the above-named dft coy, that H., receiver and manager appointed herein on, &c., may be directed to pay the necessary costs as and when they shall be required for the purpose of prosecuting an action by the dft coy against, &c., and of opposing a motion to expunge the dft coy's trade mark, &c., and that such costs may be allowed to the sd receiver and manager in passing his accounts.

**Form 420.**

Order giving liberty to bring action for specific performance.

It is ordered that S. W. M., the receiver and manager appointed by the sd order dated the 17th April, 1931, be at liberty upon indemnifying the liqr of the dft coy to his satisfaction to issue a writ in the name of the dft coy against —— for specific performance of the agreemt on the pt of the sd —— under a building agreemt dated the —— September, ——, and made between the sd —— of the one pt, and A. W. Gamage, Limtd, of the other pt (which has been transferred to the dft coy) to grant to the dft coy a lease of the ——, —— Street, for a term of ninety-nine years from the 25th December, 1928, at a yearly rent for the first four years of the term of ——*l.*, and thereafter ——*l.*, such lease to be in the terms set forth in the sd building agreemt and in the alternative for damages for breach of the sd building agreemt.

And the remainder of the sd summons stands adjourned. *Gamages (West End), Ltd.* (G. 913 of 1931). Stiebel, Reg.

**Form 421.**

Liberty to take proceedings to recover a debt.

It is ordered that upon the off recr and liqr of the dft coy being indemnified to his satisfaction, G. W., the receiver appointed in this action be at liberty to take such proceedings as he may be advised against S. R. to recover a sum of ——*l.* alleged to be owing to the dft coy by the sd S. R. and to use the name of the dft coy for that purpose, but the sd receiver is not to incur costs in excess of 15*l.* without further order. *Airedale Garage Co., Ltd.* (A. 252 of 1931). Stiebel, Reg.

**Form 422.**

Order to pay 250*l.* for costs.

Upon the applicon by summons dated, &c., of the dft coy, &c., It is ordered that H., the receiver and manager appointed herein, do pay the necessary costs, not exceeding 250*l.*, as and when they they shall be required for the purpose of prosecuting the claim of the dft coy and of opposing, &c., in an action. *Clark* v. *Meaby & Co.*, 6th August, 1897.

**Form 423.**

Summons for receiver to pay company 150*l.* more to meet costs of action.

Let, &c. (*Form* 171 *or* 172), on hearing of an applicon on the pt of the dfts for an order that H., the receiver and manager appointed herein on —— of ——, do pay a further sum of 150*l.* for the purpose of prosecuting a claim of the coy and of opposing the motion to expunge the dfts' trade mark in the action and matter of —— v. ——, and that the sd 150*l.* be allowed to the sd receiver on passing his sd account, and that the costs of this applicon be taxed and pd by the plt, he adding such costs to his own costs.

I, &c.

**Form 424.**

Affidavit as to payment of further funds to prosecute action against others.

1. By an order herein dated the —— of ——, It was ordered that H., the receiver and manager appointed herein, should pay the necessary costs, not exceeding the sum of 250*l.*, as and when they should be required, for the purpose of prosecuting the claim of the coy and of opposing, &c.

2. In my opinion, the sum of 250*l.* mentd in such order is not sufficient to provide against the costs herein incurred in relation to the preparation for and the trial of this action. There are, at present, between twenty and thirty witnesses in different pts of the country, namely, &c. The brief is a large one.

3. Three counsel will have to be employed, and the dft's solors have informed us that they have between twenty and thirty witnesses, which added to ours, will necessitate the payment of upwards of ——*l.* to counsel.

4. In my opinion, another 150*l.* is required to answer the costs as above mentd.

**Form 425.**

Order on receiver to pay further money for costs of action.

Upon the applicon by summons dated the 19th October, 1897, of the above-named dft coy, and upon hearing counsel for dfts and the solor for the plt, and upon reading the two several orders dated resply the 6th August, 1897, and the 25th August, 1897, and an affit of K., It is ordered that H., the receiver and manager appointed herein, do pay a further sum of 150*l.* as and when the same shall be required for the purpose of prosecuting the claim of the coy and of opposing the motion to expunge the dfts' trade mark in the action and matter of, &c. in the Chancery Division of the Supreme Ct. And it is ordered that such costs not exceeding 150*l.* be allowed the sd receiver and manager in passing his accounts. And it is ordered that the plt C. do pay to the dfts, Meaby & Coy, Limtd, their costs of this applicon, such costs to be taxed, and that he be at liberty to add such costs to his own costs. *Clark* v. *Meaby & Co.*, Ridley, J., 22nd October, 1897.

**Form 426.**

Summons for liberty to defend action for negligence.

Let, &c. (*Form* 171 *or* 172), that W., the receiver and manager appointed in this action, may be at liberty to defend an action by G. and others for 1,000*l.*, for negligence on the pt of the employees of the dft coy.

**Form 427.**

Affidavit by receiver in support.

1. My solors, Messrs. ——, have recently been served with the writ now produced and shown to me and marked, &c. By the sd writ a claim is made by G. and others, trading as, &c., for 1,000*l.* for negligence on the pt of the employees at the —— Wharf in unloading puncheons

**Form 427.** of molasses without proper appliances and thereby damaging the puncheons and causing loss to the extent of, &c.

2. Mr. L., who manages the sd wharf for me, has been in communication with Messrs. A., the solors for the plts, and a copy of the correspondence is now exhibited to me marked ——.

3. I am advised and believe I have a good defence to the sd action, and desire the leave of this honourable Ct to defend the same.

**Form 428.**

Order giving receiver power to defend proceedings against company and to appear at public examination.

Upon the applicon of the plt, &c., It is ordered that T., the receiver appointed by order dated, &c., be at liberty in the name of F., the liqr of the dft coy, or in the name of the dft coy, to defend the proceedings brought against the sd coy or against the sd F., the liqr thof, the parlars whereof are set forth in the schedule hto on the terms of the sd order of the 6th November, 1895, the applicant and the sd T. being indemnified against any costs to be incurred by them in such proceedings out of the assets of the sd coy, And it is ordered that the sd T. as such receiver be at liberty either in his own name or in the name of the plt or of the sd F. as such liqr to appear by counsel upon the hearing of the public examination of the directors and other officers and persons of or connected with the sd dft coy to be held on the —— day of ——, with liberty to apply as to appearing upon any adjournment of the sd examination, And it is ordered that the costs of this applicon other than the costs of the sd dft coy and F. the liqr thof be costs in the action. [Schedule.] *Akers* v. *Veuve Monnier, &c.*, V. Williams, 21st November, 1895.

**Form 429.**

Liberty to liquidator and receiver to intervene in liquidation proceedings abroad.

Upon the applicon of the liqr, &c., It is ordered that the liqr and the receiver and manager appointed in the above-mentd action be at liberty to intervene in the liquidation proceedings of the above-named coy now pending in the High Ct of Griqualand, South Africa, and to apply to that Ct that the sale of the ppty of the above-named coy may be stayed provisionally pending the reconstruction of the coy, and for this purpose to instruct agents in Kimberley, the expenditure for the afsd purposes not to exceed ——*l.* without the leave of the Ct. Liberty to apply. *North Eastern Bultfontein* (00246 of 1893), and *Posno* v. *Lawson*, 1893, P. 2089. Registrar, 14th November, 1893.

**Form 430.**

Liberty to take proceedings in France.

Upon the applicon of plts, &c., Order that R., the receiver appointed in this action, be at liberty to take such proceedings as he may be advised in an action now pending in France, before the Civil Tribunal of the Seine wherein a certain coy called, &c., is plt, and

the Latigue Coy is dft. *Law Guarantee, &c.* v. *Latigue, &c. Co. and Others*, Cave, J., 13th October, 1896. **Form 430.**

**Form 431.**

Order giving receiver liberty to oppose appeal.

It is ordered that G. W., the receiver appointed in this action, be at liberty to appear on the appeal of the Bradford Corporation from the order of Mr. Justice Eve dated the 3rd May, 1932, and to brief leading counsel at a fee not exceeding —— guineas.

And the rest of the sd summons stands adjourned. *Airedale Garage Co., Ltd.* (A. 252 of 1931). Warrington, Reg.

## CHAPTER LXXII.

### MISCELLANEOUS AUTHORITIES TO RECEIVER.

CASES commonly occur in which it is necessary to obtain special authority of the Court to do a variety of things not specifically mentioned in other chapters of this work. The application should, as a general rule, be by summons issued by the plaintiff. See Ann. Pr., notes to Ord. L. r. 16.

**Form 432.** Summons for directions to receiver as to payment of rents, &c.

Let, &c. (*Form* 171 *or* 172), on the pt of the plt, for directions as to the payment by the receiver of certain rents and taxes accrued due before his appointment on the —— day of ——, and that the costs of this applicon may be costs in the cause.

*Or*, "for an order that the receiver in this action do, out of the moneys in his hands as such receiver, pay to ——, of ——, the sum of ——*l.* owing to the said —— in respect of," &c. And see *Hand* v. *Blow*, (1901) 2 Ch. 721.

**Form 433.** Summons to pay interest on first mortgage and also ground rent.

Let, &c. (*Form* 171 *or* 172), that the receiver be at liberty to pay the interest due and to accrue due on the first mortgage secured upon the ppty of the dft coy.

That the receiver be at liberty to pay the ground rent due and to accrue due in respect of the coy's premises.

**Form 434.** Liberty to pay interest on debentures.

Upon the applicon of the plt by summons, dated the 7th February, 1898, &c., It is ordered that U., the receiver appointed by the sd order dated the 1st February, 1895, be at liberty to pay the interest on the Five per Cent. Debentures of the dft coy falling due on the 15th February, 1898, and that he be allowed the amount so expended in passing his accounts. *Cannon (on behalf, &c.) and the Cartagena, &c. Tramways Co., and U. & H.*, dfts., Kekewich, 11th February, 1898. A. 5040.

**Form 435.** Liberty to receiver to pay off prior mortgage.

It is ordered that W. T. W., the receiver and manager appointed in this action, be at liberty to pay all principal moneys, interest and costs due in respect of the mortgage and two further charges dated resply the 4th April, 1919, the 27th October, 1919, and the 19th

January, 1924, in favour of R. I. and T. S., on leasehold ppty situate at —— Street, ——, in the county of York, pt of the assets of the above-named coy. *R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Stiebel, Reg. **Form 435.**

It is ordered that A. R., the receiver appointed in this action, be at liberty to continue occupation of the dft coy's premises at ——, ——, —— Street, London, until the 27th October, 1932, or further order. And it is ordered that the sd receiver be at liberty to employ travellers for the purpose of selling the dft coy's goods and to pay the sd travellers commission at the rate of —— p.c. of the price of any goods sold by them, but such employment is not to be continued after the 27th October, 1932, without further order. *Indian and Colonial Supply Assocn., Ltd.* (I. 427 of 1932). Stiebel, Reg. **Form 436.**

Order giving receiver liberty to continue in possession and employ travellers.

Upon the applicn by summons, dated the 26th October, 1896, of the plts, and upon hearing, &c., It is ordered that R., the receiver appointed in this action, be at liberty, out of moneys in his hands as such receiver, to pay to the dfts D. and E., who are the joint holders of the issue of 1885 First Mortgage Debentures of the dft coy of 100*l.* each, the sum of ——*l.*, being as to ——*l.* thof the amount of principal due in respect of the sd 1885 debentures, ——*l.* further pt thof being interest at the rate of 6 p.c.p.a. from the —— of —— to the —— of ——, the date of payment, and ——*l.* residue thof being the taxed costs of the sd dfts, D. and E., of this action and of and relating to their security, and it is ordered that upon payment by the sd R. to the sd dfts, D. and E., of the sd sum of ——*l.*, the sd dfts do deliver up to the sd R. the sd 1885 "A" First Mortgage Debentures to be cancelled, and it is ordered that the sd R. do cancel such debentures accordingly, and it is ordered that upon such payment and delivery up as afsd, the sd dfts, D. and E., be dismissed from this action. *Law Guarantee, &c. Co.* v. *Latigue, &c. Co.*, Williams, J., at Chambers, 3rd November, 1896. **Form 437.**

Order giving receiver liberty to pay off first debenture holders.

It is ordered that the funds in Ct to the credit of this action be dealt with as directed by the payment schedule hto, the payment of ——*l.* to the Commissioners of Inland Revenue thereby directed being income tax due for the year ended the 5th April, 1932, in respect of mortgage interest received during such period. **Form 438.**

Order to pay income tax out of funds in Court.

**Form 438.**

PAYMENT SCHEDULE.

In the High Ct of Justice, Chancery Division. 7th July, 1932.

Title of cause or matter. (*Set out title.*)

Ledger credit as above.

Funds in Ct, ——*l.* War Stock (5 p.c.), 1929–47; ——*l.* 4½ p.c. Conversion Stock.

| Particulars of Payment to be carried out by the Accountant-General. | Payees. | Amount. |
|---|---|---|
| Sell sufficient War Stock to provide for the following payment:— Pay (words) ——*l.* | Commissioners of Inland Revenue. | £ *s.* *d.* 2,204 5 0 |

*Re Cartagena (Columbia) Waterworks Ltd., Babcock and Wilcox, Ltd.*, v. *The Company and Others* (C. 2112 of 1928). Stiebel, Reg.

**Form 439.**

Order giving receiver liberty to pay rates.

It is ordered that Sir W. M., the receiver and manager appointed by the sd order dated the ——, 19—, be at liberty to pay the following claims for rates:—

£

General rate of 4*s.* 5*d.* in the £ due to the Westminster City Council for the half year to the 30th September, 1931, on the—

Dft coy's store premises ... ... ... ...
Housekeeper's flat ... ... ... ... ...
Two letting offices ... ... ... ... ...
Exhibition flat ... ... ... ... ...

First instalment of 5*s.* 9*d.* in the £ on a general rate of 11*s.* 6*d.* in the £ due to the Willesden Urban District Council for the year to the 31st March, 1932 (proportion to the 12th June, 1931) on dft coy's premises at ——, Middlesex ... ... ... ... ...

General rate of 4*s.* 5*d.* in the £ due to the Westminster City Council for the half year to the 30th September, 1931, on the —— flats ... ... ... ... ...

£

*Gamages (West End), Ltd.* (G. 913 of 1931). Mellor, Reg.

**Form 440.**
Liberty to pay rent.

It is ordered that W. W., the receiver and manager appointed in this action, be at liberty to pay the amount of rent now due from the dft coy to Mrs. F. in respect of the —— Mill, Keighley, and that he be at liberty to pay the further rent as it falls due in respect of the sd premises for so long as the sd premises are required for the business of the dft coy. *R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Stiebel, Reg.

**Form 441.**
Order to pay mortgagee on execution of release of mortgage.

Upon the applicon by summons, dated, &c., of the plt, &c., It is ordered that upon due execution by the sd Lloyds Bank, Limtd, of the release of all the ppty comprised in the sd indenture of mortgage of the 25th January, 1895, such execution to be certified by the Registrar of Cos (Winding-up), the funds in Ct be dealt with as directed in the Payment Schedule hto, and it is ordered that upon the payments being made in accordance with the Payment Schedule hto, for principal, interest, and costs due to Lloyds Bank, Limtd, under and by virtue of the sd indenture of mortgage, they, the sd Lloyds Bank, Limtd, do deliver the sd indenture of mortgage to the sd M., as such receiver and manager.

And it is ordered that the payments under this order are made without prejudice to the question as to the funds by which such payments shall ultimately be borne.

PAYMENT SCHEDULE.

| Particulars, &c. | Payees, &c. | Amounts |
|---|---|---|
| The —— Breweries, Ltd., and Lloyds Bank, Ltd., named in the restraint and order dated respectively, &c., having had notice. Discharge said restraint and order. Upon the due execution by Lloyds Bank, Ltd., of the release of all the property comprised in the indenture of mortgage dated, &c., such execution to be certified by the Registrar (Companies Winding-up). Out of cash and money on deposit. | | |
| Pay principal and interest, less tax, to the 1st June, 1897, due under said mortgage dated, &c. Pay ascertained costs of Lloyds Bank, Ltd., as mortgagees. | Lloyds Bank, Ltd. | 3,132*l.* |

*Agg-Gardner* v. *Gresley, &c. Co.*, Vaughan Williams, J., 14th May, 1897.

**Form 442.**
Liberty to repair.

Upon the applicon of plts, &c., It is ordered that the liberty given to F. and C., the receivers, by the order dated the 1st April, 1896, to do and execute such works of improvement or repair on any of the

**Form 442.** ppties mortgaged to secure the sd debentures of which they were then or for the time being might be in possession, as they should be advised to be necessary or advisable for preserving the security or to enable such ppty to be sold or let until the 31st October, 1897, or further order, may be exercised by them notwithstanding that the cost thof may involve an expenditure of a sum exceeding two years, but not exceeding five years, of the estimated value of the premises in respect of such works or repairs carried out by them resply, and if all of such works or repairs exceed two years' estimated value, the sd F. and C. are to hand to the plts' solors every three months a report as to the same resply, and the plts are to be at liberty to lay such report before the judge in chambers from time to time as may be needful. *Somerset* v. *Land Improvement, &c.*, February, 1897.

The direction that a receiver shall manage as well as let the estate authorizes him to bring in proposals to make ordinary repairs. *Thornhill* v. *Thornhill* 14 Sim. 600.

**Form 443.**

Affidavit on summons for liberty to repair.

I, ——, &c., make oath and say as follows:—

1. It is essential for the proper and efficient carrying on of the coy's business that the repairs referred to in the estimates now produced to me and marked resply A and B, and amounting together to 248*l.*, should be done.

2. I have consulted Mr. L., a wharfinger of great experience, and he estimates the costs of the repairs at about 250*l.*, and has advised that they should be done immediately, so as to take advantage of the slack season of the year.

3. The main portion of the repairs proposed is upon the platform in front of the wharf, which is not only unsafe owing to wear and rotting of timber, but its condition materially increases the cost of handling goods at the wharf.

4. In my judgment the receiver ought, in the interests of the debenture holders, to be authorized to expend a sum not exceeding 250*l.* upon the works specified in the exhibits A and B, and I desire to obtain the order of the Ct accordingly.

**Form 444.**

Order for repairs.

Upon the applicon, &c., it is ordered that L., the receiver and manager appointed by the sd order of, &c., be at liberty to pay out sums of money not exceeding 30*l.* in effecting repairs to the boilers used in connection with the tannery at Sittingbourne, Kent, and the hiring of a portable engine during such time as the sd repairs are being effected; it is ordered that the sd receiver and manager be allowed the moneys so laid out in manner afsd, and to account for

**Form 444.**

the same on the passing of his accounts in this action, and it is ordered that the costs of the applicant of the sd applicon be included in his costs in this action. *Evans (on behalf, &c.)* v. *Lavington, Evans & Co., Ltd.*, Wright, J., 16th August, 1900.

**Form 445.**

Liberty to renew licences.

It is ordered that W. M., the receiver appointed herein, be at liberty to employ from the date of this order until the 30th April, 1932, such staff as may be necessary for the protection and maintenance of the security herein at salaries not exceeding the sum of 75*l.* per week in all, And it is ordered that the sd receiver be at liberty to renew the "wine off" and "full on" licences granted to S. R. as the nominee of the dft coy, and for that purpose to make the necessary applicons to the licensing justices for renewal thof and to Quarter Sessions for confirmation, but the sd receiver is not to expend more than the sum of 50*l.* in making such applicons. *Gamages (West End), Ltd.* (G. 913 of 1931). Stiebel, Reg.

**Form 446.**

Liberty to arrange for offices, &c.

Upon applicon of the plt by summons, &c., It is ordered that the receiver and manager be at liberty, as from the date of his appointment on the 29th December, 1899, to continue an arrangement with the Consolidated Trust, Limtd, in the sd afft referred to, for the use of that coy's offices and clerical staff, including the salary of Mr. C., the secretary of the dfts, the Dominion Coy, for the sum of 315*l.* per annum, such arrangement to be determined by either party giving a month's notice to the other, and it is ordered that the receiver and manager be at liberty to pay to the Consolidated Trust, Limtd, the amount due in pursuance of such arrangement. Stirling, J., at Chambers, 20th January, 1898. A. 124.

**Form 447.**

Summons for liberty to discontinue business, &c.

(*Title.*)

Let, &c. (*Form* 171 *or* 172).

1. That the business of —— & Coy, carried on at, &c., be discontinued and the factory closed as on the —— of ——, and that in the meantime the receiver be directed to give all necessary and proper notices to clerks, travellers, and other workpeople to leave their employment.

2. That the receiver be directed to retain the services of the clerk and watchman until the —— of —— to receive and account for all empties hereafter to be returned by customers and also to watch and protect the ppty.

**Form 447.** 3. That the receiver may be at liberty to agree with Messrs. —— to pay them a commission of 2½ p.c. up to the first 5,000*l.* and 1 p.c. upon the total sums received as purchase-money from any person or persons introduced by them and accepted by the Ct as the purchaser or purchasers of the sd factory, being No. 1 contained in the parlars of the conditions of sale by tender.

4. That, if necessary, a meeting of the debenture holders be called to decide as to what course to adopt with reference to the closing and sale of the sd factory.

5. Or that such further or other order may be made as to this Ct may seem fit.

6. That costs of and incidental to this applicon and of the proposed meeting may be costs in the action.

**Form 448.**
Order to discontinue business.

Upon the joint applicon by summons, dated the 27th November, 1898, of &c., It is ordered that the business of the dft coy carried on at —— be discontinued and the factory closed on the 31st December, 1898, and that for that purpose the receiver do give all necessary and proper notices to all persons in his employ, and it is ordered that the receiver be at liberty to retain the services of a clerk until the 28th February, 1899, or until further order, to receive and account for all empties to be returned by customers. *Clark* v. *Meaby & Co.*, December, 1898.

**Form 449.**
Liberty to grant lease.

It is ordered that W. M., the receiver appointed in this action, be at liberty to grant a lease of flat No. ——, London, W.1, to N. G. for a term of five years at the annual rental of ——*l.*, with an option in favour of the sd N. G. to determine the sd lease at the end of the third year of the term to be granted upon the sd N. G. giving to the lessors for the time being of the sd flat six months' previous notice in writing of his intention to exercise such option. *Gamages (West End), Ltd.* (G. 913 of 1931). Stiebel, Reg.

**Form 450.**
Liberty for one of two receivers to draw cheques on joint account.

Upon the applicon of the plts by summons dated, &c., and the plts by solors undertaking to be answerable for what E. shall do for the purposes of this order.

It is ordered that E., one of the receivers and managers appointed in this action by the order dated the 13th May, 1892, be at liberty to draw and sign cheques alone on the account of the sd E. and J., the receivers and managers of the dft coy at Messrs. ——, bankers of the sd receivers and managers, for the purpose of paying the wages of the workmen at the various works carried on by the sd receivers and

managers on the pt of the dft coy for the week ending the 17th December, 1892, and of paying for any materials already ordered by the sd receivers and managers, payment for which becomes due on or before the 17th December, 1892. *Strapp* v. *Bull*, Vaughan Williams, J., 14th December, 1892. **Form 450.**

Upon the applicon by summons dated the 29th November of the plts, and upon hearing the solors for the applicants and for the dfts, &c., It is ordered that C. and G., receivers in this action, be at liberty and authorized to compromise the claim made by them as such receivers against the Italian fund of the dft coy and the proceedings pending in Italy in respect thof upon the terms set out in a letter of the 29th November, 1911, from M. to B., being the exhibit E. F. P. 1 to the afft of E. F. P., a translation whereof is the exhibit E. F. P. 2 to the last-mentd afft, namely, upon payment within a period of four months from the date of this order of the sum of 2,750*l.* together with the costs of the last two actions decided in Italy by the judgment of the 20th of July, 1911, of the first section of the Tribunal of Rome and in accordance with the sd judgment the sd receiver abandoning any right of intervention or interference in the Italian liquidation and satisfying all claims of H. C., the former Italian manager of the dft coy, and it is ordered that upon the above-mentd compromise being carried into effect, the sd receivers are to be at liberty to pay the sd H. C. the sum of 100*l.* agreed to be accepted by him in settlement of his claims against the Italian liquidation or under the order of this Ct of July, 1910, or otherwise, and to do and execute all such acts and things, including a special power of attorney to Dr. B., for the purpose of renouncing all interest in the proceedings in Italy, the examination of the necessary deed of compromise, and consenting in the fullest manner to the rights of the deposits in Italy in favour of the sd Italian liqr, and the costs of this applicon are to be costs in the action. *Harrop and Ostler (on behalf of themselves and all other policy holders of the British Natural Premium Life Assocn., Ltd., struck out by the Order dated the 29th March,* 1911), plt., *The British Natural Premium Life Assurance, Ltd., and Others*, dfts., Swinfen Eady, J., at Chambers, 13th December, 1911. **Form 451.** Liberty to receiver to compromise claim.

It is ordered that S. T., the receiver appointed in this action, be at liberty to compromise the action brought by the dft coy in Northern Ireland against —— & Co., of Belfast, and the counterclaim of the dfts in such action on the terms set forth in the schedule hto. **Form 452.** Liberty to compromise action.

——, Registrar.

**Form 452.**

THE SCHEDULE.

1. That ——, Limtd, be entld to rank as an unsecured creditor in the estate of —— & Co. for the sum of ——*l.*, and that the same be accepted by the sd coy in full discharge of its claim.

2. That the counterclaim and defence as delivered in such action on the 26th June, 1930, be withdrawn.

3. That the sum of ——*l.* lodged by the sd coy as security for the dfts' costs in pursuance of an order in such acton dated the 13th February, 1931, be pd out to the sd coy.

4. That each party shall bear their own costs of the sd action.

5. That the agreed terms be made a rule of the Ct in Northern Ireland on the applicon of either party to the sd action. *Dominion Gramophone Records, Ltd.* (D. 1135 of 1930). Stiebel, Reg.

**Form 453.**

**Liberty to settle claims for workmen's compensation.**

It is ordered that W. M., the receiver appointed in this action, be at liberty to enter into the necessary agreemts to settle the four claims under the Workmen's Compensation Act, parlars of which are set forth in the schedule hto.

And it is ordered that when such agreemts have been duly recorded in the appropriate County Cts the sd receiver be at liberty to make all necessary payments thereunder.

And it is ordered that the remuneration of S. P. for his services in negotiating the settlement of the claims against the first mentd dft coy under the Workmen's Compensation Act set forth in the second schedule to the sd certificate be and the same is hby fixed at the sum of ——*l.*, and that the sd receiver be at liberty to pay the sd sum.

THE SCHEDULE BEFORE REFERRED TO.

| Name of Claimant. | Amount to be paid in Settlement of Claim. |
|---|---|
| | £ |

*Allied Cement Manufacturers, Ltd.* (A. 3229 of 1930). Stiebel, Reg.

**Form 454.**

**Liberty for receivers to buy out some of the debenture holders.**

On the applicon of the plts, &c., It is ordered that W. and K., the joint receivers and managers appointed in this action by the sd order dated the 16th February, 1895, be at liberty to enter into an agreemt for the purchase of the interests of the other debenture holders in the dft coy upon the terms referred to in the draft minutes of arrangement, being exhibit —— of the sd afft of the sd E. W. *Land Securities Co. (on behalf, &c.)* v. *Middleton's Steam Shipping Wharf Co., Ltd.*, Vaughan Williams, J., 11th March, 1896.

**Form 455.**

*Liberty to arrange for payment in foreign currency.*

It is ordered that W. W., the receiver and manager appointed in this action, be at liberty (1) to enter into arrangements with persons or firms resident in Greece who are indebted to the dft coy or the sd W. W. as such receiver and manager whereby such persons or firms may discharge their indebtedness in Greek currency instead of in sterling, and (2) to enter into similar arrangements with persons or firms resident in Austria, Hungary and Czecho-Slovakia to discharge their indebtedness in currency of the particular country in which they reside instead of in sterling.

And it is ordered that subject to the agents hnftr mentd finding security for all moneys received by them to the satisfaction of the off recr and prov liqr of the dft coy the sd W. W., as such receiver and manager, be at liberty (1) to enter into an arrangement with Messrs. J. & Co., of Salonica, whereby the sd Messrs. J. & Co. will receive payment as agents for the sd receiver and manager of debts due from persons or firms resident in Greece and endeavour to remit the sum so received (subject as hnftr referred to) to the sd receiver and manager if and when possible so to do, having regard to exchange restrictions existing in Greece, and that in so far as it is not possible so to remit the sums so received to pay the same into an account at a bank in Greece in the name of the sd receiver and manager; and (2) to enter into a similar arrangement with Mr. V. K. whereby he will receive payments as agent for the sd receiver and manager of debts due from persons or firms resident in Austria, Hungary and Czecho-Slovakia, and endeavour to remit the sums so received to the sd receiver and manager or to pay the same into an account at a bank in the name of the sd receiver and manager.

And it is ordered that from the sums so received by the sd J. & Co. and V. K. the sd J. & Co. and V. K. be at liberty to deduct therefrom the sums of ——*l.* and ——*l.* resply in respect of arrears of commission and expenses. *R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Stiebel, Reg.

**Form 456.**

*Order for liquidator to pay moneys to credit of action without prejudice to his remuneration, &c.*

Upon the applicon of F., the liqr of coy, &c. Order that all sums of money which shall be collected by the sd F. as such liqr, being assets of the above-named coy charged to the debenture holders, when they aggregate 200*l.*, be pd by him into Ct to the credit of the above action—"*Akers* v. *Veuve Monnier, &c.*, (1895) A. No. 11, liqr's receipts"—and order that as an additional indemnity to the sd F. all sums got in by him pd into such account shall stand charged with the payment of all costs, charges and expenses, including his remuneration, which he may incur or become liable to pay or earn in the realisation of the assets of the sd coy, on behalf of the sd receiver in

**Form 456.** this action, in priority to the sd receiver and the sd debenture holders. *Akers* v. *Veuve Monnier, &c.*, Vaughan Williams, J., 27th February, 1896.

**Form 457.**

Liberty to promote Bill in Parliament, &c.

Upon the applicon of the dft coy, and upon hearing the solors for the applicants and for the plt and for the remaining dft, and upon reading, &c., It is ordered that the dft be at liberty to proceed with the Bill before the present session of Parliament intituled "A Bill to confer further powers upon the Milford Docks Coy and for other purposes," and that B., the receiver appointed by order dated the 9th February, 1892, be at liberty to pay all proper costs, charges and expenses in connection therewith, and be allowed same in his account. And it is ordered that the dft coy be at liberty to issue to the London Trust Coy, Limtd, debenture stock "A" for 150*l.*, interest due to that coy on the 1st July, 1891, and a certificate of indebtedness of the dft coy in respect of the subsequent interest. And it is ordered that the dft coy be at liberty to issue to holders of debenture stock "A" on the 1st July, 1891, who may accept the offer contained in the circular letters dated the 1st and 20th July, 1891, like debenture stock in respect of the several amounts of interest due to them. *Sheppard* v. *Milford Docks Co.* (1891, S. No. 3022), Stirling, J., at Chambers, 21st March, 1892.

Compare *Buckham* v. *Trustees of Whitehaven*, 55 L. T. 694.

**Form 458.**

Liberty to receiver to take up a new lease.

It is ordered that S. R. H., the receiver and manager appointed in this action, be at liberty to complete negotiations for the grant to the dft coy, ——, Limtd, of a lease of 7,500 acres at —— in —— Colony (in the place of the sd dft coy's existing concession) for a term of —— years from the ——, 19—, at a rental of —— cents. per acre per annum.

And it is ordered that the sd S. R. H. be at liberty to employ Mr. ——, of ——, in the same colony, the Government Surveyor, to make the necessary survey of the property at a fee including travelling expenses not exceeding $——.

And it is ordered that the sd S. R. H. be at liberty to employ Messrs. ——, solicitors of ——, to approve and complete the sd lease and to pay their fees and the lessors costs, if any, and stamp duties payable in respect of the grant of the sd lease.

And it is ordered that the dft coy, ——, Limtd, do seal and take up the sd lease in the form so approved.

And it is ordered that the dft coy, ——, Limtd, do execute a proper first charge or other security in accordance with the law of —— Colony in favour of the dft —— as tree for the holders of the prior lien debenture

stock of the sd coy, ——, Limtd, and a like second charge or other security in favour of the dfts —— and ——, as trees for the holders of convertible debenture stock of the dft coy, ——, Limtd. **Form 458.**

And it is ordered that the sd S. R. H. do pay all fees and expenses in connection with the completion of the sd securities. Master Risdale (D. 985 of 1931).

**Form 459.**

Liberty to grant lease with allowance for repairs.

Upon the applicon of the plt (by summons dated the 22nd February, 1918), and upon hearing the solors for the applicant, for the dfts, and for K. and M., the liqrs of the above-named coy, parties having liberty to attend, and upon reading an afft of W. and S., the 26th February, 1918, and the exhibits therein referred to, and an afft of W., the 18th March, 1918, and the exhibits therein referred to, It is ordered that H., the receiver appointed in this action, be at liberty to let No. ——, Bishopsgate, in the City of London, to V. for three years, at a rent of 150*l.* per annum, and to allow a sum not exceeding 40*l.* in respect of repairs to the sd premises. *Re Karamelli and Barnett, Ltd.*, Eve, J., 18th March, 1918. 1915, K. 734.

**Form 460.**

Receiver empowered to accept offer for purchase of book debts, &c.

Upon the applicon by summons dated the 17th May, 1911, of the plt, and upon hearing the solors for the applicant, for the dfts, and for H. M., a party attending the proceedings pursuant to order dated the 15th February, 1911, and upon reading the judgment dated the 24th June, 1909, and the certificate dated the 10th January, 1910, the several affts (and exhibits thto), It is ordered that H., the receiver in this action, be at liberty to accept the offer of the above-named plt for the purchase of certain book debts and ppty of the dft coy upon the terms set out in a letter from the sd plt to the sd receiver dated the 16th May, 1911. And it is ordered that the purchase-money derived from such sale to be retained by the sd receiver, and accounted for by him in passing his next account. *Payne (on behalf, &c.)* v. *A. Carmichael & Co., Ltd.*, Neville, J., at Chambers, 24th May, 1911.

**Form 461.**

Order that receiver carry on business so as not to continue nuisance.

Upon the applicon by summons dated the 16th March, 1911, of W. L. F. and F. G., of ——, the superior lessors of the premises in Halkin Place, hnftr referred to, and W. H. C. H., of. &c., and upon hearing counsel for the applicants and the solors for the plt and for the dft, the respts in the sd summons adjourned, &c., and coming on for hearing, and no one appearing for the dft coy, and upon reading the afft, &c., this Ct doth order that C. J. M., the receiver and manager in this action, do as from the date of this order carry on the business of the dft coy at the premises No. 2, Halkin Place, in such manner as not to occasion a nuisance by noise to the applicant, W. H. C. H.,

**Form 461.** as occupier of No. 1, Halkin Place, or a nuisance or danger or annoyance by noise to the applicants W. L. F. and F. G., or their lessee and tenants or the neighbourhood, in breach of the covenant on the pt of the dft coy contained in an indenture dated the 23rd January, 1909, being the exhibit, &c., and it is ordered that the sd C. J. M. do out of the assets of the dft coy pay to the applicants the sd, &c., their costs of the sd applicon, such costs to be taxed, and it is ordered that the amount of such costs so pd be allowed to the sd C. J. M. on passing his account as receiver. *The London Pure Milk Assocn., Ltd.*, Swinfen Eady, J., 18th May, 1911.

**Form 462.**

Liberty to pay off money borrowed by receiver.

Upon the applicon by summons dated the 17th May, 1911, of the dft P., and upon hearing the solors for the applicant and for the remaining dfts, and upon reading, &c., It is ordered that the funds in Ct be dealt with as directed in the payment schedule hto, the payment thereby directed to be made being in respect of principal sums amounting in the aggregate to 12,500*l.*, borrowed by the sd K. as the receiver in the sd action—*Re The Piccadilly, &c.*—pursuant to the three first above-mentd orders, with interest thereon at the rate of 5 p.c.p.a. on the respive dates when the sd several advances were made to the 14th June, 1911, but this order to be without prejudice to the claim of the dfts the Norwich Union, &c., for the costs and expenses as mortgagees for their attendance in this action.

PAYMENT SCHEDULE.

Title of action.

LEDGER CREDIT as above.

Account of money deposited by H. M. B. under conditional contract dated the 31st March, 1909.

Funds to be dealt with 34,146*l.* 3*s.* 1*d.*, money on deposit.

(1st Col.) Out of money on deposit and any interest, pay principal.

Pay interest at 5 p.c.p.a. to the 14th June, 1911.

*Carry over.*

(2nd Col.) The Norwich Union, &c.

The same.

Suspense account, income tax on interest due to the Norwich Union, &c.

(3rd Col.) 12,500*l.* 0*s.* 0*d.*
1,533*l.* 1*s.* 7*d.*
93*l.* 16*s.* 10*d.*

*Gunn* v. *Piccadilly Hotel, &c.*, Neville, J., at Chambers, 5th May, 1911.

**Form 463.**

Tenants to attorn.

Upon motion, &c., it is ordered that the respts P. and R. do attorn and become tenants to the sd C., the receiver appointed in this action in respect of the sd premises situate in B. Street afsd, together with all the furniture and fittings and appurtenances upon the sd premises, at the rent of 40*l.* per week from the date of this order. And it is ordered that the respts, the sd P. and R., be at liberty to apply as they may be advised, and the plts and the dfts are to be at liberty to apply as to costs and generally as they may be advised. *Hodson* (*on behalf, &c.*) v. *Blanchards, Ltd.*, 11th April, 1911.

**Form 464.**

Liberty to employ valuers.

It is ordered that P. S., the receiver and manager appointed in this action, be at liberty to employ Messrs. H. & G., of ——, London, W.1, estate agents, to make a valuation of all the ppty and assets of the dft coy with a view to the realization and sale thof and to pay to them a fee of —— guineas for making such valuation, such fee to include all their expenses incurred in connection with the sd valuation. *Thompson* v. *Picture Halls, Ltd.* (T. 1370 of 1932). Stiebel, Reg.

## CHAPTER LXXIII.

### COMPROMISES.

THE receiver very commonly makes provisional arrangements for the compromising of claims in relation to the subject-matter of the actions, *e.g.*, claims of the company for the recovery of part of the mortgaged premises. The proper course, as a rule, is for the plaintiff to bring the matter before the Court on summons supported by affidavit and obtain an order giving the receiver the requisite leave to compromise.

In proceedings concerning a trust the Court has power to approve compromises in the absence of some of the persons interested, see Ord. XVI. r. 9A, and *Collingham* v. *Sloper*, (1894) 3 Ch. 716; (1901) 1 Ch. 769; on appeal *sub nom. Saragossa and Mediterranean Ry. Co.* v. *Collingham*, (1904) A. C. 159.

**Form 465.**

Order empowering receiver to accept a compromise with a debtor.

Upon the applicon by summons, &c., It is ordered that M. as such receiver as afsd be at liberty to accept from T., of ——, licensed victualler,

(a) The sum of 420*l.* in cash, and

(b) A promissory note of the sd T. for 30*l.*, dated the 28th March, 1898, payable three months after date to the order of Messrs. ——, the plt's solors, in full satisfaction of all claims by the Gresley Brewery, Limtd, and those claiming thereunder against the sd T. in respect of the mortgage dated, &c., and made, &c., of the lease of the sd —— in Birmingham afsd to secure the sum of 500*l.* and interest and a promissory note given by the sd T. for 500*l.*, dated the 1st January, 1894, payable three months after date to the dft coy. *Agg-Gardner (on behalf, &c.)* v. *Gresley Brewery Co., Ltd.*, Wright, J., 26th April, 1898.

**Form 466.**

Liberty to receiver to compromise claims with vendor abroad.

Upon the applicon of the plt, and upon hearing counsel for the applicant and the solors for the dfts, and upon reading, &c., and the dft coy by their solors consenting to this order, and the other dfts not objecting, It is ordered that W., the receiver appointed by order of the 2nd March, 1892, be at liberty, by his agents in Batavia, to propose to compromise (and, if accepted, to carry into effect such proposal) the action now pending against the coy in the Batavian Cts at the suit of A., upon the terms of relieving the sd A. and his co-vendors, either wholly or in pt, from the guarantee contained in the original agreemt for sale of the 18th July, 1890 (and referred to

in the prospectus of the coy), that the tobacco crop upon the coy's tobacco estates in Sumatra, for the year 1890, should realise a net profit (after paying all expenses of planting, cultivation, cutting, and shipment to Europe, and all other expenses in connection therewith, except the coy's expenses of administration in London) of at least 13,500*l.*; and in the event of such compromise being effected, It is ordered that the dft coy deliver up to the vendors or their nominee all the shares which have been allotted to the vendors or their nominees, and which have been retained by the coy as security for the sd guarantee, or the whole of such shares less such number as, under the terms of any such compromise, it shall be agreed that the coy may retain as security for the performance of such guarantee in pt. And it is ordered that the costs of this applicon be costs in the action. *Heritage* v. *Delhi Bedazei, &c., Ltd.*, Chitty, J., at Chambers, 22nd June, 1892. A. 914. **Form 466.**

1. An action was commenced on the 2nd January last by J. F. against M. D. Wharf, Limitd, whereby the plt claims damages for personal injuries through alleged negligence on the pt of the dfts' servants, and by the statement of claim subsequently delivered such damage was fixed at 100*l.*, the writ and statement of claim are now produced and shown to me, and marked, &c. **Form 467.** **Affidavit with a view to compromise.**

2. The leave of this honourable Ct was obtained to defend the action and to transfer it to the Whitechapel County Ct on the 1st February last.

3. Counsel has been asked to advise on behalf of the dfts, and the opinion of such counsel is now produced and shown to me, marked ——. He advised that the case resolves itself into one of damages, and advises the payment of 75*l.* into Ct.

4. Acting on such advice, my solors approached the plt's solor with a view to compromising the action by paying 50*l.* for damages and costs, to be taxed, and on the 10th inst, received the letter now produced to me, and marked ——, agreeing to a settlement upon those terms.

5. In my judgment it is expedient to compromise the sd action upon the terms set out in the preceding para.

On the applicon of the plts by summons, &c., It is ordered that R., the receiver appointed in this action by the sd order dated the 12th June, 1896, be at liberty to accept from N., of ——, in the county of ——, the sum of 217*l.* 10*s.*, being 4*s.* in the £ upon 1,087*l.* 10*s.*, the total amount now due from him in respect of calls, together with the sum of two guineas towards the costs of this applicon. *Law Guarantee* v. *Latigue Ry.*, Vaughan Williams, J., 25th November, 1896. **Form 468.** **Liberty to compromise claim for calls.**

## CHAPTER LXXIV.

### SURRENDER OF LEASEHOLD, ETC.—GIVING UP POSSESSION OF PROPERTY AND NOTICE OF EQUITY OF REDEMPTION.

**Form 469.** Summons for liberty to give up tenancy.

LET, &c. (*Form* 171 *or* 172).

On the hearing of an applicon on the pt of the plt that the receiver may be at liberty forthwith to evacuate and give up possession of [*specify the ppty*] belonging to the dft coy, and that he may be at liberty to surrender the lease thof.

**Form 470.** Liberty to surrender lease.

Upon the applicon of T., &c., Order that, without prejudice to any rights which the parties may have against each other, S. and W., the receivers, do surrender to the applicant T. the indenture of lease, dated, &c., and that the sd receivers do deliver up possession to the applicant T. of premises comprised in the sd lease, and of the cottage situate at ——, afsd, held by the sd coy as yearly tenants to the applicant, and cost of plts, dfts, and receivers of this applicon to be costs in this action. *Dawson* (*on behalf, &c.*) v. *Owen*, 7th February, 1878. A. 602.

**Form 471.** Liberty to close public-houses.

Upon the applicon of the plts, and upon hearing, &c., and upon reading, &c., It is ordered that F., the receiver and manager appointed in this action, be at liberty to give up possession or otherwise dispose of the following ppties now held by the above-named dfts, J. Nunneley & Coy, the trade in which is being carried on at a loss, viz.:—

1. "The Little Wonder," situate, &c.
2. "The Castle and Falcon," situate at, &c.
3. "The Nottingham Arms," situate at, &c.
4. Maltings, situate at, &c.; and
5. Stores, at, &c.

And the costs of this applicon are to be costs in this action. *English, &c. Investment Trust* v. *J. Nunneley & Co.* (E. 1253 of 1891). Chitty, J., at Chambers, 23rd November, 1891.

Let, &c. (*Form* 171 *or* 172).

**Form 472.**

Summons by first mortgagees for possession.

1. That notwithstanding the orders made herein, dated the 15th February, 1901, and the 1st March, 1901, resply, the applicants be at liberty to enter into and take possession of the ppty comprised in the sd indenture of mortgage.

2. That the dfts, J. and R., the trees of the indenture of the 12th July, 1898, mentd in the writ of summons herein, do within fourteen days render to the applicants an account of receipts and payments in respect of the sd mortgaged premises since the 15th February, 1901, the date of the order on which the last-mentd dfts were appointed interim receivers, and pay over to the applicants any balance shown by the sd account to be in the hands of the sd trees.

3. That the sd J. and R. do forthwith hand over to the applicants or to Messrs. J. R., their solors, the leases and tenancy agreemts and all books of account, invoice and other documents relating to the sd mortgaged premises in the possession of the sd J. and R. and of the sd D., their manager, or to any of them.

4. That the applicants be at liberty to add the costs of and incident to this applicon to their security.

This, on 10th July, 1901, was followed by an order, which see, Form 475, *infra*.

**Form 473.**

Motion that receivers give up possession to prior incumbrancer.

Take notice that this Ct will be moved, &c., that N. and G., receivers appointed in this action, do deliver up possession of the sd several steamships forthwith to the applicants, or as they may direct, and that the costs of and incidental to this applicon and consequent thereon be added to what is due to the applicants under their sd mortgage securities.

**Form 474.**

Receiver in action to give up possession to receiver of first mortgagee.

Upon the applicon of H., of, &c. [*first mortgagee*], and upon hearing the solors for the applicant, and for W., the liqr, receiver and manager of the dft coy, and for the plts, and upon reading, &c., It is ordered that the sd W., as such liqr, receiver and manager do forthwith deliver up possession of the messuages and premises, No. —, —— Lane, in the city of London, to G., of, &c., the receiver of the sd ppty appointed by the applicant as first mortgagee thof. *Hicks* v. *Billiter Street Offices Co.*, and *In re Same Company*, North, J., at Chambers, 18th June, 1892. A. 900.

See *Henry Pound, Son, and Hutchins*, 42 Ch. D. 402; and *Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497, *supra*, p. 472.

**Form 475.**

Order giving first mortgagee possession.

Upon the applicon by summons of the dfts F., B. and S., the first mortgagees of leasehold flats and premises known as Albert Court, Kensington Gore, in the county of, &c., and upon hearing the solor, &c., It is ordered that the applicants, as such mortgagees as afsd, be at liberty to enter into and take possession of the ppty comprised in the indenture of mortgage dated the 4th July, 1898, and made between the Albert Court Estate Coy, Limtd, of the one pt, and the applicants of the other pt. And it is ordered that the dfts J. and R., the trees of the indenture of the 12th July, 1898, mentd in the writ of summons herein, do render to the applicants an account of all rents received by them due on and after the 25th March, 1901, and of all payments made by them thereout since the 25th March, 1901, and claimed by them to be valid, with liberty for the applicants to apply, and under that liberty to object to any items of the account which they desire to attack. Also with liberty to the applicants to apply as to any balance shown by the sd account to be in the hands of the sd J. and R. And it is ordered that so much of the sd summons as is contained in para. 3 do stand over; and ordered that applicants be at liberty to add the costs of and incident to this applicon on their security and liberty to apply. *Rosher (on behalf, &c.)* v. *Albert Court Estate, Ltd.*, Wright, J., 10th July 1901.

For summons, see Form 472, *supra*.

**Form 476.**

Order for receiver to hand over articles to third party, who claims same.

Upon the applicon of the plt by summons, dated, &c., and upon hearing the solor for the applicant, counsel for C., in the summons named, and the solors for the dfts by their liqr, and upon reading, &c., It is ordered that B., the receiver appointed by the sd order, dated the 7th November, 1891, do hand over to the sd C. the several articles set forth in the schedule to her sd afft, filed the 10th December, 1891. And it is ordered that the costs of the receiver of and incidental to this applicon be allowed to him in his accounts. *Robson* v. *Cattell & Co.*, Chitty, J., at Chambers, 19th January, 1892. B. 211.

Liberty for official liquidator to release equity of redemption in patents. *Metal Tube Co.*, Hall, V.-C., 17th March, 1878. B. 478.

# CHAPTER LXXV.

## POWERS OF ATTORNEY.

Occasions not unfrequently occur for the appointment by the receiver of an attorney or agent to act abroad, and in such cases it is necessary to apply to the Court for liberty to make the appointment, and the application should be supported by an affidavit showing why the appointment is necessary and that the proposed appointee is a fit and proper person.

**Form 477.**

Liberty to liquidator to execute power of attorney.

It is ordered that W. W., the receiver and manager appointed in this action, be at liberty for the purpose of continuing the proceedings brought in Italy against the above-named coy by one R. B., to execute a power of attorney in the form set forth in the schedule hto in favour of F. M.

And it is ordered that the sd W. W., as such receiver, may be at liberty to expend a sum not exceeding 50*l.* for the purposes of the sd proceedings.

The Schedule before referred to.

[*Copy translation of power of attorney.*]

*R. M. C. Textiles* (1928), *Ltd.* (R. 411 of 1932). Stiebel, Reg.

**Form 478.**

Order empowering defendant company to execute power of attorney to lawyer in Paris.

Upon the applicon of the plt in the above-mentd action and of S., the prov liqr of the above-named coy, by summons dated, &c., It is ordered that the sd S., as such prov liqr of the sd coy, be at liberty to execute in favour of H., of ——, Paris, in the Republic of France, avocat, and, upon his giving security to be approved by the Ct., to transmit to the sd H. a power of attorney being the exhibit —— to the sd afft of C., filed the 2nd March, 1895, and which sd power of attorney is identified by the signature of the registrar (Cos Winding-up) in the margin thof. And it is ordered that the sd S., as such prov liqr to the sd coy, be indemnified, out of the assets coming to the hands of the sd T. as such receiver, against any costs which he may become liable to pay in any proceedings properly brought or defended by the sd H. under the sd power of attorney. And it is ordered that the costs of and consequent upon this applicon be costs in the above action. *Akers* (*on behalf*) v. *Veuve Monnier, &c., Ltd.*, Wright, J., 1898.

**Form 479.**

Order indorsed on power of attorney.

Upon the applicon, &c., it is ordered that the within written power of attorney, being the exhibit G. M. S. to the sd afft of —— dated, &c., executed by T., the receiver and manager appointed herein, in favour of H., be and the same is, subject to the reservation as to clause 1 thof imposed by the Ct, hby approved for the purpose of authorizing the sd H. to do the several acts and things, subject to the reservation afsd specified in the sd power of attorney. *The London Paris Securities Corpn. (on behalf, &c.)*, Buckley, J., 6th September, 1905.

**Form 480.**

Order giving liberty to employ attorney to carry out sale.

Upon the applicon by summons, &c.

And upon hearing, &c.

And upon reading the judgment dated the 25th day of February, 1930, the order (for sale) dated the 16th day of June, 1931, the order dated the 22nd day of June, 1931, to wind up the above-named dft Melanesia Coy, Limtd, made "In the matter of The Melanesia Coy, Limtd, and In the matter of the Cos Act, 1929 (No. 00445 of 1931)," the afft, &c.

And upon the off recr and prov liqr of the dft Melanesia Coy, Limtd, being indemnified to his satisfaction.

It is ordered that the above-named dft Melanesia Coy, Limtd (by the off recr and prov liqr), and the above-named dft B. and I. Trust, Limtd, do join in the sale of the ppty to B. P. & Coy, Limtd, referred to in the sd order dated the 16th day of June, 1931.

And it is ordered that H. J. P., the receiver appointed in this action, and the above-named dft Melanesia Coy, Limtd (by the off recr and prov liqr), and the above-named dft B. and I. Trust, Limtd, be at liberty to execute a power of attorney appointing R. W. B. and N. A. M., both of ——, ——, Australia, as their joint and several attorneys in the form set forth in the schedule hto, for the purpose of carrying such sale into effect.

THE SCHEDULE BEFORE REFERRED TO.

[*See next Form.*]

Stiebel, Reg. (M. 730 of 1930.)

**Form 481.**

Power of attorney referred to in last Form.

A power of attorney created the —— day of ——, 19—, by H. J. P., of ——, London, chartered accountant, and by Melanesia Coy, Limtd, whose registered office is situate at —— (hnftr called "the coy"), acting by E. P., of ——, one of the off recrs in cos liquidation, the prov liqr of the coy (hnftr called "the liqr"), and by B. and I. Trust,

Limtd, whose registered office is situate at —— (hnftr called "the tree coy"). **Form 481.**

Whereas by a trust deed dated the —— day of ——, 19—, and made between the coy, of the one pt, and the tree coy, of the other pt, after reciting that the coy had determined to issue debenture stock to be constituted and secured in manner thereinafter provided, it was by the deed now in recital witnessed that the coy charged in favour of the tree coy all its undertaking and assets for the time being both present and future upon certain trusts therein expressed for securing the sd debenture stock.

And whereas shortly after the execution of the sd deed the coy issued 6 p.c. debenture stock framed in accordance with the form set forth in the first schedule to the sd deed.

And whereas on the —— day of ——, 19—, an action in the matter of the coy between —— Bank, Limtd, on behalf of themselves and all other the holders of the 6 p.c. debenture stock of the coy as plts and the coy and the tree coy as dfts, 1930, M. 730 was commenced in the Chancery Division of the High Ct of Justice in England, claiming to have the trusts of the sd trust deed carried into execution by the Ct and to have a receiver and manager appointed.

And whereas by a judgment dated the —— day of ——, 19—, of the sd Ct made in the sd action it was ordered and adjudged that the trusts of the sd trust deed be performed and carried into execution and the sd H. J. P. was appointed receiver on behalf of the plts and all other the holders of the sd debenture stock of the coy entld to the benefit of the sd trust deed of the undertaking of the coy and all its ppty excluding uncalled capital comprised in or subject to the charge created by the sd deed.

And whereas the sd H. J. P. has given security as such receiver to the satisfaction of the judge.

And whereas on the —— day of ——, 19—, the sd —— Bank, Limtd, presented a peton to the sd Ct, In the matter of the coy and in the matter of the Cos Act, 1929 (No. 00445 of 1931), praying that the coy might be wound up by the sd Ct under the provisions of the Cos Act, 1929.

And whereas by an order dated the —— day of ——, 19—, of the sd Ct made in the sd action it was ordered that the sd H. J. P. be at liberty to accept an offer for the sale of the ppty of the coy to B. P. & Coy, Limtd, of ——, Australia, such offer being contained in a letter dated the —— day of ——, 19—, from the sd B. P. & Coy, Limtd, to R. W. B., and that such ppty be sold with the approbation of the judge.

And whereas by an order dated the —— day of ——, 19—, of the sd Ct made upon the sd peton it was ordered that the coy be wound up by the sd Ct under the provisions of the Cos Act, 1929, and that

**Form 481.** one of the off recrs attached to the sd Ct be constituted prov liqr of the affairs of the sd coy and the sd E. P. has been so constituted.

And whereas the sd H. J. P. as such recr as afsd, the coy by the liqr as such liqr as afsd, and the tree coy as such trees as afsd, are desirous that R. W. B. and N. A. M., both of ——, Australia, should be appointed as their joint and several attorneys and attorney in the manner and for the purposes herein appearing.

And whereas by an order dated the —— day of ——, 19—, of the sd Ct made in the sd action it was ordered (*inter alia*) that the coy by the liqr and the tree coy should join in the sale of the ppty of the coy to the sd B. P. & Coy, Limtd, referred to in the sd recited order of the —— day of ——, 19—, and that the sd H. J. P., as such recr as afsd, the coy by the liqr and the tree coy should be at liberty to execute a joint and several power of attorney in the sd order referred to which has been approved by the Ct as a proper power of attorney, meaning thereby this deed.

Now this deed witnesseth that the sd H. J. P. as such recr as afsd, the coy by the liqr as such liqr as afsd, and the tree coy as such trees as afsd, and each of them in pursuance of the sd recited order dated the —— day of ——, 19—, hby appoint the sd R. W. B. and N. A. M. jointly and each of them severally to be their attorneys or attorney for them and/or any two and/or each of them, and in their respive names and in their respive behalf to do and execute the following acts and deeds:—

1. To sell the ppty of the coy to the sd B. P. & Coy, Limtd, or their nominees on the terms of the sd recited offer, and to enter into a contract for the purpose of carrying such sale into effect, such contract to be subject to the approval of the Ct in the sd action.

2. To enter into, make, sign, execute, register, perfect and do or cause to be entered into, made, signed, executed, registered, perfected and done according to the laws for the time being in force in the Commonwealth of Australia and/or the Mandated Territory of New Guinea, all such things, contracts, agreements, receipts, assignments, transfers, conveyances, reconveyances, releases, discharges, surrenders, assurances, instruments, deeds notices, notarial acts and things which in the opinion of the attorneys or attorney may be expedient, necessary or convenient for completing the sd sale, and for this purpose to affix the foreign seal of the coy to any such contract, agreement, receipt, assignment, transfer, conveyance, reconveyance, release, discharge, surrender, assurance, instrument, deed, notice or notarial act.

3. To acknowledge in the respive names of the sd H. J. P., the coy by the liqr and the tree coy and as their respive acts and deeds this power of attorney, and to register and record the same in the proper office or offices in the Commonwealth of Australia and/or

in the Mandated Territory of New Guinea, and to do or procure to be done any and every other act and thing whatsoever which may be in any wise requisite or proper for authenticating and giving full effect to this power of attorney according to the laws and usages of the Commonwealth of Australia and/or the Mandated Territory of New Guinea. Form 481.

4. Generally to do all such acts and things not herein specially authorised as the attorneys or attorney may deem proper or expedient for or in relation to all or any of the purposes or matters afsd.

5. To appoint from time to time or generally such person or persons as the attorneys or attorney may think fit as their or his substitute or substitutes to do, execute and perform all or any of such matters and things afsd and subject to such restrictions (if any) as the attorneys or attorney shall think fit and to revoke the appointment or appointments of such substitute or substitutes and to appoint another or others in his or their place as the attorneys or attorney shall from time to time think fit.

6. The sd H. J. P., the coy by the liqr, and the tree coy hby agree to ratify, confirm, and allow all and whatsoever the attorneys or attorney or his or their substitute or substitutes shall lawfully do or cause to be done in or about the premises by virtue of this power of attorney.

7. The sd H. J. P., the coy by the liqr, and tree coy, declare that this power of attorney shall continue in force until notice by cablegram or letter of revocation hof shall be actually received by the attorneys or attorney, or his or their substitute or substitutes, for the time being in the exercise hof, whichever date shall be the earlier.

8. And it is hby declared that the attorneys or attorney in exercising the power hby conferred on them shall conform to the regulations and directions for the time being imposed on or given to them by the sd H. J. P., the coy by the liqr, and the tree coy, provided always that no person dealing with the attorneys or attorney or any substitute or substitutes shall be concerned to see or enquire whether or not he is or they are acting in accordance with such regulations or directions, and notwithstanding any breach of such regulations or directions committed by the attorneys or attorney or any substitute or substitutes with regard to any act, deed or instrument, the same shall as between the sd H. J. P., the coy by the liqr, and the tree coy, and the person or persons dealing with such attorney or attorneys, or any substitute or substitutes, be valid and binding on the sd H. J. P., the coy by the liqr, and the tree coy, to all intents and purposes.

In witness, &c.

# CHAPTER LXXVI.

## RECEIVERS' ACCOUNTS.

A RECEIVER is required to deliver to the registrar, accounts in respect of every six months after his appointment. The account must show the aggregate amount of receipts and payments to date. If a receiver appointed out of Court fails to render proper accounts, a liquidator now has power to apply to the Court for an order directing the receiver to render proper accounts, and also to fix the remuneration of the receiver.

These provisions are contained in sects. 310 and 311 of the Act, which provide as follows:—

**Delivery to registrar of accounts of receivers and managers.**

**310.**—(1) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument shall, within one month, or such longer period as the registrar of companies may allow, after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months and within one month after he ceases to act as receiver or manager, deliver to the registrar of companies for registration an abstract in the prescribed form showing his receipts and his payments during that period of six months, or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.

(2) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding five pounds for every day during which the default continues.

**Enforcement of duty of receiver to make returns, &c.**

**311.**—(1) If

(a) any receiver of the property of a company, who has made default in filing, delivering or making any return, account or other document or in giving any notice, which a receiver is by law required to file, deliver, make or give, fails to make good the default within fourteen days after the service on him of a notice requiring him to do so; or

(b) any receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, has, after being required at any time by the liquidator of the company so to do, failed to render proper accounts of his receipts and payments and to pay over to the liquidator the amount properly payable to him;

the court may, on an application made for the purpose, make an order directing the receiver or manager, as the case may be, to make good the default within such time as may be specified in the order.

(2) In the case of any such default as is mentioned in paragraph (a) of the last preceding subsection an application for the purposes of this section may be

made by any member or creditor of the company or by the registrar of companies, and the order may provide that all costs of an incidental to the application shall be borne by the receiver, and in the case of any such default as is mentioned in paragraph (b) of that subsection the application shall be made by the liquidator.

(3) Nothing in this section shall be taken to prejudice the operation of any enactments imposing penalties on receivers in respect of such default as is mentioned in paragraph (a) of subsection (1) of this section.

The following rules of R. S. C., Ord. L., also apply:—

Fixing days for receivers to leave and pass their accounts and pay in balances.

**Ord. L. r. 18.**—When a receiver is appointed with a direction that he shall pass accounts, the Court or judge shall fix the days upon which he shall (annually or at longer or shorter periods) leave and pass such accounts, and also the days upon which he shall pay the balances appearing due on the accounts so left, or such part thereof as shall be certified as proper to be paid by him. And with respect to any such receiver as shall neglect to leave and pass his accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom any such receiver is to account may from time to time, when his subsequent accounts are produced to be examined and passed, disallow the salary therein claimed by such receiver, and may also, if he shall think fit, charge him with interest at the rate of 5*l.* per cent. per annum upon the balances so neglected to be paid by him during the time the same shall appear to have remained in the hands of any such receiver.

Neglect of receiver.

Interest on unpaid balances may be enforced though the receiver has been discharged. *Harrison* v. *Boydell*, 6 Sim. 211; *Re Edwards*, 31 L. T. Ir. 242. A receiver is liable for loss where he has knowingly placed the money in improper hands. *Knight* v. *Lord Plymouth*, 3 Atk. 480.

Form of receivers' accounts.

**R. 19.**—Receivers' accounts shall be in the Form No. 14 in Appendix L, with such variations as circumstances may require.

See Form 482, *infra*.

Leaving account in chambers.

**R. 20.**—Every receiver shall leave in the chambers of the judge to whom the cause or matter is assigned his account, together with an affidavit verifying the same in the Form No. 22 in Appendix L, with such variations as circumstances may require. An appointment shall thereupon be obtained by the plaintiff or person having the conduct of the cause for the purpose of passing such account.

Consequences of default by receiver.

**R. 21.**—In case of any receiver failing to leave any account or affidavit, or to pass such account, or to make any payment, or otherwise, the receiver or the parties, or any of them, may be required to attend at chambers to show cause why such account or affidavit has not been left, or such account passed, or such payment made, or any other proper proceeding taken, and thereupon such directions as shall be proper may be given at chambers or by adjournment into Court, including the discharge of any receiver and appointment of another, and payment of costs.

A similar rule applies in County Courts, C. C. R. 1903, Ord. XIII. r. 12.

Certificate of receiver's account.

**R. 22.**—A certificate of the master, stating the result of a receiver's account shall from time to time be taken.

As to paying receivers' balances into Court, see Supreme Court Funds Rules, 1927, Ann. Pr., 1938, Part III., p. 1965 *et seq.*

The order appointing a receiver almost always gives directions as to bringing in his accounts and payment into Court of the balances certified to be due from him.

Where he is appointed out and out and directed to give security, the order usually directs that he do, "on such days as shall be fixed by the Master's (or registrar's) certificate approving such security, leave in the chambers of the judge (or of the said registrar) his accounts as receiver (and manager) and do, within fourteen days after the date of the Master's (or registrar's) certificate allowing such accounts pay the balances to be certified as due from him as the judge shall direct." And where he is appointed "upon his giving security," a similar order as to accounts and payments is made. Sometimes the form is shorter, *e.g.*, "pass his accounts and pay the balances to be certified as due from him as the judge shall direct." Where, however, an order is made appointing a receiver who has already given security, the order usually fixes the days for bringing in his accounts, *e.g.*, "do on the —— day of —— next, and on each succeeding —— day of —— and —— day of ——, leave his account." The general practice is to order half-yearly accounts, but sometimes a yearly account is ordered. See Form 273.

For Master's or registrar's certificate of security given and fixing the days for leaving the accounts, see Form 248.

The omission to leave his account as ordered is a contempt of Court, but the usual plan is to apply under Ord. L. r. 21, *supra*.

The account having been brought in, an appointment should be obtained to proceed thereon. At the time thus fixed the receiver and his solicitor should attend and vouch the account. The plaintiff and other parties can also attend. Sureties are not entitled to attend without an order giving them liberty and then only at their own expense. *Re Birmingham Brewing Co.*, 31 W. R. 415.

In due course the Master's or registrar's certificate of allowance should be obtained.

When the receiver finds that the accounts will not be ready in time he can apply by summons "that he may have —— days' further time to leave his account as such receiver, pursuant to the order in the above matter dated, &c.," and if his affidavit shows ground for extending the time an order will be made accordingly.

If the receiver makes default, the plaintiff or any other party to the action can take out a summons under Ord. L. r. 21, *supra*.

See further, Dan. Ch. Pr., 8th ed., pp. 1492—1498.

(*Title, &c.*)

**Form 482.**

**Receiver's account. (Ord. L. r. 19.)**

The first account of J. H., receiver and manager appointed in this action, of all the ppty and assets of the dft coy comprised in or subject to the securities or charges created by the dft coy to the plt and the other debenture holders, and also to manage and work the business of the sd coy from the —— day of —— to the —— day of —— inclusive.

| Receipts. | | | | | Payments and Allowances. | | | | |
|---|---|---|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) |
| Number of Item. | Date when received. | Names of Persons from whom received. | On what Account received. | Amount received. | Number of Item. | Date when paid or allowed. | Names of Persons paid or allowed. | For what purposes paid or allowed. | Amount paid or allowed. |
| | | | | | | | | | |

The entries will be concise, *e.g.*, in the receipts account "goods sold and delivered," and in the payments account, "wages account," "carriage account," "coal account," "ingredients," "salary account," and so forth.

See R. S. C., Appendix L, No. 14.

No. of coy ——.

**Form 483.**

**Abstract of receipts and payments. (Sect. 310.)**

The Cos Act, 1929. [No registration fee payable.]

Receiver or Manager's Abstract of Receipts and Payments.

*Pursuant to sect.* 310.

Name of coy ——.

Name and address of receiver or manager. ——. ——.

Date and description of security containing the powers under which receiver or manager is appointed. ——.

Period covered by abstract. From ——. To ——.

Presented by ——.

[Table.

**Form 483.**

| ABSTRACT. | | ABSTRACT. | |
|---|---|---|---|
| Receipts. | | Payments. | |
| | £ s. d. | | £ s. d. |
| Brought forward ... | | Brought forward ... | |
| | | The receipts and payments must severally be added up at the foot of each sheet and the totals carried forward from one abstract to another without any intermediate balance so that the gross totals shall represent the total amounts received and paid by the receiver or manager since the date of appointment. | |
| Carried forward ... | | Carried forward ... | |

Dated the —— day of ——, 19—.

(Signature) ——.

**Form 484.**

**Affidavit as to receiver's account.**

(*Title.*)

I, ——, of ——, the receiver and manager appointed in the above action, 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 afft, and purporting to be my account of the moneys received and pd by me as receiver and manager of the ppty of the dft coy comprised in or subject to the debentures issued by the dft coy to the plt and the other debenture holders, 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 sd coy's business during the period afsd, except what is included as received in my former account [or accounts] sworn by me.

2. The several sums of money mentd in the sd account, hby verified to have been pd and allowed, have been actually and truly so pd and allowed for the several purposes in the sd account mentd.

3. The sd account is just and true in all and every the items and parlars therein contained, according to the best of my knowledge, opinion and belief.

[3A. The books now produced and shown to me, marked ——, are resply the voucher card book, the petty cash book, the petty cash

book—City, the wages book, the labour book, the wages and labour book, the cash book. **Form 484.**

3B. All the sd books were used by me in the management and keeping of the accounts at the factory afsd, and contained parlars of payments made by me and included in my sd account.]

4. The —— Society, Limtd, my sureties named in the bond dated the —— day of ——, is still carrying on business, and has not become insolvent, and no peton is pending for its winding-up [*or* the sd A. and B., the sureties named, &c., are both alive and neither of them has become bankrupt or insolvent].

Sometimes a separate affidavit as to wages and salaries is made by the receiver and manager as follows:—

**Form 485.**

Affidavit by receiver and manager as to payments for wages, &c.

1. The bundle of wages and salaries sheets now produced and shown to me, marked ——, contains a just and true account of all the payments made in respect of wages and salaries in the carrying on of the dft coy's business by me between the —— day of —— and the —— day of ——.

2. The several sums of money mentd in the sd wages and salaries sheets, hby verified to have been pd and allowed, have been actually and truly so pd and allowed as mentd in such sheets.

3. The sd bundle of wages and salaries sheets are just and true in all and every the items and parlars therein contained according to the best of my knowledge and belief, and it was necessary and proper, in order that the sd business might be properly carried on, that the several persons mentd in such wages and salary sheets should be employed. I employed no one whose services could be dispensed with.

**Form 486.**

Affidavit where agent abroad and vouchers in foreign language.

1. The account marked, &c., contains a true account of, &c. (*as in Form* 484).

2. The several sums, &c.

3. The sd account is just, &c.

4. The L. G. Society, Limtd, &c.

5. Shortly after our appointment as receivers and managers on the 28th October, 1892, we appointed J. F., of C., in the province of ——, Spain, to be our manager and agent in Spain at a salary of 40*l.* per month, and he has continued to act in that capacity ever since. During his engagement as such manager and agent as afsd, the sd J. F. has duly and regularly delivered to us monthly accounts of the working expenses and salaries pd by him in connection with the maintenance and management of the railway in Spain, of which we are receivers and managers.

**Form 486.**

6. By an order dated the 5th May, 1894, the appointment of the sd J. F. as our agent and manager of the sd railway in Spain was confirmed by the Ct, and such appointment has been from time to time continued with the sanction of the Ct, and finally, by an order dated the 19th May, 1896, the Ct sanctioned the employment of the sd J. F. being continued for a further term of three months from the 1st May, 1896, at a salary of 30*l*. per month.

7. Since his appointment up to and including the 31st July, 1896, the sd J. F. acted as our agent and manager, and managed the line, and the second pt of the account G. G. H. 4, hnbefore mentd, is the account of the sd J. F. for that period. The sd account has been prepared from monthly sheets sent to us from time to time by the sd J. F., and the items of receipts numbered 1 to 15 inclusive in the sd second pt of the sd account represent the amounts received by the sd J. F. as manager, being the amounts remitted by us to him from London and the amounts received by him from all sources in Spain. The items of payment numbered 1 to 163, both inclusive, of the sd second pt of the sd account represents the amounts of payments made by him for working expenses and other necessary expenditure during the same period.

8. To the best of our knowledge, information and belief, the sd second pt of the sd account contains a true account of all and every sum of money received by the sd J. F as such agent and manager as afsd for the period before mentd, and the several sums of money mentd in the second pt of the sd account to have been pd and allowed for the several purposes in the sd account mentd were duly pd and allowed for the several purposes in the sd account mentd, and we believe the sd second pt of the sd account to be just and true in all and every the items and parlars therein mentd.

9. We have carefully examined and checked the accounts as received by us from the sd J. F. from time to time as afsd so far as the documents in our possession as receivers and managers enabled us to do so.

10. The accounts of the sd J. F. are kept in the currency of Spain, and in the sd second pt of the sd schedule the amounts received and pd are shown in such currency.

11. We well understand and are conversant with the Spanish language, and say that the bundle of documents now produced and shown to us marked ——, which are for the most pt written in Spanish, are the vouchers for the items of payments numbered 1 to 163 contained in the sd account and such vouchers are the proper vouchers for the sd items of payment contained in the sd account.

**Form 487.**
Affidavit of sureties as to means.

We, A. B., of ——, and W. H. C., of ——, sureties that J. H., of ——, the receiver appointed in the above action by order dated the 6th August, 1897, will duly account for all moneys which he shall receive on account of all the ppty and assets of the dft coy comprised in or subject to the securities or charges created by the dft coy, the plt, and the other debenture holders, and also to manage and work the business of the sd coy, severally make oath and say as follows:—

I, the sd A. B., for myself say:—(1) I am, after paying all my just debts and liabilities, well and truly worth the sum of 10,000*l.* and upwards; and I, the sd W. H. C., for myself, say:—I am, after paying all my just debts and liabilities, well and truly worth the sum of 10,000*l.* and upwards.

Sworn, &c.

Upon passing the accounts evidence is required that the sureties are solvent.

For notice of appointment to proceed on account, see D. C. F., 7th ed., 1341.

**Form 488.**
Special order as to vouching foreign expenditure and receipts.

Upon the applicon by summons dated the 6th day of February, 1889, of the plts, and upon hearing the solors for the applicants and for the dfts, and upon reading the three several orders, dated resply the 5th May, 1898, the 20th June, 1898, and the 1st July, 1898, and the afft of E. H., filed the 8th February, 1899, It is ordered that the monthly cash statements received by the sd E. H., the receiver and manager appointed in this action, from the business in Ontario, verified by the afft of the sd receiver and manager, be accepted as sufficient accounts of the receipts and payments by the attorney and agent of the receiver and manager in connection with the business in Ontario and Sydney, New South Wales, such monthly statements to be filed with the receiver's account of his receipts and payments in this action. And it is ordered that the costs of this applicon be costs in this action. *Re The Bell Organ and Piano Co., Ltd., The Consolidated Trust, Ltd.* v. *The Bell, &c. Co., Ltd.*, Wright, J., 8th March, 1899.

Occasionally special directions as to vouching are requested, as in the above case.

**Form 489.**
Master's or registrar's certificate of passing receiver's and manager's first account.

I hby certify that, in pursuance of the order made in this action, dated the —— day of ——, and the certificate dated the —— day of ——, J. H., of ——, the person appointed receiver on behalf of the plt and first and second debenture holders of the dft coy of all the ppty and assets of the sd coy comprised in or subject to the securities or charges created by the dft coy to the plt and the sd debenture holders, and also to manage and work the business of the

**Form 489.** sd coy, has left at my chambers his first account as such receiver and manager of his receipts and payments and allowances in respect and out of the sd ppty and assets and in respect of the management of the sd business from the time of his appointment, the —— day of —— to the —— day of ——, both days inclusive, and such account has been passed and allowed. The sd receipts amount altogether to the sum of 14,328*l.*, and the sd payments and allowances amount to the sum of 14,554*l.*, and there is due to the sd receiver on the balance of his sd first account the sum of 225*l.*

Parlars of the sd receipts and payments, except as hnftr mentd, appear in the account marked "A," verified by the afft of the sd receiver, filed the —— day of ——, and such account is to be filed with this certificate.

Except that of the items of disbursement in the sd account I have disallowed those numbered 248 and 505, and I have deducted from the item numbered 17 the sum of 1*l.* 6*s.* 5*d.*, and from the item numbered 22 the sum of 8*l.* 10*s.*, and in addition to disbursements appearing in such account, the sd receiver and manager has pd or retained and been allowed the sum of 116*l.* 9*s.* for his remuneration during the period covered by the sd account, and 57*l.* 14*s.* 8*d.* his ascertained costs of passing his sd account.

The further evidence produced consists of the afft of the sd J. H., filed the 15th June, 1898, and the several exhibits therein referred to.

Dated the —— day of ——, 1898.

H. J. Hood, Registrar of Cos Winding-up.

**Form 490.**

Certificate of passing of [tenth] account of receiver.

I hby certify that in pursuance of the order made in this action dated the 21st June, 1930, and the certificate filed the 14th July, 1930, S. W. T., of ——, in the city of London, the person appointed receiver and manager on behalf of the plt and all other the holders of the mortgage debentures of the dft coy of the undertaking of the dft coy and all its ppty (except uncalled capital) comprised in or subject to the security and charge created by the debentures issued by the dft coy to the plt and the other debenture holders, but who was not to act as such manager after the 15th July, 1930, without the leave of the judge, which period was by order dated the 15th July, 1930, extended to the 15th October, 1930, has left in the chambers of the registrar, Cos Ct, his tenth account as such receiver of his receipts and payments and allowances in respect and out of the sd undertaking and ppty from the 21st September, 1932, to the 20th December, 1932 (both days inclusive), and such account has been passed and allowed. The sd receipts (including the sum of ——*l.*, the balance retained

by the sd receiver on the passing of his ninth account) amount altogether to the sum of ——*l.*, and after making the allowance for costs hnftr mentd there is due from the sd receiver on the balance of his sd tenth account the sum of (*copy in words*) ——*l.*, which sum of ——*l.* is to be retained by the sd receiver and accounted for by him on the passing of his next account. **Form 490.**

The parlars of the above receipts appear in the account marked "J" verified by the afft of the sd receiver filed the 16th January, 1933, and which account is to be filed with this certificate.

The item of disbursement in the sd account amounting to the sum of 3*l.* 7*s.* 6*d.* has been disallowed by me.

The sd receiver has pd or retained and been allowed the sum of ——*l.* for his ascertained costs of passing his sd tenth account.

The further evidence produced consists of the certificate of the passing of the sd receiver's ninth account filed the 21st October, 1932, and the certificate of the Accountant-General dated the 28th October, 1932, of the lodgment in Ct by the sd receiver of the sum of £100 on account of the balance found due from him on the passing of his sd ninth account.

Dated the —— day of January, 1933.

——, Registrar.

*Dominion Gramophone Records, Ltd.* (D. 1135 of 1930).

**Form 491.**

Registrar's certificate of passing receiver's first and final account and first account of new receiver.

I hby certify that in pursuance of the order made in this action dated the 28th day of June, 1932, and the certificate filed the 4th day of August, 1932, M. C. S., of ——, in the City of London, chartered accountant, the person by the sd order appointed receiver and manager on behalf of the plt of the ppty and assets of the dft coy (except uncalled capital) comprised in or subject to the securities and charge in favour of the plt created by the deed of security dated the ——, 19—, made between the dft coy, of the first pt, the plt of the second pt, and the Board of Trade, acting through the Export Credits Guarantee Department, of the third pt, and the debenture dated the ——, 19—, issued by the dft coy to the plt in the writ of summons in this acton mentd to act in place of Sir G. G., but who was not in any event to act as such manager after the 19th August, 1932, without leave of the judge, has left in the chambers of the Registrar, Cos Ct, (1) the first and final account of Sir G. G., the receiver and manager appointed in this action by order dated the 19th February, 1932, of the receipts and payments of the sd Sir G. G. in respect and out of the sd ppty and assets from the time of his appointment, the 19th February, 1932, to the date of his decease, the 26th June, 1932 (both days inclusive);

**Form 491.** and (2) the first account of the sd M. C. S., as the receiver and manager appointed by the sd order dated the 28th June, 1932, of his receipts and payments and allowances in respect and out of the sd ppty and assets from the time of his appointment, the 28th June, 1932, to the 19th August, 1932 (both days inclusive), and such accounts have been passed and allowed. The plt and the dft coy have attended by their respive solors.

The receipts in the sd first and final account of Sir G. G., deceased (including (a) the sum of ——*l.* borrowed by him from the plt by way of overdraft pursuant to the sd order dated the 19th February, 1932, and (b) the sum of ——*l.* received by the sd Sir G. G. on account of purchase-money on the sale of certain assets of the dft coy sanctioned by the order in this action dated the 19th August, 1932), amount altogether to the sum of ——*l.*, and the payments in such account amount to the sum of ——*l.*, and there is due from the estate of the sd Sir G. G., decd, on the balance of such first and final account the sum of ——*l.* (representing the proceeds of sale hnbefore referred to), which sum has been duly accounted for by the sd M. C. S., as hnftr appears.

The question of the remuneration of the sd Sir G. G., decd, is standing over.

The receipts in the sd first account of the sd M. C. S. (including (a) the sum of ——*l.*, borrowed by him from the plt by way of overdraft pursuant to the sd order dated the 19th February, 1932; and (b) the sd sum of ——*l.* found due from the estate of the sd Sir G. G. on the passing of his first and final account) amount altogether to the sum of ——*l.*

Pursuant to the order in this action dated the 5th October, 1932, the above-mentd sum of ——*l.* has been placed on deposit, free of interest, with the plt by the sd M. C. S. on the terms in the sd order mentd, and in the event of such sum of ——*l.*, or any pt thof, being taken off deposit by the sd M. C. S., he is to account for the same on the passing of his subsequent accounts.

The payments in the sd first account of the sd M. C. S. (including the allowance for costs hnftr mentd) amount to the sum of ——*l.*

After taking into consideration the deposit by the sd M. C. S. with the plt of the sd sum of ——*l.*, there is due to the sd M. C. S. on the balance of his sd first account the sum of [*copy in words*] ——*l.*

The parlars of the above receipts and payments appear in the accounts fastened together and marked "A," verified by the affidavit of the sd M. C. S. filed the 31st October, 1932, and which accounts are to be filed with the certificate.

In addition to the disbursements appearing in his sd first account, the sd M. C. S. has been allowed the sum of ——*l.* for the ascertained

costs of the giving of security by the sd Sir G. G. and by the sd M. C. S. and the passing of the sd accounts. **Form 491.**

The evidence produced consists of the five several orders dated resply the ——, 19—, the ——, 19—, the ——, 19—, the ——, 19—, and the ——, 19—, the judgment dated the 23rd March, 1932, the two several affts of M. C. S. filed resply the —— and the ——, 19—, and the exhibits in the sd affts resply referred to.

Dated the 2nd day of December, 1932.

——, Registrar.

*Agricultural and General Engineers, Ltd.* (A. 537 of 1932).

Sometimes, *e.g.*, where it is proposed to discharge the receiver without passing any further account, as in Form 513, it is necessary to bring the accounts up to date by an affidavit as follows:—

**Form 492.**

Affidavit of receiver's receipts since last account.

I, ——, the receiver, make oath, &c.

1. From the 17th January, 1899, the date up to which my accounts as receiver have been passed and allowed, as appears by the certificate of the registrar dated the 2nd May, 1899, to the time of swearing this my afft, I have as such receiver afsd received the several sums of money set out in the first schedule hto, and I have pd the sums set out in the second schedule hto.

2. Save as is mentd in the sd first and second schedules hto, I have not, nor has any other person or persons by my order or to my knowledge or belief, for my use since the sd 17th January, 1899, received or pd any sum or sums of money as such receiver as afsd.

3. To the best of my knowledge and belief there are no further sums to be received or pd by me as such receiver as afsd, nor any further duties to be performed by me in that capacity.

(*Schedules follow.*)

First: showing number of item, date when received, name of person from whom received, on what account received, amount received. Second schedule: number of item, date when pd, person to whom pd, for what purpose, amount pd. As in Form 482.

**Form 493.**

Another when nothing received.

I, ——, of ——, the receiver and manager appointed in the above action, make oath and say as follows:—

1. Since the —— of ——, being the date down to which I have brought my first and final account rendered in this action, I have neither received nor pd anything as such receiver and manager: nor is there any payment due to or from me as such receiver and manager, nor to my knowledge and belief has any person or persons since the

**Form 493.** sd —— of —— either received or made any payment for my use or on my account in respect of the sd action.

2. The whole of the moneys received by me on account of the above receivership are included in the sum of 944*l.* 1*s.* 5*d.* pd by me into Ct to the credit of the above action on the —— of ——.

**Form 494.** Summons for liberty to attend taking of deceased receiver's account.

Let, &c. (*Form* 171 *or* 172), on the pt of the dft F. R., that he may be at liberty at the expense of the estate to attend on behalf of himself and other holders of second mortgage debentures on the taking of the account of the late receiver, Mr. M. J., and to take a copy of such account, and that the costs of this applicon may be costs in the action.

**Form 495.** Order that receiver do pass final account and be discharged.

Upon the applicon by summons dated the 17th November, 1910, of the plt, and upon hearing the solors for the applicants and for the dfts, and upon reading the order dated the 8th February, 1909, appointing receiver, the order dated the 21st January, 1910, two certificates of the Registrar [Cos Ct] dated resply the 25th February, 1909, and the 2nd July, 1910, and the Paymaster-General's certificate of lodgment dated the 11th July, 1910, It is ordered that K., the receiver appointed in this action by the sd order dated the 8th February, 1909, be discharged. And it is ordered that he do pass his final account and lodge the balance which shall be certified to be due by him in Ct as directed in the lodgment schedule hto, and upon such lodgment being made, it is ordered that the bond dated the 17th February, 1909, entered into by the sd K., together with the M. G. Society, Limtd, and which sd bond was, by the order dated the 21st January, 1910, directed to be transferred to the Guardian Assurance Coy, Limtd, and the recognizance also dated the 17th February, 1909, entered into by the sd K., be resply vacated and discharged. *Gunn* v. *The Piccadilly Hotel, Ltd.*, Swinfen Eady, J., 8th March, 1911.

# CHAPTER LXXVII.

## RECEIVER'S INTERIM PAYMENTS INTO COURT.

THE order appointing a receiver provides for payment of his balances into Court at fixed periods (see Ann. Pr., notes to Ord. L. r. 18); but sometimes the receiver finds that he has a large sum in hand which is not required for any of the purposes of the receivership, and in such case he may apply for and obtain an order to pay into Court as below.

**Form 496.**

Summons for liberty for receiver to pay into Court money in hand.

Let, &c. Upon the hearing of an applicon on the pt of the plt that the receiver may be at liberty to pay into Ct to the credit of this action the sum of 2,000*l.* on account of any balance due from him on passing his first account.

The payment can ordinarily be made on a request under the Supreme Court Funds Rules, 1915, r. 30, without the expense of an order. Dan. Ch. Pr., 8th ed. p. 1493.

**Form 497.**

Order giving receiver liberty to pay cash in hand into Court.

Upon the applicon of the above-named plt by summons dated the 10th February, 1897, and upon hearing the solors for the applicant and for the dfts, and upon reading the order dated the 21st May, 1896, appointing J. P. receiver and manager in this action.

And the sd J. P., the applicant's solor, admitting that he has upwards of 2,600*l.* in his hands as such receiver and manager afsd, It is ordered that the sd J. P. as such receiver and manager as afsd be at liberty to make the lodgment in Ct as directed in the schedule hto.

SCHEDULE.

| | | |
|---|---|---|
| Amount admitted by Receiver and Manager to be in his hands. | — | — |
| Invest and accumulate in New Consols ..... | J. P., receiver, and address | 2,600*l.* |

Hood, Reg., 17th February, 1897.

Compare forms in Appendix to Supreme Court Funds Rules, Ann. Pr. 1926.

**Form 498.**

Order on receiver to pay in certified balance.

Upon the applicon of the plt, &c., It is ordered that the sd R., of ——, in the City of London, accountant, do within seven days after the service of this order upon him pay into Ct to the credit of this action, as directed in the schedule hto, the sum of 400*l.*, being the total of the amounts certified to be due from him as receiver and manager of the undertaking and business of the dft coy prior to the 7th April, 1903, and as receiver and manager of the undertaking and ppty of the dft coy from the 7th April, 1903, to the 13th July, 1903. And it is ordered that the sd R. do pay to the plt, the sd T., his costs of the sd applicon, such costs to be taxed.

LODGMENT SCHEDULE.

**Form 499.**

Order giving receiver liberty to pay money into Court received from mortgagors.

On the applicon of the plt, &c., It is ordered that M., the receiver and manager appointed by the sd order, dated, &c., be at liberty to lodge in Ct as directed in the lodgment schedule hto the sum of 430*l.* principal and interest to the 27th February, 1898, received by him on the 18th October, 1897, from H. under the two mortgages dated resply, &c., of the —— Hotel, at ——, in the county of ——, and referred to in the afft of M. [Lodgment schedule contained in the first column. Cash received from H. for principal and interest in respect of mortgages dated, &c., resply.] *Agg-Gardner* v. *Gresley, &c. Co.*, Vaughan Williams, J., 2nd November, 1897.

**Form 500.**

Order to pay money into Court as security for costs.

Upon the applicon by summons dated the 7th October, 1897, of the above-named dft coy, and upon hearing the solors for the dfts and for the plt, and upon reading the order dated the 6th August, 1897, It is ordered that the receiver and manager appointed herein do pay into Ct to the credit of the action *Meaby & Coy, Limtd* v. *Triticine, &c.*, security for costs, the sum of 150*l.*, the sd dft coy having, by an order made in this action and dated the 29th September, 1897, been directed to give security for the costs of T., Limtd, to the extent of 150*l.*, and it is ordered that the costs of the dfts of this action be taxed, and it is ordered that the plt C. do pay such costs when taxed to the dfts Meaby & Coy, Limtd, and be at liberty to add such costs to his own costs. Hood, Reg., 11th October, 1897.

**Form 501.**

Declaration of receiver's lien on funds in Court for balance of account and costs.

Upon motion this day unto this Ct by counsel for E. and R., the receivers and managers appointed in this action, by way of appeal from the order of Mr. Justice V. Williams, dated the 13th December, 1894, and upon hearing counsel, &c. for the plts and the dfts, and C. and others and H. & Coy in the sd order named, who were with T. W. F. & Coy, the plts in the action of *Shaw* v. *The School Board of*

Form 501.

*London* (1894), S. 1698, and are hereafter called the plts in the sd action, the costs of which action and the interpleader summons taken out by the dfts thto were, by the order dated the 8th June, 1894, directed to be dealt with in this action, and upon reading the sd orders this Ct doth discharge the sd order dated the 13th December, 1894, and doth declare that the applicants, as such receivers and managers as afsd, are entld to a first charge upon the funds in Ct to the credit of this action, and upon all moneys, funds and ppties of the dft coy comprised in or subject to any of the debentures issued by the dft coy for the due payment of the balance which shall be found due to them upon taking their accounts as such receivers and managers, and of the costs properly incurred by them as hnftr mentd which they shall not recover from the plts in the sd action, and also for effectuating and securing to the applicants an indemnity against all liability which they shall have properly incurred in acting as such managers as afsd upon contracts entered into and orders given by them or otherwise, and the applicants are to be at liberty to apply as to raising such balance and costs and providing for such indemnity out of the funds in Ct or to be brought into Ct, or any other moneys, funds and ppties subject to such charge, and it is ordered that the sd plts in the sd action do pay to the applicants their costs incurred in the sd action, including the costs of the sd order of the 8th June, 1894, and also their costs of the sd order dated, &c., and of and occasioned by this appeal, and to the plt W. Strapp his costs of the interpleader and of the sd order dated the 8th June, 1894, all such costs to be taxed by the taxing master, and it is ordered that the plt in the sd action, on or before —— May, 1895, pay into Ct as directed in the schedule hto the sum of 34*l.*, admitted to be the taxed costs of the dfts the School Board, deducted by the School Board from the sum pd into Ct by them. *Strapp* v. *Bull*, Court of Appeal, 12th March, 1895.

## CHAPTER LXXVIII.

### REMUNERATION OF RECEIVER AND MANAGER.

IN the absence of any order to the contrary a receiver is entitled to remuneration. R. S. C. Ord. L. r. 16, provides as follows:—

> Where an order is made directing a receiver to be appointed . . . the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary or allowance.

The remuneration is sometimes fixed when the first account is brought in and passed, but very commonly it is not fixed until later on. There is no definite rule as to the amount; it may be a percentage, say 5 per cent., on receipts; and sometimes the question of remuneration stands over for several accounts until substantial amounts have been got in. The scale allowed to liquidators is no guide as to the remuneration to be allowed to a receiver and manager. Per Stirling, J., in *Prior* v. *Bagster*, 57 L. T. 760. Sometimes the receiver gets a sum calculated with reference to the time employed. Occasionally he is appointed at a fixed salary. See Form 241. Even in the case where a trustee is appointed receiver, the Court has jurisdiction to allow him remuneration. *Re Bignell*, (1892) 1 Ch. 59. But usually a trustee is not allowed remuneration save so far as the trust deed provides for it.

Where the receiver has been put to any extraordinary trouble or expense, he may be entitled to allowances beyond his fixed salary. *Potts* v. *Leighton*, 15 Ves. 273; *Harris* v. *Sleep*, (1897) 2 Ch. 80; *Courand* v. *Hanmer*, 9 Beav. 3.

If one of the parties to the action is appointed, he is usually required to act without salary. *Hoffman* v. *Duncan*, 18 Jur. 69; *Powys* v. *Blagrave*, *ibid.* 462.

The receiver's costs and remuneration are paid in priority to the plaintiff's costs, and, where there is a trust deed, in priority to the trustee's costs. They also rank in priority to advances made by debenture holders (as distinguished from advances by strangers) and borrowed by the receiver under liberty to do so (*Glasdir Copper Mines, Ltd.*, (1906) 1 Ch. 365; *Strapp* v. *Bull*, (1895) 2 Ch. 1), but after the expense of realization, including costs of an abortive

sale. *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; *New Zealand Midland Ry. Co.*, (1901) 2 Ch. 357.

The receipt of remuneration for acting as receiver and manager does not disentitle the recipient to receive his remuneration until winding-up as a director of the company. *South Western of Venezuela (Barqui-Simeto) Ry. Co.*, (1902) 1 Ch. 701. As to its effect upon the remuneration of trustees under a debenture trust deed, see p. 88, and the cases there cited.

As to the remuneration of a receiver in the County Court, see C. C. R. 1903 (Ord. XIII. rr. 3, 11).

When the company is in winding-up, and a receiver has been appointed under a power in the debentures, there is no jurisdiction to fix the remuneration in the winding-up. *Re Vimbos*, (1900) 1 Ch. 470.

Where the debentures do not clearly provide that the receiver is to be the agent of the company, he may be held to be the agent of the debenture holders who appointed him, and if so, his remuneration is payable by the debenture holders. *Deyes* v. *Wood*, (1911) 1 K. B. 806, and *supra*, pp. 282, 471; *Bissell* v. *Ariel Motors*, 27 T. L. R. 73.

A receiver and manager cannot claim any remuneration until he has made good any sum for which he is accountable in respect of the security. *British Power Traction Co., Halifax Bank* v. *The Company*, (1910) 2 Ch. 470.

The receiver's remuneration ranks in priority to the claims of preferential creditors to be paid out of assets subject to a floating charge. *Re Glyncorrwg Colliery Co.*, (1926) Ch. 951.

See further, Dan. Ch. Pr., 8th ed., p. 1485.

For examples of allowance in respect of remuneration, see *supra*, Forms 489 and 490, and the following, taken from various certificates:—

**Form 502.** Extract from certificate.

*Certificate of receiver and manager's first account, showing total receipts of* 7,436*l.*, *and total payments of* 7,103*l.*, *concluded*, "and in addition to the disbursements appearing in such account, the sd receiver has pd or retained and been allowed 41*l.* 3*s.* 6*d.* for his ascertained costs for passing his sd account, and 371*l.* 16*s.* 7*d.* for his remuneration as such receiver and manager up to and including the period covered by his sd account."

**Form 503.** Another.

*Certificate of passing receiver's second account, receipts* 3,000*l. odd, payments* 2,500*l. odd, concluding*, "except that in addition to the disbursements appearing in such account the sd receiver has pd or

**Form 503.** retained and been allowed 150*l.* further on account generally of his remuneration as receiver and manager as afsd, and 14*l.* 9*s.* 4*d.* for his ascertained costs of passing his sd second account."

**Form 504.** Another. *Certificate in* 1902 *of receiver's account showing total receipts* 20,713*l. odd, and total payments* 20,048*l., concluded,* "except that in addition to the disbursements appearing in such account the sd receiver has pd or retained and been allowed the sum of 540*l.*, being the balance of his remuneration as such receiver to the close of the receivership, and the further sum of 21*l.* 16*s.* 3*d.* for his costs of passing this account."

When the remuneration of the receiver and manager is to depend on the time occupied, a time account is required, and the following is an example:—

**Form 505.** Time account. (*Title.*)

Time account of A. B. in the action ——, receiver and manager.

Numerous attendances on Mr. M. J., late receiver and manager, taking over matter from him and obtaining information.

Attending almost daily at office at which the business was carried on; consulting with the —— as to the conduct of the various businesses; receiving cash and paying into bank; drawing cheques for purchase, rent, rates, wages and general expenses, and paying the same.

The N. Wharf, Millwall, May 22nd to July 28th, 1896, &c., &c.

Attending occasionally M. Wharf, ——.

Making arrangements for sale by auction of stock, plant, &c., at —— Wharf, Millwall.

Numerous interviews with Messrs. —— thereon, net proceeds of sale amounting to ——*l.*

The like at O. Wharf, ——, the net proceeds of sale amounting to ——*l.*

Negotiating with H. for sale to him of, &c., resulting in the purchase by him for ——*l.*

Negotiating for an extension of the leases, &c.

Making arrangements for the disposal of the stock at, &c.

Making lists of the book debts of the various businesses. Such debts number upwards of 1,100.

Making out various accounts; making applicon for debts; lengthy correspondence thereon, and registering the same; calling upon various debtors, and interviews with the same. Instructing solors to sue in various cases.

**Form 505.**

Numerous attendances on solors on various matters, and frequent intercourse with Messrs. ——.

| For time occupied: | £ | s. | d. |
|---|---|---|---|
| Self and partner, 438 hours, equal to 62⅔ days of 7 hours each at 3 guineas ... ... ... ... | 197 | 2 | 0 |
| Senior clerks, 905 hours=129⅔ days of 7 hours, at 1½ guineas ... ... ... ... ... ... | 203 | 12 | 6 |
| Junior clerks, 1,057 hours=151 days of 7 hours, at 1 guinea ... ... ... ... ... ... | 158 | 11 | 0 |
| | £559 | 5 | 6 |

**Form 506.**

*A. B.* v. *The —— Wharf, Limtd.*

Another.

Memdum of work done by the receiver and manager during the year ending the 31st March, 1899:—

Time occupied in connection with proceedings instituted against Mr. A. B. for recovery of the amount due from him under the minutes of arrangement dated the 20th March, 1896; in preparation of lists of claims pd for deficiencies in stocks, accounts, and sales of surplus stock, and detailed schedules accounting for upwards of 10,000 tons of stock in warehouse on the 31st March, 1896; attendances upon counsel and the Ct.

Also engaged in connection with various proceedings instituted by and against the wharf, correspondence and interviews with the solors and The —— Wharf, Limtd, thereon as to accidents to labourers and others, &c.

Interviews with Mr. J., representing The —— Wharf, Limtd, as to the management of the wharf, the introduction of new business, expenditure on improvements and repairs to the ppty, watching this expenditure and supervising the accounts of the wharf prepared half-yearly by The —— Wharf, Limtd, on filing statements from monthly returns and working and earnings.

Preparing quarterly cash accounts showing receipts amounting to 27,543*l.* 18*s.* 11*d.*, and vouching the accounts in chambers, and clerk's attendances before the registrar in connection therewith.

General correspondence, &c.

[*Signature.*]
Receiver and Manager.

Address and date.

**Form 507.**

**Statements of receivers and managers with a view to determining remuneration.**

The receivers and managers crave leave to refer to the previous statements, dated resply —— and ——, and made by them on the two occasions of their remuneration in this action being fixed by the Ct.

During the seven months from the 1st January to the 31st July, the concluding period of their receivership, the receivers, in addition to their ordinary duties as managers of the railway, have been engaged in raising funds for the prosecution of proceedings in the winding-up and making official arrangements for carrying out the scheme of reconstruction formulated by them and sanctioned by the Ct, and which will be completed immediately the receivers' accounts have been passed and their remuneration fixed. In the course of such arrangements the receivers and managers have negotiated for the surrender to the coy by the holders of a large number of ordinary shares in order to reduce the capital charge thereby, and as the result of such negotiations, 64,580*l.* nominal value of shares have been surrender to the coy.

In April last both receivers and managers went to Spain to inspect the line, and during their stay effected a re-arrangement of the contract with the —— Railway Coy for the working of the coy's line, whereby *inter alia* the fixed deposit of this coy was reduced from 8,000 to 2,000 pesetas, and the charge of working the line was reduced by between 8,000 pesetas and 9,000 pesetas per annum.

The receivers and managers carefully inspected the permanent way, and are of opinion that its condition now compares favourably with that of any line in Spain.

The future of the coy's line depends in a large measure on the development of the grain traffic. The receivers and managers whilst in Spain, and since their return, have devoted special attention to the re-arrangement of the tariff in connection with the neighbouring railway, the —— Coy.

The profits of this coy being closely bound up with those of the transversal line from Z. to S., the receivers and managers inspected that line, which was then in course of construction and has since been opened for traffic, with a view to a possible future combination between or fusion of the two companies.

Since their return to England the receivers and managers have been engaged in arranging for the renewal of the concession, and the freeing it from conditions which a section of the Cortes sought to impose.

The receivers and managers have also been occupied in endeavouring to settle the claim of the Spanish Government for inspection charges, and believe that they have succeeded in effecting a saving to the coy under this head of 19,750 pesetas.

**Form 507.**

Negotiations have also been on foot for effecting a settlement of the coy's claim for a subvention from the town of N., and a memorial has now been presented to the director of Public Works on the subject. If the matter goes through on the lines indicated by the receivers and managers, the coy will receive a sum of 1,000,000 pesetas, to be expended on the completion of the line, which is essential to the coy.

The above matters have necessitated a large amount of attention and correspondence. The receivers and managers beg to point out that they provide both office and staff without charge, and venture to submit that, having been appointed for special reasons—namely, their knowledge of the Spanish language, the working and management of Spanish railways, and of the coy's line in particular—they are entld to a continuance of their remuneration for this, the concluding period of their office, at the same rate at which it has hitherto been allowed, and which was agreed upon when they accepted office, namely, at the rate of ——*l.* per annum.

The receivers and managers pd the sum of 15*l.* to the London Guarantee, &c., Limtd, as premium on their security bond.

Cases sometimes occur in which the receiver has to apply for payment of his remuneration out of the funds in Court, thus:—

**Form 508.**

Summons for apyment of receiver's remuneration.

Let, &c., on the hearing of an applicon on the pt of the plts that the sum of 1,400*l.*, the amount fixed as remuneration, be pd to the receiver out of the funds in Ct to the credit of this action.

**Form 509.**

Order for payment of remuneration out of assets.

Upon the applicon of the plts, it is ordered that the sd A., the receiver and manager herein, do pay out of the assets of C. D. & Coy, Limtd, the sum of 970*l.*, the balance of remuneration due to the sd D. as receiver and manager of the C. D. & Coy. *Debenture Corpn., Ltd.* v. *C. D. & Co.*, Romer, J., 24th January, 1898.

# CHAPTER LXXIX.

## DISCHARGING RECEIVER.

APPLICATIONS to discharge a receiver or receiver and manager come in the natural sequence and are common enough. Generally the application is made because there is nothing more to receive, the property having been realised and paid into Court, or because the continuance of his appointment has become unnecessary. Sometimes, however, application is made to discharge a receiver and appoint another in his place, *e.g.*, where the existing receiver has misconducted himself or is unable to act or has become unfit for the office. Sometimes the order to discharge is made on further consideration as in Form 554.

How discharged.

The application is made by summons to a judge in chambers.

A receiver may be discharged on passing his account and may be paid his remuneration and costs without waiting to see whether the assets are sufficient to pay all the costs. *Batten* v. *Wedgwood & Co.*, 28 Ch. D. 317.

**Ord. LX. r. 4.**—When by the practice of the Chancery Division recognizances are . . . . by any judgment or order directed to be vacated, the proper officer shall, on due notice thereof, attend one of the masters, who shall thereupon vacate such recognizances in the usual manner.

See *supra*, p. 764, as to delivering accounts and abstract to the Registrar of Companies where receiver or manager ceases to act.

See further, Dan. Ch. Pr., 8th ed. p. 1498; Seton, 7th ed. p. 781.

As to discharging receivers in the County Court, see C. C. Rules, 1903, Ord. XIII. r. 12.

**Form 510.**

Summons or notice of motion to discharge receiver and appoint another.

(*Title.*)

Let, &c. (*Form* 171 *or* 172), *or* Take notice, &c., that A., the receiver appointed in this action by order, dated the —— day of ——, may be discharged, and that he may be ordered to pass his final account as such receiver and pay the balance certified to be due from him thereon into Ct to the credit of this action, and that thereupon the recognizance, dated the —— day of ——, entered into by the sd ——, and the bond,

dated the —— day of ——, entered into by the sd A., together with the —— Society, Limtd, as his sureties, may be vacated [and that B., of ——, or some other fit and proper person may be appointed receiver on behalf of the holders of the First Mortgage Debentures issued by the dft coy of the undertaking and premises comprised in the sd debentures, with liberty to act forthwith], or that such further or other order may be made in the premises as to this Honourable Ct may seem meet. **Form 510.**

**Form 511.**

**Order to discharge and appoint another.**

Upon the applicon of the —— Bank, Limtd, the holders of first mortgage debentures in the above-named coy (by summons dated the 23rd January, 1899), and upon hearing the solors for the applicants and for the plt, and for G., the receiver and manager appointed in this action by the order dated the 31st August, 1898, and B., the off recr and liqr of the dft coy in person, and upon reading the writ of summons issued in this action, the order dated the 31st August, 1898, the two affts of, &c., and the receipt of the Clerk of Enrolments, dated the 10th December, 1898.

Add applicants as dfts to action.

Discharge A. from his office as such reciever and manager, and order him to lodge, &c., his first and final account of his receipts and payments as such receiver and manager, and within seven days after the date of the certificate of the allowance of such account pay the balance (if any) which may be certified to be due from him into Ct as directed by the lodgment schedule hto.

And thereupon [vacate recognizances and bonds].

And order that C., of ——, chartered accountant, be and is hby appointed receiver on behalf of the debenture holders of the dft coy to receive the ppty and assets of the dft coy comprised in or charged by the first mortgage debentures issued by the dft coy as therein mentd in the place and stead of the sd A.

And the applicants by their solors undertaking to be responsible for the receipts of the sd B. as such receiver until he shall have given security as hnftr mentd. Order that the sd B. be at liberty to act at once.

And order C. on the 24th October, 1899, and on the 30th March, 1900, and on the 30th March and the 24th October in each succeeding year to leave in the chambers of the Registrar [Cos Ct] his accounts as such receiver, and to pay the balances which shall be certified to be due from him on each such account or so much thof as shall be proper to be so pd into Ct as directed in the lodgment schedule hto. *Re Triticine, Ltd., Hick* v. *Same Co.*, Wright, J., at Chambers, 8th March, 1899.

**Form 512.**

Order for discharge and to pay or be paid balances.

Upon the applicon of the plt (by summons dated the 18th April, 1898), and upon hearing the solors for the applicant, and the dft coy appearing in person by W., the off recr and liqr thof, and upon reading the orders dated resply, &c., the Master's certificate dated the 3rd December, 1897, and the afft of S., filed the 22nd April, 1898, Order that S., the receiver and manager appointed in this action, be discharged, and that he do forthwith pass his first and final account as such receiver and manager. And order that the sd S. do make the lodgment in Ct as directed in the lodgment schedule hto.

And upon such lodgment in Ct being made by the sd S., or upon its being certified that there is nothing due from him upon his sd first and final account, Order that the recognizance dated, &c., entered into by the sd S., and the bond dated the 11th November, 1897, entered into by the sd S., together with the —— Corporation, be resply vacated.

And order that the funds in Ct be dealt with as directed by the lodgment and payment schedules hto. *J. M. Hubbard (on behalf, &c.)* v. *Hubbard & Co., Ltd.*, Wright, J., at Chambers, 22nd April, 1898.

THE LODGMENT AND PAYMENT SCHEDULES.

Pt I., first column—Balance (if any) due from receiver and manager on his first and final account, the amount to be certified by the Registrar of Cos (Winding-up); second column, name of receiver. Pt. II., first column—Out of cash and money on deposit and any interest pay balance (if any) due to receiver and manager on his first and final account, the amount to be certified by the Registrar of [Cos Ct]. *Re Hubbard & Co., Ltd., Hubbard (on behalf, &c.)* v. *Hubbard & Co., Ltd.*, Wright, J., 22nd April, 1898.

Compare forms in Appendix to S. C. Funds Rules.

**Form 513.**

Order to discharge receiver without passing any further account.

It is ordered that L. W. R., the receiver appointed by the sd order dated the 1st August, 1930, be discharged without passing any further account.

And it is ordered that the bond dated the ——, 1930, entered into by the sd L. W. R. together with the Liverpool and London and Globe Insurance Coy, Limtd, as his surety, be vacated. *Burnards (Established* 1899), *Ltd.* (B. 3246 of 1930). Stiebel, Reg.

[*Title in two actions, the plt in the first action being a debenture holder, and the plts in the second action being holders of prior lien debentures.*]

**Form 514.**

**Receiver and manager to hand over possession to receiver on behalf of prior lien debentures.**

Upon the applicon of the plt in the second above-mentd action, and upon hearing counsel for the applicants and the solors for the plt in the first above-mentd action and for the dfts in both actions, and the plt and dfts in both actions by their counsel and solors consenting to this order, It is ordered that the applicants be at liberty to intervene in the first above-mentd action for the purpose of this applicon only.

And it is ordered that Sir W. H. P., who was appointed receiver and manager of the assets and business of the dfts, Darlington Forge, Limtd, on behalf of the first debenture holders by order dated the 19th July, 1932, made in the first above-mentd action do hand over possession of all the assets of the sd coy to Sir W. M., of ——, London, who has been appointed receiver and manager of the assets and business of the sd coy on behalf of the prior lien debenture holders by order dated the 28th July, 1932, in the second above-mentd action.

And it is ordered that the sd Sir W. H. P., do cease to act as manager of the business of the sd coy forthwith. *Darlington Forge, Ltd.* (D. 1491 of 1932). Maugham, J., 29th July, 1932.

# CHAPTER LXXX

## TRANSFER OF DEBENTURE AND DEBENTURE STOCK ACTIONS.

WHEN an order has been made for winding-up a debenture holders action against the company is transferred to one of the judges of the Chancery Division to whom the winding-up business is assigned.

R. S. C. Ord. XLIX. contains the following rules:—

**Transfer of actions after winding-up order.**

**R. 5.**—When an order has been made by any judge of the Chancery Division for the winding-up of any company, or for the administration of the assets of any testator or intestate, the judge in whose Court such winding-up or administration shall be pending, shall have power, without any further consent, to order the transfer to such judge of any cause or matter pending in any other Court or division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose estates are being so administered, as the case may be.

**R. 5a.**—Upon a winding-up order being made against a company all chamber proceedings in any action against such company, at the instance of or on behalf of debenture holders pending before the judges, to whom for the time being company business is assigned [Bennett, Crossman and Simonds, JJ.], shall be dealt with by the Registrar in Companies Winding-up.

Rule 42 of Companies Winding-up Rules, 1929, provides as follows:—

**Transfer of actions.**

(1) Where an order has been made for the winding-up of a company then if such order was made by the High Court or if the proceedings have been transferred to the High Court, the judge shall have power, without further consent, to order the transfer to him of any action, cause or matter pending in any other Court or Division brought or continued by or against the company, and any action or proceeding by a mortgagee or debenture holder of the company against the company for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the company's assets or property which is pending in the High Court or before any judge thereof, shall without further order be transferred to the judge of the High Court. In the case of applications in Chambers in actions so transferred where the practice in winding-up is different from the practice in the Chancery Division the practice in winding-up shall prevail.

(2) Where any action brought by or against a company against which a winding-up order has been made is transferred to the judge of the High Court, the registrar may, under the general or special directions of the judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in Chambers. These provisions shall apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the Chamber proceedings are directed to be dealt with by the registrar.

Bennett, Crossman and Simonds, JJ., are the present judges exercising jurisdiction in winding-up.

Where there is no winding-up order a debenture action commenced in the King's Bench Division would usually be transferred to the Chancery Division, under the provisions of the following rules of Ord. XLIX.

Transfer by Lord Chancellor.

**R. 1.**—Causes or matters may be transferred from one division to another of the High Court or from one judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any division without the consent of the President of the Division.

See Ann. Pr., notes to rr. 1 and 2 of Order.

Transfer from one division to another by order of Court or judge.

**R. 3.**—Any cause or matter may, at any stage, be transferred from one division to another by an order made by the Court or any judge of the division to which the cause or matter is assigned: provided that no such transfer shall be made without the consent of the president of the division to which the cause or matter is proposed to be transferred.

Hearing of particular application by any judge.

**R. 4.**—A particular application in any cause or matter may by the direction of the Lord Chancellor be heard and disposed of by any judge of the High Court who shall consent so to do, to whatever division or judge such cause or matter may have been assigned.

See *Briton Medical, &c. Assocn., In re*, 39 Ch. D. 65.

A debenture action assigned to one judge of the Chancery Division can also be transferred to another judge of the same Division.

Power of one judge of Chancery Division to hear cause or matter for another.

**R. 4a.**—Any judge of the Chancery Division may, at the request or with the consent of any other judge of that division before whom a cause or matter is pending, hear such cause or matter, or any application therein, and, for that purpose, it shall not be necessary that an order for transfer shall be made or consent of the parties obtained.

This rule is re-enacted by sect. 66 (2) of the Judicature Act, 1925, which adds, "provided that if any party to the proceeding objects to the proceeding being so heard and disposed of it shall not be so heard and disposed of without the concurrence of the Lord Chancellor to be signified by an order in writing under his hand."

Cases for transfer.

Where a debenture action is brought to enforce a series of debentures, and is assigned to one judge of the Chancery Division, and afterwards, or concurrently therewith, another action is brought by a different plaintiff to enforce the same series or a different series of the same company, and is assigned to another judge of the same Division, it is generally desirable to have both actions before the same judge, and, therefore, to obtain a transfer of one. In order to obtain the transfer, application may be made to the Lord Chancellor under Ord. XLIX. r. 1, *supra*. If all parties consent, no difficulty will arise; but, if one party objects, the application must be by motion before the Lord Chancellor. Application for transfer by the plaintiff should be

made on the summons for directions (Ord. XXX.); afterwards either party may apply by notice under Ord. XXX. r. 5; Dan. Ch. Pr., 8th ed., p. 1594.

The application may be made *ex parte*. *Scott* v. *Sharpe*, W. N. (1884) 28.

Where a winding-up order has been made against the defendant company, and there is a debenture action pending elsewhere in the Chancery Division, the action is automatically transferred under Companies Winding-up Rules, 1929, r. 42, *supra*.

In transferred actions it is not the usual practice for the registrar to adjourn the matter to the judge; he makes the order, and leaves the party dissatisfied to move the judge in Court to discharge it. Practice Note, W. N. (1905) 128.

**Form 515.**

Petition for transfer.

(*Title, &c.*)

To the Right Honourable the Lord Chancellor of Great Britain the humble peton of the plt

Showeth as follows:—

1. On the —— day of —— your petr commenced this action.

2. Your petr desires that this action should be transferred to Mr. Justice —— (in order that the same may be consolidated with the action of —— v. —— now pending before the sd Mr. Justice ——), and when so transferred may be considered as an action originally assigned to him. And your petr will ever pray, &c.

We consent to the prayer of this peton,

—— and ——, solors for the dft coy.

**Form 516.**

Notice of motion for transfer.

(*Title, &c.*)

Take notice that the Lord High Chancellor of Great Britain will be moved on ——day, the —— day of ——, or so soon thereafter as counsel can be heard, by counsel on behalf of the above-named plt, that this action may be transferred to Mr. Justice ——, and when so transferred may be considered as an action originally assigned to him.

Where all parties to the action consent, the Lord Chancellor will direct the transfer on a written application accompanied by the written consent of all the parties. Memorandum, 1 Ch. D. 41. If all the parties do not consent, an application by motion upon notice must be made to the Lord Chancellor.

**Form 517.**
**Order of Lord Chancellor for transfer of action.**

Upon the peton of C., the liqr of the above-named coy on the 18th September, 1917, preferred unto the Right Honourable the Lord High Chancellor of Great Britain, and the solors for the plt and the receiver of the dft coy having subscribed the sd peton signifying their consent to the prayer thof, It is ordered that the action commenced in the Chancery Division of the High Ct of Justice be transferred to the Honourable Mr. Justice Eve or the judge for the time being having jurisdiction of cos winding-up.

**Form 518.**
**Order for transfer of action.**

Upon the applicon by summons dated the 11th August, 1911, of E. B. S., off recr at Liverpool, and prov liqr of the above-named coy, and upon hearing the solor for the applicant and counsel for A. & Coy, the respts to the sd summons, and upon reading the order to wind up the sd coy dated the 9th August, 1911, the report of the off recr dated the 12th August, 1911, the afft of, &c., It is ordered that all further proceedings in this matter be transferred from the High Ct of Justice (Cos Winding-up), Liverpool District Registry, to this Ct. And it is ordered that the costs of the applicant, the sd E. B. S., and of the respts, the sd A. & Coy, of this applicon be costs in the winding-up. *The National Provincial Insurance Corpn., Ltd.*, Horridge, J., sitting as Vacation Judge at Chambers, 18th August, 1911.

For forms of orders by High Court judges for transfer from one division to another, see Seton, 7th ed. p. 790.

**Form 519.**
**Another.**

Upon the peton of the plts this day preferred unto his Lordship and the solors of the dft coy having subscribed the sd peton signifying their consent to the prayer thof, It is ordered that this action, which has been assigned to Mr. Justice Byrne, be transferred to Mr. Justice Wright; and it is ordered that the same, when so transferred, be considered as an action originally assigned to Mr. Justice Wright. *Hartlidge's Smokeless Fuel, Julius Merner & Co. (on behalf, &c.)* v. *The Company*, Lord Chancellor, 27th May, 1899.

## CHAPTER LXXXI.

### SECURITY FOR COSTS.

IN actions to enforce debentures or debenture stock, the company, being a *defendant*, cannot as a rule be required to give security for costs; but, if it counterclaims, it may in some cases be regarded as a plaintiff, so far as regards the counterclaim, and may be ordered to give security for costs under sect. 371 of the Act.

This section provides as follows:—

**Limited company security for costs.**

**371.** Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

As to the meaning of "sufficient," see *Dominion Brewery* v. *Foster*, 77 L. T. 507; and *Imperial Bank of China and Japan* v. *Bank of Hindustan*, L. R. 1 Ch. 437.

See Form 521, *infra;* and *Washoe Mining Co.* v. *Ferguson*, 2 Eq. 371; *Moscow Gas Co.* v. *International Finance Soc.*, 7 Ch. 225; *Strong* v. *Carlyle Press* (No. 2), W. N. (1893) 51; *New Fenix Compagnie* v. *General Accident Corpn.*, (1911) 2 K. B. 619.

When the plaintiff is a limited company, it may be ordered to give security for costs under the section.

Sometimes in a debenture action directions are given to bring or proceed with an action against some outsider in the name of the company, and if in such action the company is ordered to give security for costs under sect. 371, provision will have to be made in the debenture action for enabling the company to comply with the order. See Form 522.

The fact that a limited company is in voluntary liquidation affords *primâ facie* evidence that its assets will be insufficient to meet the costs, and may therefore justify an order for security. See *Northampton Coal, &c. Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500; and *Pure Spirit Co.* v. *Fowler*, 25 Q. B. D. 235.

Sect. 371 can be applied even after remission of the action to the County Court. *Plasycoed Collieries* v. *Partridge* (1911), 104 L. T. 807.

Security was ordered where a banking company in voluntary liquidation had, before bringing the action, sold its business to another bank. *National Bank of Wales* v. *Collins*, 38 Sol. J. 186.

As a general rule, a claimant under a general inquiry cannot be required to give security for costs, but a claimant out of the jurisdiction may be ordered to do so, on the ground of his being in the position of a plaintiff in interpleader. *Milward & Co.*, (1900) 1 Ch. 405.

Probably the same principle might be applied to the case of an insolvent company, although within the jurisdiction. See further, Part II., 15th ed., pp. 386, 387.

It is a matter of discretion whether the bond of a foreign company should be accepted as security for costs. *Aldrich* v. *British Griffin, &c. Co.*, (1904) 2 K. B. 850.

**Form 520.**

Summons for security for costs of counterclaim.

Let the dfts, The ——, Limtd, attend, &c. (*Form* 171 *or* 172), on the hearing of an applicon of the plt A. for an order:—

1. That the dfts, The ——, Limtd, do procure some sufficient person on their behalf to give security in the sum of —— *l.* for the plt's costs of their counterclaim.

2. That until such security be given all further proceedings in respect of the sd counterclaim be stayed.

3. And that in default of such security being given within fourteen days the sd counterclaim be struck out.

4. That the time for delivery by the plt of reply and defence to counterclaim be extended until fourteen days after such security shall have been given.

**Form 521.**

Order against defendant company to give security for costs of counterclaim.

Upon the applicon of the plt G. by summons, &c., and upon hearing counsel, &c., and upon reading the statement of claim delivered, &c., and the statement of defence and counterclaim of the dfts, the Gresley Brewery, Limtd, delivered on the 20th February, 1895, It is ordered that the dfts, the Gresley, &c., do give security to answer costs of the plt in case any shall be awarded to be pd by the dft coy in respect of their counterclaim, and for that purpose the dft coy are to be at liberty to lodge the sum of 50*l.* in Ct as directed in the schedule hto, and in the meantime until such lodgment is made and notice thof given to the plt's solors the dfts, the Gresley, &c., are not to take any further proceedings in respect of their sd counterclaim; And it is ordered that the time for the delivery by the plt of his reply and defence to the sd counterclaim be extended until fourteen days after such security shall have been given. *Agg-Gardner (on behalf)* v. *Gresley Brewery, Ltd.*, V. Williams, J., 24th March, 1896.

**Form 522.**

Summons that receiver pay into Court where defendant company ordered to give security for costs.

Let, &c. (*Form* 171 *or* 172), on the hearing of an applicon on the pt of the dft for an order that H., the receiver and manager herein, do pay into Ct to the credit of the action, —— *v.* ——, as security for costs, a sum of [150]*l.*, the sd dft coy having by an order made in that action and dated, &c., been directed to give security for the costs of ——, to the extent of 150*l.*, and that the costs of this applicon be taxed and pd by the plt, he adding such costs to his own costs.

# CHAPTER LXXXII.

## APPLICATIONS AND APPEALS BY THIRD PARTIES.

Applications by parties prejudiced by receivership.

INTERFERENCE (as appears above, p. 505) with a receiver appointed by the Court is a contempt of Court and punishable accordingly. But the Court respects the rights of third parties, and if any person considers that he is prejudiced by the appointment of the receiver or by the acts of the receiver, he can apply in the action *pro interesse suo*, and the Court will grant him such relief as the circumstances call for. See *Russell* v. *East Anglian Ry. Co.*, 3 M. & G. 104; *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332; *Henry Pound, Son and Hutchins*, 42 Ch. D. 402. Thus the landlord may apply for liberty to distrain or re-enter (*General Share Trust Co.* v. *Wetley Brick Co.*, 20 Ch. D. 260); the first mortgagee may apply for possession, notwithstanding the appointment of a receiver at the instance of the second mortgagee. *Re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497. See, further, Seton, 7th ed. p. 744.

Applications may be made in regard to rates, taxes, gas, &c. See *Marriage, Neave & Co.*, (1896) 2 Ch. 663; *Richards* v. *Mayor of Kidderminster*, (1896) 2 Ch. 212; *Paterson* v. *Gas Light Co.*, (1896) 2 Ch. 476; *Re Crosbie, Ltd.*, 74 J. P. 25; *Husey* v. *London Electric Supply Corpn.*, (1902) 1 Ch. 411; *Metropolitan Water Board* v. *Brooks*, (1911) 1 K. B. 289, C. A.

So where the receiver is in possession of goods belonging to an outsider, the latter can apply for liberty to remove them; and many other cases could be specified. The application should be made in the action in which the receiver was appointed (*Searle* v. *Choat*, 25 Ch. D. 723), and should, as a general rule, be by summons, and should be supported by the requisite evidence.

Such an application will serve all purposes, for the Court will see that justice is done by its officer. In such cases it is not proper to sue the receiver, nor will the Court allow its receiver to be proceeded against for alleged misconduct in any Court but its own. *Maidstone Palace of Varieties*, (1909) 2 Ch. 283.

Where any person interested wishes to appeal from the decision of a Master or registrar, he is usually entitled to have the matter adjourned to the Court. The Companies Winding-up Rules provide as follows:—

Appeals from the registrar or Master.

**R. 7.**—Subject to the provisions of the Acts and rules in every Court: (1) The registrar [in Companies Winding-up] may, under the general or special directions

of the judge, hear and determine any application or matter which under the Act and rules may be heard and determined in chambers. (2) Any matter or application before the registrar may at any time be adjourned by him to be heard before the [winding-up] judge, either in chambers or in Court. (3) Any matter or application may, if the judge, or, as the case may be, the registrar, thinks fit, be adjourned from chambers to Court, or from Court to chambers.

Kekewich, J., stated the practice in untransferred actions as follows:—

"It is a Master's duty to adjourn a summons to the judge upon application by any suitor, and no Master will venture to refuse to do so. When the matter is before the judge, it may be decided in chambers or adjourned into Court, and the order then made may be varied or discharged by motion, but any motion of this kind to vary or discharge the Master's order is wholly irregular and will be refused." *Harrington* v. *Ramage*, 51 S. J. 514.

But Warrington, J., one of the winding-up judges, in July, 1905, said: "Questions have lately arisen as to the mode in which applications in chambers in actions transferred under rule 42 of the Rules of 1903 should be dealt with. Under the jurisdiction in winding-up it has for some time been the practice, as a general rule, for the registrar in such cases to make such order as he thinks fit, leaving the dissatisfied party to move the judge in Court to discharge it. In the Chancery Division, as we know, the Master adjourns the application to the judge without actually making the order. I have consulted Buckley, J., and we have come to the conclusion that, to avoid a diversity of practice in the office, the practice in winding-up should be followed in the transferred actions." Practice Note, W. N. (1905) 128. This practice is now embodied in the new rule.

In neither case do the rules themselves provide a time limit for moving to discharge the order of a judge or registrar in chambers, but the time is regulated by analogy to that imposed in cases of appeals to the Court of Appeal. *Heatley* v. *Newton*, 19 Ch. D. 326; *Re Woodbridge*, W. N. (1884) 187; *Re Lewis*, 31 Ch. D. 623.

By Ord. LVIII. r. 15—

Subject and without prejudice to the power of the Court of Appeal under Ord. LXIV. r. 7, no appeal to the Court of Appeal from any interlocutory order . . . shall, unless the Court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time, be brought after the expiration of *fourteen days*. . . . The said . . . periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was *pronounced, or when the appellant* first had notice thereof, and in all other cases, from the time at which the . . . order is signed, entered or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal.

The time is fourteen days even in the case of a final order, or an order on further consideration in chambers. *Re Johnson*, 42 Ch. D. 505; *Re Giles*, 43 Ch. D. 391.

The application to discharge or vary is, strictly speaking, not an appeal but a re-hearing. *Re Giles, supra;* and see notes in Ann. Pr. to Ord. LV. r. 74a.

In the case of a mere refusal it has been held that an appeal can be brought without any order being drawn up. *Re Clagett*, 20 Ch. D. 134. And it is submitted that by analogy no order need be drawn up before moving to discharge an order made by the registrar in chambers. This proposition was assented to by Warrington, J., in an unreported case of *Re Saul, Moss & Sons, Ltd.* (June 4th, 1907). In that case the order had not been complete when the notice of motion to vary was served, and on the motion coming on to be heard it was officially stated that what was sought to be varied was something which the registrar had not finally decided. To avoid any such difficulty it is as well to ask the registrar to adjourn the matter to the judge, and if he refuses, as he probably will, to ask him to make a note that he has actually decided in a certain way. As the period of fourteen days runs from the time when the order is pronounced, a party wishing to discharge or vary it will probably be out of time if he waits until the order is perfected. And see further Ann. Pr., notes to Ord. LVIII. r. 15.

**Form 523.**

Summons for inquiry *pro interesse suo.*

(*Title, &c.*)

Let, &c. (*Form* 171 *or* 172), on the pt of N., of ——, that an inquiry may be made whether the sd N. has any and what interest in the ppty taken possession of by A. as the receiver appointed in this action, or any and what pt thof.

**Form 524.**

Summons by outsider for liberty to distrain.

Let, &c. (*Form* 171 *or* 172), on the applicon of W., of ——, for an order that he may be at liberty as lessor to put in a distraint against the dft coy at their buildings and premises situate at —— and known as ——, and also at the premises situate, &c., and all of which sd premises are now held by the sd coy of the applicant as lessees, for the sum of ——*l.* arrears of rent due to the applicant in respect of the sd premises up to and including the 29th September last, or that the receivers and managers of the undertaking and effects of the dft coy appointed by this honourable Ct may be ordered out of moneys in their hands to pay to the applicant the sd amount, and that the costs of and occasioned by this applicon may be ascertained and pd by the sd receivers and managers.

For order on application of landlord for surrender of lease, see *supra*, p. 756.
For order to give up possession to receiver of first mortgagee, see *supra*, p. 757.
For order to hand over chattels to third parties entitled thereto, see *supra*, p. 758.

# CHAPTER LXXXIII.

## STOP ORDERS.

WHEN money or securities are in Court to the credit of a debenture holders' action, the Court may, on the application of any party interested, make an order, called a stop order, to prevent payment out or transfer of the funds.

**Priorities.** Any person claiming to have a charge over a fund in Court should apply for a stop order as soon as possible, since priorities as between various incumbrancers will usually depend upon the dates of the stop orders which they have obtained. *Stuart* v. *Cockerell*, L. R. 8 Eq. 607; *Palmer* v. *Locke*, 19 Ch. D. 381. Notice to trustees of a fund does not give priority after the fund is paid into Court. *Pinnock* v. *Bailey*, 23 Ch. D. 497. A receivership order by way of equitable execution has priority over a stop order subsequently obtained. *Re Marquis of Anglesey*, (1903) 2 Ch. 727.

The application should be by summons in the action, except where a fund exceeding 1,000*l.* has been paid into Court under the Trustee Relief Act and there has been no prior application as to the fund—in which case a petition is necessary. *Re Toogood's Trusts*, 56 L. T. 703; *Re Day's Trusts*, 49 L. T. 499; and see Ann. Pr., notes to Ord. XLVI., r. 13.

Any person interested can apply; the assignor and assignee can join in the application. *Quarman* v. *Williams*, 5 Beav. 133. A judgment creditor can obtain a stop order in the Chancery Division without first obtaining a charging order in the division in which judgment was obtained. *Shaw* v. *Hudson*, 48 L. J. Ch. 689. As to service, see r. 13, p. 801, *infra*. If the assignor under whom the applicant claims does not join in the application, he should be served (*Parsons* v. *Groome*, 4 Beav. 521); but having regard to r. 13, other parties should not be served. See *Glasbrook* v. *Gillatt*, 9 Beav. 611. In that case the applicant was ordered to pay the costs of parties unnecessarily served.

The paymaster is to notify on his certificate of funds in Court the day of any stop orders, and whether they affect principal or interest and the names of any persons to whom notice is to be given or in whose favour such orders have been made. S. C. F. R. 1915, r. 96.

The following notice was issued in 1894 for use in the Chambers of Stirling, J.:—

"The judge directs that upon the making of all stop orders on funds in Court, it shall be ascertained and shall be shown or stated on the

face of every such order whether the restraint should affect capital or income or *both* capital and income of the funds, and further that the limit or extent of the share or interest of the person whose share or interest is the subject of the restraint shall also be shown on the face of the order."

NOTE.—The judge considers that an assignee or incumbrancer of a life interest in a fund (whether on the general credit of a matter or action, or carried to a separate account), is entitled to notice of any dealing with the capital of the fund whether for change of investment or otherwise.

The following rules of R. S. C., Ord. XLVI. apply as to the costs of stop orders and the service of the application:—

Costs occasioned by stop orders.

**R. 12.**—Where any monies or securities are in Court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such monies or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such monies or securities, the person by whom any such order shall be obtained on the shares of such monies or securities affected by such order shall be liable, at the discretion of the Court or a judge, to pay any costs, charges and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such monies or securities.

Service of application for stop order

**R. 13.**—Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the parties to the cause or matter, or upon the persons interested in such parts of the monies or securities as are not sought to be affected by any such order.

See generally, Ann. Pr., note to Ord. XLVI. r. 13; and Seton, 7th ed., pp. 486—489.

*As to evidence.*—The applicant must show by affidavit or otherwise, *e.g.*, by the Master's or registrar's certificate, that he is interested. *Quarman* v. *Williams*, 5 Beav. 133. Where the applicant claims by assignment "two things are necessary. First, you must show generally the title of the assignor, but it is not absolutely necessary to show the particular share of the fund to which he is entitled. Secondly, you must show the assignment either by proving its execution in the usual way, or by assignees appearing and admitting it." Per Romilly, M. R., *Wood* v. *Vincent*, 4 Beav. 419.

In any case the paymaster's certificate of the fund in Court (Supreme Court Funds Rules, 1915, r. 96) must be obtained and produced.

A stop order may be made at any time after payment into Court and can even be made before payment into Court (*Shaw* v. *Hudson*, 48 L. J. Ch. 689), but it will not be granted when there is neither a a fund in Court nor an order to bring a fund into Court. *Wellesley* v. *Mornington*, 11 W. R. 17.

The order takes effect when the original or an office copy has been lodged with the paymaster. Seton, 7th ed., p. 487. As to priorities, see Ann. Pr., notes to Ord. XLVI. r. 13.

Parties are not entitled as a general rule to costs of obtaining a stop order. This rule was recognized in *Grimsby* v. *Webster*, 8 W. R. 725, although there the costs were allowed. And see *Hoole* v. *Roberts*, 12 Jur. 108.

The Court usually requires the applicant to undertake to pay any expenses which by reason of the order shall be occasioned by any party to the action or matter, or any person interested, and which the judge in his discretion should consider ought to be paid. See Ord. XLVI. r. 12, *supra*, p. 801.

Where an order is made for payment out of Court of part of a fund in relation to which a stop order has been granted and it is necessary to continue the stop order, the order should contain the words "notwithstanding the said order dated, &c." but where it is not necessary to continue the stop order it should be simply discharged.

**Form 525.**

Summons for stop order.

(*Title, &c.*)

Let, &c. (*Form* 171 *or* 172), on the pt of ——, that no pt of the —— [*describe as in paymaster's certificate*], *e.g.*, ——*l.* consolidated 2½ p.c. annuities, and ——*l.* cash in Ct to the credits of this action, —— v. ——, to which [*here state parlars of the parties interested*] is entld, or of any dividends to accrue due on the sd securities may be transferred, sold, pd out, or otherwise disposed of without notice to the applicant.

The summons should state whether capital, or income, or both, are to be affected. *Mack* v. *Postle*, (1894) 2 Ch. 449.

**Form 526.**

Affidavit in support of application for stop order.

(*Title, &c.*)

I, A., of ——, make oath and say as follows:—

1. B., of ——, is the registered holder of a debenture of the above-named coy for ——*l.*, which debenture is numbered ——, and is now produced and shown to me marked ——.

2. By the Master's certificate in this action dated the —— day of ——, and duly filed on the —— day of ——, it was certified amongst other things that there was due to the sd B. as the holder of the sd debenture the sum of ——*l.* and upwards.

3. On the —— day of —— the sd B., in consn of a loan of ——*l.* made by me to him, deposited the sd debenture with me this deponent, together with a memdum under his hand defining the terms of the deposit, which memdum is now produced and shown to

me marked ——. I saw the sd B. sign the sd memdum. The name or signature B. subscribed to the sd memdum is of the proper handwriting of the sd B. **Form 526.**

4. The sd sum of ——*l.* is still due and owing to me with an arrear of interest.

5. The facts hnbefore deposed to are within my own knowledge.

Sworn, &c.

**Form 527.**
Stop order on funds in Court.

Upon applicon by summons, dated the 11th March, 1898, of N. and L., solors of the Supreme Ct, carrying on business as —— and ——, in the city of London, and upon hearing the solors for the applicant and for the respts, and upon reading, &c., It is ordered that no pt of the 5,554*l.* new Consols, or of the 4,676*l.* money on deposit, or of the proceeds of sale thof, or of the ——*l.* cash in Ct to the credit of *Re Hart & Grundle, Limtd, Routledge* v. *Hart & Grundle, Limtd,* 1895, A. 3486, as may be apportioned as the share due to O. D., certified in the Master's sd certificate, dated the 15th June, 1897, as the holder of five debentures in the dft coy, or of any dividends to accrue due thereon, be transferred or pd out or otherwise dealt with without notice to the sd N. and L. *Re Hart & Grundle, Ltd., Routledge (on behalf)* v. *Co. and Others,* Romer, J., 21st March, 1898. A. 1126.

**Form 528.**
Another.

Upon the applicon, &c., and upon hearing the solors for the applicant and for the plts and the dfts, and upon reading, &c., and the certificate of fund.

It is ordered that no pt of the share or interest to which the dft T. F. G. is or may become entld of and in the capital of ——*l.* (*in figures*) now in Ct to the credit of this action to an account intituled "proceeds of sale," and of any interest to accrue thereon be sold, transferred, or otherwise dealt with, without notice to the sd L. J. C. and M. Bank, Limtd. *Globe Kinemas, Ltd.,* Stiebel, Reg.

# CHAPTER LXXXIV.

## MEETINGS OF DEBENTURE HOLDERS.

Meetings.

CASES not uncommonly occur in which it is found desirable to hold a meeting of the debenture or debenture stockholders in order to ascertain their wishes in regard to some question which has arisen in the action, *e.g.*, as to carrying on or closing the business, or as to selling on special terms, or as to a compromise.

The following are examples of orders made in such cases:—

**Form 529.**

Order giving liberty to convene meeting of debenture Stockholders.

Upon the applicon of the plt by summons, &c., It is ordered that the plts be at liberty to convene in the manner prescribed by the trust deed dated the 4th March, 1920, in the sd judgment mentd a meeting of the holders of debenture stock of the first named dft coy for the purpose of submitting to that meeting an extraordinary resolution modifying the scheme of arrangement between Plaistowe & Coy, Limtd, and its creditors (already sanctioned by an extraordinary resolution of the sd debenture holders passed on the 26th November, 1926) which scheme involves a sale to the sd Plaistowe & Coy, Limtd, of the assets comprised in the trust deed in the sd judgment mentd. *E. & T. Pink and Plaistowe (Proprietary), Ltd.*, Stiebel, Reg., 6th July, 1927.

For order on application to confirm conditional agreement for sale of assets directing the application to stand over, meeting of the debenture holders to be convened and result stated, see *Vickerman* v. *Bonvilles Co.*, Hall, V.-C., 2nd August, 1878. B. 1602.

For order at trial of action, whereby, after reciting, *inter alia*, that meeting of debenture holders had been held, and approved the scheme of compromise as follows, &c., it was ordered that the compromise should be carried into effect, and that all proceedings in the action, except such as should be necessary for enforcing the order and carrying out the compromise, should be stayed, see *Hooper* v. *Newtown Manure Co.*, 13th April, 1878. A. 806.

**Form 530.**

Advertisement convening meeting of debenture holders.

*(Short title and reference to record.)*

Notice is hby given that, pursuant to an order of this Honourable Ct, made the 2nd day of August, 1918, A MEETING OF THE DEBENTURE HOLDERS of the above coy will be held at the Inns of Court Hotel, Holborn, London, on Thursday the 19th day of September, inst., at one o'clock in the afternoon, for the purpose of considering, and (if

approved) to sanction the acceptance of a conditional agreemt dated the 11th of July last, for the purchase of the works and ppty of the coy comprised in the parlars of sale dated the 17th of May last, when the works were offered for sale by auction, and subject to the conditions attached to the parlars of sale. **Form 530.**

Dated the 10th September, 1918.

H. B., Receiver, Manager, and Liqr.

(*Short title and reference to record.*) **Form 531.**

Another.

Notice is hby given that, pursuant to an order made in the above action, and dated the —— day of ——, 19—, a general meeting of the holders of the debentures of the above-named coy entld to the benefit of the indenture dated the ——, 19—, will be held at the office of the coy, situate at ——, on Thursday, the —— day of ——, 19—, at 12 o'clock (noon), for the purpose of ——, the receiver and manager appointed in the sd action (and to act as chairman of the meeting), explaining the present position of the coy's affairs and submitting certain resolutions for raising the amount required to meet the immediate liabilities of the coy, and for providing working capital, and for the creation and issue of further prior lien bonds to secure the sd amount, ranking (*pari passu* with the prior lien bonds of the nominal amount of 12,500*l.*, already issued) as a first charge on the coy's ppty and undertaking in priority to the debentures entld to the benefit of the above-mentd indenture.

Dated this —— day of ——, 19—.

——, Solors for the Receiver and Manager.

**Form 532.**

Sanction of resolutions of debenture holders.

Upon the applicon of the plt for the confirmation and sanction and approval of the resolutions of the debenture holders come to at the meeting of debenture holders held on the 4th day of December, 1885, or come to by the necessary majority of debenture holders within the terms of the debentures, and that the same might be carried into effect, and upon hearing counsel for the applicant, and for the dft, &c., and the judge being of opinion that the sd resolutions, being the resolutions set out in the Exhibit H. R. S. to the sd afft of H. S., and the Exhibit J. McD. to the sd afft of J. McD., are valid and binding on the debenture holders, doth approve of their being carried into effect.

And it is ordered that the costs of all parties in reference to the sd resolutions and of this applicon be costs in the action, including the dissentient debenture holders' costs, which are to be pd by the receiver

**Form 532.** out of the assets along with his costs. *Carden* v. *Albert Palace*, Chitty, J., at Chambers, 18th January, 1886.

The resolution above referred to was one authorizing the creation of a prior charge.

**Form 533**

Order to add applicant as a defendant, and to represent dissentient debenture holders; and to hold meetings of debenture holders to consider questions as to appointment of receiver and sending mission to America.

Upon the applicon of J., &c., and holder of twenty first mortgage debentures of 50*l.* each of the dft coy, and upon hearing counsel for the applicant and for the plt in the first-mentd action, and the solors for the dft coy, and the plt in the second action in person, and upon reading, &c., It is ordered that the writ in each of the sd actions be on or before —— amended, by adding the applicant J. as a party dft to the sd consolidated actions. And the judge doth appoint the sd J. to represent all other holders of first mortgage debentures of the dft coy who are opposed to the view of the plts, and object to the appointment of a receiver and manager. And it is ordered that the rest of the sd applicon which asks that all further proceedings under the order of the 5th June, 1891, for the appointment of a receiver and manager might be stayed until after a period of four months, do stand over until the 27th day of July, 1891. And it is ordered that in the meantime a meeting of the first mortgage debenture holders of the coy be summoned by the plt H., by advertisements (at least seven days beforehand), once in the following papers, namely, once in the *Times*, one other daily London newspaper, one York newspaper, one Liverpool newspaper, one Bristol newspaper, and the *Glasgow Herald*. And it is ordered that the plt H., or, in his absence, the plt M., do act as chairman of such meeting, and do report the result thof to the judge, and such meeting is to be summoned to consider—(1) whether Mr. X.'s mission to the ppty of the dft coy in America should proceed or not; (2) whether the appointment of a receiver and manager, pursuant to the order of the 3rd June, 1891, should be proceeded with forthwith. *Howard* v. *Iron, &c. Co. of Minnesota*; *Mitchell* v. *Same*, Kekewich, J., at Chambers, 6th July, 1891. A. 985.

## CHAPTER LXXXV.

### TRUSTEES, VARIOUS ORDERS AS TO.

**Form 534.**

Liberty to trustees to take possession and appoint attorney abroad.

Upon the applicon of the plts by summons dated the 7th March, 1899, and upon hearing the solors for the applicants and for the dfts and for A., a debenture holder having liberty to attend these proceedings under the order dated the 9th February, 1899, and upon reading the order dated the 5th May, 1898 (appointing receiver), an afft of W., filed the 8th March, 1899, and the exhibits therein referred to, It is ordered that the applicants be at liberty as trees for the debenture holders of the dft coy to take possession of the undertaking, ppty and assets of the dft coy comprised in the trust deed dated the 27th August, 1890, in the statement of claim in this action mentd.

And also to be at liberty to oppose any action instituted by the sd A. in Canada, and for the purposes afsd to grant a power of attorney to Mr. K., of ——, New York, U.S.A., the agent of the receiver and manager in Canada, such power of attorney to be settled by the judge in chambers. And it is ordered that the costs of this applicon be costs in the action. *Re Bell Organ and Piano Co., Ltd., The Consolidated Trust* v. *The Bell Organ Co.*, Wright, J., 17th March, 1899.

**Form 535.**

Liberty for trustees for debenture holders to make various payments and consignments.

Upon the applicon of the plt, and upon hearing the solors for the applicant and for the dfts, and upon reading, &c., It is ordered that the dfts, W., H. and L., be at liberty (notwithstanding that D. and L. have not given security as directed by the sd order dated the 15th March, 1892) out of the money in their hands as trees to remit to the sd D. and L. any sum or sums not exceeding in the whole the sum of 3,000*l.*, to be applied by them in or towards all or any of the purposes mentd in the sd order dated the 5th March, 1892, and that the sd dfts be at liberty to remit to the sd D. and L. the further sum of 800*l.* to be expended by them in paying the duty payable on the registration of the mortgage to secure the First Debenture Stock of the dft coy on the further lands acquired by the dft coy. And it is ordered that C., the receiver and manager, be at liberty to give the necessary orders for stores, consisting of duplicate pts of engines, carriages, and wagons required for working the railway, at a cost not exceeding 3,200*l.*, including the engineer's fee for inspection and the cost of shipment to the Argentine Republic, and also to order coal for use on the railway

**Form 535.** at a cost, including the shipment thof to the Argentine Republic, of 1,200*l.*, and to consign such material and coal to the sd D. and L., and to pay sundry small accounts of the coy amounting together to 177*l.* 9*s.* 7½*d.* And it is ordered that the sd dfts be at liberty, out of the moneys in their hands as trees, to pay to the sd receiver and manager the sd sum of 177*l.* 9*s.* 7½*d.*, and such amounts as he may require for the purchase and shipment of the sd materials and coal and expenses connected therewith, not exceeding the sums of 3,200*l.* and 1,200*l.* above mentd. *Coppinger* v. *Santa Fé, &c. Co.*, Chitty, J., at Chambers, 28th July, 1892. A. 1321.

For an order giving receiver and manager leave to draw cheques for workmen, &c., see *Strapp* v. *Joseph Bull, Sons & Co.*, 1892, S. 1720; Reg. 14th December, 1892.

**Form 536.** Liberty for trustees for debenture holders to appoint agents to complete railway abroad, and send them money.

Upon the applicon of the plt, and upon hearing the solors for the applicant and for the dfts, and upon reading, &c., It is ordered that the dfts, W., H. and I., be at liberty to appoint D. and L., the members of the local board of directors of the dft coy at Buenos Ayres in the Argentine Republic, as agents of the sd dfts, to complete the railway and works in accordance with the provisions of the deed dated the 23rd May, 1889, mentd in the indorsement on the writ, and that the sd dfts be at liberty to remit to such agents out of the moneys in their hands, a sum not exceeding 7,000*l.* for the purpose of being expended by and under their direction in or towards completing the sd works. *Coppinger* v. *Santa Fé, &c. Co.*, 1891, C. 3802. Chitty, J., at Chambers, 7th November, 1891.

**Form 537.** Liberty to trustees to appeal.

Upon the applicon, &c., of the dfts N. and S., trees for the first mortgage debenture holders of the dft coy, and upon hearing, &c., Order that the applicants be at liberty to appeal against the judgment of the Civil Tribunal of the Seine, Paris, in the actions instituted by H., referred to in the sd order, dated the 20th January, 1896, and that they be indemnified against any costs, charges, and expenses incurred by them in connection with such appeal out of any moneys arising from the realisation of the security comprised in the trust deed or in the hands of F., the receiver in this action, or which may be pd into Ct by him, and order that the funds in Ct be dealt with as directed in the payment schedule hto; the sum of 150*l.* to be pd to the applicants, being for the purpose of prosecuting the sd appeal and for paying the further bill of costs of H., the legal adviser in France of the applicants. The payment schedule provided—"Sell sufficient new Consols to raise 150*l.* cash, pay proceeds to N. and S. dfts." *Wilson* v. *Martiny, Ltd.*, Vaughan Williams, J., 2nd July, 1896.

**Form 538.**

Order to advertise for claims against trustees.

Upon the applicon, &c., It is ordered that an advertisement for claims against the dft G., as surviving tree of an indenture dated, &c., being a trust deed for securing the debentures issued by the dfts the Gresley Brewery, Limtd, be settled by the judge in chambers, and be advertised once in the *London Gazette* and twice in each of the following newspapers, namely—(a) the *Times;* (b) the *Daily Telegraph;* (c) the *Burton Chronicle;* (d) the *Burton, Ashby and Colville Guardian.*

And the Ct being of opinion that the advertisements for claims against the sd Reginald Mason, as such receiver and manager as afsd, already inserted, are sufficient, It is ordered that no further advertisements be inserted for such claims. *Agg-Gardner (on behalf, &c.)* v. *Gresley Brewery Co.*, Wright, J., at Chambers, 13th January, 1899.

**Form 539.**

Approval of contract for lease.

Upon the applicon of K. and B., the trees for the mortgage debenture holders of the above-named coy, and upon hearing the solors for the applicants, and for the [off] liqr of the sd coy, and upon reading an order dated the 26th June, 1875 [*winding-up*], an afft, &c., Let the applicants be at liberty to carry out the conditional contract, dated the 8th May, 1876, made between the applicants of the one pt, and the S. Coy of the other pt, for the lease of the sd S. Coy of the premises therein mentd and comprised. And let the [off] liqr have fourteen days from the date of this order to remove all ppty from the premises belonging to the above-named coy not comprised in the mortgage by the sd coy to the applicants. *The Globe New Patent, &c. Co.*, 24th March, 1876.

**Form 540.**

Liberty to trustees to grant leases.

Upon the applicon by summons dated, &c., of the dfts J. and R., and upon hearing the solors for the applicants, for the plt, and for the dfts F., P. and S., and the dft coy by George S. Barnes, off recr and prov liqr thof, in person, and upon reading the writ of summons dated, &c., and the order dated the 20th February, 1901, and the afft of W. H. D., filed the 3rd April, 1901, It is ordered that the applicants, the trees of the indenture mentd in the indorsement of the sd writ, be at liberty, without prejudice to the rights of the dfts F., M., P. and S., the first mortgagees, to grant to such persons as shall be approved of by the sd applicants and the sd mortgagees leases or agreemts for lease of those portions of the building known as Albert Ct comprised in the sd indenture which are enumerated in the schedule hto at the yearly rents set opposite the number describing each of such portions resply or at rents not being less than 75 p.c. of the rents so appearing in such schedule, and that during the first three years of the term granted by any such lease

**Form 540.** *rents may be reserved which may be less than 75 p.c. of the* rents so specified in the sd schedule, and that in any case an allowance not exceeding the first year's rent reserved by such lease may be made to the lessee to be applied by such lessee for or *towards decorating the portion of the sd building comprised in such* lease. And it is ordered that the terms of such lease or agreemt shall be subject to the approval of the sd first mortgagees so far as regards the term granted and the rent reserved by such lease or agreemt, the date of commencement of such term, and the amount to be allowed to the lessee to be applied by him for or towards decorating the portion of the sd building comprised in such lease or agreemt if that system be adopted in such case. And it is further ordered that the counterparts of all leases and tenancy agreemts already granted and to be granted shall be held by the sd first mortgagees, and that such counterparts as afsd already granted shall forthwith be handed over to Mr. J. R., of ——, the solor to the sd first mortgagees, and counterparts of all leases or tenancy agreemts which may hereafter be granted shall be handed over to the sd J. R. within seven days after the execution thof. *Rosher (on behalf, &c.)* v. *Albert Court Estate Co., Ltd., and Others*, Wright, J., 3rd April, 1901.

**Form 541.** Summons by trustees for payment of their remuneration.

Let, &c. (*Form* 171 *or* 172), on the hearing of an applicon of the dfts the Securities Insurance Coy, Limtd, the trees of the debenture holders of the above-named dft coy, that out of the ——*l.* money on deposit and any cash in Ct to the credit of (the action) the sum of 250*l.*, the amount of remuneration certified by the registrar's certificate, dated the 29th February, 1896, to be due to the applicants as such trees as afsd to the — —, of ——, be pd to ——, of ——, the joint liqrs acting in the voluntary winding-up of the sd applicant coy, and that the costs of the applicon may be costs in the above action.

**Form 542.** Order to tax and pay trustees' costs.

Upon the applicon of the dfts the Law Guarantee, &c., It is ordered that notwithstanding the sd order, and in lieu of the directions therein contained with reference to the costs of the dft society, it be referred to the taxing master to tax as between solor and client, the costs of the dft, the Law Guarantee, &c., of this action including therein any costs, charges and expenses properly incurred by them as trees of the indenture dated, &c., in the writ of summons mentd, and including the charges and expenses incurred or to be incurred by the dft society in the employment of the New England, &c. Coy, of —— Street, New York, for carrying out and completing the assignment to the dft society, and the assignment by the sd society

to the receiver of the deposited securities, and for collecting the interest and principal moneys due in respect of the deposited security. And it is ordered that the dft society be at liberty to claim and retain the amount of their sd costs when so taxed, and also the remuneration of the dft society as tree of the sd indenture as to $\frac{11}{12}$ pts thof out of any moneys in their hands belonging to the "A" debenture holders, and as to the remaining $\frac{1}{12}$ pts thof out of any moneys in their hands belonging to the "B" debenture holders. *Macdonald (on behalf)* v. *Southern Agency, &c. Ltd.*, Romer, J., at Chambers, 25th October, 1897. B. 4181. **Form 542.**

**Form 543.**

Order appointing new trustees and making them plaintiffs in action, and discharge receiver, &c.

Upon the applicon by summons, dated the 7th April, 1899, of P., a party having liberty to attend the proceedings in this action, pursuant to order dated the 14th May, 1897, and upon hearing the solors for the applicant, for the plt, for the dfts, and for M. and C. hnftr mentd, and upon reading the order dated the 12th June, 1896, appointing R. receiver in this action, &c., &c., and the plt, the Law Guarantee, &c., desiring to retire from the trusteeship of the indenture of the 29th July, 1891, referred to in the sd judgment dated the 9th February, 1897, It is ordered that the sd M., of ——, and C., of ——, be, and they are hby appointed in pursuance of sect. [25] of the Trustee Act, [1893,] trees of the sd indenture in the place of the Law Guarantee, &c., Limtd; and it is ordered that the real and personal ppty and the right to sue for and recover all choses in action now subject to the trusts of the sd indenture be, as from the date of this order, vested in the sd M. and C. as such new trees as afsd, and for all the estate and interest therein now vested in the plt; and it is ordered that the sd M. and C. be added as plts in this action, and that this action be continued, carried on, and prosecuted in the name of the sd M. and C. in the place of the sd Law Guarantee, &c., Limtd, as plts in this action; and it is ordered that the costs of the Law Guarantee, &c., Limtd, as the plts in this action, from the foot of the taxation directed by the sd order dated the 1st September, 1898, including therein any charges and expenses properly incurred by them as trees of the sd indenture beyond their costs of this action, the plts having waived their claim to any further payment in respect of fees for acting as trees under the sd indenture, be taxed as between solor and client, and that such costs, when taxed, be pd by the receiver appointed by this order out of any moneys coming into his hands as such receiver; and it is ordered that R., the receiver appointed by the sd order dated the 12th June, 1896, be discharged and that he do forthwith lodge in the chambers of the Registrar (Cos Winding-up) his fourth and final account as such receiver, and pay the balance, if any certified to be due from him

**Form 543.** on passing his sd account to the sd M. and C., they having undertaken not to part with or otherwise deal with such balance until all the costs due to the plt society have been pd, and upon such payment being made, or upon its being certified that there is nothing due from the sd R. on the balance of his fourth and final account, it is ordered that the recognizance entered into by the sd R., and also the bond entered into by the sd R. together with the Law Guarantee, &c., both dated, &c., be resply vacated, and the sd M. having given security by entering into the sd recognizance and also into the sd bond together with the Law Guarantee, &c., Limtd, as his sureties, which recognizance and bond resply have been approved by the Ct and have been duly enrolled, it is ordered that the sd M. be and he is hby appointed receiver of the ppty and assets of the dft coy comprised in and subject to the trusts of the sd indenture dated the 29th July, 1891, in the sd judgment mentd, and of the ppty and assets of the dft coy charged by the debentures but not comprised in the sd indenture and accounts and balances. Wright, J., at Chambers, 14th July, 1899. Hood, Reg.

**Form 544.**

Order that trustees shall not take possession.

Upon the applicon by summons dated the 21st February, 1902, of the dfts J. and K., the trees to the sd trust deed dated the 15th February, 1898, in the pleadings mentd, and upon hearing the solors for the applicant, the plt, and for the remaining dfts other than the coy, and the dft coy by H. B., the off recr and liqr thof in person, and upon reading the orders of the 17th January and the 31st January, 1902, and the afft of T. R., filed the 26th February, 1902, and the exhibits thto, it is ordered that the applicants as such trees do abstain until further order from entering into possession of or selling the hereditaments and premises comprised in the sd trust deed in accordance with the trusts and provisions thof, and from dealing with and enforcing the three debentures of the sd coy held by the sd trees as collateral security also comprised in the sd trust deed. *Wood* v. *Mansions Proprietary, Ltd.*, 27th February, 1902, Byrne, J.

# CHAPTER LXXXVI.

## INTERIM DIVIDENDS TO DEBENTURE AND DEBENTURE STOCK HOLDERS.

Interim dividends.

THE final distribution of the fund is usually made on further consideration, when the Master or registrar has made his certificate pursuant to the judgment or order; but occasionally, either before or after further consideration, liberty is given to pay an interim dividend. In order to justify such an order there should be affidavit evidence showing the position, and that, taking into account the funds in hand and probable further receipts and the costs, &c. to be provided for, the money proposed to be divided is properly divisible. The application should be by summons.

As to making payments on account of principal, so as to avoid income tax, see *Smith* v. *Law Guarantee and Trust Society*, (1904) 2 Ch. 569.

Where a director, who was also a debenture stock holder, was being proceeded against for misfeasance, the Court ordered the amount divisible in respect of his share of stock to be retained and carried to a separate account pending the result of the proceedings against the director. *Rhodesia Goldfields, Ltd.*, (1910) 1 Ch. 239.

**Form 545.**

Order giving liberty to pay a dividend to debenture holders.

Upon the applicon of the receiver appointed by order dated ——, and liqr of the above-named coy, and, &c., Order that the applicant be at liberty to pay to each holder of debentures whose name is stated in the second column of the first pt of the schedule to the Master's certificate a dividend of 5*l.* in respect of each 100*l.* debenture held by him, out of the moneys in his hands as such receiver and liqr.

**Form 546.**

Order for payment of interim dividend.

Upon the applicon of the plt (by summons dated the 21st July, 1898), and upon hearing the solors for the applicant and for the dfts and for James Ford the liqr of the dft coy, and upon reading the registrar's certificate dated the 29th February, 1896, the order on further conson dated the 24th June, 1897, and the certificate of the fund, It is ordered that a further dividend of 3*s.* 6*d.* in the *l.*, making with the dividend of 2*s.* in the *l.* directed to be pd by the sd order of the 24th June, 1897, 5*s.* 6*d.* in the *l.*, be pd to the debenture holders of the above-named dft coy out of the funds in Ct as directed in the schedules hto.

And it is ordered that the costs of the applicon be costs in the action. *Akers* v. *Veuve Monnier, &c.*, Wright, J., 26th July, 1898.

**Form 547.**

Order giving liberty to pay coupons.

Upon the applicon by summons dated the 10th April, 1899, of the plts, and upon hearing the solors for the applicants and for the dfts, and upon reading the order dated the 5th May, 1898 (appointing receiver), the order made in the matter of the Bell Organ and Piano Coy, Limtd, and in the matter of the Cos Acts, 1862 to 1890, and in the matter of the Joint Stock Cos Arrangement Act, 1870, and in this action dated the 6th March, 1899, sanctioning the scheme of arrangement, and an afft of W., filed the 14th April, 1899, and the exhibits therein referred to, It is ordered that H., the receiver and manager appointed in this action, be at liberty to pay any unpd coupons in respect of the debentures issued by the dft coy due prior to the appointment of the sd receiver and manager, such payments to be made to the debenture holders on presentation of such unpd coupons to the liqr of the dft coy or the Bell Organ, &c. Coy (incorporated 1899) on production of evidence that the liqr or the new coy have not satisfied any unpd coupons. And it is ordered that any payments so made be allowed to the sd receiver and manager in his accounts. And it is ordered that the costs of this applicon be costs in the action. *Re Bell Organ, &c. Co., Consolidated Trust, Ltd.* v. *Same Co.*, Wright, J., 18th April, 1899.

**Form 548.**

Order to pay interest on first debentures.

Upon the applicon of the plts by summons, &c., It is ordered that the dfts, H. B. and A. W., do out of the 3,120*l.* East India Railway Stock, and 456*l.* 4*s.* 7*d.* New South Wales Government Stock, mentd in Pt 3 of the third schedule to the registrar's sd certificate, raise the sum of 1,740*l.*, being the amount of the half-year's interest less tax accrued due on the 15th September, 1894, on the First Mortgage Debentures amounting to 60,000*l.* issued by the dft coy, and that they do pay the same to J. B., the receiver and manager appointed in this action, And it is ordered that the sd J. B. do distribute the sd sum of 1,740*l.* when received by him among the several persons named in the second column of the first schedule to the sd certificate, being the holders of the sd 60,000*l.* First Mortgage Debentures, in payment to them resply of the interest so accrued due to the 15th September, 1894, on the several debentures held by them resply, and that he do account for the sd sum of 1,740*l.* on passing his accounts as receiver in this action. *Laurence, &c. (on behalf)* v. *Barnard, Bishop and Barnards, Ltd., and others*, Vaughan Williams, J., 24th December, 1894.

**Form 549.**

Order to pay off principal due to first mortgage debenture holders.

Upon the applicon of the plts, by summons dated the 10th March, 1897, &c., and the dfts by their solors not objecting, It is ordered that out of the funds in Ct to the credit of this action there be pd to the plts and the other First Mortgage Debenture holders of the dft coy the amounts certified by the chief clerk's certificate, dated the 18th

February, 1897, to be due to them resply on the security of their First Mortgage Debentures, as in the schedule hto; but the question of interest on the principal amounts certified due is reserved. Payment schedule: this shows payees. *Re The Chemists' Assocn., Fry* v. *Same*, North, J., at Chambers, 1st April, 1897. **Form 549.**

Upon applicon by summons dated the 15th April, 1897, by the dfts W. and H., and upon hearing the solors for the applicant and for the plts and for the dfts, John Davidson & Sons, Limtd, and for R. C. and W., purchasers, and upon reading the order dated, &c., the taxing-master's certificate dated, &c., and afft, &c., and the certificate of the fund, and the sd purchasers by their solors consenting to this order, It is ordered that the fund in Ct be dealt with as directed in the schedule hto, the payments thereby directed to be made to the debenture holders being a second distribution to all the holders of the first series of mortgage debentures in the first pt of the first schedule to the chief clerk's certificate, dated the 23rd July, and filed the 29th October, 1893. **Form 550.** Order for part payment of first debenture holders.

PAYMENT SCHEDULE.

In first column: "R. C. and J. W., named in the restraint dated the 17th March, 1896, have had notice." "Pay the costs to be taxed under order of the 15th June, 1896, and taxing master's certificate, dated the 9th April, 1897, namely, costs of plt [*in second column the names of the solors; third, amount*]." "Pay [*and in second column name of debenture holders opposite*]." *Davidson (on behalf)* v. *John Davidson & Co.*, North, J., 30th April, 1897. A. 577.

Upon the applicon of the plts, &c., It is ordered that the funds in Ct be dealt with as directed in the payment schedule hto. The sum of 110*l.* 13*s.* 11*d.* thereby directed to be pd being in respect of income tax on the amounts pd to the debenture holders in respect of interest under the sd orders dated the 11th July and the 20th November, 1896. **Form 551.** Order for payment of costs and income tax.

In schedule. First column. The restraint contained in the lodgment schedule, dated the 18th August, 1896, requiring notice to Messrs. Dalgate & Coy, Limtd, is hby discharged.

Notwithstanding the order of the 20th November, 1896, and in lieu of the directions therein contained. Sell sufficient Consols as with cash and other 66*l.* money on deposit will raise 100*l.* and the costs to be taxed under the sd order dated the 20th February, 1896.

Out of proceeds and the sd cash and money on deposit: pay the sd costs; pay income tax [*and in second and third column* Her Majesty's Commissioners of Inland Revenue, 160*l.* 13*s.* 11*d.*]. *Barclay (on behalf, &c.)* v. *Vickers, &c.*, North, J., 10th March, 1897. A. 423.

## CHAPTER LXXXVII.

### FURTHER CONSIDERATION.

**Practice.**

WHERE the Master or registrar has made his certificate and there is something to divide, the action is brought on for further consideration. An order can be made on further consideration discharging the receiver and directing payment of the costs and distribution of the fund among the persons shown to be entitled to it, or an order can be made to tax and pay costs and divide part of the fund.

Setting down of causes on further consideration.

**Ord. XXXVI. r. 21.**—When any cause or matter in the Chancery Division shall have been adjourned for further consideration, the same may, after the expiration of eight days, and within fourteen days from the filing of the Master's certificate, be set down by the registrar in the cause book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the proceedings, and after the expiration of such fourteen days the cause or matter may be set down by the registrar on the written request of the solicitor for the plaintiff or for any other party; and in either case, upon production of the judgment or order adjourning further consideration, or an office copy thereof, and an office copy of the Master's certificate or a memorandum of the date when the certificate was filed, endorsed on the request by the proper officer. The request may be in the Form No. 26 in Appendix L. The cause or matter when so set down shall not be put into the paper for further consideration until after the expiration of ten days from the day on which the same was so set down, and shall be marked in the cause book accordingly. Notice thereof shall be given to the other parties in the action at least six days before the day for which the same may be so marked for further consideration. Such notice may be in the Form No. 27 in Appendix L.

The papers required for the judge's use are: two copies of the minutes of the proposed judgment or order, one copy of the pleadings, and one copy of the Master's certificate. These must be left with the judge's clerk one clear day before the further consideration is ready to come into the paper.

In Chambers.

Ord. LV. r. 2 (16), includes in the business to be disposed of in chambers the following:—

(16) Applications for orders on the further consideration of any cause or matter where the order to be made is for the distribution of an insolvent estate or for the distribution of the estate of an intestate [*or for the distribution of a fund among* creditors or *debenture holders*].

See Ann. Pr., notes to Ord. LV. r. 2 (16).

Notice of setting down need not be given to parties who, having been served with notice of the judgment, have not entered appearances

unless the order asked for requires them to pay money or otherwise affects them personally. *Re Rolfe*, 70 L. T. 624. If it is intended to use evidence already given in chambers, notice must be given to the other parties. See Ann. Pr., notes to Ord. XXXVI. r. 21.

As to setting down without fee, see Ann. Pr., notes to Ord. XXXVI. r. 21.

As to marking an action for hearing on further consideration as a short cause, see Dan. Ch. Pr., 8th ed. p. 1011.

Further consideration of matter originating in chambers.

**Ord. LV. r. 72.**—Where any matter originating in chambers shall, at the original or any subsequent hearing, have been adjourned for further consideration in chambers, such matter may, after the expiration of eight days and within fourteen days from the filing of the chief clerk's certificate, be brought on for further consideration by a summons, to be taken out by the party having the conduct of the matter, and after the expiration of such fourteen days by a summons, to be taken out by any other party. Such summons shall be in the form following:—

"That this matter, the further consideration whereof was adjourned by the order of the —— day of ——, 18—, may be further considered," and shall be served six clear days befor the return. Provided that this rule shall not apply to any matter, the further consideration whereof shall, at the original or any subsequent hearing, have been adjourned into Court.

## Costs in Debenture Actions.

*Primâ facie*, the plaintiff in an action to enforce debentures or debenture stock, whether on his own account only or on behalf of himself and other members of the class is entitled only to party and party costs (*Queen's Hotel, Cardiff*, (1900) 1 Ch. 792), but where the assets charged are insufficient to pay the debentures or debenture stock in full, the plaintiff is entitled to be allowed costs as between solicitor and client. *New Zealand Midland Rly.; Smith* v. *Lubbock*, (1901) 2 Ch. 357; and *Bristol Collieries Co.*, 54 Sol. J. 376. The principle on which this rests is stated by Collins, L. J., in the case of the *New Zealand Midland Rly.*, *supra*; thus: "Where the fund exclusively belongs to a particular class of persons, so that they may be indemnified in full by a distribution of that fund, and they are not seeking indemnity at anybody else's expense, then it seems to me, as a matter of common sense, that there should be a complete indemnity to the person through whose instrumentality this fund has been secured for the benefit of all, and that such a complete indemnity could not be given without allowing that person costs as between solicitor and client."

In some cases a debenture holder may be entitled to costs of an action even though he gets nothing else—*e.g.*, where the plaintiff brings an action on behalf of himself and all the other debenture holders, and the proceeds of sale prove insufficient to pay the debenture

holders of the class ranking before him. *See Carrick* v. *Wigan Tramways Co.*, W. N. (1893) 98.

In that case the fund in Court was sufficient only to pay the first five debenture holders and the plaintiffs ranked fifteenth in order of priority; but Chitty, J., held that the plaintiff was entitled to the costs of the action, other than such, if any, as had been incurred by him in support of his own security only, being of opinion that the proceedings had been for the benefit of the persons interested in the fund in Court by effecting a sale of the undertaking, and by getting in and securing in the meantime the income thereof, and by ascertaining and determining the rights and priorities of the parties entitled to the proceeds of sale and income, and by effecting a distribution thereof accordingly. And see *Batten* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612.

In *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317, it was held that, the fund being insufficient, the costs and other expenses must be paid thereout in the following order:—

1. Plaintiff's costs of the realization of the property, including the costs of any abortive attempt to sell.
2. Costs due to solicitors to the trustees before action brought, they having a lien on title deeds.
3. The balance, if anything, due to the receiver and manager, including his remuneration and his costs of the action.
4. The costs, charges and expenses of the trustees of the covering deed where made defendants.
5. The plaintiff's costs in the action, and, where the plaintiff has been substituted for a former plaintiff, then the costs of such plaintiffs *pari passu*.

In that case Pearson, J., said: "The property must be realised by someone in order that it may be distributed, and whoever has realised it and brought the proceeds under the control of the Court has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled. These costs must be paid in priority to the receiver."

And see *London United Breweries, Ltd.* (1907) 2 Ch. 511.

The costs of defending another action for the benefit of the debenture holders are payable in priority to the claims of the receiver. *Wrexham, Mold and Connah's Quay Ry. Co.*, (1900) 1 Ch. 261.

In *Clayton Engineering, &c. Co.*, 90 L. T. 283; W. N. (1904) 28, Swinfen Eady, J., said: "The rule is correctly stated in Palmer's Company's Precedents, 9th ed., Vol. III., p. 710, namely:

"'The defendant company in a debenture or debenture stock action is not entitled to costs, unless, indeed, the action fails. *Mortgage Insurance Corpn.* v. *Canadian Agricultural, &c. Co., Ltd.*, (1901) 2 Ch.

377. The company must look to the surplus; nor are second debenture holders made defendants entitled to costs, they also must look to the surplus.' This is the same as the general rule in mortgage actions where subsequent incumbrancers are made defendants. Where they are made plaintiffs, different considerations arise."

Where the trustees of a debenture or debenture stock covering deed are made defendants, they are entitled to their full costs (*Mortgage Insurance Corpn., Ltd.* v. *Canadian Agricultural, &c. Co., Ltd.*, (1901) 2 Ch. 377), and they will be entitled to such full set of costs even where they and the defendant company have appeared by the same solicitor. *S. C.*

In *Re W. C. Horne & Sons, Ltd.*, (1906) 1 Ch. 271, the assets being sufficient to pay the debentures in full and the plaintiff unable to pay the difference between party and party and solicitor and client costs of action, the Court made a charging order in favour of the plaintiff's solicitor for such difference upon so much of the funds in Court as belonged to the debenture holders, and also a charging order upon the balance of the funds which would be payable to the liquidator for the solicitor's costs as between solicitor and client, incurred on behalf of the receiver of certain proceedings at home and abroad for the purpose of recovering and preserving assets which were really part of the receiver's costs of administration and might have been included in his accounts.

By Ord. LXV. r. 27 (17 b), framed in January, 1902, to meet the difficulty in *Silkstone and Haigh Moor Coal Co.* v. *Edey*, (1901) 2 Ch. 652, it is provided that "the taxing officers of the Supreme Court or of any Division thereof shall have power and authority to make one or more interim certificate or certificates, allocatur or allocaturs, in any taxation for any portion or portions of the taxed costs directed to be taxed, without waiting until a certificate for the full amount can be made."

As to apportioning costs where one party is liable to pay part only of the costs of an action, see *Re Pollard*, W. N. (1902) 49. See also *Re Wright, Crossley & Co.*, W. N. (1902) 54; *Re Bourne's Trade Marks, Bourne* v. *Swan*, (1903) 1 Ch. 211.

As to a liquidator (who has not been acting as receiver or been employed in realising the property charged), it must be remembered that the assets of the company in the winding-up of incumbered property consists only of the equity of redemption or suplus after clearing off the incumbrancers. See Part II., 15th ed. pp. 675, 676.

The costs of the trustees have priority over a charging order by solicitors for property recovered or preserved. *Re Turner*, 95 L. T. 861; (1907) 2 Ch. 539, affirming (1907) 2 Ch. 126.

As to the cost of sending out notices of judgment and of meetings of debenture holders, see *Re Commonwealth Oil Corpn., Ltd.*, (1917) 1 Ch. 404.

**Form 552.**

Notice that cause has been set down for further consideration.

In the High Ct of Justice,
Chancery Division.
Mr. Justice ——.
A. *v.* B.

Take notice that this cause, the further conson whereof was adjourned by the order of the —— day of ——, was on the —— day of —— set down for further conson before Mr. Justice —— for the —— day of ——.

Dated, &c.

To Mr. ——, solor for ——. C. D., solor for ——.

The above form is No. 27 of Appendix L.

**Form 553.**

Summons for further consideration.

Let, &c. (Form 171 or 172), On the hearing of an applicon on the pt of the plt that this action the further conson of which was adjourned by the judgment dated the —— day of —— may be heard on further conson and that an order may be made in the terms of the accompanying minutes.

Dated, &c.

This summons was taken out by ——,
of ——, solors for the plt.

To [*dfts*].

**Form 554.**

Further consideration; discharge receiver; tax and pay costs; apportion and divide balance.

Upon the applicon of the plts by summons dated the 28th October, 1905, for the further conson of this action, and upon hearing the solors for the applicants and for the dfts, and upon reading the order dated the 17th August, 1904, a judgment dated the 24th August, 1904, and the certificate dated the 18th April, 1905, of the result of the accounts and inquiries directed by the sd judgment, and the afft of M. filed this day, It is ordered that M., the receiver and manager appointed by the sd judgment, be and he is hby discharged from his office of receiver and manager. And it is ordered that the sd M. do forthwith [lodge at the chambers of the judge] *or* [leave and pass in the chambers of the Registrar (Cos Ct.)] his first and final account as such receiver and manager (including therein an account of his receipts payments and allowances as the interim receiver appointed by the sd order dated the 17th August, 1904), and that he do pay the balance appearing due from him on such account or such pt thof as shall be certified as proper to be pd by him into Ct to the credit of this action as directed in the lodgment schedule hto.

And upon such lodgment being made, or it being certified that there is nothing due from the sd receiver on the balance of his final account, It is ordered that the bond dated, &c., entered into by the sd M. with the Law Guarantee, &c. Society as surety be vacated.

**Form 554.**

And it is ordered that the plts' costs of this action be taxed as between solor and client, and on such taxation the plts are to be allowed the amounts properly pd by them to the dft coy for its costs of appearing on the motion for judgment. And it is ordered that the funds in Ct be dealt with as directed in the payment schedule hto.

LODGMENT SCHEDULE.

In the High Ct of Justice,

Chancery Division. Date of order ——, 19—.

Title of Cause or Matter: *Re A. Coy, Limtd, B.* v. A. *Coy, Limtd.* 1918. A. No. ——.

Ledger Credit as above.

| Particulars of funds to be lodged to the Account of the Paymaster-General. | Person to make the lodgment. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Balance (if any) on passing his first and final account as Receiver and Manager. | C. D. (*the Receiver and Manager*). | | |

PAYMENT SCHEDULE.

(*Title as above.*)

Ledger Credit as above.

Funds in Ct to be dealt with in pursuance of this order.

Consols ——.

Cash ——.

Funds to be lodged.

| Particulars of payments, transfers, or other operations to be carried out by the Paymaster. | Payees and Transferees or Titles of separate Accounts. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Sell Consols ... ... ... | | | |
| Out of cash and proceeds of sale and funds to be lodged as above— | | | |
| Pay costs to be taxed under this order. | | | |
| Divide residue into ninths. | | | |
| Pay five ninths ... ... | E. F., of ——. | | |
| Pay four ninths ... ... | G. H., of ——. | | |

*Frost* v. *Isaac Frost & Sons*, Buckley, J., 23rd November, 1905

**Form 555.**

Another, where fund insufficient to pay debenture holders.

Upon the applicon by summons dated the 22nd July, 1897, of the plts for the further conson of this action, and upon hearing the solors for the applicant, and no one appearing for the dfts, although duly served with the sd summons as by afft of, &c., appearing and upon reading, &c., and it appearing that E., the receiver and manager appointed in this action, has pd the sum of 944*l.* 1*s.* 5*d.* into Ct as directed by the sd registrar's certificate, dated the 20th July, 1897, and that he has not received or pd anything as such receiver and manager since the 4th May last, the date of his last account, and that there is nothing due to or from him, Order that the sd E., the receiver and manager appointed by the sd order dated the 14th February, 1896, be discharged, and that the joint and several bond dated the 17th March, 1896, entered into by the sd E. with The —— Coy, Limtd, as his sureties, be vacated, And order that the plts' costs of this action be taxed as between solor and client, And order that the residue of the funds in Ct, after payment of such costs, be apportioned amongst the debenture holders named in the first schedule to the sd chief clerk's certificate, dated the 16th July, 1897, in proportion to the amount thereby certified to be due to them, and that the amount so apportioned, and the names of the persons to whom such amounts are payable, be certified, and any person interested is to be at liberty to apply as there may occasion.

THE PAYMENT SCHEDULE.

(*Title.*)

Funds in Ct, 944*l.* 1*s.* 5*d.*, money on deposit: First column, amount of money on deposit and any interest: Pay plt costs, to be taxed under this order: Pay sums to be apportioned to debenture holders named in the first schedule to registrar's certificate dated the 16th July, 1897, to the persons to whom the same shall be certified to be payable. *Cooper* (*on behalf*) v. *Richmond Colortype Printing Co., Ltd.*, Byrne, J., for Vaughan Williams, 7th August, 1897.

**Form 556.**

Certificate of apportionment.

(*Title.*)

I certify that under an order dated the 7th August, 1897, the sums stated in the schedule subjoined hto, amounting in the whole to 748*l.* 18*s.* 4*d.*, have been ascertained to be the sums payable under the sd order to the persons resply named in respect of the debentures held by them.

Dated this —— day of ——.

——, Registrar.

SCHEDULE, with three columns headed resply: **Form 556.**

(1) Name; (2) Address (if ascertained); (3) Amount.

This was based on certificate by plaintiff's solicitor as follows:—

(*Title of Action.*)

Fund in Ct at date of order, the 7th August, 1897:

| | £ | *s.* | *d.* |
|---|---|---|---|
| Money on deposit ... ... ... ... ... | 944 | 1 | 5 |
| Interest allowed to date of withdrawal ... ... | 1 | 11 | 5 |
| | £945 | 12 | 10 |
| Less taxed costs ... ... ... ... ... | 160 | 14 | 6 |
| Residue for apportionment ... ... ... ... | £784 | 18 | 4 |

The above residue of 784*l.* 18*s.* 4*d.* has been apportioned amongst the debenture holders named in the first schedule to the registrar's certificate dated the 16th July, 1897, in proportion to the amount thereby certified to be due to them, and the apportioned amounts and the names of the persons to whom such amounts are payable are as follows:—Tabular form, with two columns headed resply: (1) Names of Debenture Holders; (2) Apportioned Amount to be pd.

We hby certify the above to be the proportions of the funds in Ct payable to the debenture holders therein, pursuant to the order dated 7th August, 1897. —— & ——, plts' solors.

Upon the applicon, &c. **Form 557.**

Discharge of receiver. Distribution of fund (insufficient for payment in full).

And it appearing from the sd afft of R. A. that all the ppty and assets of the dft coy capable of realization have been got in and realized and that all the preferential debts have been pd or satisfied.

It is ordered that R. A., the receiver and manager appointed by the sd judgment in this action dated the ——, 19—, be discharged and that he do pass in the chambers of the registrar his third and final account as such receiver and do lodge the balance which may be certified to be due from him thereon into Ct to the credit of this action as directed in the lodgment and payment schedule hto.

And thereupon and upon it being certified that there is nothing due from the sd receiver on passing his sd account, It is ordered that the bond dated the ——, 19—, entered into by the sd receiver, together with the —— Insurance Coy, Limtd, as his surety be vacated.

And it is ordered that the costs of the plt and of the dft H. T. W. of this action, including in the costs of the sd H. T. W. his costs,

**Form 557.** charges and expenses as tree of the trust deed dated the 7th May, 19—, be resply taxed as between solor and client, and on such taxation the plt is to be allowed the amount properly pd by him to the dft coy for its costs of appearing and consenting to the sd judgment.

And it is ordered that the funds in Ct to be lodged pursuant to this order be dealt with as directed in the payment schedule hto.

And any of the parties are to be at liberty to apply as they may be advised.

LODGMENT SCHEDULE.

In the High Ct of Justice,
Chancery Division.

Date of order, ——, 19—.

Title of Cause or Matter: *Re Cowey Engineering Coy, Lmtd, Moncrieffe* v. *The Coy and Another* (1931. C. No. 1216.)

Ledger Credit as above.

| Particulars of funds to be lodged to the Account of the Accountant-General of the Supreme Court. | Person to make the lodgment. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Balance (if any) to be certified to be due from the Receiver on passing his third and final account. | R. A. (*the Receiver*). | | |

PAYMENT SCHEDULE I.

In the High Ct of Justice,
Chancery Division.

Date of order [*as above*].

*Re* [*as above*].

Ledger Credit as above, "Proceeds of Sale."

Funds in Ct to be dealt with: War Stock 5 p.c. 1929-47, ——*l.*

| Particulars of Payments, Transfers or other operations to be carried out by the Accountant-General of the Supreme Court. | Payees and addresses of same and Transferees or titles of Separate Accounts. | Amounts. |
|---|---|---|
| Sell War Stock.<br>Carry over proceeds of sale and any interest. | Said action. | |

PAYMENT SCHEDULE II. **Form 557.**

In the High Ct of Justice,
Chancery Division.

Date of order [*as above*].

*Re* [*as above*].

Ledger Credit as above.

Funds in Ct and to be dealt with—War Stock 4 p.c. 1929-47, ——*l.*; Funds to be carried over under Payment Schedule I.; Funds (if any) to be lodged under Lodgment Schedule.

| Particulars of Payments, Transfers or other operations to be carried out by the Accountant-General of the Supreme Court. | Payees and addresses of same and Transferees or Titles of Separate Accounts. | Amounts. |
|---|---|---|
| Sell War Stock. | | |
| Out of proceeds of sale and any interest and the funds to be carried over under Payment Schedule I. and the funds to be lodged as above— | | |
| Pay tax (if any) ... .. ... | Commissioners of Inland Revenue. | |
| Pay in satisfaction of the claim of the V. W. Co., Ltd. | E. H. W., —— Street, E.C.4 (*Liquidator of the V. W. Co., Ltd.*). | ——*l.* |
| Pay remuneration of trustee for debenture holders. | H. T. W., ——, W.C. | ——*l.* |
| Pay receiver's remuneration ... | R. A., ——, W. C. (*Receiver*). | ——*l.* |
| Pay costs to be taxed under this order | | |
| Divide residue into forty-six parts. | | |
| Pay such parts among the debenture stockholders named in the second column rateably in proportion to the amounts (totalling ——*l.*) set opposite their respective names in this column, no portion of such payments being in respect of interest:— | | |
| ——*l.* ... ... ... ... | J. R. M., ——, W.1. | |
| ——*l.* ... ... ... ... | M. M. (same address) (Married Woman). | |
| ——*l.* ... ... ... ... | L. B., ——, London, W. | |
| ——*l.* ... ... ... ... | R. C. C., ——, W.C. (Married Woman). | |
| &c. | | |

*The Cowey Engineering Co., Ltd.* (C. 1216 of 1931). Stiebel, Reg.

**Form 558.**

Order on further consideration where winding up.

Upon the applicon by summons dated the ——, 19—, of the dft I. & G. Trust, Limtd, for the further conson of this action, and upon hearing counsel for the plts B. Bank, Limtd, and B. M. Trust, Limtd, and for the dfts, the I. & G. Trust, Limtd, and the solors for the dfts Allied Cement Manufacturers, Limtd.

**Form 558.**

And upon reading the judgment dated ——, 19—, the order dated the ——, 19—, the Master's certificate filed ——, 19—, the afft of Sir W. M. filed the ——, 19—, the afft of D. M. filed this day, and the exhibits in the sd affts referred to and the certificate of funds.

And it appearing by the sd Master's certificate that the plts B. Bank, Limtd, are entld under a deed of charge dated the 14th October, 1928, to a first charge upon all the assets of the dfts Allied Cement Manufacturers, Limtd, other than the ppty specifically charged by the trust deed mentd in the endorsement on the writ of summons in this action (except in so far as certain charges mentd on pages 9 and 10 of the sd certificate may take priority thto) to secure the payment to the sd plts of the sum of ——*l.*, together with interest as in the sd deed of charge mentd and that the whole of the sd sum and certain interest is still outstanding and due to the sd plts.

And it appearing that the sum of ——*l.* is now in Ct to the credit of this action, "Proceeds of sale to the A. P. C. M., Limtd," being the sum lodged in Ct to the credit of the sd account pursuant to the sd order dated the ——, 19—, and that the sum of ——*l.* is now in Ct to the credit of this action, being the balance certified to be due from the receiver on the passing of his first account.

And it appearing from the sd afft of the recever that he has in his hands or under his control a sum exceeding ——*l.* representing ppty not specifically charged by the sd trust deed and not comprised in any of the sd charges mentd on pages 9 and 10 of the sd certificate.

And the plts B. Bank, Limtd, by their counsel consenting to payment off of the total amount due to the holders of the sd First Mortgage Debenture Stock before any payment is made to the sd plts in respect of their sd first charge for ——*l.* and interest upon the footing that they are to be subrogated to the sd stockholders and to be entld to the benefit of the sd trust deed to the extent of the sd first charge and the principal and other moneys thereby secured.

And it appearing from the afft of D. M. filed this day, and the register of transfers and transmission of interest exhibited thto that the interest of certain of the holders of the sd First Mortgage Debenture Stock mentd in the schedule to the sd certificate has been transmitted or transferred since the date of the sd certificate as shown by the sd register to persons whose names appear amongst others in the schedule to this order, and that the present holders of the sd Debenture Stock are correctly set forth in the sd schedule.

And the persons whose names are set opposite serial numbers —— in the schedule to the Master's sd certificate having since the filing of the sd certificate produced their Debenture Stock certificates.

And the plts B. Bank, Limtd, and B. M. Trust, Limtd, and the dfts I. & G. Trust, Limtd, by their respive counsel consenting to this order.

**Form 558.**

It is ordered that the sd receiver do on or before the —— day of ——, 19—, lodge in Ct as directed in the schedule hto the sd sum of ——*l.*

And it is ordered that the sum of ——*l.* be carried over to a special account to meet the claims of preferential creditors named in the afft of D. M., filed the ——, 19—, as directed in the payment schedule II. hto.

It is ordered that the funds to be so lodged and the funds in Ct be dealt with as directed in the schedules hto, the several payments and carry over in payment schedule II. in respect of principal and premium being the full amounts found due in the sd certificate to the holders of the sd First Mortgage Debenture Stock, such payments and carry over to be made upon the footing that the plts B. Bank, Limtd, are to be subrogated as afsd, but subject as afsd to be without prejudice to the claims of any other persons or companies in respect of any charges claimed by them resply or to any questions as to the priority of such respive charges.

And it is ordered that the costs of the dfts I. & G. Trust, Limtd, of this action be taxed.

And it is ordered that all further proceedings be stayed against the dfts I. & G. Trust, Limtd, except for the purpose of carrying this order into effect.

And it is ordered that the future conduct of this action be committed to the plts B. Bank, Limtd, and B. M. T., Limtd.

And the further conson of this action is adjourned.

Liberty to apply.

This order to be without prejudice to the order dated the 13th January, 1931, appointing the receiver.

LODGMENT AND PAYMENT SCHEDULE.

LODGMENT.

In the High Ct of Justice,
Chancery Division.

Date of order, 21st April, 1932.

Title of Cause or Matter: *Re Allied Cement Manufacturers, Limtd, B. Bank, Limtd* v. *The Coy.*

Ledger Credit as above.

| Particulars of funds to be lodged to the Account of the Accountant-General. | Person to make the lodgment. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Cash in hands of Receiver ... | Sir W. M. (*the Receiver*). | ——*l.* | |

**Form 558.**

PAYMENT SCHEDULE I.

In the High Ct of Justice,
Chancery Division.

Date of order [*as above*].

Title of Cause or Matter: [*as above*].

Ledger Credit as above, "Proceeds of sale to the A. P. C. M., Limtd."

Funds in Ct, money on deposit, ——*l.*

| Particulars of payments, &c. | Payees, &c. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Carry over the above funds and any interest ... ... ... | The said action. | | |

PAYMENT SCHEDULE II.

Date of order [*as above*].

Title of Cause or Matter: [*as above*].

Funds to be dealt with: ——*l.* money on deposit; Funds to be lodged as above, and Funds to be carried over under Payment Schedule I.

| Particulars of payments, transfers or other operations to be carried out by the Accountant-General. | Payees, transferees of titles of separate accounts. | Amounts. | |
|---|---|---|---|
| | | Money. | Securities. |
| Out of the cash, the fund to be lodged, the fund to be carried over and any interest, carry over. | Said action:—"To meet claim for income tax." | ——*l.* | |
| Upon production of a certificate or certificates of Sir P. C. S. or E. C. S., members of the firm of S. & S., that the debenture stock certificates to secure the repayment of the under-mentioned sums have been handed up for cancellation, pay and carry over to the persons or accounts whose names or titles are set forth in the second column hereof the principal sums and premium set forth in this column opposite their respective names or accounts amounting in the aggregate to ——*l.* principal and ——*l.* premiums, together with interest on such respective principal sums at the rate of 6½ p.c. p.a. from the ——, 1930, to the date of payment. In the case of joint payees, pay survivor or survivors thereof. | | | |
| *Here will follow*— | | | |
| Principal 100*l.* ..... | (1) John Adams, of, &c. (*as per schedule*) | | |
| Premium 3*l.* | | | |
| 103*l.* | | | |

(A. 3229 of 1930.) Maugham, J., 21st April, 1932.

**Form 559.**

Taxation and payment of costs and apportionment.

Upon the applicon of the plts, &c., and it appearing from the sd afft of M., filed the 29th day of June, 1905, that since the 31st October, 1904, a day to which his eighth account as receiver and manager was made up, and lastly, as appears by the registrar's sd certificate, dated the 21st February, 1905, the sd M has received the sum of 13*l.*, which is in his hands, and there are no other sum or sums of money to be got in in respect of the undertaking or ppty of the dft coy, comprised in or subject to the security created by the debentures issued by the dft coy to the plt and the other debenture holders of such coy. It is ordered that the sd M. do pay the sd sum of 13*l.* to the plt's solors on account of the plt's costs hnftr ordered to be taxed, and upon such payment being made, it is ordered that the recognizance, &c. be vacated. And it is ordered that the costs as between solor and client, of the plt and the dfts, M. and F., of this action from the foot of the taxation directed by the sd order on further conson, dated the 14th August, 1903, including in the costs of the sd dfts any charges and expenses properly incurred by them as trees of the indenture dated the 29th March, 1897, beyond their costs of this action and not already pd or allowed and including in the costs of the dfts, the costs of M. of an action in the K. B. Div., &c., and the costs and outlay of G. attending the proceedings under order dated the 14th March, 1901, of this action, including therein his costs of attending on the taking of the receiver's accounts in this action from the foot of the taxation directed by the sd order on further conson, dated the 14th August, 1903, and also the costs of the dft coy of this action, so far as the same have been improperly incurred in the realisation of its assets, be taxed And order that the funds in Ct be dealt with as directed in the payment schedule hto. And order that the residue of the fund in Ct (after the payments directed by the Payment Schedule hto have been made) be apportioned among the debenture holders named in the first schedule to the registrar's certificate, dated the 6th April, 1903, rateably in proportion to a moiety of the amounts thereby certified to be due to them for principal, and that the sums so apportioned and the names of the persons to whom such sums are payable be certified.

PAYMENT SCHEDULE.

Pay income tax payable in respect of interest pd to E. H. under order dated the 14th August, 1903. Sell the new Consols; out of proceeds and money on deposit, balance of cash, and any interest: Pay costs to be taxed under this order. Pay sums to be apportioned to debenture holders by registrar's certificate to the persons to whom such sums shall be certified to be payable. *Field (on behalf, &c.)* v. *Henry Lovibond & Son*, Warrington, J., 1st August, 1905.

**Form 559.** Where there is a restraint or stop order on the fund in Court, the first column of the payment schedule will commence with the words "notwithstanding restraint dated ——," or "C., the purchaser named in the restraint dated 16th December, 1904, consenting, discharge such restraint."

**Form 560.**

Further consideration—order to vary Master's certificate.

This action coming on for further conson this day before this Ct in the presence of counsel for the plts and dfts and the applicon by summons dated the 26th November, 1896, and the plt Charles Pegge, to vary the Master's certificate dated the 13th June, 1897, which, upon hearing the solors for the applicant and for the plt L. and for the dfts in chambers, was adjourned to be heard in Ct, coming on this day for hearing in the presence of counsel for the sd parties and upon reading the Master's certificate dated the 24th and filed the 30th June, 1897, the Master's certificate, &c., and an afft of, &c., filed, &c., and upon hearing counsel for the sd parties, This Ct doth upon the applicon to vary declare that the applicant is entld to be ranked with the holders of Second Mortgage Debentures for the amount of 400*l.* with interest at 4*l.* 10*s.* p.c.p.a. from the 7th October, 1898, the date when his afft in support of his claim was sworn, and to participate *pari passu* with such debenture holders in the distribution of the assets of the coy accordingly, and that as to the interest of 5 p.c.p.a. in arrear and promissory notes the applicant is to be entld to claim the same against the coy, And it is ordered that the applicant's costs of the sd applicon be added to his sd security, such costs to be taxed by the taxing master, and it appearing that the receiver has pd to certain of the debenture holders in the sd certificate mentd sums amounting to 147*l.* 10*s.* 7*d.* in all, and that notwithstanding the sd certificate dated the 30th June, 1897, 137*l.* 15*s.* 9*d.* only of such sum was pd in respect of interest on debentures, and the balance of 9*l.* 14*s.* 10*d.* was pd in mistake to the plt in respect of interest due on certain promissory notes of the dft coy held by him, &c., &c.

Order to recoup receiver amount pd and receiver to pass his account, taxation of costs and distribution of assets. *Pegge and Llewellyn (on behalf of themselves, &c.)* v. *The Neath and District Tramways Co., Ltd.*, North, J., 18th December, 1897. B. 1505.

**Form 561.**

Order to pay dividends to debenture holders.

Upon the applicon by summons, &c., of the dfts the C. Bank, &c., Order that the funds in Ct be dealt with as directed in the payment schedule hto, the several payments and carryings over hby directed to be made being in respect of a dividend of 10*l.* p.c. on the amount of the principal sums found due on the several debentures referred to in the third schedule to the registrar's certificate dated, &c., and order that the costs of applicants, of the plt and of the dfts and of the sd M. on sd applicon be taxed, and that such costs when taxed be pd by

J., the receiver in this action, out of any moneys in his hands available for the purpose. The payment schedule provided: "Sell new Consols: out of proceeds of sale, cash dividends, interest, and so much of the money on deposit as may be necessary, make the payments to the several persons and the carryings over to the several accounts resply mentd in the second column of this schedule, being a dividend at the rate of 10*l.* p.c. on the principal sums due in respect of the debentures referred to in the third schedule to the certificate of the Registrar of Cos Winding-up, dated the 24th December, 1895." *Stubber* (*on behalf, &c.*) v. *Thomas Daniel & Co., Ltd.*, Vaughan Williams, J., 20th October, 1896. **Form 561.**

**Form 562.**

**Another. Where shares have been distributed in part payment of debentures.**

Upon the applicon of the plts by summons dated the 13th June, 1904, for the further conson of this action and upon hearing the solors for the applicant and no one appearing for the dft coy, although it has been duly served with the sd summons as appears by the office copy summons dated, &c., in default of appearance and upon reading the order, &c., the certificate of the Master, dated, &c., two several registrar's certificates, dated, &c., and the afft of ——, the certificate of lodgment dated, &c., and the certificate of bond, and it appearing that S., the receiver in this action, has transferred to each holder of debentures whose name is stated in the second column of the first schedule to the sd registrar's certificate, dated, &c., 115 1*l.* fully pd up 6 p.c. cumulative preference shares in the —— Coy, Limtd, mentd in the second schedule to the sd certificate in respect of each 100*l.* debenture held by him as directed by the Registrar on the 17th June, 1904, and it appearing by the sd afft of S., the receiver appointed in this action, that beyond the amounts appearing in his accounts of receipts and payments referred to in the certificate of the registrar dated the 10th November, 1905, no receipts have come to his hands nor have any payments been made by him as such receiver, and it appearing that all the assets of the dft coy referred to in the second schedule to the registrar's certificate dated, &c., have been realized except certain book debts which are unrealizable and of no value, and that the duties of the sd S. as such receiver have concluded, it is ordered that the sd S., the receiver appointed in this action by order dated, &c., be and is hby discharged as receiver as afsd as from the 19th August, 1904, without passing any further accounts. And it is ordered that the bond entered into by the sd S., together with the —— Society as his sureties, dated, &c., be vacated, and it is ordered that the costs of the plts of this action be taxed as between solor and client. And it is ordered that the funds in Ct be dealt with as directed in the payment schedule hto; liberty to apply.

**Form 562.** Payment Schedule, first column: Sell Consols; out of proceeds, money on deposit, cash and any interest, pay remuneration to receiver in this action, pay plt's costs of action to be taxed under this order, divide residue of funds in twentieths and pay as under three-twentieths to ——, &c.

*Smith (on behalf, &c.)* v. *Albion Wheel and Tyre Works, Ltd.*, Buckley, J., 17th November, 1905.

### Foreclosure.

That the holders of mortgage debentures charging the undertaking and property, both present and future, of a company, are entitled to foreclosure, was held by Kekewich, J., in *Sadler* v. *Worley*, (1894) 2 Ch. 170. See the form of order in this case, *ibid.* p. 177, and Form 563, below. An order for foreclosure will not be made in the absence of any debenture holder of the same class as the plaintiff. *Continental Oxygen Co.*, (1897) 1 Ch. 511. All the debenture holders subsequent to the mortgagee should be parties to a foreclosure action by a legal mortgagee, even though their security constitutes only a floating charge. *Wallace* v. *Evershed*, (1899) 1 Ch. 891. *Westminster Bank, Ltd.* v. *Residential Properties, Ltd.*, (1938) Ch. 639.

Foreclosure may accordingly be impracticable in certain cases. See *Re Continental, &c. Co.*, (1897) 1 Ch. 511. In such cases nearly the same result can be obtained by an order for sale, with liberty for the debenture holders to bid. See Form 383, *supra*.

An order for foreclosure absolute must be stamped as a conveyance on sale. See Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6; and see Seton, 7th ed. p. 1920; *Re Lovell & Collard's Contract*, (1907) 1 Ch. 249. By the Finance Act, 1910, s. 73, the stamp duty is double that specified in the schedule to the Stamp Act, 1891, where the consideration for the sale exceeds 500*l*.

**Form 563.** Foreclosure order.

Declare that the plt, as the holder of nine mortgage debentures of dft coy for 500*l*. each, dated the 23rd November, 1891, is entld to a charge on all the ppty, funds, assets and effects of the dft coy, including its uncalled capital, as the same existed on the 8th of November, 1893 (the date of the resolution to wind up the dft coy), subject to any charges on specific pts thof created previously to that date and then subsisting for securing the repayment of the principal moneys and interest on the sd mortgage debentures. And order—1. An account of what is due for principal and interest to the plt as the holder of all the sd mortgage debentures on the security thof, and for his costs of this action to be taxed by the taxing master; 2. An inquiry what ppty, assets or effects of the dft coy are comprised in the sd mortgage debentures, and the charge or security thby created, and in whom the same are now vested. And order that, upon the dfts, or any of them, paying to the plt what shall be certified to be due to him as afsd, within six months from the date of the chief clerk's certificate at such

time and place as shall be thby appointed, the plt to deliver up (upon oath if required) the sd debentures and all deeds and writings in his custody or power relating thtoto the dfts, or to such of them as shall redeem the mortgaged hereditaments and premises or as he or they shall direct; and in case the dfts or any of them shall so redeem the plt, the dft or dfts so redeeming is or are to be at liberty to apply to this Ct as he or they may be advised and on such applicon it is not to be incumbent on such person or persons so applying to give to the plt any notice thof. And this order is to be without prejudice to any question which may arise as to the rights or interests of the dfts as between themselves to or in the premises charged by the sd nine mortgage debentures. But in default of the dfts, or some of them, paying to the plt what shall be certified to be due to him as afsd by the time afsd, Declare that the plt will be entld to the hereditaments and premises comprised in the sd debentures free and clear of and from all right, title, interest and equity of redemption of, in and to the sd premises, and to have an absolute conveyance. And it is ordered that in such case the dft coy, and the liqrs thof for the time being, do all such acts and execute all such conveyances and deeds as may be necessary for vesting in the plt the sd mortgaged ppty, 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 Ct generally as they may be advised. *Sadler* v. *Worley*, Kekewich, J., 14th March, 1894. The order was made on an originating summons. See also *Oldrey* v. *Union Works*, W. N. (1895) 77. **Form 563.**

I hby certify that the result of the account which has been taken in pursuance of the order in this action dated —— is as follows:— **Form 564.** Certificate of registrar in foreclosure action.

The plt and dft cos have attended by their respive solors. The remaining dfts have not attended, although they have been duly summoned as appears by the joint and several afft of —— and —— filed the ——.

There is due to the plt coy under and by virtue of the [debentures] deposited by the dft coy with the plt coy referred to in the sd order the sum of £*a* for principal and the sum of £*b* for overdraft including interest on the sd sum of £*a* at rates varying according to the prevailing bank rates from the —— to ——.

The sd principal sum of £*a*, and the sd sum of ——*l.*, being added to the sum of £*b*, being the certified amount of the costs of the plt coy of this action directed to be taxed by the sd order, make together the sum of £*d*.

**Form 564.** The plt coy has received rents and profits of the hereditaments and premises [specifically charged by the sd debentures] so deposited by the dft coy as afsd to the amount of £*e*, and the sd plt coy has pd or is entld to be allowed on account thof sums to the amount of £*f*, leaving a balance due from the sd plt coy of £*g*, on the sd account.

The parlars of such receipts and payments appear in the account marked "H. M. C. 1," verified by the afft of —— and ——, filed the ——. The sd account is filed with this certificate. The last above mentd sum of £*g*, being deducted from the sd sum of £*d*, leaves a balance due to the plt coy of £*h*. There will also be due to the plt coy on the ——, being six [calendar] months after the date of this certificate, the further sum of £*a*, for half a year's interest at the rate afsd to the sd —— on the sd sum of £*i*.

The sd sum of £*i* being added to the above mentd balance of £*h*, makes together the sum of £*j*. The plt coy has submitted to be charged with the sum of £*k*, the balance of the receiver's estimated rents, profits and outgoings in respect of the sd hereditaments and premises between the date of this certificate and the sd —— (the date hnftr appointed for redemption). The above mentd sum of £*k* being deducted from the sd sum of £*j*, leaves a balance due to the plt coy of £*l* —— day the —— between the hours of —— and —— of the clock in the —— noon and Room No. 138 R. C. J. are appointed as the time and place at which the dft, the sd ——, Limtd, is to pay the sd sum of £*l* to the plt.

The evidence produced consists of the sd order dated ——, the two several affts of —— and ——, filed resply the —— and the ——, and the exhibits therein resply referred to, and the certificate of the registrar as to completion of receiver's security filed the ——.

Dated the —— day of ——, 19—.

*National Bank, Ltd.* v. *Savoy Picture House (Grimsby), Ltd. and Others.* Stiebel, Reg.

**Form 565.**

**Book debts taken in part satisfaction of amount due.**

Upon the applicon by summons, dated, &c., of the plt, and upon hearing the solors for the applicant and for the dft J. B., and for C. J. S. the off recr and liqr of the above-named coy, and upon reading the judgment, &c., the Master's certificate in this action dated, &c., and the afft, &c., It is ordered that the book debts due to the dft coy included in the exhibit A. to the sd afft of, &c., be assigned to the plt and to the dft J. B., to be accepted by them at the full amount stated in the sd exhibit in pt payment (one-half to each) of the amount found due to them resply by the sd Master's certificate. *Fowler* v. *Broad's, &c. Co.*, 1891, V. Williams, J., 8th August, 1898.

# CHAPTER LXXXVIII.

## ARRANGEMENTS.

Act in relation to debentures and debenture stock.

THE holders of a series of debentures or of debenture stock issued by a company are a class of creditors. *Alabama and New Orleans, &c. Co.*, (1891) 1 Ch. 213; *Midland Coal Co.*, (1895) 1 Ch. 267: 71 L. T. 744; *Wood* v. *De Mattos*, L. R. 1 Ex. 100. Hence a compromise or arrangement under the Act, when duly sanctioned by the Court, is binding on the whole class. All that is necessary is to obtain the requisite majority at the meeting, and then to obtain the sanction of the Court, and the decision whether the arrangement proposed is or is not to be accepted rests with those of the class who are present *and vote* in person or by proxy at the meeting.

The relevant section of the Act is sect. 153, which provides as follows:—

Arrangements and reconstructions.

**153.**—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) of this section shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(5) In this section the expression "company" means any company liable to be wound up under this Act, and the expression "arrangement" includes a

**re-organisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.**

The corresponding section (120) of the Act of 1908 did not contain the words "and voting"; accordingly all those present at the meeting in person or by proxy had to be counted, even if no vote by proxy was taken; but those who were not present in person or by proxy were not counted. *Bessemer, &c. Co.*, 1 Ch. D. 251; *Alabama and New Orleans &c. Co.*, (1891) 1 Ch. 213.

"The Court" is the Court having jurisdiction to wind up the company. See sects. 380, 163. "Arrangement" in this section is wider than "compromise." *Re Guardian Assurance Co.*, (1917) 1 Ch. 431 (a scheme for fusion of two companies).

In case of bearer securities the creditors must produce their securities at the meeting. *Wedgwood Coal Co.*, 6 Ch. D. 627.

**The Court's discretion.**

As regards the discretion of the Court. 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 interest of those they represent, take a view which can be reasonably taken by business men (per Lindley, L. J., *Alabama and New Orleans, &c. Co.*, (1891) 1 Ch. 213) and where they have taken such a view the Court usually sanctions the scheme, and see *Re Dorman Long & Co.*, (1934) Ch. 635. But the Court has a discretion: in special circumstances it will refuse its sanction, *e.g.*, where it is satisfied that the majority has not been acting *bonâ fide*. *Wedgwood Coal Co.*, 6 Ch. D. 627; and see *Empire Mining Co.*, 44 Ch. D. 402; *Buenos Ayres Water Co.*, 66 L. T. 408; *Re Richards & Co.*, 11 Ch. D. 676; *Dynevor Collieries Co.*, 11 Ch. D. 605; *Edinburgh American Land Co.* v. *Lang's Trustee*, (1909) S. C. 488, Ct. of Sess.

**Character of schemes.**

The most diverse schemes of arrangement have been sanctioned, and of these the following are the more common:—

1. A new company to be formed to take over the assets and liabilities of the old company. The debenture holders of the old company to receive debentures or debenture stock of or paid-up shares in the new company, and the ordinary creditors of the old company to receive a composition, or perhaps second debentures or paid-up shares in the new company, and the members of the old company to receive shares in the new company with a liability thereon
2. The debenture holders of the company to receive debenture stock of the same company payable after a term of years and carrying perhaps a reduced rate of interest and secured on the undertaking. The general creditors to receive second debentures or debenture stock and paid-up shares. The winding-up

of the company to be stayed, so that it may resume business subject to the provisions of the scheme.

A considerable number of schemes of arrangements which have been sanctioned will be found in Part II. of this work, 15th ed., Forms 915 *et seq.*

The usual course of procedure, where it is desired to carry an arrangement through under the above Act, is as follows:— Procedure.

1. Prepare the scheme of arrangement with the privity of some of the parties principally interested.
2. Apply by summons to the Court for an order to convene the requisite meetings, *e.g.*, of the debenture holders, the unsecured creditors, and the contributories or classes of contributories.
3. Obtain the requisite order.
4. Hold the meetings and let the result be reported to the Court.
5. Then apply by petition to the Court to sanction the arrangement, and in due course obtain the order of the Court accordingly.

For full details as to the procedure as to the forms of application and order, and as to the schemes which have been sanctioned, see 15th ed. of this work, Part II., particularly, Forms 915, 920, 923—925, 928, 937, 944 and 953.

Under the section a scheme may be adopted which will materially assist in extricating a company from its difficulties. For example:

The scheme may provide for reducing rateably the amount of the debentures or the rate of interest thereon, or for the conversion of them wholly or in part into paid up shares, of for enlarging the time for payment, or for the raising of further funds by the creation and issue of prior lien debentures, or for the acceptance of securities of another company in satisfaction. And may make special provision for the payment of the other creditors or leave them untouched.

By sect. 154 of the Act facilities are now given for carrying a compromise or arrangement into effect. This section provides as follows:—

**154.**—(1) Where an application is made to the court under the last foregoing section of this Act for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the court may, either by the order sanctioning

the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provision to be made for any persons, who within such time and in such manner as the court direct, dissent from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause an office copy thereof to be delivered to the registrar of companies for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

By sub-sect. (5) this section is confined to "a company within the meaning of this Act."

**Form 566.**

**Order to convene meetings (scheme of arrangement). Debentures of two companies.**

Upon the applicon by originating summons dated the ——, 19—, of the above-named The Rhodesia Railways, Limtd, and The Mashonaland Railway Coy, Limtd, whose registered offices are situate at ——, in the City of London, and upon hearing counsel for the applicants, and upon reading the sd originating summons, the afft of Sir H. B. filed the ——, 19—, and the several exhibits therein referred to (the exhibit marked H. B. 13 being the scheme of arrangement hnftr mentd), It is ordered that the above-named cos do convene separate meetings of:—

(1) The holders of The Rhodesia Railways, Limtd, 5 p.c. First Debentures;

(2) The holders of The Rhodesia Railways, Limtd, 3 p.c. and 4 p.c. Guaranteed Debentures;

(3) The holders of The Mashonaland Railway Coy, Limtd, 5 p.c. First Mortgage Debentures;

(4) The holders of The Mashonaland Railway Coy, Limtd, 5 p.c. Guaranteed Mortgage Debentures; and **Form 566.**

(5) The holders of The Rhodesia Railways, Limtd, and The Mashonaland Railway Coy, Limtd, 6 p.c. Consolidated Debentures,

for the purpose of considering and, if thought fit, approving (with or without modification) a scheme of arrangement proposed to be made between the sd The Rhodesia Railways, Limtd, and The Mashonaland Railway Coy, Limtd, and the above-mentd holders of the sd debentures.

And it is ordered that at least ten clear days before the day appointed for the sd meetings an advertisement convening the same and stating that a copy of the sd scheme can be seen and forms of proxy and forms for depositing bearer debentures can be obtained at the registered offices of the sd respive cos be inserted once each in the *London Gazette*, *The Times*, and *Daily Telegraph* newspapers, and in addition that at least ten clear days before the day appointed for such meetings a notice convening the same and enclosing a copy of the sd scheme, and a proper stamped form of proxy in the form settled in chambers, be sent by prepd letter post addressed to each of the registered holders of the sd debentures at their registered or last known addresses.

And the Ct doth hby appoint B. P., or, failing him, A. C., chairman of the sd meetings, and doth order that the chairman do report the results of the sd meetings resply to the Ct. 00707 of 1932. Stiebel, Reg.

(*Full title.*)

**Form 567.**

Notice of meetings.

To the holders of the Consolidated Debenture Stocks of the above-named coy.

Notice is hby given that by an order dated the ——, 19—, made in the above matters, the Ct has directed separate meetings to be convened of the respive holders of the Consolidated Debenture Stocks of the coy specified in the first column of the schedule hto for the purpose of considering and, if thought fit, approving (with or without modification) a scheme of arrangement proposed to be made between the sd coy and such holders (a printed copy of which scheme is enclosed herewith) and that such meetings will be held at the respive places and times mentd in the second and third columns of the schedule hto, at which respive places and times all such holders are resply requested to attend.

Stockholders may attend the meeting with which they are concerned and vote thereat either in person or by proxy. A form of proxy applicable for such meeting is enclosed herewith.

In the case of joint holders of stock, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the vote of the other joint holders, and for this

**Form 567.** purpose seniority shall be determined by the order in which the names stand in the register.

Proxies must be lodged not later than 12 o'clock noon on Monday, the —— day of ——, 19—, in the case of proxies for the meeting in London at the London office of the coy, ——, London, E.C.2, and in the case of proxies for the meeting in Adelaide at the Adelaide office of the coy, ——, Adelaide, South Australia.

By the sd order, J. B. B., or, failing him, J. C. B., or, failing him, W. P., is appointed chairman of the meeting in London; and J. K. S., or, failing him, Sir D. J. G., is appointed chairman of the meeting in Adelaide; and the chairman of each meeting is directed to report the result thof to the Ct.

The sd scheme will be subject to the subsequent approval of the Ct.

THE SCHEDULE.

| Particulars of Meetings ordered to be convened. | Place of Meeting. | Time of Meeting. |
|---|---|---|
| (1) The holders of the 5½ p.c. Consolidated Debenture Stock. | ——, London, E.C.1, England. | 12 o'clock noon on Friday, the 19th day of May, 1933. |
| (2) The holders of the 6 p.c. "A" Consolidated Debenture Stock, 7½ p.c. "B" Consolidated Debenture Stock and 6 p.c. "D" Consolidated Debenture Stock. | ——, Adelaide, South Australia. | 12 o'clock noon on Thursday, the 18th day of May, 1933. |

Dated this —— day of ——, 19—.

S. M. & Co.
of ——, in the City of London,
Solors to the sd coy.

**Form 568.**

Form of proxy.

FORM OF PROXY.

In the High Ct of Justice, No. 0060 of 1933.
Chancery Division.
Mr. Justice ——.

In the matter of ——,
and
In the matter of the Cos Act, 1929.

(*a*) ——, the undersigned of * ——, being the holder(s) of 5½ p.c. consolidated debenture stock of the above-named coy hby appoint J. B. B., of —— Street, London, E.C.1.; or, failing him, J. C. B., of —— Street, afsd; as (*a*) ——proxy, to act for (*b*) —— at the meeting of the holders of the 5½ p.c. consolidated debenture stock of the coy

to be held at —— Street, London, E.C.1, on ——day, the —— day of ——, 1933, at 12 o'clock noon, for the purpose of considering, and, if thought fit, approving the proposed scheme of arrangement referred to in the notice convening the meeting, and at such meeting or at any adjournment thof to vote for (*b*) —— and in (*a*) —— name (*c*) —— the sd scheme, either with or without modifications as (*a*) —— proxy may approve. **Form 568.**

Dated this —— day of ——, 1933.

Signature ——.

NOTE.—If any other proxy be preferred, strike out the names here inserted and add name of proxy desired and initial the alteration; and see Note 3.

NOTES.

1. This proxy must be signed and lodged at the London office of the coy, ——, London, E.C.2, not later than 12 o'clock noon, on ——day, the —— day of ——, 1933.

2. Any alteration made in this form of proxy must be initialled.

3. The person to whom this proxy is given must be a holder of 5½ p.c. consolidated debenture stock of the coy and must attend the meeting in person to represent you.

4. In the case of joint holders of stock, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the vote of the other joint holders, and for this purpose seniority shall be determined by the order in which the names stand in the register.

5. If the appointor is a corporation, then the form of proxy must be under its common seal, if any, and, if none, then under the hand of some officer duly authorised in that behalf, and the fact that the officer is so authorised must be so stated.

---

* Fill in your address.

(*a*) Fill in "I" or "We," "my" or "our," throughout, as the case may be.

(*b*) Insert "me" or "us."

(*c*) If for, insert "for"; if against, insert "against" and strike out the words after "scheme" and initial such alteration.

**Form 569.**

**Order sanctioning scheme of arrangement.**

Upon the peton of the above-named, The Rhodesia Railways, Limtd, and The Mashonaland Railway Coy, Limtd, whose registered offices are situate at ——, in the city of London, on the ——, 1932, preferred unto this Ct and upon hearing counsel for the petrs and —— and ——, and the respts to the sd peton, and upon reading the sd peton the order

**Form 569.** dated the ——, 1932, whereby the sd coys were ordered to convene separate meeting of:—

(1) The holders of The Rhodesia Railways, Limtd, 5 p.c. first debentures;

(2) The holders of The Rhodesia Railways, Limtd, 3 p.c. and 4 p.c. guaranteed debentures;

(3) The holders of The Mashonaland Railway Coy, Limtd, 5 p.c. first mortgage debentures;

(4) The holders of The Mashonaland Railway Coy, Limtd, 5 p.c. guaranteed mortgage debentures; and

(5) The holders of The Rhodesia Railways, Limtd, and The Mashonaland Railway Coy, Limtd, 6 p.c. consolidated Debentures.

for the purpose of considering and if thought fit approving, with or without modification, a scheme of arrangement proposed to be made between the sd coys and such debenture holders, the *London Gazette*, and the *Times*, and the *Daily Telegraph* newspapers, all of the 4th November, 1932, each containing an advertisement of the notice convening the meetings directed to be held by the sd order dated the ——, 1932, the afft of ——, filed the ——, and the afft of —— and —— &c., all filed the ——, 1932, and the exhibits in the sd affts or some of them respively referred to.

And the respts, the sd —— and ——, by their counsel submitting to be bound by the scheme of arrangement sanctioned by this order.

This Ct doth hby sanction the scheme of arrangement as set forth in the schedule to the sd peton and in the schedule hto.

And it is ordered that the sd coys do each of them deliver an office copy of this order to the Registrar of Cos.

——, Registrar.

THE SCHEDULE BEFORE REFERRED TO

(Scheme of Arrangement).

# CHAPTER LXXXIX.

## BANKING AND ADVANCE SECURITIES.

### Introductory Notes.

Advance business.

An enormous and constantly increasing volume of business in the way of temporary advances is done every year—chiefly by banks and finance and other companies registered under the Companies Acts, and a very large proportion of the loans are made to companies so registered.

Legal mortgages.

The securities for such advances vary with the circumstances. Where the borrower does not object to give a legal mortgage, the lender is not likely to refuse to make the advance on what his lawyer will tell him is the safest kind of security; but where the loan is only required for a short time, the borrower very commonly objects to the expense and delay incident to a legal mortgage, especially of land; and people with capital lying idle are often not inclined to impose onerous conditions on a borrower lest by doing so they should drive good business elsewhere. Accordingly, temporary advances are, to a large extent, secured by equitable mortgages or charges to the mutual satisfaction of borrowers and lenders.

Equitable mortgages.

No doubt the security afforded by an equitable mortgage or charge is not as good as that of a legal mortgage, but experience has shown that dishonesty is comparatively rare, and that, where advances are made with discrimination, equitable securities, especially if accompanied by deposit of title deeds or registered, can generally be relied on as a convenient and effective mode of affording to lenders an adequate assurance for the repayment of their advances.

How, then, may an equitable mortgage or charge be created?

How created.

Subject to the subordinate rules below mentioned, it may be stated that a valid equitable mortgage or charge on property can in England be created by contract in writing, or even by verbal contract. All that is required, according to the principles of equity, is that there shall be a binding contract charging the property, and that the property charged shall be capable of identification (either at the time when the charge is created, or, in the case of future property, at the time when it comes into existence) as that which it was intended to charge. If these two conditions are fulfilled, the

property is bound in equity. Nor is equity particular as to the words used.

Thus, if A. says to B., "lend me 100*l.*, and you shall have a charge on my shares in the —— Company, Ltd" [*or*, "on my share in the partnership business of ——"], and B. advances the amount, he has in equity a valid charge. But the charge would in equity have been just as valid if A. had said, "you shall have as security my shares," or "I will give you a mortgage on my shares," or "consider my shares as a security for the amount," or "I make over to you as security my shares," or "I bind my shares with the payment," or "I charge my shares with the payment" (*Re Florence Land, &c. Co.* (1878), 10 Ch. D. 530, 546); for equity looks to the intention and not to the particular form of words used, *infra*, p. 849 *et seq.* *Strand Music Hall* (1865), 3 De G. J. & S. 147; *Fleming* v. *Bank of New Zealand*, (1900) A. C. 577.

And if the intention to charge is sufficiently clear the absence of words of charge will not defeat the intention. *Cradock* v. *Scottish Prov. Institution* (1893), 69 L. T. 380; on appeal, 70 L. T. 718; and see *infra*, p. 849 *et seq.*

Consideration.

Where a charge is created by deed, no consideration is requisite to support the deed; but, where the charge is created by contract not under seal (*i.e.*, by what is called a simple contract), whether in writing or oral, a valuable consideration for the charge must be proved; for consideration is, under English law, an essential feature in a simple contract. Consideration here means some consideration which, in a legal sense, is of value.

"A valuable consideration, in the sense of the law, may consist, either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Currie* v. *Misa* (1875), L. R. 10 Ex. Cas. p. 162. "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant," is a consideration in point of law. Per Tindal, C. J., *Laythoarp* v. *Bryant* (1836), 3 Scott, p. 250.

Hence, if A. is indebted to a bank, and the bank requests him to give security, and he complies with this request by writing to the bank a letter saying that it shall have a charge for the amount on a specified property, the Court will treat the transaction as importing a contract that A. shall give the security, and that in consideration thereof the bank shall forbear for a time to enforce payment, and inasmuch as this giving of time or forbearance is an inconvenience

sustained by the bank at the implied request of the debtor, it affords a sufficient consideration for the contract.

Thus, in *Alliance Bank* v. *Broom* (1864), 2 Dr. & S. 289, a banker had required security from his customer for an overdrawn account. The customer, by letter, promised to hypothecate certain goods. Upon proceedings by the bank to enforce this promise, it was objected that there was no consideration for it, since the bank did not in terms agree to give time; but it was held that the circumstances implied an understanding that there should be some forbearance, and that this was sufficient to prevent the promise to hypothecate from being void as a *nudum pactum*.

In *Oldershaw, &c.* v. *King* (1857), 2 H. & N. 517, at p. 520, Erle, J., said:—

"Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was, that further advances should be made, and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract."

Above cases approved in House of Lords.

These cases were approved in *Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309. In that case the customer of a bank in Ireland having overdrawn his account and being pressed by the bank undertook by letter addressed to the bank's manager to deposit a title deed of an Irish estate as security for his overdraft. He deposited the deed with the bank, which did not register the charge. It was held that there was a binding agreement by the customer to give this security. "In such a case as this it is not," said Lord Macnaghten, at p. 313, "necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time and that forbearance for a reasonable time was, in fact, extended to the person who asked for it. That proposition seems to me to be established in the case of *Alliance Bank* v. *Broom*, *supra*; and . . . *Oldershaw* v. *King*, *supra*, with the observations on that case, and on the case in *Drewry and Smale* by Bowen, L. J., in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, 289, and I may add that the proposition seems to be good sense."

On the same principle, if A., not being indebted to B., writes a letter to B., stating that he sends B. certain title deeds in order that B. may have a security for any advance he may make to A., B. on making any advance obtains a charge on the property comprised

in the deeds, for the letter is regarded as a continuing offer which, when accepted by the making of an advance, matures into a contract. See *Carlill* v. *Carbolic, &c. Co.*, (1893) 1 Q. B. 256, 270.

Again, if A. is indebted to B., and C. requests B. to forbear from suing A., and offers to give B. a security, and B., although he does not at the time bind himself not to sue, does in fact afterwards forbear to sue A. for a time, there is a good consideration for the contract. See Lord Esher, M. R., *Crears* v. *Hunter*, 19 Q. B. D. 341, 344.

This case shows that the request, compliance with which affords a sufficient consideration to support the contract, may be either express or implied. "If a request is to be implied from the circumstances, it is the same as if there were an express request." Per Lord Esher, M. R., *Crears* v. *Hunter* (1887), 19 Q. B. D. p. 345.

**What property to be charged.**

As to the property to be charged, equity allows the utmost freedom. It matters not whether the property be real or personal; whether it be present, future or contingent; whether it be situate in England or abroad. Whatever the property may be, it can, as a general rule, be bound in equity by a contract of charge made in England. Thus, if the property be land, or some interest in land, or chattels, or stock-in-trade, or ships, patents, copyrights, book debts, policies, salaries, shares, stocks, securities, or reversions, it can, as a general rule, be charged in equity. But equity goes still further, for it allows a charge on future property, or on an expectancy or a possibility. Hence, a valid charge in equity may be given by A. on "any legacy that may be left me by A. B.," or, for that matter, "on any legacies that may thereafter be left me by anyone." *Bennett* v. *Cooper* (1846), 9 Beav. 252; *Holroyd* v. *Marshall* (1861), 10 H. L. C. 191; *Tailby* v. *Official Receiver*, 13 App. Cas. 523. So, a charge can be created on future property, as in the everyday case of a debenture issued by a company charging all its property present and future for the repayment of an advance. And a charge may be given by apt words on uncalled capital, although the uncalled capital is in a strict sense not property of a company, only potentially property. See *infra*, Form 587.

And, as we have seen above, there is no difficulty in equity in creating a charge good in this country on property situate abroad, even though according to the local laws the charge would be ineffective.

**Subordinate rules as to equitable charges.**

The creation, however, of an equitable charge on property is subject to certain subordinate rules, for the most part established by statute. Of these rules the following may be specified as those which are most frequently applicable:—

**Bills of Sale Acts.**

1. In the case of personal chattels within the Bills of Sale Acts, 1878 and 1882, the charge, if in writing, will be ineffective unless the

requirements of these Acts, where applicable, are satisfied. But a company under the Companies Act of 1929 may give an effective charge on chattels without complying with the Bills of Sale Acts of 1878 and 1882. *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627.

Registration under Act of 1929.

2. Where the charge is given by such a company, it must, if requiring registration under the Companies Act (*supra*, p. 186), be duly registered.

3. A floating charge created by a limited company within six months of winding-up is only valid to the extent of any cash paid to the company at the time of, or subsequently to, the creation of the charge, unless the company was solvent at the date of making the charge. Sect. 266. And see p. 73, *supra*.

Fraudulent preference.

4. The rules as to fraudulent or undue preference of creditors within three months of a bankruptcy or winding-up, as established by sect. 44 of the Bankruptcy Act, 1914, and the Companies Act, 1929, s. 265, must be borne in mind.

Statute of Frauds.

5. If the charge is a charge on land, or any interest in land, the provisions of sects. 40 and 53 of the Law of Property Act, 1925 (replacing sect. 4 and other sections of the Statute of Frauds) must not be overlooked. See further as to this, *infra*.

Other special statutory provisions.

6. As to various classes of property, it must also be remembered that unless the charge is made effective according to the special statutory provisions it will be liable to be displaced:—*e.g.*, in the case of a charge on land in Yorkshire or the title to which is registered under the Land Registration Act, 1925, which is not duly registered; a charge on ships which is not in the statutory form, and duly registered under the Merchant Shipping Act, 1894; a charge on a patent which is not duly registered as required by the Patents and Designs Acts, 1907 and 1919; a charge on shares in any company which is not made effective by transfer or by notices when notices are receivable; a charge on a chose in action which is not perfected by notice to the trustee or debtor; or a charge on property abroad which is not duly registered or perfected in accordance with the requirements of the local law.

### As to the replaced provisions of the Statute of Frauds in relation to Equitable Charges.

Statute of Frauds as to lands.

Sect. 40 of the Law of Property Act, 1925, replacing sect. 4 of 29 Car. 2, c. 3, provides (*inter alia*) that no action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action shall be brought or some memorandum or note thereof is in writing, and signed by the party to be charged, or some other person thereunto

by him lawfully authorized. The object of this statute was not vexatious, but to prevent certain important classes of contracts resting on "the frail testimony of memory." With reference to the construction and application of that section to equitable mortgages, the following propositions are established:—

(1) The section applies, subject as below mentioned, to a contract by way of equitable mortgage of land, or of any interest in land.

(2) The section does not make a contract which is within its provisions void if not in writing; it only requires that if one party sues another on the contract, the plaintiff must, if required, (a) prove that the contract was in writing signed by the defendant or his duly authorized agent, or (b) must show that by some memorandum in writing so signed the parties to and terms of the contract have been admitted. See *infra*, and *Maddison* v. *Alderson* (1883), 8 App. Cas. 474.

Hence, a proposal in writing signed by one party and accepted orally by the other party is a sufficient memorandum against the party who signs. *Reuss* v. *Picksley*, L. R. 1 Ex. Cas. 342. The memorandum need not be contemporaneous with the agreement; all that is wanted is *evidence* under the hand of the party sued, or his agent duly authorized, that he entered into the agreement. For instance, a letter by the defendant, before action brought, to a third person admitting or casually mentioning the terms of the agreement is sufficient. *Gibson* v. *Holland*, L. R. 1 C. P. Cas. 1. And so is a minute of a resolution of the directors of a company mentioning the terms of the agreement. *Jones* v. *Victoria, &c. Dock Co.*, 2 Q. B. D. 314. An acknowledgment in the will of the party to be charged will suffice. *Hoyle* v. *Hoyle*, (1893) 1 Ch. 84.

An acknowledgment in an affidavit or pleading in proceedings against some third party will be sufficient. *Barkworth* v. *Young* (1856), 4 Drew. 1.

"And I should say that an entry in a man's own diary, if it were signed by him, and the contents were sufficient, will do." Per A. L. Smith, L. J., *Hoyle* v. *Hoyle*, *supra*.

Equity, led by the imperious Thurlow, L. C., has by certain important decisions qualified and relaxed the operation of the section and enabled parties in some cases to sue on agreements without complying with the requirements of the statute. Thus:—

(a) It is well settled that a parol agreement may be sometimes enforced when the plaintiff shows that he has partly performed his obligations under the contract. *Lester* v. *Foxcroft* (1700), Colles, P. C. 108. But it is not every act of part performance which will suffice to take a contract out of the statute. For example, payment by the plaintiff of part of the consideration is not sufficient. *Clinan*

v. *Cooke* (1802), 1 Sch. & Lef. 40; *Hughes* v. *Morris* (1852), 2 De G. M. & G. 356.

The acts of part performance relied on must be unequivocally, and in their own nature, referable to some such agreement as that alleged (per Lord Selborne, L.C., *Maddison* v. *Alderson*, 8 App. Cas. 467, 479), *e.g.*, when the plaintiff has been admitted into possession pursuant to the contract, the statute does not apply, and *à fortiori* it does not apply where he has, pursuant to the contract, laid out money or built on the premises. *Lester* v. *Foxcroft*, *ubi supra*. The reason is that such acts are explicable on no other hypothesis than that there was a contract between the parties.

But part performance, to take a case out of the statute, always presupposes a complete agreement. There can be no part performance where there is no complete agreement in existence. *Thynne* v. *Earl of Glengall* (1848), 2 H. L. C. 131, 158. Companies are equally bound with individuals by acts of part performance. *Wilson* v. *West Hartlepool Ry. Co.* (1865), 2 De G. J. & S. 475.

(b) It is also well settled that a contract for an equitable mortgage of land, evidenced by the deposit of title deeds, can be enforced by the depositee without compliance with the requirements of the Statute of Frauds. *Russel* v. *Russel* (1783), 1 Bro. C. C. 269. Such a deposit of deeds to secure money imports, *primâ facie*, a contract that the depositor's interest shall be liable to the debt and that he will perfect the security. *Pryce* v. *Bury* (1853), 2 Drew. 41; *Ashton* v. *Dalton* (1846), 2 Coll. 565; *Matthews* v. *Wallwyn* (1798), 4 Ves. 119; *Farmer* v. *Pitt*, (1902) 1 Ch. 954.

The section does not apply to personalty. Hence a valid charge may in the case of personalty be created by parol. *Parish* v. *Poole* (1884), 53 L. T. 35.

### Equitable Mortgages by Deposit generally.

Equitable mortgages by deposit.

A valid equitable mortgage by deposit may be created, though some only of the documents necessary to prove the title be deposited (*Lacon* v. *Allen* (1856), 3 Drew. 579; *Daw* v. *Terrell* (1863), 33 Beav. 218); and a deposit of documents of earlier date will give a good charge, even though those of later date be not deposited. *Dixon* v. *Muckleston*, 8 Ch. App. 155; and see *Roberts* v. *Croft* (1857), 24 Beav. 223; on appeal, 2 De G. & J. 1 (in which the conveyance to the depositor was not deposited). A deposit will only affect the beneficial interest of the depositor. *Ex parte Farley, Re New* (1841), 1 Mont. D. & De G. 683.

The deposit of deeds with A., as trustee for B., who advances the

money, will create a valid security in favour of B. *Ex parte Whitbread* (1812), 19 Ves. 209.

Equitable mortgages by deposit are not confined to title deeds relating to land. Equitable mortgages of stock, shares, debentures, debenture stock, policies, bonds, and other securities may be and are frequently created without writing by depositing the certificates or instruments relating thereto. *Ex parte Moss* (1849), 3 De G. & Sm. 599 (shares); *Carter* v. *Wake*, 4 Ch. D. 605 (railway bonds); *Re Pryce, Ex parte Rensburg*, 4 Ch. D. 685 (debentures); *Shand* v. *Stansfield*, Seton, 4th ed. 1129-30 (policy of assurance); such a mortgage gives the right to foreclosure. *Harrold* v. *Plenty*, (1901) 2 Ch. 314; *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

If, however, the deposit is made without any written memorandum or agreement as to its object, there is ample room for dispute in the future (*Farmer* v. *Pitt*, (1902) 1 Ch. 954), and accordingly the depositee should take care to get an agreement or memorandum specifying the terms of the deposit duly signed by the depositor. Where there is such a contract or memorandum, it defines and governs the arrangement. *Shaw* v. *Foster*, L. R. 5 H. L. 321; *Burton* v. *Gray*, 8 Ch. App. 932. And parol evidence is not admissible to contradict it (*Ex parte Coombe* (1810), 17 Ves. 369); though such evidence is admissible to extend the security, *e.g.*, to further advances. *Ex parte Kensington* (1813), 2 Ves. & B. 79; *Ex parte Nettleship* (1841), 2 Mont. D. & De G. 124.

Where the memorandum stated that the deeds relating to freeholds and leaseholds were deposited, both properties were held charged, though only the deeds relating to the leaseholds were in fact deposited. It is a question of intention which must govern: thus, where the memorandum only related to one set of deeds, whereas all the deeds were deposited, the charge was held to extend to the one set only. *Wylde* v. *Radford*, 33 L. J. Ch. 51; 9 Jur. N. S. 1169.

A good equitable security may also be created by a written agreement to deposit, *e.g.*, an agreement to deposit a lease when granted (*Ex parte Orrett* (1837), 3 Mont. & Ayr. 153); or by deposit of an agreement for a lease. *Unity, &c. Assocn.* v. *King* (1858), 25 Beav. 72; and see *Finck* v. *Tranter*, (1905) 1 K. B. 427.

A deposit of a lease containing a proviso against assignment is effective as against the depositor and does not avoid the lease. *Ex parte Baglehole* (1812), 1 Rose, 432; *Ex parte Sherman* (1820), Buck, 462.

Where deeds are deposited to secure the payment of accommodation bills, and the bills are renewed at the request of the depositor, the security will extend to the fresh bills. *Ex parte Skinner* (1832), 1 Deac. & C. 403.

A mortgage by deposit may be created in the case of lands abroad when the depositor is here (*Ex parte Pollard* (1838), 4 Deac. 27), for a Court of equity acts *in personam*.

As regards a mortgage by deposit of negotiable instruments, the rule is that the title of the mortgagee, if he takes in good faith and for value, is unimpeachable. *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Venables* v. *Baring Bros.*, (1892) 3 Ch. 527; *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120. Nor is negligence or forgetfulness sufficient to affect his title. *Raphael* v. *Bank of England*, 17 C. B. 161.

"I apprehend that when a person, whose honesty there is no reason to doubt, offers negotiable securities to a bank or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required. And I do not think that the law lays upon him the obligation of making any inquiry into the title of the person he finds in possession of them. Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different": per Lord Herschell, *London Joint Stock Bank* v. *Simmons*, (1892) A. C. at p. 223. If a purchaser of shares leaves them in the hands of a broker, together with blank transfers, and the broker deposits the certificates by way of charge, the purchaser may be estopped from disputing the validity of the charge. *Fuller* v. *Glyn, Mills, Currie & Co.*, (1914) 2 K. B. 168. But see *Sheffield (Earl of)* v. *London Joint Stock Bank*. 13 App. Cas. 333, where a bank, knowing that it was dealing with an agent having limited authority, was held bound to inquire into the extent of its authority. See also *Jameson* v. *Union Bank of Scotland* (1913), 109 L. T. 850.

An equitable security is not lost where the debt is barred by statute. *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

An equitable mortgagee of leaseholds does not come under liability to the lessor. *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815; *Hand* v. *Blow*, (1901) 2 Ch. 721.

### Equitable Mortgages by Registered Companies and Societies.

Deposits by companies.

In making advances to statutory companies and societies, including those registered under the Act of 1929, it must be borne in mind that the lender is fixed with notice of the contents of the company's memorandum and articles, or rules or Act of Parliament, and accordingly it is necessary to see—

(1) That the company has by its constitution the necessary powers to borrow and give security; and

(2) That the directors are in a position to exercise the company's powers.

Usually the company has express or implied power, and the directors have either specific or general powers without any limit, and such general powers justify an equitable mortgage, whether by deposit or otherwise. *Re Patent File Co.* (1870), 6 Ch. App. 83.

Sometimes, however, though the company has the requisite powers, the directors' power to borrow or mortgage is limited by the articles, so that the power cannot be extended except by special resolution. In such case the lender should require the passing of a special resolution.

More commonly the directors' powers are limited in a qualified manner: *e.g.*, they may borrow and give security, but so that the amount owing shall not, *without the sanction of a general meeting*, exceed a specified amount. In such case the lender is not bound to ascertain whether the proposed loan is within the limit, for he is entitled to assume that if it is beyond the limit the requisite authority has been obtained; but if he has notice that the loan will be beyond the limit, and that no resolution of a general meeting has been passed, he cannot hold the company to the contract; and this being so, there are cases in which it is considered desirable to inquire and ascertain whether the loan is within or beyond the prescribed limit, and in the latter case whether the requisite resolution has been passed.

Where there is by the articles a fixed limit to the directors' borrowing powers (*i.e.*, not capable of extension by resolution of a general meeting), a bank or individual who takes a mortgage to secure a current account or future advances must be extremely careful. In strictness the bank or other lender should, whenever making a further advance, ascertain that it is within the limit. Otherwise it may find that, although originally its advance was fully secured, yet by subsequent events its further advances are not secured. For instance, suppose the directors' powers are limited to 100,000*l.*, and they borrow from the bank by way of overdraft 100,000*l.*, and afterwards by payment into their general account the balance is reduced to 50,000*l.*, and subsequently the directors, without the knowledge of the bank, raise 50,000*l.* elsewhere, and afterwards the bank allows further overdrafts up to 100,000*l.* in all; in such case the loan of the last 50,000*l.*, being in excess of the limit, will be *ultra vires* the directors, and the bank will have no claim for it as against the company, though it may sue the directors personally for damages for breach of their implied warranty of authority.

That, however, which has been done by the directors in excess of *their* powers is capable of ratification by the company, by resolution

duly passed at a general meeting; but that which has been done *ultra vires* the *company* cannot be ratified and is absolutely void; but in the latter case there may be a personal remedy against the directors, and the lender may have a right of subrogation, that is, to stand in the place of creditors of the company or society who have been paid out of the *ultra vires* borrowed moneys. See *Baroness Wenlock* v. *River Dee Co.* (1887), 19 Q. B. D. 155.

### Investigation of Title.

**Investigation of title.**

Where temporary advances are made on the security of deposited title deeds or other documents, it is not usual to investigate the title, as in the case of a legal mortgage. Nevertheless, lenders' legal advisers generally look through the documents and satisfy themselves that the title appears, *primâ facie*, good.

The protection afforded to the possession of documents is expressly preserved by sect. 13 of the Law of Property Act, 1925.

This protection, it is submitted, is not impaired by the fact that, under sect. 198, registration of certain mortgages and charges as land charges is actual notice, and that registration under sect. 79 of the Companies Act has the same effect. See Land Charges Act, 1925, s. 10 (5).

The joint effect of these sections is not, however, very clear, and possession of documents was never a complete protection against a prior legal mortgage, where the mortgagee was not guilty of negligence in not obtaining the title deeds. See *Grierson* v. *National Provincial Bank*, (1913) 2 Ch. 18.

The bank should, therefore, where possible, search the register under sect. 79 before advancing money on a deposit of title deeds.

A banker in dealing with a customer is not fixed with notice of the contents of a document deposited with him as security by another customer. *Re Valletort Sanitary Laundry Co., &c.*, (1903) 2 Ch. 654.

### Fortifying Equitable Securities.

**Fortification of equitable securities.**

An equitable security may be fortified in various ways, for example:—

1. Where it is not in writing, by getting a memorandum of the terms of the contract signed by the mortgagor.
2. By obtaining possession of the title deeds or other documents relating to the property mortgaged.
3. By having an indorsement made on such documents.
4. By giving notices to prior mortgagees (if any).

5. In case of any charges on choses in action, by giving prompt notice of the charge to the trustees or debtors.
6. By giving notice, in lieu of *distringas* proceedings, in the case of shares and securities. See *infra*, p. 882.
7. In the case of bills and other securities to order, deposited without indorsement, by procuring the depositor to indorse the same.
8. In the case of a company, by registering the charge under sect. 79 of the Companies Act. This gives notice to all persons dealing with the company, and (except where title deeds are deposited) gives priority to the charge according to the date of registration. Land Charges Act, 1925, s. 10 (5); Law of Property Act, ss. 97 and 198.
9. In case of registered land, by obtaining a deposit of the land certificate and by serving a notice on the registrar. Land Registration Act, 1925, s. 52.
10. In the case of patents, or land in a register county, by registering the security at the patent office or in the proper register.
11. By getting the mortgagor to convert the security into a legal mortgage, or by taking a transfer from some other mortgagee who has got the legal estate.
12. By issuing a writ and registering the action as a pending action pursuant to the Land Charges Act, 1925. A purchaser or mortgagee is treated as having notice of a duly registered *lis pendens* or pending action so far as regards the land, but not as regards personal property. *Wigram* v. *Buckley*, (1894) 3 Ch. 483.
13. By bringing an action for sale or foreclosure, and obtaining a receiver or an injunction restraining the mortgagor from parting with the legal estate *pendente lite*. *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490. Such an injunction should be obtained where there is danger that the mortgagor will part with the legal title.

### Appropriation of Payments.

**Appropriation of payments.**

In relation to banking and other securities, *where there is an account current between the parties* (*Cory Bros. & Co.* v. "*Mecca*" (*Owners of S.S.*), (1897) A. C. 286, 295), it is necessary to bear in mind the rules as to appropriation of payments made by a debtor to his creditor. These are as follows:—

(a) The debtor in making payment can direct its appropriation as he chooses, *e.g.*, to a debt not guaranteed in preference

to one that is guaranteed (*Kirby* v. *Duke of Marlborough* (1913), 2 Man. & S. 18; *Re Sherry, London, &c. Co.* v. *Terry*, 25 Ch. D. 692); to a debt bearing interest in preference to one that does not (*Chase* v. *Box* (1702), Freem. Reps. 260; to a new instead of to an old debt (*Peters* v. *Anderson* (1814), 5 Taunt. 596); to a debt barred by statute in lieu of one not so barred (*Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455); but as to appropriation by the creditor to statute-barred items, see *Friend* v. *Young*, (1897) 2 Ch. 421; to a secured debt instead of to an unsecured debt, *Peters* v. *Anderson*, 5 Taunt. 596; see also as to what is appropriation, *Galula* v. *Pintus* (1911), 104 L. T. 574. An express statement by the debtor is not necessary. *Parker* v. *Guiness* (1910), 27 T. L. R. 129. Appropriation once made by agreement cannot be altered except by consent. *Mahomed Jan* v. *Ganga Bishun Singh* (1910), L. R. 38 Ind. App. 80—P. C.

(b) If the debtor at the time of payment makes no appropriation, express or implied, the creditor may at any time appropriate as he thinks fit (*Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Cory Bros. & Co.* v. "*Mecca*" (*Owners*), (1897) A. C. 286. *Deeley* v. *Lloyds Bank*, (1912) A. C. 756); the creditor may make the appropriation up to the "very last moment" even when being examined as a witness in an action by him against the debtor (*Seymour* v. *Pickett*, (1905) 1 K. B. 715—C. A.); but the appropriation once made by him and communicated to the debtor, *e.g.*, by letter or by writ, is final. *Ibid.* Entries made by a man in books which he keeps for his own private purposes are not conclusive against him until he has made a communication on the subject of those entries to the opposite party (*e.g.*, by sending him a pass book or account showing the appropriation), and until that time he continues to have the option of altering the appropriation. *Simson, &c.* v. *Ingham* (1823), 2 B. & C. 65. Even the accounts rendered are only *evidence* of the appropriation to the earlier items, which may be rebutted by evidence to the contrary. *Henniker* v. *Wigg* (1843), 4 Q. B. 792; *City Discount Co.* v. *McLean*, L. R. 9 C. P. Cas. 692; *Cory Bros & Co.* v. "*Mecca*" (*Owners*), *supra*. How the money is to be applied is governed by the *intention* of the creditor, expressed, implied, or presumed. *Cory's case, supra*.

(c) When neither party makes an appropriation, the English law will appropriate the payment to the earlier, and not, as the

Roman law, to the most burdensome, debt. *Clayton's case* (*Devaynes* v. *Noble*) (1816), 1 Mer. 585.

In the case of a banking account ". . . all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying: 'This draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday.' There is a fund of 1,000*l.* to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts": per Sir William Grant, M.R., *Clayton's case*, 1 Mer. at p. 608.

***Clayton's case.*** The rule in *Clayton's case* is very material to bankers, especially where the bank holds a security from the customer or from a surety. For, if the debt secured is brought into the account, payments in will, *primâ facie*, go in satisfaction thereof, and in the result the security will be discharged. *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Re Medewe's Trust* (1859), 26 Beav. 588; *Cory Bros. & Co.* v. "*Mecca*" (*Owners*), (1897) A. C. 286; *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722. But the rule in *Clayton's case* is based on the presumed intention of the parties, and accordingly it may be excluded or modified by arrangement or by evidence of intention, express or implied. *City Discount Co.* v. *McLean*, L. R. 9 C. P. Cas. 692; *Re Sherry, London, &c. Bank* v. *Terry*, 25 Ch. D. 692; *Cory Bros. & Co.* v. "*Mecca*" (*Owners*), *supra*; *Deeley* v. *Lloyds Bank*, (1912) A. C. 756.

By sect. 75 (4) of the Companies Act, 1929, debentures deposited by a company whether before or after the Act to secure advances "on current account or otherwise," are not to be deemed redeemed by reason only of the company's account ceasing to be in debit.

The intention to appropriate to a later rather than to an earlier item may be inferred from the course of business between the parties (*Taylor* v. *Kymer* (1832), 3 B. & Ad. 333), or from the fact that the earlier item was secured and intended to be kept separate. *City Discount Co.* v. *McLean*, L. R. 9 C. P. Cas. 692.

**Order of appropriation where intention not shown.** Unless some other appropriation is made or arranged, payments by the debtor will be taken to be appropriated as follows:—

(a) To payment of interest before principal (*Bower* v. *Marris* (1841),

1 Cr. & Ph. 351), unless the account is overdrawn. *Parr's Banking Co.* v. *Yates*, (1898) 2 Q. B. 460.

(b) The earlier items of one entire account before the later items. *Clayton's case*, 1 Mer. 585.

(c) Money from realization of a particular security will be taken to be appropriated to the payment of the amount thereby secured (*Pearl* v. *Deacon* (1857), 24 Beav. 186; on appeal, 1 De G. & J. 461; *Young* v. *English* (1843), 7 Beav. 10); but where there is one security for several debts, the creditor can appropriate. *Ex parte Dickin*, L. R. 20 Eq. 767.

The rule in *Clayton's case* only applies to an entire unbroken account, and not to several accounts. *Re Sherry, &c.*, 25 Ch. D. 702; *Cory's case, supra.*

The simplest way to avoid the application of the rule is to break the account and open a new and distinct account. This, in the absence of contract with the surety to the contrary, may be done. *Re Sherry, ubi supra.* And there is nothing to prevent the appropriation of subsequent payments to the new account, thus stopping the flow of payments in the guaranteed account in relief of the surety and of the security.

Although, in the absence of notice of fraud or irregularity, a bank is bound to honour its customer's cheque if his account be in funds (*Gray* v. *Johnston*, L. R. 3 H. L. 1); yet where a customer has several accounts at a bank, the bank, unless otherwise agreed, may at any time combine them, so as to apply the credit balance on one to the satisfaction of the debit balance on the other (*Garnett* v. *M'Kewan*, L. R. 8 Ex. Cas. 10; *Re European Bank, Agra Bank claim*, 8 Ch. App. 41; *British Guiana Bank* v. *British Guiana Ice Co. (Official Receiver)* (1911), 104 L. T. R. 754), unless there is a waiver of the right. *Re Johnson & Co.*, (1902) 1 Ir. R. 439; *Mutton* v. *Peat*, (1900) 2 Ch. 79.

**Combining two or more accounts.**

But not where the bank has notice that one of the accounts is a trust account. *Ex parte Kingston*, 6 Ch. App. 632; *Foxton* v. *Manchester, &c. Banking Co.* (1881), 44 L. T. 406, 408; *Coleman* v. *Bucks, &c. Bank*, (1897) 2 Ch. 243, 253. And see *Union Bank of Australia* v. *Murray-Aynsley*, (1898) A. C. 693; *Bank of New South Wales* v. *Goulburn Valley, &c. Co.*, (1902) A. C. 543.

As to what is closing an account, see *Berry* v. *Halifax Commercial Banking Co.*, (1901) 1 Ch. 188.

Sect. 82 of the Bills of Exchange Act, 1882, protects from liability a banker who in good faith and without negligence receives payment "for a customer" of a cheque crossed generally or specially to himself, although the customer has no title or a defective title thereto; and the banker does not lose this protection because the customer's

**Crossed cheques to which customer not entitled.**

account is overdrawn at the time, even when the cheque is applied in reduction of the overdraft. *Clarke* v. *London and County Banking Co.*, (1897) 1 Q. B. 552. This protection is lost in case of negligence, or where the person credited is not a "customer." *Savory & Co.* v. *Lloyds Bank*, (1932) 2 K. B. 122.

### Compound Interest.

Compound interest.

In order to justify a claim for compound interest a contract must be shown. A customer is not bound or affected by his bankers charging interest upon interest, by making periodical rests, unless it be proved that he was aware that this was their custom. *Moore* v. *Voughton* (1816), Stark. 487; *Bruce* v. *Hunter* (1813), 3 Camp. 467; *Fergusson* v. *Fyffe* (1840), 8 Cl. & F. 121.

Where the account of a customer is kept at compound interest, and the customer dies or closes the account, the final balance only carries simple interest, unless otherwise agreed. *Crosskill* v. *Bower* (1863), 32 Beav. 86; *Williamson* v. *Williamson* (1869), L. R. 7 Eq. 542, 545. Hence it seems wise to provide expressly for half-yearly rests. It appears, too, that the debt does not carry interest at all from the time of the death of the debtor, unless there is a special contract to that effect. But an agreement for payment of interest may be inferred from the course of dealing, *e.g.*, if it has been frequently charged and paid without objection in former and similar accounts. *Calton* v. *Bragg* (1812), 15 East, 223; *Bruce* v. *Hunter* (1813), 3 Camp. 467; *Eaton* v. *Bell* (1821), 5 B. & Ad. 34.

Compound interest cannot be charged by a moneylender. See Moneylenders Act, 1927, s. 7.

### As to Notice before Calling In or Paying Off.

In the case of a mortgage with a regular proviso for redemption, the mortgagee, after default, is entitled to six months' notice before he is bound to accept payment, or to six months' interest in lieu of notice (*Browne* v. *Lockhart* (1840), 10 Sim. 420); but this is not so in the case of an equitable mortgage by deposit (*Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385); or where the mortgagee takes proceedings to enforce payment (*Re Alcock, Prescott* v. *Phipps* (1883), 23 Ch. D. 372); or where the mortgagee has entered into possession. *Bovill* v. *Endle*, (1896) 1 Ch. 648. The rule as to disentitling a mortgagee to notice applies whether the time fixed for payment in the proviso for redemption has expired or not. *Ib.* Where there are several accounts, the rule applies to each account whilst they are kept separate.

A mortgagee who has given notice to the mortgagor to pay off the principal money and interest, is not entitled to withdraw the notice without the mortgagor's consent. *Santley* v. *Wilde*, (1899) 1 Ch. 747; reversed on other grounds, (1899) 2 Ch. 474.

## Statute of Limitations.

Limitation.

Where a bank had an equitable charge on shares in a limited company to secure a simple contract debt, and after the debt was barred brought an action to enforce their security by foreclosure or sale, Stirling, J., held that the bank were not deprived of their remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no Statute of Limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable. *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161. And see *Weld* v. *Petre*, (1929) 1 Ch. 33.

A statement in the company's balance sheet showing the amount of the debenture debt and interest, is a sufficient acknowledgment to take the case out of the statute, the debentures being under seal and the arrears of interest, therefore, a specialty debt. *Atlantic and Pacific Fibre Co.*, (1928) Ch. 836.

## Bankers' Lien.

Bankers' lien.

In framing bankers' securities, the fact must be remembered that "bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with the lien." *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787; *Leese* v. *Martin* (1873), L. R. 17 Eq. 224; *City Bank case, &c.* (1861), 3 De G. F. & J. 629; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413, 422 (J. C.); *Misa* v. *Currie*, 1 App. Cas. 564.

The implied lien is excluded where the securities are deposited for a specific purpose (*Brandao* v. *Barnett, ubi supra*), *e.g.*, for safe custody (*Leese* v. *Martin, ubi supra*), or were left casually or by mistake. *Lucas* v. *Dorrien* (1817), 7 Taunt. 278.

And where an agent deposits securities belonging to his principal in his bank with the object of raising a loan on behalf of his principal for a special purpose, and the banker is cognizant of the special purpose, the banker cannot hold the securities *against the principal* as security for an overdraft of the agent for his own purposes. *Cuthbert* v. *Robarts, Lubbock & Co.*, (1909) 2 Ch. 226.

But even where the securities are deposited by way of specific security, the lien will, it seems, attach for any balance due after the specific security is satisfied, unless the deposit was for a purpose inconsistent with such lien. *Young* v. *Bank of Bengal* (1836). 1 Dea. 622, 677; *Jones* v. *Peppercorne* (1858), Johns. 430, 438; *Re European Bank, &c.*, 8 Ch. App. 41; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413; *In re Bowes, &c.*, 33 Ch. D. 586.

In the case last mentioned, it was held that a deposit with a banker of securities, accompanied by a memorandum to the effect that they were deposited to secure money advanced or to be advanced, not exceeding a specified amount, excluded by implication the bankers' general lien, *i.e.*, disabled the bankers from claiming a lien on the deeds in respect of any sum beyond the specified limit.

Sometimes such a construction is negatived by the insertion of a special provision in the security, *e.g.*, that the security is not by implication or otherwise to exclude or cut down the general lien of the bank.

The lien arises where the customer is in debt to the bank, even though the indebtedness is only made out by aggregating several accounts of the customer. *Re European Bank*, 8 Ch. App. 44; *Garnett* v. *M'Kewan* (1872), L. R. 8 Ex. Cas. 10. But a banker has no lien upon a trust account, where the banker has notice that it is a trust account, for the debt due on an overdrawn private account. *Ex parte Kingston, Re Gross* (1871), 6 Ch. App. 632.

The lien extends to promissory notes, bills of exchange (indorsed in blank and payable to bearer), and exchequer bills (*Brandao* v. *Barnett*, 12 Cl. & F. 787), coupons, bonds of foreign governments (*Jones* v. *Peppercorne* (1858), 28 L. J. Ch. 158), cheques (*Scott* v. *Franklin* (1812), 15 East, 428), share certificates (*Re United Service Co.*, 6 Ch. App. 212), debentures, debenture stock, mortgages, conveyances, leases, and money (*Roxburghe* v. *Cox*, 17Ch. D. 520—C. A.), and marginal receipt notes. *Jeffryes* v. *Agra, &c. Bank* (1866), L. R. 2 Eq. 674.

The lien is not a mere right to retain possession; it more resembles the right of a pawnee (*Donald* v. *Suckling*, L. R. 1 Q. B. Cas. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. Cas. 299), for the banker may realize the security, and may sue on it. *Bolland* v. *Bygrave* (1825), Ryan. & M. 271; *Scott* v. *Franklin*, 15 East, 428. And it seems that he may sell the security when the customer makes default in payment after notice. *Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278; *Martin* v. *Reid* (1862), 11 C. B. N. S. 730; *Pigott* v. *Cubley* (1864), 15 C. B. N. S. 701.

As regards bills of exchange, the question whether there is a lien or not is only material when the bills are the property of the customer.

As to this, bills paid into a bank before maturity are *primâ facie* the property of the customer. *Giles* v. *Perkins* (1807), 9 East, 14. But if indorsed to the bank the property in the bill *primâ facie* passes to the bank. *Ex parte Schofield, Re Firth*, 12 Ch. D. 337. It is for the banker to make out the intention with which a bill was paid in (*Ex parte Sargeant* (1810), 1 Rose, 153); entries in his book may afford evidence against him, though such entries, if not communicated to the customer, cannot be evidence in the banker's favour.

The implied lien is subject to the rule in *Hopkinson* v. *Rolt* (1861), 9 H. L. C. 514. And the lien is therefore subject to other incumbrances, of which the banker had notice, and to the rights of a purchaser if the banker has notice of the purchase. *London and County Bank* v. *Ratcliffe*, 6 A. C. 722.

### Guarantees.

Guarantees.

In many cases temporary advances to a borrower are further secured by guarantees, sometimes given by one, and sometimes by several persons. Occasionally, the guarantors give the lender security by equitable mortgage, or otherwise, for the due payment of the debt guaranteed. See Form 596, *infra*.

A guarantee is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who is himself in the first instance liable to such payment or performance. Sect 4 of the Statute of Frauds (29 Car. 2, c. 3) requires that an agreement to answer for the debt of another person, or some memorandum or note thereof, shall be in writing, signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. But the consideration for the promise need not appear in writing, or by necessary inference from a written document. Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3. As to the Scotch law, see Mercantile Law (Scotland) Amendment Act, 1856 (19 & 20 Vict. c. 60), s. 6; and *Wallace* v. *Gibson*, (1895) A. C. 354.

Unless, however, the guarantee is under seal, valuable consideration must exist. See *supra*, p. 844.

In framing a guarantee by a firm it is necessary to bear in mind the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 4, which is as follows:—

"No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in

respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Hence, in the case of a firm, it is desirable to add the words, "the guarantee is to continue, notwithstanding any change in the constitution of the firm, whether by retirement or admission of partners."

In the case of a guarantee for advances, the lender is not, as a rule, bound to make full disclosure of all material facts to the proposed surety (*Davies* v. *London and Provincial, &c. Co.*, 8 Ch. D. 475; *North British Insurance Co.* v. *Lloyd* (1854), 10 Ex. Reps. 523), *e.g.*, a suspicion that the principal has been guilty of forgery. *Bank of Scotland* v. *Morrison*, (1911) S. C. 593—Ct. of Sess.

Thus, it is not necessary, unless questions are asked, for bankers who are about to be guaranteed to inform the guarantor how the account of the customer has been kept, or whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, &c. *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109, 119. In this case the guarantee was for a cash account, and the amount was applied in paying off an old debt to the bank, and it was held by the House of Lords that there was no obligation on the bank to disclose the information to the proposed surety.

Nor is the person guaranteed bound to inform the proposed guarantor that the guarantee is to be substituted for a previous one given by another person. *North British, &c. Co.* v. *Lloyd*, 10 Ex. Rep. 523.

But a contract of guarantee may under special circumstances be one of those contracts in which *uberrima fides* is required on the part of the person with whom the contract is made, *e.g.*, in the case of guarantee policy for a premium paid by the lender (*Seaton* v. *Heath*, (1899) 1 Q. B. 782; reversed, *sub nom.*, *Seaton* v. *Burnand*, (1900) A. C. 135); and misrepresentation, or any concealment of some material part of the principal's contract, at any rate if it amounts to fraud, will avoid the guarantee. *Pidcock* v. *Bishop* (1825), 3 B. & C. 605; *Lee* v. *Jones*, 17 C. B. N. S. 482.

Thus the guarantee was avoided when the surety was informed, contrary to the fact, that the borrower was not at the time indebted to the lender. *Stone* v. *Crompton* (1838), 5 Bing. N. C. 142.

And a guarantee will not hold good where the lender stands by and allows a fraud to be practised on the proposed guarantor. *Owen* v. *Homan* (1853), 4 H. L. C. 997.

Payment to a surety, before he has been called upon to pay as such, may be a fraudulent preference. *Re Paine, Ex parte Read,* (1897) 1 Q. B. 122.

In *Re Warren,* (1900) 2 Q. B. 138, it was held that a payment made to a creditor with the *dominant* motive of relieving a surety for the debt was not a fraudulent preference; but now, by sect. 44 of the Bankruptcy Act, 1914, a fraudulent preference in favour of any surety or guarantor for a debt is brought within the section, provided the dominant motive is to prefer or relieve the surety. Thus a payment made with a view to procuring further money for the company's business has been held not to be a fraudulent preference, though its effect was to relieve a surety. *G. Stanley & Co.,* (1925) Ch. 148.

Generally a continuing guarantee, unless containing an express stipulation to the contrary, is revocable by the surety (*Offord* v. *Davies* (1862), 12 C. B. N. S. 748), but a continuing guarantee under seal, where the consideration is given once for all, is not determined by the death of the guarantor. *Re Crace, Balfour* v. *Crace,* (1902) 1 Ch. 733.

As to the effect of the Statute of Limitations on a guarantor's liability for interest, see *Parr's Banking Co.* v. *Yates,* (1898) 2 Q. B. 460.

## Building Societies.

The catastrophe of the Birkbeck Building Society drew a good deal of attention to borrowing by building societies, and emphasised the importance of using great care in making advances to such societies. The following are some precautions recommended:—

As to societies under the Act of 1836.

1. As to those certified under the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), and not subsequently re-registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42)—

(a) It must be seen that the society was certified prior to the 1st January, 1857, for by sect. 25 (2) of the Building Societies Act, 1894 (57 & 58 Vict. c. 47), passed the 25th August, 1894, the Act of 1836 is repealed as from the 25th August, 1896, as to all societies certified under the Act of 1836 after the year 1856. Hence, a society registered after the 31st December, 1856, is irregular, unless, prior to the 25th August, 1896, it was re-registered under the Act of 1874.

(b) The rules must be examined to ascertain whether they give borrowing powers, for, unless there is in the rules an express or implied power, borrowing is *ultra vires. Murray* v. *Scott* (1884), 9 App. Cas. 519; *Cunliffe Brooks & Co.* v. *Blackburn Building Soc.,* 9 App. Cas. 857; *Re Mutual Aid*

*P. B. B. Soc.* (1885), 29 Ch. D. 182; *Re National P. B. B. Soc.* (1869), 5 Ch. App. 309.

(c) A borrowing rule usually gives a limited power to borrow, but an unlimited power is valid. *Murray* v. *Scott*, *supra*.

(d) A lender is fixed with notice of the rules, and accordingly, if there is no power in them to borrow, a lender cannot safely lend, and if there is a limited power a lender must ascertain that his loan is within the limits. *Chapleo* v. *Brunswick, &c. Soc.* (1881), 6 Q. B. D. 696.

(e) To borrow where there is no power given by the rules, and to borrow in excess where there is limited power given by the rules, is *ultra vires*, and the lender has no remedy against the society, except by subrogation, and any security given to him by the society must be given up (*Cunliffe Brooks & Co.* v. *Blackburn Building Soc.*, 9 App. Cas. 857; *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696); and where a security is given for an *ultra vires* loan, the fact that the society has subsequently acquired borrowing powers is not sufficient to validate a new security for the loan. *Ex parte Watson*, 21 Q. B. D. 301. As to subrogation, see *Cunliffe Brooks & Co.* v. *Blackburn Building Soc.*, *supra*, and *Baroness Wenlock* v. *River Dee*, 19 Q. B. D. 155.

(f) It should also be seen that there is power express or implied to give security for money borrowed. As a general rule, a power to borrow would seem to imply a power to give security. See *Re Durham County, &c. Soc.*, L. R. 12 Eq. 516; but Blackburn, J., in *Murray* v. *Scott*, 9 App. Cas. 519, at p. 556, doubted whether this implication arose. It was not, however, necessary to decide the point.

(g) It should also be seen that the rules do not contain a provision to the effect that all loans and advances are to rank *pari passu* in point of security on the properties, or any provision to the like effect; for such a provision negatives any implied power to give specific security to any one lender. *Murray* v. *Scott*, 9 App. Cas. 519.

(h) An overdraft from the society's bankers is a borrowing of money. *Cunliffe Brook & Co.* v. *Blackburn Building Soc.*, 9 App. Cas. 857. Thus, if the rules only give a limited power of borrowing, it is dangerous to allow a building society an overdraft on its current account.

(i) Where the rule only allows borrowing for specified purposes, the lender must see that the money is borrowed for such purposes. *Re Durham County, &c. Soc.*, L. R. 12 Eq. 516.

It is not easy to reconcile this view with the decisions in regard to companies referred to in Part I., 15th edit., p. 70.

(j) Where a society borrows in excess of its powers, the directors may be held personally liable on an implied warranty of authority. *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Chapleo* v. *Brunswick, &c. Soc.*, 6 Q. B. D. 696. And see *Firbank (Exors.)* v. *Humphreys* (1886), 18 Q. B. D. 54.

As to societies under the Acts of 1874 and 1894.

2. As to those societies which are registered under the Acts of 1874 and 1894, the following points must be borne in mind:—

(a) It must be seen that the rules give power to borrow and fix a limit (see sect. 16 (2) of Act of 1874, and sect. 1 (4) of Act of 1894), and that the limit is within the limits prescribed by the Building Societies Acts.

(b) As to the limits prescribed by the Acts, see sect. 15 of the Act of 1874, and sect. 14 of the Act of 1894.

Reading the two sections together, the limits prescribed are as follows:—

(1) In a permanent society the total amount for the time being owing on deposit or loan is not to exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. See *Re West Riding, &c. Building Soc.*, 45 Ch. D. 463.

(2) In a terminating society the total amount for the time being owing in respect of deposits or loans is not to exceed two-thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force.

(3) In calculating the amount for the time being "secured to the society by mortgages from its members," the amount secured on properties the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had been twelve months in possession at the date of such account and statement, are to be disregarded. And see *Neath Building Soc.* v. *Luce*, 43 Ch. D. 158; and *West Riding of Yorkshire P. B. B. Soc.* (1890), 39 W. R. 74.

(4) An unlimited power to borrow is *ultra vires*. See the above sections. A lender is fixed with notice of the rules, see *supra*, p. 127.

(5) Borrowing in excess of the limits is *ultra vires*, and the lender has no remedy save so far as he can prove that the amount

has been applied in paying off valid debts of the society. See Part I., 15th ed., p. 429, and the cases there cited; see also *Owen* v. *Roberts* (1887), 57 L. T. 81; and *Re Companies Acts, Ex parte Watson; Re Sheffield P. B. B. Society* (1888), 21 Q. B. D. 301.

(6) Overdrawing is borrowing. *Cunliffe Brooks & Co.* v. *Blackburn Building Society*, 9 App. Cas. 857; *Looker* v. *Wrigley* (1882), 9 Q. B. D. 397.

(7) Sect. 43 of the Act of 1874 provides that if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess. See *Cross* v. *Fisher*, (1892) 1 Q. B. 467.

(8) To allow a society which has only a limited power to borrow a continuing overdraft on a current account with a bank is dangerous, for it is not practicable for the directors of the bank to watch the transactions of the society from day to day; and although the overdraft when first allowed may be within the limits, yet at some subsequent period the overdraft may exceed the limits, and to that extent the bank will have no security.

(9) The statutory receipt given by a building society under sect. 42 of the Building Societies Act, 1874, on payment off of a legal mortgage had the effect of vesting the legal estate in the person having the best right to call for a conveyance, and for this purpose a third party who paid off such a legal mortgage at the request of the mortgagor had a better title than the mortgagor. *Crosbie-Hill* v. *Sayer*, (1908) 1 Ch. 866. Sect. 115 of the Law of Property Act, 1925, is substituted for the above-mentioned section.

(10) A borrowing power must not be used for a purpose which is outside the objects of the society, *e.g.*, banking. *Re Birkbeck Permanent, &c. Building Soc.*, (1912) 2 Ch. 183.

(11) Where a building society carries on the business of a bank, the whole banking business being *ultra vires*, assets remaining after payment of valid debts must be distributed between the depositors and the shareholders *pari passu*. *Sinclair* v. *Brougham* (*Birkbeck, &c. Building Soc.*, on appeal), (1914) A. C. 398.

These observations are sufficient to show that dealings with building societies require very great caution. If it proposed to make a loan to a building society, it is desirable to make the loan of specified amount on specified security, and not to make the loan by allowing an over-

draft on a current account. If a loan is made by a bank on specified security, to secure such loan the bank will, of course, ascertain that the loan is within the limits prescribed at the time when it is made, and if the society should afterwards transgress those limits as regards other persons, the security to the bank will not be affected.

## Advances on Bills of Lading, Dock Warrants, and other Documents of Title.

The Factors Act, 1889.

In making such advances, questions frequently arise as to the operation of the Factors Act, 1889 (52 & 53 Vict. c. 45), and it may, therefore, be convenient here to set out its principal provisions:—

### *Preliminary.*

Definitions.

1. For the purposes of this Act—

(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any person subject to his control or for him or on his behalf:

(3) The expression "goods" shall include wares and merchandise.

(4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6) The expression "person" shall include any body of persons corporate or unincorporate.

### *Dispositions by Mercantile Agents.*

Powers of mercantile agent with respect to disposition of goods.

2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other

disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any document of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

**8.** A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

**4.** Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

**5.** The consideration necessary for the validity of a sale, pledge, or other disposition of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

**6.** For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

**7.**—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

### *Dispositions by Sellers and Buyers of Goods.*

Disposition by seller remaining in possession.

**8.** Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. (Re-enacted in sect. 25 (1) of the Sale of Goods Act, 1893.)

**9.** Where a person having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (Re-enacted by sect. 25 (2) of the Sale of Goods Act, 1893.)

Disposition by buyer obtaining possession

**10.** Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Effect of transfer of documents on vendors' lien or right of stoppage in transitu.

## *Supplemental.*

**11.** For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by the custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Mode of transferring documents.

**12.**—(1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

Saving for rights of true owner.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

**13.** The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Saving for common law powers of agent.

Operation of the Act.

The Act repealed the prior Factors Acts (4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39). In relation to those Acts there were a great number of decisions; but it is well settled that in construing a statute like the Factors Act, 1889, we are, in the first place, to look to the language of the Act itself without reference to the old cases, and that it is only necessary and proper to refer to them on some special ground, *e.g.*, where there is some ambiguity in

the Act which the old cases may assist in solving. Thus, in *Bank of England* v. *Vagliano*, (1891) App. Cas. 144, Lord Herschell said:—

"I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to *interpret the language of the statute*, and that an appeal to earlier decisions can only be justified on some special ground."

Same principle applies both to codifying and consolidating and amending Acts.

These observations were made in relation to the Bills of Exchange Act, 1882, which was intended to codify the law as to bills of exchange, but the same principle applies to a consolidating and amending Act.

Some provisions of the Factors Act, 1889 (ss. 8 and 9), have been re-enacted in sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and decisions on the Sale of Goods Act may often be usefully referred to to interpret the Factors Acts.

Questions on the Act.

Premising thus much, it will be convenient to touch on a few of the leading questions that arise on the Act.

### 1. "Mercantile Agent."

Mercantile agent.

A mercantile agent as defined by the Act is a "mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." This definition does not qualify the provisions of sub-sect. (2) of sect. 2 of the Act so as to invalidate a transaction under that sub-section merely because the agent disregards the instructions, expressed or implied, of his principal. For example, a person entrusted with diamonds for sale, being a mercantile agent within the definition, can confer a good title to the diamonds on a pawnbroker with whom he pledges them, though the pledge is in fraud of his principal and contrary to the custom of the diamond trade. *Oppenheimer* v. *Attenborough & Sons*, (1908) 1 K. B. 221. This decision was followed in *Weiner* v. *Harris*, (1910) 1 K. B. 285, in which case jewellery was entrusted to a travelling agent for sale or return, but on terms which

showed that he was not to be a purchaser, but an agent, and a pledge by such a mercantile agent with a moneylender advancing in good faith without notice, was held to be good against the principal.

### 2. Possession of Goods.

Possession.

When is a person to be deemed to be "in possession of goods or of the documents of title"? (See sects. 8 and 9, and paragraph (2) of sect. 1.) The concluding words of the sect. 1 (2) as to control are intended *inter alia* to confirm the law established in *Portalis* v. *Tetley* (1867), L. R. 5 Eq. 140, 147.

"If the factor pledges the goods to A. for half their value, and then pledges them for the remainder of their value or for some further security to B., it would, I apprehend, be an exceedingly narrow construction to say that he is not at that time in possession of the documents and goods, both of them being in his control as against his principal until the principal withdraws them," said Page-Wood, V.-C., in that case.

Possession of, not property in, the thing disposed of is the cardinal fact. "From the point of view of the *bonâ fide* purchaser, the ostensible authority based on the fact of possession is the same, whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not." Per Collins, L. J., in *Cahn* v. *Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, 658. "Actual physical custody" is the construction adopted by A. L. Smith, L. J., in the same case, p. 655. And see *Folkes* v. *King*, (1923) 1 K. B. 282.

### 3. "Documents of Title to Goods."

Documents of title to goods.

"Documents of title" are defined by the Act, sect. 1 (4). Stock and share certificates are not documents of title to goods within the Act. *Freeman* v. *Appleyard* (1862), 32 L. J. Ex. 175. A mere receipt for purchase-money is not a document of title (*Kemp* v. *Falk* (1882), 7 App. Cas. 585); nor is a wharfinger's certificate that goods are lying at the works of the manufacturer ready for shipment (*Gunn* v. *Bolckow, Vaughan & Co.*, 10 Ch. App. 492), unless it can be made out that such a certificate is used in the ordinary course of business as proof of the possession or control of goods. *Merchant Banking Co. of London* v. *Phœnix, &c. Co.*, 5 Ch. D. 205.

A bill of lading is expressly mentioned in the definition in sect. 1 (4) of the Factors Act, and in the Sale of Goods Act "documents of title to goods" has the same meaning as it has in the Factors Act (sect. 62). And see *Cahn* v. *Pockett's Bristol, &c. Co.*, *supra*. As

to delivery orders in blank, see *Union Credit Bank* v. *Mersey Docks and Harbour Board*, (1899) 2 Q. B. 205.

### 4. Power to Pledge.

Agent's power to pledge.

Power of mercantile agent to pledge. See sect. 2 of the Factors Act, 1889, p. 867, *supra*.

Consent.

Paragraph (1) of the section is the vital one. In dealing with a mercantile agent under the Act, the first point to be considered is whether the agent is, *with the consent of the owner*, in possession of goods or documents of title. Bankers very commonly assume consent, at any rate when they are dealing with a mercantile agent who is a customer; and it is apprehended that in most cases this assumption may safely be made even where goods or documents of title are placed by the owner in the possession or under the control of a mercantile agent not as such for sale or pledge, but for some other purpose, *e.g.*, for safe custody or for transmission. It would seem that such agent is, nevertheless, in possession "with the consent of the owner." So, too, the agent is in possession with consent even though such consent has been obtained by fraudulent representations to the owner. *Sheppard* v. *Union Bank of London* (1862), 7 H. & N. 661; *Baines* v. *Swainson* (1863), 4 B. & S. 270; *Folkes* v. *King*, (1923) 1 K. B. 282.

The question was considered in *Cahn* v. *Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643. That case arose under sect. 25, sub-sect. (2), of the Sale of Goods Act, which is a re-enactment of sect. 9 of the Factors Act. There, in fulfilment of a contract for the sale of copper, the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendant's ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, but he delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper *in transitu*. In an action by the plaintiffs against the defendants for non-delivery of the copper, the Court of Appeal held that, the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under sect. 25, sub-sect. (2), of the Act of 1893, and that the sellers had a right to stop it *in transitu*.

Collins, L. J., made the following observations (at p. 658):—"But the Legislature has not carried the rights of a purchaser under these

Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having *found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner*. But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it, were under a contract voidable as fraudulent (see *Baines* v. *Swainson* and *Sheppard* v. *Union Bank of London* (1862), 7 H. & N. 661), he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser."

Theft.

If, however, the documents have been stolen, there being no consent, there is no power to pledge; and so also where A., being in possession of goods stored in the cellars of B., and C., by false statements to B., obtains possession, he is not in possession "with the consent of A." *Robinson* v. *Restell* (1896), 12 T. L. R. 174, Mathew, J. See also *Oppenheimer* v. *Frazer*, (1907) 2 K. B. 50; *Lake* v. *Simmons*, (1927) A. C. 487.

Presumption of consent.

It is to be noted that if litigation ensues, the onus of proving that the goods or documents of title were not in possession of the agent with the consent of the owner is on those who aver the absence of consent; for the Act provides, in paragraph (4) of the same section, that "for the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary." See *Robinson* v. *Restell, supra*, in which evidence to the contrary was given and held sufficient. See also *Oppenheimer* v. *Frazer*, (1907) 2 K. B. 50.

### 5. Ordinary Course of Business.

Ordinary course of business.

The next point is whether the pledge is "in the ordinary course of business of a mercantile agent," not, be it noted, in the ordinary course of business as between him and his principals. That it is in the ordinary course of business for brokers, factors, and other mercantile agents of various kinds to obtain advances is well known. The words "when acting in the ordinary course of business of a mercantile agent" in sect. 2 (b), mean acting as a mercantile agent in the way in which such an agent would act if that particular transaction were one duly authorized by his principal. *Oppenheimer* v. *Attenborough*, (1908) 1 K. B. 221; and see *Turner* v. *Sampson* (1911), 27 T. L. R. 200.

Good faith and no notice of defect.

The next point is whether the bank or other party making the advance is acting in good faith without notice of want of authority.

See the proviso to paragraph (1) of sect. 2: "provided that the person taking under the disposition acts in good faith and has not, at the time of the disposition, notice that the person making the disposition has no authority to make the same." The test of good faith is honesty, and mere carelessness will not negative good faith. *Jones* v. *Gordon* (1877), 2 App. Cas. 616; *Tatam* v. *Haslar*, 23 Q. B. D. 345; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201.

Notice.

"Notice" in the Act does not include "constructive notice," as used in connection with notice of equitable interests.

> "One word I would say upon the question of notice and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry."

Per Lord Herschell in *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 221.

No doubt that was said in relation to negotiable instruments, but if suspicion is enough in regard to them, it is *à fortiori* enough in regard to documents of title which have only some of the incidents of negotiability attaching. See *Sheffield (Earl of)* v. *London Joint Stock Bank*, 13 App. Cas. 333, as explained in *London Joint Stock Bank* v. *Simmons*, *supra*, as to the danger of dealing with an agent with notice of want of authority.

"The equitable doctrines of constructive 'notice' are common enough in dealing with land and estates, with which the Court is familiar, but there have been repeated protests against the introduction into *commercial* transactions of anything like the extension of these doctrines, and the protest is founded on perfect good sense. In commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralysing the trade of the country." Per Lindley, L. J., in *Manchester Trust* v. *Furness*, (1895) 2 Q. B. 539, 545.

Para. (2) of sect. 2.

Withdrawal of consent. See paragraph (2) of sect. 2. Under the old law, it was held that the secret revocation of the agent's authority prior to the pledge defeated the right of *bonâ fide* pledgees (*Fuentes* v. *Montis* (1868), L. R. 4 C. P. 93); but this paragraph negatives that doctrine.

Where a mercantile agent "has been in possession with consent, the determination of the consent does not, while he retains possession, defeat his disposition." Per Collins, L. J., in *Cahn and Mayer* v. *Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, 658.

Sect. 3. As regards sect. 3, providing that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods," does not relate to all pledges of documents, but only to those effected by mercantile agents. *Inglis* v. *Robertson*, (1898) A. C. 616, 630.

Sect. 4. Antecedent debt. As to sect. 4, see *Jewan* v. *Whitworth*, 2 Eq. 692; *Macnee* v. *Gorst*, 4 Eq. 315; *Kaltenbach, Fischer & Co.* v. *Lewis* (1885), 10 App. Cas. 617.

Sect. 5. As to sect. 5, note that this section covers exchanges. *Bonzi* v. *Stewart* (1842), 4 M. & Gr. 295, shows the necessity for the provision.

Sect. 9. As to sect. 9 of the Act, see *Lee* v. *Butler*, (1893) 2 Q. B. 318; and *Helby* v. *Matthews*, (1895) A. C. 471 (option to buy, not an agreement to purchase). See also *Belsize Motor Supply Co.* v. *Cox*, (1914) 1 K. B. 244; *Whiteley, Ltd.* v. *Hilt*, (1918) 2 K. B. 808 (hire-purchase agreements).

A few precautions. In making advances to a mercantile agent on documents of title or goods, the lender will do well to adopt the following safeguards:— Require evidence of the consent referred to in sect. 2 of the Act, unless he is prepared to take that risk. Where there is any suspicion, make due inquiry. Where the lender's position can be fortified by notice or registration, take the requisite steps at once. Beware of prior lien charges for warehousing, &c., which may have accumulated.

In dealing with industrial societies or other associations to which the Companies Act, 1929, does not apply, the provisions of the Bills of Sale Acts should also be borne in mind, though these do not as a rule apply to dealings with goods in the ordinary course of business.

Bills of Sale Acts. The expression "bill of sale" in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), does *not* include "transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." Sect. 4.

And these documents of title are not within the Bills of Sale Act (1878) Amendment Act, 1882. See sect. 3 of that Act.

An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their

deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882. Bills of Sale Act, 1890, s. 1, as amended by Bills of Sale Act, 1891.

### Stamps.

Stamp duties.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), imposes a duty of 2*s.* 6*d.* per cent. on a mortgage other than an "equitable mortgage" as defined in sect. 86 (see *infra*); and by the section last referred to, the term "mortgage" is defined in very wide terms. Under sect. 88, "a security for the payment or repayment of money to be lent, advanced, 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," and if not limited, the security is to be good for advances up to the amount of the duty impressed, and in respect of further advances there must be further duty impressed.

Equitable mortgages.

The Stamp Act, whilst imposing a duty of 2*s.* 6*d.* per cent. on ordinary mortgages, provides that an "equitable mortgage" is only to require a duty of 1*s.* per cent.; and in sub-sect. (2) of sect. 86 of the Act an equitable mortgage is specially defined as follows:—

> "For the purposes of this Act the expression 'equitable mortgage' means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property."

The revenue authorities hold, that to be an equitable mortgage, subject to the 1*s.* duty, the instrument must contain little, if anything, more than a memorandum of the deposit of the deeds, with an undertaking to execute a legal mortgage if called on, and that if a power of sale be inserted, the instrument can no longer be considered an equitable mortgage within the definition, and is liable, therefore, to the higher duty of 2*s.* 6*d.* per cent. It is not easy to understand how this construction of sub-sect. (2) of sect. 86 of the Act can be justified. The words "relating to" are wide. They are used in other portions of the Act, and there have been various decisions in regard to their meaning. Thus, the Act contains an exemption from the agreement duty of any "agreement, letter, or memorandum made for or *relating to* the sale of any goods, wares, or merchandise," and on these words it has been held that the exemption covers an agreement by vendors of goods to indemnify the purchaser or broker

against loss (*Curry* v. *Edensor* (1790), 3 T. R. 524); a guarantee for payment of goods supplied to another (*Warrington* v. *Furbor* (1807), 8 East, 242); and an agreement to share in profit or loss upon goods already purchased. *Venning* v. *Leckie* (1810), 13 East, 7. And it would seem that a provision in the agreement or memorandum by way of equitable mortgage conferring a power of sale is quite as much a matter *relating* to the deposit of the deeds as the agreements referred to in the above cases were agreements *relating* to the sale of goods. However, the commissioners always refuse to adjudicate an instrument as duly stamped with the 1*s.* duty where a power of sale is inserted, and no one has yet been courageous enough to obtain a legal decision on the question.

But there is, of course, nothing to prevent the giving of a power of sale to the equitable mortgagee by a separate power of attorney on a 10*s.* stamp, and this is not uncommonly done.

Mortgage of shares.

A memorandum of charge accompanying a deposit of share or stock certificates or a transfer is stamped, as an agreement, 6*d.*, if under hand only.

Sect. 23 of the Stamp Act, 1891, provides as follows:—

**23.**—(1) Every instrument under hand only (not being a promissory note or bill of exchange), given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(2) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(3) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty.

The commissioners hold that where the transaction is effected by the deposit of share certificates or scrip, or bills or notes with a covering memorandum under hand stating that the deposit has been made as security for a loan, the memorandum is liable to the duty of 6*d.* as an agreement merely. They also hold that the "duly stamped" transfer referred to in sect. 23 means a transfer bearing a duty of 10*s.*; or where the *ad valorem* mortgage duty would be less than 10*s.*, then such less amount.

This section, and more especially sub-sect. (2) thereof, is largely made use of. In construing it, it should be remembered that, by sect. 122 of the Act, "stock" includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, corporation, company, or society

in the United Kingdom, or of any foreign or colonial corporation, company, or society. And "marketable security" is by the same section declared to mean "a security of such description as to be capable of being sold in any stock market in the United Kingdom." See also as to marketable securities, sect. 82 (1) of the Act, and *Brown, Shipley & Co.* v. *C. I. R.*, (1895) 2 Q. B. 598.

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**Form 570.**

Agreement for deposit subject to bank's usual clauses (set out) [applicable to land].

THE BANK, LIMTD.

*General Deposit Clauses.*

1. Where documents of title are deposited with the bank by way of security the ppty comprised therein, or to which the same relates, is (unless otherwise arranged) to stand as a continuing security for the due satisfaction of the depositors' liabilities to the bank, whether incurred before or after the deposit, and whether matured or not, and whether incurred by the depositors alone or jointly with others, and whether as principals or sureties, and whether absolute or contingent, including liabilities in respect of advances and in respect of cheques, bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed or guaranteed, and in respect of interest, commission, and other usual banking charges.

Sometimes the words following are added: "and in respect of all costs, charges, and expenses incurred by the bank in paying any rent, rates, taxes, or other outgoings in respect of the mortgaged property, or in insuring, repairing, maintaining, managing, or realising any of the mortgaged property, or in investigating the title to such property."

Sometimes a less extensive clause is used, *e.g.*, for the due payment to the bank of the balance which shall for the time being be owing from the depositors to the bank on their account current with the bank for cheques, bills, or notes drawn, accepted, or indorsed by the depositors, or for advances made to them, or for their accommodation or benefit or otherwise, including interest with half-yearly rests, commission, and other customary banking charges.

An equitable mortgagee, as a general rule, is entitled to the same costs as a legal mortgagee. *Lewis* v. *John* (1838), 9 Sim. 366; *Wade* v. *Ward* (1859), 4 Drew. 602. He has, by implication of law, and without special stipulation, a charge on the mortgaged premises—

(1) For his costs of preparing a legal mortgage. *National Prov. Bank of England* v. *Games*, 31 Ch. D. 582.

(2) For the expenses of investigating the title with a view to such mortgage, unless the agreement was only to give a mortgage of the depositors' interest. *S. C.*

(3) For expenses of proceedings to establish or defend the mortgagee's title. *Godfrey* v. *Watson* (1747), 3 Atk. 517; *Blackford* v. *Davis*, 4 Ch. App. 304.

(4) For incidental legal proceedings [or expense with a view thereto], *e.g.*, action against surety (*Ellison* v. *Wright* (1827), 3 Russell, 458); correspondence with a surety. *National, &c. Bank* v. *Games, ubi supra.*

(5) For sums expended to protect the security from forfeiture or detriment, *e.g.*, premium on a life policy (*Bellamy* v. *Brickenden* (1861), 2 J. & H. 137; *Gill* v. *Downing*, 17 Eq. 316); and for lasting repairs when in possession. *Shepard* v. *Jones* (1882), 21 Ch. D. 469; *Henderson* v. *Astwood*, (1894) A. C. 150; *White* v. *Metcalfe*, (1903) 2 Ch. 567.

(6) For costs of abortive sale. *Farrer* v. *Lacy, Hartland & Co.*, 25 Ch. D. 636.

(7) For his costs of an action of redemption or foreclosure. *Cotterell* v. *Stratton*, 8 Ch. App. 295; *National Prov. Bank* v. *Games*, 31 Ch. D. 582. But where the mortgage is not by deed, there is no implied charge for moneys expended in insuring the mortgaged premises. *Dobson* v. *Land* (1850), 8 Ha. 216; *Bellamy* v. *Brickenden* (1861), 2 J. & H. 137. (As to a mortgage by deed, see now sect. 101 of the Law of Property Act, 1925.)

It is therefore sometimes desirable to insert a special provision in the contract that the charge shall extend to additional matters besides those; and it is to be borne in mind that in the event of the Court at any time directing an account of what is due to the mortgagee, reasonable expenditure on the additional matters will, without further directions by the Court, be allowed to the mortgagee in the account as just allowances. *Blackford* v. *Davis*, 4 Ch. App. 304 (insurance and management); *Bompas* v. *King*, 33 Ch. D. 279.

In the case last mentioned, the mortgage contained power to "manage" the premises, which consisted of a large building let out in flats, and managed somewhat like a residential club. When the mortgagees took possession, it was found that many of the tenants held under agreements which entitled them to the supply of cooked food at a fixed tariff, and to the use of domestic servants employed by the landlord, and the existence of a power to manage was held to authorize the mortgagee to carry on the concern and to claim, out of the proceeds of sale, losses incurred in so carrying on the undertaking.

2. All moneys from time to time owing by the depositors to the bank are to carry interest (with half-yearly rests), at such rate as may from time to time be agreed on, or otherwise at the rate of one p.c.p.a. above the minimum rate of the Bank of England from time to time prevailing, but never less than —— p.c.

*Or*, "At the rate of five per cent. per annum, or such higher rate as shall be the current rate of interest for the time being payable to bankers."

3. The depositors, on the request of the bank, are to execute a legal mortgage of the premises comprised in the deposited deeds or documents, such mortgage to be prepared by the bank's solors at the expense of the depositors, and to be in such form and to contain such provisions, including full powers of sale, as the sd solors in the bank's interest may deem expedient.

As to the effect of such a clause in excluding the consolidation section (sect. 17) of the Conveyancing and Law of Property Act, 1881 (now sect. 93 of the Law of Property Act, 1925), see *Farmer* v. *Pitt*, (1902) 1 Ch. 954.

As to inserting in an equitable mortgage a declaration of trust with a power to appoint a new trustee, see *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

**Form 570.**

4. Any notice by way of request, demand, or otherwise, may be served by the bank on the depositors in the manner specified in sect. 196 of the Law of Property Act, 1925.

To the above-named bank.

GENTLEMEN,

I have deposited with you by way of security the documents specified in the schedule hto [*or* within], and upon the footing of the above general deposit clauses.

Yours, &c. ——.

THE SCHEDULE ABOVE REFERRED TO.

This will be divided into three columns, headed respectively:—Date of Document, Parties to Document, Nature of Document.

The above is intended to take effect as an "equitable mortgage" within sect. 86 of the Stamp Act, 1891 (see *supra*, p. 876), so as to fall within the 1*s.* per cent. duty. As to the seemingly unfounded objection of the Commissioners to the insertion of a power of sale, see *supra*, p. 877.

For power of sale, if required, see *infra*, p. 887.

As to giving power of sale by separate power of attorney, see *infra*, p. 885.

**Form 571.**

Memorandum in shape of letter.

TO THE —— BANK, LIMTD.

GENTLEMEN,

I have this day deposited with you documents relating to ——, in order that you may have a charge on the ppty comprised therein, or to which such documents relate, for securing the due satisfaction of my liabilities to you, whether incurred, &c., *as in clause* 1, Form 570.

[*If desired, add:* All moneys, &c., *as in clause* 2, Form 570.]

[*If desired, add:* And I undertake on your request, &c., *as in clause* 3, Form 570.]

Yours, &c. ——.

Sometimes a bank prefers to embody the conditions in the letter, as in the above form.

**Form 572.**

Agreement for deposit similar to Form 570, but applicable to registered shares, stocks, debentures, &c.

THE —— BANK, LIMTD.

*General Deposit Clauses.*

1. Where any shares, stocks, bonds, debentures, or other securities (below referred to as "mortgaged premises") are, by a deposit of the documents of title thto, or by transfer thof to the bank or trees for the bank, or otherwise, made a security, they are (unless otherwise arranged) to stand as a continuing security, &c., *as in clause* 1 *of* Form 570.

2. All moneys from time to time owing by the depositors to the bank are to carry interest, &c., *as in clause* 2 *of* Form 570.

Form 572.

3. If at any time the value of the mortgaged premises, taken at the lowest market price of the day, as certified by a stockbroker employed by the bank, shall not exceed the amount of the depositor's liabilities to the bank by a margin of at least ——*l.*, the bank is to be at liberty to notify the fact to the depositors, and they are within —— hours afterwards to give the bank additional securities approved by the bank to make up the required margin, or, in the alternative, are to pay to the bank so much cash as shall restore the required margin.

4. The bank is to have a power to sell the mortgaged premises in the terms of sub-sect. (1) of sect. 101 of the Law of Property Act, 1925, and sects. 104 to 107 of the sd Act are to be applicable as if the power of sale were conferred by the sd Act, but such power is not to be exercised unless and until the depositors have made default for more than seven days in the payment of some money hby secured, or in the performance of their obligations to the bank, and sect. 103 of the sd Act is not to be applicable.

Where the power of sale is made exercisable when the account is closed, either party may close the account, and the customer can close it though in debt. *Berry* v. *Halifax Commercial Banking Co.*, (1901) 1 Ch. 188.

5. Upon any sale under the power afsd, a statutory declaration made by a director, manager, or cashier of the bank that the depositors have made default as afsd, and that the power of sale is exercisable, shall be conclusive evidence in favour of any purchaser or other person deriving title to the premises under such sale.

6. The depositors are to execute and sign from time to time all transfers, powers of attorney, and other documents which the bank may require for perfecting the bank's title to the mortgaged premises, or vesting the same, or any of them, in any purchaser.

7. As regards transfers in blank handed to the bank of any of the mortgaged premises, which are not transferable by deed exclusively, the bank is to be at liberty to fill up the blanks in favour of itself or its nominees.

8. Any notice by way of request, demand, &c., *as in clause* 4 *of* Form 570.

To the above-named bank.

GENTLEMEN,

I have deposited with you by way of security the documents specified in the schedule hto [*or* within], and upon the footing of the above general deposit clauses.

Yours, &c., ——.

**Form 572.** THE SCHEDULE ABOVE REFERRED TO.

*[List of Securities.]*

NOTE.—It is easy to embody the conditions in the letter if preferred, as in Form 571.

## Notice in Lieu of Distringas.

Under Ord. XLVI. r. 4, of the Supreme Court Rules, any person claiming to be interested in any stock, shares, or securities of any company, or dividends thereon, may obtain and serve a notice in lieu of *distringas* as follows:—

(a) He should make an affidavit himself, or procure his solicitor to make an affidavit as below (Form A), with such variations as the circumstances may require.

(b) He should file, or procure the filing thereof, in the Central Office of the Royal Courts of Justice, or any district registry, with a notice, as below (Form B), with such variations as the circumstances may require; and

(c) He should obtain there an office copy of the affidavit, and a duplicate of the filed notice authenticated by the seal of the Central Office.

(d) He should serve such office copy and duplicate notice on the company by leaving the same at the registered office of the company.

The effect of serving these documents is, that the company is bound to abstain from complying with a request to register a transfer of the shares [or to pay the dividends thereon when the notice extends thereto] until after due notice of the request has been given to the claimant; but the company may not, by virtue of such service, refuse to register or pay for more than eight days after the request (r. 10). Nevertheless, after the eight days, where the company sees that there is a *bonâ fide* dispute, it may rest neutral, and leave the parties to fight the matter out in Court. Immediately on receiving any such request, the company, acting by its secretary or otherwise, should give notice in writing to the claimant or his solicitors, stating that a request has been made for registration of a transfer or for payment of the dividends, and that unless an injunction is obtained and served on or before a specified day, usually within the eight days above mentioned, the *distringas* notice will no longer be regarded. Upon receipt of such notice the claimant must, if he wants to prevent the transfer or payment, bring an action, and obtain in that action an injunction to restrain the transfer or payment, and if he does not do so, the notice at the end of the eight days will fall to the ground. Or the claimant may apply by originating motion (see Daniel's Chancery Forms 1693—1704) or originating summons under the Court of Chancery Act, 1841, s. 4. The company need not be made a party and an injunction in an urgent case may be applied for *ex parte*, an application being made for leave to serve the notice of motion on the company. *Re Blaksley*, 23 Ch. D. 549; *Chamberlain and Sproat* v. *Wall and Lloyd*, W. N. (1921), 11; Ann. Pr. (1937), p. 914. A restraining notice may be withdrawn by the person by whom or on whose behalf it was given (see Form D), and the Court can vacate it by order on motion, on notice, or petition, or by summons at the instance of any other person claiming to be interested (r. 9).

The address given in the restraining notice may be altered. (See Form C below, and r. 7.)

Where the mortgage, settlement, or other instrument, comprises shares or securities of different companies, there must be a separate affidavit and notice

for each company, and a 10*s.* stamp will be required on each notice. The duplicate notice must be signed in the same way as the original notice. It will be sealed by the filing Department without fee. **Form 572.**

**Form A.** **Form 573.**

Affidavit for distringas.

AFFIDAVIT FOR DISTRINGAS.

(See Ord. XLVI. rr. 4—11 of Supreme Court Rules.)

In the High Ct of Justice,
Chancery Division.

In the matter [*here state nature of the document comprising the shares, and add the date and other particulars so far as known to the deponent sufficient to identify the documents, e.g.*].

In the matter of an Indenture of Mortgage dated the —— day of ——, and made, &c., comprising, *inter alia*, —— shares of ——*l.* each in the —— Coy, Limtd [numbered —— to —— inclusive], standing in the name of A. B.,

and

In the matter of the Act of Parliament 5 Vict. chap. 5.

I, A. B., of ——, in the county of —— [*description*], make oath and say that according to the best of my knowledge, information and belief, I am [*or if the affidavit is made by the solicitor*, say, "A. B., of, &c., is "] beneficially interested in the shares comprised in the indenture of mortgage above mentioned, which shares, according to the best of my knowledge and belief, now consist of [*or* comprise amongst others] the shares specified in the notice hto annexed.

Sworn by the deponent A. B. [*state where and before whom, e.g.*,] at my office, No. ——, New Square, Lincoln's Inn, in the County of London, before me

R. D.,

A Commissioner to administer Oaths in the Supreme Court of Judicature in England.

NOTE.—This affidavit is filed on behalf of A. B., whose address is [*here state address for service*].

N.B.—The above note must be *indorsed* on the affidavit. See Ord. XXXVIII. r. 10.

**Form 574.**

Distringas notice annexed to affidavit.

**Form B.**

DISTRINGAS NOTICE TO BE ANNEXED TO AFFIDAVIT.

(*Title as in preceding Form.*)

*To the —— Coy, Limtd.*

Take notice that the shares comprised in and now subject to the indenture of mortgage referred to in the affidavit to which this notice is annexed consist of the following parlars, that is to say, —— shares of ——*l.* each in the capital of the —— Coy, Limtd [numbered —— to —— inclusive], standing in the name of ——.

This notice is intended to stop the transfer of the sd shares only, and not the receipt of dividends [*or* the receipt of dividends on the shares as well as the transfer of the shares].

(Signed)

N.B.—This notice must be signed by the deponent to the affidavit to which it is annexed.

**Form 575.**

Notice as to address.

**Form C.**

NOTICE AS TO ADDRESS.

(*Title as in Form A.*)

*To the —— Coy, Limtd.*

I beg to give you notice that my address, or the address of A. B., is now at ——, instead of at ——, as mentd in the afft and notice filed by me [*or* on my behalf, *or* by *or* on behalf of the sd A. B.] on the —— day of ——.

(Signed)

[*Here state the name and address of the person giving the notice, or of his solor.*]

Ord. XLVI. r. 7, allows alteration of address.

**Form 576.**

Withdrawal notice.

**Form D.**

WITHDRAWAL NOTICE.

(*Title as in Form A.*)

*To the —— Coy, Limtd.*

I beg to give you notice that I hby withdraw the notice given by me, or on my behalf, on or about the —— day of ——, which notice restrained the transfer of —— shares of ——*l.* each standing in the name

of —— [*here add the names of the persons in whose names the shares are standing, and if the notice applied to the dividends also,* and the dividends due and to accrue due thereon].

**Form 576.**

Dated this —— day of ——.

(Signed) A. B., of ——.

Witness to the signature of A. B.

To the —— Bank, Limtd.

**Form 577.**

Proposal for deposit in order to obtain overdraft.

[*Conditions as in Form* 570, *or Form* 572, *as suitable.*]

Gentlemen,

We, the —— Coy, Limtd, beg to make to you the proposal following, that is to say:—

1. That we shall deposit with you, by way of security, on the footing of the above general deposit conditions, the documents specified in the schedule hto.

2. That you shall thereupon allow us an overdraft, not exceeding at any one time ——*l.*

3. That we shall forthwith, after your acceptance of this proposal, execute such powers of attorney as you may require for enabling you to transfer the mortgaged ppty to any purchaser or purchasers.

4. That we shall also furnish you with an approved guarantee for ——*l.*

Be so good as to notify to us your acceptance of this proposal.

For the —— Coy, Limtd.

——, Secretary.

Sometimes a transaction is impeded by the expense of stamping the securities; it may be that the loan is one only for a short time, and that to expend 2*s.* 6*d.* per cent. on stamp duty, or even 1*s.* per cent., is more than it is possible to afford. Moreover, it may not be practicable to bring the securities within the 1*s.* per cent. duty, *e.g.*, where it is desired that there should be a power of sale. In such cases it is not uncommon to deal with the matter by way of written *proposal*, as above, to be accepted *orally* by the bank. The proposal in such case requires no stamp, for the agreement is an oral one. Nevertheless, the proposal constitutes an efficient memorandum of the arrangement when orally accepted, and in effect invests the bank with the desired securities and powers. *Supra*, p. 847.

Where a security by way of deposit is given by deed, the following clause can be inserted:—

**Form 578.**

Power of attorney to execute mortgage.

"And we hby irrevocably appoint you to be our attorney to convey the legal estate in the mortgaged premises or any pt thof, to any purchaser or purchasers thof, upon any sale under the statutory power, and to execute and do all deeds, instruments, and things requisite for that purpose; and sect. 103 of the Law of Property Act, 1925, is not to apply."

**Form 579.**

Agreement for deposit of securities to bearer.

THE —— COY, LIMTD.

*General Deposit Clauses.*

BEARER SECURITIES.

1. Where any securities to bearer are deposited with the bank by way of security, they are (unless otherwise arranged) to stand as a continuing security, &c. [Clause 1 of Form 570.]

2. All moneys, &c. [Clause 2 of Form 570.]

3. If at any time the value, &c. [Clause 3 of Form 572.]

4. The bank is to have a power to sell, &c. [Clause 4 of Form 572.]

5. Any notice, &c. [Clause 4 of Form 570.]

6. In the above clauses the expression "securities" includes any shares or stock warrants to bearer, debentures to bearer, and any bonds, certificates, and other instruments passing title by delivery, whether negotiable or not.

[*Add form of letter as in Form* 572, *with schedule of securities.*]

As to deposit by way of security of bearer securities, see *supra*, p. 850.

**Form 580.**

General deposit security.

THE —— BANK, LIMTD.

All stocks and shares, and all securities, marketable or otherwise, as well as bills of exchange, promissory notes, scrip, bills of lading, dock warrants, delivery orders, and cash, which, or the certificates or documents relating to which, are now, or may at any time hereafter be, lodged with or held by you on [my] account, or which have been or may be transferred to you or your nominees, or registered in your or their name or names by or for ——, whether lodged, held, treated, or registered for safe custody, collection, security, or other specific purpose, or generally, shall be and remain a continuing security for the due payment and satisfaction of all [my] liabilities to you whatsoever for the time being and from time to time, whether matured or not, and whether incurred by [me] alone or jointly with others, and whether as principal or surety, including liabilities in respect of advances, whether on account current or otherwise, and in respect of bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed, signed, or guaranteed by ——, which you may have discounted, taken up, made advances on, or become interested in, together with interest, commission, banking charges, law and other costs, charges, and expenses, and all moneys from time

**Form 580.**

to time owing to you, to carry interest, with half-yearly rests, at the rate of 5 p.c.p.a., unless any special rate be agreed on.

And if —— make default in payment to you of any moneys secured hby for —— days after notice in writing requiring payment, you shall have power to sell the premises hby charged in the terms of para 1 of sect. 101 of the Law of Property Act, 1925, and sects. 104 to 107 of the sd Act shall apply as if the power of sale hby conferred were conferred by the sd Act, and a certificate by any of your managers that such power of sale has arisen shall be conclusive in favour of any purchaser.

—— undertake from time to time to execute and sign all transfers, powers of attorney, and other documents which you may require for perfecting your title, and for vesting or enabling you to vest the ppty in any purchaser or nominee.

In the event of the premises being considered by you at any time an insufficient security, —— undertake on your request to furnish such further securities as you may require.

Any notice by way of request or otherwise may be served by you on me in the manner provided in sect. 196 of the sd Act.

The above form is sometimes used, but the Revenue authorities (see p. 876) object to the power of sale. The form can readily be converted into a proposal See Form 577.

**Form 581.**

Agreement for deposit of goods warrants.

THE —— BANK, LIMTD.

*General Deposit Clauses.*

GOODS WARRANTS.

1. Where warrants for goods are deposited with the bank by way of security the same are (unless otherwise arranged) to stand, &c. [Clause 1 of Form 570.]

2. All moneys, &c. [Clause 2 of Form 572.]

3. If at any time the value, &c. [Clause 3 of Form 572.]

4. The bank is to have power to sell goods in the terms, &c. [Clause 4 of Form 572.]

5. The bank is to be at liberty to sample all or any of the goods, and to insure the goods against fire, loss and damage, and to debit the depositors with the premiums, or to repay the same out of the proceeds of the goods.

6. Notice. [Clause 4 of Form 570.]

7. Interpretation. [Clause 5 of Form 570.]

**Form 581.**

To the above-named bank.

GENTLEMEN,

I have deposited with you, by way of security, the warrants specified in the schedule hto [*or* within], and upon the footing of the above general deposit clauses. The present market value of the goods is as stated below.

Yours, &c. ——.

SCHEDULE.

**Form 582.**

Agreement for deposit of securities to secure loan of specified sum.

TO THE —— COY, LIMTD.

In conson of the sum of ——*l.* this day lent by you to us, The —— Corporation, Limtd, we have deposited with you the securities specified in the schedule hto.

The following are the terms on which the loan and deposit are made:—

1. We are forthwith to pay to you a commission of ——*l.* as a premium for the loan.

2. The loan is to be repaid by us on the —— day of ——.

3. The loan is to carry interest at the rate of 7 p.c.p.a., but if the loan is repaid on the above date, with interest at the rate of 5 p.c.p.a., you are to accept the lower rate of interest in lieu of the first-mentd rate.

4. If the loan is not repaid on the sd —— day of ——, it shall thenceforth carry interest at the rate of 10 p.c.p.a., payable quarterly on the usual quarter days.

Such a provision for raising the rate of interest after the time passed for repayment of the loan is valid. It is not a penalty against which equity will grant relief. *Herbert* v. *Salisbury, &c. Co.* (1866), L. R. 2 Eq. 221.

"Punctually" with reference to payments under mortgages means "at the time specified": see *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, (1898) 1 Ch. 343; followed and approved in *Maclaine* v. *Gatty*, (1921) 1 A. C. 376.

5. The deposited securities are to be held by you as a security for the repayment of the loan and the interest thereon.

6. If at any time the value of the securities for the time being deposited with you on the footing of this memdum, taken at the lowest market price of the day as certified by a stockbroker employed by you, shall not exceed the amount due to you on the security thof by a margin of at least —— p.c., you are to be at liberty to notify to us the fact, and we will, within twenty-four hours afterwards, deposit with you additional securities to your satisfaction to make up the required margin, and in default you may, by a further notice to

us, call in the loan, and the same shall thereupon immediately become payable. **Form 582.**

7. On our failing to repay the loan with interest on its becoming repayable, you are to have power to sell the deposited securities in the terms of sub-sect. (1) of sect. 101 of the Law of Property Act, 1925, and sects. 104 to 107 of the sd Act are to be applicable as if the power of sale were conferred by the sd Act, but such power is not to be exercised unless and until we have made default in the payment of money hby secured or in the performance of our obligations to you.

Where shares, stock, or debentures are mortgaged to secure payment of a sum on a specified day, and the mortgage contains no power of sale, and is not under seal, the mortgagee has an implied power to sell after the mortgagor has made default, and a reasonable notice has been given by the mortgagee calling for payment, and informing the mortgagor that in default the mortgagee will be in a position to enforce his rights. *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579.

As to tender by mortgagor after expiry of notice, see *Edmondson* v. *Copland*, (1911) 2 Ch. 301.

8. Upon any sale, &c. [Clause 5 of Form 572.]

IN WITNESS whereof we have caused this memdum to be signed by our managing director on our behalf this —— day of ——.

**Form 583.** Another.

AN AGREEMT, &c.—The —— Coy, Limtd (hnftr called "the coy"), of the one pt, and —— Bank, Limtd (hnftr called "the bank"), of the other pt.

WHEREAS the coy is the owner, free from incumbrances, of the several stocks, shares, and securities, the short parlars of which are set forth in the schedule hto, which stocks, shares, and securities are hnftr referred to as "the scheduled investments."

AND WHEREAS the coy has applied to the bank to make an advance to the coy of the sum of 12,000*l.*, which the bank has consented to do upon the terms hnftr set forth.

NOW THEREFORE IT IS AGREED as follows:—

1. The bank shall, on the signature hof, advance to the coy the sum of 12,000*l.*

2. The coy shall, on the —— day of ——, repay to the bank the sd sum of 12,000*l.*

3. The sd sum of 12,000*l.*, or so much thof as shall for the time being remain due, shall carry interest at the rate of 4 p.c.p.a., or at the Bank of England rate if more than 4 p.c., up to the sd —— day of —— from the date hof, and such interest is to be pd on the sd —— of ——.

**Form 583.**

4. The coy is to be at liberty to pay off the whole or any pt of the sd sum of 12,000*l.*, at any time or times before the sd —— day of ——, without being required to give any previous notice of its intention so to do, and as and whenever any such payment is made the bank shall, subject as hnftr provided, re-transfer to the coy a proportionate pt of each of the scheduled investments.

5. If the coy shall, on the sd —— day of ——, make default in payment of the sd sum of 12,000*l.*, or so much thof as shall then be due, the coy shall pay interest on such sum, or so much thof as shall then be due, at the rate of 4 p.c.p.a. from that day, or at the Bank of England rate if more than 4 p.c., until full payment of the sd sum of 12,000*l.* has been made.

6. The coy shall forthwith transfer to the bank the scheduled investments, and shall, save as regards those (if any) transferable by delivery, forthwith procure the bank to be registered as the holders thof, and the bank shall hold the scheduled investments as security for the payment of all moneys payable to the bank hereunder, and if the coy do not duly comply with this clause the bank may at any time call in the sd sum of 12,000*l.*, and the same shall thereupon become payable.

7. If the sd sum of 12,000*l.* is not fully pd off on or before the —— day of ——, the statutory power of sale hnftr mentd shall immediately become exercisable by the bank as regards the scheduled investments, or such pt thof as shall not previously have been transferred under clause 4 hof.

8. All moneys received by the bank in respect of any sale or enforcement or otherwise under this security, whether the same shall have been received before or after the sd —— day of ——, shall be applied: first, in payment of all costs and expenses of and incident to any such sale or enforcement, or getting in of such moneys; and, secondly, in or towards satisfaction of the principal moneys and interest owing hereunder, and the surplus (if any) shall be pd to the coy.

9. If, before the sd sum of 12,000*l.* is fully pd, the debentures of The —— Coy, Limtd, referred to in the schedule hto, shall become enforceable by reason of any default or otherwise on the pt of such coy, the coy shall forthwith, at the request of the bank, take such steps in regard to the enforcement thof for the benefit of the bank as the bank may think expedient and require.

10. All dividends and interest from time to time received by the bank in respect of the scheduled investments shall be dealt with in accordance with clause 8 hof.

11. The statutory power of sale conferred by the Law of Property

Act, 1925, is to be applicable hto, but sect. 103 of the sd Act is not to apply hto. **Form 583.**

As to implied power of sale, see *supra*, p. 889 note to clause 7.

12. When and so soon as all principal and other moneys and interest owing on the security hof shall have been satisfied, the bank shall re-transfer to the coy, or as it may direct, the scheduled investments, or such pt thof as shall not previously have been sold or re-transferred.

AS WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

**Form 584.**

Advances on debentures payable on demand.

AN AGREEMT made, &c., between The —— Coy, Limtd (hnftr called "the coy") of the one pt, and The —— Bank, Limtd (hnftr called "the bank") of the other pt.

WHEREBY IT IS AGREED as follows:—

1. The bank is forthwith to make to the coy a loan of 10,000*l.*, and as security for the payment thof, with interest, the coy is to issue to the bank ten debentures of the coy each for the sum of 1,000*l.*, framed in accordance with the form which has already been approved by the parties hto.

See Form below.

2. If the coy duly pays the interest on the sd debentures on the days thereby fixed for the payment of the same, or within fourteen days after each of the sd days resply, and duly pays the principal moneys secured by such of the sd debentures as shall for the time being be payable, or within fourteen days after the same shall become payable, then the bank shall not demand payment of the sd debentures otherwise than as follows, that is to say:—

One of the sd debentures may be called in at any time after the —— day of ——.

Two of the sd debentures may be called in at any time after the —— day of ——, &c., &c.

3. The provisions of the last preceding clause shall cease to operate if an order shall be made, or an effective resolution shall be passed, for the winding-up of the coy.

4. As and when each debenture is pd off the bank shall, on the request of the coy, deliver up the same to the coy to be cancelled.

AS WITNESS, &c.

**Form 584.** The debenture referred to will be in the terms following:—

THE —— COY, LIMTD.

Issue of ten debentures of 1,000*l.* each, all ranking *pari passu*.

No. ——. *Debenture.* 1,000*l.*

1. The —— Coy, Limtd (hnftr called "the coy"), will on demand pay to the —— Bank, Limtd (hnftr called "the bank"), the sum of 1,000*l.*

As to meaning of the words "on demand," see *English Bank of River Plate*, (1893) 2 Ch. 438; 69 L. T. 14.

2. The coy will in the meantime, until such payment, pay to the bank interest on the sd sum of 1,000*l.* at the rate of —— p.c.p.a. by equal half-yearly payments on every —— day of —— and —— day of —— in each such year, the first of such half-yearly payments to be made on the —— day of —— next.

3. The coy hby charges with such payments its undertaking and all its ppty whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

4. This debenture is one of a series of ten debentures each for securing the principal sum of 1,000*l.* The debentures of the sd series are all to rank *pari passu* in point of charge on the ppty hby charged without any preference or priority one over another, and such charge as regards the coy's land, goodwill, and the present uncalled capital is to be a specific charge, and as regards the coy's other assets is to be a floating security, but so that the coy is not to be at liberty to create any mortgage or charge in priority to the sd debentures.

5. The coy may at any time give notice in writing to the bank of its intention to pay off this debenture, and upon the expiration of one month from such notice being given the principal moneys hby secured shall become payable.

6. None of the now uncalled capital of the coy shall, whilst this debenture is outstanding, be called up or received in advance of calls without the consent in writing of the bank, and if the same is called up with or without such consent, the amount shall be made payable to the bank and to no other person or persons, and shall be applicable in or towards payment of the moneys owing from the coy to the bank.

7. The principal moneys hby secured shall immediately become payable if an order is made, or a resolution is passed for the winding-up of the coy.

8. At any time after the principal moneys hby secured become payable the bank may, by instrument in writing, appoint any person or

persons, whether an officer of the bank or not, to be a receiver or receivers of the premises hby charged, and a receiver so appointed shall have power, &c. [*As in Form* 598, *clause* 7.] **Form 584.**

9. The debentures of this series are issued to the bank pursuant to an agreemt dated the —— day of ——, and made between the coy and the bank, and subject to the provisions thof.

GIVEN, &c.

**Form 585.**

Memorandum as to deposit of debentures to secure current account.

MEMDUM of AGREEMT, made the —— day of ——, between The —— Coy, Limtd (hnftr called "the coy"), of the one pt, and the —— Bank, Limtd (hnftr called "the bank"), of the other pt. WHEREAS the coy has a current account with the bank, and from time to time the bank allows the coy to overdraw such account, and as it may allow further overdrafts, the coy has, with the privity of the bank issued to and deposited with it [*or* with A. and B. as trees for the bank], a debenture for ——*l.*, charging the undertaking of the coy. NOW, THEREFORE, IT IS AGREED AND DECLARED as follows:—

Recitals.

Debenture to be security for account.

1. The sd debenture is to stand as a security to the bank for the payment of the final balance on the sd current account, including therein all usual and accustomed bankers' charges, and commission, together with interest on such final balance until payment at the rate of 5 p.c.p.a.

What is final balance.

2. For the purposes hof the final balance afsd means such sums as, upon the closing at any time of the current account of the coy by either party, shall be found due thereon to the bank; and accordingly payments to the credit of the account, so long as the same shall be current, shall not be deemed to be made in or towards discharge of the sd debenture.

Sect. 75 (4) of the Companies Act, 1929, provides that: "Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debt whilst the debentures remained so deposited."

No prior mortgage.

3. The coy hby declares that there is no mortgage or charge on its ppty or assets having priority to or ranking *pari passu* with the sd debenture, and that the coy will not at any time during the continuance of this security create any mortgage or charge ranking, or which can by any means be made to rank, in priority to or *pari passu* with such debenture.

AS WITNESS, &c.

**Form 586.**

**Another, where debentures put into names of trustees.**

AN AGREEMT made the —— day of ——, between the —— Coy, Limtd (hnftr called "the coy") of the first pt, the —— Banking Coy, Limtd (hnftr called "the bank") of the second pt, and —— of ——, and —— of —— (hnftr called "the present trees") of the third pt.

WHEREBY IT IS AGREED as follows:—

1. The coy shall forthwith create and isuue —— [second] debentures of the coy for 100*l.* each, which are to be charged on the coy's undertaking *pari passu* and are to rank as a first charge on the coy's undertaking immediately after and in subordination to the existing first debentures of the coy for ——*l.*, and are to be further secured by a trust deed in a form approved by the bank creating a specific charge on the freehold and leasehold ppty of the coy specified in the schedule hto, subject only as to such of the sd freehold and leasehold ppty as is thereby specifically charged to the specific charge created by an indenture dated, &c., and made, &c., and creating a floating charge upon all the other assets of the coy for the time being, present and future, including its uncalled capital, and containing covenants on the pt of the coy, &c. The sd [second] debentures are to be framed in accordance with the form to be scheduled to the trust deed and are to be issued exclusively to the bank or its nominees as hnftr provided, and are not to be issued to any other person or persons or coy.

2. The coy shall not, during the continuance of this agreemt, without the previous consent in writing of the bank and the present trees or other the trees or tree for the time being hof (hnftr called "the trees or tree"), create any mortgage or charge ranking in priority to or *pari passu* with the charge hby agreed to be created, nor exercise the power reserved to it by the sd indenture of the —— June, ——, of issuing further debentures entld *pari passu* to the benefit of such indenture.

3. The coy is forthwith to issue the whole of the sd [second] debentures to the present trees as nominees of the bank, and the same are to be deposited with the bank, and thereupon the bank is by way of advance to place the sum of [20,000*l.*] to the credit of the coy's current account, and is to debit the amount to the coy's loan account (now to be opened) [and further, the bank is from time to time as and when the coy shall request to make to the coy further advances up to a further 40,000*l.* beyond the sd sum of 20,000*l.* by crediting the coy's current account and debiting the coy's loan account with the amount of such further advance: PROVIDED ALWAYS that the obligation of the bank to make any further advance to the coy beyond the sd 20,000*l.* shall cease in the event of any failure on the pt of the coy to observe and perform all or any of the

obligations imposed upon it hby or by the sd intended trust deed or second debentures]. Form 526.

4. The sd loan account is also from time to time to be debited [with all further advances from time to time made by the bank to the coy on the footing that they are to be debited to such account, and also] quarterly with interest on the balance from time to time owing on such account, and with all charges and expenses of and incident to the advance afsd, and is to be credited from time to time with all payments made by the coy into such account, and the coy shall from time to time at the request of the bank pay into such account the amount of such interest, charges and expenses, and the bank shall be at liberty from time to time to transfer to the credit of the sd loan account from the coy's current account the amount of any interest on the sd loan account which is for the time being overdue and any sum debited for charges or expenses which remains unpaid.

5. The interest so to be debited is to be at the rate of 5 p.c.p.a., but the interest on any of the sd [second] debentures is not to be payable or to be deemed (as between the coy and the bank) to run until—(a) the bank has become entld as hnftr provided to call in the moneys for the time being owing on the sd loan account; or (b) the expiration of the term of —— years from the date hof; or (c) the sd [second] debentures resply shall be sold by the bank—whichever event shall first happen.

6. The sd [second] debentures so issued and deposited as afsd are to stand as a security for the payment of the moneys for the time being and from time to time owing from the coy to the bank on the balance of the sd loan account.

7. The sd security is to be a continuing security, and accordingly is not to be affected by any settlement of account or fluctuation in the amount for the time being due or by the existence of a credit balance at any time, but the coy shall be at liberty at any time and from time to time within the sd period of —— years on giving one day's notice in writing to the bank to repay the whole or any pt of the moneys owing on the sd loan account.

8. Subject as afsd and to the next succeeding clause, the moneys for the time being owing on the security of the sd loan account may be called in by the bank in any one or more of the events hnftr mentd, that is to say:—

(a) If the coy shall at any time make default for more than fourteen days in paying any interest due hereunder, whether the same shall have been lawfully demanded or not; or

(b) If a peton shall be presented for the winding-up of the coy; or

**Form 586.**

(c) If a notice convening a general meeting of the coy for the voluntary winding-up thof shall be issued; or

(d) If the coy shall stop payment; or

(e) If a receiver shall be appointed of the coy's undertaking or any pt thof; or

(f) If a distress or execution shall be levied on the ppty of the coy; or

(g) If the coy fails to observe and perform any stipulation of this agreemt, or any stipulation contained in the sd intended trust deed or second debentures; or

(h) If any event occurs on which the security constituted by the sd intended trust deed becomes enforceable.

But save as afsd the bank shall not call in the amount for the time being owing on the sd loan account, or sell such second debentures for the term of —— years from the date hof.

9. Before calling in the sd moneys under para. (a) of the sd preceding clause hof, the bank is to give to the coy at least seven days' notice in writing of its intention to call in the same, but in every other case twenty-four hours' notice in writing of such intention shall be sufficient.

10. The statutory power of sale conferred by the Law of Property Act, 1925, is to be applicable, and in case of a sale by the bank of the sd [second] debentures, or any of them, the trees or tree are, or is, to execute such transfers of such second debentures as the bank shall from time to time direct [and sect. 103 of the sd Act shall not apply].

11. In case at any time the security created hby or by the sd intended second debentures and trust deed is in the opinion of the bank in jeopardy, or in case the sd security becomes enforceable, the trees or tree shall be at liberty to, and, if required by the bank, shall enforce the sd second debentures, and in case they or he shall thereby realize any sum in excess of the amount for the time being due to the bank, shall hold such surplus moneys in trust for the coy.

12. The statutory power of appointing new trees hof is vested in the bank, and it is to be no objection that a tree appointed under such power or that a tree of the sd intended trust deed is a director, officer, or employee of the bank.

AS WITNESS, &c.

**Form 587.**

Mortgage of uncalled capital to secure a sum advanced by bank.

AN AGREEMT made the —— day of ——, 19—, between the —— Coy, Limtd (hnftr called "the coy"), of the one pt, and the —— Corporation, Limtd (hnftr called "the bank"), of the other pt.

WHEREAS the coy was incorporated in 1890 with a nominal capital of 100,000*l.*, divided into 10,000 shares of 10*l.* each.

Form 587.

AND WHEREAS 9,000 only of the sd shares have been issued, and the sum of 4*l.* per share has been pd up thereon, and the sd shares are numbered —— to —— inclusive, and are still outstanding.

AND WHEREAS the coy has applied to the bank for an advance of 25,000*l.*, which the bank have agreed to make on the terms hnftr expressed.

NOW THESE PRESENTS WITNESS AND DECLARE as follows:—

1. The bank shall, immediately after the execution hof, advance to the coy the sum of 25,000*l.*

2. The coy shall repay the sd sum of 25,000*l.* to the bank on the —— day of ——.

3. The coy shall forthwith pay to the bank the sum of ——*l.*, being interest on the sd sum of 25,000*l.* at the rate of 6 p.c.p.a., as from the date hof up to the sd —— day of ——, and also a commission at the rate of 2 p.c. on the sd sum of 25,000*l.*, making together the sum of ——*l.*

4. If the sd sum of 25,000*l.* is not pd on or before the —— day of ——, such sum, or so much thof as shall for the time being remain unpd shall carry interest at the rate of —— p.c.p.a. until the actual payment thof.

5. The coy hby charges with the payment of the sd principal moneys and interest the whole of the capital, namely 6*l.* per share, now uncalled upon the sd 9,000 shares in the coy's capital which have been issued.

6. The sd capital shall not, during the continuance of this security, be called up or received in advance of calls without the consent in writing of the bank first had and obtained.

7. If during the continuance of this security the sd capital hby charged, or any pt thof, shall with the consent of the bank or otherwise be called up or in any way got in, the amount shall be pd over to the bank as security for the advance, with full power to the bank to apply a competent pt thof in or towards satisfaction of the advance and the interest thereon (if any) unpd.

8. The coy shall not at any time during the continuance of this security create any charge on the sd capital hby charged without first giving notice to the person or persons in whose favour such charge is created of the existence of this security.

9. During the continuance of this security the coy shall forthwith after the presentation of any transfer of ordinary shares in the capital of the coy, give the bank notice containing full parlars thof and no person shall be registered until forty-eight hours after such notice shall have been given, and no transfer shall be registered otherwise than in favour of a solvent transferee.

**Form 687.**

10. [General charge on undertaking of coy.]

See Form 39.

11. In each of the events following, namely:—

(1) If a petition shall be presented, or a resolution shall be passed, or an order be made for the winding-up of the coy; or

(2) If judgment shall be obtained against the coy for upwards of ——*l.*, and shall remain unsatisfied for —— days; or

(3) If a distress or execution shall be levied or enforced against any of the ppty of the coy; or

(4) If the coy shall make default in the payment of any moneys due and owing hereunder by it at the time hnbefore provided for payment thof; or

(5) If the coy shall commit any breach of any of the provisions herein contained, and that whether the bank shall or shall not have waived any prior breach;

the bank may, by notice in writing to the coy, call in the principal moneys secured, and such principal moneys shall become payable immediately on the service of such notice.

12. If the principal moneys hby secured shall not be duly pd as and when the same shall be payable, the coy shall, upon the request of the bank, procure the sd capital hby charged to be called up by such instalments and payable at such times as the bank shall in writing request.

13. The bank may, at any time after the principal moneys hby secured shall have become payable, appoint a receiver of the capital hby charged, and of all calls made in respect thof, and also of the undertaking and ppty of the coy hby charged, and sect. 103 of the Law of Property Act, 1925, shall be modified accordingly.

14. The coy hby covenants with the bank that the sd capital hby charged has not been called up or incumbered in any way, and that the contracts under which the sd shares were allotted are not in any way void or voidable.

[14a. The coy shall forthwith give notice in writing to each of its shareholders of this charge on uncalled capital.]

15. The coy shall procure each of its directors for the time being to covenant with the bank that whilst he is a director of the coy he will not be party to anything in breach of the obligations hby imposed on the coy, and that he will give to the bank immediate notice of any such breach, and also of any threat to commit any such breach, which shall come to his knowledge, and such covenant shall be executed, as regards the present directors, immediately after the

execution hof, and as regards each future director, immediately after his appointment. **Form 587.**

16. The principal moneys and interest hby secured will be pd, and shall be assignable free from any right of set-off or equities between the coy and the bank.

IN WITNESS, &c.

Where a bank takes a separate mortgage to secure a loan it is sometimes considered expedient to make provision as in clause 16. In the absence of such a clause a transferee of the mortgage would take subject to the mortgagor's right if sued to set off against the amount secured by the mortgage the credit balance on his current account with the bank at the time when notice of the transfer is given to him. (*Cavendish* v. *Geaves* (1857), 24 Beav. 163.) But of course the mortgagor can by agreement waive or exclude the application of the right of set-off. Perhaps, however, he may not be willing at the critical moment to do so—hence the utility of the clause.

**Form 588.**

Mortgage of uncalled capital by way of continuing security.

AN AGREEMT made the —— of ——, between the —— Coy of the one pt, and The —— Bank, Limtd, of the other pt. [*Recitals of incorporation and issued capital and uncalled capital.*] AND WHEREAS the coy is indebted to the bank in the principal sum of ——*l.* and upwards, and has applied to the bank for a further advance of ——*l.* which the bank has agreed to make on receiving the security hby constituted. NOW THESE PRESENTS, &c.

Charge.

1. The coy hby charges the whole of the capital, namely, ——*l.* per preference share, and ——*l.* per ordinary share, now uncalled upon the sd —— preference shares and —— ordinary shares in the coy's capital, with the payment to the bank of the sum of 5,000*l.*, and interest as from the date hof at the rate of —— p.c.p.a.

Continuing security.

2. The sd charge limtd in amount as afsd shall stand as a continuing security to the bank for the due satisfaction of the coy's liabilities to the bank, whether incurred before or after, &c., as in Form 570.

Commission.

3. The coy shall pay to the bank upon the execution hof a commission of —— p.c. on the sd sum of ——*l.* as a premium for the advance.

Payment after demand.

4. The coy shall pay to the bank all moneys for the time being owing on the security hof within thirty days after a demand in writing shall have been served by the bank on the coy.

5—13. [Set out 6, 7, 8, 9, 11 to 14 and 15 of Form 587.]

Cesser.

14. Lastly, if the coy shall at any time pay to the bank all principal moneys and interest for the time being owing on the security hof, the bank shall at any time thereafter at the request and expense of the coy, whilst no principal moneys or interest shall be owing on the security hof, release the sd capital from the sd charge and otherwise from this security.

AS WITNESS, &c.

**Form 589.**

Security for loan on debentures and charge on undertaking.

AN AGREEMT made between L. & A., Limtd (hnftr called "the coy"), of the one pt, and The —— Banking Coy, Limtd (hnftr called "the bank"), of the other pt.

WHEREAS the coy has issued, or is about to issue, debentures to the total nominal amount of 100,000*l.* in 1,000 debentures of 100*l.* each, secured by a trust deed, dated, &c., and made between, &c.: AND WHEREAS the sd debentures are all to be framed in accordance with the form, a print whereof is annexed hto: AND WHEREAS the coy has requested the bank to advance to it the sum of 20,000*l.* upon the security of 200 debentures of 100*l.* each, numbered —— to —— inclusive, pt of the sd issue of 100,000 debentures, which 200 debentures are hnftr referred to as "the security debentures": AND WHEREAS the bank has agreed to make such advance on the terms hnftr appearing.

NOW THESE PRESENTS WITNESS, AND IT IS HBY AGREED as follows:—

1. In conson of the sum of 20,000*l.* now advanced and pd by the bank to the coy, the receipt of which is hby acknowledged, the coy shall pay to the bank on the —— day of ——, or on such earlier day as the same may become payable in accordance with the provisions hnftr contained, the principal sum of 20,000*l.*, and in the meantime, until payment of such principal moneys, shall pay to the bank interest upon the sd sum of 20,000*l.*, or such pt thof as shall for the time being remain unpd, at the rate of 6*l.* p.c.p.a. as from the —— day of ——, by half-yearly payments on, &c. in each year.

2. The coy shall on the execution hof pay to the bank the sum of ——*l.* by way of bonus or commission for the sd advance.

3. If the coy shall on the execution hof pay the sum mentd in the last preceding clause, and shall also pay interest upon the sd principal sum of 20,000*l.*, or upon so much thof as shall for the time being remain unpd, at the rate of ——*l.* p.c.p.a., upon or before, or within ten days after, each of the half-yearly days afsd, up to and including the sd —— day of ——, in accordance with clause 1 hof, and shall duly observe all the other provisions of this agreemt, then the bank will accept interest at that rate in lieu of interest at the rate of ——*l.* p.c.p.a. for each half-year in respect of which the same shall be so pd; but no claim for reduction of interest under this provision shall be made in respect of any half-yearly payment not made within the time afsd, and no claim for reduction of interest payable after the sd —— day of —— shall in any case be made.

4. The coy shall forthwith issue to and into the name of the bank the security debentures, and the same shall constitute a collateral

security for the principal moneys and interest hby secured, and shall stand charged accordingly. **Form 589.**

5. So long as the coy shall duly pay interest on the sd sum of 20,000*l.*, or so much thof as shall for the time being remain unpd, at the rate of —— p.c.p.a. in accordance with the provisions hof, the bank will accept each half-year's interest so pd in satisfaction of the corresponding half-year's interest on the security debentures.

6. The coy may at any time before the —— day of —— give notice in writing to the bank of its intention to repay the whole or any pt of the sd sum of 20,000*l.*, such pt not being less at any one time than 500*l.*, and being a multiple of 100*l.*, and at the expiration of one month from such notice being given, the principal moneys therein specified shall be payable, and the coy shall forthwith pay the same accordingly, and upon payment thof being made in accordance with this clause the bank shall allow or pay to the coy a rebate calculated at the rate of 1 p.c.p.a. on the amount then repaid for the time remaining unexpired, between the date of such redemption and the sd —— day of ——.

7. Upon any repayment being made by the coy to the bank with interest in pursuance of the last preceding clause hof, the bank shall transfer or give up to the coy security debentures equal in face or nominal value to 80 p.c. (or as near thto as the debentures will permit) of the amount of the principal moneys repaid.

8. If the coy shall commit any breach of any of the obligations imposed on it by these presents or by the sd trust deed or the debentures secured thereby, or if the sd debentures or any of them shall become payable, or if the security constituted by the sd trust deed shall become enforceable, or if the coy shall stop payment or cease to carry on business, or if any of the events specified in clause —— of the sd trust deed shall happen, then, and in any and every such case, the bank may, by not less than twenty-four hours' notice in writing to the coy, call in the principal moneys hby secured, and thereupon the whole of the principal moneys hby secured and then remaining unpd shall immediately become payable without any right to rebate on the pt of the coy, and the coy shall forthwith pay the same accordingly.

9. Sects. 93 and 103 of the Law of Property Act, 1925, shall not apply hto.

10. If the coy shall at any time within fourteen days from the date hof by deed give to the bank the option in accordance with the conditions following of purchasing from the coy the security debentures and every pt thof at the price of 97*l.* for every debenture in respect of which the option is exercised, the bank shall accept such option in satisfaction of the sum of —— made payable to the bank under

**Form 589.**

clause 2 hof, but the deed afsd to be operative in this respect must comply with these conditions, that is to say:—

(a) It must provide that the option afsd may be exercised from time to time by notice in writing to the coy specifying the amount to be purchased, and served during the continuance of this security.

(b) It must provide that if the bank shall determine to offer for public subscription the debentures purchased, or otherwise to sell or dispose of the same, the coy shall furnish the bank with such reports of experts and other information as the bank shall reasonably require for the purpose of a prospectus offering the debentures for public subscription, and that the bank shall be at liberty to use and publish such reports and information in any such prospectus.

(c) It must provide that the bank shall be at liberty to apply the purchase-money payable for the debentures so far as necessary in satisfaction of the moneys for the time being owing to the bank under or by virtue of this security.

(d) It must provide that the coy shall, when required by the bank, apply to the committee of the London Stock Exchange for a quotation of the debentures, and shall do, and concur in doing, all acts and things which the sd committee shall require before and for the purpose of granting a quotation of the debentures.

(e) It must be delivered to the bank within fourteen days from the date hof.

IN WITNESS, &c.

Sometimes, where there is a mortgage of shares, debentures or debenture stock, for a specified sum, it is desired to give the mortgagee power to buy such shares, debentures, or debenture stock. This, however, cannot be done by the original mortgage, for the power operates as a clog on the equity of redemption and the well-established rules of equity prohibit such a clog. *Samuel* v. *Jarrah Timber and Wood Paving Corp.*, (1904) A. C. 323; *Noakes & Co.* v. *Rice*, (1902) A. C. 24; *Bradley* v. *Carritt*, (1903) A. C. 253; and see *Reeve* v. *Lisle*, (1902) A. C. 461; *Salt* v. *Northampton (Marquis of)*, (1892) A. C. 1.

But the desired end can in some cases be achieved thus: Let the mortgage as above be made redeemable on payment of a larger sum than the advance, *i.e.*, with a bonus of, say, 25 per cent. This is allowable. *Webster* v. *Cook*, 2 Ch. App. 542; *Potter* v. *Edwards* (1857), 26 L. J. Ch. 468; *Mainland* v. *Upjohn*, 41 Ch. D. 126. Insert a clause as above under which the liability for the bonus is to be cancelled if the mortgagor within a specified time by deed gives the desired option. The mortgagor, of course, at once gives the notice, although he is not in any way bound to give it, and thus the power is conferred by a transaction subsequent to the mortgage, and is therefore unobjectionable. See *Samuel* v. *Jarrah Timber and Wood Paving Corp.*, *supra*.

**Form 590.**

Security of bank on bills and by deposit of debentures in blank.

THIS DEED is made, &c., between The —— Coy, Limtd (hnftr called "the coy"), of the one pt, and The —— Bank, Limtd (hnftr called "the bank"), of the other pt.

WHEREAS the coy is indebted to the bank in the sum of ——*l.*

AND WHEREAS it has been arranged that the sd sum of ——*l.* shall be repaid by instalments at various dates, and that such instalments shall be secured by bills of exchange to be drawn by the bank upon, and accepted by, the coy, and the parlars of such bills are set forth in the schedule hto.

AND WHEREAS it is one of the terms of the sd arrangement that such bills shall be secured as hnftr provided.

NOW THIS DEED WITNESSETH, and it is hby agreed and declared, as follows:—

1. The coy shall forthwith accept the sd bills and hand them over to the bank.

2. The payment of the sd bills to the holders for the time being thof shall be secured by the issue to the bank as tree of ——*l.* debentures of the coy, pt of the series of debentures secured or to be secured by an indenture, dated, &c., and made, &c.

3. With a view to such issue, ——*l.* debentures of the coy, framed in accordance with the form set forth in the —— schedule to the sd indenture, with blanks left nevertheless in the first para of each of the sd debentures for the name and address of the payee, shall forthwith be sealed by the common seal of the coy, and handed over duly stamped, to the bank upon the footing that the bank is to be at liberty at any time to fill up the sd blanks as hnftr provided, and that in the meantime the bank is to stand in the same position in regard to security as if the name of the bank were inserted in each and every of the sd debentures as the name of the payee thof.

4. The coy hby empowers the bank, as and when the bank shall think fit, to fill in the name of the bank as the payee of the sd debentures, and to deliver the debentures so from time to time completed as the deed of the coy, and the coy hby irrevocably appoints the bank to be the attorney of the coy for the purposes afsd.

5. The sd debentures when issued, and the bank's title in the meantime to stand in the position afsd as regards security, shall be held in trust to secure the payment to the holders for the time being, and from time to time, of the bills of exchange afsd of the principal moneys and interest payable in respect of such bills.

*Re Queensland, &c. Co., Davis* v. *Martin*, (1894) 3 Ch. 181; *Pegge* v. *Neath, &c. Tramways Co.*, (1898) 1 Ch. 183; *Simultaneous Colour Printing Syndicate* v. *Foweraker*, (1901) 1 K. B. 771.

**Form 590.**

6. The coy shall not, whilst any of the sd bills are outstanding, issue, or attempt to issue, any debentures entld to the benefit of the sd trust deed other than the debentures for ——*l.* afsd.

7. In each and every of the events following the security hby constituted shall immediately become enforceable; that is to say:—

(1) If the coy makes default in payment of any such bill as afsd at maturity.

(2) If an order shall be made, or a resolution shall be passed, for the winding-up of the coy.

(3) If any of the sd bills shall be dishonoured.

(4) If the bank shall be of opinion that the coy is in financial difficulties.

(5) If the coy shall commit any breach of any of the provisions of this agreemt.

(6) If the coy shall not procure every director of the coy to deliver to the bank a covenant with the bank that he will not, whilst he is a director, be a party to anything in breach of clause 6 hof, such covenant to be delivered, as regards each of the present directors of the coy, immediately after the execution hof, and as regards each future director, immediately after his appointment to be a director.

8. If and when the security hby constituted becomes enforceable, the bank may sell the sd debentures, or any of them, or the bank may bring any action or take any proceedings to enforce the same or any of the rights hby given to the bank, and generally may take such steps with a view to enforcing and realising the security as the bank shall think expedient, and with a view thto the bank may fill up the blanks in the sd debentures as afsd.

9. All moneys arising under the last preceding clause shall be applicable by the bank, first, in paying all expenses incurred by the bank as tree hof, and, secondly, in paying off the sd bills of exchange *pari passu*, and so that, if any of the sd bills shall not then have matured, a sufficient portion of such surplus proceeds shall be set apart to meet such bills.

10. The coy may at any time pay off any of the sd bills at or before or after the time fixed for payment thof, and upon production thof to the bank duly cancelled, the bank shall give up to the coy a due proportion of the debentures afsd.

11. The issue of the sd debentures is not in any way to operate as a merger of the debt owing by the coy on the sd bills of exchange resply.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

[*Particulars of Bills.*]

**Form 591.**

Mortgage of securities for present and future advances.

AN AGREEMT made the —— day of ——, between the —— Coy, Limtd (hnftr called "the coy"), of the one pt, and the —— Bank, Limtd (hnftr called "the bank"), of the other pt, whereby it is agreed as follows:—

Present advance.

1. The bank is forthwith to advance to the coy on the footing of this agreemt the sum of 100,000*l.*

Further advances.

2. The bank is to make further advances from time to time on the request of the coy on the footing of this agreemt, but so that the total amount of the principal moneys to be hby secured shall not exceed at any one time 150,000*l.*

Interest.

3. The advances afsd are to carry interest as follows, namely:—

As to the sd 100,000*l.* at the rate of 3½ p.c.p.a., up to the —— day of —— next, or at such higher rate as shall for the time being and from time to time be the minimum rate of the Bank of England, and as to the balance at the minimum rate for the time being and from time to time of the Bank of England, but not less than 3 p.c.p.a.

Repayment.

4. The advances afsd are to be repaid by the coy to the bank on the 30th June, 19—, unless on or before the 31st March, 19—, an arrangement at the request of the coy is made for extending the time for payment.

Interest after date for payment.

5. As from the time when the sd advances become repayable until the actual payment thof, the same shall carry interest at the rate of 10 p.c.p.a., unless a lower rate shall be agreed on.

Security.

6. As security for the repayment of the sd advances and interest thereon, the coy is forthwith to execute in favour of the bank a mortgage of the freehold ground rents specified in the schedule hto, such mortgage to be in the terms of the draft already approved by the parties hto.

Further securities.

7. As further security for the repayment of the sd advances and interest, the coy will from time to time vest in the bank further securities of a value not less than 30 p.c. beyond the advances in excess of 100,000*l.* from time to time owing on the security hof.

Approval.

8. The further securities afsd shall in every case be subject to the approval of the bank, and shall not be regarded as further securities for the purposes of this agreemt until the same have been so approved, and the value of such further securities must be made out to the satisfaction of the bank, and shall not be deemed to have been so made out until the bank shall have certified that it is so satisfied, and such further securities shall be vested in the bank in such manner as the bank shall direct, and whether by deposit of deeds or by legal

**Form 591.**

mortgage, or by equitable mortgage or otherwise, and in every case the short parlars of the further securities shall be entered in the annexed schedule.

Legal mortgage.

9. When any such further security is vested in the bank by deposit of deeds, the coy shall at any time or times on the request of the bank execute an effectual mortgage of the premises comprised in the deposited deeds, such mortgage to be prepared by the bank's solors at the expense of the coy, and to be in such form and to contain such provisions, including full power of sale, as the sd solors in the bank's interest may deem expedient.

Value to be kept up.

10. If at any time the value of the mortgaged premises according to a valuation to be made by some expert approved by the bank shall not exceed the amount of the coy's liabilities in respect of the advances made on the footing thof by a margin of at least 30 p.c., the bank is to be at liberty to notify the fact to the coy, and the coy is within —— days afterwards to vest in the bank further securities approved by the bank to make up the required margin, or in the alternative is to pay to the bank so much cash as shall restore the required margin.

Sale.

11. The bank is to have a power to sell the mortgaged premises in the terms of sub-sect. (1) of sect. 101 of the Law of Property Act, 1925, and sects. 104 to 107 of the sd Act are to be applicable as if the power of sale were conferred by the sd Act; but such power is not to be exercised unless and until the coy shall have made default for more than seven days in the payment of some money hby secured or in the performance of some obligation hby imposed on the coy. Sect. 103 of the Act is not to apply.

Declaration evidence of default, &c.

12. Upon any sale under the power afsd, a statutory declaration made by a director, manager, or cashier of the bank that the coy has made default as afsd, and that the power of sale is exercisable, shall be conclusive evidence in favour of any purchaser or other person deriving title to the premises under such sale.

Transfers, &c. to be executed.

13. The coy is from time to time to execute and sign all transfers, powers of attorney, and other documents which the bank may require for perfecting the bank's title to the mortgaged premises, or vesting the same in the bank or in any purchaser from the bank.

Withdrawal.

14. With the consent of the bank the coy is to be at liberty from time to time to withdraw any of the further securities afsd vested in the bank pursuant to this agreemt by the vesting in the bank other securities in accordance with the foregoing provisions.

AS WITNESS, &c.

## Securities on Debentures and Debenture Stock. Form 591.

Where a bank is willing to take debentures as security, they can of course be specially framed so as to meet the circumstances. Thus, they can be made payable on demand, or on demand in certain events. See Form 583.

But cases very commonly occur in which this is not practicable or expedient, *e.g.*, where the company has already issued part of a series of debentures or debenture stock, and the best security it can offer to the bank is the balance of the same issue. In such cases the security may be effected—

(1) In the case of debentures, by issuing the debentures to trustees for the bank, and giving the bank a charge thereon with a power of sale under which it can, if necessity arise, sell the debentures and transfer them to the purchasers; or

(2) In the case of debentures, by sealing the debentures in blank as to dates and names of payees, and depositing them with the bank as security, with power at any time to fill up the blanks and deliver the instruments as the deeds of the company (see Form 590), and with power for the company on paying to the bank a specified sum per debenture to withdraw any of the debentures, *e.g.*, which it finds means to place with outsiders.

(3) In case of debenture to bearer, by simply depositing the debentures with the bank and giving the requisite power of sale, &c., for debentures being negotiable instruments, the legal title passes to the depositee. *Bechuanaland Exploration Co.* v. *London Trading Bank*, (1898) 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144.

(4) In the case of debenture stock, by issuing the stock to the bank or its nominees with definite certificates, or by giving a charge without issue of any certificates, or by giving a charge and issuing a provisional scrip certificate, or by issuing definitive certificates of various amounts, with power to fill up.

## Guarantees. Form 592.

### *Joint and Several Guarantee.*

Joint and several guarantee of bank overdraft.

We hby jointly and severally guarantee to —— the due payment of all existing and future liabilities (including interest, discount and other usual banker's charges) of —— to the sd bank on any account whatsoever, either alone or jointly with any other person or persons: this guarantee to be a continuing one and to remain binding on us and our respive personal representatives until terminated by written notice from all of us or from our sd representatives to the sd bank, the giving of which notice by one or some of us shall not, however, in any way affect the liability (even as regards subsequent advances) of such of us as may not have given such notice, And this guarantee is not to be prejudiced by the settlement of any account or by any collateral or other securities being taken for any of such liabilities as afsd (which securities as well as the securities, if any, now held by the sd bank and the proceeds of all such securities may be released, exchanged, applied or otherwise dealt with as the sd bank may think

**Form 592.**

fit), or by the giving of time to the taking composition from or otherwise dealing as bankers with the sd party hby guaranteed, or with any of us, or with the sd other person or persons as the sd bank may deem expedient, And this guarantee shall be applicable to the final balance of or loss on the sd liabilities after realization of all collateral or other securities or otherwise as the sd bank may think fit, and shall be in addition to and not in substitution for any other guarantee which the sd bank may hold or obtain, Provided always that we or any of us shall not be called upon to pay under this guarantee more than 25,000*l.*, with interest and other charges as afsd on that amount or on such less amount as may be due from the time or times that the same became payable.

Dated this —— day of ——.

**Form 593.**

Joint and several guarantee (general clauses).

THE —— BANK, LIMTD.

*General Clauses (Joint and Several Guarantee).*

1. Unless otherwise expressed, the guarantee is to be considered joint and several.

See note on guarantees, *supra*, p. 861.

*Primâ facie*, a guarantee by several is to be regarded as a joint contract, but it is a question of intention; and even where the word "severally" is not used, it may appear that a joint and several liability was intended. See *Fell* v. *Goslin*, 7 Ex. Reps. 185, where the words were "we undertake and guarantee . . . in the proportion of 200*l.* each," which words were held to mean that the guarantors were *not* jointly liable for the whole amount. When the guarantee is expressed to be joint and several, A., who signs on the understanding that B. is also to sign, will not be bound if B. does not in fact sign (*Underhill* v. *Horwood* (1804), 10 Ves. 209, 226; *Bonser* v. *Cox* (1841), 4 Beav. 379; 6 Beav. 110), or if B. qualifies his signature. *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q. B. 75. The release of one guarantor *primâ facie* operates as the release of all, even though the guarantee is expressed to be joint and several. *Mercantile Bank of Sydney* v. *Taylor*, (1893) A. C. 317; and see *Re E. W. A.*, (1901) 2 K. B. 642.

Sometimes it is provided that—"It is not to be incumbent on the bank to call upon the principals to pay before requiring the guarantors to pay the amount guaranteed." But it is unnecessary, for it only expresses what the law implies. *Ranelaugh* v. *Hayes* (1683), 1 Vern. 189; *Wright* v. *Simpson* (1802), 6 Ves. 714, 733.

Some guarantees also provide that—"The amount guaranteed is (unless otherwise provided) to be due and payable at the expiration of fourteen days after notice requiring payment shall have been served on the guarantors." This is a concession to the guarantor, for *primâ facie* the creditor can sue the surety without any previous notice or demand. *Hitchcock* v. *Humfrey* (1843), 5 Man. & Gr. 559; *Cutler* v. *Southern* (1667), 1 Wms. Saund. 133.

Sometimes it is provided that—"As from the time when the bank requires payment of any moneys from the guarantors, such moneys are, until payment, to carry interest at the rate of 5 per cent. per annum."

Where two or more sureties for a common principal bind themselves in different amounts, in the event of the principal being in default they are liable to con-

tribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts. *Ellesmere Brewery Co.* v. *Cooper*, (1896) 1 Q. B. 75; *Re Ennis, Coles* v. *Peyton*, (1893) 3 Ch. 242; and *Stirling* v. *Burdett*, (1911) 2 Ch. 418.

As to the signature to a guarantee being obtained by fraud, see *Carlisle and Cumberland Banking Co.* v. *Bragg*, (1911) 1 K. B. 489.

2. Unless otherwise provided the guarantee is to be considered a continuing guarantee for the purpose of securing (subject to any limit specified therein) the general balance due, or that may be due, from time to time, and at any time, from the principals to the bank, notwithstanding any payments from time to time made to the bank, or any settlement of account, or any other thing whatsoever. And the guarantor's liability to pay is to arise first when notice in writing is given to him requiring him to pay.

If A. guarantees the payment to B. of all sums to become owing to him by C. up to a specified sum, the question arises whether the guarantee attaches merely on the debts incurred up to the specified sum, so that when they are cleared off the guarantee will be at an end, or whether it is a continuing guarantee as above expressed. To avoid doubt the matter should be dealt with in clear terms. *Laurie* v. *Scholefield*, L. R. 4 C. P. 622; *Heffield* v. *Meadows*, *ibid.* 595; *Kirby* v. *Duke of Marlborough* (1813), 2 M. & S. 18; *Parr's Banking Co.* v. *Yates*, (1898) 2 Q. B. 460; *In re Crace, Balfour* v. *Crace*, (1902) 1 Ch. 733.

It may be desirable to state when first the liability to pay is to arise, so that the statute may not run till then. *Henton* v. *Paddison* (1893), 68 L. T. 409; *Parr's Banking Co.* v. *Yates*, (1898) 2 Q. B. 460.

3. The guarantee (unless otherwise arranged) is to remain in force as to each of the guarantors until the expiration of fourteen days after a notice in writing to discontinue the same shall be given to the bank by such guarantor or his legal personal representative, and notwithstanding the discontinuance as to one or more of the guarantors, the guarantee is to remain a continuing security as to the other or others.

The death of a surety will determine his guarantee if he could by notice have determined the same in his life (*Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Harriss* v. *Fawcett*, 8 Ch. App. 866; *In re Sherry*, 25 Ch. D. 692, 705; *Re Whelan*, (1897) 1 Ir. R. 575); but in the case of a joint and several continuing guarantee the death of one does not, *ipso facto*, determine the continuing operation of the guarantee as to the survivors (*Beckett & Co.* v. *Addyman* (1882), 9 Q. B. D. 783); and if the contracting parties desire that on the death of a guarantor a special notice shall be necessary to determine the guarantee, they can so provide, and the provision binds the estate of the guarantor. *Coulthart* v. *Clementson*, 5 Q. B. 42, 48. See, however, *Re Silvester*, (1895) 1 Ch. 573; and *Re Crace*, (1902) 1 Ch. 733, 739.

Where the consideration for a guarantee is given once for all, the guarantee cannot be determined in the absence of express provisions (*Lloyd's* v. *Harper*, 16 Ch. D. 290; *Calvert* v. *Gordon* (1828), 3 Mann. & Ry. 124); but where the consideration is to consist of separate advances and credits, to be from time to

**Form 593.**

time made and given, it is considered that a surety may determine his liability by notice as regards future advances. It is therefore wise to make the matter clear by express provision. Sometimes a much longer period than fourteen days is fixed, *e.g.*, one month, three months, or six months.

4. The bank, without exonerating the guarantors, may grant time or other indulgence to the principals, or any other person or persons liable to the bank on or in respect of any bills, notes, guarantees, or undertakings, and give up, or modify or abstain from perfecting or taking advantage of any securities or contracts, and discharge any party or parties, and accept or make any composition or arrangement, and realise any securities when and in such manner as the bank may think expedient.

*Primâ facie* the surety has an interest "in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." Per Lord Loughborough, in *Rees* v. *Berrington* (1795), 2 Ves. jun. 543; and see *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

*Giving time and forbearance.* If the creditor agrees with the principal debtor to give him time, the surety, unless the contract otherwise provides, is discharged. *Combe* v. *Woolf* (1832), 1 Moo. & Sc. 241; 8 Bing. 156; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, 7 Ch. App. 142, 150: affd. L. R. 7 H. L. 348; *Bolton* v. *Buckenham*, (1891) 1 Q. B. 278. But to have this effect the agreement for time must be of a binding character, and made for valuable consideration (*Blake* v. *White* (1835), 1 Y. & C. (Exch.) 620); the giving of time without any binding agreement does not discharge the surety; nor will the surety be discharged if the agreement is not with the debtor, but with some third party. *Frazer* v. *Jordan* (1857), 26 L. J. Q. B. 288; 8 El. & Bl. 303; *Clarke* v. *Birley*, 41 Ch. D. 422.

As to the effect, on an action for contribution, of one surety giving time to the principal debtor, see *Greenwood* v. *Francis*, (1899) 1 Q. B. 312.

A release of the principal operates *primâ facie* as a discharge of the surety. *Ex parte Harvey, In re Blakely* (1854), 4 De G. M. & G. 881; *Cragoe* v. *Jones*, L. R. 8 Ex. 81; *Wilson* v. *Lloyd*, L. R. 16 Eq. 50 (composition). Not so if the guarantee contains provisions to the contrary. *Union Bank of Manchester* v. *Beech* (1865), 3 H. & C. 672; 34 L. J. Ex. 133; *Cowper* v. *Smith* (1838), 4 M. & W. 519. And a release by the creditor of one of the sureties operates *primâ facie* as a release of all. *Mercantile Bank of Sydney* v. *Taylor*, (1893) A. C. 317. Not so where the release of the debtor is by operation of law. *Ex parte Jacobs*, 10 Ch. App. 211; *Megrath* v. *Gray*, L. R. 9 C. P. 216. A release of the principal by novation extinguishes the remedy against the surety. *Commercial Bank of Tasmania* v. *Jones*, (1893) A. C. 313.

The surety is not released where the release of the principal only amounts to a covenant not to sue, with a reservation of the rights and remedies against the surety (*Green* v. *Wynn*, 4 Ch. App. 204); but where the principal is really released, there can be no such reservation. *Commercial Bank of Tasmania* v. *Jones*, (1893) A. C. 313. As to when a release is not implied, see *Perry* v. *National Provincial Bank of England*, (1910) 1 Ch. 464.

*As to securities.* A surety is *primâ facie* entitled to the benefit of all securities —whether known to the surety or not—which the creditor holds, as against the principal debtor (*Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1); even though obtained after the contract of suretyship. *Forbes* v. *Jackson*,

19 Ch. D. 615, 621; and see Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; and *The Englishman and The Australia*, (1895) P. 212. Hence, in the absence of express provision, a surety is released by the creditor taking a new, or different, security in lieu of the original security. *Clarke* v. *Henty* (1838), 3 Y. & C. (Ex.) 187; *Boaler* v. *Mayor* (1865), 19 C. B. N. S. 76. But the surety does not get the benefit of securities held by the creditor unless he pays the whole of the debt for which he is a surety. *Ewart* v. *Latter*, 4 Macq. 983. Otherwise he obtains only a charge subsequent to the security of the principal creditor. *Gedge* v. *Matson*, 25 Beav. 310. **Form 593.**

Where directors have guaranteed the whole overdraft of a company which is secured by a mortgage to the bank with a limit, and one of the guarantors pays the whole overdraft and takes a transfer of the bank's mortgage, he must give his co-sureties the benefit of the mortgage, but is entitled to take credit for any additional payments necessary for the purpose of acquiring the transfer of the mortgage, as well as his costs, charges and expenses as mortgagee. *Re Arcedeckne*, 24 Ch. D. 709; and see Form 595, a form of order approved as varied by the Court of Appeal.

As to the right of retainer by a surety who takes out administration to the deceased principal debtor, see *Re Allen, Adcock* v. *Evans*, (1896) 2 Ch. 345.

Where through the fault of the creditor any security for the debt is lost, the surety is *primâ facie* discharged *pro tanto*. *Wulff and Billing* v. *Jay*, L. R. 7 Q. B. 756 (bill of sale not registered); *Pledge* v. *Buss* (1860), Johns. 663; *Coates* v. *Coates* (1864), 33 Beav. 249; *Strange* v. *Fooks* (1863), 4 Giff. 408 (not giving notice of assignment of chose in action); *Capel* v. *Butler* (1825), 2 S. & S. 457 (omission to register transfer of books); *Mutual Loan Fund Assocn.* v. *Sudlow* (1858), 5 C. B. N. S. 449 (neglecting to restore collateral security); *Latham* v. *Chartered Bank of India*, L. R. 17 Eq. 205 (not presenting bill at maturity). But the surety is not released by the creditor realising the security in exercise of the powers conferred on him. *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596; and see *Carter* v. *White*, 25 Ch. D. 670, and *Belfast Banking Co.* v. *Stanley* (1867), 1 Ir. Reps. C. L. 693, as to negligence not discharging surety.

Accordingly it is sometimes provided that the guarantors are not to make any claim against the bank, on the ground that, by negligence or otherwise, the bank has lost the benefit of any security or guarantee which, if enforced, or preserved, would or might have afforded funds in relief of the guarantors.

5. All dividends, compositions, and payments received from any such person or persons are to be treated as payments in gross, and the guarantors are not to have any right to participate except to the extent of the surplus remaining after satisfaction of the ultimate balance due to the bank.

*Primâ facie*, where the guarantee is a limited one, and the debt exceeds the sum guaranteed, and the creditor receives a dividend from the estate of the bankrupt or deceased debtor, the surety is entitled to treat a proportionate part of the dividend as paid in reduction of the guarantee, and to insist that the whole shall not be applied in reduction of the unguaranteed portion of the debt. *Thornton* v. *M'Kewan* (1862), 1 H. & M. 525; *Hobson* v. *Bass*, 6 Ch. App. 792; Seton on Judgments, 7th ed. p. 2077. But the rights of the surety may be waived or modified as above. *Ex parte National Provincial Bank of England, Re Rees*, 17 Ch. D. 98; *Midland Banking Co.* v. *Chambers*, 4 Ch. App. 398; *Ex parte Miles, Re Porter* (1848), 1 De G. (Bank.) 623; *Re Blakeley* (1892), 9 Morr. B. R. 173. Where, however, the *whole* debt is guaranteed with a proviso limiting the

**Form 593.** guarantor's liability, the above stipulation is unnecessary. See *Re Sass, Ex parte National Provincial Bank of England*, (1896) 2 Q. B. 12.

[5a. Where the principals are a corporation or society the bank is not to be concerned to see or inquire into the powers of the principals or their directors or other agents acting, or purporting to act, on their behalf, and moneys in fact borrowed from the bank in professed exercise of such powers shall be deemed to form part of the moneys guaranteed, even though the borrowing or obtaining of such moneys be in excess of the powers of the principals, or of the directors or other agents afsd, or shall be in any way irregular or defective or informal.]

This clause merely expresses the legal position, for, although *primâ facie* the surety is not liable unless there is a principal debtor liable (*Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613; (1874), 7 H. L. 17), where directors of a company guarantee the repayment of a loan borrowed *ultra vires* of the company, they will be held liable on their guarantee. *Yorkshire Railway Waggon Co.* v. *Maclure*, 19 Ch. D. 478 (where on appeal (21 Ch. D. 309) it was held that the transaction in question was not *ultra vires*; and *Garrard* v. *James*, W. N. (1925) 99.

[5b. Any accounts settled or stated by or between the bank and the principals, or admitted by them or on their behalf, may be adduced by the bank, and shall in that case be accepted by the guarantors, and each of them and their respive representatives, as conclusive evidence that the balance or amount thereby appearing is due from the principals to the bank.]

Such a clause is sometimes used. In the absence of some such provision, the principal debtor's admission as to the amount owing is not available as against the surety. *Evans* v. *Beattie* (1803), 5 Esp. 26. Even a judgment against the principal debtor is not evidence against the surety in an action in which he is sued by the creditor (*Ex parte Young, In re Kitchin*, 17 Ch. D. 668) (following the American case, *Douglass* v. *Howland*, 24 Wendell, 35); unless, indeed, the surety was made a party to the former action, or was served with a third party notice.

[5c. A certificate in writing under the common seal of the bank stating the amount at any particular time due and payable to it under the guarantee shall be conclusive evidence as against the guarantors, and each of them, and their respive legal personal representatives.]

Such a provision is occasionally used.

6. As to each of the guarantors any notice may be served on him, or his legal personal representatives, either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day following that on which it is posted.

7. In these clauses the singular includes the plural, and *vice versâ*

Where several covenant as principal debtors, and it is subsequently arranged between them that one shall be liable as a surety only, and the creditor has notice, he may do nothing to prejudice the surety without in effect releasing him. *Rouse* v. *Bradford Banking Co.*, (1894) A. C. 586. **Form 593.**

To the —— Bank, Limtd. **Form 594.**

Gentlemen,

Letter on footing of above conditions.

In conson of your making advances or otherwise giving credit or accommodation to the —— Coy, Limtd (hnftr called "the principals"), we, the undersigned, on the footing of the above general clauses, guarantee the due payment and discharge of all the principals' liabilities to you, whether incurred before or after the date hof, and whether incurred by the principals alone or jointly with others, and whether as principals or sureties, and whether such liabilities are matured or not, and whether absolute or contingent, including liabilities in respect of advances and in respect of cheques, bills, notes, and other negotiable or non-negotiable instruments drawn, accepted, indorsed, or guaranteed by the principals; and in respect of interest with half-yearly rests, commission, and other usual banking charges [and in respect of all costs, charges, and expenses which you may incur in paying any rent, rates, taxes, calls, instalments, or other outgoings in respect of the mortgaged ppty, or in insuring, repairing, maintaining, managing, or realizing any of the mortgaged ppty, or in investigating the title thto]:—

[*If so, say:*

And this guarantee is to extend to the person or persons for the time being and from time to time carrying on the business now carried on by the principals.]

[*If so, add:*

We are not to be called on under this guarantee to pay more than ——*l.*]

Dated this —— day of ——.

If one of two joint guarantors is sued on the guaranty itself, and judgment is recovered, the other one cannot be sued; but it is otherwise when the first one is sued on his cheque. See *Wegg-Prosser* v. *Evans*, (1895) 1 Q. B. 108, 112, 113; overruling *Cambefort & Co.* v. *Chapman*, 19 Q. B. D. 229

As to liability of surety for interest when creditor has proved in the bankruptcy of the principal debtor, *In re FitzGeorge*, (1905) 1 K. B. 462; *In re Moss*, (1905) 2 K. B. 307.

**Form 595.**

Order for accounts where one guarantor has paid off whole overdraft, which exceeds the limit of the guarantee.

It is ordered that the following accounts be taken, that is to say:—

1. An account of what is due to the plt from the dfts ——, Limtd, for principal and interest under the covenant to pay in the legal charge dated the 30th January, 1930, in the pleadings mentd to the 24th June, 1930.

2. An account of all sums properly pd by the plt in obtaining the transfer of the equitable charge in the pleadings mentd.

3. An account of all sums properly pd by the plt in obtaining the sd legal charge.

4. An account of all sums properly pd by the plt in respect of the maintenance of the ppty secured by the sd legal charge and in the enforcement of the sd legal charge by the exercise of the power of sale thereunder.

5. An account of all sums of money received by the plt upon the sale of the ppty charged by the sd legal charge.

And it is ordered that the total of what shall be certified to have been pd by the plt under accounts Nos. 2, 3 and 4 shall be deducted from what shall be certified to have been received by the plt under account No. 5 and the balance certified (which balance is in this order referred to as balance No. 1).

And it is ordered that balance No. 1 be deducted from the total of what shall be certified to be due to the plt under account No. 1 and the balance certified (which last mentd balance is in this order referred to as balance No. 2).

And it is ordered that the plt do recover against the dfts ——, Limtd, the amount of balance No. 2, together with interest from the 24th June, 1930, at the rate provided in the sd legal charge, and also so much of the costs of this action as would have been incurred if it had been brought against the sd dfts only, such costs to be taxed by the Taxing Master.

And it is ordered that the plt's costs of this action and of the sd counterclaim be taxed by the Taxing Master, and the Taxing Master is to deduct from such costs the plt's costs hnbefore directed to be taxed and certify the balance.

And it is ordered that the dfts, E. D. B., W. H. P. and E. R., do within fourteen days after the date of the Master's certificate each pay to the plt one-fourth pt of the amount of balance No. 2 (but not exceeding the sum of ——*l.*), together with interest from the 24th June, 1930, at the rate secured by the contract of guarantee dated the 6th September, 1928, in the pleadings mentd after deducting what, if anything, the plt shall have received from the dfts, ——, Limtd, under the afsd judgment.

**Form 595.**

And it is ordered that the dfts E. D. B. and E. R., do pay to the plt the balance of his costs of this action and counterclaim when taxed.

And the plt is to be at liberty in case of his failing to recover from any of the dfts E. D. B., W. H. P. or E. R., the sums hnbefore ordered to be pd by them resply to apply in chambers as he may be advised to obtain contribution towards the payment of such sums by the other dfts and payment to him of such contribution.

And the parties are to be at liberty to apply generally. *Munro* v. *Burley* (M. 1324 of 1930). Luxmoore, J.

**Form 596.**

Charge by surety.

1. Where documents of title are deposited with the bank by way of guarantee for the due discharge of the liabilities of a third person (in these conditions referred to as the party guaranteed to the bank), they are, unless otherwise arranged, to stand as a continuing security for the due satisfaction of the liabilities of the party guaranteed to the bank, whether incurred before, &c. [as in clause 1 of Form 570].

2. All moneys, &c. [as in clause 2 of Form 570].

3. The depositors, &c. [as in clause 3 of Form 570].

4. The bank, without exonerating, &c. [as in clause 4 of Form 593].

5. All dividends, &c. [as in clause 5 of Form 593].

6. Any notice, &c. [as in clause 4 of Form 570].

**Form 597.**

Letter on above conditions.

TO THE —— BANK, LIMTD.

GENTLEMEN,

I have deposited with you the below-mentd documents, by way of guarantee for the due discharge of the liabilities of A. B., of ——, to you, and upon the footing of the above general clauses, but so that the security is not to be available for more than ——*l.*

Yours, &c. ——.

[Particulars of Documents.]

**Form 598.**

Deed of indemnity from company to directors and another for becoming sureties for company to bank.

THIS INDENTURE, made, &c., between The —— Coy, Limtd (hnftr called "the coy"), of the one pt, and A. B., of, &c., C. D., of, &c., E. F., of, &c., and G. H., of, &c., (hnftr called "the guarantors"), of the other pt.

WHEREAS the coy recently obtained from The —— Bank, Limtd (hnftr called "the bank"), an advance of 6,000*l.*

AND WHEREAS the sd advance was made on the security of an indenture, dated, &c., and made between the coy of the first pt, the

**Form 598.**

guarantors of the second pt, and the bank of the third pt, and by that indenture the coy and the guarantors, jointly and severally, covenanted with the bank to pay to the bank on the —— day of —— the sum of 6,000*l.*, with interest thereon at the rate of 5 p.c.p.a., computed from the date thof, and also so long after that day as any moneys remained due on the security thof, to pay to the bank interest thereon after the same rate, by equal half-yearly payments on the —— day of —— and the —— day of —— in each year; and by the sd indenture the coy assigned to the bank certain patents and patent rights specified or set out in the second and third schedules to a certain agreemt of the —— day of ——, which agreemt was framed in accordance with the draft thof set forth in the first schedule to the coy's arts of asson, and is hnftr referred to as "the scheduled agreemt," to hold the same unto the bank, subject to the proviso therein contained for the redemption of the same premises on payment on the sd —— day of —— by the coy to the bank of the sd sum of 6,000*l.*, with interest thereon in the meantime at the rate afsd, and the sd indenture contained a proviso to the effect that, although, as between the coy and the guarantors resply, the guarantors were only sureties for the coy as between the guarantors and the bank, they, the guarantors, were to be considered as joint and several principal debtors for all the principal moneys and interest intended to be secured by the indenture now in recital, so that the guarantors, their heirs, exors, or admors, should not be released or exonerated by time being given to the coy, or by any other dealing between the bank and the coy, or by any act or omission of the bank, or by any other matter or thing whatsoever, whereby the guarantors, their heirs, exors, or admors, or any of them, as a surety or as sureties only for the coy, would be released or exonerated.

AND WHEREAS the guarantors, other than the sd G. H., are directors of the coy.

AND WHEREAS the directors of the coy are empowered by the arts of asson of the coy, amongst other things, to execute in the name and on behalf of the coy, in favour of any director or other person who may incur, or be about to incur, any personal liability for the benefit of the coy, such mortgages of the coy's ppty, present and future, as they think fit, and any such mortgage may contain a power of sale, and such other powers, covenants, and provisions as shall be agreed on; and by clause —— of the sd arts of asson it is provided, amongst other things, that no director shall be disqualified by his office from contracting with the coy or from voting in regard to any contract by or on behalf of the coy, to give to any director any security by way of indemnity.

Form 598

AND WHEREAS it was one of the terms on which the guarantors agreed to execute the sd indenture that the coy should forthwith execute in their favour a security in the terms hof.

NOW THESE PRESENTS WITNESS AND DECLARE as follows:—

1. The coy shall indemnify the guarantors against all actions, proceedings, claims, and demands in respect of the sd indenture of the —— day of ——.

2. The coy shall, upon the request in writing of the guarantors, pay off the principal moneys and interest secured by the sd indenture, and procure the release of the guarantors from all claims under or in respect of the sd indenture.

3. The coy hby charges in favour of the guarantors, the undertaking and ppty of the coy whatsoever and wheresoever, both present and future, with the payment of all moneys which shall from time to time become payable under clause 1 hof, and as a security for the due performance by the coy of all the obligations imposed on the coy by that clause.

4. The sd charge shall operate as a fixed charge, so far as concerns the sd patents and patent rights, and as regards the residue of the premises hby charged shall operate as a floating security. Nevertheless, each of the guarantors shall be at liberty, at any time, by notice in writing to the coy, to determine the floating character of the charge afsd as regards any parlar asset specified in such notice, and thereupon the charge, as regards such asset, shall become and operate as a fixed charge, and shall cease to be a floating charge.

5. The statutory power of sale conferred on mortgagees by sect. 101 of the Law of Ppty Act, 1925, shall apply to these presents, and shall be exercisable without further notice by the guarantors at any time after the coy shall have committed any breach of any of the obligations hby imposed on it, and sects. 104 to 107 of the sd Act shall be regarded as modified accordingly.

6. The coy irrevocably appoints the guarantors to be the attorneys or attorney of the coy, in the name and on behalf of the coy or otherwise to execute and do any such assignments, conveyances, assurances, and things as the guarantors may find it necessary to execute and do for the purpose of carrying any such sale as afsd into effect.

7. The guarantors may, at any time after the power of sale afsd has become exercisable, appoint any person or persons to be a receiver or receivers of the ppty hby charged, and a receiver or receivers so appointed shall have power to take possession of the sd ppty charged, to carry on, or concur in carrying on, the business of

**Form 598.** the coy, and to sell, or concur in selling, any of such ppty; such receiver shall be the agent of the coy, and all moneys received by such receiver or receivers shall, after providing for the matters specified in the first three paras. of clause 8 of sect. 109 of the sd Act, be applied in paying off all moneys for which the guarantors shall then be liable under the sd indenture of the —— day of ——, and in making good to them all moneys they may previously have pd, and generally in effectuating the complete indemnity of the guarantors in accordance with clause 1 hof, and any surplus shall be pd to the coy.

8. The coy hby covenants with the guarantors, and as a separate covenant with each of them, that the coy will duly observe and perform all the obligations hby imposed on it.

9. In these presents the expression "the guarantors," where the context admits, includes the guarantors and each of them and their and each of their heirs, exors, admors and assigns.

IN WITNESS, &c.

**Form 599.** Resolution approving deed of indemnity.

That the proposed deed of indemnity submitted to the meeting be approved, and that the common seal be affixed thto.

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